IN THE SUPREME COURT
of the
MISSISSIPPI BAND OF CHOCTAW INDIANS

JULIAN MCMILLAN — APPELLANT

vs. — CAUSE NO. 2014-05

MISSISSIPPI BAND OF CHOCTAW INDIANS — APPELLEE

OPINION AND ORDER

SUMMARY

Appellant Julian McMillan was convicted of rape in a February 10, 2014, bench trial conducted by Hon. Jeffrey Webb, a non-tribal-member judge then presiding over the Choctaw Domestic Violence Court. The Appellant now alleges that the trial court lacked jurisdiction to try him because between the time of Appellant's bench trial and the time of his appeal, our decision in *Pierceson Farve v. MBCI,* Cause No. SC 2014-07, July 25, 2015 established that criminal proceedings held before non-tribal member judges were void for want of jurisdiction. Since the circumstances of his trial were identical to the *Farve* case, he alleged his conviction should be vacated. The Tribe conceded the issue, but the Prosecution requested that the case be remanded for a new trial. The Appellant asked that instead his conviction be reversed and rendered. We now hold that Appellant's earlier conviction and sentence be vacated, but the cause remanded to the court below for trial anew. We further hold that in the event Defendant McMillan is again convicted anew then the sentencing court grant credit for the time Defendant served in pretrial detention. We do so, noting that the Defendant had already served 187 days in pretrial detention while facing the Class A charge of rape and the Tribal Code statute provides, if convicted, for a maximum imposable sentence of six (6) months' incarceration. ORDERED: Appellant's earlier conviction on the charged offense is voided, his then-imposed sentence be vacated, and that the cause be remanded for proceedings anew. Defendant is discharged from further criminal proceedings or penalties.

PROCEEDINGS BELOW

(Per Curium) This matter comes before the Court on direct appeal filed by Appellant Julian McMillan following his February 10, 2014, bench trial and conviction on one count of Rape, a violation of Choctaw Tribal Code § 3-3-28, and a Class A offense. The bench trial was

conducted by the Honorable Jeffrey Webb, a non-tribal member, who was at the time regularly presiding as a Domestic Court Judge over such Choctaw Tribal Criminal Court cases.

The incident out of which these charges arose is alleged to have taken place on October 21, 2013 at a residence location in the Tucker community of Choctaw reservation lands. On April 25, 2013, the criminal complaint was filed and a warrant for Defendant's arrest was issued. On May 8, 2013, he was arrested in the Pearl River community. The following day he made his initial appearance and defense counsel was appointed for him. Notice of pretrial was also then scheduled for August 16, 2013, and for jury trial on August 22, 2013. On May 9, 2013 the Defendant appeared in court with counsel, entered a plea of "not guilty," and was ordered to remain in detention until May 23, 2013 at 9:00 a. m. On that same May 23 date his release on bond was authorized pending further proceedings. Defendant failed to appear for his next scheduled August 16 pretrial hearing and an order for his arrest and detention without bond pending further proceedings was issued. Defendant was rearrested on August 22, 2013 in the Bogue Chitto community. Thereafter, he remained continuously incarcerated until the February 10, 2014 date of his bench trial, conviction, and imposition of sentence.

At trial the Prosecution called four witnesses during its case in chief. Defendant then made a motion for a directed verdict of acquittal which the court denied. The Defense then called the Defendant and four other witnesses in its efforts to establish an alibi defense. The Triibe then called a single rebuttal witness before testimony concluded. Arguments were had, after which the court found Defendant McMillan guilty on the single count charge of rape. The Defense then renewed its JNOV motion, asking the court to reverse its "guilty" verdict. The Court denied that motion as well.

Sentencing immediately followed on the single count of Rape as a violation of CTC § 3-3-28 and a Class A offense. Defendant was assessed the maximum allowable fine of $500, ordered to register as a sex offender and to comply with all requirements of the Sex Offender Notification and Registration Act, and sentenced to the maximum sentence of six months (180 days) of detention. He was given credit for pretrial time served -- thereby making him eligible for immediate release.

On February 12, 2014, defense counsel filed a motion for reconsideration of judgment and in the alternative for a new trial. Judge Webb entered his order denying this motion two days later.

On March 5, 2014, a Notice of Appeal was duly submitted. The case was briefed by parties and Oral Argument was had on April 22, 2016. In the time intervening between the March 5, 2014 filing of the appeal and its April 22, 2016 oral arguments before this Court, the opinion in the *Pierceson Farve v. MBCI,* case was handed down, establishing that *Farve's* criminal proceedings held before a regularly-presiding non-tribal member judges was void for want of jurisdiction.

That having been the same situation at Defendant McMillan's trial, counsel for Appellant raised the same argument in both of its appellate briefs, and Appellee Tribe conceded that issue in its reply brief. Appellant primarily requests that the original conviction and sentence be vacated and the case rendered, but in the alternative he would seek remand for retrial. The Tribe asks this Court to remand the matter for a new trial.

Statement of the Case\Facts

Officer Nikki Charley filed the single count criminal complaint against Appellant Julian McMillan in the Choctaw Tribal Domestic Violence Court on April 25, 2013, charging Rape, a violation of CTC § 3-3-28 and a Class A offence. The crime was alleged to have taken place on October 21, 2013, at a residence location in the Tucker community of Choctaw reservation lands. The alleged victim was the 16-year-old daughter in the mother's home.

The facts, as best the trial record establishes, are to the general effect that the daughter and her two-year-old sibling were in the home during the late afternoon or early evening hours -- somewhere between 5:00 p.m. and 6:00 p.m. A Choctaw male entered the home unannounced and uninvited, and without speaking, he pulled her into her bedroom. There he pulled her jeans and panties off, completely undressed himself, and started engaging in sexual intercourse.

The trial record is in places unclear and sometimes inconsistent, but it tends to show that the mother had a little earlier come home from work and driven her son to stickball practice. After dropping him off at Tucker's stickball field, she drove next to a location where a community wake was being held, planning to meet up with her live-in boyfriend there. She instead encountered him just as he was driving back home to use the bathroom. She turned around and followed him back, waiting for him outside in her vehicle. The record indicates he went in the house, opened the daughter's bedroom door, and saw a naked male atop the girl, who was lying on her back on a bed. He quietly pulled the door to and went to wave at the living room picture window for the mother to come inside. Without saying a word to the mother about what he had just seen going on in her daughter's bedroom, he simply went on back to a back bathroom

Though not always clear from the transcript, the mother came in the front door into the living room. By then her daughter apparently had her clothes back on and was standing there. The mother went on back to her own bedroom and the daughter followed. Seeing her daughter was trembling and on the verge of tears, the mother twice asked her, "What?" Before her daughter could answer, the mother caught the movement of a male figure she could only describe as wearing a black shirt darting into the kitchen which led to the back door. The mother called out to him and gave chase in time to see him scrambling past items in the backyard and disappearing into the woods. The mother testified she could not recognize the figure dashing away.

Testimony, sometimes contradicting, establishes the following sequence of events. The mother called in a report to Choctaw police and was told an officer was being dispatched to her home. Meanwhile, her live-in boyfriend left, still without apparently saying anything and went to a friend's house. Even though a responding officer was enroute, the mother nonetheless took their two-year-old child and drove back off to pick up her older son from stickball practice, leaving her daughter at home alone. Sometime between the mother's leaving and coming back, responding officer Israel Bell arrived at the home. He was unable to get any answer at the door. He called in a "negative contact" report and left the area.

The mother, older son, and two-year-old sibling returned home and asked the daughter if the police had arrived yet. The daughter said no police had been there, so the mother called in a second report. A second officer, Sheila Anderson, responded and secured the scene. The mother was sent with the daughter to the health center where a sexual assault kit was prepared, a cervical examination was conducted, and a forensic interview through the Child Advocacy Center took place. The victim claimed Appellant McMillan had raped her. All lab testing of her clothing and bedding as well as the state crime lab's microscopic examination report on the sexual assault kit later came back negative as to the presence of any traces of sexual intercourse. The mother told investigators she could not recognize the person fleeing the house. (Testimony later establishes that the mother some 11 years before had had a live-in relationship with the Appellant for a couple of months while he lived with her in the home.) Neither mother nor daughter told police or the forensic interviewing team that the live-in father of the youngest child had been there and had witnessed the act taking place.

Some four months later Choctaw police learned the mother's live-in boyfriend, who is the father of the mother's youngest child, had been an eyewitness to the intercourse. His excuses for not coming forward as a witness earlier were vague, but both he and the mother testified that that evening "he didn't say nothing" after beckoning the mother inside even though the mother repeatedly asked him, "What?" [T. P. 10.] At trial he made a courtroom identification of the Appellant as the perpetrator he had seen that day. Both the victim and later the older brother as a rebuttal witness for the tribe testified that their mother told them not to mention to the police or investigators that her boyfriend had been home and had witnessed the act. The mother said she did not tell them that. Following the testimony, the prosecution rested its case in chief, and the court denied a defense request for a verdict of acquittal.

Defense counsel then called Julian McMillan and three other witnesses to testify in support of his alibi. Two defense witnesses, a cousin Melissa Gibson and her boyfriend Paul Bell, testified they were in Tucker with the Defendant all that afternoon and night. Both recalled there had been a wake in the community and Melissa confirmed it was a Sunday and they learned there the community's stickball had been cancelled for Tucker's wake. Paul Bell testified they afterwards

played basketball and remembers that day as the only day Defendant had ever gone with him to Tucker for stickball practice. The three left Tucker's stickball field and basketball court area with Paul Bell, her kids, Chastity Bell's daughter, and Julian McMillan. After dropping Chastity's daughter off at her mother's home, Melissa and the others went to Pizza Hut. Chastity Bell testified that she was at her home in the Tucker community, and that Paul and their daughter, Melissa, her kids, Daniel, Julian McMillan and Chastity's daughter arrived at her home in the same vehicle late that afternoon. She remembered talking a little with Melissa Gibson and also with Julian McMillan, and "that was only time I seen them."

Appellant Julian McMillan next took the stand and testified he was 26 years old on the date in question and that some 11 years ago he had a live-in relationship with the mother. The daughter had then been four or five years old. As to his movements on the date in question, he got a cousin to take him from Pearl River to West Side that morning. At approximately 2:30 p.m. a black friend drove him to the Tucker basketball court. Around 3:15 and 3:30 p.m. he met up there with Paul Bell, Melissa with her kids, and Chastity. He was with Paul and Melissa the entire rest of the day and evening, never leaving them and never being in the vicinity of the victim's house which he said was a long-distance walk 20 to 30 minutes away.

Officer Charley was recalled as a defense witness and confirmed the presence of the eye witness boyfriend was never disclosed until four months later. She did not do any follow-up interviewing of the named alibi witnesses. The defense then rested its case.

The Prosecution then called one final witness in rebuttal – the victim's brother. It would be counter-productive to fully detail all this witness' testimony. Suffice it to say the prosecution time and again through leading questions sought to have its own witness' testimony place the Defendant on the road in front of his house that day. The brother, however, testified without coaxing that he saw Julian McMillan at the stickball field when his mom carried him there that day and that he noticed him there about 15 minutes thereafter.

The Prosecution rested its case, oral arguments were held, and the court found the Appellant guilty of rape. As previously stated, Defendant was assessed the maximum allowable fine of $500, ordered to register as a sex offender and to comply with all requirements of the Sex Offender Notification and Registration Act, and sentenced to the maximum sentence of six months (180 days) of detention. He was given credit for that 187 days of pretrial time he had already served and that made him eligible for immediate release.

DISCUSSION AND ANALYSIS

To determine the question as to whether the appropriate case disposition would be remand to the lower court for trial anew, or to render and discharge the Appellant from further prosecution, we must first determine whether jeopardy has already attached such that the double jeopardy would bar further prosecution. We therefore look first to the evolution of the governing caselaw.

In *Mississippi Band of Choctaw Indians v. Donovan Allen,* SC 2013-03 (April 17, 2013), this Court held the double jeopardy provisions of Article V of the U.S. Constitution; 25 USC § 1301 - 1304 of the Indian Civil Rights Act of 1968; and Article X, Sec. 1(c) of the Tribal Constitution of the Mississippi Band of Choctaw Indians all prohibit a criminal Defendant from twice being put in jeopardy for the same offence. Two years later in *Pierceson Farve v. Mississippi Band of Choctaw Indians,* SC2014-07 (July 28, 2015) this Court held that CTC § 1-3-1(1)(g) providing that "No person shall be eligible to be a judge assigned to the Criminal Court * * * unless he or she: (g) is an enrolled member of the Tribe" is a statute jurisdictional in nature and, as such, criminal court proceedings regularly presided over by a non-tribal member judge are void for want of jurisdiction. The *Farve* decision furthermore properly noted that a jurisdiction challenge may be raised by the prosecution, the defense, or by the court *sua sponte.* Furthermore, the claim of lack of jurisdiction may be raised for the first time at any stage of proceedings, whether it be at trial, on appeal, or as a post-conviction claim for relief after all otherwise available avenues of appeal have been exhausted. In this case Appellant first raised the lack of jurisdiction issue on appeal.

The reason it was only brought up on appeal was because the criminal trial of the Appellant was conducted as a bench trial presided over by Judge Jeffrey T. Webb, who is a non-tribal member and the lower court proceedings, and conviction, took place on February 10, 2014. That is, Appellant's trial took place prior to the July 25, 2015 issuance of our Court's opinion in the Pierceson Farve case, but before McMillan's appeal was readied for briefing. The same circumstances and arrangement giving rise to the appointment of Judge Webb to serve on the Choctaw Criminal Court in the *Pierceson Farve* case were those that applied in relation to Judge Collins' presiding over Appellant's lower court trial. The Appellee Tribe's Reply Brief acknowledges that point and thus concedes the inescapable conclusion that the lower court at the time of Appellant McMillan's trial also lacked jurisdiction over his trial.

Although the Tribal Prosecutor concedes the trial judge lacked jurisdiction over that first trial, he is now asking that the case be remanded for retrial, which in cases where jurisdiction was wanting in the first trial, is more properly termed "trial anew." Defense Counsel's prayer for relief initially is for this Court to reverse and render – that is not only to reverse and hold void the original conviction -- but also to discharge the Appellant and thereby bar his subsequent retrial. Alternatively, the defense would concede that remand for trial anew would be an available dispositional remedy. Neither party briefed or presented authoritative arguments in

support of their preferential disposition. It therefore falls upon this Court to make that determination.

In doing so, then, we are now presented with the next generation of questions to be addressed by this Court; namely, once a claim of lack of jurisdiction has been raised and determined to be valid under *Farve*, are defendants' protections of the double jeopardy clause which were recognized in *Allen* applicable to prohibit the accused being subjected to a second prosecution? We now hold that it does not and therefore direct that this cause be remanded to the court below for trial anew.

In *Grafton v. United States,* 206 U.S. 333 (1907), the Supreme Court clearly stated the governing black letter rule of law when it wrote: "We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." 206 U.S. 333, 345. In *Serfass v. United States,* 420 U.S. 377 (1975), the High Court noted that, "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.' Kepner v. United States, 195 U.S., at 133, 24 S.Ct., at 806. See Price v. Georgia, 398 U.S., at 329, 90 S.Ct., at 1761." *Supra. At p. 392.*

Appellant McMillan's case presents a situation not frequently visited by court systems, for seldom do such situations arise where the very tribunal that routinely exercises criminal jurisdiction is limited in its exercise of jurisdiction by special rules such as the requirement that only tribal member judges may regularly preside over criminal court cases. Compounding the dilemma is that McMillan had completed his 108-day jail servitude by the time of his first trial.

A single case was found out of Utah, however, that is somewhat analogous to Appellant's situation and that we find of useful guidance for our application to the facts of this case and to our choice of a disposition which is just in this case. Captioned *South Jordan City v. Summerhays,* No. 20150527-CA, 2017 UT App. 18 2017, Defendant had earlier pleaded guilty to one to one of the two counts of violating a protection order. The prosecutor had incorrectly charged both counts as class B offences and filed the case in Justice Court. Furthermore, Summerhays had begun serving a ten-day jail sentence. He immediately appealed his conviction to the district court, contending the lower justice court lacked jurisdiction since the charge was a class A misdemeanor and justice courts did not have jurisdiction to consider any criminal charge above a class B level. The district court on appeal agreed, vacated his conviction, dismissed the case and released him from jail. By then, however, Summerhays had already served 7 days of his 10-day jail term imposed by a court lacking jurisdiction. South Jordan prosecutors then filed a new information correctly charging the violations as class A misdemeanors and properly filed the case in district court which did have jurisdiction. Appellant Summerhays sought interlocutory appeal from a district court denial of his motion to dismiss the new counts on grounds of double jeopardy. The Utah Appeals Court concluded that the original (Justice Court)

conviction was void *ab initio* because that court lacked subject matter jurisdiction over the offenses charged, and therefore jeopardy never attached under the now-vacated conviction. Nevertheless, in so holding the court did hold that Summerhays' double jeopardy clause claim to its protection against multiple punishments for the same crime was correct and does serve that function. Ultimately, it concluded, "[the Double Jeopardy Clause] thus **affords no protection against retrial of the charged offenses, *although it does entitle him to credit for time served on any sentence imposed should he be convicted.***" *Id.* p. 8. (Italics and emphasis added.)

We take notice that Appellant was assessed the maximum allowable fine of $500, ordered to register as a sex offender and to comply with all requirements of the Sex Offender Notification and Registration Act, and sentenced to the maximum sentence of six months (180 days) of detention. Given that he served and was credited for 180 days of that pretrial time he had already served, thereby making him eligible for immediate release from further incarceration, this Court adopts the rationale of *Summerhays* to find that if, upon retrial, defendant is again convicted, whether at bench trial or before a jury, the only remaining imposable sentence would be to the assessment of a fine to be then determined by the sentencing court but in no event to exceed the maximum allowable fine limit of $500.00 and also to be ordered to register as a sex offender and to comply with all requirements of the Sex Offender Notification and Registration Act.

APPELLANT'S SECOND ASSIGNMENT OF ERROR

Given the above analysis and conclusion are determinative of this outcome to this prosecution, the Court need not entertain Appellant's claim as grounds for reversal or rendering; namely, that the verdict is against the sufficiency of the evidence.

CONCLUSION

In summary then, this Court in conformity with our earlier ruling in *Pierceson Farve v. Mississippi Band of Choctaw Indians,* SC2014-07 (July 28, 2015) hereby rules that Appellant's first assignment of error is well-taken in that jurisdiction to try him in the first instance was lacking. The Court further holds that since jurisdiction to try this Defendant in the first instance was never properly acquired, those protections of the double jeopardy clause never attached such as to bar prosecution anew. Finally, if upon retrial Defendant is once again convicted, whether before a jury of his peers or at bench trial, Defendant shall be credited for the maximum 180 days incarceration heretofore served. Accordingly, the adjudication of guilt and sentence is hereby vacated and this matter is ORDERED REVERSED AND REMANDED for further lower court proceedings not inconsistent with this ruling.

SO ORDERED, this the ____ day of November, 2017.

Chief Justice Kevin Briscoe

Associate Justice Edwin R. Smith

Brenda Toineeta Pipestem
Associate Justice Brenda T. Pipestem

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 3rd day of November, 2017 caused to be forwarded by the United States Mail and Hand Delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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