

FILED

FEB 27 2018

CHOCTAW SUPREME COURT
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**IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS**

MIKE ANDERSON

APPELLANT

VS.

CAUSE NO. SC-2015-07

MISSISSIPPI BAND OF CHOCTAW INDIANS

APPELLEE

OPINION AND ORDER

SUMMARY

Appellant Mike Anderson was convicted of disorderly conduct, a violation of CTC §3-6-2 and a Class C offense, in a September 21, 2015 bench. Appellant's Defense Attorney had filed a last-minute Motion for Continuance and a Notice of Alibi on the Friday before the scheduled Monday trial. Rule 15 of the Choctaw Rules of Criminal Procedure require that any notice of alibi defense be filed at least ten (10) working days before trial providing the names of any witnesses upon whom the Defense intends to rely for an alibi defense. Rule 15 further says that a failure to provide such notice will prevent the use of such witnesses unless it can be shown the prior notice was impossible or that no prejudice to the Prosecution has resulted, in which case the judge may order the trial delayed or make such other orders as required to assure a just determination of the case. Defense Counsel's motion for a continuance noted that he had just been appointed and his first opportunity to meet with his client was too late to make a timely filing of the Notice of Alibi Defense possible and that a continuance for trial was needed to satisfy Rule 15's 10-day advance notice requirement. The Lower Court Judge denied the continuance request and refused to allow the one available alibi witness's testimony, citing defendant's pattern of delays and avoidances of earlier court proceedings.

This appeal contends Defendant's Constitutional right to compulsory attendance of witnesses was denied him by the earlier court proceedings when it denied the continuance and refused to entertain consideration of the testimony by the one available alibi witness at trial that day. Notwithstanding that a compelling pattern of earlier avoidance and evasion efforts to delay justice, if considered in isolation, would have supported court sanction under the first portion of the preclusion language of the Tribal Notice of Alibi statute, the Lower Court granted Defendant's request for assistance of counsel and the continuance. Having done so, however, the extension of time had to be meaningful to ensure Defendant and his counsel meaningful due process. The record clearly supports Defense Counsel's claim that it was impossible for him to meet the Rule 15 Notice of Alibi requirement due to the timing of his appointment to the case. Additionally, it was not established that any prejudice to the Prosecution would occur if the continuance were to be granted. Accordingly, we do find the Lower Court Judge's denial of Defense Counsel's Motion for a Continuance constituted an abuse of discretion and this Court orders Reversal of the Conviction and Remands the Case for retrial.

PROCEEDINGS BELOW

(Per Curium) This matter comes before the Court on direct appeal filed by Appellant Mike Anderson following his September 21, 2015 bench trial and conviction on a single count complaint alleging Disorderly Conduct as a Class C offense and a violation of Choctaw Tribal Code § 3-6-32.

The incident out of which this charge arose is alleged to have taken place on June 11, 2015 at approximately 12:30 a.m. in the Conehatta Community of Choctaw reservation lands. The complainant filed this criminal charge that same day. A warrant to apprehend was issued over the Lower Court Judge's signature the following day. On June 29, 2015, Defendant Mike Anderson was taken into custody and he was released the next day on a signature surety bond pending his July 1, 2015 next court appearance. The Defendant in the intervening time became incarcerated in the Neshoba County jail,

so on June 29, 2015 an Order for Requisition of Defendant was issued, calling upon the Neshoba County Sheriff's Department to release Defendant into the custody of the Choctaw Police Department immediately in advance of his upcoming scheduled Choctaw criminal court appearance, unless bond were earlier posted or Anderson were otherwise released from state custody in advance of his court. Whatever the circumstances or conditions resulting in Defendant's intervening release from the Neshoba County jail, Defendant was released from the county jail, but failed to appear on July 1, 2015 when his case was called for arraignment in the Choctaw Tribal Criminal Court. Anderson appeared later that same afternoon and provided a written "Excuse from Work or School" from the Neshoba County General Hospital's Emergency Department in claimed documentary explanation of his earlier non-appearance. The Tribal Court granted his request for a continuance and reset the case for a new July 15, 2015 arraignment date. Next, on July 8, 2015, (the matter apparently having been advanced one week on the docket), Defendant appeared and entered his "not guilty" plea to the charge and his bench trial was scheduled for 1:00 p.m. on August 31, 2015. A written copy of the Notice of Trial was hand-delivered him. Defendant was not present when the case was called for trial; consequently, the criminal trial of Defendant was begun *in absentia*. While the trial was in progress, the Defendant appeared late and requested appointment of an attorney. The court halted the trial mid-point, granted Defendant's request for appointment of counsel and the matter was reset for trial on September 21, 2015. On September 18, 2015, a Friday and the last work day before the scheduled Monday afternoon trial, Defense Counsel filed a Notice of Alibi Defense, naming three alibi witnesses and he also filed a Motion for a Continuance. The Defense Attorney's motion acknowledged the lateness of his filing of the Notice of Alibi Defense did not allow compliance with the CRCP Rule 15 requirement of 10 days' notice in advance of scheduled trial. Counsel's motion claimed he had just recently received assignment to the case and also needed time to conduct Rule 13 discovery. The Prosecution immediately filed written objection to any continuance, arguing that the Defendant had constantly "dragged his feet" in an attempt to delay justice and that all during the intervening time the Complainant and her immediate family members were being subjected to Defendant's, and others' frequent harassment.

At the appointed time for trial on September 21, 2015, the court first entertained arguments of both counsel on their motions and denied the Defendant his requested relief. The court thereafter proceeded immediately to trial, declined to hear the proffered alibi witness's testimony, and at the trial's conclusion found the Defendant guilty on the disorderly conduct charge. The court proceeded to sentencing and imposed a \$100 fine and 30 days detention with the servitude of same being conditionally suspended.

A Motion to Reconsider or For New Trial was next filed by Defendant, citing as bases for his requested relief that the trial court's ruling against the continuance was error since it precluded Defense Counsel's ability to thereby meet the Rule 15 10-day advance Notice of Alibi requirement and the court's consequential disallowance of one alibi witness's testimony. The Prosecution filed an Answer in Opposition, pointing out that Defendant himself did testify he was elsewhere with three other potential witnesses, and furthermore the Prosecutor pointed out that Anderson's mother was in the courtroom during trial and lived across the street from where the incident occurred, yet she was not called by the Defense to testify. Additionally, the Prosecution pointed out that Defendant's father, who had been present at the first trial date and was placed by Prosecution testimony at the scene of the incident in question, was "interesting[ly]" not in attendance on that day trial was actually had. Twenty days lapsed after the Motion to Reconsider or For New Trial was filed without the trial court issuing a ruling; therefore, the Defense motion was deemed automatically denied under CRCP Rule 23(a).

A Notice of Appeal was timely filed, the matter was briefed by both counsel, and oral argument was held November 3, 2016. This opinion and order hereinafter ensues.

ISSUES AND ANALYSIS

This appeal calls upon the Court to determine whether the Trial Judge abused her discretion in denying Defense Counsel's motion for a continuance of trial in order that his last-minute filing of a Notice of Alibi Defense might satisfy Rule 15 of the Choctaw

Rules of Criminal Procedure's requirement that such notice be filed not less than 10 working days in advance of trial. The issue calls upon this Court to reconcile the Constitutional guarantee of the Compulsory Process Clause of Article X Section 1(f) of the MBCI Constitution and By-Laws (May 8, 2013), with the language of Choctaw Rule of Criminal Procedure Rule 15. The language of the Tribal Compulsory Process Clause is the same as the Federal 6th Amendment Clause that guarantees the criminally accused their right "to have compulsory process for obtaining witnesses in his favor...." In order for the accused to exercise that right, court systems over time realized that there must be orderly criminal rules of procedure in place to avoid abuses within their systems.

Historical background to Criminal Procedure Rules on Notice of Alibi defenses: During the 1920's the alibi defense in criminal trials became a target of criticism as "one of the main avenues for escape of the guilty." Millar, *Modernization of Criminal Procedure*, 11 J. Crim. L. & Criminology 344, 350 (1920). Sometimes referred to as "trials by ambush," these last-minute productions of a bevy of surprise witnesses, previously undisclosed, who all testified that the defendant was someplace else at the time the offense was committed became a commonplace trial strategy and defense mechanism for heading off convictions. Oftentimes these so-called "hip pocket" defenses, easily manufactured for introduction in the final hours of trial, led to acquittals since surprised prosecutors were ill-prepared to check out and refute the testimony of these surprise alibi witnesses. To counter these abuses, increasingly the states, the federal courts, and many tribal courts enacted criminal procedural rules requiring defense counsel to provide advance notice of alibis and the identity of the witnesses they planned to call to support their claimed alibi. Under some jurisdictions' rules, prosecutors were then required to notify the defense of witnesses the prosecution planned thereafter to discredit alibi claims. Such is the case with the Federal Alibi Rule established in 1975 as the Federal Rules of Criminal Procedure Rule 12. The Choctaw Tribal Code Rule 15 is the Notice of Alibi Rule Defense and it is shorter and more direct than the federal Rule 12.

Tribal Notice of Alibi Rule: Although the federal and tribal compulsory process language reads the same, the criminal procedure rules in the Choctaw Tribal Code are distinct and govern our review of the case before this Court. CRCP Rule 15 reads:

The defendant or his legal representative shall by written notice to the court at least ten (10) working days before trial provide the names of any witnesses upon whom the defense intends to rely for an alibi defense for the defendant. Failure to provide such notice will prevent the use of such witnesses by the defense unless it can be shown by the defense that prior notice was impossible or that no prejudice to the prosecution has resulted, in which case the judge may order the trial delayed or make such other orders as required to assure a just determination of the case.

That second sentence of Tribal Rule 15 discretionarily empowering the trial court to bar defense alibi witnesses' testimony is called the "Sanctions or Preclusion Provision." It is functionally similar to the Federal Rule 12's provision reading, "(e) FAILURE TO COMPLY. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify." Both tribal and federal sanctions provisions make the decision to impose the sanction of witness preclusion discretionary with the judge; the main difference is that the tribal rule excludes imposition of that sanction if the defense can show that prior notice was impossible or that no prejudice to the prosecution has resulted.

The U. S. Supreme Court has on multiple occasions upheld the use and imposition of the alibi notice rule and its enforcement, in appropriate cases and to a limited extent, of the witness preclusion sanction. In *Williams v. Florida*, 399 U.S. 78, 80-86 (1970), for instance, it upheld the constitutionality of alibi witness rules in general, holding that a requirement of notice by defendants does not violate their Fifth Amendment privilege against self-incrimination. As regards imposition of the preclusion sanction, *Taylor v. Illinois*, 484 U.S. 400 (1980) squarely upheld imposition of a defense witness preclusion sanction where it determined defendant's lawyer

willfully concealed disclosure of an alibi witness until the second day of trial. In doing so, the *Taylor* court applied the balancing test by weighing variously the interests and responsibilities of the respective parties as well as those interests and responsibilities of the court in order to ensure orderly progression of a case while also attaining a determination that is just. We adopt the same approach in making our determination of the question on review.

We also note that the well-established applicable standard of review is whether the Trial Judge's ruling denying Defense Counsel's requested continuance and refusing to entertain the proffered testimony constitutes an abuse of discretion in violation of Appellant's Compulsory Clause rights. On the abuse of discretion standard we have previously ruled that an appeal can give rise to a reversal of a criminal conviction "if the findings of fact are not supported by substantial evidence in the record or if a conclusion regarding applicable law is clearly erroneous" and in conducting this review we "will show deference to such commonsense or reasonable inferences made by the trial court that are supported by any evidence that may appear in the record." *Mississippi Band of Choctaw Indians v. Williamson*, No. 2001-32 (2004).

Here, we first identify and weigh the interests of the court. The Trial Judge was fully aware of the history (outlined above in "Proceedings Below") in this case's progression to the September 21st date of trial and conviction. She recites it as being in part her basis for denying Defense Counsel's requested continuance and for precluding even the one present alibi witness's testimony. Appellee's brief restates their last argument in opposition to another continuance and identifies in support of the court's interest in the imposition of the preclusion sanction as "the fact that he [the Defendant] wants to present an alibi witness 24 hours late or Friday morning prior to trial on Monday requesting discovery, he made no mention of this two weeks ago. Nothing was said about alibi witness." (Tr. 10).

On the Prosecution's interest, their stance was three-fold: (1) Defendant had compiled an extensive track record of obstruction and delay for which he should be held accountable; (2) Defense Counsel's very 11th hour disclosure of Defendant's claim of alibi and alibi witnesses which Defendant had not even mentioned two weeks ago when requesting appointed counsel should not be condoned by the court granting continuance; and (3) the Prosecutor's claim that this case had dragged on long enough and necessitated immediate closure without further continuances.¹

Defense Counsel's interest and claimed reasons for their motions being granted was: (1) the Defendant was not a lawyer and thus was unfamiliar with procedures; (2) the 10-day requirement for Alibi Notice was impossible to meet as the Defense Counsel did not learn of his appointment to represent Defendant until the week before the September 21, 2015 scheduled trial; (3) Defense Counsel was able to first meet with his client only on that Friday of that week before the Monday trial and he took immediate action to notify the court and prosecutor of the alibi claim and witnesses as well as the necessity of a continuance in order to satisfy Rule 15's requirements in as short a time as was by then feasible; and (4) the granting of a continuance by the Lower Court would in nowise prejudice the prosecution.

With all of the above identified interests and arguments in mind, we must objectively examine them only within the limited time lens from the August 31, 2015 halting mid-trial of Defendant's *in absentia* bench trial and the granting of Defendant's request for appointed counsel and trial continuance to September 21, 2015, the then-rescheduled trial date. That was a time span of just 21 days. Rule 15 requires that the Notice of Alibi be filed "at least ten (10) working days before trial." (Emphasis added.) The Defense Attorney advised the Lower Court that he did not even learn of the appointment until the week before trial; that would have been the week of Monday, September 14th through Friday, September 18th. Consequently, it was absolutely

¹ 81 days lapsed between arraignment and date of last trial setting.

impossible for the Defense Attorney to meet the ten-working-days-before-trial Notice of Alibi Defense filing requirement. Furthermore, he was only able to first meet with his client on that Friday, the 18th which was the final working day before the scheduled Monday, the 21st trial; notwithstanding which, he immediately filed his Notice of Alibi Defense and Motion for Continuance – and did so sufficiently early enough in that last workday for the tribal prosecutor to file responsive pleadings in opposition. Looking back to the preceding workweek, it was Monday, September 7th through Friday, the 11th, yet Monday, September 7, 2015 was Labor Day, a federally-recognized holiday on which all court systems were officially closed. There were therefore only four workdays that week to be counted towards the ten-working-days-before-trial filing requirement; therefore the next preceding workday would be Friday, September 4, 2015. The upshot of this analysis is that once the Lower Court ordered appointment of a lawyer for Defendant on August 31st, there remained only that next two workdays for Choctaw Legal Defense to appoint counsel and for counsel to meet with Defendant before that third workday of September 3rd on which Notice of Alibi Defense could ever conceivably be timely filed. According to the record on review, appointment of counsel was not done in that three-day timeframe.

On August 31, 2015, it was disingenuous for the Lower Court to appoint Counsel, only to turn around and deny the Defense Attorney any meaningful right and opportunity to represent his client by setting a trial date of September 21, 2015. To give a right of counsel representation at trial on the one hand, but on the other hand to then take away that same counsel's right to provide meaningful representation by denying his Motion for Continuance and precluding use even of the one available Defense witness works at cross-purposes and thus violates commonsense or reasonable inferences being made and appearing in the record. Lower Court denial of the requested continuance therefore did not meet the *Williamson* standard. Hence, it was sufficiently shown by the Defense that prior Notice of Alibi Defense was impossible and it was then up to the Lower Court Judge to order the trial delayed or make such other orders as required to make a just determination of the case.

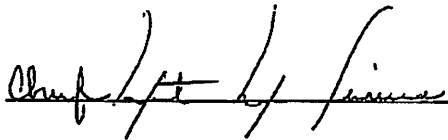
Defense Counsel furthermore met the alternate standard of Rule 15 for a continuance contending that no prejudice to the Prosecution has resulted. The Prosecution's contention that "this case has dragged on long enough and necessitated immediate closure without further continuances" is unsupported in the record because, again, later rescheduling was required if the Rule 15 Notice of Alibi filing time was to be met. Appellee's brief argues at page 9 that on that the September 21 trial date this late-minute filing placed the Prosecution at a strategic disadvantage of surprise. They were therefore now needing opportunity to conduct reciprocal discovery and further investigation of the alibi claim and witnesses – all problems created by the excessively expedited trial date and all capable of remediation by the Lower Court if it had granted the requested (and needed) continuance.

CONCLUSION

Premises considered, the Lower Court Judge committed reversible error by siding with Prosecution's argument against granting the requested continuance, enforcing the preclusion sanction. After all, the "reset button was activated" when the Lower Court Judge halted the August 31, 2015 trial mid-point and granted a continuance for trial within too short a time frame. Whether notice filed by Defense Counsel upon appointment or upon last workday before trial matters not, as both still miss the 10-day advance notice of alibi period. The Prosecution's complaint that this case had dragged on long enough is simply not a valid argument for violating Compulsory Clause Rights.

Accordingly, it is ORDERED that the conviction in this case is reversed and the cause remanded for retrial.

SO ORDERED, this the 27th day of February, 2018.



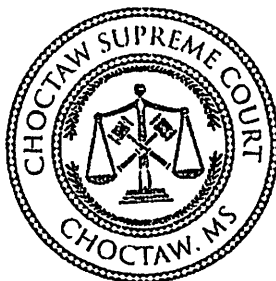
Kevin Briscoe, Chief Justice



Edwin R. Smith, Associate Justice



Brenda Toineeta Pipestem, Associate Justice



CERTIFICATE OF SERVICE

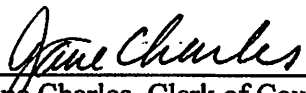
I, do hereby certify that I have this, the 27th day of February, 2018 caused to be forwarded by electronic mail, United States mail and/or hand delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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