

IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

FILED

DEC 18 2017

CHOCTAW SUPREME COURT
BY *J. Paul Barlett*
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MISSISSIPPI BAND OF CHOCTAW INDIANS

APPELLANT

v.

SC 2016-04

FRANK MILSTEAD, JR.

APPELLEE

OPINION AND ORDER

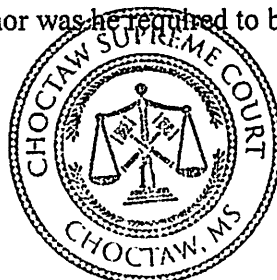
SUMMARY

PROCEDURAL HISTORY

On June 2, 2016, Appellee Frank Milstead, Jr. was charged in a written complaint with Aggravated Battery Domestic, Class A, a violation of Choctaw Tribal Code § 3-3-5. The complaint alleged that on May 30, 2016, the Appellee struck his father, Frank Milstead, Sr., in the face, resulting in a serious injury requiring medical attention. The complaint further states that the incident occurred at 110 Tucker Facility Rd., Philadelphia, MS, which is located on the Choctaw Indian Reservation. Frank Milstead, Sr., is a non-Indian who was formerly married to Lori Milstead, who is an enrolled member of the Mississippi Band of Choctaw Indians. The couple has since divorced, but Lori Milstead and her son Frank Milstead, Jr., continue to live in the Tucker community of Choctaw reservation lands.

Following the filing of the criminal complaint, an arrest warrant was issued for Appellee. After his apprehension on June 6, 2017, he was brought before Judge Timothy Taylor on June 7, 2016, for arraignment. At that time and as a threshold matter, the judge *sua sponte* announced that the court did not have jurisdiction over Defendant Milstead because he was not an enrolled member of the Tribe and was not eligible for enrollment. The court ultimately issued an order of dismissal “with prejudice” stating as its basis that it was due to the defendant being ¼ Choctaw and the Choctaw Tribal Court not having jurisdiction over non-enrolled members of the tribe.” That same day the Tribe filed a Notice of Appeal of the Judge’s final order in accordance with CTC § 7-1-2 and Rule 24 of the Choctaw Rules of Criminal Procedure.

Appellant Mississippi Band of Choctaw Indians duly filed it’s brief on appeal. Appellee Frank Milstead, Jr., did not file a response, nor was he required to by the provisions of CTC § 7-1-2



relating to criminal appeals at the request of the prosecution.¹ Oral arguments were held July 8, 2016, and both the Defendant Frank Milstead, Jr., and his mother were in attendance, although the Defendant chose not to participate.

STANDARD OF REVIEW

The matter before this Court arises from the Appellant Tribe's filing of a direct appeal pursuant to the provisions of CTC § 7-1-2 governing prosecutorial appeals of criminal cases in which the defendant has been "acquitted." Such appeals shall be based solely on a question or questions of law. For purposes of our review, this Court shall equate the trial judge's unilateral summary dismissal of defendant's charge "with prejudice" as being tantamount to an "acquittal" even though in actuality jeopardy had not yet attached.² Prosecutorial appeals under the language of CTC § 7-1-2 quoted below in footnote one are statutorily to be based solely on a question or questions of law, and it is well-established that the appellate standard of review is *de novo*.

Caselaw also supports the *de novo* standard of review approach. In the case captioned *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995), wherein the question of law was whether the victim was non-Indian for purposes of federal jurisdiction, it was held that review of the Indian status was held to be *de novo*. Our own Court in the case styled *Pierceson Farve v. Mississippi Band of Choctaw Indians*, Cause No. SC 3014-07 (July 28, 2015) said, "this Court considers it a jurisdiction challenge in relation to the Choctaw Criminal Courts and therefore the applicable Standard of Review is *de novo*. Reinforcing that point, the Fifth Circuit wrote in *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) that "[w]e review a dismissal for lack of subject matter jurisdiction *de novo*."

ARGUMENTS AND ANALYSIS

Whether the criminal jurisdiction of tribal courts of one tribe over its "Indian country" lands and members likewise extends to Indians who are nonmember Indians of that -- or for that matter -- of any other federally recognized tribe is a question of law that has been well-settled both by the courts and by Congress. Indeed, it should be indisputable that among the inherent powers of tribal self-government are those requisite to the exercise of criminal jurisdiction over all Indians.

¹ The pertinent provision of CTC § 7-1-2 reads, "provided that appeals at the request of the prosecution from a criminal case in which the defendant has been acquitted shall be based solely on a question or questions of law, the answer to which shall be given prospective application only, without any effect on the defendant and without requiring the defendant to participate in the appeal in any manner."

² Appellant Tribe's brief, at p. 9, notes as well this distinction, reading: "Although there was not a judgment of conviction, there was a final order, and the Tribe would respectfully submit that the Trial Court's ruling was based on a clearly erroneous conclusion of the law and that question of subject matter jurisdiction should be reviewed *de novo*."

Jurisdiction Pursuant to the Tribal Constitution

That jurisdictional power of our own tribal government is clearly expressed in the first instance in its tribal Constitution through Article II titled “Jurisdiction,” the full wording of which is set forth as follows:

Article II – Jurisdiction: - The jurisdiction of the Mississippi Band of Choctaw Indians shall extend to all lands now held or which may hereafter be acquired by or for or which may be used under proper authority by the Mississippi Band of Choctaw Indians, and to all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians.

Our Court has previously interpreted this jurisdictional provision of the Tribal Constitution in the case of *Williams v. Parke-Davis*, (April 27, 2004).³ The *Parke-Davis* opinion directly addressed, and rejected, the pharmaceutical company’s unitary interpretation and argument that the language of Article II limits the Tribe’s jurisdiction to cases in which all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians have engaged in activity on Choctaw Reservation Lands. Instead, this Court stated, “the language in Article II precisely captures the two discrete elements of tribal authority namely the physical, territorial reach of tribal jurisdiction and the potential activities of members wherever they might occur.” *Supra*, p. 9. Stated another way, jurisdiction encompasses (i) the territorial reach as being all lands within the reservation confines, and (ii) the reach, both intra-territorial and extra-territorial, of its legal relationship to all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians. Examples of the latter mentioned in the *Parke-Davis* opinion include such matters as probate, voting, and per-capita distributions.

A second, related provision of the Constitution and By-Laws of the Mississippi Band of Choctaw Indians deals with the power and duty of the Tribal Council to define the scope of tribal criminal jurisdiction through the exercise of its legislative actions and is set forth under Article VIII. For purposes of this opinion we need only to set forth those relevant portions of its wording in quotations hereinafter:

Article VIII - Powers and Duties of the Tribal Council:

The Tribal Council exercises the legislative power under Article III, Sec. 1 (m) of “establishing a tribal court; and **defining the powers** and duties of that court; subject to the approval of the Secretary of the Interior where such approval is required by Federal law.” Section 1

³ *Williams v. Parke-Davis*, Opinion and Order issued April 27, 2004, reaffirming the Court’s prior ruling of July 29, 2003, dismissing the consolidated interlocutory appeals from Civ. Act. #1142-01 and Civ. Act. 1142-01.

(p) then empowers the tribal Council “To pass any ordinances and resolutions necessary or incidental to the exercise of any of the foregoing powers and duties.”

Read together then, Article II extends to the tribal government, *inter alia*, territorial governance jurisdiction over all its reservation lands, and Article VIII empowers the Tribal Council to establish a tribal court system and to define court powers and duties through council passage of ordinances and resolutions.

Jurisdictional Provisions of the Choctaw Tribal Court

The Choctaw Tribal Council has exercised the above constitutional authority to define the reach and scope of Tribal Court jurisdiction over civil and criminal matters arising on the reservation through its enactment of the Choctaw Tribal Code. The Tribal Code sets forth the Jurisdictional Policy in CTC § 1-2-1 that reads:

CTC § 1-2-1 – Tribal Policy

It is hereby declared a matter of Tribal policy and legislative determination by the Tribal Council of the Mississippi Band of Choctaw Indians that the public interest and the interests of the Mississippi Band of Choctaw Indians required that the Tribe provide itself, its members, and other persons, both Indian and non-Indian, living on the reservation, or who are within the jurisdiction of the Tribe, with an effective means of redress in civil cases in which at least the party presence, business dealings, or contracts, or other actions or failures to act, or other significant minimal contacts on or with the Reservation, the party defendant has incurred civil obligations to persons or entities to the Tribe’s protection. ***This tribal policy likewise extends to authorize the prosecution of criminal offenses committed within Tribal jurisdiction by Indian offenders.*** (Emphasis added.)

The jurisdictional provisions of this Tribal Code and the procedures and requirements contained herein shall, except as otherwise expressly provided, apply to all persons and entities within the territorial jurisdiction of the Tribe, subject to the limitations set forth above and whether members of the Tribe or not. Nothing contained in this statement of Tribal policy shall be construed as an assertion of criminal jurisdiction over non-Indians nor of civil jurisdiction over obligations involving or affecting only non-Indian parties. (Emphasis added.)

There is nothing ambiguous about the above Tribal Jurisdiction Policy statement: it does not in any manner limit criminal jurisdiction in any way only to tribal persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians. Instead, it specifically states that the tribal jurisdictional policy “extends to authorize the prosecution of criminal offenses committed within Tribal jurisdiction by Indian offenders.

What’s more, the Code clearly defines the terms “Indian” or “Indian person.” CTC § 1-5-8(1) defines those terms as follows:

CTC § 1-5-8 Definitions

The following definitions will apply to the Tribal Code:

- (d) “Indian” or “Indian person” means any person of Indian descent who is defined as an Indian for purposes of federal criminal jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153.

What Code provision 1-5-8(1) accomplishes with this definition is that it couples and applies the Tribal Code definition with existing Federal Indian Country statutes and case law on the subject both of what constitutes an “Indian” in the language of the law and what authority or authorities establish that tribal sovereignty has been empowered to tribes to exercise criminal jurisdiction over all persons satisfying that definition of Indian. It matters not whether they be members of this or any other tribe or, for that matter, those who may be ineligible for membership in any federally recognized tribe, yet meet the definition of “Indian” as defined above.

All of the above tribal constitutional and code provisions for our tribal court system’s exercises of criminal jurisdiction over non-tribal member Indians are clearly conferred by congressional enactment and validated by federal Supreme Court and Appeals Court rulings. We need only cite those dealing with tribal court jurisdiction over non-tribal member Indians, whether they be members of another federally recognized tribe or simply meeting the “Indian” definition of CTC § 1-5-8(1) and neither being a member of a tribe nor eligible for tribal membership. The defendant, Frank Milstead, Jr., falls in the last-mentioned category.

Congressional Legislation

Tribes have long faced court challenges to their jurisdiction to prosecute crimes that occur on tribal lands by persons who were not members of their tribe. But it was not until 1970 that the United States Supreme Court directly addressed the subject of a tribe’s exercise of criminal jurisdiction over non-member Indians.

That case, captioned *Duro v. Reina*, 495 U.S. 676 (1990), involved an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians which is located in California allegedly shooting

and killing a 14-year-old member of the Salt River Pima Maricopa Indian Community. The United States filed federal charges of murder and aiding and abetting murder in federal court under the Major Crimes Act; the Pima-Maricopa tribe filed criminal charges of illegally firing a weapon (the weapons charge was Indian tribes were then limited to prosecuting misdemeanor offenses).

Duro's motion to dismiss for lack of jurisdiction was denied in the tribal court, so he then filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. The District Court granted the writ and ordered Duro's release, holding the tribal court had no jurisdiction over non-Indians. The Ninth Circuit reversed, holding that the tribal court did have jurisdiction over non-member Indians, for federal statutory law allowed tribal jurisdiction over all Indians, and not simply over tribal members. Finally, it concluded that if tribes were to lack criminal jurisdiction over non-members, there would be a "jurisdictional void" since only the state would have the power to prosecute the nonmember and may lack the power or resources to do so.

The United States Supreme Court agreed to review the Ninth Circuit's decision and ultimately held that the Pima Maricopa tribal court did not have prosecutorial power over persons who are not members of their tribe. As to the argument that a "jurisdictional void" would be created by the Court's ruling, Justice Kennedy's closing paragraph concluded that "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." *Id.*, at 698.

Congress responded quickly in addressing that "jurisdictional void" created by amending the Indian Civil Rights Act in 1990. The measure was signed into law November 5, 1990, six months and six days after *Duro*'s issuance. That portion of the amended Indian Civil Rights Act, 25 USCS § 1301(2), now reads: "(2) 'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed including courts of Indian offenses; and ***means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.***" (Emphasis added.)

That 1990 amendment to the Indian Civil Rights Act did not go unchallenged. The constitutionality of the amended federal statute came before the United States Supreme Court for review in a case styled *United States v. Lara*, 541 U.S. 193 (2004). Billy Jo Lara was an enrolled member of the Turtle Mountain Band of Chippewa Indians who was married to a member of the Spirit Lake Tribe and living on the Spirit Lake Reservation. As a consequence of several altercations on Spirit Lake lands, he was banned from the reservation. During a later confrontation while back on Spirit Lake lands, Lara struck a federal officer. That conduct resulted in his being criminally charged both in tribal court and in federal court for offenses.

Lara argued in the federal case that dual tribal and federal prosecutions for the same alleged criminal transaction violated the constitutional protections against double jeopardy. The trial level Federal Magistrate Judge and an Eighth Circuit panel rejected Lara's claim. The Eighth Circuit Court of Appeals sitting *en banc* reversed both lesser court rulings by a 7 to 4 vote. Instead, it held that the Tribal Court, in prosecuting Lara, was exercising a federal prosecutorial power, thereby triggering the double jeopardy protections provision.

The government appealed that decision to the United States Supreme Court, which held that since the two prosecutions were brought by two different sovereigns, the second, federal, prosecution did not violate the Double Jeopardy Clause. The High Court held that the source of the tribal power to punish nonmember Indian offenders arose from "inherent tribal sovereignty," rather than from delegated federal authority. The Court wrote: "The statute says that it 'recognize[s] and affirm[s]' in each tribe the '*inherent*' tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors." *Id.*, 541 U.S. 193, 199. Furthermore, the Court concluded the Constitution authorizes Congress' power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute 25 USCS § 1301(2) was enacted to do:

[W]e hold, * * * that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute.

(*Id.*, 541 U.S. 193, 210) (Emphasis added).

The *Lara* decision, when coupled with 25 USCS § 1301(2), affirmatively and conclusively establishes that tribes do in fact lawfully possess the power to exercise criminal jurisdiction over non-member Indians who commit crimes on their reservations. And as we earlier pointed out, the Mississippi Band of Choctaw Indians has exercised that power through enactment of CTC § 1-2-1. The Court therefore needs only to establish that Frank Milstead, Jr., does by law meet the definitional requirements necessary to satisfy the status of "Indian" under CTC § 1-5-8(d) and for federal criminal jurisdiction purposes that same standard under the Major Crimes Act, 18 U.S.C. § 1153.

Frank Milstead, Jr's Status as "Indian"

To make that determination that Frank Milstead, Jr., does by law meet the definitional status of "Indian" set forth in CTC § 1-5-8(d), which accords with federal precedential rulings relating to Major Crimes Act and Assimilative Crimes Act determinations of "Indian," we need look no further than our own Tribal Court system. Appellant Tribe's brief in this present case persuasively

sets forth the arguments relied upon in *In Re Mississippi Band of Choctaw Indians Juvenile Probation Office v. Ketcher*, No. 1578-97, Choctaw Tribal Youth Court, February 20, 1998.

In *Ketcher*, the Choctaw Tribal Youth Court had occasion initially to proceed in a determination as to whether that juvenile, known to be of one-quarter or more of Mississippi Choctaw Indian blood -- if in fact less than one-half degree of that blood quantum -- in such a contingency would nonetheless meet the definition of "Indian" found at CTC § 1-5-8(1) so as to be subject to the Youth Court's (and Juvenile Probation Office's) jurisdiction.⁴ In doing so, the court applied the standards of *St. Cloud v. United States*, 702 F. Supp. 1456, (1988) to hold:

The undisputed facts set forth in the background portion of this brief make it clear that the minor child here at issue had the requisite ties to the tribe and had been informally recognized by the tribe and the federal government as an "Indian" within the meaning of § 1153 when this proceeding began, though not as an enrolled member of the Mississippi Band of Choctaw Indians. The factors of being born to a tribal member, attending Choctaw Central High School, living in one of the Choctaw communities, and receiving IHS (Federal Government) services and tribal services, all show that she has been informally "recognized" as an "Indian" within the meaning of § 1153. This evidence is clearly sufficient to meet the "Indian" test of section 1153 even if the child involved was never shown to be eligible for tribal membership or had never been formally enrolled.

Ketcher, supra at 16.

Furthermore, the court, applying the *St. Cloud* standards, ruled that "formal enrollment or eligibility for enrollment in the Mississippi Band of Choctaw Indians or in any other federally recognized Indian tribe is not required to establish that a person is an Indian for purposes of § 1153 or of § 1-5-8(1) or § 11-1-3(e), Choctaw tribal code." (App. Br. P. 16.)

As noted above, *St. Cloud* was a 1988 decision and it was applied in the Tribal Youth Court *Ketcher* decision issued a decade later in 1998. Both predated the United States Supreme Court 2004 *Lara* decision, yet we note that the two principal authoritative post-Lara decisions now cited for their "Indian" testing standards are *United States v Maggi*, 598 F.3d 1073 (9th Cir. 2010) and *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) and they apply functionally similar

⁴ Later in the course of the proceedings it was determined that the child was three-quarter Mississippi Choctaw and eligible for membership. Appellant's brief at p. 16, fn. 6 states: ", the court's analysis on the "who is an Indian" question as it arose in the *Ketcher* case is directly in line with the position for which the tribe here advocates and is squarely consistent with controlling federal and tribal law. This Court agrees and adopts that premise.

standards. Initially, the courts look first to the degree of Indian blood and second to tribal or government recognition as an Indian. *Maggi, supra.* 1037, 1078. For the first requirement, no set degree of Indian blood is required; however, the Indian blood must trace back to a federally recognized tribe. *Id.* at 1080-1081. When analyzing this second tribal or federal recognition standard, courts have considered, in declining order of importance, evidence of the following: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition through residence on the reservation and participation and Indian social life. See *Bruce*, 394 F.3d at 1226 and *Maggi*, 598 F.3d at 1082-1083. From these and other cases it appears that courts look to the cumulative effect of these considerations, with no single factor being determinative. Neither are the above a complete listing of factors. For instance, an additional consideration this Court could take into account if the question should ever arise again in the future in relation to criminally accused nonmembers claiming Mississippi Choctaw ancestry might be whether they speak or understand Choctaw.⁵

Attached as Exhibits A through D to Appellant Tribe's Brief on Appeal is documentation establishing that Defendant Frank Milstead, Jr., fully meets the criteria requisite to satisfying the definition of "Indian" under CTC § 1-5-8(1); the first of the two discrete elements of tribal authority enunciated in Tribal Constitution Article II, namely the physical, territorial reach of tribal jurisdiction; and federal precedential rulings relating to Major Crimes Act and Assimilative Crimes Act determinations of "Indian," for purposes of asserting federal criminal jurisdiction. *In seratum* they include: (1) tribal enrollment records indicating that defendant's mother is one half degree of Mississippi Choctaw Indian blood (a copy of Mrs. Milstead's CDIB is attached as Exhibit A); (2) tribal medical records documenting numerous occasions beginning in August 2000 through June 2016 of the Defendant's utilization of the services of the Choctaw Health Center (Exhibit B); (3) Defendant's earlier attendance at Choctaw Central High School (Exhibit C is a copy of his tribal school records); and (4) A police report entered on March 17, 2008 indicating that law enforcement encountered Defendant Frank Milstead, Jr., while he was fishing at a community pond (a privilege afforded to those who are of Choctaw descent) on the reservation and that he identified himself as ¼ Choctaw (Exhibit D). Furthermore, the Defendant informed the trial judge in the proceedings below that he lived on the reservation. (Tr. 2:24)

As can be seen from the information listed above, Defendant Frank Milstead Jr. does by an abundance of factors meet sufficient criteria ascertaining his status as an "Indian." This Court therefore finds that he clearly meets the requirements to enjoy "Indian" status recognition for tribal jurisdiction and other associated purposes.

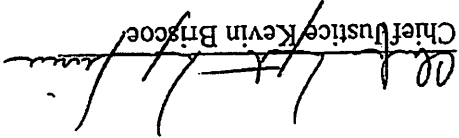
⁵ Given the significant number of "urban-relocatees" generated after the passage of the Indian Relocation Act of 1956 and the number of "outplacements" of Indian children the Indian Child Welfare Act is designed and intended to curb, this Court is by no means suggesting "Choctaw speaker" as a necessary, nor indispensable criterion.

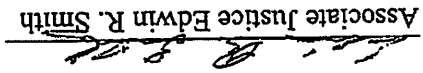
CONCLUSION

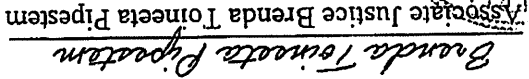
Therefore, on the basis of the above authorities, arguments, and analysis, this Court orders that the June 7, 2016, Order of Dismissal by the then presiding trial court Judge Tim Taylor be and hereby is Ordered Reversed.

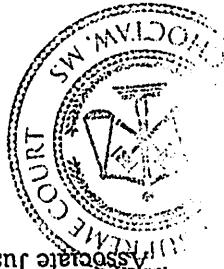
Furthermore, that portion of the Order of Dismissal directing that the dismissal be "with prejudice" is likewise Ordered Rescinded on grounds that jeopardy had not yet been set in. Instead, this Court Orders that the cause be Remanded for Further Proceedings not inconsistent with this opinion.

SO ORDERED, this the 18th day of December, 2017.


Chief Justice/ Kevin Briscoe


Associate Justice Edwin R. Smith


Associate Justice Brenda Toineeta Pipestem



CERTIFICATE OF SERVICE

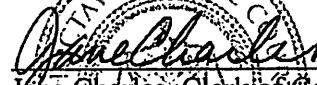
I do hereby certify that I have this, the 18th day of December, 2017, caused to be forwarded by the United States Mail or Hand Delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

Hon. Kevin Payne, Special Prosecutor
Mississippi Band of Choctaw Indians
Office of The Attorney General
Choctaw, Mississippi 39350
(Hand Delivery)

Mr. Frank Milstead, Jr.
110 Tucker Facility Road
Philadelphia, Mississippi 39350

Hon. Peggy Gibson
Choctaw Tribal Court
Choctaw, Mississippi 39350
(Hand Delivery)

Hon. Melissa Carleton
Acting Attorney General
Mississippi Band of Choctaw Indians
Office of the Attorney General
Choctaw, Mississippi 39350



Jane Charles, Clerk of Court
Choctaw Tribal Supreme Court

