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

MISSISSIPPI BAND OF CHOCTAW INDIANS **APPELLANT**

V. **SC 2019-02**

JULIAN WILLIS **APPELLEE**

PER CURIAM

Appellant, the Mississippi Band of Choctaw Indians (Tribe), initiated this appeal of the lower court's Dismissal of Charges that was granted with prejudice of a two-count criminal complaint alleging battery by way of domestic violence. The defendant's motion to dismiss was granted following completion of the evidentiary phase of the bench trial and on a later date specifically set by the court for the sentencing phase of proceedings.

STATEMENT OF THE CASE

Appellant Tribe filed the appeal pursuant to Choctaw Tribal Code (CTC) § 7-1-5 seeking to overturn the trial court's order granting defendant's *ore tenus* Motion to Dismiss with prejudice a criminal complaint that alleged two counts of domestic battery, a violation of CTC § 3-10-2. Although the evidentiary phase of the bench trial had been completed, the court continued the matter for sentencing proceedings to a later date in order to take under advisement the respective arguments of both counsel on whether or not the charges should be treated as domestic battery as initially charged, or as a lesser charge and penalty of abuse of a child, CTC § 3-3-8. At the conclusion of the evidentiary phase of the bench trial, the court ordered that the defendant undertake a counseling program such that any rehabilitative actions taken by defendant during

the intervening time might be considered in determining which of the two charges the sentencing should be based.

On the date set for sentencing, counsel for both parties remained in disagreement over which of the two charges the court's verdict and thus sentencing should be based. The mother pressed the prosecutor to seek permission of the court for her to relate certain information developed in the domestic litigation proceedings held the previous Wednesday. The prosecutor, after making the request known to defense counsel and then without disclosing to the court the substance of the information the mother wanted to be conveyed, sought permission for the mother to address the court. The trial judge allowed her to speak on the condition that the mother did not make mention of any information developed in the domestic litigation. With that restriction understood, the mother in a brief four-sentence statement twice obliquely alluded to what happened in the proceedings that were held on that Wednesday.[1] The defense attorney objected and immediately moved the court to dismiss all charges with prejudice. Over strenuous objection by the Tribal Prosecutor, the court summarily granted the defense motion, stating in material part. "... my sentencing was set for today [and] I'm getting more information than what I needed, and that shouldn't have been." Sentencing Tr. at 11. Beyond that the court made no factual findings.

STATEMENT OF THE ISSUES

On appeal the appellant argues: (1) there was no prosecutorial misconduct; (2) the defense suffered no prejudice; and (3) the court abused its discretion in dismissing the charges against Willis.

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[1] After introducing herself to the trial court judge as being the mother of the two minor child victims, the full extent of her statement purportedly prompting summarily dismissal with prejudice of both charges against the defendant was as follows:

> "I understand that I cannot bring the issue up, what happened on Wednesday, but if you could take the time to think about for a minute that I'm just -- in respect for my kids, just to please make note that I'm just asking the charges remain the same as what we had established in the beginning.
>
> I believe that whatever the decision you make, I believe he should be held accountable. I just in the respect -- the attitude that he had shown to my kids on Wednesday, I just feel like no leniency should be given. And that's all that I request."

The appellee contends that the appellant's effort to seek reversal and remand to the lower court for sentencing violates CTC § 7-1-2 of the Choctaw Rules of Appellate Procedure and that Double Jeopardy bars further criminal proceedings against defendant Willis; and that any issues that the lower court may address must be of prospective application only, as contemplated by CTC § 7-1-2.

STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of a motion for summary judgment or a motion to dismiss under a de novo standard. *Walker v. Mississippi Band of Choctaw Indians D/B/A Golden Moon Casino Resort et al.*, SC 2018-04 (March 12, 2021).

DISCUSSION

PART I

The first question before the Court is whether the Tribe's appeal is properly brought under the initial clause of CTC § 7-1-2 which provides a right to appeal for any party aggrieved by any final order, or under the second clause that addresses prosecution appeals from criminal cases where the defendant has been acquitted. CTC § 7-1-2 reads as follows:

> **§7-1-2 Right to Appeal**
>
> Any party who is aggrieved **by any final order,** commitment or judgment of the Tribal Court may appeal in the manner prescribed by these rules, *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.

(Emphasis and italics added.)

A full reading of the statute inescapably indicates that it first grants the right to appeal to any party aggrieved. The term "any" necessarily includes the prosecution as a general principle. It is all-inclusive. "Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified." CTC §1-5-7 (2). Secondarily, that latter clause of the statute addresses only those appeals by the prosecution in criminal cases in which the defendant has been acquitted.

Appellee Willis's brief argues that the trial Judge's unilateral summary dismissal of defendant's two charges "with prejudice" was tantamount to an "acquittal" and that further prosecution is barred both by that second (residual) part of CTC § 7-1-2, specifically addressing prosecutorial appeals following defendants' acquittals, and by double jeopardy protections.

Curiously, Appellee first argues this Court's decision in *Mississippi Band of Choctaw Indians v. Frank Milstead Jr.,* SC 2016-04 (December 18, 2017), governs. We say "curiously" because in that CTC § 7-1-2 appeal, although initially treated on review as being tantamount to an acquittal appeal, jeopardy had not yet attached, and the case culminated with this Court reversing the trial court order of dismissal and instructing the lower court that the "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." *Id.* at 10. In other words, *Milstead* better represents an instance where a lower court dismissal with prejudice, after reversal on appeal, did not pose a double jeopardy bar to our Court ordering remand for further prosecutorial proceedings and, if convicted, to sentencing.

Appellee next cites *Mississippi Band of Choctaw Indians v. Donovan Allen,* SC 2013-03 (April 17, 2014), as another example of this Court treating an appeal by the tribe as a prosecution appeal of an acquittal. The lower court in *Allen* granted the defense's Motion for a Directed Verdict based on the prosecution's **failure to present sufficient admissible factual evidence to establish guilt**. In *Allen* we wrote: "[i]t matters not whether the trial court granted the directed verdict of acquittal for good reasons or based on an error of law or an error in interpretation of facts -- or some combination of errors of facts and law. The result remains clear; the defendant,

once acquitted for any of the previous stated reasons, cannot be re-prosecuted without violating double jeopardy prohibitions." *Id.* at p. 6. However, the crucial distinction between *Allen* and this case before us is that none of the above scenarios are applicable as the lower court did not issue a directed verdict.

Both parties on appeal disagree as to whether or not a verdict has yet been rendered at the point in time that the court granted defendant's motion to dismiss with prejudice and/or whether defendant at this juncture on appeal was acquitted or convicted. A review of the record shows that the judge did not pronounce a verdict for to do so the offence must first be announced on which sentence would be imposed. Further, the court's stated purpose of continuing the case for sentencing after both parties had rested was to entertain arguments as to whether the sentence (and therefore guilt) should be imposed on the basis of domestic battery (CTC § 3-10-2) or simple battery (CTC § 3-3-8). It was during this sentencing proceeding that the defendant made his *ore tenus* Motion to Dismiss with prejudice without stating arguments in support of said motion and that the trial judge granted defendant's motion over the prosecution's stringent objection. Thus, this case stood poised in this ill-defined "netherworld" status where in defense counsel voluntarily initiated its Motion to Dismiss with prejudice after both sides had rested their case, but before verdict and sentencing.

We find guidance for resolving this ambiguous situation in *United States v. Scott,* 437 U.S. 82 (1978):

> [T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. . . . In the present case, respondent successfully avoided such a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him. . . .
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> * * * *
>
> No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of

> such a mid-trial termination of the proceedings in a manner favorable to the defendant.

Id. at 99-100.

At least as recently as *Evans v. Michigan,* 568 U.S. 313 (2013), the Supreme Court has articulated its ongoing endorsement of this *Scott* rule, writing:

> First, we have no reason to believe the existing rules have become so "unworkable" as to justify overruling precedent. *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The distinction drawn in *Scott* has stood the test of time, and we expect courts will continue to have little "difficulty in distinguishing between those rulings which relate to the ultimate question of guilt or innocence and those which serve other purposes." 437 U.S., at 98, n. 11, 98 S.Ct. 2187 (internal quotation marks omitted). See, *e.g., United States v. Dionisio,* 503 F.3d 78, 83–88 (C.A.2 2007) (collecting cases); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 25.3(a), p. 629 (3d ed. 2007) (same).

568 U.S. 313, at 328.

Returning, then, to that "netherworld" status of this present case, the record firmly establishes that the lower court determined at the trial's conclusion that the proceeding should be continued to a date later for sentencing; in the preliminary stages of that later scheduled sentencing hearing the defendant willfully sought to avoid conviction by making his Motion to Dismiss with prejudice without articulating any grounds for doing so; and the trial court ruled in favor the defendant, yet with no pronounced legally cognizable basis. This present case therefore, falls squarely within that category of case situations recognized by *United States v. Scott,* 437 U.S. 82 (1978) and upheld as recently by *Evans v. Michigan, 568 U.S. 313 (2013)* which makes clear that the protections of the Double Jeopardy clause do not extend to shield Appellee Julian Willis from the consequences of his voluntary actions and remand by this Court for purposes of sentencing imposition.

The second impediment to further prosecutorial proceedings, Appellee Willis contends, is statutory: namely, that under the second clause of CTC §7-1-2 "Right to Appeal" prosecutorial appeals from a criminal case in which the defendant has been acquitted are limited to only to questions of law. And even in those appeals, Appellee's argument continues, if this Court's

ruling is favorable to the prosecution, our answer is to be given prospective application only, without any effect on the defendant. Futher, Appellee Willis additionally argues that since the second clause in CTC §7-1-2 specifically addresses appeals at the request of the prosecution, the only prosecutorial appeals that may be taken are those where the defendant has been acquitted. We disagree.

As discussed above, the court's granting of defendant's motion to dismiss with prejudice at the sentencing stage of the proceedings was not an acquittal. The Court, having construed C.T.C. §7-1-2 "as a whole to give effect to all its parts in a logical, consistent manner", CTC §1-5-7 (4), finds that any party has a right to appeal and that only in a criminal case where a defendant has been acquitted is the appeal limited to a question(s) of law and relief limited. Therefore, based upon the above analysis and conclusion, neither the double jeopardy clause nor any proper reading of the first and second clauses of CTC §7-1-2 "Right to Appeal" pose an impediment to the right of Appellant Tribe to a full review and relief sought.

PART II

Next, this Court turns to the merits of Appellant's appeal. Appellant asserts an abuse of discretion by the court in the granting of defendant's motion to dismiss all charges with prejudice. "A trial court may be reversed for abusing its discretion only when the court of appeals finds the court acted 'in an unreasonable or arbitrary manner...without reference to any guiding rules and principles.'" *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226. (1991) (citations omitted). Clearly, this present case is such an instance.

As evidenced in the record, the court was in the process of hearing from the parties before making the determination of whether sentencing would be based on a finding of guilt of the initial charge of domestic battery, a violation of CTC § 3-10-2, or a lesser charge and penalty of abuse of a child, CTC § 3-3-8. The prosecutor, at the mother's behest, requested permission to disclose pertinent information regarding defendant's remorse learned in a civil court hearing involving all parties two days prior. The court denied the request saying "[w]hy don't we just go ahead and leave the matter from civil court out, because what I have here is a sentencing matter." (Sentencing Tr. at 8.) The defendant then asked the court to take into account that Willis "is

gainfully employed. My client, his job is secured with a grant. If he has a domestic on his record, he will lose his job. I would ask that you not convict him of a battery domestic..." (Sentencing Tr. at 9.) Following this request, the prosecutor on behalf of the mother requested that the mother be heard and the following communications transpired:

> DEANNA MCMILLAN [The mother]: I understand that I cannot bring the issue up, what happened on Wednesday, . . . just to please make note that I'm just asking the charges remain the same as what we had established in the beginning . . . . I just in the respect – the attitude that he had shown to my kids on Wednesday, I just feel like no leniency should be given. . . .
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> MR. LEWIS [Defendant]: I move the case be dismissed, Your Honor. Your Honor has already made your determination that nothing from Wednesday was supposed to come in here....I make a motion that the case be dismissed with prejudice.
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> * * * *
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> MS. SPEETJENS [Prosecutor]: She is not a lawyer. She is not well versed. But if, in fact, there is a remedy to that problem, Your Honor is perfectly capable of fashioning a remedy that is much less than dismissing these charges. I think that would be extreme and out of the question in these circumstances. (Sentencing Tr. at 10.)
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> * * * *
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> THE COURT: Ms. DeAnna, I think you have done enough. Thank you. You can have a seat.
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> In Cause No. 18-392, Julian Willis, and 18-391, we've had our trial, and my sentencing was set for today. I'm getting more information than what I needed, and that shouldn't have been. I'm dismissing all charges against Mr. Julian Willis.
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> * * * *
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> THE COURT: And that is with prejudice.

Sentencing Tr. at 9-10.

The defense counsel cited no legal basis for its *ore tenus* motion to dismiss with prejudice. Regardless, the trial court immediately and without stating its legal basis, if any, granted

defendant's motion despite the prosecutor's urgings that the court grant consideration to the multitude of available lesser sanctions.

Given that the statement of the witness was so brief and appeared respectful to the court, the record does not support a showing of absolute impropriety or contumacious misconduct on the part of the witness such as to trigger so serious of sanctions as dismissal with prejudice. Further, the record fails to impute any causal connection between any perceived witness misconduct (which could stem only from her very brief statement) and prosecutorial misconduct. Therefore, the record of proceedings below reflects no circumstances whatsoever whereunder the dismissal with prejudice might be justified nor any rationale for so dramatically sanctioning the prosecution's case based on the seemingly innocuous testimony of the witness.

The only conceivable remedial action that could be rationally related under these circumstances, if any there were, could only be directed at the witness in the form of a contempt citation. However, no lesser sanctions were apparently considered, despite the prosecutor's urgings.[2] The record is void of any indication that the Court considered other lesser sanctions.

Based on this critique and analysis, this Court can only conclude that the trial court's granting of defendant's motion to dismiss with prejudice was a clear abuse of discretion.

CONCLUSION

Circumstances considered, the Court finds the lower court acted in an unreasonable and arbitrary manner without reference to any guiding rules and principles when it granted the defense's motion for summary dismissal with prejudice. Further, the Court finds that this case falls within the initial clause of CTC § 7-1-2 where by any party, including the prosecution, may appeal "any final order" in the manner prescribed by these rules. This Court therefore vacates the lower

[2] MS. SPEETJENS: She is not a lawyer. She is not well versed. But if, in fact, there is a remedy to that problem, Your Honor is perfectly capable of fashioning a remedy that is much less than dismissing these charges. I think that would be extreme and out of the question in these circumstances. Your honor can certainly disregard that. [Sentencing transcript at P. 13: 3-10.]

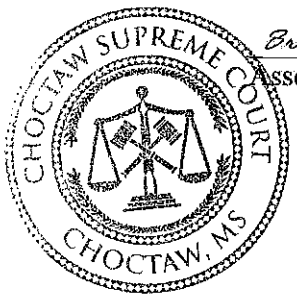
court's order dismissing the case with prejudice and remands this cause to the trial court below for sentencing.

SO ORDERED this the 24th day of May, 2021.

Chief Justice Kevin Briscoe
Chief Justice

Associate Justice

Brenda Toineeta Pipestem
Associate Justice



CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 24th day of May, 2021 cause to be forward 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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