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

IN RE: MISSISSIPPI BAND OF CHOCTAW INDIANS	APPELLANT
	SC-2020-01
Previously captioned:	
MISSISSIPPI BAND OF CHOCTAW INDIANS	APPELLANT
VS.	SC-2020-01
DELANO JOHN	APPELLEE

OPINION AND ORDER

This is an appeal filed by the Mississippi Band of Choctaw Indians pursuant to CTC §7-1-2 headed "Right to Appeal." The section provides in material part "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." The criminal charges against Delano John were dismissed with prejudice by the trial court upon motion of defense counsel after the minor victim and the mother failed to appear for trial. That dismissal was not appealed by the prosecution. The prosecution's appeal alleges simply that the lower court abused its discretion when it summarily assessed jury costs to the Office of the Attorney General after dismissing the tribe's case for failure of the minor victim and the mother to appear at trial. At no time did the tribal court make a finding that the failure of the victim and mother to appear was due to any fault of the

prosecutor, or of the Tribe, nor does the record reflect any reason or basis upon which the court could have done so.

STANDARD OF REVIEW

The standard of review this Court shall utilize on this appeal is "abuse of discretion." See e.g. *Crosby v. State*, 760 So. 2d 725 (Miss. 2000). "We find that the trial judge did not abuse his discretion in granting a mistrial nor in assessing the cost of the jurors' pay for the day of jury duty." Id at 728.

STATEMENT OF THE FACTS

The relevant facts of this case and the action of the trial judge's *sua sponte* assignment of juror costs to the Tribe are undisputed. At the December 20, 2019 pretrial conference, the mother and victim minor appeared and both were served by Tribal Court Clerk Kristina Jim with a notice setting the case for a jury trial at 8:30 AM on January 9, 2020. The prosecutor communicated with the minor victim and her mother leading up to the date of trial. When the prosecutor contacted them the day before trial, neither the minor victim nor her mother indicated they would not appear for the scheduled trial the following day. They also did not express a desire to dismiss the case against the defendant. The prosecutor asked them to come in early at 8:10 A.M. When they did not show up as instructed, he tried calling them, but there was no answer. The prosecutor was allowed to put on the transcript record the following account: "when the Court turned around and gave us 10 more minutes to make contact, I was able to reach her [i.e, ... the mother] in which she said her daughter had some reservations about testifying and they weren't going to be there until a little bit later today, so they were saying that they were about ten minutes out from 9:10, however, we understand that the Court gave us time for them -- to get them in here, but we would just put on for the record that they knew they were supposed to be here, they were -- they were served to be here and we did everything in our power at the Attorney General's Office in order to make sure that they were here, as well as having a conversation with her yesterday and she did say she would be here this morning." [Tr. p. 8:4-22.] Due to the failure of the mother and the minor victim to appear despite having been served with notice to do so, the Tribal Court granted defense counsel's *ore tenus* Motion to Dismiss with

prejudice. Next, the transcript shows that the trial court addressed the assessment of costs for bringing in both jury panels as follows:

> THE COURT: * * * * You know, I hate -- I hate to -- to re-victimize the victim, however, it was her that did not make that 9:00 morning session.
> MR. JOHNSON: We'll settle it.
> THE COURT: It will be between you and her to make a decision who's going to cover the cost of this because, you know, I only set a limited amount per -- per year to have jury trial and bringing both -- both panels in, they really cost the Court a lot.
> MR. JOHNSON: Yes, Your Honor.
> THE COURT: If you want to go halfsies, that's fine, but the Attorney General is going to have to take care of the cost.
> [Tr. p. 10:10-24.]

From the above it can only be inferred that in the final analysis the trial court was sanctioning the Office of the Attorney General, but at no time did the court find that the prosecutor or the prosecutor's office were at fault for the failure of the minor victim and her mother to appear.[1]

DISCUSSION AND ANALYSIS

This is a case of first impression for our Court. This Court's granting of prosecutorial appeal under CTC § 7-1-2's provision "from a criminal case in which the defendant has been acquitted" and "based solely on a question or questions of law" is highly appropriate. The single question on appeal is whether the court below abused its discretion when it assessed jury costs to appellant following dismissal of the Tribe's case due to the failure of the minor victim and the mother to appear at trial despite their both having been duly served with notice to appear. The sanction was imposed notwithstanding that the record establishes the non-appearance of mother and daughter was due to no fault of the Appellant, and after the prosecution's full due diligence efforts to ensure their attendance. Further, the court's reasoning provided for this action is factually unsubstantiated and legally without merit.

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[1]Throughout this opinion the term "sanction" shall be utilized as that is the standard mechanism through which the court imposes a penalty upon one party litigant to the exclusion of all others in redress for a wrong or harm unnecessarily or unjustifiably sustained by or before the court. Normally this is associated with some misconduct, but in this case there was none alleged and none found. The terminology is that normally used in the reported opinions and is also through proceedings in contempt.

Courts derive their powers to assess costs, including in appropriate circumstances, attendance fees and mileage of jurors, from varying sources. The Choctaw Tribal Code pursuant to Title 1's General Provisions § 1-3-5(2) grants that "[t]he Senior judge of each court shall develop rules and procedures of his or her court not inconsistent with this Title." The term "each court" would encompass criminal courts, but in this instance the senior criminal court judge has not developed explicit local rules for assessing juror costs. Therefore, we will look to the state laws of Mississippi for guidance in accordance with CTC § 1-1-4 that provides that matters "...not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi." However, in this instance, CTC § 1-3-5(2) speaks to the matter of developing court rules and procedures.

We find most pertinent Rule 3.13 of the Mississippi Uniform Civil Rules of Circuit and County Court Practice. That rule specifies that "the court may assess all costs, **including fees and mileage of jurors who have been required to be present for the trial**, against whichever party litigant or attorney it deems appropriate, for failure of an attorney to try the case or for failure to notify the court of settlement of a case before 5:00 P.M. on the day before the trial." (Emphasis added) Although these rules are termed civil rules, Rule 4.01 goes on to specify that the subsequent rule series, being Rules Series 4 and 5, "shall apply only to civil proceedings;" suggesting thereby that the possibility of any rule or rules in Series 1 through 3 may apply to criminal proceedings as well.

Furthermore, the Mississippi Supreme Court has upheld Rule 3.13's application in several criminal cases. This was initially done in a 2000 criminal case, *Crosby v. State,* 760 So. 2d 725 (Miss. 2000), which upheld a lower court contempt finding and sanction by ordered payment of juror fees. On appeal, the Supreme Court wrote that "U.R.C.C.C. 3.13 provides the court with authority to assess an attorney costs, including fees and mileage of jurors, for failure of an attorney to try the case. Although he did not specifically cite this provision, the trial judge made it clear that he felt Crosby should pay the fees, because he deliberately set out to delay the trial after his motions for continuance had been denied." *Id.* at 728. Then, in *Harris v. State*, 224 So. 3d 76 (Miss. 2017), the Supreme Court had occasion to directly address the question of whether that rule could be utilized in criminal cases. In that appeal "Harris challenge[d] the trial court's reliance on Uniform Rule of Circuit and County Court Practice 3.13 to assess Harris $1,200—the cost of the jury." *Id.* at 82. Noting that "Harris argues this rule applies only to

attorneys who fail to try *civil* cases, not criminal ones," the Mississippi Supreme Court answered, "[b]ut nothing in the rule itself or this Court's interpretation precludes its application to criminal trials." *Id.* at 82. In ruling so, it pointed to its earlier decision in *Crosby v. State* as precedential to the issue. That same term *Minka v. State,* 234 So. 3d 353 (Miss. 2017) upheld a trial court's assessment of jury costs against defense counsel who refused to proceed to trial after unsuccessfully attempting to withdraw as counsel on the morning set for trial. Upholding the trial court's assessment, the *Minka* court wrote, "The same type sanction was upheld recently in *Harris* ... and previously in *Crosby.v. State*...." *Id.* at 363. (Citations omitted.) This Court finds persuasive and holds that a tribal criminal court judge is endowed with the power to impose the sanction of ordered payment of juror fees whenever appropriate.

What the court does not have the power to do, however, is to exercise her power in such a manner as to be arbitrary or capricious, for to do so would be a violation of due process of the law. We therefore must look next to whether there was a rational relationship in fact and at law between the court action taken and the wrongdoing conduct it was intending to penalize. In short, whether the action imposed on appellant tribe conformed with fundamental principles of due process. Appellant tribe maintains it did not. We agree.

Looking first of all to the court action taken, the order was that "the Attorney General is going to have to take care of the cost."[2] [Tr. p. 10:23-24.] Appellants brief at page 8 correctly points out that "The facts of the case at bar are easily distinguishable from the facts of the three cases reviewed by the Mississippi Supreme Court. In each of those cases, the trial court's decision to assess jury costs was supported by a finding that the defense attorney was directly responsible for causing a mistrial or a delay of the trial proceedings." [App. Brief, p. 8.] The distinguishable court action appellant's brief cites is that "[I]n the case at bar, the Tribe's prosecutor was not responsible for the absence of the minor victim and her mother and the Tribal Court did not make a finding that the Tribe's prosecutor was at fault...." *Id.* at pp. 8-9.

In addition to the above distinction pointed out in appellant's brief, this case is also clearly distinguishable from the three cases reviewed by the Mississippi Supreme Court in other ways. *Crosby, Harris*, and *Minka* were all three instances where the sanction ordered was a

[2]See the Statement of Facts portion of this Opinion for the entirety of that portion of the transcript colloquy that relates to the imposition of jury costs upon the prosecution.

direct consequence of deliberate attorney misconduct wherefrom the court duly found the responsible attorney in direct contempt; furthermore, each attorney's actions or (mis)behavior was causally connected to the court's needless incurring of the costs attendant to summoning the jurors. By contrast, in this present case there was no attorney misconduct and none alleged. Furthermore, appellant prosecution counsel was nowise causally connected to the court's costs having been incurred through what, in hindsight, constituted a needless summonsing of the juror panels. Lastly, it was the defendant who pursuant to Rule 12 of the CRCrP *inter alia* requested that the trial be by jury. The prosecution by contrast did not even have that inalienable Rule 12 right to request or demand a jury and so this assignment for reimbursement of jury costs upon them could not have possibly served any legitimate deterrent purpose. Prosecutor's office should not be encumbered by concerns of arbitrariness in court jury cost assessments like these.

Not only was it improper for the court to penalize a non-offending party, but the existence of grounds to impose any sanction at all must be based on a legitimate reason. The tribal court seems to express a need to assess jury costs more as a cost replenishment measure for the court's budgetary line item jury cost allocation than as any prosecutorial sanction punishment. The brief filed by the appellant AG's office was augmented by an affidavit of the tribal financial controller. That affidavit set out the physical figures relating to budgetary allocations totaling $15,000 per fiscal year for the payment of costs for jury trials. The figures provided clearly demonstrate that in each of the two preceding full fiscal years more than 40% of the jury cost allocation remained unexpended at year's end and that the partial year to date was, on a projected basis, well on the way to leaving a significantly greater percentile of juror funds unspent. Therefore a factual rational relationship was lacking between the stated reason for the court action taken and the claimed need for this sanction.

CONCLUSION

Although the senior criminal court judge has yet to develop explicit local rules for assessing juror costs, the Court holds a criminal court judge is endowed with the power to impose ordered payment of juror fees whenever appropriate. However, the court is not authorized to exercise that power arbitrarily or capriciously. To do so would violate fundamental principles and protections of due process of the law.

The lower court's ordered sanction imposing jury fees fell upon a non-offending litigant, and on the basis of a stated fiscal rationale unsupported by the actual underlying financial reality. Given the totality of the circumstances, the Court holds that the lower court's decision was arbitrary and capricious; and, hereby orders that the lower court-imposed assessment of juror fees against Appellant Mississippi Band of Choctaw Indians be vacated and the case remanded for entry of orders consistent herewith.

SO ORDERED, this the 30th day of July, 2020.

Chief Justice

Associate Justice

Brenda Toinesta Pipestem
Associate Justice

CHOCTAW SUPREME COURT
CHOCTAW, MS

CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 30th day of July, 2020 cause to be forward by electronic mail a true and correct copy of the above and foregoing document to the below listed counsel of record.

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