IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

MUSCOGEE (CREEK) NATION,	)	
	)	
Appellant,	)	
	)	**Case No.: SC-2023-04**
v.	)	**(District Court Case No.: CF-2022-1430)**
	)	
MICHAEL WILSON,	)	
	)	
Respondent.	)	

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation

Kimberly London, Muscogee (Creek) Nation, Office of the Attorney General, Okmulgee, OK, for the Appellant, the Muscogee (Creek) Nation.

Theodore Hasse, The Wirth Law Office, Tulsa, OK, for the Respondent, Michael Wilson.

ORDER AND OPINION

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.[1]

Before: ADAMS, *C.J.*; LERBLANCE, *V.C.J.*; DEER, HARJO-WARE, MCNAC, SUPERNAW, THOMPSON, *JJ.*

PER CURIAM

Order of the District Court reversed and remanded.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

Per Curiam

The Muscogee (Creek) Nation (hereinafter, the "Nation") submits its appeal pursuant to M(C)NCA Title 14, § 1-701 (B)(1), seeking final order review of a Muscogee (Creek) Nation District Court *Order Granting Defendant's Motion to Dismiss for Lack of Jurisdiction* entered on July 21, 2023. The Nation asserts that the District Court erred in ruling that the Nation does not have jurisdiction to prosecute Michael Wilson (hereinafter, "Wilson"), a non-Indian, for alleged criminal conduct committed within the reservation boundaries of the Muscogee (Creek) Nation because the alleged victim was not an enrolled citizen of a tribal nation at the time of the alleged crime. On the record presented, and for the reasons set forth below, we reverse and remand the July 21, 2023, *Order* of the Muscogee (Creek) Nation District Court.

BACKGROUND

On March 15, 2022, the President of the United States signed into law the Violence Against Women Act Reauthorization Act of 2022 (hereinafter, "VAWA 2022"), which, in part, amends the Indian Civil Rights Act of 1968 (hereinafter, "ICRA"), granting participating Indian tribes the authority to prosecute certain "covered crimes" committed by non-Indians in Indian country. On September 30, 2022, the Principal Chief of the Muscogee (Creek) Nation signed into law NCA 22-113, the "Muscogee (Creek) Nation Victim Protection and Jurisdiction Expansion Act" in an effort to implement the special tribal criminal jurisdiction provisions of the VAWA 2022 federal legislation. Pursuant to NCA 22-113, the tribal legislation had an effective date of October 1, 2022.

On October 21, 2022, the Nation filed its *Criminal Complaint and Information* against Wilson, a non-Indian, alleging that on or about October 2, 2022, Wilson committed the crime of Sexual Abuse against a minor child, in violation of M(C)NCA Title 14, § 2-325 [as amended by

NCA 11-021].[2] It was alleged in the *Criminal Complaint and Information* that the minor child was a "member of the Choctaw Nation." However, through discovery, it was later determined that the minor child was not a "member" of the Choctaw Nation at the time of the alleged crime, but was only "eligible for membership" with the Choctaw Nation.

On July 11, 2023, Wilson filed *Defendant's Motion to Dismiss for Lack of Jurisdiction*, asserting that the Nation lacked jurisdiction to bring charges against him because VAWA 2022's expanded criminal jurisdiction does not authorize a participating tribe to "exercise special Tribal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian." [Emphasis Added]. Further, the ICRA defines "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." However, upon inspection of section 1153, of Title 18, the term "Indian" is not clearly defined. As such, the United States Court of Appeals for the 10th Circuit has stated that:

> "[i]n the absence of a statutory definition, this circuit has applied a two-part test for determining whether a person is an Indian for purposes of establishing federal jurisdiction over crimes in Indian country. We have concluded that, "[f]or a criminal defendant to be subject to § 1153, the court must make a factual finding that the defendant *'(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government.*'"[3]
>
> [Emphasis Added]

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[2] M(C)NCA Title 14, § 2-325 provides: "Sexual abuse. Whoever knowingly (A) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or engages in a sexual act with another person if that other person is (1) incapable of appraising the nature of the conduct; or (2) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be guilty of a felony."

[3] U.S. v. Prentiss, 273 F.3d 1277, 1280. (December 6, 2001)

Wilson argues that (1) he clearly does not qualify as an Indian person, and (2) the alleged victim is also not an Indian person for purposes of this definition because the minor child was not a citizen of the Choctaw Nation at the time of the events in question. Thus, Wilson argues, prong two of the 10th Circuit's test has not been met, and the Nation is therefore not authorized to exercise jurisdiction over this case.

The Nation filed its *Response* on July 11, 2023, just prior to a hearing set that same day on pending motions, arguing that M(C)NCA Title 27, § 1-102 (C) [as amended by NCA 16-038] provides that "[f]or purposes of criminal jurisdiction an "Indian" refers to a person who is a member of any federally recognized tribe, including Native Hawaiians and Alaska Natives; or a person who possesses a CDIB; or a person eligible for membership in a federally recognized tribe." [4][Emphasis Added]. As such, even if the alleged victim was not a citizen of the Choctaw Nation at the time of the charges, so long as the alleged victim was eligible for citizenship, then jurisdiction was proper.

On July 11, 2023, following review of the responsive pleadings filed that same day, the Muscogee (Creek) Nation District Court ordered the case dismissed for lack of jurisdiction. A written *Order of Dismissal* was subsequently filed on July 21, 2023. This appeal follows.

JURISDICTION, SCOPE, AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).[5] This Court will review issues of law *de novo* and issues of fact for clear error.[6] Each respective question will be addressed based on its applicable standard of review.

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[4] Nation's Brief in Chief, at 10.

[5] M(C)NCA Title 27, § 1-101 (C), vests this court with exclusive jurisdiction to review final orders of the Muscogee (Creek) Nation District Court.

[6] *See* A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al., SC 2010-01 at 3, ___ Mvs. L.R. ___ (May 22, 2013); In the Matter of J.S. v. Muscogee (Creek) Nation, SC 1993-02, 4 Mvs. L.R. 124 (October 13, 1994); McIntosh v. Muscogee (Creek) Nation, SC 1986-01, 4 Mvs. L.R. 28 (January 24, 1987); Lisa K. Deere v. Joyce C.

ISSUES PRESENTED

1. May the courts of the Muscogee (Creek) Nation exercise criminal jurisdiction over a non-Indian charged with a VAWA 2022 "covered crime" when the alleged victim was not a citizen of a federally recognized Indian tribe at the time of the alleged criminal act, but was eligible for membership with a federally recognized Indian tribe?

DISCUSSION

In general, federally recognized tribal nations possess the same inherent powers that all sovereigns possess, with the exception that they are subject to the plenary power of the federal government, and may have rights that are traditionally reserved to a sovereign entity divested by federal legislation and/or federal caselaw. Relevant examples of the plenary power of the United States Congress can be found in examining the history preceding the passage of the ICRA. In Talton v. Mayes, the United State Supreme Court was tasked with reviewing a writ of habeas corpus filed by a citizen of the Cherokee Nation of Oklahoma. The citizen had been convicted of murder by the tribe and was sentenced to death. He argued that the conviction violated his federal and tribal rights because his jury had arguably not been composed of a sufficient number of members. Upon review, the United States Supreme Court found that federal law, as well as the fifth amendment to the United States Constitution providing the right to a Grand Jury, was not applicable to Indian tribes.[7] Similarly, in Native American Church of North America v. Navajo Tribal Council, the Tenth Circuit held that the first amendment to the United States Constitution did not apply to tribal nations, stating that:

Deere, SC 2017-02 at 5, ___ Mvs. L.R. ___ (May 17, 2018); Muscogee (Creek) Nation v. Bim Stephen Bruner, SC 2018-03 at 5, ___ Mvs. ___ (September 6, 2018); Derek Huddleston v. Muscogee (Creek) Nation, SC 2018-02 at 3, ____ Mvs. ___ (October 4, 2018); Bim Stephen Bruner v. Muscogee (Creek) Nation, SC 2018-04 at 4, ___ Mvs. ___ (May 13, 2019).

[7] Talton v. Mayes, 163 U.S. 376. (May 18, 1896)

> The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment. Thus construed, the First Amendment places limitations upon the actions of Congress and of the States. But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States...[8]

Cases implicating the Bill of Rights, like the two cases listed above, brought about unfounded concerns in the United States Congress that individual civil rights could be violated in tribal courts. This eventually led to the enactment of the ICRA, requiring tribal nations to ensure certain minimum rights (rights that substantially mirrored those found in the United States Bill of Rights) are provided to individuals appearing before tribal courts.

Another significant federal divestiture (relevant to the above-styled action) prohibits, in large part, tribal nations from exercising criminal jurisdiction over non-Indians. In Oliphant v. Suquamish Indian Tribe, the United States Supreme Court reviewed two writs of habeas corpus filed by non-Indians after being charged under the tribe's criminal code for "assault on a tribal officer" and "recklessly endangering another person[.]" The Supreme Court made clear that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians."[9]

On March 7, 2013, the Violence Against Women Reauthorization Act of 2013 was signed into law.[10] This Reauthorization Act created a new "special domestic violence criminal jurisdiction" system for participating tribal nations, amending the ICRA to allow Indian tribes to exercise limited criminal jurisdiction over "all person[,]" whether Indian or non-Indian, in certain

[8] Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131. (November 17, 1959)
[9] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212. (March 6, 1978)
[10] *See*, PL 113-4. This reauthorization follows the initial Violence Against Women Act of 1994, found at PL 103-322.

domestic, dating, and family violence situations.[11] This legislation represented the first significant departure from the Oliphant court's ban on tribal criminal jurisdiction over non-Indians within Indian country.

On March 15, 2022, VAWA 2022 was signed into law.[12] This second Reauthorization Act further expanded tribal criminal jurisdiction over non-Indians, again amending the ICRA to create a more extensive list of "covered crimes[,]" upon which tribal courts may exercise criminal jurisdiction. For purposes of the above-styled action, this list includes "child violence" and "sexual violence[.]"[13] [14] [15]

However, it must be noted that both VAWA 2022 and the ICRA require that "[a] participating tribe may not exercise Tribal criminal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian."[16] [Emphasis Added]. The question becomes, what is the definition of "Indian" for purposes of the ICRA, and does the alleged victim in this action meet that standard?

Upon review of the ICRA, we find the term "Indian" defined as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."[17] However, when inspecting 18 U.S.C. 1153 (as directed by the ICRA), we find that this

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[11] *See*, PL 113-4, Section 204 (b)(1).
[12] *See*, PL 117-103.
[13] *See* PL 117-103, Section 804 (3)(B).
[14] VAWA 2022 defines "child violence" as "the use, threatened use, or attempted use of violence against a child proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs." *Id.*
[15] VAWA 2022 defines "sexual violence" as "any nonconsensual sexual act or contact proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs, including in any case in which the victim lacks the capacity to consent to the act." *Id.*
[16] 25 U.S.C. § 1304 (b)(4)(A).
[17] *See*, 25 U.S.C 1301 (4).

statute does not provide any clarity concerning the definition of the term "Indian[.]" Instead, Title 18 provides the following:

> **(a)** Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> **(b)** Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

As a result, the Tenth Circuit has recognized that there is an "absence of a statutory definition" for the term "Indian" (as applied to the ICRA), and has crafted a two-part test (also used by other federal circuit courts) to determine if an individual is an "Indian" for purposes of the ICRA. This test requires the court to "make factual findings that the defendant '(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government.'".[18] (hereinafter, the "Prentiss test"). Wilson asserts that criminal jurisdiction within the Mvskoke courts is limited to the two prongs of the Prentiss test. Further implying that prong two requires actual enrollment with a federally recognized tribe, and nothing less. Should the Mvskoke Courts adopt this approach, then the alleged victim would not satisfy prong two of the Prentiss test, as he was not enrolled with the Choctaw Nation at the time of the alleged criminal conduct. Such a result would be untenable, as minor children are not born with enrollment cards, and parents may elect not to seek enrollment of their eligible children with an Indian tribe until sometime after birth, if at all, creating an unavoidable gap in which some minor children would arguably not be covered by the protections

[18] U.S. v. Prentiss, 273 F.3d 1277, 1280. (December 6, 2001).

established in VAWA 2022. Such a result would be contrary to VAWA 2022's own recognition that "the majority of domestic violence cases involve children either as witnesses or victims…[,]" as well as its stated purpose "to empower Tribal governments and Native American communities, including urban Indian communities and Native Hawaiian communities, with the resources and information necessary to effectively respond to cases of domestic violence, dating violence, stalking, sex trafficking, sexual violence, and missing or murdered Native Americans…[.]" Perhaps acknowledging this, the Tenth Circuit has since concluded that prong two "recognition by an Indian tribe" is not limited solely to enrollment.[19] In U.S. v. Drewry, the Tenth Circuit was presented with a case similar to our case at bar, in which two minor child victims were not enrolled citizens of their respective tribes at the time of the alleged crime. The Tenth Circuit affirmed that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction[,]"[20] and that "[w]hile tribal enrollment is one means of establishing status as an "Indian" under 18 U.S.C. § 1152, it is not the sole means of proving such status."[21] The Court went on to adopt a four-factor extension to the Prentiss test (established by the Eight Circuit) for determining whether an individual has been recognized by an Indian tribe or by the federal government.[22] This test asks whether the individual has (1) been enrolled by the tribe, (2) has received government recognition formally or informally through receipt of assistance reserved only to Indians, (3) enjoys benefits of tribal affiliation, or (4) has attained social recognition as an Indian through residence on a reservation and participation in Indian social life.[23] The Oklahoma

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[19] *See*, U.S. v. Drewry, 365 F.3d 957, 960-961 (April 28, 2004), and Parker v. State, 495 P.3d 653, 664 (July 15, 2021). [The Drewry case was remanded by the United States Supreme Court for further consideration on other, non-related matters]

[20] Quoting United States v. Antelope, 430 U.S. 641, 646 n. 7 (April 19, 1977).

[21] Quoting United States v. Keys, 103 F.3d 758, 761 (December 13, 1996).

[22] *See*, United States v. Lawrence, 51 F.3d 150 (March 30, 1995).

[23] Drewry at 961.

Court of Criminal Appeals has also adopted this Tenth Circuit approach; finding it to be "settled law that a person may be an Indian for purposes of federal criminal jurisdiction even if he or she is not formally enrolled in any tribe."[24]

The July 21, 2023, *Order Granting Defendant's Motion to Dismiss for Lack of Jurisdiction*, filed by the Muscogee (Creek) Nation District Court, held that "even if the Nation were to establish that L.W. is eligible for membership in a federally recognized tribe, that would still be an insufficient basis for establishing the Nation's criminal jurisdiction in this case because it is not a sufficient basis for L.W. to be considered "Indian" under U.S. federal law for purposes of criminal jurisdiction." This Court does not agree.

Federal case-law makes it clear that prong two's "recognition by an Indian tribe" provision may be established if an individual "enjoys benefits of tribal affiliation." Following enactment of the Violence Against Women Reauthorization Act of 2013, and after two years of participation in a federal pilot program implementing tribal criminal jurisdiction over non-Indians in domestic, dating, and family violence crimes, the Muscogee (Creek) Nation enacted NCA 16-038 amending M(C)NCA Title 27, § 1-102 (C) to add that "[f]or purposes of criminal jurisdiction, an "Indian" refers to a person who is a member of the Muscogee (Creek) Nation; or a person who is a member of any other federally recognized tribe, including Native Hawaiians and Alaska Natives; or a person who possesses a CDIB; or a person eligible for membership in a federally recognized tribe." [Emphasis Added]. Additionally, following enactment of VAWA 2022, the Muscogee (Creek) Nation immediately passed NCA 22-113 to implement VAWA's Special Tribal Criminal Jurisdiction within the Nation. That legislation specifically amended the definition of "Indian" in

[24] Parker at 664.

M(C)NCA Title 6, § 3-103 to include "a person eligible for membership in a federally recognized tribe."

It should also be noted that VAWA 2022 places significant weight on the law of the Indian tribe exercising jurisdiction. VAWA 2022 requires that the definition of "child violence[,]" "sexual violence" and numerous other defined terms should be obtained by looking to the "criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs." [25] While the definition of "Indian" is not specifically mentioned in VAWA 2022, (and further, is not clearly defined in the ICRA or in any other referenced federal statute, as explained above) it is entirely consistent with both the Prentiss and Drewry analysis, as well as VAWA 2022's tendency to define terms by looking to the law of the Indian tribe exercising jurisdiction, for that term to be drawn from the laws of the Indian tribe exercising criminal jurisdiction. In this instance, the alleged criminal activity occurred within the territorial jurisdiction of the Muscogee (Creek) Nation. The Nation has clearly shown its willingness to extend "benefits of tribal affiliation" to a limited class of individuals that are eligible for membership in a federally recognized Indian tribe. This is consistent with Mvskoke traditional common law that placed significant importance on the protection of minor children, even those who are not members of the Muscogee (Creek) Nation. Absent any express federal law to the contrary, we find that M(C)NCA Title 27, § 1-102 (C) [as amended by NCA 16-038] and M(C)NCA Title 6, § 3-103 [as amended by NCA 22-113] are consistent with federal law, and that an individual may be considered an "Indian" for purposes of VAWA 2022's Special Tribal Criminal Jurisdiction program if they are eligible for membership in a federally recognized tribe.

[25] *See*, PL 117-103, Section 804 (3)(B)(3) and (3)(B)(13).

CONCLUSION

For the reasons stated above, we reverse the District Court's July 21, 2023, *Order Granting Defendant's Motion to Dismiss for Lack of Jurisdiction*, finding that M(C)NCA Title 27, § 1-102 (C) [as amended by NCA 16-038] and M(C)NCA Title 6, § 3-103 [as amended by NCA 22-113] are consistent with federal law, and that an individual may be considered an "Indian" for purposes of VAWA 2022's Special Tribal Criminal Jurisdiction program if they are eligible for membership in a federally recognized tribe. The matter is remanded back to the District Court to determine if the alleged victim meets this standard for purposes of Wilson's *Motion to Dismiss*.

FILED AND ENTERED: January 26, 2024

Andrew Adams, III
Chief Justice

Richard Lerblance
Vice-Chief Justice

Montie Deer
Associate Justice

Ileah Harjo-Ware
Associate Justice

Amos McNac
Associate Justice

Kathleen Supernaw
Associate Justice

George Thompson, Jr.
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on January 26, 2024, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Kimberly London, Muscogee (Creek) Nation, Office of the Attorney General, P.O. Box 580, Okmulgee, OK 74447; Allen M. Smallwood, 1310 S. Denver Ave., Tulsa, OK 74119; Theodore Hasse, Wirth Law Office, 500 W. 7th St., Tulsa, OK 74119. A true and correct copy was also hand-delivered to the Office of the Muscogee (Creek) Nation District Court Clerk.

Laura Marks

Laura Marks, Deputy Court Clerk