

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

BRIAN SCOTT CASEY,)
)
Appellant,)
)
v.)
)
MUSCOGEE (CREEK) NATION)
)
Respondent.)

Case No.: SC-2021-11
(District Court Case No.: CRF-2021-642)

SUPREME COURT
FILED

AUG 01 2022

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

Carla R. Stinnett, Sapulpa, Oklahoma for the Appellant, Brian Scott Casey.

David Pierce, Okmulgee, Oklahoma, for the Respondent, the Muscogee (Creek) Nation.

LM
COURT CLERK
MUSCOGEE (CREEK) NATION

ORDER AND OPINION

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

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

PER CURIAM

Order of the District Court affirmed in-part and reversed and remanded in-part.

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

Per Curiam.

Brian Scott Casey (hereinafter, the “Appellant”) submits a final order appeal of a December 16, 2021, *Order* of the Muscogee (Creek) Nation District Court. The Appellant asserts (1) that his right to speedy trial under M(C)NCA Title 14, § 1-303 (F), the Indian Civil Rights Act, and the United States Constitution were violated due to his incarceration in the Nation’s custody for one hundred and eighty one (181) day while awaiting trial, and (2) that the District Court erred in ruling that the statutory defense of duress was not available to the Appellant at trial. On the record presented, and for the reasons set forth below, we affirm in-part and reverse and remand in-part the December 16, 2021, *Order* of the Muscogee (Creek) Nation District Court.

BACKGROUND

On December 22, 2020, a protective order was issued by the Tulsa County District Court for the State of Oklahoma (Case No: PO-2020-3755) against the Appellant, ordering the Appellant to remain away from Angela Torrez, the petitioning individual, who did then reside at the Autumn Ridge Apartments in Tulsa, Oklahoma. Less than six (6) months later, on June 15, 2021, an altercation occurred between the Appellant and a third individual (Patrick Riggs), sometime after the Appellant entered the Autumn Ridge Apartment property, in violation of the Tulsa County protective order. Evidence and testimony later provided at trial shows that a box cutter was used by the Appellant during the altercation and that the third party individual, Mr. Riggs, was cut by the blade. The Appellant was arrested that same day (June 15, 2021) and placed in the Nation’s custody. Nine (9) days later, on June 24, 2021, the Appellant made his first appearance before the Muscogee (Creek) Nation District Court and a twenty thousand dollar (\$20,000.00) bond was set. The Appellant was unable to make bond and remained in the Nation’s custody. On July 13, 2021, twenty eight (28) days after the Appellant’s initial arrest, a *Criminal Complaint and Information*

was filed by the Muscogee (Creek) Nation charging the Appellant with one (1) count of Aggravated Assault, pursuant to M(C)NCA Title 14, § 2-302 (B) and one (1) count of Violation of Protective Order, pursuant to M(C)NCA Title 6, § 3-301 (B)(2). Arraignment was set for September 14, 2021, ninety one (91) days after the initial arrest. At the initial arraignment date, the Appellant was provided an application for the appointment of a public defender. The arraignment was passed an additional nine (9) days, to September 23, 2021, at which time the Appellant's newly assigned counsel was present and the Appellant entered a plea of "not guilty" on both charges. On September 30, 2021, one hundred and seven (107) days after initial arrest, a bond review hearing was conducted and the Appellant's bond was reduced to ten thousand dollars (\$10,000.00). The Appellant was still unable to make bond and remained in the Nation's custody. The Appellant's next Court appearance was for pre-trial conference on November 12, 2021, one hundred and fifty (150) days after initial arrest. At this time the Appellant requested a bench trial be set, and a date was provided by the District Court for December 13, 2021, one hundred and eighty one (181) days after initial arrest. Prior to the start of the bench trial on December 13, 2021, the Appellant plead guilty to Count Two of the Nation's *Criminal Complaint and Information*, for violation of the Tulsa County protective order.

On December 13, 2021, the Appellant's bench trial proceeded on the remaining charge of Aggravated Assault. At trial the Appellant presented the statutory defense of duress (pursuant M(C)NCA Title 14, § 2-1005 (B)), arguing that use of the box cutter was necessary for self-defense against a larger individual that had made previous threats to the Appellant.² Following presentation of evidence, the Court found that the Appellant had "a reasonable opportunity to escape any imminent danger or serious bodily injury" and, as a result, the affirmative defense of duress was

² See December 13, 2021, Transcript, Pg. 131 – 133.

not available to the Appellant pursuant to statute.³ The Appellant was found guilty of Count One, aggravated assault (pursuant to M(C)NCA Title 14, § 2-302 (B)). Additionally, the District Court specifically addressed the Appellant’s right to speedy trial, finding that “given the circumstances of courthouse closures due to COVID-19 in fall 2021, the time-period in question was reasonable.”⁴ The Appellant filed his *Notice of Intent to Appeal* with the Muscogee (Creek) Nation Supreme Court on December 27, 2021, asserting that his “rights pursuant to the Speedy Trial provisions of the Indian Civil Rights Act (25 U.S.C. § 1302 (a)(6)) and the United States Constitution were violated” and that “the Nation did not prove, beyond a reasonable doubt, that [the Appellant] failed to use a reasonably safe opportunity to escape from imminent danger of death or serious bodily injury.”⁵

JURISDICTION, SCOPE, AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).⁶ This Court will review issues of law *de novo* and issues of fact for clear error.⁷ Each respective question will be addressed based on its applicable standard of review.

³ M(C)NCA Title 14, § 2-1005 (B) provides that “[t]he defense is not available to a defendant who fails to use a reasonably safe opportunity to escape from imminent danger of death or serious bodily injury.”

⁴ See Muscogee (Creek) Nation District Court case number CRF 2021-642, *Order*, at 3 (December 16, 2021).

⁵ See Muscogee (Creek) Nation Supreme Court case number SC-2021-11, *Notice of Intent to Appeal*, at 2 (December 27, 2021).

⁶ 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.

⁷ 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. 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).

ISSUES PRESENTED

1. Does the Muscogee (Creek) Nation recognize a right to speedy trial and, if so, how are violations of this right determined?
2. Did the Muscogee (Creek) Nation District Court err in rejecting the Appellant's defense of duress?

DISCUSSION

Part 1. Right to Speedy Trial

As this Court has previously explained, “all criminal defendants prosecuted within the Muscogee (Creek) Nation Courts are entitled to certain due process rights as defined by statute.”⁸

⁸ See, Derek Huddleston v. Muscogee (Creek) Nation, SC-2018-02, at 4, ___ Mvs. L.R. ___ (October 4, 2018), citing Muscogee (Creek) Nation v. Johnson, SC-2011-13, at 11, ___ Mvs. L.R. ___ (August 15, 2013), and M(C)NCA Title 14 § 1-303 [as amended by NCA 16-038]. Rights of defendants. In all criminal proceedings, the defendant shall have the following rights:

- A. Representation. The defendant shall have the right to appear and represent himself; to be represented by a Indigent Defense Attorney upon application and approval by the Court if found qualified for free representation; to be represented at his or her own expense by any attorney admitted to practice before the District Court.
- B. Nature of charges. The defendant shall have the right to be informed of the nature of the charges against him and to have a written copy of the complaint containing all information required by Title 14, § 1-401 herein.
- C. Testimony by defendant. The defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the charge against him or her, provided, however, that once a defendant takes the stand to testify on any matter relevant to the immediate proceeding against him or her, he or she shall be deemed to have waived all right to refuse to testify in that immediate criminal proceeding. However, such a waiver in one distinct phase of the criminal trial process, such as a motion hearing, trial or sentencing hearing, shall not be deemed to constitute a waiver of defendant's right to remain silent in other distinct phases of the criminal trial process.
- D. Confront witnesses. The defendant shall have the right to confront and cross-examine all witnesses against him, subject to evidentiary requirements in the Judicial Code or other applicable law of the Muscogee (Creek) Nation.
- E. Subpoena. The defendant shall have the right to compel by subpoena the attendance of witnesses on his or her own behalf.
- F. Speedy trial. The defendant shall have the right to have a speedy public trial. The defendant may waive his or her right to a speedy trial, otherwise, said trial is to be held before an impartial judge or jury as provided in this Title or other applicable law of the Nation.
- G. Appeal. The defendant shall have the right to appeal in all cases.
- H. Right to Habeas Corpus, Every defendant has the privilege of the writ of habeas corpus to test the legality of his or her detention by order of the Muscogee (Creek) Nation and may petition the court to stay further detention pending the habeas proceedings.
 1. The Court may grant a stay if the court:
 - a. Finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

M(C)NCA Title 14, § 1-303 (F) [as amended by NCA 16-038] specifically provides that a criminal defendant “shall have the right to have a speedy public trial...before an impartial judge or jury[.]”⁹ Further, the sixth amendment right to speedy trial guaranteed under the United States Constitution is made applicable to Indian tribes through the Indian Civil Rights Act of 1968.¹⁰ In the above-styled action the Appellant asserts that the one hundred and eighty one (181) days he was detained in the Nation’s custody while awaiting a December 13, 2021, bench trial violated this statutory right.

In 2013, the United States Congress passed the Violence Against Women Reauthorization Act, which, in part, “return[ed] to the tribes a portion of their authority over criminal acts of Non-Native Americans as they pertain to domestic, dating, and family violence.”¹¹ Seeking to take advantage of these new federal law provision, the Muscogee (Creek) Nation National Council enacted NCA 16-038, which authorized “enforcement and prosecution of crimes of domestic, dating and family violence committed by non-Native offenders.”¹² This new legislation also

-
- b. After giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under the conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
 - I. Spouse’s testimony. The defendant shall have the right to prevent his or her present or former spouse from testifying against him concerning any matter which occurred during such marriage, except that:
 - 1. The defendant’s present or former spouse may testify against him in any case in which the offense charged is alleged to have been committed against the spouse or the immediate family, or the children of either the spouse or the defendant, or against the marital relationship; and
 - 2. Any testimony by the spouse in the defendant’s behalf will be deemed a waiver of this privilege.
 - J. Double jeopardy. The defendant shall have the right to not be twice put in jeopardy by the Nation for the same offense, provided that nothing herein shall be construed as prohibiting the prosecution in the Muscogee (Creek) Nation Courts of a defendant following a state or federal jeopardy.

⁹ See, M(C)NCA Title 14, § 1-303 (F) [as amended by NCA 16-038], which provides: “Speedy trial. The defendant shall have the right to have a speedy public trial. The defendant may waive his or her right to a speedy trial, otherwise, said trial is to be held before an impartial judge or jury as provided in this Title or other applicable law of the Nation.”

¹⁰ See, 25 U.S.C. § 1302 (a)(6), which provides: (a) No Indian tribe in exercising powers of self-government shall – (6) deny to any person in a criminal proceeding the right to a speedy public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b))[.] [Emphasis Added]

¹¹ See, NCA 16-038, Section 1, B.

¹² *Id.* at Section 1, D.

amended certain previously established Mvskoke laws, such as M(C)NCA Title 14, § 1-303 (F) [hereinafter, referred to as “§ 1-303 (F)”], concerning the right to speedy trial. The amendment to this provision is significant to the above-styled case because it removed certain hard deadlines concerning the right to speedy trial. The original language of § 1-303 (F) provided:

The defendant shall have the right to have a speedy public trial, which shall be held within one-hundred and eighty (180) days of the date of the defendant’s arraignment if he or she has made bail *and within ninety (90) days of the date of the defendant’s arraignment if he or she is incarcerated due to his or her failure or inability to make bail*, unless the defendant waived his or her right to a speedy trial, said trial to be held before an impartial judge or jury as provided by this Title or other applicable law of the Nation.

[Emphasis Added]

Following passage of NCA 16-038, the hard deadlines were removed, and the law was amended to read:

The defendant shall have the right to have a speedy public trial. The defendant may waive his or her right to a speedy trial, otherwise, said trial is to be held before an impartial judge or jury as provided in this Title or other applicable law of the Nation.

Under the pre-2016 version of § 1-303 (F), the Appellant (who was “incarcerated due to his...failure or inability to make bail” for over ninety (90) days before bench trial) would have a strong argument that his right to speedy trial had been violated. However, with removal of the hard deadlines through passage of NCA 16-038, this is not necessarily the case. A void now exists in the law concerning the outer boundaries of a speedy trial violation. Simply put, how long is too long?

The Appellant has presented the Court with several state and federal court options as persuasive authority for determining speedy trial violations, and has specifically requested that this Court adopt the four-factor balancing test established by the United States Supreme Court in Barker v. Wingo, wherein that Court looked to (1) the length of the delay, (2) the reason for the

delay, (3) whether the defendant had asserted his/her right to speedy trial, and (4) whether there was prejudice to the defendant due to the delay.¹³ Likewise, the Respondent has expressed no objection to the Court adopting this test.¹⁴ The Court has also been presented statutory law from the State of Oklahoma listing factors it considers when reviewing speedy trial violations (though, it should also be noted that a defendant is not authorized to raise a speedy trial violation under Oklahoma law until twelve (12) months to eighteen (18) months after arrest).¹⁵

While this Court is determined not to overstep its Constitutional authority into the legislative sphere, the timing void created by NCA 16-038 makes it necessary for the judicial branch to set parameters (within the confines of the law enacted by the legislative branch) by which to judge whether a speedy trial violation has occurred. This is essential to establish some level of predictability for litigants coming before the courts of the Nation and to assist the lower court in its speedy trial violation analysis. As this is an issue of first impression, the Court has reviewed various options from other jurisdictions to assist in crafting a path forward for the Mvskoke Courts. This is appropriate based on our past precedent that states, “[i]n the event the Nation’s laws are silent on a given topic, and the Nation’s courts have not previously resolved a similar matter, the courts may, at times, look to non-jurisdictional sources as persuasive authority, solely to guide the court to its own ultimate determination. The courts of the Nation are never bound by these non-jurisdictional authorities to rule in the same manner.”¹⁶

¹³ See, Barker v. Wingo, 407 U.S. 514, 522-525 (1972).

¹⁴ During the parties’ May 20, 2022, Oral Argument, the Respondent was asked, “[w]hat is the Nation’s position on this Court adopting the Barker analysis for a reasonable time?” To which the Respondent replied, “I think balancing test that is within that, I don’t think the Nation has a problem with that at all, you know.” See Muscogee (Creek) Nation Supreme Court case number SC-2021-11, Transcript of May 20, 2022, Oral Argument, Pg. 19, Ln 20-25 (May 20, 2022).

¹⁵ See, 22 OS 812.1 (Time Limit to Begin Trial), and 22 OS 812.2 (Process for Review).

¹⁶ See, Ron Graham v. Muscogee (Creek) Nation Citizenship Board, SC-2020-01, at 10, ___ Mvs. L.R. ___ (September 17, 2020).

In Barker v. Wingo, the U.S. Supreme Court recognized that “the right to speedy trial is a more vague concept than other procedural rights[;]”¹⁷ that it is “impossible to determine with precision when the right has been denied[.]”¹⁸ concluding that “[t]he right to speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.”¹⁹ The U.S. Supreme Court was presented with three options in the Barker case. The first option was to create its own hard deadlines. However, the Court determined that this approach was too ridged and would “require [the] Court to engage in legislative rulemaking activity[.]”²⁰ The second option was to consider speedy trial violations only in cases where the defendant had “demanded a speedy trial.” The Court concluded that this approach was inconsistent with its prior precedent on waivers of Constitutional rights.²¹ Instead, the Court crafted a balancing approach, “in which the conduct of both the prosecution and the defendant are weighed.”²² This approach has been adopted by various states,²³ the federal courts, and tribal nations.²⁴ We conclude that such an approach is also consistent with the principles of justice and fairness aspired to within the Courts of the Muscogee (Creek) Nation. As such, we adopt the four-factor balancing test established in Barker v. Wingo until such time as the legislative branch of government establishes its own process to address the void created by NCA 16-038.

In the above-styled action, the District Court reviewed the Appellant’s speedy trial violation claims and determined that delays caused by the COVID-19 pandemic (and the Court’s

¹⁷ Barker v. Wingo, 407 U.S. 514, 522 (1972).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 523.

²¹ *Id.* at 523-525.

²² *Id.* at 529-530.

²³ *See*, as an example, recent state court opinions in State of Minnesota v. Larry Duane Lucas, Jr., 2022 WL 2912030 (July 25, 2022), and State of New Mexico v. Jeremy Badhand, 2022 WL 2915482 (July 25, 2022).

²⁴ *See*, as an example, Navajo Nation v. Badonie, 6 Am. Tribal Law 725 (March 7, 2006), and Lambert v. Colville Confederated Tribes, 12 Am. Tribal Law 356 (September 14, 2015).

preference to conduct in-person hearings) justified the limited delay. However, as we are establishing a new test through this *Opinion* to guide the lower court's analysis, we reverse the December 16, 2021, *Order* of the Muscogee (Creek) Nation District Court with respect to the Appellant's speedy trial violation claims and remand the matter back to the District Court to conduct its analysis using the Barker four-factor test.

Part 2. Defense of Duress

M(C)NCA Title 14, § 2-1005 (B) provides the following with respect to a defendant's ability to claim the exculpatory affirmative defense of duress:

The defense of duress is a defense when the defendant engages in acts or omissions constitution the crime charged under compulsion or threat of imminent infliction of death or serious bodily injury, if the defendant reasonably believes that death or serious bodily injury will be inflicted upon the defendant or a member of the defendant's immediate family. The Defense is not available to a defendant who fails to use a reasonably safe opportunity to escape from imminent danger or serious bodily injury.

Whether or not a defendant "reasonably believes that death or serious bodily injury will be inflicted" or that a "reasonably safe opportunity to escape from imminent danger or serious bodily injury" existed at the time of the incident are clearly factual determination. This Court reviews issues of fact for clear error.²⁵ This is appropriate because the lower Court is in the best position to weigh the sufficiency of the admitted evidence, evaluate the credibility of each witness as they are testifying, consider the specific testimony of each live witness, and hear arguments of counsel at the time of trial. This Court has previously stated the following with respect to the Supreme Court's role in reviewing issues of fact:

[T]he Appellant's arguments concern issues of fact initially reviewed by the District Court sitting as the trier of fact. The Judge weighed the sufficiency of admitted evidence, evaluated the credibility of each witness, considered each witnesses' specific testimony, and heard arguments of counsel. The District Court's

²⁵ See footnote 7.

[Order] stands as the culmination of the Judge’s factual analysis. As for the Supreme Court’s role in evaluating the determinations made by the trier of fact, our case law is clear that we will review issues of fact for clear error. In applying this standard, it is not the appellate court’s position to place itself as the trier of fact or to conduct *de novo* review of the case, even if it would have ruled differently had it sat as the trier of fact. To do so would be to overstep the appellate court’s bounds. So long as the District Court’s ruling is plausible in light of the record viewed in its entirety, this Court should defer to the trier of fact.”²⁶

The Appellant asserts that the District Court’s refusal to accept one of the Nation’s arguments, specifically; that the Appellant was a trespasser on the apartment property (in violation of a Tulsa County protective order) and, as such, could not claim the defense of duress, demonstrates that the Nation failed to establish beyond a reasonable doubt that the Appellant had a “reasonably safe opportunity to escape from imminent danger or serious bodily harm.” However, this represents only one argument, and does not preclude other facts that could establish a “reasonably safe opportunity to escape from imminent danger or serious bodily harm.” Further, the District Court’s December 16, 2021, *Order* does not state that the court found the fact of trespassing irrelevant to the issue of a duress defense; simply that trespassing does not establish a “categorical bar” for the defense. This Court can easily picture a situation in which an individual has trespassed on a property and yet, when presented with danger, exercises all effort to remove themselves from the dangerous situation. In such a case, it would not be fair or just for the court to deny that individual an opportunity to claim the defense simply because they trespassed on the property. Much like our analysis concerning speedy trial violations (see above), the court must review the facts on a case-by-case basis.

In the above-styled matter, the District Court specifically found that “a reasonably safe opportunity to escape any imminent danger of death or serious bodily injury was available to the

²⁶ See Lisa K. Deere v. Joyce C. Deere, SC-2017-02, at 11, ___ Mvs. L.R. ___ (May 17, 2018).

Defendant and therefore the affirmative defense is not available.”²⁷ The Supreme Court has been presented no evidence showing clear error by the District Court in its factual determination and, as such, shall defer to the lower court, and affirm its decision.

IT IS HEREBY ORDERED that the Muscogee (Creek) Nation District Court’s December 16, 2021, *Order* is **REVERSED AND REMANDED** in-part, and **AFFIRMED** in-part for the reasons stated above.

²⁷ See Muscogee (Creek) Nation District Court case number CRF 2021-642, *Order*, at 2 (December 16, 2021).

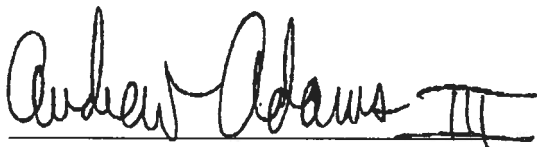
FILED AND ENTERED: August 1, 2022



Richard Lerblance
Chief Justice



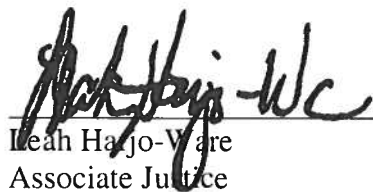
Amos McNac
Vice-Chief Justice




Andrew Adams III
Associate Justice



Montie Deer
Associate Justice



Leah Harjo-Ware
Associate Justice



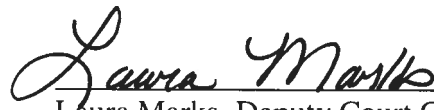
Kathleen Supernaw
Associate Justice



George Thompson, Jr.
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on August 1, 2022, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Carla R. Stinnett, 404 E. Dewey Ave., Ste 100, Sapulpa, OK 74066; David Pierce, Muscogee (Creek) Nation, P.O. Box 580, Okmulgee, OK 74447. A true and correct copy was also hand-delivered to: The Office of the Muscogee (Creek) Nation District Court.



Laura Marks, Deputy Court Clerk