

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

MUSCOGEE (CREEK) NATION, )  
)  
Appellant, )  
)  
v. )  
)  
KEVIN DRAKE, )  
)  
Respondent. )

SUPREME COURT  
FILED

JAN 26 2024

Case No.: SC-2023-05

Dist. Ct. Case No.: CF-2021-923

CM-2020-344

CONNIE DEARMAN  
MUSCOGEE (CREEK) NATION  
COURT CLERK

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.

Anthony L. Allen, Okmulgee, OK, and Eric W. Johnson, Wagoner, OK, for the  
Respondent, Kevin Drake.

ORDER AND OPINION

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

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

PER CURIAM

Order of the District Court affirmed.

<sup>1</sup> “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, “Appellant”) submits its appeal pursuant to M(C)NCA Title 14, § 1-701 (B)(4), seeking review of a Muscogee (Creek) Nation District Court *Order Vacating Sentence and Allowing Defendant to Withdraw Plea*, entered on July 21, 2023. The Appellant asserts that the District Court erred in authorizing Kevin Drake (hereinafter, “Respondent”) to withdraw his “no contest” plea, and further vacating sentence imposed on April 24, 2023. On the record presented, and for the reasons set forth below, we affirm the July 21, 2023, *Order* of the Muscogee (Creek) Nation District Court.

## **BACKGROUND**

On November 11, 2020, a *Criminal Complaint and Information* was filed against the Respondent, charging him with one count of Violation of Protective Order (pursuant to M(C)NCA Title 6, § 3-301), a criminal misdemeanor, for allegedly violating the terms of a Wagoner County, State of Oklahoma, protective order by accessing electronic records of the alleged victim. This action was filed as MCN District Court case number CM-2020-344.

On April 14, 2021, a second *Criminal Complaint and Information* was filed against the Respondent charging him with one count of Domestic Assault with a Dangerous Weapon (pursuant to M(C)NCA Title 14, § 2-303 (D)(1)), a criminal felony; one count of Domestic Abuse (pursuant to M(C)NCA Title 14, § 2-303 (C)), a criminal misdemeanor; one count of Domestic Abuse in the Presence of a Minor (pursuant to M(C)NCA Title 14, § 2-303 (E)), a criminal misdemeanor; and one count of False Imprisonment (pursuant to M(C)NCA Title 14, § 2-318), a criminal misdemeanor. This action was filed as MCN District Court case number CF-2021-323.

On February 17, 2023, the Respondent entered a blind plea in both cases, wherein the prosecutor agreed to “stand mute at this time[.]” A sentencing hearing was scheduled by the Muscogee (Creek) Nation District Court for April 24, 2023, at which time the District Court issued the following sentence on the Respondent’s plea:

Count 1 – Domestic Assault with Dangerous Weapon: three (3) years in jail with three (3) years suspended, not to serve more than one (1) year in county facility, with the balance to be served at the Bureau of Prisons. Respondent to pay \$5,000.00 in fines.

Count 2 – Domestic Abuse: one (1) year in jail, with one (1) year suspended, during which the Respondent shall be on supervised probation. Respondent to pay \$1,500.00 in fines.

Count 3 – Domestic Abuse in the Presence of a Minor: one (1) year in jail, with six (6) months suspended. Respondent to surrender to the Muscogee (Creek) Nation Chief of Lighthorse Police on May 3, 2023, at 1:00 p.m. to serve Six (6) months at a county facility or Bureau of Prisons. Respondent to be on supervised probation for the balance of the term. Respondent to pay \$1,500.00 in fines.

Count 4 – False Imprisonment: Respondent sentenced to one (1) day in jail with one (1) day suspended. No fine.

On May 3, 2023, the Respondent appeared (as required by the April 24, 2023 sentencing order) to surrendered himself to the Muscogee (Creek) Nation Chief of Lighthorse Police and begin his six (6) month term of imprisonment. Respondent’s counsel simultaneously filed (1) a *Motion to Vacate the Judgment and Grant a New Trial or in the Alternative, Vacate the Judgment and Modify the Sentence*, as well as (2) a *Motion to Arrest, Correct, or Reduce Sentence, Alternatively, Motion to Withdraw Plea, Additionally, Motion to Stay Sentence of Imprisonment, Fine, and Probation Pending Entry of Judgment and Intended Appeal* (hereinafter, “Respondent’s

May 3<sup>rd</sup> *Motions*”), wherein counsel advised the District Court that the Respondent agreed to enter his blind plea with the understanding that (1) the Attorney General would dismiss one matter, (2) that the alleged victim would be allowed to make a victim impact statement, (3) that the Attorney General’s Office would decline to file any charges related to a second alleged victim, and (4) that the Attorney General’s Office would not make arguments against the Respondent, and would stand mute at sentencing. Respondent’s counsel asserts that the Attorney General’s office did not remain mute, and instead “attacked” the Respondent during the sentencing hearing, in violation of the plea agreement.

The District Court issued an *Order Staying Effect of Sentence* on May 3, 2023, setting the matter for hearing on May 31, 2023. Following the May 31<sup>st</sup> hearing, the Court took the matter under advisement and on July 21, 2023, issued its *Order Vacating Sentence and Allowing Defendant to Withdraw Plea*. The District Court reviewed Question 10 of the February 17, 2023, *Plea of Guilty: Summary of Facts* (a standard document completed by all individuals accepting a plea before the District Court) in which that document provides:

10. You stand now on a plea of not guilty. In the event you should change your plea to guilty / no contest, do you understand that the Trial Court is not bound by any recommendation made by the prosecuting attorney, or any agreement entered by your attorney and the prosecuting attorney?

Yes / No

The District Court noted that the Respondent circled the words “no contest” and “Yes” on the *Plea of Guilty: Summary of Facts* document, and signed the document along with counsel. However, the District Court concluded that it “failed to fully inquire of the [Respondent], on the record (audio/video record) as to whether the [Respondent] actually understood that the Court was not a

party to any plea agreement or subject to the recommendations of either party.” As a result, the District Court issued its *Order* vacating the April 24, 2023 sentence and allowed the Respondent to withdraw his plea.

On July 26, 2023, the Appellant filed its *Notice of Intent to Appeal*, arguing that a motion to withdraw a plea of guilty may be made only before a sentence is imposed, or to correct a manifest injustice; that in this action the Respondent’s *Motion* was filed after imposition of the sentence, and that the findings of the District Court “do not rise to the level of manifest injustice required by [M(C)NCA Title 14, § 1-406].”

### **JURISDICTION, SCOPE, AND STANDARD OF REVIEW**

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).<sup>2</sup> This Court will review issues of law *de novo* and issues of fact for clear error.<sup>3</sup> Each respective question will be addressed based on its applicable standard of review.

### **ISSUES PRESENTED**

1. May the Muscogee (Creek) Nation District Court authorize a defendant to withdraw their plea of guilty or no-contest and further, elect to vacate a sentence after sentence has been imposed?

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<sup>2</sup> 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.

<sup>3</sup> 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).

## DISCUSSION

M(C)NCA Title 14, § 1-406 provides that “[a] motion to withdraw a plea of guilty may be made only before a sentence is imposed, deferred, or suspended, except that the Court may allow a guilty plea to be withdrawn to correct a manifest injustice.” The record on appeal in this action clearly establishes that the Respondent’s May 3<sup>rd</sup> *Motions*, as well as the District Court’s July 21, 2023, *Order Vacating Sentence and Allowing Defendant to Withdraw Plea* were entered after the Respondent’s sentence had been imposed on April 24, 2023. As such, the Respondent’s plea could only be withdrawn pursuant to § 1-406 if the District Court concluded, based on the pleadings, evidence, and testimony presented to the lower court, that such an action was necessary to correct a manifest injustice. Such a determination by the District Court would constitute an issue of fact, not an issue of law. “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. 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.”<sup>4</sup> The presiding District Court Judge concluded that she “failed to fully inquire of the [Respondent], on the record (audio/video record) as to whether the [Respondent] actually understood that the Court was not a party to any plea agreement or subject to the recommendations of either party.” On appeal, this Court has reviewed the entire record, as well as a video recording from the February 17, 2023, pre-trial conference/plea hearing. This review confirms that the District Court did not orally question the Respondent concerning the nature of his plea agreement, or, more specifically, whether the Respondent understood that the Court was not obligated to follow the terms of any plea agreement reached with the prosecutor, and could enter any sentence it found appropriate.

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<sup>4</sup> See, Lisa K. Deere v. Joyce D. Deere, SC-2017-02, at 11, \_\_\_ Mvs. L.R. \_\_\_ (May 17, 2018).

The question before this Court is whether it was plausible, in light of the record viewed in its entirety, for the District Court to conclude that a manifest injustice had occurred due to the Court's failure to orally advise the Respondent of the consequences of entering a plea agreement. To that end, this Court finds the following events to be instrumental:

1. The Respondent, along with Respondent's counsel executed a February 17, 2023, *Plea of Guilty: Summary of Facts* document in which (1) the Respondent marked that he understood "the Trial Court is not bound by any recommendation made by the prosecuting attorney...[,]” and (2) that, in exchange for Respondent's blind plea, the prosecutor agreed to "stand mute at this time” with respect to its recommendation for Respondent's sentencing.
2. That the District Court did not question the Respondent orally at the February 17, 2023, pre-trial conference/plea hearing with respect to the Respondent's understanding of the legal consequences of entering a blind plea, nor did the Court orally advise the Respondent that the Court was not obligated to follow the terms of any agreement made with the prosecutor, and could enter any sentence it determined was appropriate.
3. That, contrary to the terms of the February 17, 2023, plea agreement, the Appellant did not "stand mute” at the Respondent's sentencing hearing; calling witnesses to the stand (other than the alleged victim for presentation of her victim impact statement), and specifically recommending to the Court that the Respondent "serve time” on the charges.
4. M(C)NCA Title 14, § 1-405 provides that “[w]henver the defendant plea[ds] guilty as a result of a plea arrangement with the Prosecutor, the full terms of such agreement shall be disclosed to the Judge. The Judge in his or her discretion, is not required to

honor such agreement. In the event that the Judge decides not to honor such agreement, he or she should offer the defendant an opportunity to withdraw his or her plea and proceed to trial.” In authorizing the prosecutor to present argument at sentencing (as opposed to standing mute, as per the party’s plea agreement) the Judge may rightly feel that she did not honor the plea arrangement and, as such, “should” have offered the Respondent the opportunity to withdraw his plea and proceed to trial. Such an offer was not made by the Court.

Black’s Law Dictionary defines “manifest injustice” as “[a] direct, obvious, and observable error in a trial court, such as a defendant’s guilty plea that is involuntary *or is based on a plea agreement that the prosecution has rescinded.*”<sup>5</sup> [Emphasis Added]. In considering the events highlighted above, we find that the District Court did not commit clear error in its July 21, 2023, *Order Vacating Sentence and Allowing Defendant to Withdraw Plea*; in which it was determined that that the District Court “failed to fully inquire of the [Respondent], on the record (audio/video record) as to whether the [Respondent] actually understood that the Court was not a party to any plea agreement or subject to the recommendations of either party[;]” and that such a decision was plausible in light of the record viewed in its entirety.

### CONCLUSION


For the reasons stated above, we affirm the District Court’s July 21, 2023, *Order Vacating Sentence and Allowing Defendant to Withdraw Plea*, finding that the District Court did not commit clear error in its determination that the Respondent’s sentence should be vacated and that the Respondent should be allowed to withdraw his plea.

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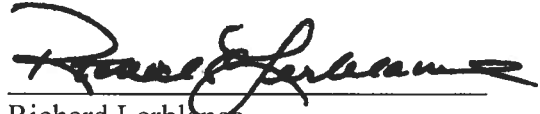
<sup>5</sup> Manifest Injustice, Black’s Law Dictionary (11<sup>th</sup> ed. 2019).



FILED AND ENTERED: January 26, 2024



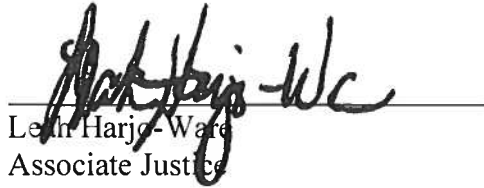
Andrew Adams, III  
Chief Justice



Richard Lerblance  
Vice-Chief Justice



Montie Deer  
Associate Justice



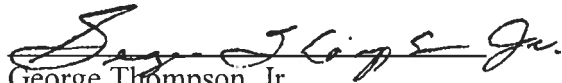
LeIn Harjo-Ware  
Associate Justice



Amos McNac  
Associate Justice



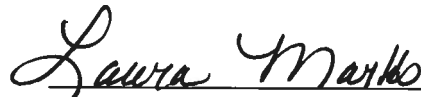
Kathleen R. Supernaw  
Associate Justice



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; Eric W. Johnson, 318 E. Cherokee, P.O. Box 881, Wagoner, OK 74477; Anthony L. Allen, 106 S. Okmulgee Ave., Okmulgee, OK 74447. A true and correct copy was also hand-delivered to the Office of the Muscogee (Creek) Nation District Court Clerk.



Laura Marks, Deputy Court Clerk