

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FLOYD JOSEPH BALL, JR.,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2020-54

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 3 2021

JOHN D. HADDEN
CLERK

OPINION

HUDSON, JUDGE:

Appellant, Floyd Joseph Ball, Jr., was convicted at a jury trial for the crimes of Kidnapping (Count 1); Assault and Battery with a Dangerous Weapon (Count 2); Aggravated Assault and Battery (Count 3); and Disrupt/Prevent/Interrupt an Emergency Telephone Call (Count 4), in the District Court of McClain County, Case No. CF-2018-157. The jury recommended sentences of twenty years imprisonment on Count 1, five years imprisonment on Count 2, five years imprisonment on Count 3, and one year in the county jail plus a \$3,000.00 fine on Count 4.

The Honorable Charles Gray, Associate District Judge, presided at trial and sentenced Appellant in accordance with the jury's

verdicts. Judge Gray ordered the sentences for Counts 1—3 to run consecutively each to the other but concurrently with the Count 4 sentence.

Ball now appeals and raises nine propositions of error. In Proposition VIII, Appellant complains that trial counsel was ineffective for not objecting to the state court's jurisdiction in this case. Appellant claims that he is an Indian for purposes of federal law and that the crimes charged in this case occurred in Indian Country. Appellant also filed an Application to Supplement Record or for Evidentiary Hearing on Sixth Amendment Claims challenging defense counsel's effectiveness for failing to raise the jurisdictional claim set forth in Proposition VIII. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Pursuant to *McGirt*, Appellant's claim raises three separate questions: (a) his Indian status, (b) whether the crimes occurred in Indian Country; and (c) whether trial counsel was constitutionally ineffective for failing to challenge jurisdiction based on these factors. These issues require fact-finding. We therefore remanded this case to the District Court of McClain County for an evidentiary hearing on these issues.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Appellant's presentation of *prima facie* evidence as to his legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has jurisdiction. The District Court was ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe or the federal government. The District Court was further ordered to determine whether the crimes in this case occurred in Indian Country. In so doing, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony. Finally, we ordered the District Court to determine whether trial counsel was constitutionally ineffective for failing to raise this issue under the two-part standard for evaluating claims of ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties may enter into a written stipulation

setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. The District Court was also ordered to file written findings of facts and conclusions of law with this Court.

The record before this Court shows the parties presented a written stipulation to the District Court concerning the above issues in lieu of an evidentiary hearing. On March 26, 2021, Judge Gray entered a written order adopting the parties' stipulations and making written findings of fact and conclusions of law relating to the three questions in our remand order. The record indicates that attorneys from the Oklahoma Attorney General's Office, the McClain County District Attorney's Office and counsel for Appellant authored and signed the stipulation and presented it to the District Court.

In its written findings of fact and conclusions of law, the District Court found that Appellant is 1/8th degree Indian blood of the Mississippi Choctaw Tribe; that Appellant was an enrolled member of the Choctaw Nation of Oklahoma on the date of the charged crimes; that the Choctaw Nation of Oklahoma is recognized by the federal government; and that the charged crimes in this case occurred within the Chickasaw Reservation. The District Court concluded based on

these findings that Appellant was an Indian and that the location of Appellant's crimes occurred in Indian country for purposes of criminal jurisdiction.

Concerning Appellant's claim that trial counsel was constitutionally ineffective for failing to raise this jurisdictional claim, the trial court found as follows: "The parties stipulate, and this court finds that it lacks jurisdiction of defendant Ball for which reason his ancillary claim of ineffective assistance of trial counsel for failing to raise the jurisdictional claim in the trial court is moot."

Although the agreed stipulation of the parties was not made part of the record on appeal transmitted to this Court, Appellant has attached it to his supplemental brief as Exhibit A. It is signed by counsel for the parties and fully supports the District Court's written findings.

On April 26, 2021, both parties filed supplemental briefs with this Court after remand. Both parties acknowledge our recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, recognizing the Chickasaw Nation's continuing existence. Both parties also cite and attach to their briefs our unpublished decision in *Floyd Joseph Ball v. State of Oklahoma*, No. C-2019-263, slip op. (Okl.Cr. Apr. 1, 2021), an

appeal from McIntosh County, in which we acknowledged Appellant's Indian status in that case. In its brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above and the District Court's findings. The State contends in its brief that should this Court find Appellant is entitled to relief based on the District Court's findings, this Court should stay any order reversing the convictions for twenty (20) days.

After thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts and the briefs of the parties, we find that under the law and evidence relief is warranted. Based upon the record before us, the District Court's findings of fact and conclusions of law are supported by the stipulations jointly made by the parties on remand. We therefore find Appellant has met his burden of establishing his status as an Indian, having 1/8th degree Indian blood of the Mississippi Choctaw Tribe and being a member of the Choctaw Nation of Oklahoma. We further find Appellant met his burden of proving the crimes in this case occurred on the Chickasaw Reservation and, thus, occurred in Indian Country. Pursuant to *McGirt*, we find the State of Oklahoma did not have

jurisdiction to prosecute Appellant in this matter.¹ The trial court did not abuse its discretion in concluding that this finding renders the ancillary claim of ineffective assistance of counsel moot. The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of McClain County with instructions to dismiss the case.²

DECISION

The Judgment and Sentence of the District Court is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The **MANDATE** is not to be issued until twenty (20) days from the delivery and filing of this decision.

**AN APPEAL FROM
THE DISTRICT COURT OF MCCLAIN COUNTY
THE HONORABLE CHARLES GRAY
ASSOCIATE DISTRICT JUDGE**

¹ I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *E.g.*, *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, __P.3d__ (Hudson, J., Specially Concurs).

² This resolution renders the other eight propositions of error raised in Appellant's brief moot.

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OPINION BY: HUDSON, J.

KUEHN, P.J.:

CONCUR

ROWLAND, V.P.J.:

CONCUR

LUMPKIN, J.:

CONCUR IN RESULTS

LEWIS, J.:

CONCUR IN RESULTS

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also

willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.¹ The result seems to be some form of "social

¹ Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate

justice” created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize “the emperor has no clothes” as to the adherence to following the rule of law in the application of the *McGirt* decision?

My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently

Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner’s speech that in Oklahoma, he did not think “we could look forward to building up huge reservations such as we have granted to the Indians in the past.” *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, “[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated.” (emphasis added).

show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, JUDGE, CONCURRING IN RESULTS:

Based on my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, I concur in results in the decision to dismiss this case for the lack of state jurisdiction.