ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOSEPH SCOTT BENNETT,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2020-818**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 28 2022

JOHN D. HADDEN
CLERK

OPINION

ROWLAND, PRESIDING JUDGE:

Joseph Scott Bennett was tried by jury in the District Court of Washington County, Case No. CF-2019-243, and convicted of Child Sexual Abuse (Counts 1 and 7), in violation of 21 O.S.Supp.2018, § 843.5(E), Enticing a Child Under 16 into a Secluded Place (Count 2), in violation of 21 O.S.Supp.2018, § 1123(A)(3), Lewd or Indecent Acts to a Child Under 16 (Count 3), in violation of 21 O.S.Supp.2018, § 1123(A)(2), Performing Lewd Act in Presence of Minor (Count 4), in violation of 21 O.S.Supp.2018, § 1123(A)(5), and Possession of Firearm After Former Felony Conviction (Counts 5 and 6), in violation of 21 O.S.Supp.2014, § 1283(A). The jury assessed punishment at

life imprisonment without the possibility of parole and a $5,000.00 fine on each of Counts 1, 2, 3, 4, and 7, and ten years imprisonment and a $10,000.00 fine on each of Counts 5 and 6. The trial court sentence Bennett accordingly, ordering the sentences imposed on Counts 1, 2, 3, 4, and 7 to run concurrently with each other and sentences imposed on Counts 5 and 6 run concurrently with each other. Sentences on Counts 1, 2, 3, 4, and 7 were ordered to run consecutively to sentences imposed on Counts 5 and 6.

Bennett appeals his Judgment and Sentence raising the following issues:

(1) whether the State of Oklahoma lacked jurisdiction to prosecute him; and

(2) whether the two convictions for a single act of possession of a firearm after former felony conviction violated the statutory prohibition against multiple punishments for a single act.

Because we find relief is required on Bennett's jurisdictional challenge in Proposition 1, his other claim is moot. Bennett claims the State of Oklahoma did not have jurisdiction to prosecute him relying upon 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. __, 140 S.Ct. 2452 (2020).

Prior to and during trial Bennett moved to dismiss challenging the State's jurisdiction under *McGirt*. He alleged that the crimes were committed within the boundaries of the Cherokee Nation Reservation and that he is an Indian.[1] The State argued in response that the United States Supreme Court's ruling in *McGirt* did not extend to Indian reservations other than the Muscogee-Creek Reservation. The trial court denied the jurisdictional challenges but acknowledged that the issue was preserved for appellate review.

Bennett correctly argues on appeal that any ambiguity surrounding the issue of whether *McGirt* applies to the Cherokee Reservation has since been resolved. In *Hogner v. State*, 2021 OK CR 4, ¶ 18, 500 P.3d 629, 635, this Court found that the district court "appropriately applied *McGirt* to determine that Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Reservation. . . ." We concluded that since Hogner proved his status as an Indian, and the crime was committed within the

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[1] There was evidence that Bennett had a Certificate of Degree of Indian Blood showing 1/16 degree of Indian blood and was a member of the Cherokee Nation since 1997.

boundaries of the still existing Cherokee Reservation, the State of Oklahoma did not have jurisdiction to prosecute. *Id. See also Spears v. State*, 2021 OK CR 7, ¶ 16, 485 P.3d 873, 877 (This Court held that "for purposes of federal criminal law, the land upon which the parties agree Spears allegedly committed the crime is within the Cherokee Reservation and is thus Indian country. The ruling in *McGirt* governs this case and requires us to find the District Court of Rogers County did not have jurisdiction to prosecute Spears.").

The record in the present case shows Bennett proved his Indian status and that the crimes occurred with the historic boundaries of the Cherokee Nation Reservation.[2] Accordingly, the ruling in *McGirt* governs this case and requires us to find the District Court of Washington County did not have jurisdiction to prosecute Bennett.

The Judgment and Sentence of the District Court is **VACATED**. The matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED**

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[2] The States does not disagree with this evidence. While the State continues to disagree with the Supreme Court's decision in *McGirt*, it acknowledges that no remand is necessary as the record is fully developed on the issues of Bennett's Indian status and whether the crime occurred in Indian country.

to issue in twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY THE HONORABLE RUSSELL C. VACLAW, ASSOCIATE DISTRICT JUDGE

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OPINION BY: ROWLAND, P.J.
HUDSON, V.P.J.: Specially Concur
LUMPKIN, J.: Concur in Results
LEWIS, J.: Concur
MUSSEMAN, J: Concur

HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

Today's decision dismisses multiple convictions for various sex crimes involving a child victim as well as convictions for felonious possession of a firearm from the District Court of Washington County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This decision is unquestionably correct as a matter of *stare decisis*. The record shows Appellant had some Indian blood and was a member of the Cherokee Nation at the time of the crimes. The record further shows the crimes in this case took place within the historic boundaries of the Cherokee Nation Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for these crimes lies. *See Roth v. State*, 2021 OK CR 27, 499 P.3d 23. I therefore as a matter of *stare decisis* fully concur in today's decision. Further, 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. *See, e.g., State v. Lawhorn*, 2021 OK CR 37, 499 P.3d 777. (Hudson, V.P.J., Specially Concurs);

Sizemore v. State, 2021 OK CR 6, 485 P.3d 867 (Hudson, 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

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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.