IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

TERRANCE LUCAS COTTINGHAM,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2017-1294**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION REMANDING WITH INSTRUCTIONS TO DISMISS

HUDSON, JUDGE:

Appellant, Terrance Lucas Cottingham, was tried by jury and convicted of Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 801, in the District Court of Washington County, Case No. CF-2015-350. In accordance with the jury's recommendation, the Honorable Curtis DeLapp, District Judge, sentenced Appellant to twenty five years imprisonment with credit for time served. Appellant must serve 85% of this sentence before becoming parole eligible. Appellant now appeals from this conviction and sentence.

In Proposition I of his brief in chief on appeal, Appellant claims the District Court lacked jurisdiction to prosecute him. Appellant cites

18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) in support of this argument. Appellant argues he is a citizen of the Osage Nation and claims the robbery in this case occurred within the boundaries of the Cherokee Nation which he says is Indian Country for purposes of federal law.

On August 21, 2020, this Court remanded Appellant's case to the District Court of Washington County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues—(a) Appellant's status as an Indian; and (b) whether the crime occurred in Indian Country. We instructed that Appellant bore the initial burden of presenting *prima facie* evidence as to his legal status as an Indian and as to the location of the crime in Indian Country. Upon such a showing, the burden shifts to the State to prove it has jurisdiction.

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. Our Order further provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation

setting forth those facts upon which they agree. The breadth of the parties' stipulation determining whether a hearing on the issues is necessary.

As to Appellant's status as an Indian, the District Court was specifically ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe or the federal government.[1] To determine whether the crime occurred in Indian Country, the District Court was directed to follow the analysis set out in *McGirt* to determine (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In doing so, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

An evidentiary hearing in this case was timely held before the Honorable Russell C. Vaclaw, Associate District Judge, on October 19, 2020. Prior to the hearing, Appellant filed a brief with the District Court setting forth his position on the remanded issues. The Cherokee

[1] *See Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. *See also United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

Nation Attorney General likewise filed an amicus brief addressing the creation and continued existence of the Cherokee Nation reservation. The State, by contrast, did not submit a written brief to the District Court. At the hearing, the parties presented the District Court with agreed-upon stipulations that partially answered the questions presented to the court. Counsel for the Cherokee Nation also appeared at the hearing as amicus and presented argument.

As to Appellant's status as an Indian, the parties stipulated:

1. Appellant is thirty-five two-hundred-fifty-sixths (35/256) degree of Indian blood of the Osage Tribe.

2. Appellant is a member of the Osage Nation and was such on October 6, 2015, the time of the charged offense.

3. The Osage Nation is an Indian Tribal Entity recognized by the federal government.

No additional evidence was presented relating to this issue.

As to the location of the crime, the parties stipulated:

4. The charged crime occurred within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

The Cherokee Nation, at Appellant's request introduced into evidence a packet of exhibits containing the treaties and federal legislation referenced in the stipulation along with a map of the Cherokee Nation showing the location of the robbery. The State presented no additional evidence relating to this issue.

Appellant primarily stood on the briefs that were submitted by defense counsel and the Cherokee Nation prior to the hearing in arguing the jurisdictional issue. Defense counsel argued that, based on the stipulated facts, Appellant was an Indian for purposes of federal law and that the robbery in this case occurred in Indian Country. Appellant adopted the arguments presented by the Cherokee Nation in its amicus that the Cherokee Nation reservation was created by treaty with the federal government and continued to exist over time because Congress had never disestablished it. At the hearing, counsel for the Cherokee Nation presented extended argument summarizing the Tribe's position in support of the continued existence of the Cherokee Nation reservation and referenced pertinent treaties and federal legislation resulting in the present territorial boundaries for the Nation which includes all of Washington County. The Tribe pointed out the total absence of

legislation from Congress disestablishing the Cherokee Nation reservation and urged that the reservation still existed today.

The State was represented at the hearing by the elected District Attorney along with counsel from the Oklahoma Attorney General's Office. The State took no position at the hearing on the two legal questions before the District Court but merely stipulated to the underlying facts. The record shows the State neither advocated it had jurisdictional authority to prosecute Appellant nor conceded its lack thereof. Instead, the State acknowledged the facts agreed to by stipulation and asserted that it was leaving it to the Court to determine whether, as a matter of law, Appellant was an Indian and whether the crime occurred in Indian Country.[2]

In its written findings of fact and conclusions of law filed after the hearing, the District Court accepted and found the facts as stipulated by the parties. The court concluded: (1) Appellant "is a member of the Cherokee Nation [sic]"; (2) the robbery in this case

[2] Towards the end of the hearing, the elected District Attorney expressed his view that the continuing existence of a reservation for the Cherokee Nation was inconsistent with the fact of Oklahoma statehood. This argument, however, was not a definitive assertion by the State that it had jurisdiction to prosecute Appellant in the present case.

occurred within the historical and territorial boundaries of the Cherokee Nation's reservation; (3) Appellant and the Cherokee Nation's counsel argued that Congress had not disestablished the reservation for the Cherokee Nation; (4) the State "did not present any evidence or argument as to whether Congress disestablished the Cherokee Reservation[;]"; and (5) "The Court, having heard no other evidence, must find that the Cherokee Reservation was not disestablished."

Both Appellant and the State have filed supplemental briefs with this Court post-remand. Appellant urges that the District Court's findings should be adopted by this Court in total. Appellant tells us the record supports the District Court's conclusions concerning both his Indian status and the occurrence of the robbery in this case on the Cherokee Nation reservation. Appellant further argues that the record shows Congress established a reservation for the Cherokee Nation, the State cannot and did not at the hearing point to any language in federal legislation or treaties disestablishing the Cherokee Reservation and therefore the robbery charged in this case was committed in Indian Country for purposes of federal law. Based on these findings, Appellant urges dismissal of the present case for lack of jurisdiction.

In its response brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above. The State also acknowledges the District Court's findings establishing both that Appellant was an Indian and that the crimes occurred in Indian Country. The State reiterates, however, that it "takes no position as to the existence, or absence, of a Cherokee Nation Reservation." State's Supp. Br. at 5 n.4. Should this Court find Appellant is entitled to relief based on the District Court's findings, the State asks this Court to stay any order reversing Appellant's conviction for thirty days to allow federal authorities time to secure custody of Appellant. *Cf.* 22 O.S.2011, § 846.

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. The State in effect stipulated to Appellant's legal status as an Indian. However, the State took no position and presented no argument or evidence that the Cherokee Nation reservation had been disestablished and thus the crime did *not* occur in Indian Country. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying

Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We find no such abuse. *See State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194 (defining "an abuse of discretion").

Based upon the record before us, the District Court's Order is supported by the evidence presented at the evidentiary hearing. We therefore find Appellant has met his burden of establishing his status as an Indian, having 35/256 degree of Indian blood and being a member of the Osage Nation tribe on the date of the robbery in this case. We also find the District Court appropriately applied *McGirt* to determine that Congress established a Cherokee Nation reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma had jurisdiction in this matter.

Pursuant to *McGirt*, we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter.[3] The Judgment and

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[3] 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 Bosse v. State*, 2021 OK CR 3, __P.3d__ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, __P.3d__ (Hudson, J., Specially Concurs); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

Sentence in this case is hereby reversed and the case remanded to the District Court of Washington County with instructions to dismiss the case.[4]

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.[5]

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

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[4] This resolution renders moot the remaining eight propositions of error raised in Appellant's brief.

[5] By withholding the issuance of the mandate for twenty days, the State's request for time to allow federal authorities to secure custody of Appellant is rendered moot.

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OPINION BY: HUDSON, J.
KUEHN, P.J.: CONCUR IN RESULTS
ROWLAND, V.P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR IN RESULTS
LEWIS, J.: CONCUR IN RESULTS

KUEHN, PRESIDING JUDGE, CONCURRING IN RESULT:

I agree with the Majority that the State of Oklahoma had no jurisdiction to try Appellant, and his case must be dismissed. This Court recently found that the Cherokee Reservation was not disestablished, and is Indian Country. *Spears v. State*, 2021 OK CR 7, ¶¶ 15-16. Because the issue of reservation status has already been decided, I find the Majority's discussion of it is superfluous dicta. I further note that the Majority's inclusion of a blood quantum is unnecessary. This Court, like the Tenth Circuit, requires only a finding of *some* Indian blood to determine Indian status, and has explicitly rejected a specific blood quantum requirement. *Bosse v. State*, 2021 OK CR 3, ¶ 19.

I also disagree, as I have before, with the Majority's complaint that the State's position below left a "void" in the record. *Hogner v. State*, 2021 OK CR 4, ¶ 3 (Kuehn, P.J., concurring in result). Petitioner provided the trial court with law and evidence relevant to the jurisdictional issue. The trial court's findings and conclusions clearly set forth the details of the material it used to make its decisions. Often, in a criminal trial, the defendant does not offer

evidence to counter the evidence of guilt presented by the State. And yet, this Court routinely finds the evidence is sufficient for our review, without complaining that the defendant's choice leaves a void in the record. The same is true here.

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

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[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.

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.