IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAKOTA SHAY FOX,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2019-196**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION REMANDING WITH INSTRUCTIONS TO DISMISS

HUDSON, JUDGE:

Appellant, Dakota Shay Fox, was tried and convicted by a jury in the District Court of McCurtain County, Case No. CF-2018-07, of Murder in the First Degree, Malice Aforethought, in violation of 21 O.S.Supp.2012, § 701.7. The jury recommended a sentence of life imprisonment without the possibility of parole. The Honorable Gary Brock, Special Judge, presided at trial and sentenced Appellant in accordance with the jury's verdict. 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. He relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and

argues he is a member of the Choctaw Nation and the crime occurred within the boundaries of the Choctaw Nation Reservation.

On August 21, 2020, this Court remanded this case to the District Court of McCurtain 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 Choctaw 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 Judge Brock on October 5, 2020. Prior to the hearing, Appellant filed *Defendant/Appellant's Remanded Hearing Brief Applying McGirt Analysis to Choctaw Nation Reservation*, and the Choctaw Nation filed an *Amicus Curiae Brief in Support of the Continued Existence of the Choctaw Reservation and Its Boundaries*. The State did not submit a

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[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).

brief. At the hearing, the parties presented the court with agreed-upon stipulations, which partially answered the questions presented to the court. As to Appellant's status as an Indian, the parties stipulated:

> Defendant/Appellant, Dakota Shay Fox, has ¼ Choctaw blood and was a member of the Choctaw Nation of Oklahoma (Membership Number CN226351) at the time of the crime. The Choctaw Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government.

(10/5/2020 Exhibit 1). No additional evidence was presented with regard to this issue.

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

> The crime in this case occurred near the intersection of SE Adams and SE G streets in Idabel, McCurtain County, Oklahoma. This location is within the historical boundaries of the Choctaw Nation—boundaries as set forth in, and adjusted by, the 1855 and 1866 treaties between the Chickasaw and Choctaw Nations and the United States.

(10/5/2020 Exhibit 1). Appellant also introduced a packet of exhibits titled "Defendant's Evidentiary Hearing Exhibits," containing "some treaties, some federal acts, the Choctaw Constitution and a map of the Choctaw Reservation." The State presented no additional evidence relating to this issue.

Appellant, for the most part, stood on the briefs that had been submitted throughout the appeal process in this case, including the

appellate briefs filed with this Court.[2] While the State did not stipulate to Appellant's status as an Indian, Appellant asserted the facts agreed to by stipulation definitively resolved the issue. In addition to the agreed-upon facts relating to whether the crime occurred in Indian country, Appellant argued that the Choctaw Nation Reservation was created by treaty and "is still intact to this day[.]" Appellant observed that *McGirt* simplified the issue by "focusing almost exclusively on the language that Congress has spoken with, either in treaties or subsequent federal legislation." Appellant argued there is no evidence that any acts of Congress clearly disestablished the Choctaw Reservation.

The State inexplicably took "no position on [the two] legal questions" before the District Court but merely stipulated to the underlying facts. The State thus neither advocated it had jurisdictional authority to prosecute Appellant nor conceded its lack thereof. As discussed below, the State continues this tactic on appeal.

In its written findings of fact and conclusion of law filed after the hearing, the District Court accepted and found the facts as stipulated

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[2] Counsel for the Choctaw Nation of Oklahoma also elected to stand on the Tribe's *amicus* brief "in support of the continued existence of the Choctaw Nation of Oklahoma Reservation and its boundaries."

by the parties. The court concluded: (1) Appellant was an Indian at the time of the crime; and (2) the crime occurred within the boundaries of the Choctaw Nation Reservation. As to boundaries of the reservation, the court specifically found there was "no evidence presented that Congress has ever explicitly erased [the historical] boundaries of the Choctaw Nation and disestablished that reservation."

Both Appellant and the State filed with the Court supplemental briefs after remand. Appellant argues in his brief that "the record conclusively supports the district court's finding that [Appellant] is an Indian." As to whether the crime occurred in Indian Country, Appellant notes that the parties agreed the crime occurred within the "Choctaw Nation's [historical] boundaries [as] set by the treaties of 1855 and 1866." Thus, Appellant contends the only questions remaining are whether these treaties created a reservation; and if so, whether the reservation "continues to exist." Appellant argues the answer to both these questions is "yes."

Reviewing the evidence provided at the evidentiary hearing under the standard of review set forth in *McGirt*, Appellant argues this Court should affirm the District Court's findings. Appellant asserts that like

the Creek Reservation, "[n]o explicit language of total withdrawal of the reservation exists in Choctaw treaties or allotment acts" (citing *McGirt*, 140 S. Ct. at 2463). Because the State did not and cannot point to any such language regarding the Choctaw Reservation, Appellant argues this Court should find that Congress did not disestablish Choctaw Reservation.

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 that Appellant was an Indian and the crimes occurred in Indian Country. The State reiterates, however, that it "takes no positon as to the existence, or absence, of a Choctaw Reservation." 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 the United States Attorney's Office for the Eastern District of Oklahoma 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 Choctaw 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 1/4 degree Indian blood and being a member of the Choctaw Nation of Oklahoma tribe on the date of the crime. We also find the District Court appropriately applied *McGirt* to determine that Congress established a Choctaw Nation Reservation and that no evidence was presented showing that Congress explicitly erased or

disestablished the boundaries of the Choctaw Nation or that the State of Oklahoma had jurisdiction in this matter.[3]

Based on the foregoing, we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter. The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of McCurtain 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]

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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).

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

[5] By withholding the issuance of the mandate for 20 days, the State's request for time to allow the United States Attorney's Office for the Eastern District of Oklahoma to secure custody of Appellant is rendered moot.

AN APPEAL FROM THE DISTRICT COURT OF MCCURTAIN COUNTY
THE HONORABLE GARY BROCK, SPECIAL JUDGE

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OPINION BY: HUDSON, J.

KUEHN, P.J.: CONCUR IN RESULT
ROWLAND, V.P.J.: CONCUR IN RESULT
LUMPKIN, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR IN RESULT

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 Choctaw Reservation was not disestablished, and is Indian Country. *Sizemore v. State*, 2021 OK CR 6, ¶¶ 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.[1] *Bosse v. State*, 2021 OK CR 3, ¶ 19.

I also disagree with the Majority's characterization of the State's position below as inexplicable. As I have said before, the State's decision to stipulate to some issues and take no position on the issue of reservation status was an available legal strategy and conserved judicial resources.[2] *Hogner v. State*, 2021 OK CR 4, ¶ 2 (Kuehn, P.J.,

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[1] Inclusion of Appellant's tribal membership number is also inappropriate.

[2] This position is also entirely consistent with the State's position in civil Indian Child Welfare Act proceedings. On August 17, 2020, the Oklahoma Department of Human Services, on behalf

concurring in result). And I repeat that there is no "void" in the record. Petitioner provided the trial court with law and evidence relevant to the jurisdictional issue. The State chose not to augment or contest this law and evidence. 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.

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of the State, entered into an Intergovernmental Agreement Between the State of Oklahoma and the Choctaw Nation of Oklahoma Regarding Jurisdiction Over Indian Children Within the Tribe's Reservation (filed, Oklahoma Secretary of State, Aug. 17, 2020). Throughout the Agreement the State explicitly recognizes the continued existence of the Choctaw Reservation.

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.