IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JOSEPH STANLEY HARJO,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2017-889**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

HUDSON, JUDGE:

Appellant, Joseph Stanley Harjo, was tried by a jury and convicted of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E), in the District Court of Muskogee County, Case No. CF-2016-692. The jury recommended a sentence of life imprisonment. The Honorable Norman D. Thygesen, Associate District Judge, presided at trial and sentenced Harjo in accordance with the jury's verdict. Appellant must serve 85% of the sentence imposed before becoming eligible for parole. Appellant now appeals from this conviction and sentence.

In Proposition I of his brief in chief, Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a

citizen of the Creek Nation and the crime in this case occurred within the boundaries of the Creek Reservation. Pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Appellant's claim raises two separate questions: (a) his Indian status; and (b) whether the crimes occurred on the Creek Reservation. These issues require fact-finding. We therefore remanded this case to the District Court of Muskogee County for an evidentiary hearing.

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 Appellant's 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.

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 fact and conclusions of law with this Court.

On remand, the parties filed with the District Court an Agreed Stipulation announcing and requesting the Court accept the following stipulations: 1) Appellant is 1/4th degree Indian blood; 2) Appellant is an enrolled member of the Muscogee (Creek) Nation and was such in 2016 at the time of the charged crime; 3) the Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government; and 4) the charged crime occurred within the Creek Reservation. The Agreed Stipulation was signed by counsel for both parties including attorneys from the Oklahoma Attorney General's Office, the Muskogee County District Attorney's Office and counsel for Appellant.

On October 14, 2020, Judge Thygesen filed an Order containing his written findings of fact and conclusions of law. This Order thereafter was timely filed with this Court along with the Agreed

Stipulation which is included as an attachment. The District Court accepted and adopted the stipulations made by the parties and concluded in its findings of fact and conclusions of law that Appellant has some Indian blood, that he is also recognized as an Indian by a tribe or by the federal government and therefore Appellant is an Indian under federal law. Finally, the District Court accepted and adopted the stipulation of the parties that the crime in this case occurred on the Creek Reservation.

On November 9, 2020, the State filed with this Court a supplemental brief after remand. In its brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above and references 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 conviction for thirty (30) days so federal authorities may 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. 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 1/4th degree Indian blood and being a member of the Muscogee (Creek) Nation. We further find Appellant met his burden of proving the crimes in this case occurred on the Creek 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 Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of Muskogee 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

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[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. *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).

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

MANDATE is not to be issued until twenty (20) days from the delivery and filing of this decision.[3]

AN APPEAL
FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE NORMAN THYGESEN
ASSOCIATE DISTRICT JUDGE

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

OPINION BY: HUDSON, J.
KUEHN, P.J.: CONCUR IN RESULTS
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' 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 section 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 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

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 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

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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).

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 to the decision to dismiss this case for the lack of state jurisdiction.