ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JUSTIN DALE LITTLE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2020-125**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

ROWLAND, VICE PRESIDING JUDGE:

Appellant Justin Dale Little was tried by jury and convicted of First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7, in the District Court of Tulsa County, Case No. CF-2018-1700. In accordance with the jury's recommendation, the Honorable Sharon Holmes, District Judge, sentenced Little to life in prison with the possibility of parole. Little raises eight issues for review. This appeal turns on whether Little is an Indian as defined by federal law, and whether the alleged crime was committed within Indian country as that term is defined by federal law. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to

the federal government. Because we find relief is required on Little's jurisdictional challenge in Proposition 1, his other claims are moot.

1. Controlling Law: *McGirt v. Oklahoma*

In *McGirt v. Oklahoma*, 591 U.S. __, 140 S.Ct. 2452 (2020), the Supreme Court held that land set aside for the Muscogee Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation remains in existence today for purposes of federal criminal law because Congress has never explicitly disestablished it.

2. Jurisdiction

Federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on the Muscogee Reservation. 18 U.S.C. §§ 1152, 1153; *McGirt,* 140 S.Ct. at 2479-80. The charge of first degree murder filed against Little in this case fits squarely within the crimes subject to exclusive federal jurisdiction. *See State v. Klindt,* 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.")

3. Two Questions Upon Remand

On January 15, 2021, this Court remanded this case to the District Court of Tulsa County for an evidentiary hearing for fact finding on Little's claim that the State of Oklahoma did not have jurisdiction to prosecute him because he is an Indian and his crime occurred in Indian country. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Little's status as an Indian; and (b) whether the crime occurred within the boundaries of the Muscogee Reservation. Our Order 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, and no hearing would be necessary.

On February 19, 2021, the parties entered a written joint stipulation in which they agreed: (1) that Little has some Indian blood; (2) that he was a registered member of the Seminole Nation on the date of the charged offense; (3) that the Seminole Nation is a federally recognized tribe; and (4) that the charged crime occurred within the boundaries of the Muscogee Reservation. The District Court accepted the parties' stipulation.

The District Court filed its Findings of Fact and Conclusions of Law in this Court on May 6, 2021. The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Little is an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee Reservation. The District Court's findings and conclusions are supported by the record. The ruling in *McGirt* governs this case and requires us to find the State of Oklahoma was without jurisdiction to prosecute Little. Accordingly, we grant Little's Proposition 1.

DECISION

The Judgment and Sentence of the District Court is **VACATED** and this 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. (2021), the **MANDATE** is **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, THE HONORABLE SHARON HOLMES, DISTRICT JUDGE

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

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.

HUDSON, J., SPECIALLY CONCURS:

Today's decision dismisses a conviction for first degree murder from the District Court of Tulsa 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* based on the Indian status of Appellant and the occurrence of these crimes on the Muscogee Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes charged in this case. Instead, Appellant must be prosecuted in federal court. 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., 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); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).