ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SONNY RAYE MCCOMBS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2017-1000
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee,	)	

SUMMARY OPINION

LEWIS, JUDGE:

Sonny Raye McCombs, Appellant, was tried by jury and convicted of, count one, second degree robbery in violation of 21 O.S.2011, § 799; count two, use of a vehicle in the discharge of a weapon in violation of 21 O.S. 2011, § 652(B); count three, possession of a firearm after former conviction of a felony in violation of 21 O.S.Supp.2014, § 1283; count five, larceny of merchandise from a retailer in violation of 21 O.S.Supp.2016, § 1731, and count six, obstructing an officer in violation of 21 O.S.Supp.2015, § 540, in the District Court of Tulsa County, Case No. CF-2016-6878. In accordance with the jury's recommendation the Honorable Doug Drummond, District Judge, sentenced McCombs to ten (10) years on

count one, twenty-five (25) years on count two, five (5) years on count three, thirty (30) days on count five, and one (1) year on count six. Counts one, two, and three were ordered to be served consecutively and counts five and six were ordered to be served concurrently with each other and concurrently with count one. McCombs filed an appeal from the Judgments and Sentences raising twelve propositions of error. We find that the claim raised in his eleventh proposition entitles McCombs to relief, thus the remaining propositions are moot.

In his eleventh proposition, McCombs claims the District Court abused its discretion by failing to grant his motion to dismiss for lack of subject matter jurisdiction. McCombs argues that he is a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the reservations of the Cherokee Nation and the Muscogee (Creek) Nation.[1] McCombs, in his direct appeal, relies on *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which was affirmed by the United States Supreme Court in *Sharp v. Murphy*, 591 U.S.

[1] Counts 1 and 5 occurred within the boundaries of the Muscogee (Creek) Nation Reservation and Counts 2, 3, and 6 occurred within the boundaries of the Cherokee Nation Reservation.

___, 140 S.Ct. 2412 (2020) for the reasons stated in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020).

McCombs' claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred in Indian Country. This Court remanded the case back to the District Court because we determined that his claim required fact-finding on the two separate questions.

An evidentiary hearing was timely held before the Honorable Tracy Priddy, District Judge, and Findings of Fact and Conclusions of Law were timely filed with this Court. In its findings of fact, the District Court found that McCombs has 9/64 degree of Muscogee (Creek) blood and has been a registered member of the Muscogee (Creek) Nation since October 11, 2005. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.

The District Court also found that counts one and five occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation, and counts two, three, and six occurred within the historical boundaries of the Cherokee Nation Reservation.

The evidence established that neither the Muscogee (Creek) Nation Reservation nor the Cherokee Nation Reservation have been

expressly disestablished by Congress. Therefore, the District Court concluded, and we agree, that the crimes occurred in Indian Country. *See McGirt*, 140 S.Ct. at 2468; 18 U.S.C. §§ 1152 and 1153; *Spears v. State*, 2021 OK CR 7, ¶ 15, ___ P.3d ___; and *Hogner v. State*, 2021 OK CR 4, ¶ 18, ___ P.3d ___.

We therefore find that the State of Oklahoma did not have jurisdiction to prosecute McCombs in this matter.

DECISION

The Judgments and Sentences of the District Court of Tulsa County are **REVERSED** and the case 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 **STAYED** for twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE

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

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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., CONCUR IN RESULTS:

Today's decision applies *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) to the facts of this case and dismisses convictions from the District Court of Tulsa County for second degree robbery, drive-by shooting, felonious possession of a firearm, larceny of merchandise from a retailer and obstructing an officer. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of these crimes within the historic boundaries of the Creek and Cherokee Reservations. Under *McGirt*, the State has no jurisdiction to prosecute Appellant. Instead, Appellant must be prosecuted in federal court. I therefore as a matter of *stare decisis* fully concur in today's decision.

I disagree, however, with the majority's definitive conclusion based on *Spears v. State*, 2021 OK CR 7, __P.3d__ and *Hogner v. State*, 2021 OK CR 4, __P.3d__, that Congress never disestablished the Cherokee Reservation. We should find instead no abuse of discretion based on the record evidence presented. I also join Judge Rowland's observation in his special writing in *Hogner* that the Major Crimes Act does not affect the State of Oklahoma's subject matter

jurisdiction in criminal cases but, rather, involves the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority. *Id.* at ¶ 4 (Rowland, V.P., Concurring in Result).

Finally, 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).