ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PATRICK WAYNE OLIVE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2019-496**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

ROWLAND, PRESIDING JUDGE:

Patrick Wayne Olive appeals his convictions and sentences for Trafficking in Illegal Drugs, in violation of 63 O.S.Supp.2018, § 2-415 (Count 1), Speeding – Posted Zone, in violation of 47 O.S.2011, § 11-802 (Count 2), and Possession of Contraband in a Penal Institution, in violation of 57 O.S.Supp.2015, § 21(D), in the District Court of Muskogee County, Case No. CF-2018-187. In accordance with the jury's recommendation, the Honorable Thomas Alford sentenced Olive to thirty-two years imprisonment on Count 1, a fine of $35.00 on Count 2, and one year in county jail on Count 3. The sentences were ordered to be served concurrently.

Olive filed his brief in chief on September 29, 2020, along with an application to supplement the record or for an evidentiary hearing on his Sixth Amendment claims. Olive challenges the State's jurisdiction pursuant to the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), finding that the Muscogee (Creek) Reservation was not disestablished, and that the State of Oklahoma does not have jurisdiction over crimes committed by Indians within the borders of the reservation. Olive claims that he is an enrolled member of the Cherokee Nation and that the crimes were committed within the boundaries of the Muscogee (Creek) Nation Reservation and he sought to supplement the record with documentation supporting these assertions.

On January 27, 2021, the State tendered for filing an application to supplement the record on appeal.[1] The State did not dispute Olive's claims but rather, moved to supplement the record with documentation showing that Olive has some degree of Indian blood, was an enrolled member of the Cherokee Nation at the time

[1] On that same day, the State also filed a combined motion to stay briefing schedule and response to Olive's *McGirt* claim.

that the crimes were committed, and with documentation showing that the crimes occurred within the boundaries of the Muscogee (Creek) Reservation.

On July 28, 2021, this Court issued an order granting the State's motion to supplement and directing the Clerk of this Court to file the same, granting Olive's motion to supplement, and directing the State to show cause why Olive's convictions should not be vacated. As directed, the State filed its response to the show cause order on August 23, 2021. The State, again, did not dispute any of the facts underlying Olive's jurisdictional claim. The State also acknowledged that under the current state of the law, Olive's jurisdictional claim has merit. However, the State noted that it asked the United States Supreme Court to grant certiorari review in *Oklahoma v. Bosse*, Case No. 21-186, and overturn its own decision in *McGirt*. Thus, it argued that this Court should stay and abate the proceedings in this case immediately, to conserve judicial resources, pending the outcome of *Bosse*.

On August 31, 2021, this Court issued an order vacating its grant of post-conviction relief in *Bosse v. State*, 2021 OK CR 3, 484

P.3d 286, and withdrawing the opinion from publication. *Bosse v. State*, 2021 OK CR 23, __ P.3d __. That case is no longer at issue as the parties in *Bosse* filed a joint stipulation to dismiss the case at the Supreme Court on September 3, 2021. While the State may well seek and receive certiorari review in the United States Supreme Court on another case in which it is asked to revisit the *McGirt* decision, we follow the law as it exists today. In doing so we find, on the record before this Court, that Olive has some Indian blood, was an enrolled member of the Cherokee Nation on the date of the charged offenses, and that the Cherokee Nation is a federally recognized tribe. We also find, on the record, that the land upon which the parties agree Olive allegedly committed the crimes is within the boundaries of the Muscogee (Creek) Reservation. The ruling in *McGirt* governs this case and requires us to find the District Court of Muskogee County did not have jurisdiction to prosecute Olive. The State has failed to show good cause why we should hold differently.

DECISION

The Judgment and Sentence of the District Court is **VACATED**. The matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Any

related motions not previously ruled upon are **DENIED**. 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 MUSKOGEE COUNTY
THE HONORABLE THOMAS ALFORD, DISTRICT JUDGE

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

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCURS

Today's decision dismisses convictions for drug trafficking, speeding and possession of contraband in a penal institution from the District Court of Muskogee 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*. The parties have stipulated that Appellant was a registered member of the Cherokee Nation at the time of the crimes, that he had some Indian blood and the crimes in this case took place within the historic boundaries of the Creek Reservation. *See Rogers v. United States*, 45 U.S. 567, 572-573 (1846); *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for these crimes lies. *See Roth v. State*, 2021 OK CR 27, __P.3d__. 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., *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (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.