IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JIMMIE DEWAYNE STARR,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. C-2018-640**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION

ROWLAND, VICE PRESIDING JUDGE:

Petitioner Jimmie Dewayne Starr entered a guilty plea in the District Court of Okmulgee County to crimes charged in the following three cases: in Case No. CF-2016-80, Endangering Others While Eluding/Attempting to Elude a Police Officer (Count 1), in violation of 21 O.S.2011, § 540A(B) and Failure to Wear a Seatbelt (Count 2), in violation of 47 O.S.Supp.2012, § 12-417; in Case No. CF-2017-131, Possession of Controlled Dangerous Substance (Count 1), in violation of 63 O.S.Supp.2012, § 2-402 and Resisting an Officer (Count 2), in violation of 21 O.S.2011, § 268; and, in Case No. CF-2017-132, Bail Jumping, in violation of 22 O.S.2011, § 1110. The

felony counts were charged After Former Conviction of Two or More Felonies.

The Honorable Cynthia D. Pickering, Associate District Judge, accepted Starr's plea and sentenced him as follows: in Case No. CF-2016-80, twenty years imprisonment on Count 1 and costs on Count 2; in Case No. CF-2017-131, ten years imprisonment on Count 1 and one year on Count 2; and in Case No. CF-2017-132, three years incarceration. All sentences were ordered to be served concurrently.

Starr filed a timely motion to withdraw his guilty plea. After a hearing on the motion to withdraw held on June 14, 2018, the motion was denied.

Starr appeals the denial of his motion, raising the following issues:

(1) Whether the district court lacked jurisdiction to sentence him;

(2) whether he was denied effective assistance of counsel;

(3) whether the admission of improper evidence resulted in an excessive sentence;

(4) whether the district court's failure to appoint conflict-free counsel at the hearing on the motion to withdraw plea resulted in reversible error;

(5) whether his sentence is excessive; and

(6) whether the State of Oklahoma lacked jurisdiction to prosecute him.

We find relief is required on Starr's jurisdictional challenge in Proposition 6, rendering his other claims moot. Starr claims the State of Oklahoma did not have jurisdiction to prosecute him. He relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. __, 140 S.Ct. 2452 (2020).

On August 19, 2020, this Court remanded this case to the District Court of Okmulgee County for an evidentiary hearing. We directed the District Court to make findings of fact and conclusions of law on two issues: (a) Starr's status as an Indian; and, (b) whether the crime occurred within the boundaries of the Muscogee Creek 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 October 15, 2020, the parties appeared before the Honorable Cynthia D. Pickering and announced that an agreement had been reached and that no evidentiary hearing was necessary. On October 16, 2020, the parties filed in the District Court a written Agreed

Stipulation in which they agreed: (1) that Starr has some Indian blood; (2) that he was a recognized member of the Muscogee Creek Nation on the date of the charged offense; (3) that the Muscogee Creek Nation is a federally recognized tribe; and, (4) that the charged crime occurred within the Muscogee Creek Reservation.

The District Court accepted the parties' stipulation and on November 4, 2020, filed its Findings of Fact and Conclusions of Law. The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Starr is an Indian under federal law and that the charged crimes occurred within the boundaries of the Muscogee Creek Reservation. The ruling in *McGirt* governs this case and requires us to find the District Court of Okmulgee County did not have jurisdiction to prosecute Starr. Accordingly, we grant relief on error raised in Proposition 6.

DECISION

The Judgment and Sentence of the district court is **VACATED** and the matter is **REMANDED WITH INSTRUCTION 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 OKMULGEE COUNTY, THE HONORABLE CYNTHIA PICKERING, 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' 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

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

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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).

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 convictions for endangering others while eluding/attempting to elude a police officer, possession of controlled dangerous substance and various misdemeanor crimes from the District Court of Okmulgee 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 Petitioner and the occurrence of the crimes on the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Petitioner for the crimes in this case. Instead, Petitioner 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 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).