ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JESSY SHAY BAILEY, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	NOT FOR PUBLICATION No. F-2020-226

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 23 2021
JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Jessy Shay Bailey, Appellant, was tried by jury and convicted of Lewd Acts with a Child Under 16, in violation of 21 O.S.Supp.2017, § 1123(A)(2), in Atoka County District Court, Case No, CF-2018-81, before the Honorable Paula Inge, District Judge. The jury set punishment at three (3) years imprisonment. Judge Inge sentenced accordingly.

Appellant filed a motion for new trial under seal with this Court in compliance with our rules. In the motion for new trial, Appellant claims that the District Court lacked jurisdiction to try him. Appellant argues that while he is not Indian, his victim is a citizen of the Choctaw Nation and the crime occurred within the boundaries of the Choctaw

Nation Reservation. Appellant relies on *McGirt v. Oklahoma,* 591 U.S. ___, 140 S.Ct. 2452 (2020).

Appellant's claim raises two separate questions: (a) the Indian status of the victim and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore remanded this case to the District Court of Atoka County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) the victim's status as an Indian; and (b) whether the crime occurred in Indian Country, within the boundaries of the Choctaw Nation Reservation. Our Order provided that the parties could enter into written stipulations.

The District Court filed its *Findings of Fact and Conclusions of Law* in the District Court and with this Court's Clerk. In the findings of fact regarding the first question, the parties stipulated that the victim had 1/16th quantum of Indian blood and was an enrolled member of the Choctaw Nation, a federally recognized tribe, at the time of the crime; and the membership was verified by the Choctaw Nation.

Regarding the second question, the parties stipulated that the crime occurred within the historical boundaries of the Choctaw

Nation Reservation; the Choctaw Nation is a federally recognized tribe; and no evidence was presented that the treaties have been expressly nullified or modified in any way to reduce or disestablish the reservation.

The trial court concluded that a reservation was set aside for the Choctaw Nation; the reservation has not been disestablished by Congress; the crime occurred within the boundaries of said reservation; and the victim was a member of a federally recognized tribe, namely the Choctaw Nation.

Finally the trial court concluded that the crime occurred in Indian Country and the victim was an Indian as defined by *McGirt*, 591 U.S. ___, 140 S.Ct. 2452 (2020); *see* 18 U.S.C. § 1152; *see also* 18 U.S.C. § 1153 (Major Crimes Act). We find that the findings of fact and conclusions of law are supported by the record. This case is controlled by our recent decision in *Sizemore v. State*, 2021 OK CR 6, ___ P.3d ___ (holding that a crime occurring within the boundaries of the Choctaw Nation Reservation by a member of the Choctaw Nation is under federal jurisdiction not state jurisdiction).

The State argues that the State has jurisdiction concurrent with the Federal Government by virtue of the Appellant being non-Indian

and the victim being Indian. The General Crimes Act and the Major Crimes Act give federal courts jurisdiction over crimes committed by or against Indians in Indian Country. 18 U.S.C. §§ 1152, 1153. Congress provides that crimes committed in certain locations or under some specific circumstances are within the sole and exclusive jurisdiction of the United States. Section 1152, the General Crimes Act, brings crimes committed in Indian Country within that jurisdiction, unless they lie within the jurisdiction of tribal courts or jurisdiction is otherwise expressly provided by federal law. 18 U.S.C. § 1152; *see also* 18 U.S.C. § 1153 (Major Crimes Act). This gives federal courts jurisdiction over Indians and non-Indians who commit crimes against Indians in Indian Country.

This Court has also recognized that federal law preempts state jurisdiction over crimes committed by or against an Indian in Indian Country. *Cravatt v. State*, 1992 OK CR 6, ¶ 20, 825 P.2d 277, 280. Despite these holdings and the statutory language, the State argues that, federal and state courts have concurrent jurisdiction over non-Indians under the General Crimes Act. The law does not support this argument. The Attorney General relies in part on *United States v. McBratney*, 104 U.S. 621 (1881) to support the argument. However, in

McBratney, a non-Indian murdered another non-Indian within the boundaries of the Ute Reservation. The Supreme Court held that the federal government had no jurisdiction to prosecute a crime committed in Indian Country where neither the perpetrator nor the victim were Indian. *Id.*, 104 U.S. at 624. Nothing in that opinion supports a conclusion that, where federal jurisdiction exists by statute, states have concurrent jurisdiction as well. And the Supreme Court itself later refuted any such interpretation. In *Donnelly v. United States*, the Court held that *McBratney* did not apply to "offenses committed by or against Indians," which were subject to federal jurisdiction. *Donnelly*, 228 U.S. 243, 271-72 (1913). More recently, the Court has noted that where federal jurisdiction lies under Section 1153, it preempts state jurisdiction. *United States v. John*, 437 U.S. 634, 651 (1978); see also *Goforth v. State*, 1982 OK CR 48, ¶ 5, 644 P.2d 114, 115-16 (federal jurisdiction under §§ 1152, 1153 preempts state jurisdiction except as to crimes among non-Indians).

Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by

federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner.

Conclusion

Appellant's victim was an Indian, and this crime was committed in Indian Country. The Federal Government, not the State of Oklahoma, has jurisdiction to prosecute Appellant.

DECISION

The Judgment and Sentence of the District Court of Atoka County is **REVERSED** and the case is **REMANDED** with instructions to **DISMISS**. The State's Motion to Stay and Abate Proceedings is denied. 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 ATOKA COUNTY
THE HONORABLE PAULA INGE, DISTRICT JUDGE

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

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCURS

Today's decision dismisses a conviction for Lewd Acts With a Child Under 16 from the District Court of Atoka 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 the victim was an enrolled member of the Choctaw Tribe at the time of the crime, that the victim had 1/16th quantum of Indian blood and the crime in this case took place within the historic boundaries of the Choctaw 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 crime in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for this crime 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.