

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

SHANNON JAMES KEPLER,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2017-1186

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

MAR 18 2021

JOHN D. HADDEN,
CLERK

O P I N I O N

ROWLAND, VICE-PRESIDING JUDGE:

Appellant Shannon James Kepler was tried by jury in the District Court of Tulsa County, Case No. CF-2014-3952, and found guilty of First Degree Manslaughter, in violation of 21 O.S.2011, § 711. The jury assessed punishment at fifteen years imprisonment and a fine of \$10,000.00. The Honorable Sharon K. Holmes, District Judge, presided at Kepler's jury trial and sentenced him in accordance with the jury's verdict. Kepler raises seven issues for review. Kepler's jurisdiction challenge, contesting the State's jurisdiction to prosecute him, requires relief. We address only that claim and find Kepler's other claims are moot.

Kepler 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 Tulsa County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Kepler's status as an Indian; and (b) whether the crime occurred within the boundaries of the Muscogee Creek Nation 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 September 25, 2020, the parties appeared before the Honorable Tracy L. Priddy and entered a written joint stipulation in which they agreed: (1) that Kepler has some Indian blood; (2) that he was a registered 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 Nation Reservation. The district court accepted the parties' stipulation.

The District Court filed its Amended Findings of Fact and Conclusions of Law in this Court on November 16, 2020.¹ The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Kepler is an Indian under federal law and that the charged crimes occurred within the boundaries of the Muscogee Creek Nation 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 Kepler. Accordingly, we grant Kepler's Proposition 1.

¹ The district court granted Kepler's motion to substitute the exhibit of Kepler's tribal enrollment verification appended to the original Findings of Fact and Conclusions of Law because the exhibit contained protected personal material. The court substituted a redacted Enrollment Verification for the un-redacted Enrollment Verification attached to both the September 25, 2020 stipulations and the November 6, 2020 Findings of Fact and Conclusions of Law. Our record contains both the original and amended Findings of Fact and Conclusions of Law. Because the original Findings of Fact and Conclusions of Law contains the un-redacted exhibit containing protected information, we, on our own motion, order the un-redacted exhibit **SEALED**. Rule 2.7, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

DECISION

The Judgment and Sentence of the district court is **VACATED** and the matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. The Clerk of this Court shall **SEAL** the un-redacted Enrollment Verification appended to the original Findings of Fact and Conclusions of Law filed November 16, 2020. 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 K. HOLMES, DISTRICT JUDGE**

**APPEARANCES AT TRIAL
AND REMAND**

RICHARD O'CARROLL
ATTORNEY AT LAW
2171 N. VANCOUVER AVE.
TULSA, OK 74127

SCOTT TROY
ATTORNEY AT LAW
406 S. BOULDER AVE.
SUITE 405
TULSA, OK 74103
ATTORNEYS FOR DEFENDANT

**APPEARANCES ON APPEAL
AND REMAND**

KATRINA CONRAD-LEGLER
APPELLATE DEFENSE
COUNSEL
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

STEPHEN KUNZWEILER
DISTRICT ATTORNEY
KEVIN GRAY
ASST. DISTRICT ATTORNEYS
500 SOUTH DENVER
SUITE 900
TULSA, OK 74103
ATTORNEYS FOR STATE

MIKE HUNTER
ATTORNEY GENERAL
OF OKLAHOMA
TESSA L. HENRY
JENNIFER CRABB
ASST. ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

ERIK GRAYLESS
FIRST ASSISTANT
DISTRICT ATTORNEY OF
TULSA COUNTY
500 S. DENVER AVE.
SUITE 900
TULSA, OK 74103
APPEARED AT STATUS
CONFERENCE

OPINION BY: ROWLAND, V.P.J.

KUEHN, P.J.: Recuse
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

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

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 a conviction for first degree manslaughter 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 this crime on the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the homicide 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 *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 Concur); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concur) (unpublished).