

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

SHAWN LEE MCDANIEL,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2017-357

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

APR 29 2021

**JOHN D. HADDEN
CLERK**

OPINION

ROWLAND, VICE PRESIDING JUDGE:

Appellant Shawn Lee McDaniel appeals his conviction in Muskogee County District Court, Case No. CF-2015-249, for First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7(A). The Honorable Thomas H. Alford, District Judge, presided over McDaniel's jury trial and sentenced him, in accordance with the jury's verdict, to life imprisonment. McDaniel raises seven issues for review. His jurisdiction challenge, contesting the State's jurisdiction to prosecute him, requires relief. We address only that claim and find his other claims are moot.

This appeal turns on whether the murder victim was an Indian as defined by federal law, and whether the alleged crime was

committed within Indian country as that term is defined by federal law. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to the federal government.

1. Controlling Law: *McGirt v. Oklahoma*

In *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020), the Supreme Court held that land set aside for the Muscogee-Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation remains in existence today for purposes of federal criminal law because Congress has never explicitly disestablished it. Although the case now before us involves the lands of the Cherokee Nation, *McGirt's* reasoning is nevertheless controlling.

2. Jurisdiction

Federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on an Indian reservation. 18 U.S.C. §§ 1152, 1153; *McGirt*, 140 S.Ct. at 2479-80. The charge of first degree murder filed against McDaniel in this case fits squarely within the crimes subject to exclusive federal jurisdiction. See *State v. Klindt*, 1989 OK CR 75, ¶

3, 782 P.2d 401, 403 (“[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.”)

3. Two Questions Upon Remand

A. McDaniel’s Status as Indian

After *McGirt* was decided, this Court, on August 19, 2020, remanded this case to the District Court of Muskogee County for an evidentiary hearing. We directed the District Court 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, namely within the boundaries of the Cherokee 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 29, 2020, the parties appeared for an evidentiary hearing before the Honorable Bret Smith, District Judge. The District Court admitted the parties’ joint stipulation, acknowledged the presence of the Cherokee Nation’s deputy attorney general appearing

as amicus curiae, and accepted the amicus brief filed on behalf of the tribe. The joint stipulation provided that: (1) the charged crime occurred within the historic boundaries of the Cherokee Nation; (2) the victim has some Indian blood; (3) the victim was a recognized citizen of the Cherokee Nation on the date of his death; and (4) the Cherokee Nation is a federally recognized tribe.

On March 12, 2021, the District Court filed its Second Amended Findings of Fact and Conclusions of Law. The District Court found the facts recited above in accordance with the joint stipulation. The District Court correctly concluded that, on the date of his death, the victim, Billy Fools, was an Indian under federal law.¹ We adopt this ruling.

B. Whether the Crime Was Committed in Indian Country

As to the second question on remand, whether the crime was committed in Indian country, the stipulation of the parties was less dispositive. They acknowledged only that the charged crime occurred within the historical geographic area of the Cherokee Nation as

¹ In its Supplemental Brief after remand, the State “accepts” the District Court’s findings and conclusions concerning the victim’s Indian status.

designated by various treaties. At the evidentiary hearing, the State took no position on whether Congress established a reservation for the Cherokee Nation or whether Congress ever erased those boundaries and disestablished the reservation. Based on the parties' stipulation and the materials submitted by McDaniel and the Cherokee Nation at the evidentiary hearing, the District Court concluded that Congress established a reservation for the Cherokee Nation, that the charged crime against McDaniel occurred within the boundaries of that reservation, and that Congress never disestablished the Cherokee Nation Reservation. We agree. *See Spears v. State*, 2021 OK CR 7, ¶¶ 11-15, ___P.3d___ (holding Congress established a reservation for the Cherokee Nation and it remains intact because Congress has not disestablished it). Hence, for purposes of federal criminal law, the land upon which the parties agree McDaniel committed the crime is Indian country.²

While the State concedes that the victim was an Indian under federal law and that the charged crime occurred within Indian

²In its Supplemental Brief after remand, the State "accepts" the District Court's findings and conclusions concerning reservation status of the crime's situs.

country, the State maintains that federal jurisdiction over crimes committed against Indians in Indian Country pursuant to 18 U.S.C. §§ 1152 is not exclusive. The State argues in its Supplemental Brief that Oklahoma has concurrent jurisdiction with federal courts over crimes committed by non-Indian defendants against Indian victims in Indian country. We rejected the State's same argument regarding concurrent jurisdiction in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, ___P.3d___. Under the analysis in *McGirt*, we must therefore hold that the District Court of Muskogee County was without jurisdiction to prosecute McDaniel. Accordingly, we grant McDaniel's Proposition 1.

DECISION

The Judgment and Sentence of the district court is **VACATED** and the matter 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 **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 BRET SMITH, 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.: 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

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

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 a first degree murder conviction from the District Court of Muskogee County. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of the victim and the location of this crime within the historic boundaries of the Cherokee Reservation. 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__ that Congress never disestablished the Cherokee Reservation. We should find instead no abuse of discretion based on the record evidence presented.

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).