

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

JOHNNY EDWARD MIZE, II,)
)
 Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2019-68

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 25 2021

JOHN D. HADDEN
CLERK

O P I N I O N

ROWLAND, VICE PRESIDING JUDGE:

Appellant Johnny Edward Mize, II, appeals from his conviction in Tulsa County District Court, Case No. CF-2017-3891, for First Degree Manslaughter (Heat of Passion), in violation of 21 O.S.2011, § 711(2). The Honorable Dawn Moody, District Judge, presided over Mize's jury trial and sentenced him to twenty-five years imprisonment. Mize appeals raising the following issues:

- (1) whether the evidence was insufficient to disprove self-defense beyond a reasonable doubt;
- (2) whether the trial court gave unnecessary jury instructions which confused and mislead the jury;
- (3) whether the prosecutor injected personal opinion into closing arguments and vouched for the credibility of a State's witness;

- (4) whether the State of Oklahoma had jurisdiction to prosecute him;
- (5) whether he received the effective assistance of trial counsel;
- (6) whether his sentence was excessive; and
- (7) whether cumulative error requires relief.

We find relief is required on Mize's jurisdictional challenge in Proposition 4, rendering his other claims moot. Mize 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) the Indian status of his victim, Jake Ulrich, 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 September 25, 2020, the parties appeared before the Honorable Tracy L. Priddy for a status conference. The parties agreed at the status conference and entered written stipulations in which they agreed: (1) that the victim, Jake Ulrich, had some Indian blood; (2) that he was a registered citizen of the Cherokee Nation on the date of the charged offense; (3) that the Cherokee Nation is a federally recognized tribe; and (4) that the charged crime occurred within the Muscogee Creek Reservation. The district court accepted the parties' stipulations.

On November 16, 2020, the District Court filed its Findings of Fact and Conclusions of Law. The District Court found the facts recited above in accordance with the stipulations. The District Court concluded that the victim, Jake Ulrich, was an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee Creek Reservation. The District Court's findings are supported by the record.

While the State conceded that the victim was an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee Creek Reservation, the State did not

concede that the federal courts have exclusive jurisdiction over crimes committed against Indians in Indian Country pursuant to 18 U.S.C. §§ 1152. Rather, it argued that the State has concurrent jurisdiction with federal courts over crimes committed by non-Indian defendants against Indian victims in Indian Country. We rejected the State's argument regarding concurrent jurisdiction in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, ___P.3d___. Based upon this precedent, we reject the State's argument regarding concurrent jurisdiction.

The District Court of Tulsa County did not have jurisdiction to prosecute Mize and accordingly, we grant relief on Proposition 4.

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 TULSA COUNTY
THE HONORABLE DAWN MOODY, DISTRICT JUDGE**

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OPINION BY: ROWLAND, V.P.J.

KUEHN, P.J.: Concur
LUMPKIN, J.: Concur in Results
LEWIS, J.: Specially 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.

LEWIS, JUDGE, SPECIALLY CONCURRING:

I write separately to note that I am bound by my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ____. Following the precedent of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Oklahoma has no jurisdiction over persons who commit crimes against Indians in Indian Country. This crime occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, the crime occurred against Indian victims, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over the appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., SPECIALLY CONCURS:

Today's decision dismisses a first degree manslaughter conviction 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 the victim 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).