

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

ROBERT WILLIAM PERRY, II

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2020-46

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

APR -1 2021

**JOHN D. HADDEN,  
CLERK**

**SUMMARY OPINION**

**LEWIS, JUDGE:**

Robert William Perry, II, Appellant, was tried by jury and found guilty of five counts of sexual abuse of a child under 12, in violation of 21 O.S.Supp.2014, 843.5 (counts 1, 2, and 4-6 of the information) in the District Court of Tulsa County, Case No. CF-2018-3720, before the Honorable Kelly Greenough, District Judge. The jury set punishment at, count one, thirty-five years, count two, forty years, and counts four, five and six, life imprisonment on each count. Judge Greenough sentenced accordingly ordering that the sentences for counts one, four, five and six be served concurrently to each other and that count two be served consecutively with those counts. Perry filed a direct appeal and, thereafter a supplemental

brief and motion for evidentiary hearing arguing that the State of Oklahoma did not have subject matter jurisdiction to prosecute him.

We find relief is required on Perry's jurisdictional challenge. Perry's claim is supported by 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S.Ct. 2452 (2020).

Because there was insufficient evidence in the original record and Perry raised sufficient proof in his motion for evidentiary hearing, this Court remanded this case to the District Court of Tulsa County on October 7, 2020, for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Perry's status as an Indian; and (b) whether the crimes occurred within the boundaries of the Muscogee (Creek) Nation Reservation. Our order provided that, if the parties agreed upon evidentiary matters supporting the questions raised, the parties could enter into written stipulation setting forth those facts.

The parties appeared at the Tulsa County District Court before the Honorable Tracy L. Priddy, District Judge, on November 5, 2020, and made the following stipulations regarding question one, (1) that evidence would show that Perry became a registered citizen of the Muscogee (Creek) Nation on November 10, 2011, and was so

registered at the time of the commission of these crimes; (2) that evidence would show that Perry has a 1/128 quantum of Creek blood; and finally (3) evidence would show that the Muscogee (Creek) Nation is a federally recognized tribe. Regarding question two, the parties stipulated that the evidence would show that the location of the crimes were within the historical boundaries of the Muscogee (Creek) Nation Reservation.

The trial court filed its findings of fact and conclusions of law on November 16, 2020. The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Perry is an Indian under law and that the crimes occurred within the boundaries of the Muscogee (Creek) Nation Reservation. The District Court's findings are supported by the record. The ruling in *McGirt* governs the case and requires us to find the District Court of Tulsa County did not have jurisdiction to prosecute Perry. Accordingly, we hold that Perry's jurisdictional challenge is supported and this case should be dismissed.

**DECISION**

The judgment and sentence of the District Court is **REVERSED AND 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.

**APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE KELLY GREENOUGH, DISTRICT JUDGE**

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

**ROWLAND, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:**

I concur in the result of today's opinion. However, consistent with my separate opinion in *Bosse v. State*, 2021 OK CR 3, \_\_ 3d \_\_. I would find that the State lacked territorial jurisdiction and not subject matter jurisdiction.

**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.<sup>1</sup> The result seems to be some form of "social

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<sup>1</sup> 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 five separate convictions for sexual abuse of a child under 12 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 the crimes on the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the child sexual abuse 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).