



ORIGINAL

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

JOSHUA LEE PURDOM,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2019-854

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 23 2021

JOHN D. HADDEN
CLERK

OPINION

HUDSON, VICE PRESIDING JUDGE:

Appellant, Joshua Lee Purdom, was convicted at a jury trial of Counts 1, 3 and 4: Assault and Battery With a Deadly Weapon, in violation of 21 O.S.2011, § 652; Count 2: Kidnapping, in violation of 21 O.S.Supp.2012, § 741; Count 5: Sodomy By Force or Fear, in violation of 21 O.S.Supp.2017, § 888; Count 6: Rape in the First Degree, in violation of 21 O.S.Supp.2017, § 1114; and Count 7: Feloniously Pointing a Firearm, in violation of 21 O.S.Supp.2017, § 1289.16, in the District Court of Hughes County, Case No. CF-2018-93. The jury recommended sentences of seven years imprisonment each on Counts 1, 3, 4 and 7; five years imprisonment on Count 2;

twelve years imprisonment on Count 5; and eighteen years imprisonment on Count 6.

The Honorable Timothy Olsen, District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdicts. Judge Olsen ordered Counts 1—4 to run concurrently but consecutively with Counts 5—7, resulting in a total of forty-four years imprisonment. This appeal followed. Appellant raises three propositions of error in his brief in chief filed with this Court on May 21, 2020. The State's response brief was thereafter filed on August 13, 2020.

On September 24, 2020, Appellant filed with this Court a Motion to Dismiss For Lack of Jurisdiction or, Alternatively, Request For An Evidentiary Hearing. Appellant asserts in the motion that the victim, Melinda Purdom, is Indian; the charged crimes occurred within the Creek Reservation; and thus, under federal law, the District Court had no jurisdiction over this case. Appellant cites *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and 18 U.S.C. §§ 1151-1153 in support of this proposition. Appellant also cites *Cox v. State*, 2006 OK CR 51, ¶ 8, 152 P.3d 244, 248, for the proposition that jurisdiction is never waived and can be raised at any time.

In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Supreme Court held that the Creek Reservation in eastern Oklahoma was never disestablished by Congress and, thus, constitutes Indian Country for purposes of federal criminal jurisdiction. The parties in the present case have stipulated during remanded proceedings before the District Court that the victim was Indian and the crimes in this case occurred on the Creek Reservation. In today's decision, we uphold the District Court's adoption of these stipulations and reject the State of Oklahoma's claim that it has concurrent jurisdiction along with the United States to prosecute crimes committed on the Creek Reservation by non-Indian defendants against Indian victims. We therefore reverse and remand Appellant's convictions with instructions to dismiss.

I. Appellant's Jurisdictional Claim.

Pursuant to *McGirt*, Appellant's claim raises two separate questions: (a) the Indian status of the victim, Melinda Purdom, and (b) whether the crimes occurred in Indian Country, namely within the boundaries of the Creek Reservation. On January 20, 2021, we remanded this case to the District Court for an evidentiary hearing with instructions to determine whether the victim had some Indian

blood and was recognized as an Indian by a tribe or the federal government. The District Court was further ordered to determine whether the crimes in this case occurred in Indian Country. In so doing, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. Finally, the District Court was ordered to file written findings of fact and conclusions of law with this Court.

II. The Remanded Proceedings.

A hearing was held in this case on March 9, 2021, before the Honorable Timothy Olsen, District Judge. An order containing the District Court's findings of fact and conclusions of law from that hearing was timely filed with this Court along with a transcript of the hearing. The record shows the parties stipulated that the victim has 1/8 degree Indian blood of the Cherokee Nation Tribe; that the victim

was an enrolled member of the Cherokee Nation at the time of the crime; and that the charged crimes in this case occurred on the Creek Reservation. In its written findings of fact and conclusions of law, the District Court accepted and found the facts as stipulated by the parties. On these facts, the District Court concluded that the victim was an Indian for purposes of federal law based on the percentage of Indian blood. The District Court further found the victim was recognized as an Indian either by the federal government or a tribe and that the Creek Reservation is Indian Country for purposes of federal law.

III. Post-Remand Supplemental Briefs.

Both Appellant and the State filed with this Court supplemental briefs after remand. In its brief, the State urges in light of the stipulations that it has concurrent jurisdiction with the federal government over the charged crimes in this case. Specifically, the State claims it has concurrent jurisdiction over all crimes committed by non-Indians against Indian victims in Indian Country. Alternatively, the State requests in its brief that should this Court find Appellant is entitled to relief based on the District Court's findings, this Court should stay any order reversing the convictions for thirty days

so that the appropriate authorities can review his case, determine whether it is appropriate to file charges and take custody of Appellant. Cf. 22 O.S.2011, § 846.

In his brief, Appellant opposes the State's concurrent jurisdiction theory. Appellant argues this claim substantively lacks merit. Appellant urges that the federal court has exclusive jurisdiction over Appellant's crimes because no federal law authorizes state jurisdiction in this case.

IV. Analysis.

We find that under the law and evidence relief is warranted. The District Court's findings of fact and conclusions of law are fully supported by the stipulations jointly made by the parties at the remanded hearing. Appellant has thus met his burden of establishing the victim's status as an Indian, having 1/8 degree Cherokee blood and being a member of the Cherokee Nation Tribe at the time of the crime. See *Parker v. State*, 2021 OK CR 17, ¶ 36, __P.3d__. Appellant has also met his burden of proving that the crimes in this case occurred on the Creek Reservation and, thus, occurred in Indian Country for purposes of federal law. See 18 U.S.C. § 1151; *McGirt*, *supra*.

The State of Oklahoma does not have jurisdiction to prosecute Appellant in this matter.¹ This Court recently rejected the State's concurrent jurisdiction argument in *Roth v. State*, 2021 OK CR 27, __P.3d__ and we apply that holding here.² To summarize, federal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country. 18 U.S.C. §§ 1151-1153. Title 18 U.S.C. § 1152, the Indian Country Crimes Act, specifically governs Appellant's case. Under Section 1152, the United States has jurisdiction in Indian Country over crimes that non-Indians commit against Indians. *McGirt*, 140 S. Ct. at 2479; *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946). Section 1152 "extends the general criminal laws of federal maritime and enclave

¹ The State preserved its concurrent jurisdiction argument by referencing it during the remanded hearing in District Court.

² This Court first rejected the State's concurrent jurisdiction argument in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, 484 P.3d 286, 294-95, and *Ryder v. State*, 2021 OK CR 11, ¶¶ 13-28, 489 P.3d 528. However, we recently overruled *Bosse* and *Ryder* on other grounds in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, __P.3d__ (holding that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction). Based on *Matloff*, we vacated the previous orders and judgments granting post-conviction relief, and withdrew the accompanying opinions, in *Bosse* and *Ryder*. See *Ryder v. State*, 2021 OK CR 25, __P.3d__; *Bosse v. State*, 2021 OK CR 23, __P.3d__. *Matloff* has no applicability to the present case because this is a direct appeal. However, our full analysis of the concurrent jurisdiction issue in *Roth* is now controlling authority on this issue in Oklahoma and should be relied upon exclusively by the bench, bar and public going forward.

jurisdiction to Indian country, except for those offenses committed by one Indian against the person or property of another Indian.” *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (internal quotation omitted).

“Historically, based on principles of federal preemption and Indian sovereignty, ‘criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply.’” *United States v. Burch*, 169 F.3d 666, 668-69 (10th Cir. 1999) (quoting *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)). Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances. “Upon cession of such jurisdiction to a state, federal law no longer preempts the state’s exercise of its inherent police power over all persons within its borders, and the state is automatically vested with jurisdiction in the absence of state law to the contrary.” *Burch*, 169 F.3d at 671. The State of Oklahoma, however, has never asserted its right under existing federal law to assume jurisdiction over any portion of Indian Country within its borders. *McGirt*, 140 S. Ct. at

2478. *McGirt* specifically held that federal law thus applied in Oklahoma “according to its usual terms” because the State had never complied with the requirements to assume jurisdiction over the Creek Reservation and Congress had never expressly conferred jurisdiction on Oklahoma. *See id.* Pursuant to *McGirt*, the State therefore has no jurisdiction as part of its inherent police power over the crimes committed in this case. Under federal law, jurisdiction over Appellant’s crimes in the present case rest exclusively with the federal government.

We cannot ignore, or attempt to bypass, any aspect of *McGirt* based on the State’s simple assertion of concurrent jurisdiction. It is the Supreme Court’s “prerogative alone to overrule one of its precedents[,]” *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016), not ours. Adoption of the State’s novel theory of concurrent jurisdiction is a political matter which may be addressed by Congress, not this Court. *See Negonsott*, 507 U.S. at 103; *United States v. John*, 437 U.S. 634, 652-54 (1978). We have no choice but to dismiss this case for lack of jurisdiction under the Supremacy Clause, *see* Article VI, Clause 2 of the United States Constitution, and Article 1, § 1 of the Oklahoma Constitution.

Based upon the foregoing, we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter. The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of Hughes County with instructions to dismiss the case. This resolution renders moot the propositions of error raised in Appellant's brief in chief.³

DECISION

The Judgment and Sentence of the District Court is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The **MANDATE** is not to be issued until twenty (20) days from the delivery and filing of this decision.⁴

AN APPEAL FROM THE DISTRICT COURT OF HUGHES COUNTY THE HONORABLE TIMOTHY OLSEN, DISTRICT JUDGE

³ 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. *E.g.*, *Hogner v. State*, 2021 OK CR 4, __P.3d__ (Hudson, J., Specially Concurs).

⁴ By withholding issuance of the mandate for twenty days, the State's request for time to determine further prosecution is rendered **MOOT**. The State's separate request for abatement of this appeal, tendered in its May 24, 2021, supplemental brief, is **DENIED**. However, this ruling is without prejudice to any future request by the State to stay the mandate in this case pending the timely filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

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OPINION BY: HUDSON, V.P.J.

ROWLAND, P.J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULTS

LEWIS, J.: SPECIALLY CONCUR

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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.

LEWIS, J., SPECIALLY CONCURRING:

I specially concur in the reversal of this conviction with instructions to dismiss. I join that portion of the Court's opinion holding that the State of Oklahoma has no concurrent jurisdiction to prosecute these crimes against an Indian in Indian Country. 18 U.S.C. § 1152. *Roth v. State*, 2021 OK CR 27, __ P.3d __ (Lewis, specially concurring).