

ORIGINAL



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

EMMITT G. SAM,)
)
 Appellant,)
v.)
)
THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2017-1300

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC -2 2021

JOHN D. HADDEN
CLERK

OPINION

LEWIS, JUDGE:

Emmitt G. Sam, Appellant, was tried by jury and convicted of Count 1, murder in the first degree, in violation of 21 O.S.Supp.2012, § 701.7, Count 3, robbery with a firearm, in violation of 21 O.S.2011, § 801, and Count 4, robbery with a firearm, in violation of 21 O.S.2011, § 801, in Tulsa County District Court, Case No, CF-2016-3789, before the Honorable Doug Drummond, District Judge. The jury set punishment at life imprisonment and a \$10,000.00 fine on Count 1, seven (7) years imprisonment and a \$3,000.00 fine on Count 3, and seven (7) years imprisonment and a fine of \$3,360.25 on Count 4. Judge Drummond sentenced accordingly and ordered that the

sentences be served consecutively with credit for time served.¹ Appellant appeals from these convictions and sentences raising ten propositions of error, we find that the issues raised in Propositions Six and Seven require that the convictions be reversed and remanded with instructions to dismiss.

In Proposition Six Appellant claims the District Court lacked jurisdiction to try him and in Proposition Seven Appellant claims that trial counsel was ineffective for failing to properly preserve this issue at trial (along with a motion to supplement the record and request for an evidentiary hearing). Appellant claims that he is a citizen of the Cherokee Nation and the crimes occurred within the boundaries of the Muscogee (Creek) Nation Reservation. Appellant, in his direct appeal relies on *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which was affirmed by the United States Supreme Court in *Sharp v. Murphy*, 591 U.S. ___, 140 S.Ct. 2412 (2020) for the reasons stated in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020).

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred within the historical

¹ These crimes require serving 85% of the sentences before becoming eligible for parole consideration.

boundaries of the Muscogee (Creek) Nation Reservation. These issues required fact-finding; therefore, we remanded the case to the District Court of Tulsa County, for an evidentiary hearing which was completed on February 23, 2021, by the Honorable Tracy Priddy, District Judge. The trial court filed its findings of fact and conclusions of law with this Court on July 1, 2021.

By stipulation, the parties agreed that the crimes for which Appellant was convicted occurred within Indian Country as they occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation. *See McGirt*, 140 S.Ct. at 2468. The parties disputed whether Appellant is Indian for purposes of establishing federal jurisdiction over the crimes he committed in Indian Country.

In determining whether a person is an Indian for purposes of the federal Indian Major Crimes Act (MCA), two questions must be answered, (1) whether a defendant has some Indian blood; and (2) whether a defendant was recognized as an Indian by a tribe or the federal government. *State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401, 403; *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001). On appeal, the Appellant bears the burden of producing *prima facie* evidence that he has some Indian blood and that he was recognized as

an Indian. *Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d at 403. This Court considers a defendant's status as an Indian at the time the offense was committed. *See United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015).

The parties stipulated that Appellant has a blood quantum of 41/128ths of Cherokee Indian Blood and that he became a citizen of the Cherokee Nation on August 13, 2018 [over two years after the commission of the crimes]. The State disputed the claim that Appellant was a recognized member of an Indian tribe at the time he committed these crimes.

We follow the rule that a person may be Indian for purposes of federal criminal jurisdiction whether or not the person is formally enrolled in the federally recognized tribe of which he claims membership. *Parker v. State*, 2021 OK CR 17, ¶¶ 36, 40, ___ P.3d ___. We follow the determining factors that most courts consider in some respects in determining recognition. *Id.* These factors are usually referred to as the *St. Cloud* factors, *Id.* *See St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988). The factors are non-racial and are listed in declining order of importance.

- 1) enrollment in a tribe;

- 2) government recognition formally and informally through providing the person assistance reserved only to Indians;
- 3) enjoying benefits of tribal affiliation; and
- 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

Id. These factors merely guide the analysis of whether a person is recognized as an Indian. *Id.* See also *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004), *vacated on other grounds by Drewry v. United States*, 543 U.S. 1103 (2005).

The trial court used this analysis to inform its decision in this case. The trial court was faced with a defendant who was seventeen at the time he committed these crimes, but had not been granted formal membership into a federally recognized tribe. The trial court understood that lack of tribal membership is not dispositive. See *United States v. Bruce*, 394 F.3d 1215, 1224-25 (9th Cir. 2005) At the evidentiary hearing, Appellant presented witnesses to support his claim that he is a recognized member of the Cherokee Nation.

Appellant's mother testified that she was an enrolled member of the Cherokee Nation and has been a member of the tribe since birth. She testified that Appellant was raised in a predominantly Cherokee community until they moved to Tulsa in 2005. Appellant spent time

with his paternal grandmother who spoke Cherokee as her primary language. Even after moving to Tulsa he spent time with his Cherokee relatives and attended Cherokee social events.

When Appellant was one year old, he was removed from the home, because of his abusive father and he was required to be in an Indian Child Welfare Act compliant placement. Appellant's father died when Appellant was young and his uncle was influential in his life. His uncle was a chief in the family's stomp grounds.

The family utilized W.W. Hastings Hospital, where Appellant was born. Hastings hospital cares exclusively for federally recognized tribal members. The family also used Wilma Mankiller Health Center, and the Indian Healthcare Resource Center of Tulsa. As a juvenile, Appellant received services reserved only to Indians because of his mother's tribal membership.

Throughout his life, Appellant received school benefits such as tutoring, school supplies and counseling, which were funded by a program only available to tribal members. He was also involved in spring break and summer camps provided solely to Indians during his youth, due to his treatment at the Indian Health Resource Center.

Appellant's mother applied for membership for Appellant several times, but the applications were unsuccessful due to Appellant's father's absence on the birth certificate and due to his father being deceased. Without the father's involvement in the application process the applications were returned. Appellant's mother applied again and the application was granted in 2018.

In rebuttal, the State presented evidence that Appellant was a member of an African American street gang, although Native American street gangs were available to him. The State also presented evidence that Appellant did not receive services through the Cherokee Nation in his own name, but would have received benefits through his mother. The Cherokee Nation only had information about one membership application submitted by an unknown person when Appellant was about 11 years old.

The trial court found "that from birth until shortly before the offenses were committed, . . . [Appellant] received assistance reserved only for Indians, was subject to the Indian Child Welfare Act . . . , enjoyed benefits through tribal affiliation and participated in Indian social life with his extended family." The trial court concluded "that

Appellant was formally and informally recognized as an Indian by a tribe or the federal government at the time of the offense.”

We find that the trial court did not abuse its discretion in its findings of fact and conclusions of law as the record supports the findings and conclusions. We adopt the trial court’s findings of fact and conclusions of law. Appellant presented sufficient evidence to meet his burden of producing *prima facie* evidence that he has some Indian blood and that he was recognized as an Indian. The State’s evidence was insufficient to overcome Appellant’s *prima facie* evidence.

The crime for which Appellant was convicted occurred within the boundaries of a recognized Indian reservation, and Appellant is a member of a federally recognized tribe. We therefore find that the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter. The Judgments and Sentences in this case are hereby reversed and the case remanded to the District Court of Tulsa with instructions to dismiss.

DECISION

The Judgments and Sentences of the District Court of Tulsa County are **REVERSED** and the case 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 **STAYED** for twenty (20) days from the delivery and filing of this decision.

**APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE**

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

HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

Today's decision dismisses convictions for first degree murder and robbery with a firearm 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*. The record shows Appellant had some Indian blood and was recognized as an Indian by a tribe and/or the federal government at the time of the crimes. The record further shows the crimes in this case took place within the historic boundaries of the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for these crimes lies. *See Roth v. State*, 2021 OK CR 27, __P.3d__. 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, e.g., State v. Lawhorn*, 2021 OK CR 37, __P.3d__ (Hudson, V.P.J., Specially Concur); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (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 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

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 history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all

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).

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.