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SUMMARY OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (APRIL 29, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SONNY RAYE McCOMBS,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

Case No. F- 2017-1000

Before: Dana KUEHN, Presiding Judge,
Scott ROWLAND, Vice Presiding Judge,
Gary L. LUMPKIN, Judge, David B. LEWIS, Judge,
Robert L. HUDSON, Judge.

SUMMARY OPINION

LEWIS, JUDGE:

Sonny Raye McCombs, Appellant, was tried by jury and convicted of, count one, second degree robbery in violation of 21 O.S.2011, § 799; count two, use of a vehicle in the discharge of a weapon in violation of 21 O.S.2011, § 652(B); count three, possession of a firearm after former conviction of a felony in violation of 21 O.S. Supp. 2014, § 1283; count five, larceny of merch-

andise from a retailer in violation of 21 O.S. Supp. 2016, § 1731, and count six, obstructing an officer in violation of 21 O.S.Supp.2015, § 540, in the District Court of Tulsa County, Case No. CF-2016-6878. In accordance with the jury's recommendation the Honorable Doug Drummond, District Judge, sentenced McCombs to ten (10) years on count one, twenty-five (25) years on count two, five (5) years on count three, thirty (30) days on count five, and one (1) year on count six. Counts one, two, and three were ordered to be served consecutively and counts five and six were ordered to be served concurrently with each other and concurrently with count one. McCombs filed an appeal from the Judgments and Sentences raising twelve propositions of error. We find that the claim raised in his eleventh proposition entitles McCombs to relief, thus the remaining propositions are moot.

In his eleventh proposition, McCombs claims the District Court abused its discretion by failing to grant his motion to dismiss for lack of subject matter jurisdiction. McCombs argues that he is a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the reservations of the Cherokee Nation and the Muscogee (Creek) Nation.[1] McCombs, 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).

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[1] Counts 1 and 5 occurred within the boundaries of the Muscogee (Creek) Nation Reservation and Counts 2, 3, and 6 occurred within the boundaries of the Cherokee Nation Reservation.

McCombs' claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred in Indian Country. This Court remanded the case back to the District Court because we determined that his claim required fact-finding on the two separate questions.

An evidentiary hearing was timely held before the Honorable Tracy Priddy, District Judge, and Findings of Fact and Conclusions of Law were timely filed with this Court. In its findings of fact, the District Court found that McCombs has 9/64 degree of Muscogee (Creek) blood and has been a registered member of the Muscogee (Creek) Nation since October 11, 2005. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.

The District Court also found that counts one and five occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation, and counts two, three, and six occurred within the historical boundaries of the Cherokee Nation Reservation.

The evidence established that neither the Muscogee (Creek) Nation Reservation nor the Cherokee Nation Reservation have been expressly disestablished by Congress. Therefore, the District Court concluded, and we agree, that the crimes occurred in Indian Country. *See McGirt*, 140 S.Ct. at 2468; 18 U.S.C. § 1152 and 1153; *Spears v. State*, 2021 OK CR 7, ¶ 15, ___ P.3d ___; and *Hogner v. State*, 2021 OK CR 4, ¶ 18, ___ P.3d ___.

We therefore find that the State of Oklahoma did not have jurisdiction to prosecute McCombs in this matter.

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.

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

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Opinion by: Lewis, J.
Kuehn, P.J.: Concur
Rowland, V.P.J.: Concur
Lumpkin, J.: Concur in Results
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 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

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[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 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).

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 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 convictions from the District Court of Tulsa County for second degree robbery, drive-by shooting, felonious possession of a firearm, larceny of merchandise from a retailer and obstructing an officer. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of these crimes within the historic boundaries of the Creek and Cherokee Reservations. 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 ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, that Congress never disestablished the Cherokee Reservation. We should find instead no abuse of discretion based on the record evidence presented. I also join Judge Rowland's observation in his special writing in *Hogner* that the Major Crimes Act does not affect the State of Oklahoma's subject matter jurisdiction in criminal cases but, rather, involves the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority. *Id.* at ¶ 4 (Rowland, V.P., Concurring in Result).

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).

DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA, FINDINGS OF FACT AND CONCLUSIONS OF LAW (DECEMBER 3, 2020)

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff/Appellee,

v.

SONNY RAY McCOMBS,

Defendant/Appellant.

Tulsa County District Court Case No. CF-2016-6878

Court of Criminal Appeals Case No. F-2017-1000

Before: Tracy PRIDDY, District Court Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on October 15, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 24, 2020. The State appeared by and through Assistant Attorney General Julie Pittman. Defendant, who is incarcerated, appeared by and through the Tulsa County Public Defender's office by Stuart W. Southerland. Erik Grayless appeared for

the Tulsa County District Attorney's Office. The Court makes its findings based upon the stipulations and evidence presented by the parties, review of the pleadings and attachments in this Court and the Oklahoma Court of Criminal Appeals, and the briefs and argument of counsel.

In Proposition Eleven of his appeal, Appellant claims the District Court lacked jurisdiction to try him as he is a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the Muscogee (Creek) Nation, although he later claimed that count two was committed within the boundaries of the Cherokee Nation.

In the August 24, 2020, Order Remanding for Evidentiary Hearing, the Oklahoma Court of Criminal Appeals directed this Court as follows:

> The District Court shall address only the following issues:
>
> First, the Appellant's status as an Indian. The District Court must determine whether (1) Appellant has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.
>
> Second, whether crimes occurred within the boundaries of the Creek Nation. With regard to crimes occurring in the Cherokee Nation, the District Court is directed to follow the analysis set out in *McGirt* [*v. Oklahoma*, 140 S.Ct. 2452 (2020)], determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether

Congress specifically erased those boundaries and disestablished the reservation.[1]

The parties filed written stipulations.[2] The parties stipulated and agreed as follows:

1. As to the Defendant/Appellant:

   a. Defendant/Appellant, Sonny Raye McCombs, has 9/64 degree of Muscogee (Creek) blood.

   b. Defendant/Appellant was a registered member of the Muscogee (Creek) Nation at the time of the crimes (on December 15, 2016). Defendant/Appellant has been a registered member of the Muscogee (Creek) Nation since October 11, 2005.

   c. The Muscogee (Creek) Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government.

2. As to the location of the crimes:

   a. In regard to Count 1, Robbery in the Second Degree, the parties agree that the crime occurred on Highway 169 in Tulsa, Oklahoma, near the 21st and Garnett exit. This location is within the boundaries of the Muscogee (Creek) Reservation.

   b. In regard to Count 2, Use of a Vehicle in the Discharge of a Firearm, the parties agree, based on police dash camera foot-

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[1] Order Remanding for Evidentiary Hearing at 4

[2] Exhibit 5, Evidentiary Hearing Stipulations filed October 9, 2020.

age, that the crime occurred near the intersections of East 30th Street North and Harvard as well as Harvard and Apache in Tulsa, Oklahoma. This location is within the historical boundaries of the Cherokee Nation—boundaries set forth in, and adjusted by, the Treaty of New Echota between Cherokee Nation and the United States on December 29, 1835, 7 Stat. 478, the Treaty of 1866 between the Cherokee Nation and the United States on July 19, 1866, 14 Stat. 799, and the agreement of December 19, 1891, between the Cherokee Nation and the United States, which was ratified by an Act of Congress on March 3, 1893, 27 Stat. 612.

c. In regard to Count 3, Possession of a Firearm After Former Conviction of a Felony, the Defendant/Appellant presumably continuously possessed the firearm during the entire string of crimes on December 15, 2016. However, the firearm was visible in the dash camera footage while the Defendant/Appellant discharged the firearm at officers during the chase. Thus, the parties agree that the crime occurred near the intersections of East 30th Street North and Harvard as well as Harvard and Apache in Tulsa, Oklahoma. This location is within the historical boundaries of the Cherokee Nation—boundaries set forth in, and adjusted by, the Treaty of New Echota between

Cherokee Nation and the United States on December 29, 1835, 7 Stat. 478, the Treaty of 1866 between the Cherokee Nation and the United States on July 19, 1866, 14 Stat. 799, and the agreement of December 19, 1891, between the Cherokee Nation and the United States, which was ratified by an Act of Congress on March 3, 1893, 27 Stat. 612.

d. In regard to Count 5, Larceny of Merchandise from a Retailer, the parties agree that the crime occurred at the Academy Sports and Outdoors located at 6120 East 41st Street in Tulsa, Oklahoma. This location is within the boundaries of the Muscogee (Creek) Reservation.

e. In regard to Count 6, Obstructing an Officer, the parties agree that this crime occurred near the Elba Terrace trailer park in Tulsa, Oklahoma. This location is within the historical boundaries of the Cherokee Nation–boundaries set forth in, and adjusted by, the Treaty of New Echota between Cherokee Nation and the United States on December 29, 1835, 7 Stat. 478, the Treaty of 1866 between the Cherokee Nation and the United States on July 19, 1866, 14 Stat. 799, and the agreement of December 19, 1891, between the Cherokee Nation and the United States, which was ratified by an Act of Congress on March 3, 1893, 27 Stat. 612.

f. The parties stipulate that if the Court determines that the treaties referenced herein established a reservation for the Cherokee Nation, and if the Court also concludes that Congress never explicitly erased those boundaries and disestablished the reservation, then the crimes occurred within Indian Country as defined by 18 U.S.C. § 1151(a). The parties further stipulate, pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), that the crimes that were committed within the boundaries of the Creek Reservation were committed within Indian Country as defined by 18 U.S.C. § 1151(a).

Additionally, Defendant/Appellant moved to admit as evidence, Exhibits 1, 2, 3 & 4. These exhibits were admitted into evidence without objection. Finally, Defendant/Appellant filed Defendant's Remanded Hearing Brief Applying *McGirt* analysis to Cherokee Nation Reservation on September 25, 2020.

I. Defendant/Appellant's Status as an Indian.

The State of Oklahoma and Defendant/Appellant have stipulated to Defendant/Appellant's Indian status by virtue of his tribal membership with the Muscogee (Creek) Nation since October 11, 2005 and proof of his blood quantum of 9/64 Creek. Based upon the stipulations provided, the Court specifically finds Defendant/Appellant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. Defendant/Appellant is an Indian.

II. Whether the Crimes Occurred in the Creek Nation.

The State of Oklahoma and Defendant/Appellant stipulated that two of the crimes were committed at locations identified to be within the boundaries of the Muscogee (Creek) Nation. Specifically, the crime of second degree robbery (Count One) and the crime of larceny of merchandise from a retailer (Count Five) were committed within the Muscogee (Creek) nation boundaries. Based upon the stipulations as to Counts One and Five, the Court finds these crimes occurred within the historical boundaries of the Muscogee (Creek) Nation, which is Indian Country as defined by 18 U.S.C. § 1151(a).

III. Whether the Crimes Occurred in the Cherokee Nation.

The State of Oklahoma and Defendant/Appellant stipulated that the remaining crimes for which Defendant/Appellant was convicted, specifically the crime of use of a vehicle in the discharge of a weapon (Count Two), the crime of felon in possession of a firearm (Count Three) and the crime of obstructing an officer (Count Six) were committed at locations that are within the historical boundaries of the Cherokee Nation as set forth in, and adjusted by, the Treaty of New Echota between Cherokee Nation and the United States on December 29, 1835, 7 Stat. 478, the Treaty of 1866 between the Cherokee Nation and the United States on July 19, 1866, 14 Stat. 799, and the agreement of December 19, 1891, between the Cherokee Nation and the United States, which was ratified by an Act of Congress on March 3, 1893, 27 Stat. 612.

Whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).

2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.

3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S.Ct. at 2479.

4. In *McGirt*, the United States Supreme Court noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *Id.* at 2461.

5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.

6. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.

7. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).

8. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S.Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

9. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee

Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

10. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S.Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Ten. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

11. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries

to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

12. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

13. Under *McGirt*, the "most authoritative evidence of [a tribe's] relationship to the land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place." *McGirt*, 140 S.Ct. at 2475-76.

As a result of the treaty provisions referenced above and admitted into evidence by Defendant/ Appellant, related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt*.

Whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1835 Cherokee treaty, diminished only by two express cessions.

2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.

3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.

4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (*i.e.*, the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).

6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.

7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, "Upon Appellant's presentation *of prima facie* evidence as to the Appellant's legal status as an Indian and as to the location of the crimes in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction."[3]

On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S.Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or dis-

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[3] Order Remanding for Evidentiary Hearing at 4.

established the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds Defendant/Appellant is an Indian and that the crimes were committed at locations identified to be within the historical boundaries of the Muscogee (Creek) Nation and also within the historical boundaries of the Cherokee Nation as established by the 1835 and 1866 Treaties with the Cherokee and that those boundaries have not been erased and disestablished by Congress, thus the Cherokee Nation is a reservation and falls within the definition of Indian Country for the purposes of the General Crimes Act, 18 U.S.C. § 1152 and the Major Crimes Act, 18 U.S.C. § 1153.

IT IS SO ORDERED this 2nd day of December, 2020.

/s/ Tracy Priddy
District Court Judge

COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, ORDER REMANDING FOR EVIDENTIARY HEARING (AUGUST 24, 2020)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SONNY RAYE McCOMBS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-2017-1000

District Court Case No. CF-16-6878 CFF

Before: David B. LEWIS, Presiding Judge,
Dana KUEHN, Vice Presiding Judge,
Gary L. LUMPKIN, Judge, Scott ROWLAND, Judge,
Robert L. HUDSON, Judge.

ORDER REMANDING FOR EVIDENTIARY HEARING

Sonny Raye McCombs, Appellant, was tried by jury and convicted of count one, second degree robbery in violation of 21 O.S.2011, § 799; count two, use of a vehicle in the discharge of a weapon in violation of 21 O.S. 2011, § 652(B); count three, possession of a fire-

arm after former conviction of a felony in violation of 21 O.S.Supp.2014, § 1283; count five, larceny of merchandise from a retailer in violation of 21 O.S.Supp, 2016, § 1731, and count six, obstructing an officer in violation of 21 O.Supp.2015, § 540, in the District Court of Tulsa County, Case No. CF-2016-6878. In accordance with the jury's recommendation the Honorable Doug Drummond, District Judge, sentenced Appellant to ten (10) years on count one, twenty-five (25) years on count two, five (5) years on count three, thirty (30) days on count five, and one (1) year on count six.[1] Counts one, two, and three were ordered to be served consecutively and counts five and six were ordered to be served concurrently. Counts five and six were ordered to be served concurrently with count one. Appellant appeals from these convictions and sentences.

In Proposition Eleven Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the Muscogee (Creek) Nation. 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).

In later motions, Appellant claims that some crimes were committed within the boundaries of the Muscogee (Creek) Nation, while others, particularly,

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[1] Appellant must serve 85% of his sentence on count two before becoming eligible for parole consideration.

count two, was committed within the boundaries of the Cherokee nation.

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred in the Creek Nation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Tulsa County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.[2]

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Appellant's presentation of *prima facie* evidence as to the Appellant's legal status as an Indian and as to the location of the crimes in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall then make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues.

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[2] In light of this order, Appellee's request to file a supplemental response filed July 16, 2020 is rendered moot. Appellant's motion for evidentiary hearing filed on July 17, 2020 and amended on August 3, 2020 is moot.

First, the Appellant's status as an Indian. The District Court must determine whether (1) Appellant has some Indian blood, and (2) is recognized as Indian by a tribe or the federal government.[3]

Second, whether crimes occurred within the boundaries of the Creek Nation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony. With regard to crimes occurring in the Cherokee Nation, the District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Appellant, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the

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[3] *See e.g. Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. *See also United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Drewry*, 365 F.3d 957, 960-61 (10th Cir. 2004); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they 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. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law, and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Tulsa County: Appellant's Brief in Chief filed April 19, 2018; and Appellee's Response Brief, filed December 3, 2018.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th day of August, 2020.

/s/ David B. Lewis
Presiding Judge

/s/ Dana Kuehn
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ Robert L. Hudson
Judge

/s/ Scott Rowland
Judge

ATTEST:

/s/ John D. Hadden
Clerk