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**OPINION OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA
(MARCH 18, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DONTA KEITH DAVIS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2019-420

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

ROWLAND, VICE PRESIDING JUDGE:

Appellant Donta Keith Davis appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-2018-1994, for Robbery with a Dangerous Weapon (Count 1), in violation of 21 O.S.2011, § 801 and Assault with a Dangerous Weapon (Count 2), in violation of 21 O.S.2011, § 645, both After Former Conviction of Two or More Felonies. The

Honorable Kelly Greenough, District Judge, presided over Davis's jury trial and sentenced him, in accordance with the jury's verdict, to life imprisonment on each count. Judge Greenough ordered the counts to run consecutively.

Davis appeals raising the following issues:

- (1) whether impermissible voir dire undermined his right to a fair trial;
- (2) whether the State presented evidence in violation of the discovery code;
- (3) whether restrictions on the testimony of expert witnesses operated to undermine his ability to present a defense;
- (4) whether the trial court erred by admitting testimony of two lay witnesses who did not witness the robbery;
- (5) whether the trial court erred in allowing the State to elicit irrelevant and prejudicial evidence;
- (6) whether he received effective assistance of trial counsel;
- (7) whether the pretrial identification process was impermissibly suggestive and unreliable;
- (8) whether prosecutorial misconduct denied him a fair trial;
- (9) whether the trial court erred in denying his request to present alternate perpetrator evidence;
- (10) whether his convictions for both robbery and assault violated 21 O.S.2011, § 11; and

(11) whether his sentences are excessive.

In conjunction with his claim of ineffective assistance of counsel in Proposition 6, Davis filed a motion for an evidentiary hearing under Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). In this motion he asserted that defense counsel was ineffective for failing to raise a jurisdictional defect in his prosecution under 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020). We find relief is required on Davis's jurisdictional challenge in Proposition 6, rendering his other claims moot.

On October 9, 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) Davis's status as an Indian; 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 November 5, 2020, the parties filed a written stipulation in the District Court of Tulsa County in which they agreed: (1) that Davis has some Indian blood; (2) that he was a registered citizen of the Muscogee Creek Nation on the date of the charged offense; (3) that the Muscogee Creek Nation is a federally recognized tribe; and (4) that the charged crime occurred within the Muscogee Creek Reservation. The Honorable Tracy L. Priddy, District Judge, accepted the parties' stipulation.

On November 12, 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 stipulation. The District Court concluded that Davis is an Indian under federal law and that the charged crimes occurred within the boundaries of the Muscogee Creek Reservation. The District Court's findings are supported by the record. The ruling in *McGirt* governs this case and requires us to find the District Court of Tulsa County did not have jurisdiction to prosecute Davis. Accordingly, we grant relief on Proposition 6.

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 KELLY
GREENOUGH, DISTRICT JUDGE**

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OPINION BY: ROWLAND, V.P.J.

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

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 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).

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 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 convictions for robbery with a dangerous weapon and assault with a dangerous weapon 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 these crimes on 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. 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).

**DISTRICT COURT FOR TULSA COUNTY,
STATE OF OKLAHOMA, FINDINGS OF FACT
AND CONCLUSIONS OF LAW
(NOVEMBER 12, 2020)**

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

DONTA KEITH DAVIS,

Defendant/Appellant,

v.

THE STATE OF OKLAHOMA,

Plaintiff/Appellee.

Tulsa County District Court Case No. CF-2019-1994

Court of Criminal Appeals Case No. F-2019-420

Before: Tracy L. PRIDDY, District Judge.

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Pursuant to the remand order of the Oklahoma Court of Criminal Appeals (“OCCA”) issued October 9, 2020, this matter is before the court. The parties informally advised the court that they had agreed and stipulated to facts supporting the issues to be determined and submitted an Agreed Stipulation including attached documentation from the Muscogee (Creek) Nation of Oklahoma Citizenship Board that

was filed on November 5, 2020. Stuart Southerland appeared on behalf of Appellant, Donta Keith Davis, who was not present. Assistant Attorney General Randall Young appeared for Appellee. Tulsa County First Assistant District Attorney Erik M. Grayless also appeared. An evidentiary hearing was deemed unnecessary.

The Appellant, in his motion to remand for evidentiary hearing filed in conjunction with his Brief-in-Chief claims the District Court lacked jurisdiction to try him as he is a citizen of the Muscogee (Creek) Nation and that his crime occurred within the boundaries of the Creek Reservation. Appellant's claim raises two questions: (a) his Indian status, and (b) whether the crime occurred on the Creek Reservation. These issues require fact-finding to be addressed by the District Court per the OCCA Order Remanding.

I. Appellant's status as an Indian

To determine the Indian status of the Appellant, the OCCA directed the District Court to make findings of fact as to whether (1) Davis has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.¹ The Court finds as follows:

Findings of Fact

1. Donta Keith Davis is the named Defendant/Appellant in the above-entitled matter.

¹ *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81(10th Cir. 2001). *Generally Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

2. The parties hereto stipulated and agreed that Appellant has 3/32 degree Creek blood.²

3. The parties hereto stipulated and agreed that Appellant is an enrolled member of the Muscogee (Creek) Nation and was such at the time of the charged offenses.³

The parties hereto stipulated and agreed that the Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.⁴

Conclusions of Law

Regarding the first determination, the Court answers the first inquiry in the affirmative. The Court adopted the Agreed Stipulation of the parties, including the attached documentation filed on November 5, 2020 and made findings of fact thereon. Donta Keith Davis has 3/32 Creek blood. Although the term “Indian” is not statutorily defined and various terms such as “sufficient”⁵, “substantial”⁶, “significant percentage of”⁷ or “some”⁸ have been used by courts in an attempt to define the quantity of Indian blood required to satisfy this inquiry, the OCCA mandate ordered

² Exhibit 1, Agreed Stipulation 1.

³ Exhibit 1, Agreed Stipulation 2.

⁴ Exhibit 1, Agreed Stipulation 3.

⁵ *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011)

⁶ *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982).

⁷ *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

⁸ *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).

this Court to determine “whether the Appellant has some Indian blood.”⁹ Thus, according to the term used by the OCCA in its Order, this Court concludes Donta Keith Davis has some Indian blood.

Additionally, the Court answers the second part of the inquiry in the affirmative. The Court adopted the Agreed Stipulation including the attached documentation and made findings of fact thereon. Donta Keith Davis was enrolled as a citizen of the Muscogee (Creek) Nation on September 27, 2001 and was recognized as a citizen of the Muscogee (Creek) Nation at the time of the offenses. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government. Therefore, Donta Keith Davis is recognized as an Indian by a tribe or the federal government.

Having answered both inquiries in the affirmative, this Court concludes Donta Keith Davis is an Indian.

II. Whether the Crime Occurred on the Creek Reservation

The OCCA further ordered the District Court to determine whether the crime occurred on the Creek Reservation, referred to as Indian Country.¹⁰ The Court finds as follows:

⁹ Order Remanding for Evidentiary Hearing October 9, 2020.

¹⁰ *McGirt v. Oklahoma*, 140 S. Ct.2452 (2020); 18 U.S.C. §§ 1152, 1153.

Findings of Fact

1. The parties hereto stipulated that the crime in this case occurred within the Creek reservation boundaries.¹¹

Conclusions of Law

The final inquiry is answered in the affirmative. This Court adopted the parties' Agreed Stipulation and made findings of fact thereon. Although, the specific address and location of the crimes was not stipulated to by the parties, the parties agreed that the location where the crimes occurred was within the Creek Reservation boundaries. These boundaries were established through a series of treaties between the Muscogee (Creek) Nation and the United States Government, and are explicitly recognized as a reservation defined by 18 U.S.C. § 1151(a). Based upon the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), this Court concludes that the crime occurred on the Creek Reservation which is Indian Country.

WHEREFORE, this Court finds that Donta Keith Davis is an Indian and that the crimes for which he was convicted occurred in Indian Country for purposes of the General Crimes Act, 18 U.S.C. § 1152 and the Major Crimes Act, 18 U.S.C. § 1153.

¹¹ Exhibit 1, Agreed Stipulation 4.

App.15a

IT IS SO ORDERED this 12th day of November,
2020.

/s/ Tracy L. Priddy
District Judge

**AGREED STIPULATION
(OCTOBER 5, 2020, FILED NOVEMBER 5, 2020)**

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

DONTA KEITH DAVIS,

Appellant/Defendant,

v.

THE STATE OF OKLAHOMA,

Appellee/Plaintiff.

Case No. F-2019-420, CF-2018-1994

Following the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Oklahoma Court of Criminal Appeals remanded Appellant's case to this Court on October 9, 2020, for an evidentiary hearing to determine 1) Appellant's status as an Indian, and 2) whether the crimes occurred on the Creek Reservation. The parties hereby announce, and request this Court to accept, the following stipulations:

1. Appellant has 3/32 degree Creek blood.
2. Appellant is an enrolled member of the Muscogee (Creek) Nation and was such at the time of the charged offenses.

3. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.
4. The charged crimes occurred within the Creek Reservation.

Respectfully submitted this 5th day of October, 2020.

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**MUSCOGEE (CREEK)
NATION ENROLLMENT VERIFICATION
(SEPTEMBER 25, 2020)**



**MUSCOGEE (CREEK) NATION
CITIZENSHIP BOARD**

Date: 7/16/2020
To: Whom It May Concern
From: Muscogee (Creek) Nation
Citizenship Board PO Box 580
Okmulgee, OK 74447

Subject: Enrollment Verification
Re: Name: Donta Keith Davis
Address: 2719 W Easton PI
Tulsa OK 74127-6131
Birthdate: 4/24/1982
Enrollment Date: September 27, 2001
Roll Number: 66305
Degree of Creek Blood: 3/32



Donta Davis

I hereby certify that Donta Keith Davis, DOB: 4/24/1982 is enrolled with the Muscogee (Creek) Nation. Enrollment Date: 9/27/2001 Roll Number: 66305, Degree of Creek Blood: 3/32

App.19a

/s/ Nathan Wilson
Director
Muscogee (Creek) Nation

Citizens

**ORDER REMANDING
FOR EVIDENTIARY HEARING
(OCTOBER 9, 2020)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DONTA KEITH DAVIS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2019-420

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

Appellant Donta Keith Davis appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-20181994, for Robbery with a Dangerous Weapon (Count 1), in violation of 21 O.S.2011, § 801 and Assault with a Dangerous Weapon (Count 2), in violation of 21 O.S.2011, § 645, both After Former Conviction of Two or More Felonies. The Honorable Kelly Greenough, District Judge, presided over Davis's jury trial and sentenced him, in accordance with the jury's verdict, to life imprisonment on each

count.¹ Judge Greenough ordered the counts to run consecutively.

In the motion to remand for evidentiary hearing filed in conjunction with his Brief-in-Chief, Davis claims the District Court lacked jurisdiction to try him. Davis argues that he is a citizen of the Muscogee (Creek) Nation and that his crime occurred within the boundaries of the Creek Reservation. Davis relies on jurisdictional issues addressed in *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).

Davis's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred on the Creek Reservation. 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.

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 Davis's presentation of *prima facie* evidence as to his legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

¹ Under 21 O.S.Supp.2014, § 13.1, Davis must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

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:

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

Second, whether the crime occurred within the boundaries of the Creek 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 evidentiary hearing and limited to twenty (20) pages

² See *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001). See generally *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

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 and Motion to Remand for Evidentiary Hearing filed January 10, 2020; Appellee's Answer Brief filed June 9, 2020; and Appellant's Reply Brief filed June 25, 2020.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th day of October, 2020.

/s/ David B. Lewis
Presiding Judge

/s/ Dana Kuehn
Vice President Judge

App.24a

/s/ Gary L. Lumpkin
Judge

/s/ Robert L. Hudson
Judge

/s/ Scott Rowland
Judge

ATTEST

/s/ John D. Hadden
Clerk