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OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (APRIL 8, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BEA ANN EPPERSON,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2017-336

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

OPINION

HUDSON, JUDGE:

Appellant, Bea Ann Epperson, was tried and convicted at a non-jury trial of two counts of Embezzlement of Building Trust, in violation of 21 O.S.Supp.2012, § 1451 in McIntosh County District Court, Case No. CF-2014-170. The Honorable James Bland, District

Judge, presided at trial and sentenced Epperson to concurrent terms of five (5) years imprisonment on each count, all suspended, plus a $500.00 fine. Appellant now appeals from these convictions and sentences.

In Proposition III of her brief in chief, Appellant claims the District Court lacked jurisdiction to try her case. Appellant argues that she is a member of the Cherokee Nation; that the victims in this case, Steven and Kinya Meineke, are possible members of the Creek Nation; and the crimes occurred within the boundaries of the Creek Reservation. Pursuant to *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), Appellant's claim raises three separate questions: (a) the Indian status of Appellant; (b) the Indian status of the victims; and (c) whether the crimes occurred on the Creek Reservation. These issues require fact-finding. We therefore remanded this case to the District Court of McIntosh County for an evidentiary hearing.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested 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 Appellant's and/or either victim's 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 jurisdiction. The District Court was ordered to determine whether Appellant and the victims have some Indian blood and are 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. The District Court was also ordered to file written findings of fact and conclusions of law with this Court.

A status hearing was held in this case on September 24, 2020, before the Honorable Michael Hogan, District Judge. A written 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 indicates that appearing before the District Court on this matter were attorneys from the Oklahoma Attorney General's Office, the McIntosh County District Attorney's Office and counsel for Appellant.

In its written findings of fact and conclusions of law, the District Court stated that the parties have jointly stipulated that the evidence will show Appellant is 3/64th degree Indian blood of the Cherokee Tribe; that Appellant was an enrolled member of the Cherokee Nation Tribe of Oklahoma on the date of the charged crimes; that the Cherokee Nation Tribe of Oklahoma is an Indian Tribal Entity recognized by the federal government; and that the charged crimes in this case occurred within the Creek Reservation. The District Court attached as Exhibit 1 to its findings of fact and conclusions of law a document entitled Stipulations of

Counsel signed by all counsel reflecting these stipulations.[1]

The District Court accepted the stipulations made by the parties and concluded in its findings of fact and conclusions of law that Appellant has some Indian blood, that she is also recognized as an Indian by a tribe and the federal government and therefore Appellant is an Indian under federal law. Finally, the District Court accepted the stipulation of the parties that the crimes in this case occurred on the Creek Reservation.

On November 12, 2020, the State filed with this Court a supplemental brief after remand. In its brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above and the District Court's findings. The State contends 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 (30) days so that the appropriate authorities can review her case, determine whether it is appropriate to file charges and take custody of Appellant. *Cf.* 22 O.S.2011, § 846.

After thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts and the briefs of the parties, we find that under the law and evidence

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[1] Although the District Court's findings of fact and conclusions of law does not address the racial status of the victims, the written stipulation does. A handwritten notation at the end of the written stipulation states that "The parties agree that the Meinekes are not enrolled tribal members and have no Indian blood." This notation is initialed by counsel for both parties.

relief is warranted. Based upon the record before us, the District Court's findings of fact and conclusions of law are supported by the stipulations jointly made by the parties at the status hearing. We therefore find Appellant has met her burden of establishing her status as an Indian, having 3/64th degree Indian blood and being a member of the Cherokee Nation Tribe of Oklahoma. We further find Appellant met her burden of proving the crimes in this case occurred on the Creek Reservation and, thus, occurred in Indian Country.

Pursuant to *McGirt,* we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter.[2] The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of McIntosh County with instructions to dismiss the case.[3]

DECISION

The Judgment and Sentence of the District Court is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.** The **MANDATE**

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[2] 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).

[3] This resolution renders the other seven propositions of error raised in Appellant's brief moot.

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 MCINTOSH COUNTY THE HONORABLE MICHAEL HOGAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

Janet Bickel-Hutson
Attorney at Law
417 West Broadway St.
Muskogee, OK 74401
Counsel for Defendant

Carol Iski
District Attorney
Greg Stidham
Asst. District Attorney McIntosh County
110 North 1st St.
Eufaula, OK 74432
Counsel for the State

Mike Hunter
Attorney General of Oklahoma
Joshua Fanelli
Asst. Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for the State

[4] By withholding issuance of the mandate for twenty days, the State's request for time to determine further prosecution is rendered moot.

APPEARANCES ON APPEAL

Kimberly D. Heinze
Okla. Indigent Defense System
P.O. Box 926
Norman, OK 73070
Counsel for Appellant

Mike Hunter
Attorney General of Oklahoma
Keeley L. Miller
Asst. Attorneys General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for Appellee

OPINION BY: HUDSON, J.
KUEHN, P.J.: CONCUR IN RESULT
ROWLAND, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR IN RESULT

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.

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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).

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.

LEWIS, JUDGE, CONCURRING IN RESULTS:

Based on my special writings in *Bosse v. State,* 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State,* 2021 OK CR 4, ___ P.3d ___, I concur in result in the decision to dismiss this case for the lack of state jurisdiction.

DISTRICT COURT OF MCINTOSH COUNTY, STATE OF OKLAHOMA, JOURNAL ENTRY OF FACTS AND CONCLUSIONS OF LAW (OCTOBER 1, 2020)

IN THE DISTRICT COURT OF
MCINTOSH COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

BEA ANN EPPERSON,

Defendant.

Case No. CF-2014-170

Court of Criminal Appeal Number F-2016-1030

Before: Michael HOGAN, District Judge
McIntosh County State of Oklahoma.

JOURNAL ENTRY OF FACTS AND CONCLUSIONS OF LAW IN ACCORDANCE WITH ORDER REMANDING FOR EVIDENTIARY HEARING ISSUED AUGUST 21, 2020

Now on the 24th day of September, 2020, this case comes on for evidentiary hearing for the purpose of determining the following: (a) Defendant's Indian status and (b) whether the crimes occurred on the

Creek Reservation. The Defendant did not appear, but appeared through counsel, Janet L. Bickel Hutson. The State appears by and through McIntosh County District Attorney, Carol Iski, and assistant district attorney, Greg Stidham. The Oklahoma Attorney General's Office appears by and through counsel, Joshua R. Fanelli.

After receiving argument and evidentiary stipulations the Court hereby FINDS and ORDERS as follows:

FINDINGS OF FACT
AND CONCLUSION OF LAW

The first issue for adjudication is the Defendant's status as an Indian as defined by federal law. The Tenth Circuit's decision in *United States v. Diaz,* 679 F.3d 1183 (10th Cir. 2012) articulates the test for making such determination. As *Diaz* states:

> To find that a person is an Indian the court must first make factual findings that the person has some Indian blood and, second, that the person is recognized as an Indian by a tribe or by the federal government.

Id. at 1187 (internal quotations omitted); *see also Goforth v. State,* 1982 OK CR 48, 644 P.2d 114. Applied to the present matter, the parties jointly stipulate in writing the evidence will show "the Defendant, Bea Ann Epperson, is 3/64 degree Indian blood of the Cherokee Nation Tribe." *See Joint Exhibit I* (attached). In addition, "Defendant Epperson was an enrolled member of the Cherokee Nation Tribe of Oklahoma on the dates of the charged offenses." *Id.* Finally, "[t]he Cherokee Nation Tribe of Oklahoma is an Indian Tribal Entity recognized by the federal government."

Id. The Court accepts and attaches these stipulations to the Court's Findings of Facts and Conclusions of Law. Applying elements of *Diaz* to the evidentiary stipulations in the present matter, the Court finds the Defendant has "some Indian blood" and is also "recognized as an Indian by a tribe and the federal government." For this reason, the Court finds the Defendant is an Indian under federal law.

Having found the Defendant is an Indian under federal law, this Court must now determine if the crime occurred on the Creek Reservation. As *McGirt v. Oklahoma,* 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) explains "[t]he 1833 Treaty fixed borders for what was to be a 'permanent home to the whole Creek nation of Indians.' *Id.* at 2461. The parties in this matter stipulate "[t]he charged crimes occurred within the Creek Reservation." For this reason, the Court adopts the stipulation and finds the crime occurred on the Creek Reservation.

In accordance with the directives of the Oklahoma Court of Criminal Appeals, the court reporter shall file an original and two certified copies of the transcript of this hearing within (20) days. This District Court Clerk shall transmit the record of the evidentiary hearing, this Journal Entry of Findings of Facts and Conclusions of Law with attachments, and the transcript of this proceeding to the Clerk of the Court of Criminal Appeals.

BE IT SO ORDERED

/s/ Michael Hogan
District Judge
McIntosh County, State of Oklahoma

STIPULATIONS OF COUNSEL
(SEPTEMBER 24, 2020)

IN THE DISTRICT COURT OF MCINTOSH COUNTY STATE OF OKLAHOMA

BEA ANN EPPERSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2017-336

District Court Case No: CF-2014-170

STIPULATIONS OF COUNSEL

NOW, on this 24th day of September, 2020, Janet L. Bickel Hutson, Attorney for Appellant, Joshua R. Fanelli, Assistant Attorney General, Hannah K. White, Assistant Attorney General, and Carol Iski, District Attorney for District 25, hereby enter the following stipulations in the above-captioned matter.

1. That the Appellant herein was charged five (5) counts of Embezzlement; however Counts 3, 4 and 5 were dismissed by the State. The Defendant was found guilty by a trial to the judge on Counts 1 and 2 and Sentenced to a 5 year suspended sentence as to each running

concurrently, 1 year District Attorney Supervision, $500.00 fine as to both counts, and $250.00 Pre-sentence investigation.

2. The Appellant has been an enrolled member of the Cherokee Nation, a federally-recognized Indian Tribal Entity, since August 6, 1988, and was an enrolled member at the time of her crimes in this case.

3. The Appellant has 3/64 degree Indian blood as recognized by the Cherokee Nation.

4. The location of the offenses the Appellant was charged and convicted of occurred within the boundaries of the Muscogee (Creek) Nation reservation.

5. The Parties agree that the Meinekes are not enrolled tribal members and have no Indian Blood

Respectfully submitted,

/s/ Janet L. Bickel Hutson
OBA #14097
Janet L. Bickel Hutson, PLLC
417 W. Broadway
Muskogee, OK 74401
(918) 912-2310 telephone
(918) 912-2309 facsimile
janet@bickelhutsonlaw.com

Attorney for Appellant

/s/ Joshua R. Fanelli
OBA #33503
Hannah K. White, OBA #34192
Assistant Attorneys General
Criminal Appeals Unit
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105

/s/ Carol Iski
District Attorney for District 25
McIntosh County D.A.'s Office
McIntosh County Courthouse
110 North 1st Street
Eufaula, OK 74432

Attorneys for Appellee

COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, ORDER REMANDING FOR EVIDENTIARY HEARING (AUGUST 21, 2020)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BEA ANN EPPERSON,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2017-336

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

ORDER REMANDING FOR EVIDENTIARY HEARING

Appellant, Bea Ann Epperson, was tried and convicted at a non-jury trial of two counts of Embezzlement of Building Trust, in violation of 21 O.S.Supp.2012, § 1451 in McIntosh County District Court, Case No. CF-2014-170. The Honorable James Bland, District

Judge, presided at trial and sentenced Epperson to concurrent terms of five years imprisonment on each count, all suspended, plus a $500.00 fine. Appellant now appeals from these convictions and sentences.

In Proposition III of her brief in chief, Appellant claims the District Court lacked jurisdiction to try her case. Appellant argues that she is a member of the Cherokee Nation; that the victims in this case, Steven and Kinya Meineke, are possible members of the Creek Nation; and the crimes occurred within the boundaries of the Creek Reservation.

Pursuant to *McGirt v. Oklahoma,* No. 18-9526 (U.S. July 9, 2020), Appellant's claim raises three separate questions: (a) the Indian status of Appellant; (b) the Indian status of the victims; and (c) whether the crimes occurred on the Creek Reservation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McIntosh 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 Appellant's presentation of *prima facie* evidence as to Appellant's and/or either victim's 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.

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, 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.[1]

Second, the Meinekes' Indian status. The District Court must determine whether (1) Steven and Kinya Meineke have some Indian blood, and (2) are recognized as Indians by a tribe or the federal government.

Third, whether the crimes occurred on 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, addres-

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[1] *See 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. Prentiss,* 273 F.3d 1277, 1280-81 (10th Cir. 2001).

sing only those issues pertinent to the 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 McIntosh County: Appellant's Brief in Chief, filed October 19, 2017; Appellant's Reply Brief, filed March 8, 2018; and Appellee's Response Brief, filed February 16, 2018. The present order renders **MOOT** any request made to date for supplemental briefing by either party in this case as well as any request to file an amicus brief.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 21st 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