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OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (MAY 6, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

TERRANCE LUCAS COTTINGHAM,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2017-1294

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

OPINION REMANDING WITH INSTRUCTIONS TO DISMISS

HUDSON, JUDGE:

Appellant, Terrance Lucas Cottingham, was tried by jury and convicted of Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 801, in the

District Court of Washington County, Case No. CF-2015-350. In accordance with the jury's recommendation, the Honorable Curtis DeLapp, District Judge, sentenced Appellant to twenty five years imprisonment with credit for time served. Appellant must serve 85% of this sentence before becoming parole eligible. Appellant now appeals from this conviction and sentence.

In Proposition I of his brief in chief on appeal, Appellant claims the District Court lacked jurisdiction to prosecute him. Appellant cites 18 U.S.C. § 1153 and *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020) in support of this argument. Appellant argues he is a citizen of the Osage Nation and claims the robbery in this case occurred within the boundaries of the Cherokee Nation which he says is Indian Country for purposes of federal law.

On August 21, 2020, this Court remanded Appellant's case to the District Court of Washington County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues—(a) Appellant's status as an Indian; and (b) whether the crime occurred in Indian Country. We instructed that Appellant bore the initial burden of presenting *prima facie* evidence as to his legal status as an Indian and as to the location of the crime in Indian Country. Upon such a showing, the burden shifts to the State to prove it has jurisdiction.

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. Our Order further 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 upon which they agree. The breadth of the parties' stipulation determining whether a hearing on the issues is necessary.

As to Appellant's status as an Indian, the District Court was specifically ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe or the federal government.[1] To determine whether the crime occurred in Indian Country, the District Court was directed to follow the analysis set out in *McGirt* to determine (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 doing so, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

An evidentiary hearing in this case was timely held before the Honorable Russell C. Vaclaw, Associate District Judge, on October 19, 2020. Prior to the hearing, Appellant filed a brief with the District Court setting forth his position on the remanded issues. The Cherokee Nation Attorney General likewise filed an amicus brief addressing the creation and continued existence of the Cherokee Nation reservation. The State, by contrast, did not submit a written brief to the District Court. At the hearing, the parties presented the District Court with agreed-upon stipulations that

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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).

partially answered the questions presented to the court. Counsel for the Cherokee Nation also appeared at the hearing as amicus and presented argument.

As to Appellant's status as an Indian, the parties stipulated:

1. Appellant is thirty-five two-hundred-fifty-sixths (35/256) degree of Indian blood of the Osage Tribe.
2. Appellant is a member of the Osage Nation and was such on October 6, 2015, the time of the charged offense.
3. The Osage Nation is an Indian Tribal Entity recognized by the federal government.

No additional evidence was presented relating to this issue.

As to the location of the crime, the parties stipulated:

4. The charged crime occurred within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

The Cherokee Nation, at Appellant's request introduced into evidence a packet of exhibits containing the treaties and federal legislation referenced in the stipulation along with a map of the Cherokee Nation showing the location of the robbery. The State presented no additional evidence relating to this issue.

Appellant primarily stood on the briefs that were submitted by defense counsel and the Cherokee Nation prior to the hearing in arguing the jurisdictional issue. Defense counsel argued that, based on the stipulated facts, Appellant was an Indian for purposes of federal law and that the robbery in this case occurred in Indian Country. Appellant adopted the arguments presented by the Cherokee Nation in its amicus that the Cherokee Nation reservation was created by treaty with the federal government and continued to exist over time because Congress had never disestablished it. At the hearing, counsel for the Cherokee Nation presented extended argument summarizing the Tribe's position in support of the continued existence of the Cherokee Nation reservation and referenced pertinent treaties and federal legislation resulting in the present territorial boundaries for the Nation which includes all of Washington County. The Tribe pointed out the total absence of legislation from Congress disestablishing the Cherokee Nation reservation and urged that the reservation still existed today.

The State was represented at the hearing by the elected District Attorney along with counsel from the Oklahoma Attorney General's Office. The State took no position at the hearing on the two legal questions before the District Court but merely stipulated to the underlying facts. The record shows the State neither advocated it had jurisdictional authority to prosecute Appellant nor conceded its lack thereof. Instead, the State acknowledged the facts agreed to by stipulation and asserted that it was leaving it to the Court to determine whether, as a matter of law, Appellant was

an Indian and whether the crime occurred in Indian Country.[2]

In its written findings of fact and conclusions of law filed after the hearing, the District Court accepted and found the facts as stipulated by the parties. The court concluded: (1) Appellant is a member of the Cherokee Nation [sic]"; (2) the robbery in this case occurred within the historical and territorial boundaries of the Cherokee Nation's reservation; (3) Appellant and the Cherokee Nation's counsel argued that Congress had not disestablished the reservation for the Cherokee Nation; (4) the State "did not present any evidence or argument as to whether Congress disestablished the Cherokee Reservation[;]"; and (5) "The Court, having heard no other evidence, must find that the Cherokee Reservation was not disestablished."

Both Appellant and the State have filed supplemental briefs with this Court post-remand. Appellant urges that the District Court's findings should be adopted by this Court in total. Appellant tells us the record supports the District Court's conclusions concerning both his Indian status and the occurrence of the robbery in this case on the Cherokee Nation reservation. Appellant further argues that the record shows Congress established a reservation for the Cherokee Nation, the State cannot and did not at the hearing point to any language in federal legislation or treaties disestablishing the Cherokee Reservation and therefore

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[2] Towards the end of the hearing, the elected District Attorney expressed his view that the continuing existence of a reservation for the Cherokee Nation was inconsistent with the fact of Oklahoma statehood. This argument, however, was not a definitive assertion by the State that it had jurisdiction to prosecute Appellant in the present case.

the robbery charged in this case was committed in Indian Country for purposes of federal law. Based on these findings, Appellant urges dismissal of the present case for lack of jurisdiction.

In its response brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above. The State also acknowledges the District Court's findings establishing both that Appellant was an Indian and that the crimes occurred in Indian Country. The State reiterates, however, that it "takes no position as to the existence, or absence, of a Cherokee Nation Reservation." State's Supp. Br. at 5 n.4. Should this Court find Appellant is entitled to relief based on the District Court's findings, the State asks this Court to stay any order reversing Appellant's conviction for thirty days to allow federal authorities time to secure custody of Appellant. *Cf.* 22 0.5.2011, § 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 relief is warranted. The State in effect stipulated to Appellant's legal status as an Indian. However, the State took no position and presented no argument or evidence that the Cherokee Nation reservation had been disestablished and thus the crime did *not* occur in Indian Country. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We find no such abuse. *See State v. Delso,* 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194 (defining "an abuse of discretion").

Based upon the record before us, the District Court's Order is supported by the evidence presented at the evidentiary hearing. We therefore find Appellant has met his burden of establishing his status as an Indian, having 35/256 degree of Indian blood and being a member of the Osage Nation tribe on the date of the robbery in this case. We also find the District Court appropriately applied *McGirt* to determine that Congress established a Cherokee Nation reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma had jurisdiction in this matter.

Pursuant to *McGirt,* we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter.[3] The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of Washington County with instructions to dismiss the case.[4]

DECISION

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

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[3] I maintain my previously expressed views on the significance of *McGirt,* its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *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).

[4] This resolution renders moot the remaining eight propositions of error raised in Appellant's brief.

not to be issued until twenty (20) days from the delivery and filing of this decision.[5]

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY THE HONORABLE RUSSELL C. VACLAW ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

Garrett Marshall
Chad Johnson
Okla. Indigent Defense System
P.O. Box 926
Norman, OK 73070
Counsel for Defendant

Kevin Buchanan
District Attorney
Washington County
420 S. Johnstone, Room 222
Bartlesville, OK 74003
Counsel for the State

Mike Hunter
Okla. Attorney General
Julie Pitman
Ashley Willis
Asst. Attorneys General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for the State

Sara Hill

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[5] By withholding the issuance of the mandate for twenty days, the State's request for time to allow federal authorities to secure custody of Appellant is rendered moot.

Cherokee Nation
Attorney General's Office
P.O. Box 1533
Tahlequah, OK 74465
Counsel for Amicus
Cherokee Nation

APPEARANCES ON APPEAL

Lisbeth L. McCarty
Chad Johnson
Okla. Indigent Defense System
P.O. Box 926
Norman, OK 73070
Counsel for Appellant

Mike Hunter
Attorney General
Tessa L. Henry
Asst. Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for Appellee

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

KUEHN, PRESIDING JUDGE, CONCURRING IN RESULT:

I agree with the Majority that the State of Oklahoma had no jurisdiction to try Appellant, and his case must be dismissed. This Court recently found that the Cherokee Reservation was not disestablished, and is Indian Country. *Spears v. State,* 2021 OK CR 7, ¶¶ 15-16. Because the issue of reservation status has already been decided, I find the Majority's discussion of it is superfluous dicta. I further note that the Majority's inclusion of a blood quantum is unnecessary. This Court, like the Tenth Circuit, requires only a finding of *some* Indian blood to determine Indian status, and has explicitly rejected a specific blood quantum requirement. *Bosse v. State,* 2021 OK CR 3, ¶ 19.

I also disagree, as I have before, with the Majority's complaint that the State's position below left a "void" in the record. *Hogner v. State,* 2021 OK CR 4, ¶ 3 (Kuehn, P.J., concurring in result). Petitioner provided the trial court with law and evidence relevant to the jurisdictional issue. The trial court's findings and conclusions clearly set forth the details of the material it used to make its decisions. Often, in a criminal trial, the defendant does not offer evidence to counter the evidence of guilt presented by the State. And yet, this Court routinely finds the evidence is sufficient for our review, without complaining that the defendant's choice leaves a void in the record. The same is true here.

LUMPKIN, JUDGE, CONCUR 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 with Chief Justice Roberts and the dissenters in *McGirt*

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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).

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, CONCUR 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 results in the decision to dismiss this case for the lack of state jurisdiction.

DISTRICT COURT OF WASHINGTON COUNTY, STATE OF OKLAHOMA, FINDINGS OF FACT (OCTOBER 29, 2020)

IN THE DISTRICT COURT OF WASHINGTON COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Plaintiff,

v.

TERRANCE COTTINGHAM,

Defendant.

Case No. CF-15-350

Before: Russell VACLAW, District Court Judge.

FINDINGS OF FACT

NOW on this 29th day of October, 2020, the Court, upon remand from the Oklahoma Court of Criminal Appeals, on a request for the trial Court to enter certain findings of fact, hereby FINDS AND ORDERS as follows:

1. The Defendant, Terrance Cottingham is a member of the Cherokee Nation.

2. The Defendant was convicted of crimes which occurred in Washington County, Oklahoma.

3. The crimes committed in Washington County, Oklahoma were also committed within the historical and territorial borders of the Cherokee Reservation.

4. Defendant argued, as well as the Cherokee Nation legal representative, Sara Hill, that Congress has not disestablished the Cherokee Reservation.

5. The State of Oklahoma, by and through the Oklahoma Attorney General's Office, did not present any evidence or argument as to whether Congress disestablished the Cherokee Reservation.

6. The Court, having heard no other evidence, must find that the Cherokee Reservation was not disestablished.

It is so ordered.

/s/ Russell Vaclaw
District Court Judge

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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

TERRANCE LUCAS COTTINGHAM,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

F-2017-1294

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

Appellant, Terrance Lucas Cottingham, was tried by jury and convicted of Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 801, in the District Court of Washington County, Case No. CF-

2015-350. In accordance with the jury's recommendation, the Honorable Curtis DeLapp, District Judge, sentenced Appellant to twenty five years imprisonment with credit for time served. Appellant must serve 85% of this sentence before becoming parole eligible. Appellant now appeals from this conviction and sentence.

In Proposition I of his brief in chief, Cottingham claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Osage Nation and has submitted documentation suggesting he is also a member of the Seneca-Cayuga Nation. Further, Appellant contends the crime occurred within the boundaries of the Cherokee Nation and/or the Delaware Nation.

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Washington 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 the Appellant'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, 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.[1]

Second, whether the crime occurred in Indian Country. 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/or the Delaware Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation(s). 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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[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).

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 Washington County: Appellant's Brief in Chief, filed August 29, 2018; and Appellee's Response Brief, filed December 27, 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