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OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (SEPTEMBER 23, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JESSY SHAY BAILEY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2020-226

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

SUMMARY OPINION

LEWIS, JUDGE:

Jessy Shay Bailey, Appellant, was tried by jury and convicted of Lewd Acts with a Child Under 16, in violation of 21 O.S.Supp.2017, § 1123(A)(2), in Atoka County District Court, Case No, CF-2018-81, before the Honorable Paula Inge, District Judge. The jury set

punishment at three (3) years imprisonment. Judge Inge sentenced accordingly.

Appellant filed a motion for new trial under seal with this Court in compliance with our rules. In the motion for new trial, Appellant claims that the District Court lacked jurisdiction to try him. Appellant argues that while he is not Indian, his victim is a citizen of the Choctaw Nation and the crime occurred within the boundaries of the Choctaw Nation Reservation. Appellant relies on *McGirt v. Oklahoma,* 591 U.S. ___, 140 S. Ct. 2452 (2020).

Appellant's claim raises two separate questions: (a) the Indian status of the victim and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore remanded this case to the District Court of Atoka County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) the victim's status as an Indian; and (b) whether the crime occurred in Indian Country, within the boundaries of the Choctaw Nation Reservation. Our Order provided that the parties could enter into written stipulations.

The District Court filed its *Findings of Fact and Conclusions of Law* in the District Court and with this Court's Clerk. In the findings of fact regarding the first question, the parties stipulated that the victim had 1/16th quantum of Indian blood and was an enrolled member of the Choctaw Nation, a federally recognized tribe, at the time of the crime; and the membership was verified by the Choctaw Nation.

Regarding the second question, the parties stipulated that the crime occurred within the historical boundaries of the Choctaw Nation Reservation; the

Choctaw Nation is a federally recognized tribe; and no evidence was presented that the treaties have been expressly nullified or modified in any way to reduce or disestablish the reservation.

The trial court concluded that a reservation was set aside for the Choctaw Nation; the reservation has not been disestablished by Congress; the crime occurred within the boundaries of said reservation; and the victim was a member of a federally recognized tribe, namely the Choctaw Nation.

Finally the trial court concluded that the crime occurred in Indian Country and the victim was an Indian as defined by *McGirt,* 591 U.S. ___, 140 S. Ct. 2452 (2020); *see* 18 U.S.C. § 1152; *see also* 18 U.S.C. § 1153 (Major Crimes Act). We find that the findings of fact and conclusions of law are supported by the record. This case is controlled by our recent decision in *Sizemore v. State,* 2021 OK CR 6, ___ P.3d ___ (holding that a crime occurring within the boundaries of the Choctaw Nation Reservation by a member of the Choctaw Nation is under federal jurisdiction not state jurisdiction).

The State argues that the State has jurisdiction concurrent with the Federal Government by virtue of the Appellant being non-Indian and the victim being Indian. The General Crimes Act and the Major Crimes Act give federal courts jurisdiction over crimes committed by or against Indians in Indian Country. 18 U.S.C. §§ 1152, 1153. Congress provides that crimes committed in certain locations or under some specific circumstances are within the sole and exclusive jurisdiction of the United States. Section 1152, the General Crimes Act, brings crimes committed in Indian Country within that jurisdiction, unless they lie within the jurisdiction of tribal courts or jurisdiction is otherwise

expressly provided by federal law. 18 U.S.C. § 1152; *see also* 18 U.S.C. § 1153 (Major Crimes Act). This gives federal courts jurisdiction over Indians and non-Indians who commit crimes against Indians in Indian Country.

This Court has also recognized that federal law preempts state jurisdiction over crimes committed by or against an Indian in Indian Country. *Cravatt v. State,* 1992 OK CR 6, ¶ 20, 825 P.2d 277, 280. Despite these holdings and the statutory language, the State argues that, federal and state courts have concurrent jurisdiction over non-Indians under the General Crimes Act. The law does not support this argument. The Attorney General relies in part on *United States v. McBratney,* 104 U.S. 621 (1881) to support the argument. However, in *McBratney,* a non-Indian murdered another non-Indian within the boundaries of the Ute Reservation. The Supreme Court held that the federal government had no jurisdiction to prosecute a crime committed in Indian Country where neither the perpetrator nor the victim were Indian. *Id.,* 104 U.S. at 624. Nothing in that opinion supports a conclusion that, where federal jurisdiction exists by statute, states have concurrent jurisdiction as well. And the Supreme Court itself later refuted any such interpretation. In *Donnelly v. United States,* the Court held that *McBratney* did not apply to "offenses committed by or against Indians," which were subject to federal jurisdiction. *Donnelly,* 228 U.S. 243, 271-72 (1913). More recently, the Court has noted that where federal jurisdiction lies under Section 1153, it preempts state jurisdiction. *United States v. John,* 437 U.S. 634, 651 (1978); *see also Goforth v. State,* 1982 OK CR 48, ¶ 5, 644 P.2d 114, 115-16 (federal jurisdiction under §§ 1152,

1153 preempts state jurisdiction except as to crimes among non-Indians).

Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner.

CONCLUSION

Appellant's victim was an Indian, and this crime was committed in Indian Country. The Federal Government, not the State of Oklahoma, has jurisdiction to prosecute Appellant.

DECISION

The Judgment and Sentence of the District Court of Atoka County is **REVERSED** and the case is **REMANDED** with instructions to **DISMISS**. The State's Motion to Stay and Abate Proceedings is denied. 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 ATOKA COUNTY THE HONORABLE PAULA INGE, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCURS:

Today's decision dismisses a conviction for Lewd Acts With a Child Under 16 from the District Court of Atoka County based on the Supreme Court's decision in *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020). This decision is unquestionably correct as a matter of *stare decisis.* The parties have stipulated that the victim was an enrolled member of the Choctaw Tribe at the time of the crime, that the victim had 1/16th quantum of Indian blood and the crime in this case took place within the historic boundaries of the Choctaw Reservation. *See Rogers v. United States,* 45 U.S. 567, 572-573 (1846); *Goforth v. State,* 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116; *United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012). Under *McGirt,* the State has no jurisdiction to prosecute Appellant for the crime in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for this crime lies. *See Roth v. State,* 2021 OK CR 27, ___ P.3d ___. I therefore as a matter of *stare decisis* fully concur in today's decision. Further, I maintain my previously expressed views on the significance of *McGirt,* its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See, e.g., Sizemore v. State,* 2021 OK CR 6, 485 P.3d 867 (Hudson, J., Concur in Results).

LUMPKIN, JUDGE, CONCURRING IN RESULTS:

Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma,* ___ U.S. ___, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt,* I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and

history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social 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.

DISTRICT COURT OF ATOKA COUNTY, STATE OF OKLAHOMA, FINDINGS OF FACT AND CONCLUSIONS OF LAW (MARCH 24, 2021)

IN THE DISTRICT COURT OF ATOKA COUNTY, STATE OF OKLAHOMA

JESSY SHAY BAILEY,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Case No.: CF-2018-81

OCCA No. F-2020-226

Before: Paula INGE, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 10, 2021, the above-captioned case came on for an evidentiary hearing pursuant to the remand order of the Oklahoma Court of Criminal Appeals issued January 22, 2021. Petitioner appeared through his attorney of record, James L. Hankins. Respondent appeared through Assistant District Attorney, Whitney Kerr and Assistant Attorney General, Taylor Ledford. Also appearing was attorney, Lindsay Dowell for Amicus

Curiae Choctaw Nation. The hearing was reported by Certified Court Reporter, Tonya Rogers. The parties announced ready to proceed with the hearing.

The Choctaw Nation's Motion for Leave to file amicus brief was granted. Petitioners oral motion to incorporate the amicus brief was granted without objection by the Respondent. The Petitioner's oral motion to strike the Respondent's pre-hearing brief asserting concurrent jurisdiction filed on March 10, 2021, was denied but the Petitioner was given leave of court to file a written response to the matters raised in the pre-hearing brief within seven (7) days of March 10, 2021.

This case was remanded to the District Court by the Oklahoma Court of Criminal Appeals to address only: (a) the victim's Indian status and (b) whether the crime the Petitioner was convicted of occurred within the boundaries of Indian Country. To determine the victim's status as an Indian the District Court must determine whether (1) she has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.

FINDINGS OF FACT

1. On January 16, 2020, the Petitioner was found guilty by a jury of the crime of Lewd Acts with a Child Under 16, in violation of Title 21 O.S. § 1123(A)(2) and recommended a sentence of three (3) years. On March 9, 2020, the Petitioner was sentenced by the district court in accordance with the verdict of the jury.

2. On May 14, 2020, Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA").

3. On January 22, 2021, the Petitioner, filed with the OCCA, a Motion for a New Trial/Dismissal under seal, claiming the district court lacked jurisdiction to try him because the victim was a member of the Choctaw Nation of Oklahoma and the crime was committed within the boundaries of the Choctaw Nation of Oklahoma.

4. The parties have entered into joint stipulations as set forth in Exhibit 1, attached hereto and incorporated by reference.

5. The court makes the additional finding the Petitioner is non-Indian.

CONCLUSIONS OF LAW

6. The victim has "some Indian (Choctaw) blood" and was a member of the Choctaw Nation at the time of the crime.

7. The Choctaw Nation is an Indian Tribal Entity recognized by the federal government.

8. The crime occurred within the boundaries of Atoka County, State of Oklahoma, and the historic Choctaw Nation.

9. Applying the reasoning used by the United States Supreme Court in *McGirt,* the wording of the treaties demonstrate the Choctaw lands were set aside for the Choctaw people and their descendants. The Choctaws were also assured the right of self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state thus establishing a reservation for the Choctaw Nation.

10. The Supreme Court in *McGirt* held the constitutional authority to breach a Treaty belongs to Congress

alone once a reservation has been established. There was no evidence presented that the Congress has disestablished the Choctaw Nation reservation.

11. The Atoka County Court Clerk is directed to mail a copy of the district court's findings of fact and conclusions of law to the Oklahoma Court of Criminal Appeals as ordered by the Court in its Order dated January 22, 2021.

IT IS SO ORDERED.

/s/ Paula Inge
Judge of the District Court

March 24, 2021
Date

cc: Attorneys of record
Oklahoma Court of Criminal Appeals

ORDER OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, REMANDING FOR EVIDENTIARY HEARING (JANUARY 22, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JESSY SHAY BAILEY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-2020-226

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

ORDER ACCEPTING FILING OF APPELLANT'S MOTION FOR NEW TRIAL UNDER SEAL, REMANDING FOR EVIDENTIARY HEARING, AND HOLDING DIRECT APPEAL IN ABEYANCE

Jessy Shay Bailey, Appellant, was tried by jury and convicted of Lewd Acts with a Child Under 16, in violation of 21 O.S.Supp.2012, § 1123 a 2, in Atoka

County District Court, Case No, CF-2018-81, before the Honorable Paula Inge, District Judge. The jury set punishment at three (3) years imprisonment. Judge Inge sentenced accordingly.

Appellant has filed a motion to file under seal a motion for new trial. We find that the motion complies with Rule 2.7, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. We, therefore, **ORDER** the motion for new trial to be filed under seal in this Court. The motion shall be accessible only to the parties in this case, and the District Court for purposes of resolving the issues raised in the motion. Appellant has also filed his motion to hold appeal in abeyance, or alternatively, for an extension of time to file opening brief.

In the motion for new trial, Appellant claims that the District Court lacked jurisdiction to try him. Appellant argues that while he is not Indian, his victim is a citizen of the Choctaw Nation and the crime occurred within the boundaries of the Choctaw Nation. Appellant relies on *McGirt v. Oklahoma,* 591 U.S. ___, 140 S. Ct. 2452 (2020).

Appellant's claim raises two separate questions: (a) the Indian status of the victim and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Atoka 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 victim's legal status as 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 Indian status of the victim. The District Court must determine whether (1) the victim had some Indian blood, and (2) was 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 Choctaw 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.

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[1] *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).

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 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 ORDERED that the Clerk of this Court shall accept for filing Appellant's motion for new trial under seal. The matter is **REMANDED** to the District Court of Atoka County for an evidentiary hearing as outlined above. **IT IS FURTHER ORDERED** that the Clerk of this Court shall transmit copies of the motion for new trial, under seal, to the District Court of Atoka County. The parties to this action and the District Court shall have access to the sealed motion

for the purposes of resolving this issue. **IT IS FURTHER ORDERED** that Appellant's direct appeal shall be held in abeyance until further order of this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of January, 2021.

/s/ Dana Kuehn
Presiding Judge

/s/ Scott Rowland
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ David B. Lewis
Judge

/s/ Robert L. Hudson
Judge

ATTEST:

/s/ John D. Hadden
Clerk