

**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NOT FOR PUBLICATION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).