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**OPINION OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA  
(AUGUST 26, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA,

*Appellant,*

v.

HAROLD DENTON MCCURTAIN,

*Appellee.*

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NOT FOR PUBLICATION

Case No. S-2020-533

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

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**SUMMARY OPINION**

**LUMPKIN JUDGE:**

Appellee was charged in the District Court of Leflore County, Case No. CF-2019-76, with Lewd Molestation, in violation of 21 O.S.Supp.2017, § 1123. After preliminary hearing on September 5, 2019, Appellee was bound over for trial, after former conviction of three felonies. Appellee filed a motion to dismiss for

lack of subject matter jurisdiction on July 24, 2020. The hearing on this motion occurred on August 5, 2020, before the Honorable Marion D. Fry, Associate District Judge. At the conclusion of the hearing, Judge Fry found the State of Oklahoma lacked jurisdiction to try Appellee. The State announced its intent to appeal in open court. The trial court stayed enforcement of its decision pending outcome of this appeal.

The State timely filed its written Notice of Intent to Appeal and Designation of Record seeking to appeal pursuant to 22 O.S.2011, § 1053.<sup>1</sup> As the District Court granted Appellee's motion to dismiss for lack of the court's jurisdiction, we find that the State may properly proceed on appeal pursuant to Section 1053. *State v. Morgan*, 2019 OK CR 16, ¶ 5, 452 P.3d 434, 436. For the reasons discussed below, we affirm the District Court's ruling.<sup>2</sup>

In its sole proposition of error, the State contends the trial court erred in ruling the District Court of LeFlore County lacked jurisdiction to try Appellee for lewd molestation. In appeals brought to this Court pursuant to 22 O.S.2011, § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. *Delso v. State*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1193-94; *State v. Hooley*, 2012 OK

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<sup>1</sup> Although the Petition in Error states the appeal is taken pursuant to 22 O.S.2011, § 1089.1, it is actually taken pursuant to Section 1053 since the ruling at issue occurred after preliminary hearing and bind-over.

<sup>2</sup> While I continue to maintain my views concerning the disestablishment of Indian reservations in Oklahoma, expressed in my separate writing in *Bosse v. State*, 2021 OK CR 3, ¶¶ 1-4, 484 P.3d 286, 288-89 (Lumpkin, J., concurring in results), I accede to *stare decisis* in this case.

CR 3, ¶ 4, 269 P.3d 949, 950. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117.

In *McGirt v. Oklahoma*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 2452, 2460-62 (2020), the Supreme Court held that Congress established a reservation for the Muscogee Creek Nation. As Congress is the only entity which may disestablish a reservation, through explicit language evincing a total surrender of all tribal interests, and no Congressional Acts concerning the Muscogee Creek Nation utilized this language, the court determined the reservation continues in existence today. *Id.*, at 2468. Therefore, only the federal and tribal governments have jurisdiction over crimes committed by or against Indians on the Muscogee Creek Reservation. 18 U.S.C. § 1152, 1153; *Bosse v. State*, 2021 OK CR 3, ¶ 3, \_\_\_ P.3d \_\_\_.

This Court has ruled similarly, based on evidence presented at evidentiary hearings, in cases involving other tribes in Oklahoma. *See Bosse*, 2021 OK CR 3, ¶ 12, \_\_\_ P.3d \_\_\_ at (finding the District Court’s conclusions regarding the continued existence of the Chickasaw Reservation were based upon the evidence presented at the evidentiary hearing and adopting those conclusions); *Hogner v. State*, 2021 OK CR 4, ¶¶ 17-18, \_\_\_ P.3d \_\_\_ (“[b]ased on the record before us, the District Court’s Order [finding the continued existence of the Cherokee Reservation] is supported by the evidence presented at the evidentiary hearing.”).

Turning to the instant case, at the hearing on his motion to dismiss, Appellee presented evidence of his quantum of Indian blood and of his citizenship in the Choctaw Nation. Appellee also attached a map of Oklahoma showing tribal jurisdiction of the various Oklahoma tribes, including the Choctaws, to his motion to dismiss. Appellee's counsel referenced *McGirt* and the authority cited in his motion<sup>3</sup> and argued to the court that the Choctaws were "treated the exact same way as the Creeks were" and that Congress never specifically disestablished the Choctaw Reservation.

The State objected to Appellee's evidence regarding his status as an Indian on the basis of hearsay. The trial court overruled the objection, finding, among other reasons, the evidence was admissible pursuant to 12 O.S.2011, § 2803 as a business record.

The prosecutor argued that *McGirt* only applied to Creeks. She conceded that the Choctaws were granted a reservation by treaty. She attempted to distinguish the Choctaw treatment by the federal government from that of the Creeks, referencing the materials attached to the State's response to the motion to dismiss. The prosecutor argued that the federal government

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<sup>3</sup> Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), Choctaw removal; Treaty of June 22, 1855, 11 Stat. 611, setting boundaries of Choctaw and Chickasaw Nations; Treaty of 1866, 14 Stat. 767, abolishing slavery in the two nations and providing for cession of the western part of the two nations from 98th parallel to the current Oklahoma border; Act of July 1, 1892, 32 Stat. 716, authorizing Dawes Commission to facilitate allotment in the two nations and abolishing tribal governments; Act of April 26, 1906, 34 Stat. 148, providing for continuation of tribal governments until allotment concluded; Oklahoma Enabling Act, 34 Stat. 267, reaffirming federal government authority over Indians.

had diminished the Choctaw Reservation, first by causing the Choctaws to sell part of their reservation to the Chickasaws and second by causing them to cede part of their lands to the federal government in 1866. She further argued that the 1866 treaty planted the seed of allotment, in contrast to the Creek treaty of 1866. Ultimately, the prosecutor argued that after allotment was completed and with the passage of time, the Choctaw Reservation was fractured and only land upon which the Indian title had not been extinguished remained reservation land. Since the land in question was not part of any allotment to which Indian title was not extinguished, she contended that Oklahoma had jurisdiction.

The prosecutor's argument mirrors the law as it was applied for over one hundred years and jointly interpreted by both the State and the tribes. However, with *McGirt* the Supreme Court now requires magic words instead of looking to the retention of legal title in the land by an individual Indian or tribe.

After considering the parties' arguments, the evidence presented in the motion to dismiss and the State's response thereto, the Court found that although the federal government had diminished the Choctaw Reservation, it never "affirmatively terminated the Choctaw Reservation and that LeFlore County was, and is, located in lands granted to the Choctaw Nation in the Treaty of Dancing Rabbit Creek." The Court also found that based upon the evidence presented, Appellee was a member of the Choctaw Nation and had 3/32 degree of Choctaw blood. Finally, the court found that lewd molestation falls under the crimes set

forth in the Major Crimes Act and concluded the District Court of LeFlore County had no jurisdiction to try Appellee.

Both parties filed briefs with this Court which concern the same material as did the motion to dismiss and response thereto filed in the District Court and which reiterate the arguments contained in those pleadings and presented at the hearing before the District Court. Having reviewed this record and the treaties and various Acts of Congress referenced therein, we find the State's argument to be without merit. Although the 1866 treaty mentions surveying the Choctaw and Chickasaw lands in order for allotment to occur, it states that such action will not occur until the "Choctaw and Chickasaw people" agree to it through their respective legislative councils. Treaty of 1866, 14 Stat. 767, Art. 11. In fact, allotment did not occur until after passage of numerous acts designed to accomplish the enrollment of members of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, commencing in 1893 with the "Dawes Act," 27 Stat. 612, 645 and ending with the Act of May 27, 1908, 35 Stat. 312, sec. 3, which made conclusive the enrollment records of the Commissioner to the Five Civilized Tribes for allotment purposes. Furthermore, *McGirt* holds that allotment alone does not result in disestablishment of a reservation. *McGirt*, 140 S. Ct. at 2464. Based upon the record, the trial court correctly concluded that the crime occurred within the Choctaw Reservation and that Appellee is an Indian for purposes of the Major Crimes Act. Accordingly, the trial court did not abuse its discretion in granting Appellee's motion to dismiss for lack of jurisdiction.

**DECISION**

The order of the District Court of LeFlore County granting the motion to dismiss is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** issued **twenty days** from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF  
LEFLORE COUNTY THE HONORABLE MARION  
D. FRY, ASSOCIATE DISTRICT JUDGE

**APPEARANCES AT HEARING**

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

**HUDSON, VICE PRESIDING JUDGE,  
SPECIALLY CONCURS:**

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Today's decision applies *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) to the facts of this case and dismisses a pending lewd molestation charge from Le Flore County. I concur in today's decision based on the evidence below concerning the Indian status of Appellee and the location of this crime within the historic boundaries of the Choctaw Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellee for the crime charged. Instead, Appellee 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*, 2021 OK CR 3, 484 P.3d 286 (Hudson, V.P.J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, \_\_\_ P.3d \_\_\_ (Hudson, V.P.J., Specially Concur); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, V.P.J., Specially Concur) (unpublished).

**LEWIS, JUDGE, CONCURRING IN RESULTS:**

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Based on my special writings in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 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 LEFLORE COUNTY,  
STATE OF OKLAHOMA, ORDER DISMISSING  
FOR LACK OF JURISDICTION  
(AUGUST 5, 2020)**

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IN THE DISTRICT COURT FOR LEFLORE  
COUNTY STATE OF OKLAHOMA

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THE STATE OF OKLAHOMA,

*Plaintiff,*

v.

HAROLD DENTON MCCURTAIN,

*Defendant.*

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Case No. CF-2019-76

Before: Marion D. FRY, Judge of the District Court.

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**COURT MINUTE REGARDING MOTION TO  
DISMISS FOR LACK OF JURISDICTION**

**NOW** on this 5th day of August, 2020, the above styled and numbered cause came on for hearing on a motion to dismiss filed by the defendant on July 24, 2020, and a response by the State filed on August 3, 2020. After hearing the evidence and the arguments of counsel, the Court found that LeFlore County is located within the reservation of the Choctaw Nation of Oklahoma and that the State lacks jurisdiction to try the defendant, who is an Indian by blood and a

member of the Choctaw Nation of Oklahoma, for the crime of lewd molestation, which is an enumerated crime in the Major Crimes Act (MCA), *18 U.S.C. § 1153*. The Court stayed enforcement of the decision and granted leave to the State to appeal. The State announced its notice of intent to appeal on the record.

The defendant orally requested that the bail be reduced and the Court denied the request.

The proceedings were on the record. (Retta Brittain, court reporter.)

/s/ Marion D. Fry

Judge of the District Court

cc: DA

Interoffice mail

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