

IN THE DISTRICT COURT IN AND FOR THE 13<sup>TH</sup> JUDICIAL DISTRICT  
OTTAWA COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

vs.

CASE NO. CF-2020-129  
CF-2020-177  
CF-2020-178  
CF-2018-298

FILED  
DISTRICT COURT  
OTTAWA CO. OKLA.

MAR 02 2021

WINSTON BRESTER,  
Defendant.

CASSIE KEY COURT CLERK  
BY 

☒ Special District Judge Baird

☒ Court Reporter: Jenny Kalsu - 2-16-21  
TAMMY THOMAS 3-1-21

Date: March 1, 2021

COURT ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

- ☒ State of Oklahoma present through Kenny Wright, ADA.
- ☒ Defendant is present in person via Skype and through Andrew Meloy, Attorney at Law.
- ☐ Defendant fails to appear. Bench warrant and Bond Forfeiture ordered. Bond set at \$ .
- ☐ Defendant fails to appear. Bench warrant and Bond Forfeiture taken under advisement until the      day of      , 20      , at      .

Also present on behalf of the Peoria Tribe are Michael McBride and Gregory Buzzard, Attorneys at Law on February 16, 2021, with Gregory Buzzard, amicus for Peoria Tribe and Joseph Halloran, amicus for Miami Tribe present by phone on March 1, 2021.

Comes on for completion of the hearing begun on February 16, 2021, on the Defendant's Motion to Dismiss for Lack of Jurisdiction in CF-20-129, CF-20-177, CF-20-278 and the Defendant's Application for Post-Conviction Relief and Motion to Dismiss Motion to Revoke in CF-18-298. The parties agree to hear all matters together and stipulate that evidence in one case may be considered in all cases. The parties further waive any irregularity in having the Defendant present via skype for hearing on the Defendant's motions.

The Defendant moves for admission of Defendant's Exhibit #A, #B, #C, and #D into evidence. The State does not object. Defendant's Exhibit #A, #B, #C, and #D are admitted into evidence.

The State moves for admission of further exhibits labeled State's #1 and #2. Defendant does not object. The Defendant moves for admission of further exhibit labeled Defendant's #1. The State does not object.

The parties stipulate that the Defendant is a recognized member of the federally recognized Seneca-Cayuga Indian tribe, was a member at the time of the commission of the alleged crime, and that he has a quantum of Indian blood..

The parties stipulate that the alleged crime in CF-20-177 and CF-20-178, as well as case CF-18-298, wherein the State's Motion to Revoke Suspended Sentence has been filed, occurred within the historical boundaries of the Ottawa tribal reservation.

The parties stipulate that the alleged crime in CF-20-129 occurred within the historical boundaries of the Peoria tribal reservation.

Under *McGirt v. Oklahoma*, 591 U. S. \_\_\_\_ (2020), the issue thus becomes whether the Ottawa and/or Peoria reservations continue to exist or have been disestablished, thus resulting in the alleged crimes having occurred on "Indian land".

The Court finds that the Defendant has presented sufficient evidence to shift the burden of proof to the State to show that the Ottawa and/or Peoria tribal reservations have been disestablished.

The State admits that prior to 1956 there was an existing Ottawa reservation, but argues that the Act of August 3, 1956 (which appears to have an effective date in 1967) terminated not only the federal government's relationship with the tribe but also the existing reservation; and further that the Act of May 15, 1978 repealing the 1956 Act did not reestablish a reservation. The State indicates that although it has searched and spent extensive time looking into the issue, it has found no clear statutory language of disestablishment by any Act of Congress. Essentially, the State relies on the non-statutory considerations set out in *Solem v. Barlett*, 104 S.Ct. 1161, and discussed in *McGirt*, *supra*.

This Court need not determine whether the 1956 Act extinguished or reduced the existing Ottawa reservation as the clear language passed by congress in 1978 repealed the 1956 Act. The common meaning of the term repeal acts as an annulment of the previously passed law. Congressional intent need not be inferred where it is clearly stated. Subsection C of the 1978 Act "reinstated all rights and privileges" . . . "under Federal treaty, statute, or otherwise which may have been diminished or lost." See Exhibit "D". The Court specifically finds no language in the 1956 Act which would terminate anything other than "Federal supervision over the trust and restricted property of the Ottawa Tribe" and "of Federal services furnished to such Indians."

With regard to the Defendant's post-conviction application (hereinafter referred to as PCA) in CF-18-298, the Court finds that the Defendant did not file a direct appeal and thus procedural bars may exist to the Court's consideration of the issue despite jurisdiction being a proper issue to raise in an PCA. However, the Court finds that the Post-Conviction Procedure Act, Title 22 O.S. § 1080 (b) allows the Defendant to raise the issue of jurisdiction in his initial PCA. Additionally, there is an existing motion to revoke pending in the case, which effectively if not

procedurally, brings Defendant's case back within this Court's purview. The Court would further note that in the PCA, the burden of proof remains with the Defendant.

The Peoria reservation has different issues. While the evidence is clear regarding the original historical boundaries of the reservation granted to the confederated tribes of Peoria, et al., not even the Peoria tribe is able to definitively establish the present day outlines of their reservation, distinct from any other tribe. While it is perhaps normal to think of a reservation as a defined area separate from all other entities that is not the case with the Peoria tribe. As the original reservation in Oklahoma was established for the joint benefit of the Peoria, Kaskaskias, Wens, Piankeshaws, and Miami tribes it is not necessary for the Court to address the issue of separate and distinct reservation for the purpose of this hearing. The issue is whether the land remains Indian land or whether the reservation has been reduced or disestablished in some manner. The State has not presented any evidence of specific congressional language indicating that the Peoria reservation has been reduced in any manner or disestablished, relying instead on the "termination" theory argued above.

The "termination" Act of August 2, 1956, and the repeal of that Act by Congress on May 15, 1978, have the same effect as discussed above relative to the Ottawa reservation. The underlying question is whether or not the land within the historical reservation remains "Indian land." Again the State is unable to present any clear statutory language of disestablishment by any Act of Congress and as discussed in the McGirt case, policies of the time designed to get rid of the reservations will not act as a proper substitution for the necessity of congress itself to act in disestablishing an Indian reservation. The Court specifically finds no language in the 1956 Act which would terminate anything other than "the federal supervision over the affairs of the Peoria tribe."

The Court finds, based on the arguments of counsel and the evidence introduced, that the above named defendant is an Indian and the alleged crimes were committed on Indian land and thus the State lacks jurisdiction to proceed with its prosecution for the same reasons discussed above and as set out in McGirt v. Oklahoma, 591 U. S. \_\_\_\_ (2020).

Therefore, the Court sustains Defendant's Motion to Dismiss, and hereby quashes and dismisses the information, to which action and ruling of the Court, the State of Oklahoma, by the District Attorney, excepts, and exceptions are allowed; thereupon the District Attorney gives notice in open court of his intention to appeal to the Court of Criminal Appeals.

Further, the Court finds the Defendant has met his burden of proof as it related to the PCA filed in CF-18-298, that the Court was without jurisdiction in the underlying charge, and that the State lacks jurisdiction to proceed with its pending Motion to Revoke Suspended Sentence. Thus the Judgment and Sentence is hereby reversed, without prejudice to the refiling of charges in the appropriate jurisdiction.

The Court orders the Defendant be released, subject to any holds or detainers, and bonds, if any, are exonerated and the Bondsman released from further liability. Given the State's announced

intention to appeal, the Court further orders that the Defendant be placed on an O.R. (own recognizance) bond during the pendency of the appeal as authorized in the case of Durham v. State 545 P.2d 805.

Defendant's next court appearance is set for June 2, 2021 at 9:30 a.m. for status of the appeal.

Becky R. Baird  
Special District Judge