

IN THE DISTRICT COURT OF THE 18TH JUDICIAL DISTRICT  
 WITHIN AND FOR MCINTOSH COUNTY, STATE OF OKLAHOMA

**FILED**

OCT 04 2023

LISA RODRIGUEZ, Court Clerk  
 MCINTOSH COUNTY  
 Deputy

State of Oklahoma, )  
 Plaintiff, )  
 vs )  
 Joseph Nocona Long, )  
 Defendant. )

CASE NO. CF-2023-86

**ORDER ON JURISDICTIONAL ISSUES RAISED BY DEFENDANT**

Now on this the 4<sup>th</sup> day of October, 2023, comes on for hearing *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Motion for Post-Conviction Relief, or in the Alternative Petition for Habeas Corpus and Motion to Expunge*. The Defendant's motion is in response to the State of Oklahoma's *Application to Accelerate Deferred Judgment*. The matter comes before this Court both on the Defendant's motion challenging subject matter jurisdiction and evidentiary hearing on the State's application. The Defendant appears in person and with counsel, Ryan Ferguson. The State appears through McIntosh County Assistant District Attorney, Sara Dupree.

**PROCEDURAL POSTURE**

On May 30, 2023, the Defendant was charged by information of the crimes of Count 1: Bringing Contraband into McIntosh County Jail in violation 57 Okla. Stat. § 21 (A) and Count 2: Trespassing After Being Forbidden in violation 21 Okla. Stat. § 1835. The probable cause affidavit, upon which the parties factually stipulate, states the Defendant, on May 28, 2023, trespassed unto the property of a Bill Bumganer, after previously receiving a "no trespass order." Furthermore, upon

arrest, the Defendant was booked into the McIntosh County Jail wherein he was found to have been hiding crystal methamphetamine under his cloths.

On June 27, 2023, the Defendant entered a plea of no contest, receiving a (7) year deferred sentence with (18) months of district attorney supervision on the first count and a (3) year deferred sentence on the second count. The Defendant also agreed to certain conditions of probation aimed at treating the Defendant's substance abuse. On July 6, 2023, not long after the plea, the State files the application which is currently before this Court. The State's application alleges the "defendant failed to report to District Attorney Supervision to set-up probation as ordered by the Court." In response to the State's application, the Defendant now challenges the subject matter jurisdiction of this Court, primarily citing the recent United States Supreme Court decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020) in support for his claim. In addition to citing *McGirt*, the Defendant's motion also states in unequivocal terms:

[w]hen a crime is committed, the State of Oklahoma must prove it has jurisdiction and this right cannot be waived. The Federal Government has exclusive jurisdiction over this proceeding under the General Crimes Act, 18 U.S.C. Sec. 1152.

*Motion to Dismiss for Lack of Subject Matter Jurisdiction*, filed Aug. 26, 2023, pg. 2 (herein referred to as "Defendant's statutory claim").

In furtherance of adjudicating the Defendant's motion to dismiss, the Court held an evidentiary hearing on September 6, 2023. At the evidentiary hearing both the State and the Defendant stipulated to the following facts: (1) the criminal acts occurred in McIntosh County, State of Oklahoma; (2) the acts also occurred within

the historical boundary of the Muscogee Creek Nation; and (3) the Defendant is an Indian under federal law. Despite these stipulations the State objected to dismissal of this matter, arguing it continues to have jurisdiction over the Defendant. Considering these evidentiary findings and legal arguments, the Court required additional briefing on two issues: 1) an identification of which federal laws preempt the State from exercising jurisdiction over the Defendant; and 2) if no such law exists, arguments as to whether the State's exercise of jurisdiction over the Defendant unlawfully infringes on principals of tribal self-government. These central questions being those the United States Supreme Court addresses in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 213 L. Ed. 2d 847 (2022).

#### ANALYSIS

This Court first addresses the existence, if any, of any federal law which preempts the State from exercising jurisdiction over the Defendant under ordinary principals of federal preemption. Addressing this question necessarily involves application of the historically important decision in *McGirt v. Oklahoma*. The *McGirt* decision is historic in its analysis of the relationship between the Federal, State, and Tribal authority to exercise criminal jurisdiction in Oklahoma. Though historic, subsequent decisions have found *McGirt* does not represent a change to substantive law. Instead, the decision "announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation." *State ex rel. Matloff v.*

*Wallace*, 2021 OK CR 21, ¶ 26, 497 P.3d 686, 691, *cert. denied sub nom. Par. v. Oklahoma*, 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022) (emphasis in the original). The *McGirt* decision seeks to definitively resolve a jurisdiction question, what the decision describes as “[t]he only question before us,” the issue “concern[ing] the statutory definition of ‘Indian country’ as it applies in federal criminal law under the [*Major Crimes Act*].” *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480, 207 L. Ed. 2d 985 (2020).

In resolving the definition of Indian country under federal criminal law, the *McGirt* decision holds “[o]nce a federal reservation is established, only Congress can diminish or disestablish it. Doing so requires a clear expression of congressional intent.” *Id.*, 2456. Finding a need for a clear expression of congressional intent, *McGirt* further finds “Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.” *Id.*, 2464. In the absence of express congressional legislation, the *McGirt* decision holds the Muscogee Creek Nation remains a “reservation for purposes of federal criminal law.” *See id.*, 2459. As such, the Supreme Court in *McGirt* concludes the congressional language in the *Major Crimes Act* expressly “allowed only the federal government, not the States, to try tribal members for major crimes.” *Id.* at, 2480. Further, *McGirt* held such legislation is an appropriate exercise of congressional authority. *Id.* at 2462.

In the wake of the *McGirt* there seems to exist many assumptions to jurisdictional questions. One jurisdictional issue assumed by many to be resolved was the State’s lack of jurisdiction over crimes by or against Indians in Indian Country which did not arise to the level of “major crimes.” Admittedly, such an

analysis comes, without further context, from dicta in *McGirt* stating “[a] neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country.” *Id.* at 2479 (citing the *General Crimes Act*, 18 U.S.C. § 1152 hereinafter the GCA). This dictum was the source of much confusion for several months after *McGirt* and resulted in incorrectly overturning many serious State convictions. As the *McGirt* correctly foresaw “for every jurisdictional reaction there seems to be an opposite reaction.” *Id.* at 2480.

Because of this previous uncertainty, this Court finds it will not engage in assumptions when denying the State of Oklahoma jurisdiction to enforce laws, the enforcement of which are intended for community safety of both native and non-native Oklahoma citizens.

After *McGirt* the Supreme Court made an equally historic decision in *Oklahoma v. Castro-Huerta*. *Castro* does not overturn *McGirt* but applies it in the context of greater Indian law. The *Castro* decision acknowledges “[i]n light of *McGirt* and the follow-on cases, the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country. About two million people live there, and the vast majority are not Indians.” *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2492, 213 L. Ed. 2d 847 (2022). *Castro* further acknowledges “the classification of eastern Oklahoma as Indian country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there.” *Id.* at 2492. In *Castro* the defendant urged the State lacked jurisdiction to prosecute him due to the victim being an Indian. Under the original language of *McGirt* this was a legitimate

question. See *McGirt* at 2479 (citing the GCA stating “federal law applies to a broader range of crimes by or against Indians in Indian country). Nonetheless, *Castro* sets forth what this trial Court perceives as the following general rule:

To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10. As this Court has phrased it, a State is generally “entitled to the sovereignty and jurisdiction over all the territory within her limits.

*Id.* at 2493. In light of this general rule, this Court presumes the State of Oklahoma has subject jurisdiction to prosecute criminal offenses which occur within the boundaries of the State for acts which are in contravention of State law. As set forth above, to overcome this presumption due to the native status of the Defendant, the Defendant must show either a federal law which preempts State jurisdiction or prosecution of the Defendant would infringe on principals of tribal self-government

The Court first addresses the existence of a federal law which preempts the State from exercising jurisdiction over the Defendant. The Defendant's brief only cites 18 U.S.C. § 1152, stating it preempts the State from exercising criminal jurisdiction. This Court cannot agree with Defendant's sweeping proposition due *Castro's* rejection of a similar argument. In *Castro* the Supreme Court expressly holds “[u]nder the General Crimes Act, [ ] both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian country.” *Id.* at 2495. This position is clearer in note 2 of *Castro* which states as follows:

[t]o the extent that a State lacks prosecutorial authority over crimes committed by Indians in Indian country (a question not before us), that would not be a result of the General Crimes Act. Instead, it would be the result of a separate principle of federal law that, as discussed below, precludes state interference with tribal self-government.

*Id.*, at 2495. The Defendant cites no other congressional act which expressly preempts the State from exercising criminal jurisdiction over the Defendant. For this reason, the Court finds no federal congressional action exists which preempts the State of Oklahoma from prosecuting the Defendant for the crimes of bringing contraband into a jail facility in violation 57 Okla. Stat. §21 (A) or trespassing after being forbidden in violation 21 Okla.Stat. § 1835.

The analysis of criminal jurisdiction does not end at preemption as “even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government.” *Id.* at 2500–01 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, (1980)). This analysis is commonly referred to as the *Bracker* balancing test. In conduction of a *Bracker* test the “inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” *Id.* at 145.

This Court seeks to use the *Bracker* balancing test in determining the State’s ability to prosecute the Defendant. First, this Court weighs the importance of the State’s interest in enforcing criminal law to those within its borders. State

enforcement of police powers seems to be of great importance to our Republic. The laws which the State seeks to enforce go to the heart of protection of community safety and property rights. It's a social compact, a tie that binds. This theory is at the heart of our Constitutional jurisprudence. "The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence." *Calder v. Bull*, 3 U.S. 386, 388, 1 L. Ed. 648 (1798). Applying this interest to the present case, it seems, without doubt, the State should be able to regulate what contraband should be forbidden in its jails. In addition, a review of the trespassing statutes shows its applicability and purpose is to offer protection to all property owners. The State has a legitimate interest in protecting the property rights of its citizens. Protecting property rights go to the very heart of our American ideals. In addition, the laws the State seeks to enforce are the product of the democratic process. Both natives and non-natives elect the legislators who make the law, the prosecutors who enforce the law, and the judges who interpret the law. Finally, the laws the State seeks to enforce appear to make no distinction as to the citizens entitled to protections.

Next, the Court balances the federal interests. These interests seem largely uninterrupted should the State be able to prosecute crimes which occur within its borders. An argument reasonably exists, if the State lacks jurisdiction to enforce its laws, *only* the federal government can enforce *State* law in Indian County when applied to one meeting the definition of an Indian under federal law. The Court



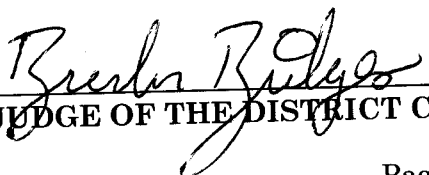
acknowledges this may be the law of the land, but, due to the novelty of such an approach this Court refrains from assumptions. Instead, the Court presumes the State to have jurisdiction to all individuals within its borders.

Third, is balancing the tribe's ability to self-govern. This is a vital right in Eastern Oklahoma. It is a right this Court believes worthy of protection. In light of *McGirt*, it is without doubt the tribe has jurisdiction to enforce its laws in Indian Country against Native Americans. Allowing State prosecution of crimes will not prevent prosecution in tribal court for tribal offenses. The Court acknowledges, however, this reservation is unique to others in that there are many non-native property owners within the borders of the Creek Nation, within the borders of Indian Country.

After conducting the balancing test, the Court finds the presumption of the State's ability to enforce its laws. With this presumption in mind, the Court finds subject matter jurisdiction exists for the State to prosecute the Defendant for violating State laws concerning bringing contraband into a jail and trespassing after being forbidden. For this reason, the *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction* is DENIED. The Defendant's *Motion for Post-Conviction Relief, or in the Alternative Petition for Habeas Corpus and Motion to Expunge* is denied for failure to follow proper procedure under the Post-Conviction Act.

In summation, the State may proceed on its *Application to Accelerate Deferred Judgment*.

**BE IT SO ORDERED!**

  
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JUDGE OF THE DISTRICT COURT

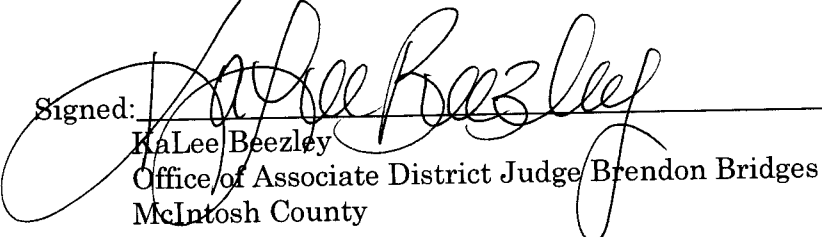
**CERTIFICATE OF MAILING**

I hereby certify on the 4<sup>th</sup> day of October, 2023, I mailed a true and correct copy of the foregoing document to the following:

**McIntosh County District Attorney's Office put in box at McIntosh County Courthouse, Court Clerk's Office.**

**Ryan Ferguson-put in box at McIntosh County Courthouse, Court Clerk's Office.**

Signed: \_\_\_\_\_

  
HaLee Beezley

Office of Associate District Judge Brendon Bridges  
McIntosh County