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CLERK



**IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA**

MA 2022 937

BILLY ZANE DEO,

Petitioner,

v.

**THE HONORABLE LAWRENCE PARISH,
DISTRICT JUDGE OF OKFUSKEE COUNTY,
TWENTY-FOURTH JUDICIAL DISTRICT,**

Respondent.

No. _____

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

OCT 25 2022

**JOHN D. HADDEN
CLERK**

BRIEF IN SUPPORT OF PETITION FOR WRIT

WRIT OF MANDAMUS

OKFUSKEE COUNTY DISTRICT COURT

CASE NOS. CF-2018-56, CF-2018-104

**CURT ALLEN
OBA NO. 15965
OKLAHOMA INDIGENT DEFENSE SYSTEM
205 S. GRAND
OKMULGEE, OK 74447
(918) 752-0447**

ATTORNEY FOR PETITIONER

SUMMARY

Billy Deo is a Muscogee (Creek) Indian. The crimes referenced in these cases occurred in the Muskogee (Creek) Nation's Reservation, of which Okfuskee County, Oklahoma is a part. In these cases the State of Oklahoma has moved to terminate him from the Okfuskee County Drug Court program and sentence him to the Oklahoma Department of Corrections for seventeen years.

This is a *McGirt* case. The State asserts that *McGirt* does not apply because Petitioner's pleas took place before *McGirt* was decided. However, any conviction in Mr. Deo's cases must necessarily take place *after* the *McGirt* decision. Mr. Deo has not been convicted of the crimes that are the subject of these cases. The time period for Mr. Deo to file a direct appeal has not yet begun. This is not a matter where Mr. Deo has exhausted his direct appeal. There is no conviction in these cases that could have become final. This is not a matter where Mr. Deo is seeking post-conviction relief.

Absent proof that Mr. Deo is not a member of the Creek Nation or that he has no quantum of Indian blood or that the crimes did not take place within the Muskogee (Creek) Reservation, Respondent did not have the discretion to deny Mr. Deo's Motion to Dismiss.

STATEMENT OF THE CASE

On June 27, 2018, an Information was filed in Okfuskee County case CF-18-56 alleging that Billy Zane Deo, Petitioner, committed the offense of:

1. Second Degree Burglary, in violation of 21 O.S. 1435.

On August 15, 2018, Petitioner pled guilty and further proceedings were deferred for a period of seven years. Petitioner was placed on supervised probation through the Okfuskee County District Attorney's office.

On December 17, 2018, an Information was filed in Okfuskee County case CF-18-104 alleging that Petitioner, committed the offenses of:

1. Grand Larceny, in violation of 21 O.S. 1705.
2. Knowingly Concealing Stolen Property, in violation of 21 O.S. 1713.

On December 19, 2018, the State filed an Application to Accelerate Petitioner's deferred sentence in CF-18-56.

On January 16, 2019, Petitioner pled guilty in CF-18-104 and stipulated to the Application to Accelerate in CF-18-56. Further proceedings were continued while Petitioner participated in the Okfuskee County Drug Court program. If Petitioner successfully completed drug court, he would receive a seven-year deferred sentence in CF-18-104 and the Application to Accelerate his sentence in CF-18-56 would be dismissed. If he was terminated from drug court he would be convicted in CF-18-104 and sentenced to ten years in the Department of Corrections. He would also be convicted in CF-18-56 and sentenced to seven years in the Department of Corrections, with both cases to run consecutively with each other for a total of seventeen years.

On February 27, 2019, the State filed an Application to Terminate Petitioner from drug

court. On May 4, 2021, Petitioner filed a pro se Motion for Post-Conviction Relief under *McGirt*, which was denied on July 21, 2022 because Petitioner had no convictions upon which post-conviction relief could be granted.

On August 31, 2022, Petitioner filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to *McGirt*. Argument was heard on the motion on September 6, 2022. The written order denying the motion to dismiss was filed September 26, 2022.

STATEMENT OF FACTS

Billy Dco is 1/2 Muskogee Creek Indian. He has been an enrolled member of the Muskogee Creek Nation since 1987. The crimes referenced in the instant cases occurred within Okfuskee County which is within the reservation of the Muskogee Creek Nation. *Joint Stipulation of September 6, 2022.*

In the *McGirt* hearing, the State argued that *McGirt* did not apply because the Application to Accelerate Petitioner's plea in CF-18-56 to a conviction and his subsequent plea into drug court in both cases took place before *McGirt* was decided. *Transcript of hearing of Sept 6, 2022 at 5:18-20.* Respondent denied the motion, finding that in both cases Petitioner had pled guilty, was represented by counsel, and had been advised of his appellate rights. *Transcript of hearing of Sept 6, 2022 at 6:17-24.* The written court minute memorializing the denial of Petitioner's *McGirt* motion was filed on September 26, 2022.

STATEMENT OF LAW

“Upon a verdict or plea of guilty or upon a plea of nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings upon the specific conditions prescribed by the court.” 22 O.S. 991c(A).

A deferred sentence is not a conviction until such time as the trial court pronounces judgment and sentence, even though it flows from a plea of guilty. *Belle v. State*, 516 P.2d 551, 552 (Okla. Crim. App. 1973), *White v. State*, 702 P.2d 1058, 1062 (Okla. Crim. App. 1985) Pleading guilty and being convicted are related but legally different concepts. “Convicted” refers to a person who has been formally pronounced guilty upon a verdict or plea of guilty, and “pleading guilty” refers to a person who is entering a plea of guilty without judgment. The concept of pleading guilty embraces those receiving a deferred sentence, which is not a conviction until the court pronounces judgment and sentence. *Woolen v. Coffman*, 676 P.2d 1375, 1378 (Okla. Crim. App. 1984), *Belle*, 516 P.2d at 552.

The Attorney General of Oklahoma also recognizes that deferred sentences are not convictions and that pleading guilty is not equivalent to being convicted. *Oklahoma Attorney General Opinions, 2004 OK AG 34 and 2005 OK AG 10*.

“When the court accepts the [Drug Court] treatment plan with the written plea agreement, the offender, upon entering the plea as agreed by the parties, shall be ordered and escorted immediately into the program.” 22 OS 471.6(D) (While the drug court admission process requires an entry of plea it does not provide for a finding of guilt)

“At the [Drug Court] revocation hearing, if the offender is found to have violated the conditions of the plea agreement or performance contract and disciplinary sanctions have been

insufficient to gain compliance, the offender shall be revoked from the program and sentenced for the offense as provided in the plea agreement.” 22 OS 471.7(E)

“The drug court program may be utilized as a disciplinary sanction ... in a case where the offender has been tried for an eligible offense in the traditional manner, given either a deferred or suspended sentence, and has violated a condition of the sentence.” 22 OS 471.8

“When an offender has successfully completed the drug court program, the criminal case against the offender shall be:

1. Dismissed if the offense was a first felony offense; or
2. If the offender has a prior felony conviction, the disposition shall be as specified in the written plea agreement.” 22 OS 471.9(A)

If the terms of drug court are not successfully completed, (after a drug court revocation hearing) a judgment of guilt is entered and the defendant is sentenced. *Hagar v. State*, 990 P.2d 894, 89 (Okla. Crim. App. 1999); *Tate v. State*, 313 P.3d 274 (Okla. Crim. App. 2013)

WHY THE WRIT SHOULD ISSUE

This Court has exclusive appellate jurisdiction over criminal matters, including the power to issue extraordinary writs over courts to maintain superintending control of those courts in exercise of or in aid of this Court’s appellate jurisdiction. *Carder v. Court of Criminal Appeals*, 595 P.2d 416, 419 (Okla. 1978). Mandamus will lie where a trial court is without jurisdiction to hear a particular matter. *Oklahoma ex rel Eubanks v. Cole*, 109 P. 736 (Okla. Crim. App. 1910); *Bennett v. District Court of Tulsa County*, 162 P.2d 561 (Okla. Crim. App. 1945)

WHEREFORE, as the trial Court is exercising jurisdiction over crimes and actions that occurred at all times within the reservation of the Muskogee (Creek) Nation which could lead to

the conviction and sentence of a Muskogee (Creek) citizen to seventeen years imprisonment in the Oklahoma Department of Corrections, this Court should issue a writ to ensure Petitioner's cases be dismissed in accordance with *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020) and *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021)

ARGUMENT

STATE ex rel. MATLOFF v. WALLACE DOES NOT APPLY TO PETITIONER'S CASE.

In State ex rel. Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021) this Court affirmed that it treated Indian Country claims under *McGirt* as presenting non-waivable challenges to criminal subject matter jurisdiction. *Matloff*, 21 OK CR 21, para. 13. The Court then ruled that it was exercising its independent state law authority to interpret the remedial scope of the state post-conviction statutes to hold that *McGirt* and its post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. *Matloff*, 21 OK CR 21, para. 15.

Post-Conviction Relief is a specific legislative provision that regulates appellate review that 1) concerns a situation where a person has been convicted or sentenced for a crime and 2) falls outside the scope of a timely appeal. 22 O.S. 1080. Petitioner's case is not a situation where he has been convicted or sentenced for a crime. Petitioner's case does not fall outside the scope of a timely appeal. Petitioner's case is not a post-conviction relief case. *Matloff* does not apply to Petitioner's case.

Petitioner did not have a conviction, let alone a conviction that was final, when *McGirt* was decided.

Petitioner was on a deferred sentence. That case was not a conviction. 22 O.S. 991c,

Belle v. State, 516 P.2d 551, 552 (Okla. Crim. App. 1973), *White v. State*, 702 P.2d 1058, 1062 (Okla. Crim. App. 1985) *Woolen v. Coffman*, 676 P.2d 1375, 1378 (Okla. Crim. App. 1984), *Oklahoma Attorney General Opinions*, 2004 OK AG 34 and 2005 OK AG 10.

A new case was filed against Petitioner, and as a result of the plea bargain between him, the State, and Respondent, he was placed in the Okfuskee County drug court program. If he successfully completed drug court, his earlier case would remain the same deferred sentence; not a conviction. If he successfully completed the drug court, his new case would be deferred for a period of seven years; not a conviction. During his time in the drug court program Petitioner's cases are not convictions. 22 OS 471.6, 471.7, 471.8, 471.9; *Hagar v. State*, 990 P.2d 894, 89 (Okla. Crim. App. 1999); *Tate v. State*, 313 P.3d 274 (Okla. Crim. App. 2013).


If Petitioner is terminated from the drug court program and if Respondent decides to enter convictions in the cases and sentence Petitioner to DOC, *only then* there will be convictions; however, those convictions will not be final. If Respondent is convicted and sentenced to DOC, he is entitled to a timely, direct appeal pursuant to 22 O.S. 471.7 and *Hagar v. State*, 990 P.2d 894, 89 (Okla. Crim. App. 1999).

CONCLUSION

In *Matloff* this court reiterated that Indian Country claims under *McGirt* present non-waivable challenges to criminal subject matter jurisdiction. Invoking its independent state law authority to interpret the remedial scope of the state post-conviction statutes, this Court held that *McGirt* and its post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Petitioner is not proceeding under the post-conviction relief statute. Petitioner has not been convicted. Petitioner does not have a conviction that is final. *Matloff* does not apply to Petitioner's case.

WHEREFORE, This Court should direct the trial court to dismiss Okfuskee Cases CF-18-56 and CF-18-104 as required by *McGirt*, *Matloff*, and *Sizemore*.

Respectfully submitted,



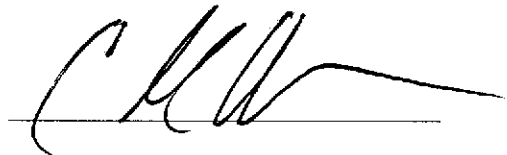
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CERTIFICATE OF DELIVERY

This is to certify that on October 25th, 2022, the original and seven copies of the foregoing Brief were mailed to: Clerk of the Court of the Appellate Courts, Oklahoma Judicial Center, Ground Floor, 2100 N. Lincoln Blvd., Suite 4, OKC, OK 73105

CERTIFICATE OF DELIVERY

This is to certify that on October 25th, 2022, a true and correct copy of the foregoing motion was mailed to the Honorable Lawrence Parish, Judge of the District Court within and for Okfuskee County, and Albert Kelly, Okfuskee County Assistant District Attorney, Okfuskee County Courthouse, 209 N. 3rd Street Okemah, Oklahoma 74859

A handwritten signature in black ink, appearing to read 'Curt Allen', is written over a horizontal line.

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