



NICHOLSON v. STITT

2022 OK 35

Case Number: 119270

Decided: 04/19/2022

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2022 OK 35, ___ P.3d ___

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JASON NICHOLSON, JUSTIN HOOPER, CAEL BURGESS, DEREK HAIR, and others similarly situated,
Plaintiffs/Appellants,

v.

KEVIN STITT, in his official capacity as Governor; STEVE KUNZWEILER, in his official capacity as District Attorney of Tulsa County; CAROL ISKI, in her official capacity as District Attorney of McIntosh and Okmulgee Counties; JACK THORP, in his official capacity, District Attorney of Wagoner County; MAX COOK, in his official capacity, District Attorney of Creek and Okfuskee Counties; ORVIL LOGE, in his official capacity, District Attorney of Muskogee County; PAUL SMITH, in his official capacity, District Attorney of Hughes County; MATTHEW BALLARD, in his official capacity, District Attorney of Mayes and Rogers Counties; THE CITY OF BEGGS; THE CITY OF BIXBY; THE CITY OF BOLEY; THE CITY OF BRISTOW; THE CITY OF BROKEN ARROW; THE CITY OF CATOOSA; THE TOWN OF CHECOTAH; THE CITY OF COWETA; THE TOWN OF CROMWELL; THE TOWN OF DEPEW; THE TOWN OF DEWAR; THE CITY OF DRUMWRIGHT; THE CITY OF EUFAULA; THE CITY OF GLENPOOL; THE TOWN OF HASKELL; THE CITY OF HENRYETTA; THE CITY OF HOLDENVILLE; THE TOWN OF INOLA; THE CITY OF JENKS; THE TOWN OF KELLYVILLE; THE TOWN OF KIEFER; THE CITY OF MANNFORD; THE CITY OF MORRIS; THE TOWN OF MOUNDS; THE CITY OF MUSKOGEE; THE CITY OF OILTON; THE CITY OF OKEMAH; THE CITY OF OKMULGEE; THE TOWN OF PORTER; THE CITY OF SAND SPRINGS; THE CITY OF SAPULPA; THE CITY OF TULSA; THE CITY OF WAGONER; THE TOWN OF WELEETKA; THE CITY OF WETUMKA; and THE CITY OF WEWOKA. Defendants/Appellees,
and
THE TOWN OF SUMMIT, Defendant.

**ON APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY,
STATE OF OKLAHOMA
HONORABLE PANDEE RAMIREZ, DISTRICT JUDGE**

¶0 Plaintiffs/Appellants Jason Nicholson, Justin Hooper, Cael Burgess, and Derek Hair (collectively, Plaintiffs) appeal the trial court's order dismissing their claims for money had and received against Defendants/Appellees Governor Kevin Stitt and certain district attorneys and municipalities which are alleged to be located within the boundaries of the Muskogee (Creek) Nation. Plaintiffs claim that, according to *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452 (2020), the State and municipalities did not have jurisdiction to prosecute them for crimes committed on the Creek Reservation. Plaintiffs argue their convictions are void *ab initio* and seek the return of fines and fees they paid to the State and municipalities. We affirm the trial

court's order of dismissal. Plaintiffs' criminal judgments and sentences have not been vacated pursuant to the Post-Conviction Procedure Act, 22 O.S.2011 & Supp.2014 §§ 1080-1089. As a result, Plaintiffs have failed to state a claim for money had and received.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

John M. Dunn and Kevin D. Adams, Tulsa, Oklahoma, for Appellants.

Jacqueline R. Zamarripa and Randall J. Yates, Oklahoma Attorney General's Office, Oklahoma City, Oklahoma, for Appellees Kevin Stitt, Steve Kunzweiler, Carol Iski, Jack Thorp, Max Cook, Orvil Loge, Paul Smith, and Matthew Ballard.

Andrew W. Lester, Shannon F. Davies, Courtney D. Powell, Anthony J. Ferate, Spencer Fane LLP, Oklahoma City, Oklahoma, for Appellees City of Beggs, City of Bixby, Town of Boley, City of Bristow, City of Catoosa, City of Checotah, City of Coweta, Town of Cromwell, Town of Depew, Town of Dewar, City of Drumwright, City of Eufaula, City of Glenpool, Town of Haskell, City of Henryetta, City of Holdenville, Town of Inola, City of Jenks, Town of Kellyville, Town of Kiefer, Town of Mannford, City of Morris, Town of Mounds, City of Muskogee, Town of Oilton, City of Okemah, City of Okmulgee, Town of Porter, City of Sand Springs, City of Sapulpa, City of Wagoner, City of Weleetka, City of Wetumka, and City of Wewoka.

Gerald L. Bender and R. Lawson Vaughn, City of Tulsa, Tulsa, Oklahoma, for Appellee City of Tulsa.

John J. Bowling and Alexander J. Sisemore, City of Broken Arrow, Broken Arrow, Oklahoma, for Appellee City of Broken Arrow.

KANE, V.C.J.:

¶1 On July 9, 2020, the United States Supreme Court handed down its decision in *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452 (2020). The United States Supreme Court determined that Congress never disestablished the Creek Reservation in eastern Oklahoma and, therefore, it is "Indian country" for purposes of the Major Crimes Act, 18 U.S.C. § 1153. Under the Major Crimes Act, "[o]nly the federal government, not the State, may prosecute Indians for major crimes committed in Indian country." *McGirt*, 140 S. Ct. at 2478.

¶2 Relying on *McGirt*, Plaintiffs/Appellants Jason Nicholson, Justin Hooper, Cael Burgess, and Derek Hair (collectively, Plaintiffs) filed the underlying civil suit for money had and received. Plaintiffs seek to recover fines and fees they were ordered to pay as a result of allegedly unlawful prosecutions by the State and certain municipalities. We hold that the trial court properly dismissed Plaintiffs' claims for money had and received.

FACTS AND PROCEDURAL HISTORY

¶3 Less than a week after the United States Supreme Court decided *McGirt*, Plaintiffs filed the underlying civil action to recover money had and received against Defendants/Appellees Kevin Stitt, in his official capacity as Governor; Steve Kunzweiler, in his official capacity as District Attorney of Tulsa County; Carol Iski, in her official capacity as District Attorney of McIntosh and Okmulgee Counties; Jack Thorp, in his official capacity as District Attorney of Wagoner County; Max Cook, in his official capacity as District Attorney of Creek and Okfuskee Counties; Orvil Loge, in his official capacity as District Attorney of Muskogee County; Paul Smith, in his official capacity as District Attorney of Hughes County; Matthew Ballard, in his official capacity as District Attorney of Mayes and Rogers Counties; the City of Beggs; the City of Bixby; the City of Boley; the City of Bristow; the City of Broken Arrow; the City of Catoosa; the Town of Checotah; the City of Coweta; the Town of Cromwell; the Town of Depew; the Town of Dewar; the City of Drumwright; the City of Eufaula; the City of Glenpool; the Town of Haskell; the City of Henryetta; the City of Holdenville; the Town of Inola; the City of Jenks; the Town of Kellyville; the Town of Kiefer; the City of Mannford; the City of Morris; the Town of Mounds; the City of Muskogee; the City of Oilton; the City of Okemah; the City of Okmulgee; the Town of Porter; the City of Sand Springs; the City of Sapulpa; the Town of Summit; the City of Tulsa; the City of Wagoner; the Town of Weleetka; the City of Wetumka; and the City of Wewoka (collectively, the State and Municipalities).¹ In their petition, Plaintiffs allege they are members of the Cherokee Nation and that the State and Municipalities prosecuted them without jurisdiction. Plaintiffs assert that the political subdivisions are located, at least, in part within the boundaries of the Muscogee (Creek) Nation. Plaintiffs claim that the State and Municipalities were unjustly enriched

through the collection of fines, costs, assessments, probationary fees, and other monies. Plaintiffs contend that, pursuant to *McGirt*, the State and Municipalities should be required to refund all or at least a portion of the money acquired without lawful authority.

¶4 The State and Municipalities filed motions to dismiss. Collectively, they argued the claims should be dismissed because Plaintiffs were required to seek post-conviction relief under Oklahoma's Uniform Post-Conviction Procedure Act, 22 O.S.2011 & Supp.2014 §§ 1080-1089, the trial court lacked subject matter jurisdiction, Plaintiffs failed to state a claim for money had and received, and § 14 of the Curtis Act precluded Plaintiffs' claims. The State and Municipalities also asserted equitable defenses and argued that venue was improper. The motions to dismiss were heard together. The trial court granted the motions to dismiss on the basis of lack of venue, lack of subject matter jurisdiction, and § 14 of the Curtis Act. The trial court denied Plaintiffs' request for leave to amend their petition finding any amendment would be futile and dismissed the case with prejudice. Plaintiffs appealed, and this Court retained the appeal *sua sponte*.

STANDARD OF REVIEW

¶5 A district court's dismissal of an action is reviewed *de novo*. See *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 22 P.3d 21, 23. The purpose of a motion to dismiss is to test the law that governs the claim, not the facts. *Id.* ¶ 5, at 24. A motion to dismiss for failure to state a claim upon which relief may be granted will not be sustained unless it appears without doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief. *Id.* Thus, the Court must take as true all of the allegations in the challenged pleading together with all reasonable inferences that can be drawn from them. *Id.* Dismissal is appropriate only when there is no cognizable legal theory to support the claim or insufficient facts under a cognizable legal theory. *Id.*

¶6 Whether the trial court erred in denying Plaintiffs' request to amend their petition is reviewed for an abuse of discretion. See *Prough v. Edinger, Inc.*, 1993 OK 130, ¶ 8, 862 P.2d 71, 75. However, that discretion is limited by 12 O.S.Supp.2018 § 2015(A), which provides that leave to amend be freely given when justice so requires. *Id.*

ANALYSIS

¶7 In their motions to dismiss, the State and Municipalities argue this civil suit for money had and received is a collateral attack on a criminal conviction and that Plaintiffs are required to seek relief under the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. Plaintiffs respond that, pursuant to *McGirt*, their convictions are void *ab initio* and that they are not required to seek post-conviction relief to vacate a void judgment and sentence. Plaintiffs write: "[T]he state convictions were made without subject matter jurisdiction, and are currently void, regardless of any collateral review (in fact, post-conviction review is not possible because there is no valid conviction to review)." During the hearing, Plaintiffs described *McGirt* as "self-executing," meaning if the State or its political subdivisions did not have jurisdiction under *McGirt*, a criminal defendant does not have to do anything to obtain relief from a void judgment and sentence. Plaintiffs assert that "[t]here's nothing left for a court to do."

¶8 Plaintiffs are correct that a judgment and sentence entered by a court without subject matter jurisdiction is void *ab initio*.² However, the soundness of their argument stops there. Contrary to Plaintiffs' notion, their convictions and sentences did not simply vanish the moment the United States Supreme Court issued its decision in *McGirt*. A final judgment and sentence can only be vacated through a timely appeal or by seeking post-conviction relief under the Post-Conviction Procedure Act. See 22 O.S.2011 § 1080 ("Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence."). The Act specifically gives "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that the court was without jurisdiction to impose sentence" the right to challenge the judgment and sentence. *Id.* § 1080(b). Such "[a] proceeding is commenced by filing a verified 'application for post-conviction relief' with the clerk of the court imposing judgment if an appeal is not pending." *Id.* § 1081. The sentencing court then makes findings of fact to determine if, as a matter of law, it had jurisdiction under *McGirt*. Decisions from the sentencing court can be appealed to the Court of Criminal Appeals. See *id.* § 1087. If an individual is not successful in having the judgment and sentence vacated through a post-conviction relief proceeding, the judgment and sentence remains in force. The United States Supreme Court contemplated as much in *McGirt*, noting that "many defendants may choose to finish their state sentences rather than risk re prosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-conviction review in criminal proceedings." *McGirt*, 140 S. Ct. at 2479.

¶9 Plaintiffs' position that a legal proceeding is not necessary to vacate a void judgment and sentence, albeit creative, is without merit. A void judgment has long been described as a "dead limb upon the judicial tree, which may be lopped off at any time." *Pettis v. Johnston*, 1920 OK 224, ¶ 0, 190 P. 681, 682 (Syllabus by the Court, No. 10). If individuals affected by the *McGirt* decision want their state and municipal court convictions and sentences vacated, they must affirmatively challenge jurisdiction using the Post-Conviction Procedure Act.³ If court action were not required to vacate a void judgment and sentence, anyone could self-declare that, according to *McGirt*, the court imposing the sentence was without jurisdiction and that their judgment and sentence is vacated. That is preposterous.

¶10 Plaintiffs try to persuade this Court that they are not seeking to have their convictions and sentences vacated; rather, they are seeking a refund of monies paid pursuant to judgments that are void *ab initio*. Regardless of how creatively Plaintiffs plead their case, this civil suit is nothing more than an impermissible collateral attack on a criminal conviction and sentence.⁴ The United States Supreme Court has warned against using civil suits as vehicles to challenge the validity of criminal judgments and sentences. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the United States Supreme Court examined this issue in the context of a § 1983 claim:

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. 486-87 (footnotes omitted) (emphasis original).

¶11 Here, Plaintiffs' claims for money had and received are premised on the belief their state and municipal court convictions and sentences are void. Like the § 1983 claim in *Heck*, Plaintiffs must prove their convictions and sentences have been overturned to recover on their claim for money had and received. Plaintiffs' claims clearly bear a relationship to their convictions and sentences. The assertions made by Plaintiffs in their petition, their briefs responding to the State and Municipalities' motions to dismiss, and at the hearing indicate their convictions have not been vacated. A judgment in favor of the Plaintiffs for money had and received would necessarily imply the invalidity of their convictions and sentences. As a result, Plaintiffs' claims for money had and received are not cognizable as a matter of law.

¶12 An action for money had and received arises when one has received money which in equity and good conscience should be paid to another. See *Sholer v. State ex rel. Dep't of Pub. Safety*, 1995 OK 150, ¶ 29, 945 P.2d 469, 475. Long ago, this Court said of such a cause of action:

It is a well-settled principle of law that, if a party through mistake receives money to which he is not justly and legally entitled, and which he should not in good conscience retain, that the law regards him as a receiver and holder of the money for the use of the lawful owner, and raises an implied promise on his part to pay the same, and, on his failure to do so, the owner may maintain an action against him therefor.

Avery v. Abraham, 1926 OK 114, ¶ 6, 243 P. 728, 728-29. Plaintiffs have not pleaded facts sufficient to support a cause of action for money had and received. Because Plaintiffs' convictions and sentences have not been invalidated, they cannot demonstrate that the money received by the State and Municipalities in equity and good conscience should be paid to them.⁵ Plaintiffs can prove no set of facts which would entitle them to relief. Thus, Plaintiffs have failed to state a claim for money had and received and their claims must be dismissed pursuant to 12 O.S.2011 2012(B)(6). The trial court concluded the claims should be dismissed because of lack of venue, lack of subject matter jurisdiction, and § 14 of the Curtis Act, not because

Plaintiffs failed to state a claim upon which relief may be granted. However, only one legally correct basis for dismissal is needed for the appellate court to affirm an order granting a motion to dismiss. See *Farley v. City of Claremore*, 2020 OK 30, ¶ 19, 465 P.3d 1213, 1225. A legally correct decision of the trial court must be affirmed even if "it was anchored to a theory different from that on which it comes to be tested on appellate review." *Id.* (quoting *Myers v. Lashley*, 2002 OK 14, ¶ 7, 44 P.3d 553, 557).

¶13 Because we hold Plaintiffs have failed to state a claim upon which relief may be granted, we need not address Plaintiffs' other allegations of error.⁶

¶14 We also affirm the part of the order denying Plaintiffs' request for leave to amend their petition.⁷ To cure the pleading defects, Plaintiffs would need to allege that their criminal convictions and sentences have been overturned.⁸ After this lawsuit was filed, the Court of Criminal Appeals determined that, for purposes of criminal law, *McGirt* does not apply retroactively to void a conviction that was already final when the case was decided on July 9, 2020. See *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689, cert. denied, 142 S. Ct. 757 (Jan. 10, 2022). Plaintiffs filed this civil action for money had and received four days after *McGirt* was decided. As discussed above, the record on appeal indicates Plaintiffs' convictions became final prior to the *McGirt* decision and have not since been vacated. Therefore, we hold the trial court did not abuse its discretion by denying Plaintiffs' request to amend their petition. Any amendment would be futile.

CONCLUSION

¶15 Plaintiffs' claims for money had and received require a determination that their state and municipal court criminal convictions and sentences are invalid. Challenges to criminal jurisdiction are governed by the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. Plaintiffs' convictions and sentences cannot be invalidated by the trial court in this civil action for money had and received. As a result, Plaintiffs have failed to state a claim upon which relief may be granted. We affirm the trial court's dismissal of the claims.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

CONCUR: Darby, C.J., Kane, V.C.J., Winchester, Edmondson, Combs, Gurich, Rowe, and Kuehn, JJ.

CONCUR IN RESULT: Kauger, J.

FOOTNOTES

KANE, V.C.J.:

¹ In their petition, Plaintiffs make allegations against Chris Ross, District Attorney for Seminole County, but Ross was not named as a Defendant in the case caption. Defendants The City of Boynton and The Town of Oktaha were dismissed without prejudice. Defendant The Town of Summit is not a party to this appeal.

² "A judgment is void on its face if the trial court lacked either jurisdiction over the parties, jurisdiction over the subject matter, or jurisdictional power to render the particular judgment." *In re Estate of Mouse*, 1993 OK 157, ¶ 7, 864 P.2d 1284, 1286; see *Application of Russell*, 1960 OK CR 61, ¶ 6, 354 P.2d 485, 487.

³ See, e.g., *Bosse v. State*, 2021 OK CR 30, ¶ 3, 499 P.3d 771, 773 (arguing *in his application for post-conviction relief* that "[b]ecause jurisdiction for Indian Country crimes rests exclusively in federal court, Oklahoma lacked jurisdiction to prosecute Mr. Bosse, and his convictions are void ab initio . . ."); *Martinez v. State*, 2021 OK CR 40, ¶ 3, 502 P.3d 1115, 1117 (arguing *in his application for post-conviction relief* that "[b]ecause the State of Oklahoma lacked jurisdiction, Mr. Martinez's convictions in the District Court of Comanche County are void *ab initio* and should be vacated and the charges dismissed.").

⁴ This Court has rejected similar attempts to use an extraordinary writ or declaratory judgment action to challenge a criminal judgment and sentence. See, e.g., *Dutton v. Midwest City*, 2015 OK 51, ¶ 21, 353 P.3d 532, 541-42 (extraordinary writ); *Okla. State Senate ex rel. Roberts v. Hetherington*, 1994 OK 16, ¶ 1, 868 P.2d 708, 709 (declaratory judgment).

⁵ Furthermore, Plaintiffs have not alleged that after successfully obtaining post-conviction relief, the fines, costs, assessments, probationary fees, and other monies paid as a result of their convictions and sentences were not returned to them nor have they alleged that the State and Municipalities are the receivers and holders of the funds.

⁶ We offer no opinion as to whether § 14 of the Curtis Act of 1898, 30 Stat. 499-500, gives municipalities criminal jurisdiction over Indians for crimes committed in Indian country.

⁷ "On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed." 12 O.S.2011 § 2012(G).

⁸ See *supra* note 5.

Citationizer[®] Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name

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Oklahoma Court of Criminal Appeals Cases

Cite	Name	Level
<u>2021 OK CR 21, 497 P.3d 686,</u>	<u>STATE ex rel. MATLOFF v. WALLACE</u>	Discussed
<u>2021 OK CR 30, 499 P.3d 771,</u>	<u>BOSSE v. STATE</u>	Discussed
<u>2021 OK CR 40,</u>	<u>MARTINEZ v. STATE</u>	Cited
<u>1960 OK CR 61, 354 P.2d 485,</u>	<u>APPLICATION OF RUSSELL</u>	Discussed

Oklahoma Supreme Court Cases

Cite	Name	Level
<u>1993 OK 130, 862 P.2d 71, 64 OBJ 3094,</u>	<u>Prough v. Edinger, Inc.</u>	Discussed
<u>1993 OK 157, 864 P.2d 1284, 64 OBJ 3647,</u>	<u>Estate of Mouse. Matter of</u>	Discussed
<u>1994 OK 16, 868 P.2d 708, 65 OBJ 531,</u>	<u>Oklahoma State Senate ex rel. Roberts v. Hetherington</u>	Discussed
<u>1920 OK 224, 190 P. 681, 78 Okla. 277,</u>	<u>PETTIS v. JOHNSTON</u>	Discussed
<u>2002 OK 14, 44 P.3d 553, 73 OBJ 879,</u>	<u>MYERS v. LASHLEY</u>	Discussed
<u>1995 OK 150, 945 P.2d 469, 66 OBJ 1818,</u>	<u>Sholer v. State ex rel. Department of Public Safety</u>	Discussed
<u>2009 OK 65, 222 P.3d 21,</u>	<u>KIRBY v. JEAN'S PLUMBING HEAT & AIR</u>	Discussed
<u>2015 OK 51, 353 P.3d 532,</u>	<u>DUTTON v. CITY OF MIDWEST CITY</u>	Discussed
<u>2020 OK 30, 465 P.3d 1213,</u>	<u>FARLEY v. CITY OF CLAREMORE</u>	Discussed
<u>1926 OK 114, 243 P. 728, 114 Okla. 101,</u>	<u>AVERY v. ABRAHAM</u>	Discussed

Title 12. Civil Procedure

Cite	Name	Level
<u>12 O.S. 2012,</u>	<u>Defenses and Objections - When and How Presented - By Pleading or Motion</u>	Cited
<u>12 O.S. 2015,</u>	<u>Amended and Supplemental Pleadings</u>	Cited

Title 22. Criminal Procedure

Cite	Name	Level
<u>22 O.S. 1080,</u>	<u>Post-Conviction Procedure Act - Right to Challenge Conviction or Sentence.</u>	Cited

