

Famous Smith Vs. United States

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Decided On : Jan-03-1894

Appeal No. : 151 U.S. 50

Appellant : Famous Smith

Respondent : United States

Judgement :

Famous Smith v. United States - 151 U.S. 50 (1894)

U.S. Supreme Court Famous Smith v. United States, 151 U.S. 50 (1894)

Famous Smith v. United States

No. 1003

Submitted November 15, 1893

Decided January 3, 1894

151 U.S. 50

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF ARKANSAS

SYLLABUS

A Cherokee Indian being indicted in the Circuit Court of the United States for the western District of Arkansas for the murder of a white man, it was set up in defense that the murdered man was also an Indian, and that the court was therefore without jurisdiction. The evidence for the defense showed that the murdered man was generally recognized as an Indian, that his reputed father was so recognized, and that he himself was enrolled, and had participated in the payment of bread money to the Cherokees. To offset this, the government showed that he had not been permitted to vote at a Cherokee election, but it also appeared that he had not been in the district long enough to vote.

HELD

- (1) That the burden was on the prosecution to prove that he was a white man.
- (2) That the testimony offered by the government had no legitimate tendency to prove that the murdered man was not an Indian.

This was a writ of error to review the conviction of the plaintiff in error for the murder of one James Gentry, alleged to have been "a white man, and not an Indian," on August 1, 1883, in the Cherokee Nation, Indian Territory. The case was tried before the Circuit Court of the United States for the

Page 151 U. S. 51

Western District of Arkansas at the May term of 1893, and the prisoner convicted, and sentenced to death. Thirty-four assignments of error were contained in the record, none of which was considered except the first and last, which raised the question of the jurisdiction of the court arising from the fact that both the accused and the deceased were Indians.

Page 151 U. S. 53

MR. JUSTICE BROWN, after stating the facts in the foregoing language, delivered the opinion of the Court.

This case, so far as we have found it necessary to consider it, raises but a single question -- namely, whether, Smith's being admitted to be a Cherokee Indian, born and raised in the Cherokee Nation, and a citizen of that nation, the undisputed testimony did not also show Gentry to have been an Indian.

If this were the case, then it is clear the court had no jurisdiction of the offense. By Rev.Stat. 2145, c. 4, Tit. 28, relating to the "government of Indian country," it is provided

"that except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

But by 2146, as amended by the Act of February 18, 1875, 18 Stat. 318, c. 80,

"the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, nor to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

As we held in *In re Mayfield*, [141 U. S. 107](#) , there is nothing in the Treaty of July 19, 1866, between the United States and the Cherokee Nation, 14 Stat. 799, which renders this statute inapplicable or indicates that the circuit courts of the United States have jurisdiction of crimes committed by one Indian against the person or property of another.

Upon this point, a number of witnesses were sworn who all stated that Gentry claimed to be a Cherokee Indian, and looked like one, having the dark hair, eyes, and complexion of an Indian, and that he was generally recognized as one. Kajo Gentry, his reputed father, appears to have been either of Cherokee blood or mixed Creek and Cherokee. He also was recognized as an Indian, and appears to have been enrolled and participated in the payment of "bread money" to the Cherokees.

The only testimony to the contrary tended to show that in 1883, Gentry was not permitted to vote at an election held in the Cherokee Nation, but it also appeared that it was because he had not been in the district long enough. To entitle him to vote at an election, he must not only have been a citizen of the Cherokee Nation, but must have resided in the particular district where he offered to vote six months prior thereto. There was also some testimony tending to show that Gentry had lived for some time, but it does not appear how long, in southern Arkansas, and came to the Cherokee Nation by the way of the Choctaw Nation.

In this connection, the court charged the jury in substance that to give the court jurisdiction, it was necessary to charge in the indictment that Gentry was a white man and not an Indian. "The meaning of that is that he was a citizen of the United States, or, more correctly speaking, a jurisdictional citizen of the United States." That if he were, notwithstanding the defendant was an Indian, the court still had jurisdiction. That in this connection, it was important "to ascertain whether he has been recognized legally by the authorities of that country as a citizen thereof." That

"if a man is an Indian by blood, and if he goes out and lives among the white people, abandons his country, lives among white people, who are citizens of the United States, and performs the duty belonging to citizenship, or exercises the rights that pertain thereto, that that is evidence on his part of a purpose to abandon the relation he may have to that country and to its people, and he may abandon it in that way so as to cause him to become a jurisdictional citizen of the United States."

That

the jury also had a right to consider that if he were related there, his relatives took no interest in him when killed, etc. Exceptions were duly taken to this portion of the charge.

That Gentry was a white man and not an Indian was a fact which the government was bound to establish, and if it failed to introduce any evidence upon that point, defendant was entitled to an instruction to that effect. Without expressing an opinion as to the correctness of the legal propositions embodied in this charge, we think there was no testimony which authorized the court to submit to the jury the question whether Gentry was a white man and not an Indian. The objection went to the jurisdiction of the court, and, if no other reasonable inference could have been drawn from the evidence than that Gentry was an Indian, defendant was entitled as matter of law to an acquittal. [*Pleasants v. Fant*, 22 Wall. 116](#); *Commissioners of Marion County v. Clark*, [94 U. S. 278](#) ; *Marshall v. Hubbard*, [117 U. S. 415](#) .

The testimony offered by the government had no legitimate tendency to prove that he was not an Indian. The evidence that he was not permitted to vote in the Canadian district, where the murder was committed, was explained by the fact that he had not resided in the district the six months required by law to entitle him to vote, and by the fact that one of the judges of election told him that he had no doubt that he was an Indian. Nor did the fact that Gentry said he lived in southern Arkansas, without any evidence showing how he came to live there, under what circumstances, or how long he lived there, constitute any evidence of his being a white man, or that, being an Indian, he had severed his tribal relations, and become a citizen of the United States.

It was held by this Court in *Elk v. Wilkins*, [112 U. S. 94](#) , that an Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily severed himself from his tribe and taken up his residence among the white citizens of a state, but who has not been naturalized, taxed, or recognized as

a citizen either by the state or by the United States, is not a citizen of the

Page 151 U. S. 56

United States within the Fourteenth Amendment of the Constitution. Much more is that the case where it appears that the Indian was but temporarily a resident of a state, the length of his residence not being shown, and that he had done nothing to indicate his intention to sever his tribal relations.

Upon the testimony in this case, we think the defendant was entitled to an instruction that the court had no jurisdiction, and its judgment must therefore be

" Reversed, and the case remanded with directions to set aside the verdict, and for further proceedings in conformity with this opinion. "

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