

RENDERED: March 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1685-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

V. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 96-CR-16

ELMER BOYD STEWART

APPELLEE

OPINION

REVERSING AND REMANDING

* * * * *

BEFORE: DYCHE, MILLER, and SCHRODER, JUDGES.

DYCHE, JUDGE. The Commonwealth appeals from an order of the Rockcastle Circuit Court granting Elmer Stewart's motion to suppress evidence related to an indictment for unlawful possession of a controlled substance. Finding the court erred, we reverse and remand.

On March 13, 1996, several Kentucky State Police and local police officers were conducting a routine road block check at the junction of Coal Branch Road and Kentucky Highway 1004 in Rockcastle County. During the operation, the police stopped a vehicle that was being driven by Barbara Feters, and which also

contained Stewart as a passenger. Fetters moved the vehicle onto the side of the road to search for her automobile insurance card. Shortly thereafter she exited the car in order to speak with one of the officers, while Stewart remained in the car. While Fetters was speaking with one police officer, a second police officer saw someone throw an item from the passenger side of the vehicle onto the side of the road. The item was retrieved by the police and later identified as a bottle containing ninety-six (96) Tylox pills. The police asked Stewart to exit the vehicle and he was searched. This search uncovered a small quantity of marijuana rolled up in a ten dollar bill taken from Stewart's pants pocket. Stewart was arrested and charged with several drug offenses.

In April 1996, the Rockcastle County Grand Jury indicted Stewart in Case No. 96-CR-16 on one felony count of first-degree possession of a controlled substance (Tylox pills) (KRS 218A.1415), and being a persistent felony offender in the first degree (PFO I) (KRS 532.080). At the time of the indictment, Stewart was on probation for three felony convictions in October 1994 involving trafficking in marijuana and unlawful transaction with a minor. Following the indictment in Case No. 96-CR-16, the Commonwealth filed a motion to revoke the two-year probated sentence on the October 1994 convictions.

On September 13, 1996, the circuit court held an evidentiary hearing on the motion to revoke probation. During the hearing, the Commonwealth offered evidence that Stewart had

violated several conditions of probation including the use of illegal drugs shown by a positive test for benzodiazepene and cocaine, failure to attend drug counseling, possession of marijuana on March 13, 1996, and possession of the Tylox pills on March 13, 1996. At the hearing, Stewart moved to suppress the evidence of his possession of the marijuana and Tylox pills arguing the highway checkpoint was illegal under Michigan Dept. of State Police v. Sitz, 496 U.S. 444, (1990) (involving sobriety checkpoint operations). See also Steinbeck v. Commonwealth, Ky. App., 862 S.W.2d 912 (1993). The trial judge stated that he would take the motion to suppress under submission pending his review of the Sitz opinion. On January 31, 1997, the circuit court issued an order revoking Stewart's probation on the 1994 convictions based on appellant's possession of marijuana.

On June 20, 1997, Stewart filed a motion to suppress the evidence of the 96 Tylox pills, and a motion to dismiss the indictment in Case No. 96-CR-16. The motion to suppress stated the basis for the request to suppress was "because the court previously conducted a hearing in which said evidence was offered and ruled said evidence inadmissiable [sic]." Stewart also stated in the motion that no Commonwealth witness at the probation revocation hearing saw Stewart with the pills. On June 25, 1997, the Commonwealth filed a written objection to the motion to dismiss and moved for an evidentiary hearing on the motion to suppress. The Commonwealth disputed the appellant's claim that the evidence of the pills had been found inadmissible

previously. On June 26, 1997, the trial court granted Stewart's motion to suppress "for the reasons set forth in defendant's motion." The Commonwealth appealed this order.

The Commonwealth argues that the trial court abused its discretion in granting Stewart's motion to suppress. It asserts that the trial court's order suppressing the evidence of the Tylox pills is erroneous because it relies on the prior revocation hearing, which also does not contain a suppression order. The Commonwealth also contends the trial court's action granting the motion to suppress is unsupported by the record.

In the case at bar, the trial court did not hold an evidentiary hearing on Stewart's motion to suppress. See generally RCr 9.78. A review of the record reveals that the trial court in fact did not rule the evidence of the Tylox pills inadmissible at any time in the probation revocation proceedings. At the probation revocation hearing, Stewart's attorney made oral motions to exclude the evidence based on an illegal roadblock and lack of competent testimony of possession. However, the trial court made no ruling on the motion to exclude based on incompetent testimony, and it denied the motion to suppress on the grounds of an illegal roadblock in its written order revoking Stewart's probation. Therefore, to the extent the trial court's order granting the motion to suppress in Case No. 96-CR-16 is based on a factual finding that the evidence of the Tylox pills had been found inadmissible previously in the revocation hearing, it is not supported by the record.

In addition, although Stewart did not specifically identify the legal principle supporting the motion to suppress in either the original motion or in his appellate brief, Stewart argues that the Commonwealth failed to connect him with the Tylox pills in the probation revocation hearing, and therefore it should not be given another opportunity to do so in the current prosecution for drug possession. Stewart's position appears to be based on some form of res judicata or collateral estoppel. Res judicata or claim preclusion bars a subsequent suit based on the same cause of action involving the same parties or their privies following a judgment on the merits. See City of Louisville v. Louisville Professional Firefighters Ass'n., Ky., 813 S.W.2d 804, 806 (1991). Res judicata bars entire claims or causes of action that were or should have been brought in a prior action. City of Covington v. Board of Trustees, Ky., 903 S.W.2d 517, 521 (1995). Meanwhile, collateral estoppel or issue preclusion bars relitigation of an issue actually litigated. Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1971); Napier v. Jones By And Through Reynolds, Ky. App., 925 S.W.2d 193, 195 (1996). Collateral estoppel is viewed as a subdivision of the doctrine of res judicata. See Revenue Cabinet, Commonwealth of Ky. v. Samani, Ky. App., 757 S.W.2d 199, 201 (1988). Although res judicata and collateral estoppel are related principles, there are significant differences.

The basic distinction between the doctrines of res judicata and collateral estoppel, . . . has frequently been emphasized. Thus, under the doctrine of res judicata, a

judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

City of Louisville, 813 S.W.2d at 807 (quoting Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326, (1955)); Donovan v. Thames, 105 F.3d 291 (6th Cir. 1997).

In the case at bar, the causes of action of the two criminal proceedings are procedurally and substantively different. Probation revocation involves compliance with the conditions of probation, while criminal prosecution involves an initial determination of guilt or innocence concerning a statutorily defined act. In addition, Stewart is attempting to bar the subsequent criminal prosecution based on an issue raised in the probation revocation hearing, even though his probation was revoked on other grounds. Therefore, res judicata is not applicable to the current situation. See, e.g., Lucindo v. Superior Court, 51 Cal.3d 335, 272 Cal.Rptr. 767, 795 P.2d 1223 (1990), cert. denied, 500 U.S. 920, (1991) (indicating that res judicata is not applicable to situation involving attempt to bar criminal prosecution based on finding in probation revocation hearing).

Stewart's motion to suppress in effect attempts to use collateral estoppel to prevent the Commonwealth from relitigating the admissibility of the evidence of Stewart's possession of the

Tylox pills in the criminal prosecution for drug possession. However, a party attempting to apply collateral estoppel must prove that the issue in question was actually and necessarily litigated and determined, and that the losing party was given a full and fair opportunity to contest it. Board of Education of Covington v. Gray, Ky. App., 806 S.W.2d 400, 402 (1991). See also Gregory v. Commonwealth, Ky., 610 S.W.2d 598, 600 (1980).

The record does not support a conclusion that Stewart properly invoked collateral estoppel to support his motion to suppress. Stewart asserted in his motion to dismiss that the Tylox pills had been ruled inadmissible by the trial court in the proceedings involving the probation revocation, but the order revoking probation explicitly indicates that the trial judge rejected his contention that the roadblock was illegal and denied his oral motion to suppress. Additionally, Stewart suggests in the written motion to suppress that the Tylox pills were not admitted because the police officer who testified at the revocation hearing did not actually see Stewart in possession of the pills. While Stewart moved to dismiss the probation revocation motion at the hearing based on the lack of competent testimony linking Stewart with the Tylox pills, the trial court never made a ruling on that issue. The trial judge made no oral ruling at the probation revocation hearing and revoked Stewart's probation based solely on his possession of marijuana. Therefore, the issue of the admissibility of the Tylox pills was never actually decided and this issue was not essential or

necessary to the revocation determination. See, e.g., People v. Bone, 82 Ill.2d 282, 412 N.E.2d 444, cert. denied, 454 U.S. 839 (1980) (where trial judge did not make ultimate fact-finding on issue in revocation hearing, state would not be barred from subsequent criminal prosecution because of collateral estoppel); State v. Donovan, 305 Or. 332, 751 P.2d 1109 (1988) (same); Manning v. State, 870 S.W.2d 200 (Tex. 1994). Consequently, the motion to suppress could not be granted on the basis of collateral estoppel related to the prior probation revocation proceeding.¹

Stewart contends that the trial court's order granting the motion to suppress should be affirmed because the Commonwealth failed to include a transcript of a suppression hearing held on July 16, 1997. A review of the record reveals a clerical error in the order granting the motion to suppress. The body of the order appears to indicate the trial judge signed the order on July 20, 1997; however, the order was entered on the record on June 26, 1997. Although the Commonwealth requested in its objection to the motion to dismiss that a hearing be held on July 16, 1997, there is no evidence that such a hearing was actually held. The trial court issued no orders after June 26, 1997. Consequently, Stewart's reliance on Ford v. Gilbert, Ky., 397 S.W.2d 41 (1965), and Tucker v. Kilgore, Ky., 388 S.W.2d 112

¹ We note that the prohibition against double jeopardy also would not prevent a subsequent prosecution following a probation revocation hearing involving the same factual allegations in the criminal prosecution. See United States v. Miller, 797 F.2d 336 (6th Cir. 1986).

(1964), is misplaced. Moreover, this appeal involves the June 26, 1997, order granting the motion to suppress. Any subsequent hearing or proceeding that did not affect that order is of little substantive relevance.

For the foregoing reasons, the order of the Rockcastle Circuit Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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