

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE MCKISSIC,

Defendant-Appellant.

UNPUBLISHED

March 15, 2002

No. 228578

Ingham Circuit Court

LC No. 98-073427-FH

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of perjury, MCL 750.422. The trial court sentenced defendant to 45 to 120 months' imprisonment. Defendant appeals as of right, and we affirm.

Defendant argues that the trial court improperly denied his motion to vacate the conviction because collateral estoppel barred the perjury prosecution. We disagree.

Application of a preclusion doctrine, such as collateral estoppel, represents a question of law we review de novo. See *People v Garcia*, 448 Mich 442, 458; 531 NW2d 683 (1995), cert den 516 US 1002; 116 S Ct 548; 133 L Ed 2d 450 (1995); *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000), citing *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). The doctrine of collateral estoppel applies to criminal cases. *Ashe v Swenson*, 397 US 436, 443; 90 S Ct 1189; 25 L Ed 2d 469 (1970). Collateral estoppel bars relitigation of an issue in a subsequent, different litigation between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was both actually litigated and necessarily determined. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990), cert den 497 US 1004; 110 S Ct 3238; 111 L Ed 2d 749 (1990). "Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in an earlier action." *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998). Moreover, collateral estoppel only applies if the issue was necessarily determined by the judgment in the prior proceeding. *Gates*, *supra*, 434 Mich at 158. "An issue is necessarily determined only if it is 'essential' to the judgment." *Id.* "Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitively, and unequivocally." *Id.*

Defendant premises his collateral estoppel claim on the acquittal of Thomas Patrick, accused as a co-conspirator in defendant's cocaine distribution organization. At Patrick's trial, Defendant testified in Patrick's favor, asserting that Patrick was never involved in the organization. Defendant claims that Patrick's acquittal constitutes a final determination that defendant's testimony related to Patrick was truthful and that Patrick was not involved in the organization. Therefore, defendant argues, that issue cannot be re-litigated through this case.

There is no dispute that defendant's testimony at Patrick's trial, and more importantly at Patrick's preliminary examination, was contrary to defendant's earlier grand jury testimony. Before the grand jury, defendant implicated Patrick as a participant and kilogram-level customer of the organization. Before Patrick's preliminary examination, however, defendant recanted, and testified at the preliminary examination that Patrick had not participated in the organization. The perjury charges at issue in this case arise from the change in defendant's testimony between the grand jury and Patrick's preliminary examination.

We find no support for defendant's contention that collateral estoppel prohibits his perjury prosecution. First, the doctrine of collateral estoppel requires the same parties to be involved in both proceedings. *Gates, supra* at 155. Substantial identity of parties, and not precise identity, is all that is required. *Dearborn Heights, supra* at 126. A party is one who was directly interested in the subject matter, and who had a right to defend in, or control, the proceedings, and who had a right to appeal from the judgment. *Id.* at 127. In Patrick's trial, defendant had no direct interest in the subject matter, he had no right to defend himself or to control the proceedings, and he had no right to appeal the judgment if Patrick was convicted. He was simply a defense witness. Therefore, we find no substantial identity of parties between this case and *Patrick*.

Second, the prosecution did not have a full and fair opportunity to litigate defendant's perjury at Patrick's preliminary examination or during Patrick's trial. *Gates, supra* at 156-157. The prosecution could not bring perjury charges against defendant as part of Patrick's trial; rather, criminal charges had to be brought against defendant in a separate forum where he had the opportunity to present a defense. Const 1963, art 1, §§ 13, 20; US Const, Am VI; *Washington v Texas*, 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). Moreover, this is not an example of a defendant testifying in his own behalf; therefore, there is no danger of an overzealous prosecutor asking a second jury to reevaluate defendant's testimony in an attempt to bypass an earlier acquittal. *People v White*, 411 Mich 366, 379; 308 NW2d 128 (1981). Patrick's acquittal is unaffected by defendant's perjury conviction.

Finally, the truthfulness of defendant's testimony regarding Patrick's participation in the cocaine organization was not necessarily determined by Patrick's acquittal. *Gates, supra* at 158. "An issue is necessarily determined only if it is 'essential' to the judgment." *Id.* "Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitively, and unequivocally." *Id.* The record does not indicate the Patrick jury's reasons for acquittal. Therefore, even if defendant was charged with perjury at Patrick's trial rather than Patrick's preliminary examination, it would be impossible for this Court to conclude that

Patrick's acquittal necessarily determined that defendant's testimony—particularly that given at Patrick's preliminary examination—was truthful.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra