COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00274-CR

THE STATE OF TEXAS — STATE

V.

AMANDA LOUISE WATERS — APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF WICHITA COUNTY
TRIAL COURT NO. 68,878-F

DISSENTING MEMORANDUM OPINION[1]

I agree with the majority that we are bound by *Ex parte Tarver*, but I do not agree that *Tarver* demands this result. 725 S.W.2d 195 (Tex. Crim. App. 1986). For that reason, I respectfully dissent.

In its Motion to Revoke Community Supervision, the State sought revocation of Waters's community supervision on five grounds:

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[1] *See* Tex. R. App. P. 47.4.

In violation of said terms and conditions of said probation, [Waters]:

> 1. Committed an offense against the laws of the State of Texas. Specifically on or about October 31, 2015 in Wichita County, Texas, [Waters] did then and there operate a motor vehicle in a public place while [she] was intoxicated [(DWI)];
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> 10. [Waters] is in arrears **<u>3</u>** hours of Community Service Restitution;
>
> 11b. [Waters] failed to pay the Court Costs incurred herein . . . ;
>
> 12b. [Waters] failed to pay the Supervision Fee . . . ; [and]
>
> 12c. [Waters] failed to pay the Crime Stoppers Fee . . . .

By the time of the hearing, Waters had paid court costs, the supervision fee, and the Crime Stoppers fee, and the two remaining matters to be adjudicated were items 1 and 10—whether she had committed a DWI on October 31 and whether she was in arrears on her community service restitution.

At the hearing, the State called only one witness—Garon Jetton, Waters's former probation officer—who took the position that Waters violated the first term of her probation, "not to commit another offense against the laws of this State or any other state or of the United States," when she was arrested for DWI on October 31, 2015, because, from the probation department's perspective, an arrest was tantamount to a conviction. Jetton testified:

> Q: Mr. Jetton, it's only a crime to commit an offense, not a crime to be accused of an offense; is that correct?
>
> A: Well I guess the Court would look at that. We don't look at it that way from a probation department.

> Q: Were you at the scene on October 31st, 2015, when this allegation of DWI happened? Were you - - were you the arresting officer in this case?
>
> A: No, sir.

On re-direct, Jetton testified:

> Q: You said earlier that probation sees getting arrested on suspicion of DWI as an offense in probation; is that correct?
>
> A: Yes, sir.
>
> Q: And that would be breaking the terms of community supervision, right?
>
> A: Yes, sir.

And then on recross-examination Jetton testified:

> Q: So, in other words, you're not here to say whether or not an incident happened, you're here to say that someone got arrested for it?
>
> A: Yes, sir.

The State later argued, "[A]t the end of the day there is still a DWI pending in the District Attorney's Office [DAO], a second one, and probation's rules make it pretty clear that a DWI, getting arrested for that is still an offense and could revoke your probation." Immediately after that argument, the court announced:

> . . .[T]he Court is going to find that the alleged violation; number one, is not true.
>
> When the State alleges a new offense, they have to prove that. Now they don't have to prove it beyond a reasonable doubt. They could have brought the officers involved in this case to court, and they would not have to prove it to a jury, they just have to prove it to me by what's called a preponderance of the evidence; that

> makes their jobs easier, but the fact that a person is arrested is insufficient to prove a new offense and so that one I will find not true.

Tarver was decided on markedly different facts. In *Tarver*, "a full hearing was held in the district court on the motion to revoke probation":

> The State called three witnesses, including the alleged complainant of the assault. After the State rested, defense counsel immediately moved that the court "find the allegation not true. I have witnesses and am prepared to go forward, but I believe it is my obligation to urge this motion just as though we were in trial . . ." Defense counsel asserted that the State had offered no "clear and convincing proof" that a crime had been committed, and again moved the court to enter a finding of not true. After hearing argument from the State the trial court granted that defense motion, adding, "I find the evidence in this case to be totally incredible."

Id. at 198. At the habeas hearing in the subsequent criminal prosecution for assault, both sides stipulated that the complainant would testify again at trial, and that "his testimony in the assault case . . . would be the same as that testimony given . . . in the hearing on the Motion to Revoke Probation." *Id.* On these facts, the court of criminal appeals held that the State was barred from relitigating the assault at the criminal trial. In so doing, however, the court cautioned, "We emphasize the narrowness of this holding," and explained,

> A mere overruling of a State's motion to revoke probation is not a fact-finding that will act to bar subsequent prosecution for the same alleged offense. A trial court in a motion to revoke probation hearing has wide discretion to modify, revoke or continue the probation. A court may continue or modify the probation even though finding that the allegations in the motion to revoke probation are true. A trial court's decision either to revoke or continue a probationer's probation may involve no fact-finding. It is only in the particular circumstances of this case, where the trial court does make a specific finding of fact that the allegation is "not true," that a fact has been established so as to bar relitigation of that same fact.

Id. at 200 (citations omitted).

While the majority correctly points out that here, after the June 26, 2016 habeas hearing, the trial court made a finding of fact[2] that it "has previously found . . . the DAO's allegation that Waters had committed a DWI . . . to be 'not true' based on the State's failure to prove its case by a preponderance of the evidence at the hearing on February 18, 2016," this is a far cry from the finding in *Tarver*—which was made on directed verdict after a full evidentiary hearing as to the truth of the assault allegation—that the allegation against Tarver was "totally incredible." *See id.* at 198.

First, the findings the majority recites here were made in an order signed four months after the probation revocation proceeding had occurred and after an order had already been signed memorializing the trial court's decision at the probation revocation hearing. Second, the findings were made—albeit by the same judge—in an entirely separate proceeding. But most importantly, the June 29 findings clearly reflect the absence of a full evidentiary hearing on the issue of whether Waters violated the law by driving while intoxicated on October 31:

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[2]The trial court made the findings recited in the majority's opinion in its Order Granting Defendant's Application for Writ of Habeas Corpus, not its prior order signed following the revocation hearing. In its February 18, 2016 Order Continuing Defendant on Community Supervision and Amending Terms of Community Supervision, the trial court merely found that term 10 was violated in that Waters was "in arrears 3 hours of Community Service Restitution," and that "term 1, term 11b, term 12b and term 12c [were] not true."

3. On February 18, 2016, the Court called cause number 62,998-F for a hearing on the DAO's motion to revoke [Waters's] community supervision.

4. The DAO called *only one witness*, community supervision officer Garon Jetton, to testify at the hearing.

5. Officer Jetton *had no personal knowledge* of the DWI alleged to have been committed by [Waters] in the DAO's motion to revoke community supervision.

6. Jetton *was only able to testify that Waters had been arrested* for DWI.

7. The Court has previously found that the DAO's allegation that Waters had committed a DWI in Wichita County, Texas, on October 31, 2015, the alleged violation of Term One, to be "not true" *based on the State's failure to prove its case by a preponderance of the evidence* at the hearing on February 18, 2016. [Emphasis added.]

Thus, the trial court made clear in its findings that it never had the opportunity to determine if Waters actually drove while intoxicated on October 31 because all that the State attempted to prove at the revocation hearing regarding that allegation was that she had been accused of that conduct. The State took the position that it need only prove a DWI arrest, not a conviction, in order to prevail. Rather than finding the allegation "not true" based on the litigation of the issue of Waters's guilt or innocence to the DWI charge, the court found the allegation "not true" based on the faulty legal theory advanced by the State.

Here, the record is clear that on that issue all that was litigated at the probation revocation hearing was whether Waters had been arrested for a crime. No attempt was made to prove that she actually committed a crime.

As the court of criminal appeals instructs us, to determine whether collateral estoppel[3] bars a subsequent legal proceeding, we must employ a two-

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[3]As explained in *Ex parte Doan*, the issue before us involves collateral estoppel, not res judicata, a distinction that is important in determining the reach to be given a preclusive effect:

> In both civil and criminal cases, "*res judicata*" is sometimes used as a broad term to describe both claim preclusion and issue preclusion, but at other times, the term is used in a more narrow sense to refer only to claim preclusion, leaving the concept of issue preclusion to be described as "collateral estoppel."
>
> . . . .
>
> And the question before us is one of issue preclusion, not claim preclusion. Whether a person should be convicted of a crime and whether his probation should be revoked are separate claims. On the other hand, whether a crime was committed is merely an issue that might arise in a probation revocation context. So, here, we are concerned with collateral estoppel.

369 S.W.3d 205, 221–22 (Tex. Crim. App. 2012) (Keller, P.J., dissenting). Although the court of criminal appeals has yet to definitively articulate the differing standards of proof between res judicata and collateral estoppel in the criminal context, since the doctrine of res judicata has its genesis in civil law, where the criminal standards are unclear, I would be guided by the standards as set forth by the Texas Supreme Court in the civil context. *See Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194 (1970) (pointing out, generally, that collateral estoppel was "first developed in civil litigation").

In civil cases, res judicata has broader application than collateral estoppel. It bars the litigation of claims that were *actually litigated* as well as those that *should have been litigated*, as long as the claims arose out of the same transaction. *Igal v. Brightstar Info. Tech. Grp.*, 250 S.W.3d 78, 86 (Tex. 2008) (emphasis added), *superseded by statute on other grounds*, Tex. Lab. Code Ann. § 61.051(c) (West Supp. 2016). However, collateral estoppel, or issue preclusion, is more restricted and bars only the relitigation of a specific issue already decided in an earlier case, focusing specifically on what was both actually litigated and essential to the judgment. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985). For collateral estoppel to

step analysis to "determine: (1) exactly what facts were 'necessarily decided' in the first proceeding, and (2) whether those 'necessarily decided' facts constitute essential elements of the offense in the second trial." *Ex parte Taylor*, 101 S.W.3d 434, 440 (Tex. Crim. App. 2002) (en banc) (quoting *Neal v. Cain*, 141 F.3d 207, 210 (5th Cir. 1998)). The court further cautions us that in that endeavor we must review the entire record—"'with realism and rationality'"—to determine the precise facts or combination of facts that the factfinder "necessarily decided." *Id.* at 441 (quoting *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194 (1970)). Such inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Ashe*, 397 U.S. at 444, 90 S. Ct. at 1194, and with a focus on the facts that were actually litigated in the prior proceeding –

> In each case, the entire record—including the evidence, pleadings, charge, jury arguments, and any other pertinent material—must be examined to determine precisely the scope of the [factfinder's] factual findings. In one case, for example, a jury's acquittal might rest upon the proposition that the defendant was "not intoxicated," while in another, that same verdict might rest upon the narrower proposition that the defendant was "not intoxicated" by a particular substance, but he might well have been intoxicated by a different substance. Generally, then ***the scope of the facts that were***

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apply, the same facts sought to be litigated in the second suit must have been "fully litigated" in the first suit, and they must have been "essential to the judgment," meaning that if the original judgment could be independently supported on more than one determination, neither determination would be essential to the judgment. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 522 (Tex. 1998) (op. on reh'g) (referencing Restatement (Second) of Judgments § 27 cmt. i (1982)), *superseded on other grounds*, by Tex. Fin. Code Ann. § 304.1045 (West 2016).

> ***actually litigated determines the scope of the factual finding covered by collateral estoppel.***[4]

Taylor, 101 S.W.3d at 442 (emphasis added).

Applying these standards to the case here, I would hold that Waters's guilt or innocence as to the October 31 DWI charge was not actually litigated during the probation revocation hearing and would hold that the State is not barred from prosecuting Waters on the October 31 DWI charge.

For these reasons, I respectfully dissent.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

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[4]The application of collateral estoppel in the civil context is similar to the criminal standard as expressed in *Taylor*. In the civil context, collateral estoppel will only bar the relitigation of a specific issue that was "fully and fairly litigated" in the first suit in which the parties were cast as adversaries and that was "essential to the judgment." *Sysco Food Servs. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994). Applying the civil standard to the facts here, the issue of whether Waters committed the offense of DWI would have been neither fully litigated, as explained above, nor essential to the judgment. As to the latter element, a trial court enjoys "wide discretion to modify, revoke or continue the probation" in its judgment following a revocation hearing. *Tarver*, 725 S.W.2d at 200. Here, along with the one finding of "not true" to term 1, the trial court made four other findings—a "true" finding as to term 10 and "not true" findings as to terms 11b, 12b, and 12c—any of which could have supported the trial court's decision to continue Waters's community supervision. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 722 (Tex. 1990) (op. on reh'g) ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result," collateral estoppel does not bar relitigation of either issue standing alone) (quoting Restatement (Second) of Judgments § 27 cmt. (i) (1982)).

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