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TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000077-OA

MELVIN HENRY IGNATOW — PETITIONER

v. ORIGINAL ACTION REGARDING JEFFERSON CIRCUIT COURT INDICTMENT NO. 97-CR-2596

STEPHEN P. RYAN, JUDGE, JEFFERSON CIRCUIT COURT — RESPONDENT

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTEREST

OPINION

DENYING PROHIBITION

*** *** ***

BEFORE: GARDNER, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge. Petitioner Melvin Henry Ignatow filed an original action pursuant to Kentucky Rules of Civil Procedure (CR) 76.36 and 81, asking this Court to prohibit enforcement of the order entered by Respondent Stephen P. Ryan, Judge, Jefferson Circuit Court, on December 9, 1998, denying Ignatow's motion to dismiss Indictment No. 97-CR-002596 charging him with first-degree perjury and with being a second-degree persistent felony offender.

On September 25, 1988, Brenda Sue Schaefer disappeared. Ignatow, the last person known to be with Schaefer, was the primary suspect in her disappearance from the beginning of the

investigation. On March 22, 1989, Schaefer's former employer, Dr. William Spaulding sent an anonymous letter to Ignatow directing him to place any information regarding Schaefer's disappearance in a post office box or Spaulding would have Ignatow killed. Ignatow filed a criminal complaint against Spaulding, which resulted in Spaulding being convicted under Kentucky Revised Statute (KRS) 508.080 for terroristic threatening. At Spaulding's trial, Ignatow testified about his relationship with Schaefer and the night she disappeared:

> TM: HAD YOU BEEN ON A BOAT WITH HER THAT DAY OR DOWN TO THE RIVER WITH HER?
>
> MI: UM, NO, I WAS NOT ON A BOAT WITH HER. UM, UM, LATE THAT EVENING WE WENT DOWN TO THE RIVER _____ CAPTAIN'S QUARTERS.
>
> TM: HAD YOU GONE TO A BOAT SHOW THAT DAY?
>
> MI: UH, WE ATTEMPTED TO YES, BUT IT WAS A VERY RAINY DISMAL DAY AND DECIDED TO, NOT TO, WE WENT OUT THERE BUT WE NEVER GOT OUT OF THE CAR.
>
> ********
>
> TM: ON SEPTEMBER 24, 1988, WHAT WAS YOUR RELATIONSHIP WITH BRENDA SCHAEFER, WAS IT GOOD OR HOW WOULD YOU CHARACTERIZE IT?

MI: IT WAS GOOD AND I LOVED HER VERY MUCH AND SHE LOVED ME AND UH WE WERE ENGAGED TO BE MARRIED.

TM: YOU HAD NO KNOWLEDGE THAT THERE WAS ANYTHING WRONG WITH YOUR RELATIONSHIP, IT WAS AN ABSOLUTE GOOD LOVING RELATIONSHIP?

MI: THAT'S CORRECT.

TM: AND YOU ALL PARTED ON GOOD TERMS WHEN YOU LAST SAW HER I TAKE IT?

MI: WHAT DO YOU MEAN BY PARTED?

TM: WHEN YOU LAST SAW HER, UH, EVERYTHING WAS FINE I TAKE IT?

MI: YES, WE HAD INTENDED TO GET TOGETHER THE NEXT DAY AS A MATTER OF FACT, WE MADE PLANS TO DO SO BECAUSE WE WEREN'T ABLE TO GO TO THE BOAT SHOW OR THE ART FAIR OR GO TAKE THE BOAT OUT OR ANYTHING CAUSE IT WAS A RAINY DISMAL DAY AND WE TRIED BUT IT WAS JUST HOPELESS SO WE HAD PLANNED TO GO THE NEXT DAY.[1]

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[1]Ignatow's alleged perjurious statements are limited to the above testimony as stated in a Bill of Particulars filed by the Commonwealth's Attorney in 97-CR-002596.

On January 9, 1990, Mary Ann Shore, a former girlfriend of Ignatow's, made a statement to the Federal Bureau of Investigation regarding the disappearance and death of Schaefer. Shore stated that Ignatow contacted her in August 1988 to help him give Schaefer a sex therapy class. Two weeks prior to Schaefer's disappearance, Ignatow and Shore dug a grave several yards behind Shore's house for Schaefer. Shore stated that Ignatow indicated he did not intend to kill Schaefer, but rather, to frighten her. On September 23, 1988, the night before Schaefer's disappearance, Ignatow left several items at Shore's house, including chloroform or ether, rope, gloves, tape, garbage bags and a paddle. Shore stated that when Ignatow arrived at her house the next evening with Schaefer, Shore deadlocked the door so Schaefer could not leave. Ignatow informed Schaefer she was there for a sex therapy class and began hours of physical and sexual torture that concluded with Schaefer's death. Shore stated she photographed the torture for Ignatow and that Ignatow took the jewelry he had removed from Schaefer and the photographs with him when he left Shore's house. Shore also led police to the location of Schaefer's body. The body was disinterred, but due to advanced decomposition, the cause of death could not be determined.

The F.B.I. then wired Shore and had her arrange a meeting with Ignatow in an attempt to obtain a confession or admission of guilt from Ignatow. The conversation between Ignatow and Shore referred to something buried behind Shore's home, but never directly mentioned Schaefer or her body.

On January 10, 1990, Ignatow was charged in Indictment No. 90-CR-0057 with first-degree murder, KRS 507.020; first-degree kidnapping, KRS 509.040; first-degree sodomy, KRS 510.070; first-degree sexual abuse, KRS 510.110; first-degree robbery, KRS 515.020; and tampering with physical evidence, KRS 524.100.

On December 21, 1991, a jury acquitted Ignatow of all charges. There was a mountain of circumstantial evidence pointing to Ignatow's guilt, but no direct evidence. Coupled with Shore's questionable credibility and the lack of an admission on the tape recording of the conversation between Shore and Ignatow, the jury was unable to find Ignatow guilty beyond a reasonable doubt.

On January 7, 1992, Ignatow was charged in the United States District Court for the Western District of Kentucky in Indictment No. CR 92-00007L(J) with Making False Statements Before A Federal Grand Jury, 18 United States Code (U.S.C.) § 1623 (1994); Subornation of Perjury, 18 U.S.C. § 1622 (1994); and Making False Statements to the F.B.I., 18 U.S.C. § 1001 (1979). These charges arose from the F.B.I.'s investigation of Ignatow for Schaefer's disappearance. On October 1, 1992, Schaefer's jewelry and photographs of Ignatow sexually abusing, torturing and murdering Schaefer were discovered by carpet installers in Ignatow's former home. On October 2, 1992, Ignatow pled guilty to all charges, confessed to killing Schaefer, and was subsequently sentenced to eight years and one month in the federal penitentiary.

On October 6, 1992, Ignatow made a statement to federal prosecutors and officers that his relationship with Schaefer had deteriorated to the point he could no longer go on, and that he

called Shore and informed her he planned to kill Schaefer. Ignatow's statement corroborated Shore's testimony from his murder trial and detailed the atrocities he committed against Schaefer.

In October 1997, Jefferson County Commonwealth's Attorney David Stengel sought and obtained an indictment against Ignatow for first-degree perjury, KRS 523.020, and second-degree persistent felony offender, KRS 532.080.[2] On October 12, 1998, Ignatow filed a motion to dismiss. On December 9, 1998, Judge Ryan entered an order denying the motion. This action followed.

Prohibition will only be granted if (1) a trial court is proceeding outside its jurisdiction and there is no adequate remedy by appeal; or (2) a trial court is proceeding within its jurisdiction, but erroneously, there is no adequate remedy by appeal, and irreparable harm or great injustice will result if no relief is obtained. Potter v. Eli Lilly and Co., Ky., 926 S.W.2d 449, 452 (1996).

Ignatow argues that prohibition is the proper remedy because Judge Ryan is acting within his jurisdiction, but improperly. Ignatow contends the December 9, 1998, order, which permits his prosecution for perjury to continue, violates the Double Jeopardy Clause of the United States Constitution, Fifth Amendment, Sections 2 and 13 of the Kentucky Constitution, and KRS 505.040, and as such he will suffer immediate and irreparable harm

[2]Ignatow was convicted of two counts Filing a Fraudulent Income Tax Return in the United States District Court for the Western District of Kentucky, Indictment No. CR 84-00108-01-L on November 21, 1984. This conviction gave the Commonwealth the underlying felony conviction necessary to enhance Ignatow's perjury conviction pursuant to KRS 532.080.

that cannot be remedied on appeal. The real party in interest, the Commonwealth, contends that prohibition is improper because Ignatow has an adequate remedy by appeal. We disagree.

The right to appeal is not an adequate remedy against double jeopardy. Abney v. United States, 431 U.S. 651, 659, 97 S. Ct. 2034, 2040, 52 L. Ed. 2d 651 (1977). The Double Jeopardy Clause is intended to prevent trial and conviction, not to remedy the violation of this right through appeal, as "[the defendant] has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well." Price v. Georgia, 398 U.S. 323, 331 n.10, 90 S. Ct. 1757, 1762 n.10, 26 L. Ed. 2d 300 (1970). To postpone appellate review until after conviction and sentence would undermine the purpose of the Double Jeopardy Clause, as it is a guarantee that a defendant will not be twice tried for the same offense.

The doctrine of collateral estoppel is derived from the Double Jeopardy Clause and precludes a second jury from reconsidering an issue on which the defendant has already prevailed. A second prosecution based in part on the very issue already decided "implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the Double Jeopardy Clause." United States v. Mespoulede, 597 F.2d 329, 336 (2d Cir. 1979). Because the same public policy concerns and principles lie in collateral estoppel as in double

jeopardy, relief in the form of prohibition is proper in an original action based on collateral estoppel. Because Ignatow is properly before this Court, we shall consider the merits of his appeal.

The Double Jeopardy Clause of the United States Constitution[3] and Sections 2 and 13 of the Kentucky Constitution[4] protect defendants in three ways: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 498; 104 S. Ct. 2536, 2540; 81 L. Ed. 2d 425 (1984). Collateral estoppel is derived from this guarantee.

The collateral estoppel doctrine holds that "when an issue of ultimate fact has once been determined by a valid and final judgment [i.e., an acquittal], that issue cannot again be litigated between the same parties in any future lawsuit [i.e., a prosecution]." Ashe v. Swenson, 397 U.S. 436, 445, 90 S. Ct. 1189, 1195, 25 L. Ed. 2d 469 (1970).[5] Collateral estoppel is applicable

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[3]Amendment Five of the United States Constitution contains the Double Jeopardy Clause: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[4]Section 2 of the Kentucky Constitution states: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Section 13 of the Kentucky Constitution states: "No person shall, for the same offense, be twice put in jeopardy of his life or limb . . . ."

[5]Ignatow's current indictment stems from his testimony in a case in which he was the criminal complainant, but not a party.
(continued...)

in criminal cases only when double jeopardy is not. United States v. Bailin, 977 F.2d 270, 275 (7th Cir. 1992).

Collateral estoppel should be rationally, rather than hypertechnically, applied. Ashe, 397 U.S. at 444, 90 S. Ct. at 1194, 25 L. Ed.2d at 475. If a previous judgment of acquittal is based upon a general verdict, then a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id. (quoting Sealfon v. United States, 332 U.S. 575, 579, 68 S. Ct. 237, 240, 92 L. Ed. 180 (1948)). However, the principle of collateral estoppel "strongly militates against giving an acquittal preclusive effect" because the absence of remedial measures for the Commonwealth in criminal cases "permits juries to acquit out of compassion or compromise or because of "'their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'"(Citations omitted.) Standefer v. United States, 447 U.S. 10, 22, 100 S. Ct. 1999, 2007, 64 L. Ed. 2d 689 (1980).

The principle of collateral estoppel was refined in Dowling v. United States, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), holding that collateral estoppel was inapplicable unless the issue in the present case was an ultimate issue in the

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(...continued)
However, the mutuality requirement is present because Ignatow alleges facts previously determined in his 1990 trial must be re-litigated and decided in favor of the Commonwealth for it to prevail under the present indictment.

previous prosecution. Dowling, 493 U.S. at 350, 110 S. Ct. at 673, 107 L. Ed.2d at 718. The burden is on Ignatow to demonstrate the issues he seeks to foreclose were actually decided in the prior proceeding. Id.

Ignatow first argues that the Commonwealth is barred from prosecuting him under KRS 505.040(1)(a) and (b), which codified double jeopardy and collateral estoppel. KRS 505.040 provides that:

> Although a prosecution is for a violation of a different statutory provision from a former prosecution or for a violation of the same provision but based on different facts, it is barred by the former prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for:
>
> (a) An offense of which the defendant could have been convicted at the first prosecution; or
>
> (b) An offense involving the same conduct as the first prosecution, unless each prosecution requires proof of a fact not required in the other prosecution or unless the offense was not consummated when the former prosecution began; or
>
> (2) The former prosecution was terminated by a final order or judgment which has not subsequently been set

aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution[.]

The Legislative Commentary to this statute states:

> [T]he subsequent prosecution is barred by subsection (1)(a) if it is for an offense of which the defendant could have been convicted at the first prosecution . . . . The prosecution most likely to be barred by this subsection is one for an "included offense" . . . .
>
> Following an acquittal, a conviction, or a determination by the court that there was insufficient evidence to warrant a conviction, a subsequent prosecution is barred by subsection (1)(b) if it is for an offense involving the same conduct as a former prosecution . . . . To this general principle, two exceptions are provided. The first allows for a subsequent prosecution for an offense arising out of the same conduct if each of the two offenses requires proof of a fact not required for conviction of the other . . . . The second exception allows for a subsequent prosecution arising out of the same conduct if the offense involved in the subsequent prosecution had not been consummated at the time of trial of the former prosecution.

Ignatow argues that subsection 1(a) of the statute requires the Commonwealth to try all possible known charges at the

same time. We disagree. KRS 505.040(1)(a) does not require the Commonwealth to try all offenses in a single trial. The prohibition is against retrial for offenses that naturally flow from the indictment, such as included offenses, as the Commentary suggests. The reason for this rule is clear. If under the indictment the defendant could have been convicted for the included offenses, then he was placed in jeopardy for those crimes. Commonwealth v. Ladusaw, Ky., 10 S.W.2d 1089, 1090 (1928). Otherwise the prosecution is not barred from a later prosecution for a separate offense. See United States v. Dixon, 509 U.S. 688, 705, 113 S. Ct. 2849, 2860, 125 L. Ed. 2d 556 (1993) ("The collateral-estoppel effect attributed to the Double Jeopardy Clause [citations omitted] may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts. But this does not establish that the Government 'must . . . bring its prosecutions . . . together.' It is entirely free to bring them separately, and can win convictions in both").

Furthermore, nowhere in the Criminal Rules is the Commonwealth mandated to join offenses. Although RCr 6.18 permits the Commonwealth to charge multiple counts in an indictment, there is no requirement that it do so. "Two (2) or more offenses may be charged in the same . . . indictment." RCr 6.18 (emphasis supplied). Therefore, Ignatow's indictment for perjury is not precluded by KRS 505.040(1)(a).

Ignatow also argues that the Commonwealth is barred from prosecuting him under subsection (1)(b). The Commonwealth is

barred from prosecuting Ignatow under KRS 505.040 1(b) if at least one element of the crimes Ignatow is presently under indictment for is exclusive from at least one element of the crimes Ignatow was indicted for in 1990. For this purpose, the Court shall adopt the procedure outlined in Blockburger v. United States, 284 U.S. 299, 304, 525 S. Ct. 180, 182, 76 L. Ed. 306 (1932). See Burge v. Commonwealth, Ky., 947 S.W.2d 805 (1996) (holding that Kentucky will apply Blockburger)[6].

In 1990, Ignatow was indicted for murder, kidnapping, sodomy, sexual abuse and tampering with physical evidence. To prove first-degree murder, KRS 507.020, the Commonwealth had to show that Ignatow: (1) with intent to cause death of another person; (2) caused the death of such person; (3) not acting under the influence of extreme emotional disturbance. For first-degree kidnapping, KRS 509.040, the Commonwealth was required to show that Ignatow: (1) unlawfully; (2) restrained another person; (3) with intent to inflict bodily injury or terror or to accomplish or advance the commission of a felony. For first-degree sodomy, KRS 510.070, the Commonwealth had to prove that Ignatow: (1) engaged in deviate sexual intercourse with another person; (2) by forcible compulsion. To prove first-degree sexual abuse, KRS 510.110(1), the Commonwealth had to show that Ignatow: (1) subjected another person to sexual contact; (2) by forcible compulsion. To convict for first-degree robbery, KRS 515.020, the Commonwealth was required to prove that Ignatow: (1) in the course of committing a

[6]Burge was held to apply retroactively in Justice v. Commonwealth, Ky., ___ S.W.2d ___ (Dec. 17, 1998).

theft; (2) used or threatened immediate use of physical force; (3) with intent to accomplish the theft; (4) caused physical injury to a person not a participant in the crime or used or threatened immediate use of a dangerous instrument on a person not a participant in the crime. Finally, to prove tampering with physical evidence, the Commonwealth had to show that Ignatow: (1) believed that an official proceeding was pending or might be instituted; (2) destroyed, mutilated, concealed, removed or altered physical evidence which he believed was about to be produced or used in the official proceeding with intent to impair its verity or avail-ability.

Ignatow is presently under indictment for perjury and for being a persistent felony offender. To prove first-degree perjury, KRS 523.020, the Commonwealth is required to show that Ignatow: (1) made a material false statement; (2) which he did not believe; (3) in an official proceeding; (4) under an oath required or authorized by law. To prove second-degree persistent felony offender, KRS 532.080, the Commonwealth is required to show that Ignatow: (1) is more than twenty-one years of age; and (2) was convicted of a felony after having been convicted of one previous felony.

Each element of perjury and persistent felony offender (with the exception of venue) differ from each element of murder, kidnapping, sodomy, sexual abuse and tampering with physical evidence. The reverse is also true. Therefore, the Commonwealth is not barred from prosecuting Ignatow under the present indictment by KRS 505.040(1)(b).

Ignatow also contends that the Commonwealth is precluded from trying him for first-degree perjury pursuant to KRS 505.040(2), because to prove perjury the Commonwealth must prove he murdered Schaefer, a crime for which he was acquitted. This contention is erroneous. Kentucky adopted the United States Supreme Court's analysis of collateral estoppel from Ashe, supra, in Smith v. Lowe, Ky., 792 S.W.2d 371 (1990). In Smith, the defendant, tried and acquitted in federal court for willfully disabling a motor vehicle employed in interstate commerce which resulted in the death of the vehicle's driver, was subsequently indicted for murder in Kentucky. Although the death of the driver was not an element of the offense, the jury instructions required a finding of death for enhancement of the sentence, and the indictment charged that the defendant's actions resulted in the death of the driver. Id. at 373.

The Smith Court adopted the reasoning of the United States Supreme Court in Ashe, supra, and applied the collateral estoppel doctrine to the case. A general verdict of acquittal was entered in federal court, and the court found that there was "no way of determining from a purely technical standpoint why Mr. Smith was acquitted." The Court determined Smith could have been acquitted for the failure of the government to prove the vehicle was being operated in interstate commerce at the time of the offense, but that argument was more theoretical than real. The Court said that the more realistic basis of Smith's acquittal was the jury did not believe the co-defendant's testimony implicating Smith. By concluding that the federal jury acquitted Smith on the

substantive issue rather than the jurisdictional issue, the Supreme Court departed from the holding in Ashe that the issue must be necessarily determined and removed the burden of proof from the defendant's shoulders. Instead, it adopted a standard for collateral estoppel which precludes re-litigation of an issue if the jury most realistically reached its verdict on that ground.[7] Therefore, if Ignatow's indictment for perjury is not precluded under Kentucky law, it is not precluded under federal law.

Having considered the record, the pleadings, the charge, and all other relevant material as required by Ashe and Smith, we conclude that the jury could have reasonably acquitted Ignatow on grounds which do not foreclose a prosecution for perjury.

Ignatow likely prevailed in the first trial for one of two reasons: (1) there was insufficient evidence to convict him due to the lack of forensic evidence and demonstrative evidence or, (2) the jury did not believe that Ignatow was the individual that murdered Schaefer. This Court is unable to extract a more definite basis for the jury verdict. To establish perjury beyond a reasonable doubt, the Commonwealth is not required to show Ignatow murdered, kidnapped, sodomized, sexually abused or robbed Schaefer, or destroyed evidence regarding these acts. Rather, the Commonwealth must show that Ignatow lied about the status of his

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[7]The Supreme Court of Kentucky had the opportunity to return to the federal interpretation of the doctrine of collateral estoppel in Case No. 97-SC-01075-MR, Benton v. Crittenden, Ky., ____ S.W.2d ____ (Dec. 17, 1998). In a 4-3 decision, the Supreme Court reaffirmed its holding in Smith. As a petition for rehearing has been filed, this opinion is not yet final, but it suggests that Kentucky will continue to apply a more expansive interpretation of the collateral estoppel doctrine.

relationship with Schaefer on the day he murdered her. The atrocities Ignatow later admitted to committing against Schaefer, which are the very acts he was acquitted of, might be admissible under the Kentucky Rules of Evidence. See KRE 403; KRE 404(b). However, the admissibility of such evidence is a matter that addresses itself to the trial court's discretion, and may be adequately reviewed in a direct appeal.

In accord with Ashe and Smith, we conclude that Ignatow's prosecution for perjury and persistent felony offender is not barred by the collateral estoppel doctrine. The status of Ignatow's relationship with Schaefer was never presented to the jury, and thus never litigated. Regardless of whether the jury acquitted Ignatow because of insufficient evidence or a belief that he did not kill Schaefer, the jury did not make any finding on the status of Schaefer's and Ignatow's relationship at the time Schaefer was killed.

At Ignatow's trial for perjury, the Commonwealth intends to admit evidence relating to Schaefer's murder by Ignatow pursuant to KRE 404(b):

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Ignatow asks this Court to determine whether evidence concerning the charges Ignatow was acquitted of is inadmissible as prior bad acts. As earlier indicated, Ignatow has an adequate remedy by appeal if evidentiary errors occur at trial.

For the foregoing reasons, Ignatow's petition for a writ of prohibition is denied.

ALL CONCUR.

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