

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001725-DG

CHARLES BRIAN RUSSELL

APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-XX-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, BUCKINGHAM AND MILLER, JUDGES.

BARBER, JUDGE: This is an opinion affirming the Jefferson Circuit Court's reversal of the district court's dismissal of terroristic threatening charges.

Appellant Charles Brian Russell was charged with four misdemeanors in Jefferson District Court. The charges, which were brought by his ex-wife and her father, alleged violation of an EPO (Emergency Protective Order, KRS 403.740) and terroristic threatening (KRS 508.080). Prior to his divorce, Russell entered an Alford¹ plea to an earlier offense, for which he was

¹North Carolina v. Alford, 400 U.S. 25, 27 L.Ed.2d. 162, 91
(continued...)

on probation. The Commonwealth moved to revoke probation. The trial court conducted a lengthy hearing on the revocation motion prior to any hearing on the district court charges. Russell argued before the district court that the telephone calls which were provided as proof of violation of an EPO were actually tapes of old telephone calls, recorded in late 1997 prior to institution of the EPO, rather than in 1998 as claimed by Kimberly Russell.

During the lengthy revocation proceeding, the district court judge stated, with regard to the charges brought by Kimberly Russell, the ex-wife, that "I have not found the testimony regarding May 30, 1998 phone call to be persuasive that phone calls were made on that day. I'll say the same for the [later] phone calls." The judge ended by saying that with regard to any phone calls to Kimberly Russell: "I do not find credible evidence to support the allegations, they will be denied." The judge did not find that a preponderance of the evidence supported Kimberly Russell's claims that Charles Russell had made threatening telephone calls to her in 1998, in violation of the EPO. The judge did revoke Russell's probation for a period of thirty days with regard to the charges brought by Dean Nevitt, father of Kimberly Russell, who alleged that Russell made a threatening phone call to him in 1998.

Following the district court ruling on revocation of probation, counsel for Russell filed a motion to dismiss any

¹(...continued)
S.Ct. 160 (1970).

further prosecution on the charges made by Kimberly Russell, claiming that further prosecution was barred on the grounds of double jeopardy, collateral estoppel, and res judicata. The Commonwealth argued that the district court's ruling in the revocation proceeding should have no effect on the separate criminal trial on charges of terroristic threatening. The criminal charges were dismissed by the district court on the grounds argued by Russell.

The district court stated that judicial economy favored dismissal of the charges, as the Commonwealth obviously could not even prove by a preponderance of the evidence that Russell had committed the wrongful acts. The district court also held that the principle of collateral estoppel prohibited the criminal trial for terroristic threatening based on the evidence which had already been discussed by the court during the revocation proceeding.

The Commonwealth appealed the district court decision to the Jefferson Circuit Court. The circuit court reversed the district court dismissal, pursuant to Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996). The circuit court held that the issue litigated in the revocation hearing was whether Russell had violated a condition of his probation, not whether he was guilty of a statutory offense. The circuit court stated that because the Commonwealth was not required to provide the statutory offense at the time the revocation hearing was held, it should not be bound by the decision rendered therein. The circuit court also found that double jeopardy did not prohibit prosecution of

the criminal complaint because a probation revocation requires proof of different elements from those found in a criminal prosecution for the same charges. Brown v. Commonwealth, Ky. App., 564 S.W.2d 21 (1977).

The circuit court correctly stated that for purposes of a revocation hearing, it need only be shown by a preponderance of the evidence that the offenses were committed, whereas, at a later trial on the merits, the Commonwealth would have to prove the defendant's guilt beyond a reasonable doubt. The Commonwealth points out that it is not necessary to obtain a criminal conviction in order to accomplish revocation of probation. See Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986). Russell argues that a defendant should not be required to go through a trial on the criminal charges where a determination as to the accusations has already been rendered by the trial court.

The Commonwealth asserts that a revocation proceeding and a criminal trial are separate and distinct proceedings and that the Commonwealth should not have the same burden of proof in a revocation hearing as it does in a criminal trial. The United States Supreme Court has recognized that probation revocation hearings are not a stage in the criminal prosecution of an individual. Morrissey v. Brewer, 408 U.S. 471, 480, 33 L.Ed.2d 484, ___, 92 S.Ct. 2593, 2600 (1972). The Commonwealth argues that the state should be entitled to hold a probation revocation hearing without worry that an adverse outcome would bar later prosecution of criminal charges. In the present case, the trial

court did not pass on the criminality of Russell's conduct during the probation revocation hearing. Rather, the trial court found that the proof failed to support the allegations of wrongful conduct during the relevant time period in 1998. This factual finding should not be held binding upon the court during a criminal trial of the charges brought by Kimberly Russell.

As a general rule, where a specific issue of fact has been determined, the Commonwealth is barred from re-trying that fact, although a re-trial of a separate issue may be permitted. See Commonwealth v. Hillebrand, Ky., 536 S.W.2d 451 (1976). However, this Court is required to use ". . . a common sense analysis based on the totality of the circumstances in the previous prosecution" to determine whether a new trial can be had on the evidence earlier before the trial court. Smith v. Lowe, Ky., 792 S.W.2d 371, 374 (1990). Future prosecutions are not barred unless an ultimate issue of fact was determined in the earlier proceeding. See Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), holding that once an ultimate issue of fact has been resolved establishing that the defendant could not have committed a criminal offense, collateral estoppel and double jeopardy preclude continued prosecution of the defendant on that issue.

Res judicata applies to prevent trial on a case where a judgment has already been rendered between the parties. Collateral estoppel bars re-trial of issues which have already been decided by the same or a different court. Russell argues that the ruling by the trial court in the revocation proceeding

on the issue of whether the telephone calls actually took place in 1998 bars further prosecution with regard to that issue. The Commonwealth cites Gregory v. Commonwealth, Ky., 610 S.W.2d 598 (1980), as holding that a civil finding as to wrongdoing cannot collaterally estop a criminal trial. The Gregory decision states that the finding in a civil proceeding does not collaterally estop a criminal trial in the same matter where the trial court did not judge the criminality of the act in rendering its opinion. Gregory also holds that the civil court determination regarding the bad act was not essential to its determination in the civil case, and that for this reason, the civil determination was not binding in the later criminal prosecution. Id.

As this issue has rarely been before the courts of Kentucky, the Commonwealth cites foreign case law in support of its argument that the trial court's finding in the probation revocation hearing should not bar prosecution in the subsequent criminal action. In Teague v. State, 312 S.E.2d 818 (Ga. 1983), the court found that the exercise of discretion by the trial court in denying a motion to revoke parole was in no way an adjudication of the allegations sufficient to constitute an acquittal in a criminal prosecution. Id. at 819. In that case it was found that the state failed to produce evidence at the revocation hearing sufficient to support the revocation. In People v. Fagan, 489 N.E.2d 222 (N.Y. 1985), the court permitted a criminal trial of the charged offense even after a separate court found that the defendant's probation should not be revoked

based upon the complaint of criminal behavior. The Fagan court held that:

Strong policy considerations militate against giving issues determined in prior litigation preclusive effect in a criminal case, and indeed we have never done so. The correct determination of guilt or innocence is paramount in criminal cases, and the People's incentive to litigate in a felony prosecution would presumably be stronger than in a parole revocation proceeding.

Id. (citation to authority deleted). We adopt this argument and find that it would place an undue burden upon the prosecution to require that it be bound by findings of fact in a probation revocation proceeding in later criminal prosecutions.

The statements of one court may be mere "surplusage," and not binding in a second action by the same or a different court. Allard v. Kentucky Real Estate Commission, Ky. App., 824 S.W.2d 884, 886 (1992). Where the initial determination was made on other grounds, any extraneous statement by the deciding court is merely dictum in a second action between the parties. City of Covington v. Board of Trustees of Policemen's and Firefighters' Retirement Fund of the City of Covington, Ky., 903 S.W.2d 517, 522 (1995); H.R. v. Revlett, Ky. App., 998 S.W.2d 778, 780 (1999). The statements of the district court in the probation revocation proceeding cannot have the force and effect of precluding Russell's trial for terroristic threatening.

Double jeopardy attaches when a defendant is punished twice for the same offense. If the charged offenses require proof of different elements, then double jeopardy does not attach. See Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996),

holding that where the defendant was sentenced to home incarceration for violation of a domestic violence order, and later indicted on assault for the violation of the DVO, he did not incur double jeopardy. The court found that he was punished for two separate offenses, as each offense required proof of an element which was not a part of the other. Id., at 812.

Similarly, a judgment of civil contempt is not barred by a judgment for the offense of flagrant non-support, even though both convictions are based on the same behavior, that being failure to provide support in accordance with a judgment against the defendant. See Commonwealth, Ex Rel. Bailey v. Bailey, Ky. App., 970 S.W.2d 818 (1998). The basis for these rulings is that where each offense requires proof of a different or additional fact than the other does not, no double jeopardy can attach. Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 358 (1999).

We find that no double jeopardy attaches in the present case. The district court's findings in the probation revocation proceeding do not bar later criminal prosecution on the same evidence. No double jeopardy attaches as the standards of proof are different in each proceeding. The Commonwealth has an interest in pursuing a probation violation prior to trial on new criminal offenses that form the basis of the alleged probation violation. Messer v. Commonwealth, Ky. App., 754 S.W.2d 872 (1988). It would be inequitable to require the Commonwealth to devote the time and resources to each probation revocation proceeding required for a criminal trial. Such a requirement

would necessarily be imposed if the determination of the judge in a probation revocation proceeding barred later trial of the underlying criminal offenses. Similarly, it would be inequitable to the defendant to bar a later criminal trial in which he could be exonerated if the district court held that probation should be revoked in a probation revocation proceeding.

For the foregoing reasons, we affirm the decision of the Jefferson Circuit Court.

BUCKINGHAM, JUDGE, CONCURS.

MILLER, JUDGE, CONCURRING BY SEPARATE OPINION: I reluctantly concur in affirming the circuit court. I agree with the district court that judicial economy favors dismissal of the charges. I cannot conceive of the Commonwealth having substantially better evidence at a trial than has been demonstrated in the revocation proceeding. It follows that the charges should and will ultimately be dismissed.

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