IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,771

VINCENT GREEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The petitioner was the appellee in the District Court of Appeal, Third District, and the defendant in the trial court. The respondent was the appellant in the Third District and the prosecution in the trial court. In this brief, the parties will be referred to as the State and the defendant. The symbol "R" will be used to designate the record on appeal. The symbol "T" will be used to designate the transcript of the trial proceedings. The symbol "SR" will be used to designate the supplemental record on appeal, and the symbol "A" will designate the appendix to this brief, comprised of the decision of the District Court of Appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The State accepts defendant's Statement of the Case as a generally accurate account of the proceedings at the trial and appellate level with such additions and exceptions as are set forth in the argument portion of this brief.

STATEMENT OF THE FACTS

The State accepts defendant's Statement of the Facts as a generally accurate account of the proceedings at the trial level with such additions and exceptions as are set forth below and in the argument portion of this brief.

1) In explaining his reasons for finding the defendant not guilty of the probation violation, the trial court expressed his unhappiness with the manner in which Officer Silvani conducted the investigation stating:

> But, all I know is that this time this guy is going to get away with it because there is just doubt in my mind. It just doesn't make sense. If this is the way the police officer acts as a police officer, he ought to go back to police school because what he did has got to be the most dangerous thing in the world.
>
> He says he's being careful. He better learn to take his gun out of his holster when he hits a situation like that. He doesn't talk casually to somebody--and, he also turns directly into the station. If he really believed he was in that much danger, he ain't going to operate the way he did.
>
> (ST. 72).

The court further chastised the officer for not mentioning the broken glass on the A-form. The court apologized when the officer pointed out that it was on the

A-form. (ST. 73). The court again expressed his displeasure with the way the officer handled the case. (ST. 80).

2) After the trial on the substantive charges, at the hearing on the defendant's motion for new trial, the defendant renewed his motion to dismiss based on the trial court's ruling at the probation violation hearing. The court again denied the motion stating that the jury had heard more evidence. (T. 180). The court again reiterated that at the probation violation hearing that he took "the position where there was the slightest doubt in [his] mind, [he] find[s] them not guilty. . .and allow[s] defendant[s] the benefit of the doubt and let[s] the jury decide on the basis of beyond a reasonable doubt." (T. 180).

QUESTION PRESENTED

WHEN, IN A PROBATION REVOCATION PROCEEDING, A TRIAL JUDGE FINDS THAT THE EVIDENCE IS INSUFFICIENT TO PROVE THE CRIMINAL OFFENSE ASSERTED AS THE SOLE GROUND FOR REVOCATION, IS THE STATE COLLATERALLY ESTOPPED FROM TRYING THE DEFENDANT FOR THE SAME CRIMINAL OFFENSE?[1]

[1]Although the "Question Presented" as stated in the defendant's brief at p. 3 is similar in form, the above question is verbatim as certified by the Third District Court of Appeal.

ARGUMENT

WHEN, IN A PROBATION REVOCATION PROCEEDING, A TRIAL JUDGE FINDS THAT THE EVIDENCE IS INSUFFICIENT TO PROVE THE CRIMINAL OFFENSE ASSERTED AS THE SOLE GROUND FOR REVOCATION, THE STATE IS NOT COLLATERALLY ESTOPPED FROM TRYING THE DEFENDANT FOR THE SAME CRIMINAL OFFENSE.

The defendant alleges in this Court, as he did in the district court, that the State is collaterally estopped under double jeopardy principles from proceeding with a criminal trial after the trial court in a probation revocation hearing based on the same charges has found that the State has adduced insufficient evidence to justify a revocation of probation. The State submits that the District Court of Appeal was correct in finding that collateral estoppel is unavailable to the defendant in that the defendant was not placed in jeopardy in the probation revocation hearing.

In Ashe v. Swenson, 397 U.S. 436 (1970), the United States Supreme Court held that "collateral estoppel" means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. The Court held that collateral estoppel applies against a state in criminal proceedings

where it is embodied in the Fifth Amendment guarantee against double jeopardy. Id. at 444-446. Thus, for collateral estoppel to apply in criminal proceedings, the defendant must have been placed in jeopardy in the first proceeding.

In State v. McCord, 402 So.2d 1147, 1149 (Fla. 1981), this Court reiterated this holding, citing the Second District's opinion in State v. Kling, 335 So.2d 614 (Fla. 2d DCA 1976) which reasoned:

> In Ashe the majority opinion made it clear that collateral estoppel in a criminal case was part of the Fifth Amendment guarantee against double jeopardy. The only reason that Ashe could not be prosecuted for the second robbery was that he had already been placed in jeopardy for the first.
>
> 335 So.2d at 615.

Thus, the State submits that the issue is whether the defendant was placed in jeopardy in the probation revocation proceedings.

There is no question that the probation violation proceeding is actually a deferred sentencing hearing. Delancy v. State, 190 So.2d 578 (Fla. 1966). The District Court found in the instant case that the probation review does not subject a defendant to jeopardy because his guilt and

sentence have already been determined in a prior trial, the only issue before the trial court is whether the defendant is entitled to serve his sentence without undergoing incarceration. (A. 3). This reasoning concurred with that of the First District Court of Appeal in State v. Jones, 425 So.2d 178 (Fla. 1st DCA 1983), which held that a defendant is not placed in jeopardy in a probation revocation hearing for the substantive offense, where the probation revocation hearing concerns only the sentence for a prior offense. 425 So.2d at 179 n. 2.

In Russ v. State, supra, this Court held that double jeopardy by way of collateral estoppel is not applicable to probation revocation hearings based upon evidence of a crime of which the defendant was acquitted at trial, stating:

> Petitioner's contention that double jeopardy applies by collateral estoppel is without merit. This is not a second prosecution for the same offense after an acquittal. If it were, a second and separate punishment could be imposed in addition to punishment for the offense previously established for which the petitioner is on probation. A revocation proceeding concerns conduct which violates the terms of probation for an already established criminal offense.
>
> 'Proof sufficient to support a criminal conviction is not required to support a judge's discretionary order revoking probation.' Bernhardt v. State, supra, 288 So. 2d at 501. To apply collateral

> estoppel, as argued by petitioner, would substantially extend the doctrine not in any way authorized or contemplated by Ashe v. Swenson, 397 U.S. 436. . .cites omitted. The ultimate facts necessary to convict for a criminal offense and the ulti mate facts necessary to establish a violation of probation are not the same. It is analogous to the decision of the United States Supreme Court in One Lot Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972), which held that an acquittal in a criminal case does not collaterally estop the same issue from being tried in a civil case because the burden of proof as well as the elements that must be established differ.
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> 313 So.2d at 760.
> (Emphasis original).

The State submits that to hold as the defendant suggests that when a probationer who is charged with violating a probation order is placed in "jeopardy" in the violation proceedings, would be a retreat from the well-established law that the State may both seek to revoke a defendant's probation and seek a criminal conviction based on the same conduct. As this Court held in Russ v. State, supra, a probation revocation hearing is not a second prosecution for the same offense after an acquittal. The ultimate facts necessary to convict for a criminal offense and those necessary to establish a violation of probation are not the same. A revocation proceeding concerns conduct

which violates an already established offense.[2] Thus, the submission to the trial judge of whether the defendant's conduct violated the terms of his probation cannot under any stretch of the imagination be equivalent to the submission of a jury of whether the defendant's conduct violated the criminal law, and thereby place the defendant in "jeopardy."[3]

[2]Even under the holding in Russ which relataes to the lesser burden of proof in the probation revocation hearing, there would be no double jeopardy in the instant case. The trial court did not use the minimal standard of proof in the probation revocation hearing. The trial court repeatedly stated that it did not use a "conscience of the court" standard, but that it used the "beyond a reasonable doubt" standard. (SR. 78). The court even went so far as to state that it had used a more stringent standard than beyond a reasonable doubt, when the court stated that it took the position that where there was the slightest doubt, the court finds the defendant not guilty. (T. 180). Thus, if the trial court used a more stringent standard than is required in a criminal trial, as the trial court itself stated, then certainly under the principles of Russ v. State, supra, the State is not barred from trying the defendant on the criminal charges using a "lesser" standard.

Furthermore even if a lesser standard was used, collateral estoppel would not apply. In Lawton v. State, 152 Fla. 821, 13 So.2d 211 (Fla. 1943), this Court held that due to the difference in the degree of burden of proof in civil and criminal cases, a final judgment in a civil case is inadmissible in a criminal prosecution. See also United States ex rel. Fulton v. Franzen, 659 F.2d 741 (7th Cir. 1981); United States v. Lima, 424 A.2d 113, D.C. App. (1980)(en banc); Flynt v. State, 153 Ga. App. 232, 264 S.E. 2d 669, 677-78 (1980).

[3]The defendant's reliance on Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852 (1981) is also misplaced. In Bullington, the capital sentencing procedure followed the trial proceeding. The Missouri statute explicitly required the jury to determine whether the state had proved its case. The jury's determination was binding. Thus, a jury's determination that life was the appropriate sentence was a determination that the jury had acquitted the defendant on whatever was necessary to impose the death sentence. Thus, it

The District Court in the instant case, as well as the Court in State v. Jones, supra, further held that a trial court's refusal to revoke probation cannot be equated with an adjudication of the criminal charges, because the trial court is vested with broad discretion to revoke, modify, or continue probation even if the charge is admitted or proved. 425 So.2d at 179 n. 2, A. at 2-3. The State submits that these appellate court decisions are persuasive and particularly applicable to the facts in the instant case.

In the present case, the trial court did not find that the evidence was insufficient, in that there was no evidence to establish the elements of the crime, but rather that because the court was so disturbed by the police officer's manner of conducting the investigation, that although he believed the defendant to be probably guilty (ST. 77), the court found the defendant not guilty. "Probably guilty" is certainly a standard sufficient to satisfy most courts' consciences, but because of the broad discretion that a trial judge is vested with in revoking probation, it was not sufficient to satisfy this particular trial judge's conscience. Thus, it can hardly be said that the trial court's refusal

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is similar to "inconsistent verdict" cases, see, e.g., Redondo v. State, 403 So.2d 954 (Fla. 1981), Mahaun v. State, 377 So.2d 1158 (Fla. 1979), in which an acquittal of a charge which contains an essential element of the convicted charges, precludes the conviction of the second charge. See also Gregg v. State, 429 So.2d 1204 (Fla. 1983).

to revoke probation in the instant case can be equated with an adjudication of the criminal charges.

The State further submits that to allow the trial court's credibility choices to be determinative of the criminal prosecution would in effect abrogate the state's right to have the criminal charges heard by a jury. See, e.g., State ex rel. Gerstein v. Baker, 339 So.2d 271 (Fla. 3d DCA 1976); Thomas v. State, 328 So.2d 545 (Fla. 3d DCA 1976). See also Rodriguez v. State, 436 So.2d 219 (Fla. 3d DCA 1983). It would require the State in any case in which it desired to have a jury trial to first proceed with the criminal trial and then proceed with the probation violation hearing.[4] There is no rule, statute, or case law that requires the State to proceed in such a manner. In an analogous situation, when there is a disagreement over the conflict of testimony, such disagreement only goes to the weight and not the sufficiency of the evidence and double jeopardy is not a bar to retrial. See, e.g., Tibbs v. State, 397 So.2d 1120 (Fla. 1980) aff'd, 457 U.S. 31 (1982).

The State would also submit that defendant's reliance on two out-of-state cases, People v. Kondo, 51 Ill.App.3d

[4]It must also be noted that because the burden in a probation revocation hearing is generally less than the burden at trial, it is not uncommon for the state, as was the case here, to not put on all of its witnesses. A reversal of the District Court's opinion would turn what are usually simple probation hearings into full blown evidentiary trials.

874, 9 Ill. Dec. 479, 366 N.E.2d 990 (1977) and State v. Bradley, 51 Or.App. 969, 626 P.2d 403 (1981) are unpersuasive. In People v. Kondo, the Illinois appellate court held that the state was collaterally estopped from attempting to relitigate an identical issue at a criminal trial upon the same evidence on which it failed to meet a less stringent burden of a probation revocation hearing. The court based its opinion on a prior Illinois Supreme Court case, People v. Grayson, 58 Ill.2d 260, 319 N.E. 2d 43 (1974) in which the court applied collateral estoppel where the defendant was first acquitted of the substantive criminal charge, but his probation was revoked based on the same offense. As stated supra, this Court has rejected that position in Russ v. State, supra.

The State asserts that State v. Bradley, supra is equally inapplicable where the holding was specifically not based on the "application of the constitutional standard of double jeopardy (or its ingredient, collateral estoppel as a principle of constitutional law, Ashe v. Swenson, 397 U.S. 436 (1970)", but on the application of a state statute which provided that collateral estoppel "only is determined by a former judgment, decree or order which was actually and necessarily included, therein or necessary thereto." 626 P.2d at 405. Florida has no such statute and therefore State v. Bradley is unavailing.

The State submits that there are other jurisdictions which have held that collateral estoppel is not available to a defendant to prevent the State from relitigating an issue previously decided in favor of the defendant at a parole or probation revocation hearing. In State v. Williams, 131 Ariz. 211, 639 P.2d 1036 (1982), the Arizona Supreme Court held the finding by a judge at the conclusion of a probation revocation hearing does not raise to the respectability of a judgment so as to collaterally estop the State from proceeding on the substantive criminal offense. In State v. Dupard, 93 Wash. 2d 268, 609 P.2d 961 (1980), the Washington Supreme Court held that collateral estoppel does not apply to a subsequent criminal trial, after a parole revocation hearing that decided an issue in favor of the defendant. The court held that public policy dictates the rejection of collateral estoppel in this instance, where parole revocation is not part of a new criminal prosecution, but rather is a continuing consequence of the original conviction. 609 P.2d at 965. The appellee submits that such reasoning is applicable to probation revocation hearings in Florida, and should be persuasive. See also State v. Spanbauer, 108 Wis.2d 322 N.W.2d 511 (1982)(for collateral estoppel purposes, parole revocation is not a criminal adjudication and, hence, decision not to revoke parole was not a binding adjudication on the merits of criminal charges and did not preclude subsequent conviction based on those charges).

Thus, the State submits that the doctrine of Ashe v. Swenson, supra, is not applicable to probation--violation hearings, such as that in the instant case. The State having been unable to persuade the trial court who made a credibility choice, of the defendant's guilt beyond the "slightest doubt," to satisfy this trial court's conscience that the defendant had violated his probation, should not be collaterally estopped under the applicable case law and reasoning, from establishing to a jury the defendant's guilt beyond a reasonable doubt, that he had violated the criminal laws. The trial court did not err in denying the defendant's Motion to Dismiss the Information, and this Court should answer the certified question in the negative.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State submits that this Court should affirm the decision of the District Court in Green v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON MERITS was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 5 day of March, 1984.

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