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IN THE SUPREME COURT OF FLORIDA

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CASE NO. 64,771

VINCENT GREEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON MERITS

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IN THE SUPREME COURT OF FLORIDA

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VINCENT GREEN,

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vs.

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ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON MERITS

INTRODUCTION

The petitioner, Vincent Green, was the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the petitioner will be referred to as defendant and the appellee as the State.

The following symbols will be utilized: the symbol "R" will designate the record on appeal, the symbol "Tr" will designate

the transcript of trial proceedings, the symbol "S.R." will 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

An information was filed on November 5, 1981, charging defendant with possession of burglary tools, attempted burglary, and criminal mischief (R. 1-3A). Defendant was arraigned on that date and stood mute; the trial court directed the entry of a not guilty plea (R. 4).

Trial commenced on April 5, 1982, and the jury returned guilty verdicts on April 6, 1982 (R. 10, 12, 13, 23-25). The court entered judgment on that date (R. 21-22). A timely filed motion for new trial was denied on April 20, 1982 (R. 27-28; Tr. 181). The court sentenced defendant to two concurrent three-year terms of imprisonment, suspending the entry of sentence on the third count, on June 23, 1982 (R. 29-32).

Notice of appeal was filed on July 23, 1982 (R. 34). The District Court of Appeal issued its decision affirming the judgment on January 17, 1984 (A. 1-3). The court certified that its decision passed upon a question of great public interest (A. 2).

QUESTION PRESENTED

WHETHER A FINDING BY A TRIAL COURT THAT THE EVIDENCE PRESENTED BY THE STATE IN A PROBATION-VIOLATION PROCEEDING, BASED UPON THE ALLEGED COMMISSION OF A CRIMINAL OFFENSE, IS INSUFFICIENT TO PROVE THAT OFFENSE COLLATERALLY ESTOPS THE STATE FROM TRYING THE ACCUSED FOR THE SAME CRIMINAL OFFENSE UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECITON 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

STATEMENT OF THE FACTS

Defendant was arrested during the early morning hours of October 16, 1981, while on the premises of Al's Mobil Station, located at Quail Roost Drive and U.S. 1 in southwest Dade County (Tr. 19-22). A window in one of the service bays had been broken (Tr. 23-25, 68), and defendant was initially charged by the arresting officer with burglary (Tr. 22). The information filed in this case charged defendant with possession of burglary tools, attempted burglary, and criminal mischief (R. 1-3). These offenses were also alleged as a basis for revoking the order granting probation to defendant in Case No. 80-12644 (S.R. 5-46). The probation case was heard on March 16, 1982 and the court, after hearing the evidence, found the evidence insufficient to revoke the probation order (S.R. 1, 70-72). Counsel for defendant filed a motion to dismiss the information subsequent to the probation-violation hearing and prior to the trial in this case, on the ground that the State was collaterally estopped from proceeding against defendant on these charges; the motion was denied (R. 16-17; S.R. 91-92).

The Probation-Violation Hearing:

Officer Joseph Silvani of the Metro-Dade Police Department testified that he had been in the vicinity of Al's Mobil Station at 1:34 A.M. on October 16, 1981, and that he had, while driving past the station, observed defendant raise an automobile jack and break the service bay window (S.R. 5-7). He stated that he had proceeded past the station, made a U-turn, and drove back, pulling into the station from the south (S.R. 7, 18-19).[1]

Officer Silvani testified that defendant had approached him, after dropping the jack onto the ground, and that he had engaged in casual conversation with defendant while awaiting the arrival of back-up units (S.R. 7-8). He stated that defendant had told him that he had been changing a tire on his automobile, but that his own observation of the tires was that none of them were flat or damaged (S.R. 7-8). The officer further testified that he had observed defendant's automobile parked near the service bay, and that there had been pieces of broken glass on the hood of the vehicle (S.R. 8).

1

On cross-examination, the officer testified he had been driving north on U.S. 1, and that the gas station had been on his right as he passed (S.R. 13). He stated that he had been driving between 35 and 40 miles per hour, and that the service bay was approximately 100 to 200 feet from his automobile as he passed through the intersection of Quail Roost Drive and the highway (S.R. 13, 18).

Upon examining a photograph of the gas station, the officer acknowledged that there is a large tree in front of the station, but stated that he did not recall having seen it as he drove past (S.R. 26-28). He stated that he had not made an immediate right turn into the gas station, but had driven past and made a U-turn, because he "didn't want to alert the Defendant that I knew that something was wrong." (S.R. 29).

Defendant was thereafter placed under arrest, and a radio check on the vehicle revealed that it was registered to Barbara Willis, whom the officer described as defendant's former girlfriend (S.R. 10; see S.R. 59). Officer Silvani testified that Ms. Willis had been brought to the gas station, and had told him that defendant had "entered her house without her knowing it and took the keys to the vehicle and took the vehicle." (S.R. 10).

Officer Silvani further testified that police officers had contacted the owner of the gas station, Mr. Alberto Lapon, and that the latter had arrived at the station while defendant was still in custody at the scene (S.R. 11-12). Mr. Lapon testified that he had been awakened at approximately 2:00 A.M. by a telephone call from his alarm service, and that he had gone to the station, where he had observed the broken window and "glass all over the place." (S.R. 39-40). Mr. Lapon further testified that he observed the automobile parked near the service bay, but that he had not seen any pieces of broken glass on the hood of the vehicle (S.R. 40-41).

Defendant testified that he and Ms. Willis had an ongoing relationship, and that he had borrowed her automobile (for which he had a set of keys) on the night of his arrest (S.R. 47). Defendant stated that he had been driving the automobile north on U.S. 1 when the transmission began "winding out", so that the vehicle would not accelerate (S.R. 48). Defendant testified that he had pulled into the gas station so that he could examine the transmission in the light, but that he had been unable to find a

crowbar with which to operate the jack in the automobile trunk (S.R. 49-51).

Defendant testified that he had gone to the curb and had attempted to attract the attention of passing motorists (S.R. 51). He stated that Officer Silvani had passed the station and had then turned and driven in, and that he had advised the officer of his problem and requested a crow bar from him (S.R. 51-52). He stated that the officer had said that he did not have any tools (S.R. 52). Defendant further testified that the officer had then observed the broken window and had accused him of breaking it, and that he had responded that the window had been broken when he first arrived (S.R. 52). Defendant stated that he had been wearing good clothing at the time of his arrest (S.R. 52-53).

Defendant further testified that Ms. Willis had arrived at the station after he had been taken into custody, and had driven her automobile home (S.R. 54). Ms. Willis testified that she had been able to drive the automobile for approximately one-half of a mile, after which the transmission ceased functioning properly, requiring her "to coast it in." (S.R. 60). Ms. Willis testified that she had eventually replaced the transmission (S.R. 61-62).[2]

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The bill for the transmission work, which reflected that the automobile had been repaired on November 20, 1981, was introduced into evidence (S.R. 62). Ms. Willis testified that she had first had the transmission fluid and filter replaced, and the automobile had functioned properly for approximately three weeks, after which the transmission malfunctioned again and she had to replace it (S.R. 60-62).

At the conclusion of the evidence, the trial court stated its opinion that "[s]omething doesn't sound kosher in this case", noting that "[t]he only damaging, real damaging testimony in this case, is the glass on top of the hood." (S.R. 64-65). The prosecutor, in response to this comment, argued that Officer Silvani had testified to having observed defendant break the glass (S.R. 65). Counsel for defendant argued that the officer's testimony regarding his ability to observe defendant and his actions at the time he had entered the gas station rendered his accusation of defendant incredible (S.R. 66-67).

The trial court made the following findings:

> The Court: I think both attorneys have been through enough trials with me to know that you don't convict somebody on the fact that they could possibly have done it. I may be wrong. He may well have done it. But, there are certain things in the officer's testimony that doesn't [sic] make any sense at all.
>
> I'll tell you what they are, and they bother me. They bother me because they're totally inconsistent with any police officer's testimony I've ever heard since I've been sitting on this bench.
>
> Number One, that story about him making the U-turn to come around doesn't make any sense at all. This picture indicates that if he saw him, he would have made the righthand turn right into the station. He's not afraid. What is a police officer on patrol afraid? He wants to come up quietly. But, let's assume that his testimony is right; that's exactly what he did.
>
> What he did then is totally inconsistent with what he's talking about. He would have come out of that car with his gun out as soon as he saw the guy didn't have a gun, get him up against the wall and wait for his backups to come.
>
> He talked casually. How does he know there is not another man on the other side of the . . . station. He probably is the burglar.

Another thing that bothers me is this, it's the first burglary I've ever heard testimony that the burglar was dressed in good clothes. This window has been testified by the owner as being a foot and a half by two feet. You know how small that window is? At his size, he's going to cut his clothes; he's going to do everything at that level. How is he going to get in and out? Suppose he did stand on the car? He'd have to jump off in there. If he is the burglar, he's a lousy burglar, I'll tell you that.

But, let me tell you something. This story -- the standard jury instructions say when there is two possible explanations, you got to believe the explanation of the Defendant. That's the way our law goes. It may well be that he is the burglar, and it may be that he did everything wrong, and if you had brought out, perhaps, the testimony exactly when that sonic alarm went out -- I don't know how the owner got there. To this day, I don't know how he got there because the officer said he sent for the owner and the owner testified that the alarm went off. I don't know who's telling the truth, or how he got there.

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. . . .

* * *

Find the Defendant not guilty. (S.R. 70-72).[3]

3

The officer and the prosecutor expressed their displeasure with this ruling after a recess (S.R. 73-77). The court responded, "I require the same degree of proof as I do in a regular trial," (S.R. 78), and further stated:

> . . . [T]here is a reasonable doubt in this particular case. The fact of how he was dressed and what he was doing there is totally inconsistent. (S.R. 78).
>
> * * *
>
> . . . I just thought that there was a possibility that that something out there didn't happen the way you said it happened, okay? (S.R. 79-80).

The Trial Proceedings:

Counsel for defendant filed the motion to dismiss prior to trial, alleging that the finding of the court in the probation-violation proceedings prohibited further litigation under the doctrine of collateral estoppel (R. 16-17). The trial court denied the motion, stating "[t]hat's not the law" (S.R. 91), and then inquired as follows of the prosecutor:

> The Court: . . . Why are you going ahead with the trial, by the way?
>
> * * *
>
> Mr. Casey [assistant state attorney]: . . . There's been new evidence to come to our attention that makes the case even stronger [than] it was at the time. (S.R. 91-92).

OIfficer Silvani testified at trial that he had been on routine patrol, proceeding northbound on U.S. 1, at approximately 1:30 A.M. on October 16, 1981, when he observed defendant break the window in the service station (Tr. 19-20, 34-35). He stated that he had been driving at approximately 35 to 40 miles per hour as he passed through the Quail Roost Drive intersection, and that he had proceeded north and made the U-turn rather than turning into the station immediately because of the speed at which he was driving; he stated that he "was taking a chance of hitting a curb" or "of sliding into a gas pump" if he had made the turn (Tr. 20-21, 37-38). The officer stated that he had been between 100 and 200 feet from defendant when he first observed him (Tr. 36-37). The officer further testified that defendant had approached him as he entered the station, had "stated that there was something wrong with one of his tires", and had asked for a

crowbar to operate the jack (Tr. 21-22), stating that "he was going to jack it up and change the tire." (Tr. 27-28). Officer Silvano stated that the tires on defendant's automobile, which he had observed parked near the service bay (Tr. 26-27), "were in perfect shape." (Tr. 28).[4]

Officer Silvano described defendant as having worn "a pair of good slacks and a good shirt" (Tr. 49) and testified that defendant had not attempted to flee (Tr. 48). He stated that he had not sought to arrest defendant immediately for fear he "would have fought", and that he had engaged defendant in casual conversation until other officers arrived, at which time defendant was placed under arrest (Tr. 22, 53-54).

The officer further testified that he had observed the broken window in the service bay door (Tr. 23). He stated that the three windows beneath the broken window had what appeared to be alarm tape on them, but that the broken window did not (Tr. 23-24). He further stated that there had been fragments of glass on the hood of the automobile, which was parked near by the door (Tr. 26-27).

Mr. Lapon testified that he has two alarm systems at the service station: alarm tape on the windows, and a "sonic" alarm, which is activated by noise inside of the station (Tr. 66). He stated that he had been called at "close to two o'clock in the

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On cross-examination, the officer testified that defendant had said that "there was something wrong with his car", and that he had assumed that defendant had meant the tires, since he had asked for a crowbar to operate the jack (Tr. 48-49).

morning" by his alarm service and advised that the alarm had been activated (Tr. 66-67). Upon arriving at the station, Mr. Lapon observed the broken window, but he testified that he did not observe any glass fragments on the hood of the automobile parked near the service bay (Tr. 69, 73).

Detective Merrell Milligan of the Metro-Dade Police Department testified that he had arrived at the scene between 2:00 and 3:00 A.M. (Tr. 81, 84).[5] He stated that he had observed the broken window, and that there had been glass fragments on the ground and on the hood of the automobile (Tr. 81-82). No crime scene investigation for the presence of fingerprints was performed at the scene (Tr. 85-86).

Defendant testified that he had borrowed his girlfriend's car and had been drinking with friends on the night of his arrest (Tr. 94-95). He stated that he had left his friends at a club and had been driving on U.S. 1 when the transmission began malfunctioning and he pulled into the service station to examine it (Tr. 96-97). He stated that he had removed the jack from the trunk and discovered that he did not have a crowbar, at which point he went to the curb and attempted to flag down passing motorists (Tr. 98-100).

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Detective Milligan did not testify at the probation-violation hearing; Ms. Willis, the defendant's girlfriend, testified that he had been at the scene when she arrived to remove that automobile (S.R. 59-60).

Defendant testified that Officer Silvani had pulled into the station after initially driving past, and that they had talked, after which the officer had followed him to this car and had observed the broken glass (Tr. 100-01). Defendant stated that he had observed the broken glass when he had first entered the station, and that he had responded to the officer's accusation by telling him that he had not broken the window (Tr. 101-02, 104).

Barbara Willis testified that the police had driven her to the service station, and that there had not been any glass fragments on the automobile when she arrived (Tr. 110-11). She further testified that she had driven the automobile to her home, and that the transmission had been malfunctioning during the drive (Tr. 112-13). Ms. Willis further testified that she had eventually been required to have a new transmission put in (Tr. 113; see R. 20; Tr. 114-115).

The jury returned guilty verdicts on the three charges in the information (R. 23-25). Counsel for defendant renewed the motion to dismiss at the hearing on the motion for new trial, and the court denied the motion, stating, "I don't want to make new law in this case." (Tr. 180-81).

ARGUMENT

A FINDING BY A TRIAL COURT THAT THE EVIDENCE PRESENTED BY THE STATE IN A PROBATION-VIOLATION PROCEEDING, BASED UPON THE ALLEGED COMMISSION OF A CRIMINAL OFFENSE, IS INSUFFICIENT TO PROVE THAT OFFENSE COLLATERALLY ESTOPS THE STATE FROM TRYING THE ACCUSED FOR THE SAME CRIMINAL OFFENSE UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The common-law doctrine of collateral estoppel is embodied in the Fifth Amendment prohibition against double jeopardy, applicable to the States through the Due Process Clause of the Fourteenth Amendment. Ashe v. Swenson, 397 U.S. 436 (1970); Benton v. Maryland, 395 U.S. 784 (1969). That doctrine bars relitigation of adjudicated issues of fact:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when a[n] 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. Ashe v. Swenson, supra at 443.

Under this rule, an acquittal of an accused bars further prosecution for offenses arising from the same state of facts, if the acquittal necessarily adjudicated the facts upon which such further prosecution would be based. Id. at 445-46; accord Turner v. Arkansas, 407 U.S. 366 (1972); Gragg v. State, 429 So.2d 1204, 1206 (Fla. 1983); State v. Katz, 402 So.2d 1184, 1187 (Fla. 1981); State v. McCord, 402 So.2d 1147, 1148 (Fla. 1981); State v. Perkins, 349 So.2d 161, 163 (Fla. 1977); Sarno v. State, 424 So.2d 829, 837 (Fla. 3d DCA 1982).

In the present case, it is indisputable that the same issue litigated in the probation-violation hearing--whether or not defendant had broken the service station window--was again litigated in his trial, and the court below did not find to the contrary. Indeed, the court noted that "the issues of fact in both proceedings appear identical" (A. 3). Rather, the court held that defendant had not been in "jeopardy" in the probation-

violation proceedings, barring application of the collateral-estoppel doctrine:

> In State v. McCord, [supra], the Supreme Court . . . held that collateral estoppel applies against the state under fifth amendment protections against double jeopardy only if jeopardy attached in the first proceeding. Subsequently, in State v. Jones, 425 So.2d 178 (Fla. 1st DCA 1983), another appellate court reiterated that jeopardy attaches only when a defendant has been subjected to risks in determining guilt . . . . The Jones court concluded that defendant Jones had not been placed in jeopardy in the probation revocation proceeding because the probation revocation hearing was directed to review of an existing sentence and the trial judge was vested with broad discretion in continuing the probation.
>
> There is no question that the law holds the state to a less stringent burden of proof in a probation revocation proceeding than it does in a criminal trial. The probation violation proceeding is actually a deferred sentencing hearing . . . and although the issues of fact in both proceedings appear identical, the probation review does not subject a defendant to jeopardy. His guilt and his sentence have already been determined in a prior trial. Whether the defendant is entitled to serve his sentence without undergoing incarceration is the issue; no new jeopardy attaches. (A. 2-3).[6]

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To the extent that the decision turns upon the notion that defendant was not in jeopardy for the charge upon which he was subsequently tried, it is manifestly erroneous. The doctrine of collateral estoppel--by its very name--applies only when an accused has not previously been placed in jeopardy for the subject offense but for another offense, which embraces an issue involved in the second prosecution. See Ashe v. Swenson, supra at 444 n.9; Gragg v. State, supra at 1206. Indeed, if an accused had been placed in jeopardy for the same offense, classic double jeopardy principles would bar retrial, see, e.g., Brown v. Ohio, 431 U.S. 161 (1977), and adversion to collateral-estoppel considerations would be unnecessary.

Thus, the determinative question presented in this case is whether an accused is placed in "jeopardy" in a probation-violation hearing.

The basis for the holding in this case and State v. Jones, supra, that jeopardy does not attach in such a proceeding is derived from this Court's decision in State v. McCord, supra, which addressed the applicability of Ashe to rulings on pretrial motions. In that case, a county court judge had suppressed narcotics paraphanalia seized from the defendant at the time of her arrest on other felony charges, and the circuit judge, "[b]elieving the collateral estoppel doctrine to be applicable . . . suppressed the evidence on the felony charges", which had been seized at the same time. 402 So.2d at 1148. This Court held that since the defendant had never been placed in jeopardy in the county court proceedings (because the misdemeanor charges were dismissed after the evidence was suppressed), Ashe was inapplicable:

> . . . McCord contends that collateral estoppel bars the State from relitigating her motion to suppress evidence after it suffered an adverse ruling on this motion in the county court even though she was never placed in jeopardy in the county court. She argues that the "valid and final judgment" required (by Ashe) before application of the collateral estoppel doctrine is only an adjudication of an issue in another action between the parties that is determined to be sufficiently firm to be accorded conclusive effect.
>
> We reject McCord's contentions. As is pointed out by Judge Grimes in [State v.] Kling [335 So.2d 614 (Fla. 2d DCA 1976)]: "In Ashe the majority opinion made it clear that collateral estoppel in a criminal case was a 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. In Kling, the Second District correctly held that since the defendants in that case were never placed in jeopardy of the charges against them in county court, they were not entitled to rely upon the doctrine of collateral estoppel.
>
> The collateral estoppel doctrine does not apply to this case. The motion to suppress was granted in the county court on a pretrial order and the misdemeanor charges against McCord were dismissed. Consequently, having never been put in jeopardy of a determination of guilt in the county court, the collateral estoppel doctrine does not preclude the circuit court from considering the motion to suppress. 402 So.2d at 1148-49 (footnote omitted).

McCord rests upon the well-established proposition that jeopardy does not attach until the fact-finding process has begun. See, e.g., Crist v. Bretz, 437 U.S. 28 (1978). But that principle and the reasoning of McCord are wholly inapplicable to a probation-revocation proceeding, and McCord does not bar application of the Ashe rule in this context.

A probation-violation hearing is a deferred sentencing hearing. Delaney v. State, 190 So.2d 578, 580 (Fla. 1966); § 948.06(1), Fla.Stat. (1983). The dispositive question in such a proceeding is whether the probationer has, by his or her conduct, violated the conditions specified in the order granting probation. Russ v. State, 313 So.2d 758, 760 (Fla. 1975), cert. denied 423 U.S. 924 (1975). While the State need not adduce proof sufficient to obtain a criminal conviction, see, e.g., State ex rel. Roberts v. Cochran, 140 So.2d 597, 599 (Fla. 1962), if it seeks a revocation of probation based upon the alleged commission of a crime, the State must prove that the offense

charged occurred and that the probationer committed it, albeit under a less stringent burden of proof than applies in criminal trials. See, e.g., Miller v. State, 420 So.2d 631 (Fla. 2d DCA 1982); Jordan v. State, 412 So.2d 970 (Fla. 2d DCA 1982); Clark v. State, 402 So.2d 43 (Fla. 4th DCA 1981); Johnson v. State, 378 So.2d 108 (Fla. 5th DCA 1980). Thus, the purpose of a probation-violation hearing, when the alleged violation is a discrete criminal offense, is to determine if a crime occurred and if the probationer committed it; if so, the court may impose the deferred sentence.[7]

It is well established that double jeopardy protections apply to sentencing proceedings, and that the final imposition of a sentence places a defendant in "jeopardy", barring further proceedings on the issue of sentencing and any increase in the severity of the punishment imposed. See, e.g., United States v. Benz, 282 U.S. 304, 306-07 (1931); Ex parte Lange, 18 U.S. (Wall.) 163, 167-74 (1874); Troupe v. Rowe, 283 So.2d 857, 859 (Fla. 1973); Scott v. State, 419 So.2d 1178 (Fla. 3d DCA 1982); Farber v. State, 409 So.2d 71, 73 (Fla. 3d DCA 1982); Andrews v. State, 357 So.2d 489 (Fla. 1st DCA 1978); Hardwick v. State, 357 So.2d 265 (Fla. 3d DCA 1978); Flowers v. State, 351 So.2d 387, 390 (Fla. 1st DCA 1977); Smith v. State, 330 So.2d 59 (Fla. 1st

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Further, the quantum of punishment which the court imposes upon making the predicate finding depends, to a significant degree, upon the nature of the violation proven at the hearing. See, e.g., Rathburn v. State, 353 So.2d 902 (Fla. 4th DCA 1977); Jones v. State, 348 So.2d 942 (Fla. 2d DCA 1977); Tuff v. State, 338 So.2d 1335 (Fla. 2d DCA 1976).

DCA 1976).[8] This rule applies with particular force when the court is empowered to impose a sentence only if the prosecution meets a legislatively-established standard of proof and the court finds that the facts necessary to impose sentence have been proven. Bullington v. Missouri, 451 U.S. 430 (1981).[9]

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This general rule is subject to certain narrow exceptions, none of which are pertinent to this analysis. See, e.g., United States v. DiFrancesco, 449 U.S. 117, (1980)(statute authorizing government appeal from sentence imposed upon "dangerous special offender" constitutional because statute eliminates expectation of finality in sentence); North Carolina v. Pearce, 395 U.S. 711 (1969)(resentencing after defendant successfully appeals judgment of conviction); State v. Payne, 404 So.2d 1055 (Fla. 1981)(original sentence not binding on court after finding of violation of probation).

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Bullington involved a defendant who was convicted of capital murder in Missouri and sentenced to life following a jury-sentencing proceeding similar to that established in Florida, see § 921.141, Fla.Stat. (1983). 451 U.S. at 435-36. The defendant in Bullington thereafter successfully moved for a new trial, and the state announced its intention to seek a death sentence at the new trial; during pretrial litigation in the state courts, it was held that the State could relitigate the propriety of a death sentence. Id. at 436-37.

Although noting the general rule that a reversal of a criminal conviction nullifies the prior proceedings and permits the imposition of a more severe sentence without offending the Double Jeopardy Clause, id. at 441-43, the Court held that rule inapplicable to bifurcated capital-sentencing statute where the jury's life sentence constitutes an "acquittal" of a death sentence, and found that "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." Id. at 445-46 (footnote omitted).

Bullington is particularly apposite to a probation-violation hearing, where, as in a bifurcated sentencing proceeding, a trial court may impose sentence only if the State proves its case and thus establishes the predicate for the lawful imposition of sentence.

In accordance with these principles, the Florida courts have, as in criminal cases where the State has failed to establish the guilt of an accused beyond a reasonable doubt, see, e.g., Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982); McArthur v. Nourse, 369 So.2d 578 (Fla. 1979), when reversing probation revocation orders because the State failed to establish a sufficient basis for revocation, directed that the probationer be restored to a probationary status, and have not remanded for new revocation proceedings. See, e.g., Miller v. State, supra; Davidson v. State, 419 So.2d 728 (Fla. 2d DCA 1982); Blue v. State, 377 So.2d 1016 (Fla. 2d DCA 1979); Donneil v. State, 377 So.2d 805 (Fla. 3d DCA 1979); Chatman v. State, 365 So.2d 789 (Fla. 4th DCA 1978); Rathburn v. State, 353 So.2d 902 (Fla. 4th DCA 1977); Franklin v. State, 345 So.2d 1082 (Fla. 4th DCA 1977); Kotowski v. State, 344 So.2d 602 (Fla. 3d DCA 1977).[10] No other disposition, once a finding is made that the State adduced insufficient evidence to prove a violation of probation, would be constitutionally permissible. Bullington v. Missouri, supra.

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A different result obtains in criminal cases when a reversal is predicated on procedural or evidentiary trial errors; it is well established that double jeopardy is no bar to a retrial in such a situation. See, e.g., North Carolina v. Pearce, supra; United States v. Ball, 163 U.S. 662, 672 (1896). The same rule applies in probation-violation cases. See, e.g., Knapp v. State, 370 So.2d 38 (Fla. 3d DCA 1979)(reversal for a new hearing when defendant denied a fair opportunity to defend against charges); Sukert v. State, 325 So.2d 439 (Fla. 3d DCA 1976)(reversal for a new hearing for failure of State to disclose records introduced at hearing); Robbins v. State, 318 So.2d 472 (Fla. 4th DCA 1975)(revocation order reversed because only proof of violation was inadmissible hearsay).

A probationer who is charged with violating a probation order is thus placed in "jeopardy" in the violation proceedings, since such proceedings, when terminated, bear all of the indicia of finality that are the hallmark of jeopardy in criminal trials and sentencing proceedings. Moreover, while the concept of "jeopardy" is somewhat fluid, and the point at which it attaches varying, see, e.g., Serfass v. United States, 420 U.S. 377 (1975); Reyes v. Kelly, 224 So.2d 303 (Fla. 1969), cert. denied, 397 U.S. 958 (1970), it is the general rule that "[s]ubmission of the guilt or innocence question to the person (judge) or persons (jury) with authority to make that determination constitutes jeopardy." Brown v. State, 367 So.2d 616, 621 n.8 (Fla. 1979)(citation omitted). In a probation-violation hearing in which the State seeks a revocation based upon the commission of a crime, the probationer's "guilt or innocence" of the crime is submitted to the court, and the probationer subjected to the imposition of sentence if the State proves its case. This is clearly "jeopardy", as that term is constitutionally defined and, indeed, as a matter of common sense.

The McCord decision is completely consistent with this reasoning. But the application of McCord by the court below and by the First District in Jones is not. In McCord, the question of the defendant's "guilt or innocence" had never been submitted to a factfinder empowered to rule thereon, further proceedings against the defendant were not barred by the ruling on the motion to suppress, and jeopardy accordingly did not attach. However, that reasoning cannot transfer to the situation presented in this

case, where a court has ruled on the criminal liability of an accused in a probation-violation hearing.[11] Under the rule of McCord, a probationer is placed in "jeopardy" in a violation hearing, and the decision below and Jones misapply McCord and are in irreconcilable conflict with the constitutionally-mandated scope of the Double Jeopardy Clause in sentencing proceedings. See Bullington v. Missouri, supra.

Courts which have considered the applicability of the collateral estoppel doctrine to this situation have so held. In People v. Kondo, 51 Ill.App.3d 874, 9 Ill.Dec. 479, 366 N.E.2d 990, 991 (1977), the defendant was charged with carrying a concealed firearm, and that charge provided the basis for an effort to revoke a previous grant of probation. The probation-violation case was heard first, and the accused defended against the charge in that proceeding on the claim that the weapon was not operable; he prevailed, the court finding that the weapon was inoperable. Ibid. The defendant then successfully moved to dismiss the criminal charge, and the Illinois appellate court

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The court noted in Jones that the refusal of a trial court to revoke a probation order "cannot be equated with an adjudication of the criminal charge, since the trial judge is vested with broad discretion to revoke, modify, or continue probation even if the charge is admitted or proved" under Section 948.06(1), Florida Statutes (1983). 435 So.2d at 179 at n.2 (citation omitted). This is certainly true as far as it goes, i.e., a discretionary refusal to revoke a probation order despite sufficient proof of the violation would clearly not constitute a finding which would invoke the doctrine of collateral estoppel, because it would not be the adjudication on the merits required by Ashe. But that reasoning just as clearly does not apply when a court finds, as in the present case, insufficient evidence to justify a revocation.

upheld that ruling:

> . . . The distinction urged by the State is that, in the case at bar, the court's finding at the prior probation revocation hearing did not result in the conviction or acquittal of defendant for the offense and therefore, the State argues, that determination was not a final judgment binding on the issue adjudicated. We find no merit to the State's contention.
>
> It is not the form that the prior adjudication assumes, but the substance of the prior adjudication which is determinative of whether collateral estoppel may be properly applied. . . .
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> * * *
>
> In the case at bar, the result of the probation revocation hearing was a "final determination of the charge". On the basis of the evidence presented, the court made a finding on the only disputed question of fact involved -- whether the weapon was broken down in a non-functioning state. At any future probation revocation hearing based on the same charged violation, the findings of the court would be conclusive upon the prosecution absent any new or additional evidence. So too, under the doctrine of collateral estoppel, the State is barred from seeking a relitigation, upon the same evidence, at a criminal trial, of the issue that had been conclusively determined on its merits at the prior probation revocation hearing. . . .
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> * * *
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> . . . . [T]he State having elected to first-prosecute defendant by way of a probation revocation hearing and having failed to meet the less stringent burden thereof, should now be barred from attempting to relitigate the identical issue upon the same evidence under the more stringent standards of a criminal trial. 366 N.E.2d at 992-93.

<u>See also</u> <u>People v. Bone</u>, 82 Ill.2d 282, 45 Ill.Dec. 93, 412 N.E.2d 444 (1980), <u>cert. denied</u>, 454 U.S. 839 (1981).

Similarly, in State v. Bradley, 51 Or.App. 969, 626 P.2d 403, 404-05 (1981), the defendant, a probationer, was charged with violating the probation order by shooting a firearm on a public highway. The probation violation hearing preceded the trial, and the court found that the State had failed to prove that the firearm was discharged on the highway. Id. at 405. The defendant then sought dismissal of the criminal charge on collateral estoppel grounds, and the trial court dismissed the complaint. Ibid.

Applying an Oregon statute which embodies collateral estoppel principles, id. at 405, the court upheld the dismissal:

> The state argues that, because the court in the revocation proceeding only had to be satisfied that the purposes of probation were not being served, it was not necessary for the court to decide the issue which the state seeks to relitigate. This argument fails to acknowledge the factfinding role of the judge in deciding whether to revoke probation or not. True, a judge might find for a variety of reasons that the purposes of probation are not being served; a finding of one fact in particular might not, therefore, be necessary or determinative. But here only one reason was asserted for the revocation, and that was that defendant had violated the terms of his probation by discharging a weapon on or across a highway. Whether the act occurred on or across a highway was a material issue, and, more importantly, it was one which was actually litigated and decided.
>
> In the instant case, the parties are the same; the issue is identical . . .; the state had its day in court in the revocation proceeding to prove the issue; it failed to prove the issue by a preponderance of the evidence; and the court in the former proceeding made a specific finding that the material issue or determinative fact necessary to revoke probation was not proven. That the ultimate fact was determined in the former proceeding by an order of the court appears on

> the face of the order. 626 P.2d at 406 (citations omitted).

The doctrine of collateral estoppel, as applied in Kondo and Bradley, barred the prosecution of defendant in this case. The same issues were presented in both proceedings, and the finding of the trial court at the conclusion of the revocation hearing disposed of the only question of fact which the State sought to relitigate at trial. The above-cited decisions afford due respect to the pronouncement in Ashe that a factual issue, once determined "cannot again be litigated by the same parties in any future lawsuit." Ashe v. Swenson, supra at 443. In the present case, the prosecution's failure to prove its case at the revocation hearing collaterally estopped it from trying again at trial; "[o]nce a party has fought out a matter in litigation with another party, he cannot later renew that duel" without running afoul of the collateral-estoppel doctrine. Commissioner v. Sunnen, 333 U.S. 591, 598 (1947).

CONCLUSION

Based upon the foregoing, defendant requests this Court to quash the decision of the court below and to remand this cause with directions to reverse the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was forwarded by mail to Penny H. Brill, Assistant Attorney General, Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 9th day of February, 1984.

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