IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,771

VINCENT GREEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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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 the initial brief, comprised of the decision of the District Court of Appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Defendant adopts the Statement of the Case presented in the brief of petitioner.

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, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

STATEMENT OF THE FACTS

Defendant adopts the Statement of the Facts presented in the brief of petitioner.

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 sole basis for the holding of the court below that the constitutional collateral-estoppel doctrine, as set forth in Ashe v. Swenson, 397 U.S. 436 (1970), and its progeny is inapplicable to this case is its conclusion that defendant was not placed in "jeopardy" in the probation-revocation hearing. Russ v. State, 313 So.2d 758 (Fla. 1975), cert. denied, 423 U.S. 924 (1975), upon which respondent places its primary reliance, does not address that question at all.

In Russ, this Court held that the Ashe rule did not bar a probation revocation based upon evidence of a crime of which the accused had been acquitted at trial. That holding rests upon two premises: first, that "the ultimate facts necessary to convict for a criminal offense and the ultimate facts necessary to establish a violation of probation are not the same", and second, that the burden of proof in a probation-violation hearing is different from the reasonable doubt standard applicable in criminal trials. 313 So.2d at 760. The subsequent rejection by this Court of the "ultimate facts" limitation on Ashe in State v. Perkins, 349 So.2d 161 (Fla. 1977), eliminates some, but not all, of the constitutional basis for the Russ decision.[1]

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Perkins resolved a conflict between Florida and federal law as to the applicability of Ashe to evidence of collateral crimes in criminal trials. Florida law, prior to Perkins, had provided that such evidence was admissible even if the accused had been acquitted of the collateral crimes, albeit with the proviso that the accused was entitled to prove the fact of such an acquittal. See, e.g., Lawson v. State, 304 So.2d 522 (Fla. 3d DCA 1974); Watson v. State, 134 So.2d 805 (Fla. 2d DCA 1961). The Court of Appeals for the Fifth Circuit held to the contrary in Wingate v. Wainwright, 464 F.2d 209, 213-14 (5th Cir. 1972), ruling that Ashe applied regardless of whether "the relitigated (Cont.)

To the extent that Russ rests upon the differing burdens of proof, it is in harmony with well-established federal constitutional law providing that an acquittal in a criminal case does not bar a subsequent civil action against the accused by the government. See, e.g., One Lot Emerald Cut Stones and Ring v. United States, 401 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938); Coffey v. United States, 116 U.S. 436 (1886). Thus, while the existence of a different standard of proof is not dispositive, see Helvering v. Mitchell, supra, it is eminently logical to conclude that the failure of the state to adduce sufficient proof for a criminal conviction by establishing guilt beyond a reasonable doubt, see, e.g., Jackson v. Virginia, 443 U.S. 307 (1979), should not bar a subsequent probation-violation hearing, even if based upon the same conduct, in which the lower standard of "conscience of the court" applies, since the state could obviously satisfy the latter but fail to satisfy the former.

But it is equally self-evident that the converse cannot be true. To the contrary, the failure of the state to meet the minimal standard of proof imposed in a probation hearing would a fortiori mean that it could not prove guilt beyond a reasonable

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issue is one of 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution." Accord Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975). This Court reached the same conclusion in State v. Perkins, supra, holding that "it is fundamentally unfair to a defendant to admit evidence of acquitted crimes." 349 So.2d at 163. Thus, to the extent that Russ rests upon the notion that the former "ultimate facts" limitation on Ashe is of weight in determining the applicability of the collateral-estoppel doctrine, Perkins eliminates that portion of the decision's foundation.

doubt.[2] It has similarly been held that when a civil action precedes a criminal trial--the reverse of the situation presented in the One Lot line of cases--and the government unsuccessfully seeks to prove the facts upon which the criminal case is based, a decision unfavorable to the government in the civil action bars a subsequent criminal prosecution. United States v. Abatti, 463 F.Supp. 596, 599-602 (S.D. Cal. 1978).[3]

Russ, which only addresses the reverse of the situation presented here, is thus inapposite. Indeed, the District Court of Appeal expressly held that "the issues of fact in both

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In the present case, the various post-hearing statements of the trial judge are certainly susceptible of a finding that he applied a reasonable doubt standard at the revocation hearing (S.R. 70-80), and the court below expressly found that the judge "had held the state to the same high burden in the probation revocation hearing that it had at trial, that is, to prove the case beyond a reasonable doubt." (A. 1-2). While that fact distinguishes this case from the general run of probation-revocation cases, the result is nonetheless the same, i.e., the not guilty finding by the court in this case was a finding that the state could not prove its case beyond a reasonable doubt.

To the extent that the state now suggests that the court applied an even stricter standard at the revocation hearing, Brief of Respondent at 9 n.2, its argument is improper in this proceeding. As this Court held in State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981), "[w]e categorically decline to accept [a] case for review on one basis and then reweigh the evidence once reviewed by the district court, in order to avoid a ruling on the legal issue which provoked our jurisdiction."

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Abatti was a criminal tax-evasion prosecution, which followed a civil action brought by the taxpayers for redetermination of their taxes. 463 F.Supp. at 598. In the civil action, the Tax Court determined that the defendants had not received income in excess of that which they had reported; the criminal prosecution was based upon their alleged failure to report excess income. Id. at 600-01. The court held that the determination of the factual issue in the tax court proceeding collaterally estopped the government from bringing criminal charges, based upon the same facts litigated in the civil case. Id. at 601-03.

proceedings appear identical" (A. 3), and did not rely upon--or even refer to--the Russ decision in reaching its ultimate conclusion.[4] The determinative issue in this case is whether defendant was placed in "jeopardy" in the probation-revocation proceeding; if he was, the Ashe priniciple applies. State v. McCord, 402 So.2d 1147, 1149 (Fla. 1981).

The state has wholly failed to marshal any support for the holding of the court below and the similar holding in State v. Jones, 425 So.2d 178 (Fla. 1st DCA 1983), that jeopardy does not attach in a probation-revocation proceeding. It dismisses Bullington v. Missouri, 451 U.S. 430 (1981), with the off-handed suggestion that Bullington is similar to Florida inconsistent-verdict cases, see, e.g., Redondo v. State, 403 So.2d 954 (Fla. 1981), and does not involve the constitutional considerations presented here. Brief of Respondent at 9-10 n.3. To the contrary, Bullington expressly holds that the Double Jeopardy Clause applies to sentencing determinations which involve application of an established standard of proof; in that case, in which the defendant had been sentenced to life by a jury in a

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The record reflects that defendant's arrest on October 16, 1981, gave rise to two identical sets of charges, one brought in an effort to revoke the previously-granted probation, and the other the substantive charges in the present case; the conflict in testimony was identical at both proceedings, with the single purported eyewitness claiming that he had observed defendant breaking the service station window, and defendant asserting his innocence (S.R. 7-12, 51-54; Tr. 19-28, 94-104). Expressing grave doubt as to the credibility of the police officer who claimed to have observed defendant breaking the window, the trial court found that the state had adduced insufficient evidence to justify a revocation of probation (S.R. 70-72, 78-80).

capital trial and was thereafter granted a new trial on guilt or innocence, the court held that the state could not seek a death sentence on retrial, concluding that "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of quilt 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." 451 U.S. at 445-46 (footnote omitted).

The court below found (A. 3), and the state concedes, Brief of Respondent at 6, that a probation-violation proceeding is "a deferred sentencing hearing." As in Bullington, it is a sentencing proceeding which involves the application of a specific standard of proof, see, e.g., Brill v. State, 159 Fla. 682, 32 So.2d 607 (1947), and the rationale of Bullington is fully apposite to this situation. The fundamental constitutional principle that the Double Jeopardy Clause is applicable to sentencing proceedings, see e.g., Troupe v. Rowe, 283 So.2d 857, 859 (Fla. 1973), further butresses this conclusion.[5]

The state thus offers no meaningful response to the

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The state's complaint that holding Ashe applicable to this situation would "abrogate the state's right to have the criminal charges heard by a jury", Brief of Respondent at 11 (citations omitted), is no more availing here than it was in Ashe itself. Collateral estoppel, by its very nature, "abrogates" the state's "right" to try a defendant based upon findings in another proceeding; the state's argument that a trial court's "credibility choices" should not deprive it of its "right" to a jury trial would, carried to its logical extent, bar application of the collateral-estoppel doctrine when a defendant is acquitted in a nonjury trial and the doctrine would otherwise bar a subsequent trial arising from the same factual incident.

contention that jeopardy does attach in probation-revocation proceedings. Its reliance upon State v. Williams, 131 Ariz. 211, 639 P.2d 1036 (1982), the only decision cited by the state which involves the issue presented here,[6] is equally unavailing. In that case, the Supreme Court of Arizona held Ashe inapplicable to probation-revocation proceedings not because the accused is not placed in jeopardy, but based solely upon an Arizona rule of procedure which limits the definition of a "judgment" to an adjudication by a court following a guilty plea or trial. Id. at 1038. The court held that since Ashe requires a "final judgment it is applicable to a probation-revocation finding in favor of an accused. Ibid. Williams is of no force in Florida, which does not have a similarly-limited definition of a "judgment", and is wholly unsupportive of the state's claim that defendant was not in jeopardy in the proceeding in the present case.

In the final analysis, the state's position before this Court turns upon its evaluation of the basis for the trial court's not-guilty finding in the probation-revocation hearing, Brief of Appellee at 14, which--in addition to being an improper argument before this Court, see n.2, supra-- is wholly irrelevant to the question certified by the court below. Applicable decisional law establishes that an individual subjected to a

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The other decisions cited by the state, State v. Dupard, 93 Wash.2d 268, 609 P.2d 961 (1980), and State v. Spanbauer, 108 Wis.2d 548, 322 N.W.2d 511 (1982), involve parole revocation proceedings; a prisoner is clearly not in "jeopardy" in such proceedings, most obviously because no court or jury findings are possible. See Brown v. State, 367 So.2d 616, 621 n.8 (Fla. 1979).

probation-revocation hearing is, for constitutional purposes, placed in jeopardy; indeed, were this not so, the unbroken line of Florida authority cited in defendant's initial brief which holds that a revocation order unsupported by the evidence must be reversed and the defendant restored to probationary status would be voided, and the state would be entitled to subject such a probationer to repeated rounds of violation hearings for the same conduct. With this premise established, the error in the decision of the court below is manifest.

CONCLUSION

Based upon the foregoing, and the reasons and authorities set forth in the initial brief in this cause, defendant requests this Court to quash the decision of the court below and to remand 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 reply brief of petitioner 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 20th day of March, 1984.

ELLIOT H. SCHERKER
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