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DEC 22 1994

SUPREME COURT OF FLORIDA

CASE NO.: 84,060

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STARR TYME, INC.

Defendant/Petitioner,
vs.

DAVID COHEN

Plaintiff/Respondent.
_____ /

PETITIONER'S REPLY BRIEF ON THE MERITS

✓
Lauri Waldman Ross, Esq.
MALAND & ROSS
Two Datran Center, Suite 1209
9130 S. Dadeland Boulevard
Miami, FL 33156
(305) 670-4900

and

✓
Bruce J. Benenfeld, Esq.
7800 W. Oakland Park Boulevard
Suite 109
Sunrise, FL 33351

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STATEMENT OF THE CASE AND FACTS

The respondent's statement of the facts merely highlights the issue on appeal. The trial court's conclusion that "there was no theft or conversion" by Cohen (Answer Brief at 6) was based entirely on Cohen's testimony, which should have been excluded pursuant to §§775.089 and 772.14, Fla. Stat. (1991). The issue on appeal is whether the trial court properly relied on such testimony or whether such reliance was statutorily barred by the adjudication of guilt and restitution order previously entered against Cohen in criminal court.¹

Cohen concedes that he pled nolo to petit theft but, without record support, asserts that he did so "in order to avoid the costs of a trial". (Answer Brief at 6, 9). Cohen says nothing about the fact that he was adjudicated guilty by the criminal court, and ordered to pay restitution of \$3000, not \$300. dollars.

Cohen interchangeably uses the term "petitioner" to refer to the actual corporate petitioner, Starr Tyme, and its share-holder Bruce Benenfeld, who was exculpated from liability and is not a party to this proceeding. (Answer Brief at 6). Statements regarding Benenfeld's purported use of "his knowledge and position as an attorney in order to have charges filed against the Respondent" (Answer Brief at 6) are not supported by the record and are simply inappropriate.

¹ Cohen's suggestion that the petitioner "was unable to prove his case" (Answer Brief at 6, 9) is wrong. The case was not dismissed for Starr Tyme's failure to state a claim under Rule 1.420(b), Fla.R.Civ.Proc. Instead, the trial court chose to believe Cohen's uncorroborated testimony in the defense case over all of the other witnesses.

SUMMARY OF THE ARGUMENT

The issue before the court is one of statutory interpretation. The statutes at issue are not concerned with the admission of a nolo plea itself, but with the defendant's "conviction" or the "judgment or decree" in favor of the state, which precludes a defendant from contradicting the same core facts in a civil proceeding. The purpose of these statutes is to serve the administration of justice and make it easier for it to be made whole. Because the Fourth District's ruling thwarts this purpose, it is respectfully submitted that the decision should be quashed and the cause remanded for proceedings consistent with the Court's opinion.

ARGUMENT

A DEFENDANT WHO IS ADJUDICATED GUILTY AFTER ENTRY OF JUDGMENT IN FAVOR OF THE STATE PURSUANT TO A NOLO CONTENDERE PLEA AND IS ORDERED TO MAKE RESTITUTION SHOULD BE COLLATERALLY ESTOPPED BY STATUTE FROM OFFERING EVIDENCE ON THE SAME CORE FACTS IN SUBSEQUENT CIVIL PROCEEDINGS.

The Respondent advances two arguments to support the Fourth District's decision: (1) the application of collateral estoppel is only appropriate where the jury makes a finding of guilt in the criminal case after the issues are fully and fairly litigated, or the Defendant enters a guilty plea, thereby stipulating to the underlying facts; and (2) a plea of nolo contendere differs from a guilty plea and is inadmissible under the Florida Evidence Code, §90.410, Fla. Stats. (1991). The Respondent not only fails to address the issue on appeal, which is one of statutory

construction, his brief ignores the effect of §772.14, Fla. Stat. (1991) altogether.

Collateral estoppel or estoppel by judgment serves to limit litigation by determining an issue for all time. While Federal courts have dispensed with the requirement of mutuality of parties as a prerequisite to asserting collateral estoppel, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), Florida continues to adhere to the rule that collateral estoppel can only be asserted when the identical issue was previously litigated between the parties and their privies. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984); Nunez v. Gonzalez, 456 So.2d 1336 (Fla. 2d DCA 1984).

Prior to enactment of the statutes in question, a victim could not use a criminal conviction (let alone a conviction entered on a nolo plea) against a criminal defendant because the victim was not a "party" to the criminal proceeding. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1986).

By their enactment, the statutes at issue here substantially changed Florida law by eliminating the requirement that the victim must have been a party to the criminal action, particularly with regard to civil theft actions. Board of Regents of the State of Florida v. Taborsky, 19 Fla.L.Wkly. D1983, D1985 (Fla. 2d DCA 1994). As the Second District recently observed, "In so doing, the

Legislature significantly increased the victim's ability in those circumstances to seek relief against the convicted felon without the long delay and cost associated with civil litigation. Both Congress and the Florida legislature intended for the victim to apply collateral estoppel so as to conclusively establish facts resolved by the criminal action." Id. at D1985.

While there is no doubt that Board of Regents, and other cases the petitioner relies upon, involve convictions after guilty plea or trial, the statutes in question are not so limited. Section 775.089(8), Fla. Stat. (1991) provides:

775.089 Restitution.--

* * *

(8) The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding... .

Thus, for its application, the statute only requires "the conviction of a Defendant for an offense involving the act giving rise to restitution...".

772.14 Estoppel of defendant. -- A final judgment or decree rendered in favor of the state in any criminal proceeding concerning the conduct of the Defendant which forms the basis for any civil cause of action under this chapter, or any criminal proceedings under chapter 895, shall estop the defendant in any action brought pursuant to this chapter as to all matters as to which such judgment or decree would be an estoppel as if the plaintiff had been a party in the criminal action.

Section 772.14, Fla. Stat. (1991) requires even less -- "A final judgment or decree rendered in favor of the state in any criminal proceeding concerning the conduct of the Defendant which forms the basis for any civil cause of action...".

Neither statute is concerned with or involves admission into evidence of the nolo plea itself nor are they in conflict with the evidence code. Instead, they are directed to the "conviction ... for an offense" giving rise to restitution or a "final judgment or decree rendered in favor of the state."

The issue of what constitutes a "conviction" to trigger operation of §775.089(8) is one of statutory interpretation. Most courts have already concluded that a judgment based on a guilty plea is a conviction because "a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1790, 23 L.Ed.2d 274 (1969); United States v. Woods, 696 F.2d 566 (8th Cir. 1982); McCrae v. State, 395 So.2d 1145 (Fla. 1980).

Recognizing that "Courts ... have consistently refused to give collateral estoppel effect to convictions based on pleas of nolo contendere reasoning that such a plea constitutes an admission only for the purpose of the criminal proceeding in which it is made", a leading commentator urges that the issue be revisited by virtue of statutory interpretation asserting "compelling arguments". Sawaya, "Use of Criminal Convictions in Subsequent Civil Proceedings," 40

U.Fla.L.Rev. 461, 601-02 (1988).²

The author notes the following: First, Rule 3.172, Fla.R.Crim.Proc. requires the trial judge to satisfy himself that a factual basis for the plea of nolo as well as the plea of guilty before accepting it. Thus, the same procedural safeguards are accorded to the defendant who enters a nolo plea in a Florida court that are accorded the guilty pleader under the Federal Rules of Criminal Procedure, Rule 11(f). These procedural safeguards ensure the defendant's due process rights. Second, pleas of nolo can be made and accepted in capital cases and "If a consequence of entering such a plea in a capital case can be the imposition of life in prison or the death penalty, it seems logical to allow this plea to result in the application of collateral estoppel provisions of the VWPA to any civil proceeding brought by the victim against the Defendants". Sawaya, 40 U.Fla.L.Rev. at 504.

Indeed, the very purpose of enactment of the VWPA and statutes of similar ilk is to make it easier for the victim to be made whole. See United States v. Webb, 30 F.3d 687, 689-90 (6th Cir. 1994) ("The premise of [proposed 18 U.S.C. Sec. 3579] is that the court in devising just sanctions for adjudicated offenders, should ensure that the wrongdoer make[s] good[], to the degree possible, the harm he has caused his victim.").

² "Because the VWPA requires a conviction to trigger operation of the collateral estoppel provisions of the statutes, the issue is a matter of statutory interpretation. Thus, one must determine whether a judgment entered in a criminal case pursuant to a plea of nolo contendere constitutes a 'conviction' within the meaning of the Act." Id. at 502.

Finally, neither the Respondent nor the Fourth District has addressed the application of Section 772.14, Fla. Stat. (1991) to the facts of this case. There is no question that the adjudication of Cohen's guilt constituted a "final judgment or decree" in favor of the State pursuant to the statute's terms. That stated, the statute should have been given effect, and Cohen prevented from presenting testimony in the civil action which undermined such adjudication.

CONCLUSION

The district court's decision should be quashed, and the cause remanded with directions to either enter judgment in the petitioner's favor, or alternatively to grant it a new trial with enforcement of the statutory estoppel provisions.

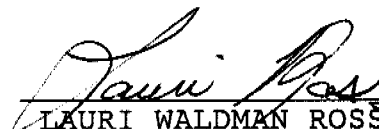
Respectfully submitted,

Bruce J. Benenfeld, Esq.
7800 W. Oakland Park Boulevard
Suite 109
Sunrise, FL 33351

and

MALAND & ROSS
Two Datran Center, Suite 1209
9130 S. Dadeland Boulevard
Miami, FL 33156
(305) 670-4900

By:

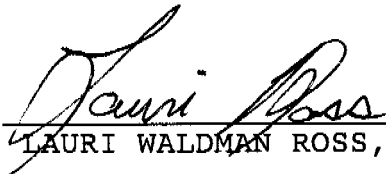

LAURI WALDMAN ROSS, ESQ.
(Florida Bar No.: 311200)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21 day of December, 1994 to:

Joseph A. Murphy, III, Esq.
Suite 200, Courthouse Square Building
200 Southeast 6th Street
Ft. Lauderdale, FL 33301

By:


LAURI WALDMAN ROSS, ESQ.