Reversed and Remanded and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00399-CR

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PHILIP DANIEL TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 24,805-272

O P I N I O N

This is a habeas corpus proceeding involving the issue of collateral estoppel. Philip Daniel Taylor (Appellant) appeals from the trial court's habeas corpus judgment. A Brazos County Grand Jury returned three indictments against Appellant. Two of the indictments were for the felony offenses of intoxication manslaughter and involuntary manslaughter and one was for the felony offense of intoxication assault. *See* TEX. PENAL CODE ANN. § 19.04 (Vernon 1994); TEX. PENAL CODE ANN. §§ 49.07.-08 (Vernon 1994). Appellant's motion to sever his trials was granted by the trial court. The State tried Appellant on his first indictment for

intoxication manslaughter and involuntary manslaughter relating to one of the two deceased victims. A jury returned a verdict of not guilty. Following his acquittal, the State proceeded to try Appellant on a re-indictment for intoxication manslaughter relating to the second deceased victim (Appellant's fiancee.) Appellant filed a pre-trial application for writ of habeas corpus in which he contended that any subsequent criminal prosecution of him by the State was barred by the doctrine of collateral estoppel, closely related to double jeopardy. Following an evidentiary hearing, the trial court denied Appellant's requested relief. On appeal to this Court, Appellant contends that the trial court erred in finding that the doctrine of collateral estoppel did not bar further criminal prosecution of him by the State for intoxication manslaughter and intoxication assault. We reverse and remand.

BACKGROUND

Appellant was operating his automobile on a rural highway in Brazos County. Kyla Blaisdell and Michelle James were passengers in Appellant's automobile. Appellant lost control of his automobile on a curve in the highway and it slid sideways into an oncoming Suburban, operated by Patricia Varner. While Appellant survived the collision, his two female passengers did not. Patricia Varner, the driver of the Suburban, was injured but survived. Three separate indictments were issued against Appellant: two for intoxication manslaughter and involuntary manslaughter for the deaths of his two passengers and one for intoxication assault for injuring the driver of the Suburban. The State tried Appellant on his first indictment for intoxication manslaughter and involuntary manslaughter, relating to the death of Michelle James. Following the trial, a jury returned a not guilty verdict. After his acquittal, the State discovered that Appellant allegedly made a statement to Kyla Blaisdell's mother that he smoked marijuana shortly before the accident occurred. Thereafter, the State re-indicted Appellant and sought to prosecute him for intoxication manslaughter, relating to the death of Kyla Blaisdell. Appellant argued in a pre-trial application for writ of habeas corpus that the doctrine of collateral estoppel barred the subsequent prosecution. The State responded that because its allegation of marijuana ingestion combined with alcohol ingestion was a new

"manner and means" of intoxication, as opposed to its reliance upon alcohol ingestion alone in Appellant's first trial, the subsequent prosecution was not constitutionally infirm. Following an evidentiary hearing, the trial court agreed with the State.

STANDARD OF REVIEW

Generally, the trial court's ruling in a habeas corpus proceeding should not be overturned absent a clear abuse of discretion. *See Brashear v. State*, 985 S.W.2d 474, 476 (Tex.App.–Houston [1st Dist.] 1998, no pet.). Whether discretion was so abused depends upon whether the trial court acted without reference to any guiding rules or principles. *Id.* In determining this, we view the evidence in the light most favorable to the trial court's ruling. *Id.*

DISCUSSION

In three points of error, Appellant contends that trial court erred in finding that the doctrine of collateral estoppel did not bar a subsequent criminal prosecution of him by the State for intoxication manslaughter and intoxication assault. He contends that after he was acquitted by a jury on his first indictment for intoxication manslaughter, any further criminal prosecution of him by the State for intoxication manslaughter and intoxication assault is constitutionally barred by the doctrine of collateral estoppel.

The doctrine of collateral estoppel, although first developed in civil litigation, has been an established rule of federal criminal law for more than seventy-five years and is embodied within the constitutional protection against a defendant being placed in jeopardy twice for the same crime. *See State v. Sauceda*, 980 S.W.2d 642, 645 (Tex.Crim.App. 1998) (citing *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970) (citing *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916))). The United States Supreme Court explained that collateral estoppel simply 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." *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. So,

where a previous judgment of acquittal was based upon a general verdict, the court must determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id*. at 444, 90 S.Ct. at 1194. Therefore, if the prior acquittal could have been based upon another issue, the second prosecution is not barred by collateral estoppel. *See Sauceda*, 980 S.W.2d at 645 (the question is whether in the first trial a "rational jury" necessarily grounded its verdict upon an issue which the defendant seeks to foreclose from relitigation, but when a fact is not necessarily determined in the former trial, the possibility that it may have been does not prevent re-examination of that issue) (citations omitted).

In *Ashe*, several armed men robbed six poker players in the home of one of the victims. *See Ashe*, 397 U.S. at 437, 90 S.Ct. at 1191. Ashe was charged in separate counts with robbery of each of the six players. *Id*. at 438, 90 S.Ct. at 1191. In his first trial, for the robbery of one of the victims, the proof that an armed robbery had occurred and that personal property had been taken from each of the victims was uncontroverted. *Id*. But, the testimony that Ashe had been one of the robbers was weak. *Id*. The trial judge instructed the jury that if it found that Ashe had been one of the participants in the armed robbery, then he was guilty under the law, as long as "any money" had been taken from the victim; it did not matter whether Ashe had personally robbed the victim. *Id*. at 439, 90 S.Ct. at 1191-1192. The jury returned a verdict of "not guilty due to insufficient evidence." *See Ashe*, 397 U.S. at 439, 90 S.Ct. at 1192. Six weeks later Ashe was brought to trial again, this time for the robbery of another participant in the poker game. *Id*. His motion to dismiss based upon his previous acquittal was overruled. *Id*. At the second trial, the witnesses were for the most part the same, though this time their testimony was substantially stronger on the issue of Ashe's identity. *Id*. at 439-440, 90 S.Ct. at 1192. The case went to the jury on instructions virtually identical to those given at the first trial. *Id*. at 440, 90 S.Ct. at 1192. Ashe was found guilty and sentenced to 35 years in prison. *Id*.

After his appeals were exhausted, Ashe brought a habeas corpus proceeding in which his conviction was affirmed by both the Western District of Missouri and the Court of Appeals for the Eighth Circuit. *See Ashe*, 397 U.S. at 440, 90 S.Ct. at 1192. The United States Supreme Court granted certiorari and, to resolve this issue, it adopted the approach taken by federal courts and reasoned that when a previous judgment of acquittal is based upon a general verdict, as is usually the case, the reviewing court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter[s], and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444, 90 S.Ct. at 1194 (citing Mayers & Yarbrough, *Bis vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)). Using this approach, the Court found that the record in the prior proceeding was utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred. *See Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195. It determined that "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers." *Id.* Because the only rational explanation for the verdict was that the jury found that Ashe was not one of the robbers, the Court held that a second prosecution for the robbery was wholly precluded. *Id.* at 445-47, 90 S.Ct. at 1195-96; *see also Sauceda*, 980 S.W.2d at 646.

In this case, our analysis begins with the recognition that where a defendant's alleged intoxication manslaughter offense results in multiple victims, for purposes of the Double Jeopardy Clause, "each individual death constitutes a complete and distinct offense (albeit under the terms of the one statute) and as such each death constitute[s] a separate 'allowable unit of prosecution.'" *Ex parte Rathmell*, 717 S.W.2d 33, 35 (Tex.Crim.App. 1986) (quoting *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978)). This maxim applies where a defendant is tried separately for each victim and is *convicted* in his first trial. *Id.* at 34-36. However, where a defendant is *acquitted* in his first trial, the doctrine of collateral estoppel will bar the re-litigation of any issues of ultimate fact found in favor of a

defendant during a second trial involving another victim. *See Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194; *Ex parte Mathes*, 830 S.W.2d 596, 598-99 (Tex.Crim.App. 1992) (in capital murder case where defendant was "acquitted" in the punishment phase of trial on an essential ultimate fact determinative of the death penalty, the doctrine of collateral estoppel barred the State from requiring defendant to "run the gantlet" in a second trial involving another victim in hope that a different jury might find the same or different evidence as in the first trial more convincing).

Because Appellant's first trial resulted in his acquittal, we must determine whether an issue of ultimate fact litigated in Appellant's first trial is the same as would be litigated in his second trial. To uncover the issues of ultimate fact litigated in Appellant's first trial, we must review the record of the prior proceeding. *Id*. at 444, 90 S.Ct. at 1194. The record of the prior proceeding shows that Appellant was tried for intoxication manslaughter and involuntary manslaughter for the death of Michelle James. The offense of "intoxication manslaughter" is proscribed by section 49.08 of the Penal Code. It provides the following:

> (a) A person commits an offense if the person:
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> (1) operates a motor vehicle in a public place, an aircraft, or a water craft; and
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> (2) is intoxicated and by reason of that intoxication causes the death of another by accident or mistake.

TEX. PENAL CODE ANN. § 49.08(a) (Vernon 1994).

As used in section 49.08(a) of the Penal Code, "intoxication" is defined as follows:

> (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more substances, or any other substance in the body; or
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> (B) having an alcohol concentration of 0.10 or more.[1]

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[1] The Texas Legislature amended the definition of "intoxication," effective September 1, 1999. The (continued...)

TEX. PENAL CODE ANN. § 49.01(2) (Vernon 1994).

Appellant's indictment in the prior proceeding contained two paragraphs relative to the offense of intoxication manslaughter. It alleged that Appellant caused the death of Michelle James by accident and mistake by (1) operating a motor vehicle in a public place while not having the normal use of his mental and physical faculties by reason of alcohol consumption, and (2) operating a motor vehicle in a public place while having an alcohol concentration of 0.10 or more.

To prove its allegations, the State presented expert testimony from several witnesses, including a forensic toxicology expert employed by the Texas Department of Public Safety and an accident reconstruction expert employed by the Texas Department of Public Safety. The State's evidence showed that Appellant's blood-alcohol level was 0.11 at the time of the accident, that due to his intoxicated condition, Appellant had lost the normal use of his mental and physical faculties at the time of the accident, and that he was driving his automobile at approximately 69 miles per hour (in a 50 mph zone) at the time of the accident. Conversely, Appellant presented testimony from a forensic toxicology expert and an accident reconstruction expert to rebut the State's evidence. Appellant's evidence showed that his blood-alcohol level was between 0.07 and 0.09 at the time of the accident, that he had not lost the normal use of his physical and mental faculties at the time of the accident[2], and that he was driving his automobile at approximately 58 miles per hour at the time of the accident. The jury was instructed by the trial court that if it believed from the evidence beyond a reasonable doubt

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[1] (...continued)
current definition provides, in part, that a person is "intoxicated" if that person has a blood alcohol concentration of 0.08 or more. The automobile accident in the instant matter occurred in May 1996.

[2] Presented as a witness by the State, Kelsey Blaisdell, the brother of Kyla Blaisdell, testified that he was with Appellant, Kyla Blaisdell and Michelle James just minutes prior to the accident. Kelsey Blaisdell testified that Appellant did not appear to be intoxicated prior to leaving the house where they were gathered. He testified that Appellant's speech was not slurred, that he did not have blood-shot eyes, nor was he stumbling or otherwise having difficulty maintaining his balance. Kelsey Blaisdell testified that he "didn't feel that [Appellant] was intoxicated at all."

that Appellant "did operate a motor vehicle in a public place while intoxicated, either by not having the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body or by having an alcohol concentration of .10 or more, and by reason of that intoxication, if any, by accident or mistake, caused the death of Michelle James, you will find [Appellant] guilty of intoxication manslaughter."

The jury resolved the conflicting evidence in favor of Appellant. In its general verdict, the jury found Appellant not guilty of intoxication manslaughter. Implicit in the jury's verdict is a factual finding that Appellant did not cause the automobile accident because of intoxication.

Turning to the prospective second trial that is the subject of this appeal, the re-indictment under which the State seeks to try Appellant a second time is for the single offense of intoxication manslaughter. It alleges that Appellant caused the death of Kyla Blaisdell by accident and mistake by operating a motor vehicle in a public place while not having the normal use of his mental and physical faculties by reason of the introduction of alcohol or marijuana or a combination of alcohol and marijuana. The State contends that the doctrine of collateral estoppel does not bar the prosecution of Appellant for intoxication manslaughter in this case because it is alleging a new "manner and means" of intoxication; that is, marijuana *and* alcohol ingestion as opposed to alcohol ingestion alone in Appellant's first trial. Implicit in the State's contention is a suggestion that the jury in Appellant's first trial may have believed that Appellant did not have the normal use of his mental or physical faculties at the time of the accident by reason of intoxication but nevertheless acquitted him because it found that such intoxication was not due to alcohol ingestion. Though ingenious, the argument fails. Stated otherwise, it is the State's contention that one of the issues of ultimate fact litigated in Appellant's first trial was the *source* of his alleged intoxication. Such is not the case.

An issue of ultimate fact that the State will have to prove in order to sustain a conviction in Appellant's second trial is the identical issue of ultimate fact litigated in Appellant's first

trial. *See generally Ex parte Peterson,* 738 S.W.2d 688, 691 (Tex.Crim.App. 1987). That issue of ultimate fact is whether Appellant was operating his automobile at the time of the accident while *intoxicated.* Indeed, save for the substance in which the State will allege that Appellant was intoxicated by in the second trial, the respective issues of ultimate fact in each case are selfsame. Being "intoxicated" at the time of an automobile accident is an essential element of the offense of intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08(a) (Vernon 1994); *Daniel v. State*, 577 S.W.2d 231, 233 (Tex.Crim.App. 1979). The source of such intoxication is not. *See id.*; *McGinty v. State,* 740 S.W.2d 475, 477 (Tex.App.–Houston [1st Dist.] 1987, pet. ref'd). Multiple substances that cause a person to become intoxicated (e.g., alcohol ingestion and controlled substance ingestion) are not distinct elements of separate intoxication manslaughter offenses; rather, such sources of intoxication are merely evidentiary and do not concern the manner in which the offense was committed. *See McGinty*, 740 S.W.2d at 477.

It is clear from our review of the entire record of the first trial that the jury's verdict of acquittal was grounded, in part, upon a finding that Appellant did not cause the automobile accident because he was intoxicated. Indeed, the jury was instructed and found against the State's allegation that Appellant's intoxicated condition caused the accident. "[W]hen 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." *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194.

Accordingly, after the first jury acquitted Appellant of intoxication manslaughter, the issue of whether Appellant caused the automobile accident because of intoxication may not be again litigated by the State. Once a jury has determined on conflicting testimony that there was at least a reasonable doubt that Appellant caused the accident because of intoxication, the State can not present the *same or different* intoxication evidence in a second prosecution for intoxication manslaughter in the hope that a different jury might find that evidence more

convincing, even though the second trial would relate to another victim of the accident.[3] *Id.* at 446, 90 S.Ct. at 1195-96 (emphasis added); *Ex parte Mathes*, 830 S.W.2d at 598.

Having been indicted and tried for the offense of intoxication manslaughter, the only rational explanation for the verdict in the first trial was that the jury found that Appellant did not cause the accident because he was intoxicated. We conclude that a rational jury could not have grounded its verdict upon any other issues. Accordingly, *any* subsequent prosecution of Appellant attempting to prove that he caused the automobile accident because he was intoxicated is precluded by the doctrine of collateral estoppel. *See id.* at 445-47, 90 S.Ct. at 1195-96. We conclude that the trial court abused its discretion in denying the relief requested by Appellant in his application for writ of habeas corpus. *See Brashear*, 985 S.W.2d at 476. Issues one through three are respectively sustained.

The trial court's habeas corpus judgment is reversed and this matter is remanded to the trial court with instructions to enter an order granting the relief requested in Appellant's application for writ of habeas corpus. *See* TEX. R. APP. P. 31.3.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed January 13, 2000.

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[3] During oral argument, the State contended that because the evidence it would introduce at the second trial was new and could not have been discovered prior to Appellant's acquittal in the first trial, the doctrine of collateral estoppel does not bar the second prosecution. The State contends that the case law supports its position. However, the State cited no such authority in its brief nor has this Court's independent research revealed any such authority. While the same or new evidence *may* allow the State to prosecute an acquitted defendant a second time for "other crimes" arising from the "same transaction," *see Ashe*, 397 U.S. at 453 n.7, 90 S.Ct. at 1199 n.7. (Brennan, J. , concurring), there is a complete absence of authority to permit the State from re-litigating the same issues against an acquitted defendant based upon the same or new evidence.

Panel consists of Justices Amidei, Edelman, and Wittig.

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