TIBA

TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org

Vol. 20, No. 25, June 25, 2012

Case Name: Ex parte Dustin Doan

- OFFENSE: Pre-Trial Habeas Corpus
- COUNTY: Travis
- COURT OF APPEALS: Austin 2010
- C/A CITATION: 322 S.W.3d 896
- C/A RESULT: Trial Court Affirmed
- CCA. CASE No. PD-1547-10 DATE OF OPINION: June 20, 2012
- DISPOSITION: Court of Appeals Reversed
- OPINION: Womack, J. VOTE: 3-3-3
- TRIAL COURT: CCL 5; Hon. Nancy Hohengarten
- LAWYERS: Terry Kirk (Defense); Giselle Horton (State)

61.02 Challenges to Prosecution / Double Jeopardy / Collateral Estoppel: While Appellant was on probation in Brazos County, the Travis County Attorney charged him with misdemeanor theft. The Brazos County Attorney then moved to revoke Appellant's probation based on the theft in Travis County. At the hearing on the motion to revoke, Appellant objected to his probation officer's testimony about how the theft in Travis County violated a condition of Appellant's probation. The trial court sustained the objection, and the prosecutor made no further effort to prove up the theft offense. The trial court denied the State's motion to revoke, finding that the State had failed to meet its burden of proof. Appellant filed a pretrial application for writ of habeas corpus in Travis County to bar prosecution of the theft offense on the basis of "issue preclusion." The trial court initially granted relief, but then changed its ruling and denied relief on the State's motion for reconsideration, arguing that the "Brazos County Judge's ruling was too vague to constitute a final adjudication of a specific fact question." The Court of Appeals affirmed the trial court, holding that (1) double jeopardy protections were inapplicable because the case did not involve a person being criminally prosecuted twice for the same event, and (2) "the Brazos County Attorney and the Travis County Attorney are independent entities with no control over each others' decision-making processes" (see , Vol. 18, No. 38; 10/04/2010). On petition for discretionary review, Appellant asserts that "the State is the same party in both cases, regardless of which prosecuting authority represents the State."

Holding: The "correct test for whether a judgment involving one government agency is res judicata in a suit involving another government agency," is "whether or not in the earlier litigation the representative of the government had authority to represent its interests in a final adjudication on the merits." *** But as a matter of state law, a prosecuting authority who alleges a criminal offense in a community supervision revocation hearing represents the same state interests as a prosecuting attorney who later alleges the same criminal offense in a trial."

Concurring / Dissenting Opinions: Judge Johnson filed a concurring opinion and was joined by Judge Cochran and Judge Alcala. Without noting that this statute was held unconstitutional on grounds of separation of powers in Meshell v. State, 739 S.W.2d 246 (Tex.Cr.App. 1987), she discussed the amendment to Article 28.061, which insured that an offense of a higher grade committed in the same transaction as an offense dismissed for failure to prosecute in accordance with the statute could still be litigated. She also noted that "[t]he amendment clearly treated municipal, county courts, and felony prosecutors as separate classes of parties," but did not treat prosecutors from different offices as separate classes. "Thus, as the Court decides today, the Brazos County Attorney is the 'same party' as the Travis County Attorney." Presiding Judge Keller delivered a dissenting opinion and was joined by Judge Keasler and Judge Hervey. She agreed that the Double Jeopardy Clause does not apply in like this case, "but so holding requires that we overrule Ex parte Tarver, 7256 S.W.2d 195 (Tex.Cr.App. 1986)" (Ed. Note: The majority states in a lengthy footnote, that it is not overruling Tarver sub silentio). Judge Keller neatly sums up her opinion in concluding, "The Brazos and Travis County Attorneys serve the same sovereign under federal double jeopardy law, but double-jeopardy protections are not implicated in this case because jeopardy does not attach at probation-revocation proceedings. Under State v. Brabson, 976 S.W.2d 182 (Tex.Cr.App. 1998)(see SDR, Vol. 6, No. 8; 03/02/1998), and Reynolds v. State, 4 S.W.3d 13 (Tex.Cr.App. 1999)(see SDR, Vol. 7, No. 37; 09/20/1999), these separate prosecuting authorities are different parties under state law because neither has control over the actions of the other."

Sidebars: (David A. Schulman) Appellate law nerds, this is your case of the week! It is not clear why, "issue preclusion" was substituted for "collateral estoppel" or why the Court addressed "res judicata" when, as clarified in the concurring opinion, the issue granted read, "The Court of Appeals erred in holding that the Brazos County Attorney and the Travis County Attorney were not the 'same parties' for collateral estoppel purposes." As noted in Presiding Judge Keller's dissent, "res judicata" usually addresses claim preclusion where "if two different prosecuting authorities had concurrent jurisdiction over an offense" and the prosecutor who "failed to file first would essentially yield its authority on the matter." Whereas, "collateral estoppel" addresses issue preclusion where "one prosecuting authority is powerless with respect to how the other prosecuting attorney litigates an issue." Finding by a preponderance of the evidence that Appellant's probation should be revoked because he committed a new offense is not the same claim as finding beyond a reasonable doubt that Appellant is guilty of committing the offense, so I fail to see how this case is about res judicata. I like this opinion, I'm simply not real clear on it's ultimate meaning.