Reversed and Remanded and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-96-00287-CR
NO. 14-96-00288-CR

THE STATE OF TEXAS, Appellant

V.

JAIME SAUCEDA, JR., Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause Nos. 26,770 and 26,770A

OPINION ON REMAND

The State of Texas appeals the granting of Jaime Sauceda's motion to dismiss and writ of habeas corpus on the grounds that collateral estoppel does not bar prosecution of appellee's indictment for the murder of a second victim in the same occurrence. We reverse and remand.

Background

In 1995, appellee was separately indicted in cause numbers 26768 and 26770 for the murders of Rene Arismendez, Jr. ("Rene") and Rodney Arismendez ("Rodney"), respectively. At appellee's trial for the murder of Rene,[1] the court charged the jury only on the law of parties:

> Now if you find from the evidence beyond a reasonable doubt that . . . Anthony Vasquez did intentionally or knowingly cause the death of . . . [Rene], by shooting him with a gun and that [appellant] . . . knew of the intent, if any, of [Vasquez] to shoot and kill [Rene], having a legal duty to prevent commission of the offense,[2] and [appellant] acted with intent to promote or assist the commission of the offense by [Vasquez] by encouraging, aiding or attempting to aid [Vasquez] to commit the offense of causing the death of [Rene],[3] you will find [appellant] guilty of murder as charged in the indictment.

The jury returned a verdict of "not guilty" in that case.

In 1996, the State re-indicted appellee in cause number 26770A[4] alleging that appellee committed the murder of Rodney:

[Paragraph A]

> by acting with intent to promote and assist [Vasquez] in the commission of the offense of murder, [appellee] . . . did . . . aid and attempt to aid

---

1 Although defense counsel objected to separate trials and requested consolidation of the cases the day before trial began, appellee filed no motion to consolidate these cases and no cross-point on appeal challenging the lack of consolidation.

2 *See* TEX. PEN. CODE ANN. § 7.02(a)(3) (Vernon 1994) (a person is criminally responsible for an offense committed by another if, having a legal duty to prevent commission of the offense and acting with intent to promote or assist in its commission, he fails to make a reasonable effort to prevent it). The abstract portion of the jury charge stated "Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person of another, it is the duty of a peace officer to prevent the offense."

3 *See* TEX. PEN. CODE ANN. § 7.02(a)(2) (a person is criminally responsible for an offense committed by another if, acting with intent to promote or assist its commission, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense).

4 In the remainder of the opinion, cause numbers 26768, 26770, and 26770A will simply be referred to by number.

> [Vasquez] in the commission of said offense of murder by driving [Vasquez] to the scene of the murder and away from the scene of the murder.
>
> [Paragraph B]
>
> by acting with intent to promote and assist [Vasquez] in the commission of the offense of murder, [appellee] . . . did . . . fail to make a reasonable effort to prevent the commission of the offense of murder, when he had a legal duty to do so as a certified peace officer.

Appellee thereafter filed a motion to dismiss 26770 and a pretrial writ of habeas corpus to dismiss 26770A, both based on collateral estoppel. Both asserted that: (a) the only issue in the trial of 26768 was whether appellant was criminally responsible for Vasquez's conduct in committing the murders; (b) the jury's verdict of acquittal established that he was not responsible; (c) appellant's guilt in 26770 and 26770A will turn on the same issue of criminal responsibility; and therefore (d) the State is collaterally estopped from relitigating that issue in 26770 or 26770A.

The trial court granted both the motion to dismiss and the writ of habeas corpus, and the State appealed to this court which reversed and remanded based solely on a review of the indictments in both cases and the jury charge from the trial in 26768. *See State v. Sauceda*, Nos. 14-96-00287-CR, 14-9600288-CR (Tex. App.—Houston [14th Dist.] April 24, 1997). After granting discretionary review, the Court of Criminal Appeals remanded the case for consideration of collateral estoppel based upon a review of the entire record. *See State v. Sauceda*, 980 S.W.2d 642, 647, 649 (Tex. Crim. App. 1998).

Collateral Estoppel

The State's sole point of error on remand[5] is that the trial court erred in dismissing the indictments based on collateral estoppel because a rational jury could have grounded its verdict in 26768 on an issue other than that which appellee foreclosed from consideration. In particular, the State argues that a rational jury could have found appellee not guilty in 26768 without deciding whether: (1) appellee failed to take reasonable steps to prevent the murder because that issue was never fully placed before the jury; (2) appellee acted with intent to assist Vasquez in the murder of Rodney; and (3) appellee committed sufficient acts to aid or assist Vasquez because the charge was written in the conjunctive rather than the disjunctive.

Collateral estoppel 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. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Where a previous judgment of acquittal was based on a general verdict, the court must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and determine whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *See id.* at 444. If the prior acquittal could not have been based on another issue, the second prosecution is barred by collateral estoppel. *See id.* at 446. The burden is on the defendant to demonstrate that the issue he seeks to foreclose from relitigation was actually decided in the first proceeding. *See Schiro v. Farley*, 510 U.S. 222, 233 (1994).

The decisions in *Ashe* and *Schiro* illustrate the circumstances in which collateral estoppel does and does not apply. In *Ashe*, three or four masked men robbed the participants of a poker game. *See* 397 U.S. at 437. When the petitioner was tried for

---

[5] In the previous appeal, the State also argued that granting appellee's motion to dismiss with prejudice in 26770 exceeded the authority of the trial court. Because that contention was not addressed by the Court of Criminal Appeals or re-asserted by the State on remand, we do not address it again in this opinion.

robbing one of the participants, the proof that the complainant had been robbed was unassailable, but the evidence that the appellant had been one of the robbers was weak, and he was acquitted. *See id*. at 438-39.

Six weeks later, the petitioner was tried for the robbery of another participant in the poker game. *See id*. at 439. His motion to dismiss based on the prior acquittal was denied. *See id*. The witnesses and jury instructions were essentially the same as in the first trial, but the witnesses' identification of the petitioner was much stronger, and he was found guilty. *See id*. at 439-40. Because the record was devoid of any indication that the first jury could have rationally found that the complainant had not been robbed, the only issue in dispute before that jury was whether the petitioner had been one of the robbers. *See id*. at 445. Therefore, by its verdict, the jury in the first trial had necessarily found that the petitioner had not been one of the robbers, and it could not have grounded its verdict on an issue other than that of identification. *See id*. Because the petitioner had already been found not to be one of the robbers, he could not be tried a second time for being one. *See id*. at 446. Accordingly, the prosecution for robbery of the second participant was barred by collateral estoppel. *See id*. at 446-47.

Conversely, in *Schiro,* the petitioner was tried for capital murder. *See Schiro,* 510 U.S. at 224. Among the alternative verdicts given to the jury to determine guilt, Count I was for knowingly killing the victim, and Count II was for killing the victim while committing the crime of rape. *See id*. at 225-26. The jury returned a verdict of guilty on Count II and left Count I blank. *See id*. at 226.

In addition to the finding of guilt, imposition of the death penalty also required the finding of an aggravating factor. *See id*. The aggravating factor at issue was whether the defendant committed the murder by intentionally killing the victim while committing or attempting to commit rape. *See id*. Finding that the State had proved beyond a reasonable doubt that the petitioner had committed the murder by intentionally killing the victim while

committing or attempting to commit rape, the trial court sentenced the petitioner to death. *See id*. at 226-27.

One issue on appeal was whether the use of intentional murder as the aggravating factor in the sentencing phase for imposition of the death penalty was collaterally estopped by the jury's failure to find the defendant guilty of intentional murder under Count I in the guilt phase. *See id*. at 232. The petitioner reasoned that, because the jury found him guilty of felony murder in the course of a rape under Count II, but failed to convict him of intentional murder under Count I, the jury must have found that he did not have an intent to kill. *See id*. at 234. However, the Court did not so interpret the jury's failure to convict on Count I because, under the various alternatives presented in the jury charge, the jury verdict did not necessarily depend on a finding that Schiro lacked an intent to kill. *See id*. at 234-35. In addition, the defense theory and proof focused on showing that Schiro was insane, not that he lacked the requisite intent. *See id*. at 235. Lastly, a finding of an intent to kill was consistent with the evidence presented at trial. *See id*. at 236. Therefore, the Supreme Court held that the petitioner did not meet his burden to establish that an issue of ultimate fact in the second case had previously been determined in his favor because the jury could have grounded its verdict on an issue other than Schiro's intent to kill. *See id*. at 232-33.

In the present case, the jury charge submitted in 26768 (set forth above) presented three factors for the State to prove: (1) appellee knew of the intent, if any, of Vasquez to shoot and kill Rene ("knowledge"); (2) appellee had a legal duty to prevent the commission of the offense ("duty"); *and* (3) appellee acted with intent to promote or assist the commission of the offense by Vasquez by encouraging, aiding, or attempting to aid him to commit the murder of Rene ("aid"). Under this charge, because all three factors were stated conjunctively rather than disjunctively, the State had to prove all three in order to secure

a guilty verdict.[6] Therefore, the jury could have returned a not guilty verdict if *any* of those three factors was not proved, *i.e.*, appellee did not know of Vasquez's intent to kill Rene, he had no legal duty to prevent the offense, *or* he did not aid Vasquez in the murder. By contrast, based on the indictment in 26770A (also set forth above), a jury could convict appellee as a party to the murder of Rodney if it finds that appellee: (1) acted with requisite intent and (2) encouraged, aided and attempted to aid Vasquez in commission of the offense, *either by* (a) driving him to and from the murder scene,[7] *or* (b) failing to make a reasonable effort to prevent the offense when he had a legal duty to do so. Because of the alternatives provided in the jury charge in 26768, the theory(s) upon which the jury based its acquittal in that trial cannot be determined unless the evidence forecloses any of the possibilities.

The evidence in 26768 includes testimony of the following facts. Appellee was certified as a peace officer employed by the Webb County Sheriff's Department as a corrections officer. On the night of the shooting, Vasquez and appellee were involved in an altercation with the Arismendezes at a party, and the Arismendezes were asked to leave. As they drove out of the parking lot, the Arismendezes yelled, "We'll be back." Vasquez then told appellee to get the car, and they drove in the same direction as the Arismendezes. Along the way, appellee told Vasquez to "blow it off."

When appellee and Vasquez saw the Arismendezes' truck in the parking lot of a service station, they pulled in. At this point, appellee thought there was going to be a verbal confrontation, possibly a fist fight, but never intended or planned to take his weapon out of the car and did not know that Vasquez had his pistol with him. They got out of their Grand Am and approached the Arismendezes' vehicle. After speaking to the Arismendezes,

---

6 As the State readily concedes, this raised the State's burden of proof as compared to a charge stating the factors disjunctively.

7 It is undisputed that appellee drove Vasquez to and from the murder scene.

Vasquez returned to the Grand Am, leaned into it, and returned to the Arismendezes' truck carrying something shiny. By this time, appellee had walked up to the truck and put his hand on its hood. A shot was fired, and Vasquez was seen with a gun in his hand. Appellee said to Vasquez, "What the f–k did you do?" A second shot was then fired within five seconds of the first. The two shots went through the windshield and hit each of the Arismendezes in the chest, but the record does not indicate who was shot first. Appellee then drove away in the Grand Am with Vasquez.

From this evidence, a rational jury could have alternatively inferred, among other things, that:

(1) appellee knew of Vasquez's intent to shoot the Arismendezes and aided him in doing so because appellee: (a) drove Vasquez to follow the Arismendezes after their altercation at the party; (b) appellee stood in front of the Arismendezes truck at the time of the shooting, as if to block their escape; and (c) appellee drove Vasquez away from the scene of the shooting;

(2) appellee did not know of Vasquez's intent to shoot the Arismendezes and did not aid him in doing so because: (a) appellee told Vasquez before the shooting to "blow it off"; and (b) after the first shot, appellee questioned what Vasquez had done;

(3) appellee had no chance to prevent the offense because: (a) he did not know that Vasquez planned to shoot anyone or had a gun; and (b) the shooting occurred too quickly and unexpectedly for appellee to take any action to prevent it; or

(4) appellee had a reasonable opportunity to prevent the offense in that he could have anticipated that a potentially deadly confrontation might occur if he drove Vasquez to follow the Arismendezes after the altercation at the party; therefore, by doing so, he acted with intent to assist with its commission and failed to make a reasonable effort to prevent it.

Based on the evidence in this case, a rational jury could thus have made either an affirmative or negative finding to any of the factors presented in the charge. Moreover,

because the factors were submitted conjunctively, the jury's verdict of acquittal could have resulted from a failure to find any or all of them. Conversely, a correct jury charge in 26770 or 26770A can submit the duty and aid factors disjunctively,[8] and an affirmative finding on either (combined with an affirmative finding on intent) would support a conviction. Because appellee did not show that any particular factor, or that all three factors, were necessarily decided in his favor in 26768, appellee did not meet his burden to show that an issue that will foreclose his prosecution in 26770 or 26770A was actually decided in 26768. Therefore, collateral estoppel does not preclude prosecution of appellee in 26770 or 26770A, and the State's second and third points of error are sustained. Accordingly, the judgments of the trial court granting the motion to dismiss in cause no. 26770 and the writ of habeas corpus in cause no. 26770A are both reversed, and both cases are remanded for further proceedings.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Amidei, Edelman, and Lee.[9]

Do not publish — TEX. R. APP. P. 47.3(b).

---

8 *See* TEX. PEN. CODE ANN. § 7.02(a)(2), (3). If a jury in 26770 or 26770A were instead required to be charged in the same conjunctive manner, then an issue of ultimate fact in the second case would have previously been determined in appellee's favor, and collateral estoppel would bar the second prosecution. Collateral estoppel would also apply if the jury's verdict in 26768 had necessarily been based on a lack of intent since that element is common to both aid and duty.

9 Senior Justice Norman Lee sitting by assignment.