Kruger v. Doran, 8 ROP Intrm. 350 (Tr. Div. 2000)

STEPHEN KRUGER,
Plaintiff,

v.

MARK DORAN,
Defendant.

CIVIL ACTION NO. 99-304

Supreme Court, Trial Division
Republic of Palau

Decided: August 8, 2000

BEFORE: R. BARRIE MICHELSEN, Associate Justice.

Background

On October 13, 1999, Defendant Mark Doran ("Doran") was convicted of an assault and battery against Plaintiff Stephen Kruger ("Kruger" or "Plaintiff"), concerning an incident in December 1997. In its Judgment of Conviction and Sentencing Order, the trial court placed Doran on probation subject to conditions, suspended the imposition of sentence, and held that "[i]f Defendant is discharged [from probation] without imposition of the sentence, the Court will vacate the judgment of conviction." This disposition is authorized by 17 PNC § 3110(e) which states that, "[u]pon discharge of the defendant without imposition of sentence, the court shall vacate the judgment of conviction and the defendant shall not be deemed to have been convicted of the crime for any purpose."

On November 2, 1999, this civil action was filed. In this suit Kruger seeks to recover damages from Doran in connection with the incident. On March 3, 2000, Kruger filed a motion for partial summary judgment on the ⊥351 question of liability. [1] The motion argued that collateral estoppel principles preclude Doran from contesting the fact-finding in the criminal case and consequently Plaintiff is entitled to judgment as a matter of law on the liability issue. In support of his motion, Kruger attached copies of the Information and First Amended Information filed against Doran, a portion of the trial transcript in the criminal case, and the resulting judgment of conviction.

On April 13, 2000, Judge Miller vacated Doran's conviction pursuant to 17 PNC § 3110(e). Once notified on the disposition of the criminal case, this Court invited the parties to brief the effect, if any, of Judge Miller's order. After a new round of briefs, oral argument was

[1] In an earlier summary judgment motion filed November 26, 1999, Kruger sought summary judgment on the issue of special damages as well as liability. In the motion filed March 30, 2000, however, Kruger stated that he is not now seeking summary judgment on the special damages issue. Br. at 10.

scheduled for July 17, 2000, and the motion was thereafter considered submitted.

Analysis

Plaintiff as a moving party bears the burden of demonstrating that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *See* ROP R. Civ. Pro. 56(c). He maintains that, regardless of the fact that the sentence has been vacated pursuant to 17 PNC § 3110(e), and in spite of the statute's all-encompassing language that "the defendant shall not be deemed to have been convicted for any purpose," collateral estoppel applies and Doran is precluded from contesting the facts that led to his conviction. Plaintiff's various arguments are considered below.

A. Constitutional Issues: Section 3110(e)

1. Separation of Powers

Kruger contends that section 3110(e) is unconstitutional because it purports to grant the judicial branch a power to pardon. However, the procedure found in section 3110(e) permitting the vacation of a judgment of conviction prior to sentencing is clearly distinguishable from the President' pardon power under Article VIII, section 7(5) of the Constitution.

The Constitution vests the Executive Branch with the power "to grant pardons, commutations and reprieves subject to procedures prescribed by law . . ." Article VIII, sec. 7(5). The Constitution therefore affords the President broad, unreviewable discretion to grant pardons based on his consideration of any factors he believes pertinent. By contrast, Section 3110(e) affords the Judiciary no discretion to pardon a convicted individual. Rather, it establishes a specific set of circumstances – discharge of a defendant without imposition of sentence at the end of a term of probation – under which an individual shall be deemed not to be convicted. Obviously, the President's power to extend executive mercy to those convicted of crime remains unaffected and unrestricted by this statute.

Analogous provisions of the United States Code, and federal caselaw, confirms this analysis. The United States Code, like the Palau National Code, establishes procedures that effectively vacate convictions in specific circumstances. Specifically, when a person who: (1) is found guilty of certain drug offenses is discharged from pre-sentence probation; (2) has no prior drug convictions, and (3) was under twenty-one years old at the time of the offense,

⊥352 the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records . . . all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings.

18 U.S.C. § 3607(c).[2]

[2] Palau law allows similar treatment for first-time drug offenders, including a discharge

The statute further provides that:

> a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or disability imposed by law upon conviction of a crime, or for any other purpose.

18 U.S.C. § 3607(b). Accordingly, this statute, like the Palau National Code, provides that in certain circumstances the Court may, for a limited time prior to sentencing, decide not to sentence the defendant and that decision terminate the prosecution.

While United States courts have not directly addressed a contention that 18 U.S.C. § 3607 infringes on the President's pardon power, in *United States v. Noonan* , 906 F.2d 952 (3d Cir. 1990), the court emphasized that an executive pardon, as a prerogative of mercy that restores political and civil rights and releases the defendant from punishment, does not "create any factual fiction that [the] conviction had not occurred" as would expunction of court records. *Id.* at 958-60 (citations omitted).

Although this analysis does not answer the question whether statutory procedures vacating the effect of a conviction infringe on executive pardon powers, it recognizes the distinction between the President's pardon power and other remedies independent of that power that neutralize the effect of criminal convictions. It also is consistent with the view that the broad sweep of executive pardon power is distinguishable from statutorily-authorized dispositions which, in effect, give certain offenders another chance to avoid the stigma of a criminal conviction if the court chooses not to sentence the defendant.

Kruger's May 31, 2000, memorandum of law also highlights the distinctions between a pardon and section 3110(e). He wrote that:

> a pardon does not blot guilt, it does not restore a convicted individual to the state of innocence. No legal fiction is created that the individual was never accused, never tried, never convicted. There is no expunction of court records. The only effect of a pardon is to exempt the person who receives the pardon from punishment. *In re North,* 62 F.3d 1436-38 (D.C. Cir. 1994) (quoting authorities).

Br. at 4. Yet among his specific objections to section 3110(e) is that the provision has the effect of "overturning the conviction; of blotting of Defendant's guilt; of restoring ⊥353 Defendant's innocence; of creating a legal fiction that Defendant was never accused, never tried, never convicted." *Id.* at 4-5. In short, and as Kruger's argument demonstrates, the effects of section 3110(e) are qualitatively different from a pardon.[3]

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after successful completion of probation. 34 PNC § 3308.

[3] There is yet another difference between the effect of section 3110(e) and a pardon. Collateral estoppel may prevent a pardoned defendant from contesting the facts or the underlying conviction for which he was pardoned. *Lettesome v. Waggoner*, 672 F. Supp. 858 (D.V.I. 1987).

Thus, the procedures prescribed in 17 PNC § 3110(e), like those prescribed in 18 U.S.C. § 3607, are not the equivalent of a Presidential pardon. Rather, they authorize a pre-sentence termination of the prosecution of the defendant, and such a termination is not a pardon. Accordingly, section 3110(e) does not infringe upon the executive pardon power.

2. Appellate Jurisdiction

Plaintiff's second constitutional objection is that section 3110(e) is an unconstitutional imposition of appellate responsibilities on the Trial Division. However, in applying section 3110(e), the criminal trial court does not exercise a power of appellate review, and does not reverse its own judgment based on a finding of error. Rather, it simply applies a statutory provision and gives its prior judgment the required statutory effect. Thus, there is no infringement on the Appellate Division's appellate jurisdiction, and the argument is without merit.

B. The Applicability of Section 3110(e)

Plaintiff contends that even if section 3110(e) is constitutional, it only applies if the defendant is not sentenced. The precondition was not met, it is argued, because the criminal court did not merely place Doran on probation, but also ordered him to pay a fine, and thus imposed a sentence upon him. This Court disagrees. The trial court's "Judgment of Conviction and Sentencing Order" commanded that Doran be:

> [p]laced on probation for six months on the following terms and conditions: . . . that Defendant pay a $100 fine within thirty (30) days . . . [i]f Defendant is discharged [from probation] without imposition of the sentence, the Court will vacate the judgment of conviction.

It is clear from this language that the court considered the order to pay the "$100" fine to be a condition of probation, and did not consider its order to constitute the imposition of sentence. Kruger, however, suggests that the order to pay $100 is necessarily a sentence as a matter of law, irrespective of the criminal court's explicitly stated intent to impose this requirement as a condition of probation. In support of this argument, Kruger cites 17 PNC § 503, which provides that a fine of up to $100 may be imposed as a sentence for an assault and battery conviction.

However, the mere fact that the order to pay $100 could have been imposed as a sentence does not resolve whether this order was, in fact, imposed as a sentence or as a condition of probation. A criminal court is entitled to "suspend the imposition of sentence . . . upon the terms and conditions which the court determines." 17 PNC § 3110(a). This broad grant of authority to set terms and conditions of probation certainly permits imposition of an order to pay a monetary amount as a condition of probation. While the criminal court's use of the word "fine" to describe this condition of probation ⊥354 may have been technically incorrect, the use of this word is not controlling where the criminal court explicitly described the $100 payment as one of the "terms and conditions" of probation, and explicitly contemplated discharging Doran without the imposition of sentence, thus demonstrating that it did not intend by its order to impose a

sentence. Accordingly, the court properly discharged Doran without imposition of sentence and thus properly applied section 3110(e). Kruger also avers that "[Doran] did not appeal, so he is not entitled to § 3110 relief." This argument is without merit. Section 3110(e) vacates a judgment of conviction, obviating the need for an appeal. Section 3110(e) applies irrespective of any appeal. Thus, the effect of the conviction must be assessed according to the operation of section 3110(e), not according to the taking *vel non* of an appeal.

C. The Scope of the Phrase: "For Any Purpose"

But for the language of section 3110(e), the principles of collateral estoppel would likely apply, and preclude the Defendant from contesting issues in this case that had previously been determined in a criminal trial.

In the absence of an applicable statute or custom of Palau, the principles of collateral estoppel are governed in this Court by the *Restatement (Second) of Judgments*.[4]

Section 85 provides in pertinent part that collateral estoppel applies as follows:

> With respect to issued determined in a criminal prosecution . . .
> (2) A judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action:
> (a) Against the defendant in the criminal prosecution as stated in Section 29.

Section 29 lists several factors a court ought consider before it applies issue preclusion. Of those factors, the one of interest here is the first; whether "[t]reating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved." Section 29(1). Comment c to the section explains:

> *Incompatibility with remedial scheme* . Where a scheme of remedies limits the effect to be given the prior determination of an issue, the determination should not be given preclusive effect if doing so would be incompatible with that ⊥355 scheme. Thus, if a statute provides that a determination is limited to the action in

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[4] The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 310 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provided in section 305 of this chapter; provided that no person shall be subject to criminal prosecution except under the written law of the Republic or recognized local customary law not inconsistent therewith.

1 PNC § 303.

> which it is made, or that it is to be treated in subsequent actions as only prima facie evidence of the facts involved, the determination should not be given preclusive effect. Whether the scheme of remedies is properly construed as requiring such a limitation is beyond the scope of this Section. *See* §§ 83, 86.

Section 3110(e) is a legislative decision to "limit[] the effect to be given the prior determination of an issue." Therefore collateral estoppel may not be invoked in this case.

Kruger contends that even if the Court cannot consider the judgment of conviction "[c]ollateral estoppel need not rely on the judgment, but may utilize the First Amended Information and facts found at trial." However, to give preclusive effect to the fact-finding that concludes Doran was "guilty" of assault and battery is tantamount to giving effect to the judgment of conviction. Such a result would reduce section 3110(e) to an empty technicality in the context of subsequent civil litigation. In order to give the statute effect, its proscription against utilizing the conviction "for any purpose" must be construed to preclude any use of the legal conclusion of guilt expressed therein, or the fact-finding that lead to the legal conclusion.

However, while this statute prohibits consideration of the criminal court's ultimate factual and legal conclusions, statutory remedies that negate the effect of judgments of conviction are distinguishable from provisions that expunge all record of the criminal proceedings. *United States v. Doe* , 556 F.2d 391, 393 (6th Cir. 1977) (distinguishing statute directing courts to "automatically set aside the conviction" from statutes that expunge the conviction and record of criminal proceedings.). Section 3110(e) does not purport to expunge all records of the criminal prosecution. Accordingly, this Court may admit evidence from the criminal trial, such a judicial admissions, testimonial evidence adduced, or exhibits admitted. Such evidence may be considered to the extent otherwise admissible pursuant to the Rules of Evidence.

While Kruger submits some such evidence in support of his summary judgment motion, it is insufficient to establish the absence of a genuine issue of material fact as to Doran's civil liability for the torts of assault and battery. Kruger submitted the Information and the transcript of proceedings, but absent a valid judgment that may be given preclusive effect, this evidence is not dispositive. Doran is entitled to introduce evidence in rebuttal, and this Court as the trier of fact must assess the appropriate weight to accord the evidence and findings from the criminal trial. Plaintiff cites the criminal court's finding that his testimony was more credible than Doran's. However, the criminal court expressly stated that it did not accept Kruger's testimony in full, and did not specify in what respects it found his testimony credible. Because the criminal court's findings of fact and conclusions of law cannot be binding in this proceeding, these credibility issues are unresolved and preclude summary judgment.

In reviewing a motion for summary judgment, all doubts must be resolved against the movant, and the motion must be denied if the non-movant identified some evidence in the record demonstrating a genuine factual dispute on a material issue. *Estate of Olkeriil v. Ulechong,* 4 ROP Intrm. 43, 51 (1993). In the affidavit submitted by Doran as part of his ⊥356 opposition, Doran presents a sworn version of events which, he will argue, absolve him of civil liability for assault and battery. Although this version of events conflicts with the aspects of the criminal trial

that Plaintiff seeks to introduce, those aspects of the criminal proceedings are, to the extent admissible, merely evidence and are not entitled to preclusive effect. The conflict between these two versions of events creates genuine issues of material fact that preclude the entry of summary judgment on the issue of Doran's liability for the torts of assault and battery. Accordingly, Plaintiff's motion for summary judgment on this issue of liability is hereby denied.