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IN THE

Supreme Court of Virginia

RECORD NO. 161346

DAVID STANLEY JAMES PIJOR,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Commonwealth mistakenly implies that collateral estoppel cannot bar a perjury prosecution.

On brief the Commonwealth asserts that there are "strong policy reasons for applying the collateral estoppel doctrine sparingly in subsequent perjury prosecutions." Brief of Appellee at 14. The Commonwealth then implies that collateral estoppel *cannot* bar a perjury prosecution because "a criminal defendant's right to testify in his own defense does not include a right to commit perjury." Brief of Appellee at 14 (quoting United States v. Ruhbayan, 325 F.3d 197, 201 (4th Cir. 2003) and Slayton v. Commonwealth, 185 Va. 371, 382 (1946)).

The Commonwealth is incorrect. A fully accurate statement of the law is that "an acquittal does not constitute an **automatic** bar to a subsequent prosecution for perjury committed during the earlier trial." Ruhbayan, 325 F.3d at 201-202. However, that statement is true in every case where collateral estoppel is asserted, regardless of the offense being tried. The Commonwealth primarily relies upon Ruhbayan for its position, but Ruhbayan recognized that a perjury prosecution may be barred by collateral estoppel if the prior verdict necessarily decided a fact essential to the Commonwealth's evidence of the perjury charge. Id. at 202-205; see

also Opening Brief of Appellant at 41-44 (citing twenty cases from twenty different state and federal courts reaching this same conclusion).

The Commonwealth's suggestion that there is some kind of "perjury exception" to collateral estoppel, or that collateral estoppel is disfavored in perjury cases is unfounded in modern law. This misconception lingers because, prior to Ashe v. Swenson,[1] this Court (and others) barred the use of collateral estoppel in perjury prosecutions in Virginia. See Slayton, 185 Va. at 382. But, Ashe overruled Slayton by establishing that estoppel is a constitutional protection against double jeopardy and not merely a matter of discretionary public policy. See Opening Brief of Appellant at 38-39.

Careful examination of the text of the Double Jeopardy Clause does not reveal a perjury exception. If Slayton was still good law after Ashe, then it would be dispositive of the bulk of this appeal, and it would have been dispositive of Sevachko v. Commonwealth, 35 Va. App. 346 (2001) (en banc). Pijor established in the Opening Brief that Slayton is no longer good law. See Opening Brief of Appellant at 38-39. The Commonwealth has offered no rebuttal to that argument. The Commonwealth's decision not to defend Slayton is a tacit concession that Slayton is no longer good law. Collateral estoppel applies to perjury prosecutions the same as it

[1] 397 U.S. 436 (1970)

applies to the prosecution of any other crime because collateral estoppel is a constitutional imperative in all criminal prosecutions under the Fifth Amendment's Double Jeopardy Clause.

II. The Commonwealth mistakenly asserts that collateral estoppel applies only to elements of the prior trial.

The Commonwealth argues that it was not estopped from proving that Pijor "saw or possessed Ben or had knowledge of Ben's whereabouts since September 6, 2013 on February 4, 2014" because those facts were "not an essential element that had to be decided at his grand larceny trial." Brief of Appellee at 17. The Commonwealth is incorrect to the degree that it asserts that collateral estoppel only bars relitigation of elements of the offense in the first trial.

The protection of collateral estoppel extends to *any* fact necessarily decided in the prior trial, regardless of whether the factual issue was an element of the previously acquitted offense or of the new offense. See Simon v. Commonwealth, 220 Va. 412, 417 (1979) ("We conclude that, under the weight of authority and the principles set forth in Ashe, the Commonwealth is barred from introducing evidence to prove an offense for which a defendant has been previously acquitted, even though the facts necessarily resolved in the acquittal are not dispositive of an element of the offense charged in the second trial."); Rhodes v. Commonwealth, 223 Va.

743, 749 (1982) ("an acquittal in a prior trial preclude[s] the Commonwealth from offering evidence in a subsequent trial upon *any* issue of fact which had been necessarily decided by the acquittal.") (emphasis added); United States v. Castillo-Basa, 483 F.3d 890, 900 n.7 (9th Cir. 2007) (stating that it does not "follow, as a matter of logic, that when an issue is *not* an element of an offense, then that issue was *not* necessarily decided . . . . [w]e have often held that an issue was 'necessarily decided' at a trial even when the issue was not an element of the offense in question.").

As explained more thoroughly in the Opening Brief of Appellant, the jury in the dog larceny trial necessarily decided that Pijor did not possess the dog, see the dog, or know the dog's whereabouts. Most notably, Pijor's continuing possession of the dog was the essence of the Commonwealth's case, and was therefore essential for the jury to decide, because it explained why the dog had not been returned to the Gooches by the date of the trial, and it rebutted Pijor's theory that the dog must have gotten lost on its own.

III. The Commonwealth's attempt to distinguish United States v. Nash is erroneous.

The Commonwealth argues that United States v. Nash, 447 F.2d 1382 (4th Cir. 1971), is distinguishable because "the Fourth Circuit found that Nash's conviction for perjury was based on the same evidence as that

underlying her mail theft prosecution." Brief of Appellee at 18, n. 3. Although Nash made the observation cited by the Commonwealth, the Commonwealth's argument is a red herring because the Court's "rehash" observation was not the *ratio decidendi* of its decision that the perjury prosecution was barred. Instead, Nash rests on the conclusion that the truthfulness of Nash's testimony was an estopped fact that was necessarily decided by the prior jury because no rational jury would have acquitted her under the specific facts of the case if the jury did not believe her. See Nash, 447 F.2d at 1385

There is no "same evidence" litmus test to be found in Ashe, nor is a "same evidence" test found in the elements of collateral estoppel. See Glasco v. Ballard, 249 Va. 61, 64 (1995) (listing and discussing the elements of a collateral estoppel claim). Contrary to the Commonwealth's argument, the United States Supreme Court has specifically held that the government *cannot* evade the collateral estoppel doctrine by offering additional evidence that was not presented at the first trial. Harris v. Washington, 404 U.S. 55, 56-57 (1971). See also Castillo-Basa, 483 F.3d at 903 ("The Fifth Amendment, as interpreted in Ashe v. Swenson, bars relitigation of an issue already decided, *no matter how much additional*

evidence the government may wish to introduce at a second proceeding.”) (emphasis added) (citing Harris).

The Commonwealth has not disputed that Nash is still good law, and the Commonwealth has failed to meaningfully distinguish it from Pijor’s case. The larceny jury necessarily decided that Pijor’s testimony was truthful and his conviction must be vacated.

CONCLUSION

Wherefore, Appellant respectfully requests that the Court vacate his conviction and provide such other relief as is appropriate and consistent with law.

CERTIFICATE

I hereby certify that this Reply Brief complies with Rule 5:26 and that on this 27th day of June, 2017, a copy of the foregoing was served by email upon Lauren Campbell, Assistant Attorney General, at both Lcampbell@oag.state.va.us and oagcriminallitigation@oag.state.va.us.

Respectfully Submitted,

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