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Robert Ruyle Edmiston

ASHE v. SWENSON: A NEW LOOK AT DOUBLE JEOPARDY

In the recent case of *Ashe v. Swenson*,[1] the United States Supreme Court decided that collateral estoppel is embodied within the fifth amendment guarantee against double jeopardy. This decision modifies an earlier case, *Hoag v. New Jersey*,[2] in which the Court held that the applicability of the doctrine of collateral estoppel was a matter for state court determination limited only by the concepts of due process and fundamental fairness. The intervening ruling in *Benton v. Maryland*[3] presented to the *Ashe* Court the question whether collateral estoppel was included in the fifth amendment guarantee against double jeopardy.

In *Ashe*, the Court ruled that the doctrine of collateral estoppel is a part of the double jeopardy clause of the fifth amendment rather than a discretionary doctrine under the due process clause of the fourteenth amendment. So, while reaffirming *Benton*, the *Ashe* Court made the doctrine of collateral estoppel mandatory for state courts through the fourteenth amendment.

In *Ashe*, the Court necessarily was dealing with the doctrine of collateral estoppel because of the particular facts

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

[2] 356 U.S. 464 (1958). *Hoag* presented a similar fact situation—a conviction at a second trial after an acquittal at the first trial; each trial involving different victims of *one* robbery. However, the *Hoag* Court, influenced by *Palko v. Connecticut*, 302 U.S. 319 (1937), held that the states could still exercise a wide degree of latitude in the administration of their own system of criminal justice; and as long as fundamental fairness was observed, their decisions would not be overturned.

[3] 395 U.S. 784 (1969). This case overruled *Palko* holding that the fifth amendment guarantee against double jeopardy is applicable to the states through the fourteenth amendment.

presented by the case. Ashe, along with three other men, was accused of robbing six poker players in the basement of one of the victims' homes. Each of the men were charged with seven separate offenses—the armed robbery of each of the six men and the theft of a get-away car.

At Ashe's first trial, he was charged with the armed robbery of one of the poker players. The proof established beyond a reasonable doubt that the crime had occurred. However, testimony from the state's witnesses was too indefinite and unconvincing to identify Ashe as one of the robbers. Ashe was found not guilty.

Six weeks later, Ashe was tried for the robbery of another of the poker players. Claiming that he was being twice put in jeopardy, Ashe filed a motion to dismiss; but the motion was overruled. At the second trial, the prosecutor did not call the witness who failed to identify Ashe at the first trial. Instead, he called those witnesses whose testimony had been strongest against Ashe and elicited even more positive identification testimony than he had gotten at the first trial. As could be expected, the second jury found Ashe guilty and sentenced him to 35 years in the state penitentiary.

Ashe's second conviction was affirmed by the Supreme Court of Missouri.[4] A later petition for relief was also denied by the state courts.[5] Ashe next attempted a habeas corpus proceeding in the United States District Court for the Western District of Missouri on the ground that the second trial placed him twice in jeopardy. The district court, relying on *Hoag v. New Jersey*,[6] denied the writ.[7] Also relying on *Hoag*, the Court of Appeals for the Eighth Circuit affirmed.[8] In

[4] State v. Ashe, 350 S.W.2d 768, 771 (Mo. 1961).
[5] State v. Ashe, 403 S.W.2d 589 (Mo. 1966).
[6] 356 U.S. 464 (1958).
[7] Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967), *aff'd*, 399 F.2d 40 (8th Cir. 1968); *rev'd*, 397 U.S. 436 (1970).
[8] Ashe v. Swenson, 399 F.2d 40, 46 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970).

affirming, the court of appeals expressed clearly their hope that *Ashe* would be reviewed and that, in doing so, the Supreme Court would re-examine their own decision in *Hoag*.

In criminal prosecutions, the doctrine of either res judicata or collateral estoppel acts as a bar to being twice put in jeopardy. As is apparent from the many law journal articles and essays written discussing these two doctrines, there is some confusion as to which would be the more appropriate doctrine in relation to a certain fact situation.[9]

Disregarding the confusion surrounding the proper application of res judicata and collateral estoppel, to most courts, the essential determination is to insure that a defendant is not "twice put in jeopardy" for the "same offense".[10] The courts encounter much difficulty in determining what constitutes the same offense. In determining what is the "same offense", the courts apply several tests. As with most rules of construction or interpretation, the court's decision will be determined by which particular test is used. One test will lead to one result, while another equally permissible test will lead to the opposite conclusion.[11]

Confined to the circumstances presented in *Ashe*, multiple crimes arising out of the same transaction, generally two tests are applied — the "same evidence" test and the "same trans-

[9] *See* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965); Comment, *Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction*, 24 Mo. L. REV. 513 (1959); Luger, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954); McLaren, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases*, 10 WASH. L. REV. 198 (1935); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life For a Moribund Constitutional Guarantee*, 65 YALE L.J. 339 (1956).

[10] Luger, *supra* note 9, at 318.

[11] *Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction, supra* note 5, at 515-16.

action" test.[12] Applied to circumstances similar to those presented in *Ashe,* opposite conclusions could be reached depending on which test is followed. The "same evidence" test would bar a second prosecution requiring the same evidence which would have been required to convict at the first prosecution. In other words, if the same evidence would be required to sustain a conviction in any subsequent litigation, then that subsequent litigation is prohibited.[13] The "same transaction" test classifies as the same offense all acts which grow out of the same criminal episode. The same transaction test limits piecemeal prosecution by forcing the state to prosecute at *one* trial all offenses committed with a common motivating intent and aimed at a single ultimate goal.[14]

Applied to the *Ashe* case, the "same evidence" test would not prohibit seven separate prosecutions in seven different trials because additional evidence would be necessary to prove robbery of different property from six different victims and theft of the get-away car. Therefore, the prosecutor could have taken Ashe to trial seeking conviction after conviction and punishment after punishment for a crime which, to Ashe, was essentially one criminal offense.

An application of the "same transaction" test, however, necessarily would result in a different conclusion. The State would have only one shot at convicting Ashe of this robbery. Since he had been acquitted in the first trial, he would no longer be subject to prosecution based on this criminal episode.

[12] *Id.* at 515.

[13] *Id.; see* The King v. Vandercomb, 168 Eng. Rep. 455 (K.B. 1796) for a discussion on the origin of the single evidence rule.

[14] Luger, *supra* note 9, at 323; State v. Mowser, 92 N.J.L. 474, 106 A. 416 (1919); State v. Cooper, 13 N.J.L. 361, 375 (1833) *see* Harris v. State, 193 Ga. 109, 116, 17 S.E.2d. 573, 578 (1941) for a critical analysis of the same transaction test in relation to the doctrine of collateral estoppel.

The Supreme Court did not consider the question to be the number of times the State could place Ashe in jeopardy for this single transaction. Instead, the Court recognized the clear applicability of the rule of collateral estoppel to this situation. The Court said:

> The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. . . . It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.[15]

The collateral estoppel doctrine bars any re-litigation of an issue between the same parties or their privies in a second trial after the issue has been ultimately determined in their favor at the first trial.[16] Looking at the particular facts of the *Ashe* case, the Court concluded that the only conceivable issue in dispute before the second jury was whether Ashe had been one of the robbers. And, since the first jury had determined he was not, then the second prosecution was wholly impermissible. Because that issue had been determined in Ashe's favor at the first trial, it was closed and could not be re-litigated in a subsequent trial.

The *Ashe* decision has made more liberal the application of the collateral estoppel doctrine by saying that it would no longer be limited in its application to the "hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[17] This liberal application will require reviewing courts to consider the entire record of the first

[15] Ashe v. Swenson, 397 U.S. 436, 446 (1970); *see* Sealfon v. United States, 332 U.S. 575 (1948); Frank v. Mangum, 237 U.S. 309 (1914); Stone v. United States, 167 U.S. 178 (1897); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943).

[16] *See Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction, supra* note 9, at 523.

[17] 397 U.S. at 444.

trial to determine whether the first jury could have based its verdict upon any issue other than the one which the defendant claims was the only issue in actual dispute at the first trial.[18] By adopting this standard, the Court lessens one of the difficulties of the doctrine — the problem of deciding what issues have been foreclosed by the first jury's verdict.[19]

As a result of the *Ashe* decision, collateral estoppel is embodied within the fifth amendment guarantee against double jeopardy and, under the *Benton v. Maryland*[20] decision, is made a mandatory policy to be followed by state courts. It may now be concluded as a practical rule that: (1) whenever an accused commits a multiple crime during the same criminal episode for which the prosecutor chooses to try him with a separate trial for each victim; and (2) the jury at the first trial acquits the accused finding the only conceivable issue in dispute in favor of the accused, then that issue once finally determined cannot be re-litigated in a subsequent trial against the accused.[21]

Ashe v. Swenson,[22] represents an extension of a just and useful doctrine, long recognized by federal and state courts as beneficial in both civil and criminal litigation, beyond the arbitrary limits of "fundamental fairness" into a more precise and practical field of constitutional rights guaranteed to all through the fourteenth amendment.

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[18] 397 U.S. at 444.
[19] For a study of early common law pleadings and their effect on double jeopardy, *see Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, supra* note 9, at 339-44.
[20] 395 U.S. 784 (1969).
[21] *Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction, supra* note 9, at 523-24.
[22] 397 U.S. 436 (1970).