STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 19, 2014)

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. P3-2013-0643A**
	:	
STEPHEN DAY	:	

DECISION

MCBURNEY, M. Stephen Day (Defendant) asks this Court to dismiss this case based on the doctrine of collateral estoppel. Jurisdiction is pursuant to Rule 12(b)(2) of the Rhode Island Rules of Criminal Procedure. For the reasons set forth below, this Court grants Defendant's motion.

I

Facts and Travel

On August 23, 2012, a Barrington police officer stopped Defendant after he observed Defendant's vehicle swerving and cross over the center divide. (Def.'s Ex. A, Appeals Panel decision, at 1-2.) At trial, the officer testified that he observed that Defendant had "bloodshot watery eyes," "a pale face," and "was sweating profusely." Id. at 2. He also testified that Defendant "had a strong odor of alcoholic beverage coming from his breath." Id. After asking Defendant to submit to a series of sobriety tests, the officer concluded that Defendant was operating a motor vehicle under the influence of alcohol. Id. at 3. He then placed Defendant under arrest and asked Defendant to submit to a chemical breath test, which Defendant refused. Id. at 3-4.

Subsequently, Defendant was charged with various roadway violations, including "Refusal to submit to chemical test," pursuant to G.L. 1956 § 31-27-2.1, and "Driving under influence of liquor or drugs" (DUI), pursuant to § 31-27-2. Id. at 1; Barrington Police Summons. Defendant contested the refusal charge, and the matter proceeded to trial. Id. The trial judge sustained the refusal charge, and Defendant filed an appeal to the Rhode Island Traffic Tribunal Appeals Panel (Appeals Panel). Id. Defendant argued before the Appeals Panel that the State failed to prove by clear and convincing evidence that he was read his rights, as is required by § 31-27-3, "Right of person charged with operating under influence to physical examination," and moved to dismiss the charge. Id. at 4. The Appeals Panel held that the State did not satisfy the statutory requirements of § 31-27-3 and dismissed the refusal charge. Id. at 9-10. The State then brought a DUI action against Defendant under § 31-27-2 at the Superior Court, and Defendant filed this motion to dismiss.

II

Standard of Review

Rule 12(b)(2) of the Rhode Island Rules of Criminal Procedure states:

> "The defense of double jeopardy and all other defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Super. R. Crim P. 12(b)(2).

This rule allows a defendant to raise the double jeopardy defense by a pretrial motion. See State v. Shelton, 990 A.2d 191, 203 (R.I. 2010); State v. Thomas, 654 A.2d 327, 330 (R.I. 1995). If

the motion is untimely, the defense of double jeopardy will be considered waived unless the trial justice permits an untimely, but otherwise proper, assertion of the defense. Shelton, 990 A.2d at 203; Thomas, 654 A.2d at 330; State v. LaPlante, 122 R.I. 446, 449, 409 A.2d 130, 132 (1979). "[T]he burden is on a defendant to show cause why relief should be granted notwithstanding the untimely assertion of the defense." State v. Lee, 502 A.2d 332, 334 (R.I. 1985) (citing State v. Sharbuno, 120 R.I. 714, 722, 390 A.2d 915, 920 (1978)).

III

Analysis

On appeal, Defendant argues that this matter is barred by the doctrine of collateral estoppel. Specifically, Defendant argues that the State is collaterally estopped from relitigating the issue of whether Defendant was informed of his rights under § 31-27-3. Defendant contends that the Appeals Panel decided that the State failed to prove by clear and convincing evidence that Defendant was informed of his rights under this provision, and therefore, the State cannot relitigate this issue in the criminal matter. In response, the State argues that collateral estoppel does not apply because a DUI charge and a refusal charge have distinct elements and distinct burdens of proof.

As a general rule, the collateral estoppel doctrine bars relitigation of an issue in future lawsuits if that issue has already been determined by a valid and final judgment. State v. Gautier, 871 A.2d 347, 358 (R.I. 2005); State v. Werner, 865 A.2d 1049, 1055 (R.I. 2005). Collateral estoppel applies when there is an (1) identity of the issues; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted is the same or in privity with the party in the previous proceeding. Werner, 865 A.2d at 1055. This doctrine, which applies in civil and criminal cases, "makes conclusive in a later

action on a different claim the determination of issues that were actually litigated in a prior action." E.W. Audet & Sons, Inc. v. Fireman's Fund Ins. Co. of Newark, 635 A.2d 1181, 1186 (R.I. 1994) (citing Providence Teachers Union, Local 958 v. McGovern, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974)); see State v. Pineda, 712 A.2d 858, 864 (R.I. 1998) (Weisberger, J. dissenting). "The doctrine of collateral estoppel is a basic and essential part of the Constitution's prohibition against double jeopardy." Ashe v. Swenson, 397 U.S. 436, 448 (1970). "[T]he raison d'etre of collateral estoppel . . . is the conservation of judicial resources by the elimination of repetitive litigation of the same issues, particularly between the same parties." R. A. Beaufort & Sons, Inc. v. Trivisonno, 121 R.I. 835, 841, 403 A.2d 664, 667 (1979) (citing Perez v. Pawtucket Redevelopment Agency, 111 R.I. 327, 336, 302 A.2d 785, 791 (1973)).

The Rhode Island Supreme Court has noted that the doctrine is capable of producing "extraordinarily harsh and unfair results," and therefore, it should not be applied mechanically. Casco Indem. Co. v. O'Connor, 755 A.2d 779, 782 (R.I. 2000). Importantly, "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Id. at 782-83 (citing Allen v. McCurry, 449 U.S. 90, 95 (1980)).

Here, all three elements of collateral estoppel are met. Id. As for the first element, the identity of the issues prong, both cases involve the issue of whether the State met the requirements of § 31-27-3. Id. With respect to the second element, a "final judgment" includes "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) Judgments § 13 at 132. To determine whether a decision constitutes a final judgment, courts may consider whether "the parties were fully heard, [whether] the court supported its decision with a reasoned opinion, [and whether] the

decision was subject to appeal or was in fact reviewed on appeal." Id. § 13 comment g at 136. Here, the Appeals Panel decision clearly constitutes a final judgment on the merits. See Def.'s Ex. A, Appeals Panel decision; Restatement (Second) Judgments § 13 at 132 (explaining that a final judgment is one that "is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court). The parties were fully heard, the Appeals Panel wrote a thorough, reasoned decision, and the decision was subject to appeal. See § 31-41.1-9 ("Any person who is aggrieved by a determination of an appeals panel may appeal the determination [to the district court.]"); Restatement (Second) Judgments § 13 comment g at 136.

Finally, with respect to the third element, parties may be considered in privity with one another where they share common interests and "sufficiently represent" one another's interests. Duffy v. Milder, 896 A.2d 27, 36 (R.I. 2006). Although the plaintiff in the refusal case was the Town of Barrington and the Plaintiff in the instant DUI case is the State of Rhode Island, both are in privity because the Town is a political subdivision of the State. See Duffy, 896 A.2d at 36. Both sufficiently represent each other's interests. See id. Moreover, the Attorney General represented the Town of Barrington and the State of Rhode Island in both the civil and criminal proceedings. See id.; cf. State v. Summers, 528 S.E.2d 17, 21 (N.C. 2000) (stating that "there can be no question that the district attorney and the Attorney General both represent the interests of the people of North Carolina" and "[i]t is the common interest in protecting the citizens of North Carolina from drunk drivers which supports a finding of privity between the Attorney General and a district attorney"); Briggs v. State, Dep't of Pub. Safety, Div. of Motor Vehicles, 732 P.2d 1078, 1082 (Alaska 1987) (holding that the Department of Public Safety and the state were in privity).

Restatement (Second) Judgments lists three exceptions to the general rule that an issue that is actually litigated and determined by a valid final judgment is precluded in a subsequent proceeding. Restatement (Second) Judgments § 28(4) at 273. These three exceptions apply when the burden of proof in the previously litigated issue changes in the following ways between the two proceedings: [1] "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; [2] the burden has shifted to his adversary; or [3] the adversary has a significantly heavier burden than he had in the first action." Id.

None of these exceptions apply in the instant matter. See id. The State of Rhode Island is the party against whom preclusion is sought and it had a lighter, not heavier, burden of persuasion in the initial action. See id. The burden has not shifted to Defendant, the adversary, nor does Defendant have a heavier burden than in the first action. See id.

Furthermore, the burdens of proof are different in a DUI case and a refusal case. It is well established that driving under the influence is a criminal charge and requires proof beyond a reasonable doubt. See Pineda, 712 A.2d at 863 (Flanders, J. and Lederberg, J. concurring) (explaining that higher standards of proof are used in driving under the influence charges than in administrative violation hearings in cases of alleged breathalyzer refusals); see generally, State v. Delestre, 35 A.3d 886, 892-93 (R.I. 2012) ("[T]he state in a criminal trial has the burden of proving beyond a reasonable doubt *every element necessary* to constitute the commission of a crime with which a defendant is charged.") (emphasis in original); State v. Hazard, 745 A.2d 748, 751 (R.I. 2000) (The United States and Rhode Island Constitutions "deny the state the power to deprive the accused of liberty unless the state proves every element necessary to constitute the crime charged beyond a reasonable doubt."). A refusal case, however, is a civil

matter and requires proof by clear and convincing evidence. See § 31-41.1-6 ("The burden of proof [at a hearing for the adjudication of a traffic violation] shall be upon the state, city, or town and no charge may be established except by clear and convincing evidence."); Pineda, 712 A.2d at 863 (Flanders, J. and Lederberg, J. concurring) (stating that the clear and convincing standard applies to breathalyzer refusal cases). The Appeals Panel determined that the State did not prove by clear and convincing evidence that the requirements of § 31-27-3 had been met. (Def.'s Ex. A, Appeals Panel decision, at 9-10.) Since the lower standard at the refusal hearing had not been met, this Court concludes that the State cannot prove beyond a reasonable doubt that the requirements of § 31-27-3 have been met in the instant DUI case. See Delestre, 35 A.3d at 892-93; see 18 Charles Alan Wright, et al., Federal Practice and Procedure § 4422 (2d ed. 2002) (explaining that "[t]he very purpose of distinguishing the criminal standard of proof is to protect against conviction on a showing that might satisfy the lower standard generally required in civil actions. There is no need for the criminal tribunal to determine whether the lesser standard has been satisfied, and any inquiry as to the lesser standard in the criminal proceeding might dilute the protection conferred by the higher standard."); but see United States v. One Assortment of 89 Firearms, 465 U.S. 354, 359 (1984) (internal citations omitted) (stating that it is well settled that "acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based").

While there is no controlling Rhode Island law on this specific issue, other jurisdictions have similarly held that collateral estoppel applies to issues determined in a civil proceeding and could not be relitigated in the subsequent criminal proceeding. See e.g., Summers, 528 S.E.2d at 22; see also State of Wisconsin v. Griese, No. 03-3097-CR (Wis. Ct. App. Sept. 9, 2004) (unpublished). For example, in Summers, the North Carolina Supreme Court considered the

issue of whether a civil Superior Court determination regarding refusal, on appeal from an administrative hearing, prevented relitigation of that issue in a criminal prosecution for "driving while impaired." Summers, 528 S.E.2d at 19. In that case, the defendant was arrested for "driving while impaired," and the charging officer recorded at the magistrate's office that the defendant refused to submit to a breath-alcohol test. Id. The refusal was reported to the Division of Motor Vehicles, which suspended his license. Id. Defendant appealed to the Division of Motor Vehicles, which upheld the suspension. Id. Defendant then appealed to the Superior Court. Id. The judge found that the defendant did not willfully refuse a chemical test and overturned the revocation order. Id. at 20. On appeal in the subsequent criminal proceeding, the North Carolina Supreme Court found that the state was collaterally estopped from relitigating an issue in a criminal driving while under the influence matter when that same issue had been litigated in a civil matter in Superior Court. Id. at 22.

Similarly, Wisconsin held in Griese that the trial court's ruling in a refusal proceeding precluded the state from relitigating the same issue in the criminal proceeding. Griese, No. 03-3097-CR, at ¶ 14. In that case, the defendant refused to submit to a blood test and was issued a notice of intent to revoke his driving privileges. Id. at ¶ 3. At the refusal hearing, the defendant claimed the police arrested him without probable cause, and the trial court agreed. Id. at ¶¶ 3-4. On appeal in the subsequent criminal case, the Wisconsin Appeals Court considered whether the state could relitigate the legality of the arrest at the criminal prosecution of the drunk driving charge. Id. at ¶ 7. The court stated that the state failed to meet its "modest" burden and held that the determination at the refusal proceeding that the police lacked probable cause to arrest the defendant precluded the state from admitting post-arrest evidence in the criminal case. Id. at ¶ 14.

At oral argument, the State maintained that the Appeals Panel decision was decided on a "technicality." Specifically, the State contended that the officer testified at trial that he read the Defendant his rights as required by § 31-27-3 but that the State did not introduce the "Rights for Use at the Scene" card into evidence. The State maintained that the Appeals Panel dismissed the refusal charge based on the narrow finding that the State did not admit the "Rights for Use at the Scene" card into evidence.

In its decision, the Appeals Panel held that the State failed to meet its evidentiary burden with respect to § 31-27-3 and therefore failed to prove by clear and convincing evidence that the requirements of this provision had been met. (Def.'s Ex. A, Appeals Panel decision, at 9-10.) Specifically, the Appeals Panel stated that the officer "made a bare assertion during his testimony that he had read the Rights for Use at the Scene Card to the [Defendant] after the administration of the sobriety tests. [S]uch a bare assertion without introducing the Rights For Use at the Scene Card into evidence does not comply with the statutory mandates required by sections 31-27-2.1 and 31-27-3." Id. at 9. Such an evidentiary failure amounts to more than a mere technicality. See generally, McDaniel v. Brown, 558 U.S. 120, 131 (2010) ("Because reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, such a reversal bars a retrial."); Burks v. United States, 437 U.S. 1, 15 (1978) ("reversal for trial error, *as distinguished from evidentiary insufficiency*, does not constitute a decision to the effect that the government has failed to prove its case") (emphasis added); State v. Brown, 599 A.2d 728, 730 (R.I. 1991) ("a rehearing of the case would be impermissible as violative of the ban on double jeopardy in light of [a] determination that the evidence is insufficient as a matter of law"). The Rhode Island Supreme Court has repeatedly stated that the arresting officer must immediately inform the arrestee of his right to be examined, at his or her expense, by a physician selected by

that person and that the prosecution must prove the defendant was informed of this right. See Levesque v. R.I. Dep't of Transp., 626 A.2d 1286, 1288 (R.I. 1993) ("suspected drunk driver must be informed of his or her right to be examined by a physician of his or her choice and of the penalties he or she could incur 'as a result of noncompliance with [that] section'") (citing § 31-27-2.1(a)); State v. Locke, 418 A.2d 843, 850 (R.I. 1980) (The "arresting officer must inform the person under arrest of his Miranda rights, of his right to be examined by a physician of his choice, of his right to refuse to submit to the breathalyzer examination, and of the consequences of the failure to consent to the test.) (citing DiSalvo v. Williamson, 106 R.I. 303, 305, 259 A.2d 671, 672 (1969)).

Here, the issue of whether the State read Defendant his rights at the scene was litigated on substantive grounds, and the Appeals Panel found insufficient evidence to meet the requirements of § 31-27-3. See generally, McDaniel, 558 U.S. at 131. Thus, this Court concludes that the Appeals Panel's finding was based on the merits of the case. See generally, Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968) (explaining that the doctrine of res judicata must be rendered "on the merits," which means that "a judgment has been rendered which reaches and determines 'the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form . . . .'") (citing Clegg v. United States, 112 F.2d 886, 887 (10th Cir. 1940)).

The State also argues that the Supreme Court in Jenkins explained that a DUI charge and a refusal charge have different elements. See State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996); see also State v. Hart, 694 A.2d 681, 682 (R.I. 1997) (explaining that "refusing a breathalyzer test and driving under the influence of liquor are wholly distinct and separate offenses as each requires proof of one or more elements which the other does not"). While it is true that the

elements in both charges are different, the State fails to mention that both require proving compliance with § 31-27-3. Section 31-27-3 requires that

> "[a] person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor . . . shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity." Sec. 31-27-3.

Similarly, a hearing officer must sustain a refusal charge if

> "(1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled . . .; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; *(3) the person had been informed of his or her rights in accordance with § 31-27-3*; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section." Sec. 31-27-2.1(c) (emphasis added).

If the State cannot prove this necessary element of its DUI case, it is irrelevant whether the other elements of a DUI charge differ from that of a refusal charge because the State cannot prove every element of the charge beyond a reasonable doubt. See Hazard, 745 A.2d at 751.

IV

Conclusion

This Court finds that the State cannot meet its burden of proving beyond a reasonable doubt that it complied with the requirements of § 31-27-3, "Right of person charged with operating under influence to physical examination." Therefore, the State cannot prove every element of a DUI case beyond a reasonable doubt. For these reasons, this Court grants Defendant's motion to dismiss. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Stephen Day**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 19, 2014**
JUSTICE/MAGISTRATE:	**McBurney, M.**
ATTORNEYS:	
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