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Recent Developments: Butler v. State: Collateral Estoppel Does Not Preclude State from Retrying Defendant on Counts upon Which Jury Deadlocked at Defendant's Former Trial

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Butler v. State:

COLLATERAL ESTOPPEL DOES NOT PRECLUDE STATE FROM RETRYING DEFENDANT ON COUNTS UPON WHICH JURY DEADLOCKED AT DEFENDANT'S FORMER TRIAL.

In an opinion which reviewed the intricate doctrines of collateral estoppel and double jeopardy, the Court of Appeals of Maryland recently held that collateral estoppel does not preclude the State from retrying a defendant on counts upon which the jury deadlocked at his former trial. In *Butler v. State*, 335 Md. 238, 643 A.2d 389 (1994), the court of appeals ruled that a defendant's acquittal of second degree murder of one victim does not specifically prohibit the State from retrying him on charges relating to assault with intent to murder another victim.

In an eight-count indictment, defendant Michael Butler ("Butler") was charged with, *inter alia*, murder and accessory after the fact in the shooting death of Sherman Chenault ("Chenault") and assault with intent to murder Sharrell Hudson ("Hudson"). Witness testimony revealed that the attack on Chenault and Hudson occurred following the consummation of a failed drug deal and that Kent Tilghman ("Tilghman") was the principal in Chenault's murder.

Butler was tried by a jury in the Circuit Court for Howard County. The jury returned verdicts of not guilty of second degree murder of Chenault and guilty of accessory after the fact to the murder of Chenault. However, the jury deadlocked on the charges of first degree murder of Chenault, use of a handgun in the murder of Chenault, and four charges relating to the attack on Hudson. When the State indicated its intention to retry Butler on the remaining six charges, Butler filed a motion to dismiss, maintaining that double jeopardy and collateral estoppel principles precluded such a retrial. Although the trial judge determined the unresolved charges relating to Chenault were barred by double jeopardy, the court ruled that the State could retry Butler on the charges concerning the assault on Hudson. In a thorough analysis of the doctrine of collateral estoppel, the Court of Special Appeals of Maryland affirmed the decision of the trial court. The Court of Appeals of Maryland granted Butler's writ of certiorari to determine if collateral estoppel barred the State from retrying Butler and affirmed the decision of the court of special appeals.

The court of appeals began its discussion with an analysis of the principles of double jeopardy and collateral estoppel. First, the court noted that the double jeopardy prohibition of the Fifth Amendment is applicable to the states as part of the Due Process Clause of the Fourteenth Amendment. *Butler*, 335 Md. at 252, 643 A.2d at 396 (citation omitted). The court further stated that the doctrine of collateral estoppel is embodied within the Fifth Amendment guarantee against double jeopardy and, as such, is an established component of Maryland's common law. *Id.* at 253, 643 A.2d at 396 (citations omitted).

In short, the court indicated that when an issue of ultimate fact has once been determined by a valid and final judgment, collateral estoppel bars the relitigation of the same issues between the same parties in any future lawsuit. *Id.* (citations omitted). Moreover, the court explained that although collateral estoppel is usually invoked based upon a prior acquittal, the critical consideration is whether an issue of ultimate fact has been previously determined in favor of the defendant. *Id.* (citations omitted). Finally, the court noted that the burden of proof remains on the party asserting estoppel to show that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Id.* at 254, 643 A.2d at 396 (citations omitted).

Applying the aforementioned principles to the instant case, the court of appeals flatly rejected Butler's contention that collateral estoppel precluded the State from retrying him on the counts pertaining to the attack on Hudson. *Id.* at 255, 643 A.2d at 397. Specifically, the court emphasized that Butler's conviction of accessory after the fact for the murder of Chenault was not, as a matter of law, inconsistent with convictions for aiding and abetting in the shooting of Hudson. *Id.* The court noted that Butler's case predated the abrogation of the common law rule that a defendant could not legally be both an accessory after the fact and a principal to the same substantive felony, and further reasoned that Butler was not charged with being an accessory after the fact in any of the counts relating to Hudson. *Id.* Thus, the court determined that Butler could not avoid retrial based on the old common law rule that accessories after the fact cannot also be principals in the same crime because the murder of Chenault and the assault with intent to murder Hudson were different felonies. *Id.*

The court similarly rejected Butler's contention that an accessory after the fact conviction is factually inconsistent with a finding that he aided and abetted in the shooting of Hudson. *Id.* at 256, 642 A.2d at 397. The court stated that where a jury is not clearly instructed to the contrary, a person could be found factually guilty of being a principal in the second degree by aiding and abetting, as well as guilty of being an accessory after the fact. *Id.* Accordingly, a jury could reasonably have found that Butler drove Tilghman from the murder scene and plotted with Tilghman to commit the crimes for which he was later charged. *Id.* at 257, 643 Md. at 398.

Additionally, the court rejected Butler's implication of the doctrine of mutual exclusivity. In further support of his collateral estoppel challenge, Butler argued that because of mutual exclusivity, collateral estoppel can be predicated upon a guilty verdict as to one crime, which, in turn, operates as a not guilty verdict as to another crime. Disregarding this argument, the court noted that although collateral estoppel barred the State from convicting Butler as an accessory after the fact to Chenault's murder and the legally inconsistent crime of being an aider and abettor to the same murder, the State was not barred from retrying Butler for the "legally consistent" crime of aiding and abetting in the shooting of Hudson. *Id.* at 259, 643 A.2d at 399.

The court concluded that although the jury acquitted Butler of second degree murder of Chenault, it did not necessarily find that Butler had no intent to kill Hudson. *Id.* at 271, 643 A.2d at 405. The court stated that it was possible that the jury found Tilghman's shooting of Chenault was clearly first degree premeditated murder and deadlocked on whether Butler aided and abetted in that murder. *Id.* Accepting the trial judge's instruction that second degree murder does not involve premeditation or deliberation and his instruction that each count must be weighed separately, the court of appeals held that Chenault's acquittal for second degree murder was not inconsistent with a determination that there was a premeditated and deliberate plan to kill Hudson. *Id.* Furthermore, the court determined that the jury neither found that Butler knowingly participated in that plan, nor found that he was an innocent participant. *Id.* In light of the jury's determination that Butler was not a principal in any

of the crimes for which he was charged, the court held that the State was free to retry him on the counts relating to the assault on Hudson.

In holding that the doctrine of collateral estoppel will not bar retrial of unresolved issues, the Court of Appeals of Maryland articulated that where a trial involves the same crime but different victims, a defendant may ultimately be convicted of being both an accessory after the fact as to one victim, *and* a principal as to another victim. This unjust and unduly restrictive holding indicates that if a defendant's conduct as to two victims is identical, the defendant may nevertheless be retried because one victim died and one survived. While defendants already carry the onerous burden of proving that the jury's verdict in the first trial precludes relitigation of a particular factual issue in a second trial, this case severely limits the availability of collateral estoppel in criminal prosecutions.

- Kimberly C. Foreman