

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41229

CHARLES EDWARD SMITH,)	2014 Unpublished Opinion No. 587
)	
Petitioner-Appellant,)	Filed: June 24, 2014
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment dismissing action for post-conviction relief, affirmed.

Charles Edward Smith, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Charles Edward Smith appeals from the judgment dismissing his action for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

This is Smith’s third appeal to this Court. In 2007, Smith was charged with felony driving under the influence (DUI), Idaho Code §§ 18-8004, 18-8005(7), with the enhancement to a felony based on a prior felony DUI conviction.¹ The information also sought a persistent violator sentence enhancement, I.C. § 19-2514, based on the prior felony DUI conviction, another prior felony DUI conviction, and a prior felony grand theft conviction. In a bifurcated proceeding, Smith was first found guilty by a jury of the substantive DUI charge. After Smith

¹ Smith was also charged and convicted of driving without privileges.

waived his right to a jury trial on the felony and persistent violator enhancements, the district court found both enhancements to have been proven. Smith was sentenced for felony DUI to a unified term of twenty years, with a minimum period of confinement of six years. Smith filed an I.C.R. 35 motion for reduction of his sentence, claiming that his sentence was “disproportionate for the crime of DUI” and that the presentence investigator’s assessment was inaccurate. Smith also filed a Rule 35 motion alleging that his sentence was illegal. The district court held a hearing and issued an order reducing Smith’s minimum period of confinement to five years. The district court did not specifically address Smith’s claim that his sentence was illegal.

Smith appealed. Smith’s appellate counsel raised a single issue--whether Smith’s right to a jury trial was violated by the officer’s testimony that Smith was intoxicated. Smith’s counsel was granted leave to withdraw, and Smith filed a supplemental brief pro se raising several other issues, among them a claim that his sentence was illegal because application of both the felony DUI enhancement and the persistent violator enhancement violated constitutional prohibitions against double jeopardy. In an unpublished opinion, this Court affirmed Smith’s judgment of conviction. *State v. Smith*, Docket No. 34855 (Ct. App. Apr. 21, 2010). However, we declined to address Smith’s claim regarding the legality of his sentence because it was not properly before this Court.

Thereafter, Smith filed another Rule 35 motion for correction of an illegal sentence. Smith’s motion alleged that his sentence was illegal on multiple grounds, including that it subjected him to multiple punishments for the same offense in violation of constitutional prohibitions against double jeopardy. Smith argued that his sentence was illegal because I.C. § 18-8005(7)² is an enhancement provision like I.C. § 19-2514 and, therefore, application of both provisions subjected him to multiple punishments for the same offense. The district court denied this motion. Smith appealed from the denial of this Rule 35 motion. In an unpublished opinion, this Court affirmed the district court’s denial of the motion. *State v. Smith*, Docket No. 38232 (Ct. App. Oct. 21, 2011).

On June 19, 2012, Smith filed the instant petition for post-conviction relief. In the petition, Smith asserted as his sole claim that “[t]he sentence is in violation of the Constitution of the United States by Virtue of multiple punishment.” In an affidavit in support, Smith more

² Now codified as I.C. § 18-8005(9).

specifically clarified “[t]hat his sentence is in violation of the United States Constitution in violation of the 5th Amendment’s Double Jeopardy Clause by way of multiple punishment” and “[t]hat the Idaho Court of Appeals has issued an Opinion in the case contrary to past decision by that Court and contrary to the Idaho Supreme Court.” In the affidavit, Smith further said that he was asserting a “new prong” of double jeopardy, contending that he was illegally subjected to “multiple prosecutions for the same offense” because misdemeanor DUI is a “lesser included offense” of felony DUI.

The State filed a motion for summary dismissal contending that the doctrine of res judicata barred Smith’s claims. Following a hearing, the district court granted the State’s motion. Smith appeals.

II. ANALYSIS

Smith contends that the district court erred in dismissing his petition based on res judicata. We find no error.

The doctrine of res judicata encompasses both claim preclusion (true res judicata) and issue preclusion (collateral estoppel). *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007); *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim, and issue preclusion protects litigants from relitigating an identical issue with the same party or its privy. *Ticor*, 144 Idaho at 123, 157 P.3d at 617; *Rodriguez v. Dep’t of Corr.*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001); *Platz v. State*, 154 Idaho 960, 971, 303 P.3d 647, 658 (Ct. App. 2013). Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 695, 273 P.3d 1284, 1288 (2012). Idaho law permits application of res judicata to criminal and post-conviction cases. *State v. Creech*, 132 Idaho 1, 9 n.1, 966 P.2d 1, 9 n.1 (1998). Whether an action is barred by res judicata is a question of law. *Ticor Title Co.*, 144 Idaho at 122, 157 P.3d at 616.

Whether a defendant's prosecution complies with the constitutional protection against being placed in jeopardy twice is a question of law over which we exercise free review. *State v. Santana*, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000). The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994); *State v. McKeeth*, 136 Idaho 619, 622, 38 P.3d 1275, 1278 (Ct. App. 2001).

In this appeal, Smith abandons his double jeopardy claim that he was, by application of multiple enhancements, illegally subjected to multiple punishment and that this Court wrongly decided the issue in his last appeal. He recognizes that a final decision on that issue was rendered in the appeal on his Rule 35 motion. Thus, issue preclusion bars him from relitigating the same issue in this post-conviction action. *Creech*, 132 Idaho at 9 n.1, 966 P.2d at 9 n.1 (holding that "when legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of res judicata from raising them again in a post-conviction relief proceeding").

Instead, Smith asserts district court error in dismissing, on res judicata grounds, his "new prong" claim of a double jeopardy violation in which he contends that he was illegally subjected to "multiple prosecutions for the same offense." His claim is as follows. In the bifurcated trial proceeding, the jury was first asked to determine whether he committed the substantive crime of misdemeanor DUI. When the jury returned a guilty verdict, the State then put on its proof that Smith had previously been convicted of felony DUI. The district court found that this enhancement had been proved beyond a reasonable doubt. Smith contends that this procedure illegally subjected him to "multiple prosecutions for the same offense." He contends that because he was first convicted of misdemeanor DUI, his continued prosecution for felony DUI in this case was precluded by double jeopardy because misdemeanor DUI is a "lesser included offense" of felony DUI. Therefore, reasons Smith, he was properly convicted of only misdemeanor DUI; his sentence is illegal because the enhancements cannot attach to a misdemeanor; and the maximum sentence for the crime of misdemeanor DUI is one year.

Even assuming that he properly pled such a claim, we find no error. First, Smith was not actually prosecuted for two offenses. He was charged and tried only for felony DUI. His trial on that charge was separated into two parts, with the jury first being asked to determine whether the State had proven the elements of misdemeanor DUI, and upon the jury making a finding favorable to the State, the trial continued on the further element of prior DUI convictions. This bifurcation of the trial was done for Smith's protection so that the jury would not be prejudiced in reaching its decision on the first phase by having heard evidence that he had multiple prior DUI convictions. There was a single trial, separated into two parts, for a single charge. There simply were not multiple prosecutions for the same offense.

Second, even if Smith's bifurcated trial could be characterized as double prosecution for the same offense, his new assertion of a double jeopardy violation is barred by res judicata. Under claim preclusion, "a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought." *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012). "The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made." *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805. Because Smith could and should have brought his "new" double jeopardy challenge along with and at the same time as his prior Rule 35 double jeopardy violation claim, the claim preclusion aspect of res judicata prevents him from bringing the claim now in piecemeal litigation.

Third, United States Supreme Court precedent shows that Smith's claim of a double jeopardy violation in this circumstance has no merit. In *Ohio v. Johnson*, 467 U.S. 493, 495-97 (1984), the defendant shot a man to death and was charged with one count each of murder, involuntary manslaughter, aggravated robbery, and grand theft. At his arraignment, he offered to plead guilty only to the charges of involuntary manslaughter and grand theft, while pleading not guilty to the more serious offenses of murder and aggravated robbery. Over the State's objection, the trial court accepted the guilty pleas and sentenced defendant to a term of imprisonment. The defendant then moved to dismiss the remaining charges against him on the ground that their further prosecution would violate his right against double jeopardy. The trial court granted the defendant's motion and dismissed the remaining charges, finding that because involuntary manslaughter and grand theft were lesser included offenses of the remaining charges

of murder and aggravated robbery, continued prosecution of the greater offenses was barred by the Double Jeopardy Clause. The Ohio appellate courts affirmed the decision of the trial court. The United States Supreme Court, however, reversed. It found error in the Ohio courts' conclusion that double jeopardy barred the continuing prosecution on the two greater offenses after convictions on the two lesser offenses had already been entered. The Supreme Court held: "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses *in a single prosecution*." *Johnson*, 467 U.S. at 500 (emphasis added).

The same result is required here. Regardless of whether, because of the bifurcated proceedings, Smith was effectively tried "first" on "misdemeanor" DUI, double jeopardy did not bar his continued prosecution for the only substantive crime charged, felony DUI. And because only one sentence was entered--for felony DUI--Smith was not given multiple punishments.

Therefore, the district court's dismissal of Smith's petition for post-conviction relief on the ground that the asserted claims were barred by *res judicata* is affirmed.

Chief Judge GUTIERREZ and Judge GRATTON **CONCUR**.