

STATE OF MAINE
CUMBERLAND, ss.

CLERK'S OFFICE

UNIFIED CRIMINAL COURT
DOCKET NO. 09-9366

MGK - 110 - 7/30/2010

2010 JUL 30 P 1:06

STATE OF MAINE,)
)
)
)
v.)
)
Trung N. CAN,)
DOB: 10/1/1974)
)

ORDER

Defendant Trung Can is accused of unlawful sexual contact with a thirteen-year-old girl, the daughter of his girlfriend, Julie Pham. Other than the alleged victim, there are four other children in the home. On August 10 and August 12, 2009, the court held a contested jeopardy hearing to determine whether there was evidence of actual jeopardy to those four other children. In its Dismissal Order after Jeopardy Hearing, dated August 13, 2009, the court determined that there was no proven jeopardy to the other four children under § 4035. Defendant now moves to dismiss the criminal complaint against him, arguing that the doctrine of collateral estoppel precludes the case from proceeding.

“The doctrine of collateral estoppel is embodied in the Constitution's Fifth Amendment guarantee against double jeopardy.” State v. Hughes, 2004 ME 141, ¶ 5, 863 A.2d 266, 268. Collateral estoppel applies where “(1) the identical factual issue was decided by a prior final judgment, and (2) the party to be estopped had an opportunity and an incentive to litigate the issue at the prior proceeding.” Id. ¶ 5, 863 A.2d at 269. “A party has a fair opportunity to litigate an issue if that party either controls the litigation, substantially participates in that litigation, or could have participated in the litigation had they chosen to do so.” Id.

The factual issue to be determined in the criminal case against Defendant has not been decided by any prior judgment. The issue in the criminal case is whether Defendant engaged in the unlawful sexual touching of a minor. Nowhere in the District Court’s Dismissal Order after Jeopardy Hearing of August 13, 2009 does the court state any finding on this factual issue.

Defendant argues that the issue of his alleged conduct must have been decided in the August 13, 2009 Order. Defendant reasons that because the alleged conduct was the only ground of jeopardy alleged in the State’s petition for child protective orders for the four other children, and because the court dismissed the petitions, the court must have determined that he did not engage in the alleged conduct.

Defendant’s argument fails to recognize that the issue of Defendant’s alleged conduct was not essential to the judgment in the jeopardy hearing. The jeopardy hearing was limited to the issue of the other four children’s safety. To determine whether those children were in

jeopardy, the court would have had to establish two facts: first, that Defendant likely engaged in the alleged contact; and second, that Defendant's conduct toward the alleged victim was likely to extend toward the other four children. Therefore, in finding that the other four children were not in jeopardy, the court was implicitly stating that it had not established *both* of these facts. Defendant's argument therefore fails because he cannot prove that the court made any finding as to the first fact, which is the fact at issue in the criminal prosecution.

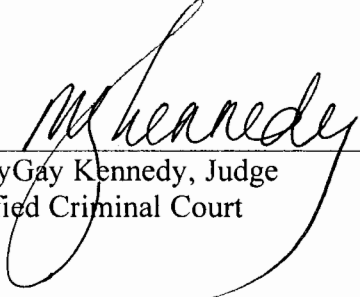
Furthermore, collateral estoppel is not a bar to Defendant's criminal prosecution because there is no identity between the parties to the contested jeopardy hearing and the parties to the criminal prosecution. At the contested jeopardy hearing, the District Attorney's Office was not present. At that hearing, the DA neither controlled nor substantially participated in the litigation, nor did they have the option to do so. The DA therefore did not have the opportunity to fully and fairly litigate the issue of Defendant's alleged criminal conduct.

Defendant argues that because the Department of Health and Human Services and the District Attorney's Office are both agencies of the State, they are sufficiently related to satisfy the requirement that the prosecution in his criminal case already had the opportunity to fully and fairly litigate the issue of his alleged criminal conduct. In support of this argument, Defendant cites a California case in which a court held that DSS's determination that a defendant had not engaged in welfare fraud collaterally estopped the State from its criminal prosecution of that defendant for the same. People v. Sims, 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (Cal. 1982).

Defendant's case is distinguished from Sims in that it does not have to do with welfare fraud. The Sims court framed its holding narrowly, and pointed to "the unique statutory scheme set up by the Legislature establishing a policy in favor of resolving [welfare] fraud cases outside the criminal justice system," in making its decision. Id. at 334. Incidentally, the holding in Sims was legislatively abrogated soon after. See People v. Preston, 43 Cal. App. 4th 450, 50 Cal.Rptr.2d 778 (Ct. App. 1996). In the absence of any authority to the contrary, this court declines to make a determination that the finding in a child protection case should be given preclusive effect in a subsequent criminal proceeding.

Because the issue of Defendant's alleged criminal conduct has not been decided in a prior final judgment, and because the District Attorney's Office has not yet had an opportunity to fully and fairly litigate the issue of Defendant's alleged criminal conduct, collateral estoppel is not a bar to the ongoing criminal case against Defendant. Defendant's Motion to Dismiss is therefore DENIED.

DATED: July 30, 2010



MaryGay Kennedy, Judge
Unified Criminal Court

STATE OF MAINE
vs
TRUNG CAN
16 GREENLEAF STREET
PORTLAND ME 04101

Docket No CUMCD-CR-2009-09366

DOCKET RECORD

DOB: 10/01/1974

Attorney: HENRY SHANOSKI

LAW OFFICE OF HENRY SHANOSKI
386 FORE ST SUITE 204
PO BOX 391
PORTLAND ME 04112
APPOINTED 04/12/2010

State's Attorney: STEPHANIE ANDERSON

Filing Document: CRIMINAL COMPLAINT
Filing Date: 12/03/2009

Major Case Type: MISDEMEANOR (CLASS D,E)

Charge (s)

1 UNLAWFUL SEXUAL TOUCHING
Seq 9314 17-A 260(1)(G)
DUNHAM / POR

04/16/2009 PORTLAND

Class D

Docket Events:

12/03/2009 FILING DOCUMENT - CRIMINAL COMPLAINT FILED ON 12/03/2009

12/03/2009 WARRANT - ON AFFIDAVIT REQUESTED ON 12/03/2009

12/03/2009 WARRANT - ON AFFIDAVIT ORDERED ON 12/03/2009

12/03/2009 WARRANT - ON AFFIDAVIT IMPOUNDED ON 12/03/2009

12/03/2009 WARRANT - ON AFFIDAVIT ISSUED ON 12/03/2009

02/22/2010 WARRANT - ON AFFIDAVIT EXECUTED ON 02/19/2010

02/22/2010 WARRANT - ON AFFIDAVIT RETURNED ON 02/22/2010

MSP-DEJROOL

02/24/2010 BAIL BOND - \$150.00 CASH BAIL BOND FILED ON 02/22/2010

Bail Receipt Type: CR

Bail Amt: \$150

Receipt Type: CK

Date Bailed: 02/19/2010

Prvdr Name: JULIE PHAM

Rtrn Name: JULIE PHAM

#636

3RD PARTY D.O.B. 12/27/1972

02/24/2010 Charge(s): 1

HEARING - ARRAIGNMENT SCHEDULED FOR 04/08/2010 @ 8:30 in Room No. 1

04/08/2010 Charge(s): 1

HEARING - ARRAIGNMENT HELD ON 04/08/2010 @ 8:30 in Room No. 1

THOMAS D WARREN , JUSTICE

Attorney: HENRY SHANOSKI

DA: TRACY LEADBETTER

DEFENDANT INFORMED OF CHARGES. 21 DAYS TO FILE MOTIONS

04/08/2010 Charge(s): 1

PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 04/08/2010 @ 8:30 in Room No. 1

THOMAS D WARREN , JUSTICE

Attorney: HENRY SHANOSKI

DA: TRACY LEADBETTER

04/08/2010 Charge(s): 1

HEARING - DISPOSITIONAL CONFERENCE SCHEDULED FOR 06/30/2010 @ 9:30 in Room No. 7

04/08/2010 Charge(s): 1

TRIAL - JURY TRIAL SCHEDULED FOR 07/26/2010 @ 8:30 in Room No. 11

NOTICE TO PARTIES/COUNSEL

04/09/2010 Charge(s): 1

MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 04/09/2010

04/13/2010 Charge(s): 1

MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 04/12/2010

ROLAND BEAUDOIN , JUDGE

COPY TO PARTIES/COUNSEL

04/13/2010 Party(s): TRUNG CAN

ATTORNEY - APPOINTED ORDERED ON 04/12/2010

Attorney: HENRY SHANOSKI

05/19/2010 ORDER - TRANSCRIPT ORDER FILED ON 05/17/2010

DONNA CARTER , ASSISTANT CLERK-E

Attorney: HENRY SHANOSKI

MOTION FOR TRANSCRIPT AT STATE EXPENSE FILED FOR 2 DAY CHILD PROTECTIVE HEARING HELD IN AUGUST 2009. A SECOND MOTION WAS FILED WITH THE DISTRICT COURT BECAUSE THE PC CASE WAS HELD HERE. I HAVE FILED BOTH REQUESTS FOR TRANSCRIPT IN THE PC CASE SO AS TO AVOID DUPLICATION.

06/07/2010 MOTION - MOTION TO DISMISS FILED BY DEFENDANT ON 06/07/2010

Attorney: HENRY SHANOSKI

06/07/2010 HEARING - MOTION TO DISMISS SCHEDULED FOR 06/22/2010 @ 1:00 in Room No. 8

NOTICE TO PARTIES/COUNSEL

06/07/2010 HEARING - MOTION TO DISMISS NOTICE SENT ON 06/07/2010

TERRY VALCOURT , ASSISTANT CLERK-E

06/07/2010 Charge(s): 1

HEARING - DISPOSITIONAL CONFERENCE NOTICE SENT ON 06/07/2010

TERRY VALCOURT , ASSISTANT CLERK-E

06/08/2010 MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 06/08/2010

Attorney: HENRY SHANOSKI

JH

06/09/2010 MOTION - MOTION TO CONTINUE GRANTED ON 06/09/2010

ROLAND A COLE , JUSTICE

COPY TO PARTIES/COUNSEL

JH

06/09/2010 HEARING - MOTION TO DISMISS CONTINUED ON 06/09/2010

06/09/2010 HEARING - MOTION TO DISMISS SCHEDULED FOR 06/29/2010 @ 1:00 in Room No. 8

NOTICE TO PARTIES/COUNSEL

06/09/2010 HEARING - MOTION TO DISMISS NOTICE SENT ON 06/09/2010

JH

06/29/2010 HEARING - MOTION TO DISMISS NOT HELD ON 06/29/2010

06/30/2010 Charge(s): 1

HEARING - DISPOSITIONAL CONFERENCE NOT HELD ON 06/30/2010

CASE SET FOR MOTION AND THEN FOR JURY SELECTION

06/30/2010 Charge(s): 1

HEARING - MOTION TO DISMISS SCHEDULED FOR 07/20/2010 @ 1:00 in Room No. 8

NOTICE TO PARTIES/COUNSEL

06/30/2010 Charge(s): 1

HEARING - MOTION TO DISMISS NOTICE SENT ON 06/30/2010

07/20/2010 Charge(s): 1

TRIAL - JURY TRIAL CONTINUED ON 07/20/2010

07/26/2010 MOTION - MOTION TO DISMISS UNDER ADVISEMENT ON 07/20/2010

MARYGAY KENNEDY , JUDGE

07/26/2010 TRIAL - JURY TRIAL SCHEDULED FOR 08/23/2010 @ 8:30 in Room No. 11

NOTICE TO PARTIES/COUNSEL

07/26/2010 TRIAL - JURY TRIAL NOTICE SENT ON 07/26/2010

07/26/2010 Charge(s): 1

HEARING - MOTION TO DISMISS HELD ON 07/20/2010

MARYGAY KENNEDY , JUDGE

Attorney: HENRY SHANOSKI

DA: TRACY LEADBETTER

IN CHAMBERS

08/02/2010 MOTION - MOTION TO DISMISS DENIED ON 07/30/2010

MARYGAY KENNEDY , JUDGE

COPY TO PARTIES/COUNSEL

08/02/2010 ORDER - COURT ORDER FILED ON 07/30/2010

MARYGAY KENNEDY , JUDGE

MOTION TO DISMISS DENIED

A TRUE COPY

ATTEST: _____

Clerk