UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2566

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES TALMADGE PHILLIPS and PHILLIP NOEL FERGUSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR-H-91-210)

(November 9, 1993)

Before JONES and DeMOSS, Circuit Judges and BARBOUR[1], District Judge.[*]

EDITH H. JONES, Circuit Judge:

Appellant Charles Phillips was indicted for bank fraud, bank bribery, money laundering, aiding and abetting the fraudulent sharing of loan proceeds, and making false statements on loan applications. Appellant Phillip Ferguson was indicted on one count of bank fraud. The district court denied Phillips' pretrial motion to dismiss which was based on double jeopardy and collateral

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[1] Chief Judge of the Southern District of Mississippi, sitting by designation.

[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

estoppel grounds. The district court denied Ferguson's pretrial motion to dismiss the indictment which was based on collateral estoppel grounds. This interlocutory appeal ensued. We affirm.

BACKGROUND

In December 1986, Phillips and his wife received two loans totalling $150,000 from Ameriway Savings Association ("Ameriway") in Houston, Texas. They defaulted on these loans and filed for personal bankruptcy in early 1989. Ameriway participated in the bankruptcy as a creditor until Ameriway failed. The Resolution Trust Corporation ("RTC") became the receiver for Ameriway.

Phillips expected to discharge his Ameriway debt. The RTC filed an adversary proceeding to deny the discharge or the dischargeability of the bank debt because Phillips had submitted false financial statements to Ameriway;[2] had transferred or concealed property (including two office buildings) within a year before the filing of bankruptcy;[3] had fraudulently concealed or failed to preserve relevant financial documents;[4] had made false statements concerning income and assets;[5] and had failed to explain satisfactorily the loss or deficiency of assets.[6]

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[2] See 11 U.S.C.A. § 523(a)(2)(B) (West 1993).

[3] See id. § 727(a)(2).

[4] See id. § 727(a)(3).

[5] See id. § 727(a)(4)(A).

[6] See id. § 727(a)(5).

Before bankruptcy, Phillips set up trusts for his children that owned a series of partnerships and corporations that in June 1987 purchased the two buildings referred to in the allegation of concealed property. In its adversary proceeding, RTC alleged that Phillips received an unreported $50,000 kickback when the buildings were purchased. Additionally, it claimed that Phillips agreed to provide a $500,000 kickback to Harvin Moore III, Chief Executive Officer of Hardin Savings & Loan Association ("Hardin"), who arranged the financing of a $10,500,000 loan made to purchase the buildings. The RTC presented this evidence in the adversary proceeding to support its contention that Phillips's discharge should be denied because he concealed his ownership of these buildings from the creditors and he did not reveal all of his income and assets to his creditors.

Following a trial, the bankruptcy court issued its opinion denying the RTC's objections to the discharge and dischargeability of the Ameriway debt. The court first decided that the RTC presented no evidence that Phillips either had submitted false financial statements to Ameriway before Ameriway made the loans to Phillips or that Phillips had concealed or failed to preserve relevant documents. Additionally, the court determined that although Phillips did create trusts for his children through which the buildings were purchased, the RTC presented no evidence that Phillips transferred his assets to buy the buildings within one year of filing for bankruptcy. Thus, Phillips did not own the two buildings, nor did he intend by the purchase to defraud creditors. The buildings were not available for his creditors. Finally, the court found that the RTC failed to demonstrate Phillips's intent to defraud his creditors because Phillips's tax returns and testimony did describe "income" related to the office buildings and certain stock that the RTC alleged Phillips tried to conceal.

The court accepted Phillips's justification of any other omissions from his statement of financial affairs as being the result of hurried and inexperienced preparation. Significantly, the court made no mention at all of any kickbacks Phillips allegedly made or received surrounding the purchase of the two office buildings.

On December 11, 1991, Phillips and Ferguson were indicted for bank fraud. The indictment alleged that Phillips, Ferguson, and Moore attempted to defraud Hardin in obtaining the $10,550,000 loan for the purchase of the two office buildings discussed in the bankruptcy proceedings. The scheme allegedly consisted of a plan to use $500,000 of the loan for Initially Ours, Inc., a corporation owned by Phillips and Moore, even though Phillips stated in the Hardin loan application that the sole purpose of the loan was to purchase two office buildings. Ferguson's role in the scheme was to help launder the $500,000 in excess loan funds. Count two of the indictment charged Phillips with bank bribery for the promise of the $500,000 loan to Moore. The rest of the indictment listed other charges against Phillips surrounding the $500,000, including concealing the source of his money and making false statements to Hardin in applying for the loan.

Phillips filed a motion to dismiss his indictment that was based upon double jeopardy and collateral estoppel grounds arising from the avoidance of discharge and nondischargeability proceeding in bankruptcy court. Ferguson moved to dismiss the indictment on collateral estoppel grounds because of Phillips's dischargeability proceeding. The district court denied both motions. The court first found that the bankruptcy proceeding was not a previous prosecution to which jeopardy attached. It then concluded that the bankruptcy proceeding did not collaterally estop the present criminal prosecution because the RTC, as receiver for Ameriway in a bankruptcy proceeding, was not the same party as the United States and because the issues in the two proceedings were not the same. Both appellants now argue that the district court erred in determining that the doctrines of collateral estoppel and res judicata are inappropriate in their cases.

DISCUSSION

A.

Phillips initially asserted that his indictment constitutes the second prosecution for the same conduct at issue in the bankruptcy proceeding in violation of the double jeopardy clause of the Fifth Amendment. Relying heavily upon United States v. Halper, 490 U.S. 435 (1989) and Grady v. Corbin, 495 U.S. 508 (1990), Phillips argued that because a civil penalty may constitute punishment for the purposes of double jeopardy, the RTC's objection to Phillips's discharge in bankruptcy under 11 U.S.C. § 727 similarly constitutes a bar to subsequent prosecution for the same conduct. Because of the Supreme Court's recent overruling of Grady in United States v. Dixon, ____ U.S. ____, 113 S. Ct. 2849 (1993), Phillips has conceded that this argument lacks merit. We agree.

B.

Both Phillips and Ferguson argue that the indictments in this case are barred by principles of collateral estoppel because of the previous trial in the bankruptcy court. They argue that issues of ultimate fact concerning their intent with respect to the transactions which are the subject of the indictment were fully and fairly litigated and resolved adversely to the government by a valid, final judgment. Accordingly, they contend that the government now cannot relitigate these issues in this case.

Collateral estoppel means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuits." United States v. Deerman, 837 F.2d 684, 690 (5th Cir. 1988), citing Ashe v. Swenson, 397 U.S. 436 (1970). Thus, in order for collateral estoppel to bar prosecution in the appellants' cases, there must be (1) identity of parties, (2) identity of issue, (3) the issue must have been brought to final judgment, and (4) the issue must have been necessary to decision in the previous proceeding. The district court found neither identity of parties nor issues in this case, and it refused to equate a bankruptcy adversary proceeding to avoid discharge with a criminal prosecution for collateral estoppel purposes. We assume arguendo that res judicata principles apply to a criminal prosecution that follows a bankruptcy adversary proceeding.

In determining whether collateral estoppel bars prosecution, the first step is to determine whether there is identity of parties. In the bankruptcy proceeding, RTC as receiver for Ameriway was the party trying to collect on a debt owed by Phillips to Ameriway. In the present indictment, the United States prosecutes Phillips for alleged criminal misconduct. Although counsel for the United States vigorously contended at oral argument that the RTC is not the same party as the United States government, and our initial reaction to this position is skeptical, it is not necessary at this time to determine whether the RTC is the government because there is no identity of issues.

The district court found that Phillips failed to show that the controlling issues in the bankruptcy proceeding and the present indictment were sufficiently similar to bar prosecution. In the bankruptcy action, the RTC complained that Phillips concealed income and assets from the trustee and that this showed an intent to defraud his creditors, including Ameriway. While the kickbacks relating to the Hardin loan were discussed, such testimony was offered only insofar as it allegedly illustrated Phillips's pattern of concealing his assets from his bankruptcy creditors.[7] RTC sought to show that Phillips had pocketed part of

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[7] See Trial Testimony of Charles to Phillips on July 15, 1991, Record on Appeal at Tab 46 Exhibit B; Closing Arguments of Mary Wilson and William King on July 16, 1991, Record Excerpts at

the proceeds of the Hardin loan himself and had funneled part to Harvin Moore as co-owner with Phillips of Initially Ours, Inc. Phillips's actions allegedly concealed this "property of the debtor's estate" from his creditors. The bankruptcy court opinion, however, never refers to the kickbacks.[8] Rather, the bankruptcy court only determined that the RTC failed to prove an intent on Phillips's part to defraud his creditors by testifying falsely or concealing assets. The court's findings and conclusions do not explicitly hold that Phillips did or did not engage in kickbacks, nor do they hold that Hardin knew or did not know of the scheme.[9]

The issue of Phillips's conduct in obtaining the loan from Hardin was not an essential issue in RTC's adversary proceeding. The present indictment, by contrast, does not center on Phillips's intent to defraud his bankruptcy creditors. Instead, it alleges bank fraud, bank bribery, money laundering, and false statements to Hardin, a different lender than his bankruptcy creditors. Because the issues that are actually litigated and necessary to decision in the bankruptcy and criminal cases are different, the doctrine of collateral estoppel does not apply.

Tab 10; Memorandum in Support of Taking the Deposition of Randy Kehrli, Record Excerpts at Tab 8; Amended Complaint to Deny Discharge and/or Dischargeability of Claim, Record on Appeal at Tab 46 Exhibit C.

[8] See Judgment and Memorandum Opinion RTC v. Phillips, October 1, 1991, Record on Appeal at Tab 46 Exhibit D.

[9] Id.

C.

Ferguson claims that because collateral estoppel should bar the prosecution of Phillips, it should equally bar his prosecution. As we have found that collateral estoppel does not preclude the prosecution of Phillips, it is no bar to Ferguson's prosecution.

CONCLUSION

We conclude that neither the double jeopardy clause nor collateral estoppel forbids the government from prosecuting Phillips and Ferguson under the present indictment. We, therefore, **AFFIRM** the denial of the appellants' motions to dismiss.