

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8618
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SEYED JAFAR ALLAGE,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-93-CR-27

- - - - -
(November 16, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Seyed Jafar Allage argues that the district court was "collaterally estopped from ordering the specific restitution of [Allage's] property in Del Rey [sic] Beach, Florida," because John Hans Muehlbauer had previously sued Allage for return of the property in a Florida state court and was unsuccessful. Allage concedes that the district court record "offers insufficient evidence of the Florida court proceeding to support a finding that the district court's restitution order was not collaterally estopped by a prior state court proceeding," but contends,

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

without citation of pertinent authority, that because the Government moved the court for specific restitution of the Florida property, the district court was obligated to raise sua sponte the question whether the Florida proceeding collaterally estopped it from imposing the penalty sought by the Government.

Appellant's assertion is without arguable merit and thus frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). The burden is on the defendant, not the court, to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. Dowling v. United States, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990); see also United States v. Giarratano, 622 F.2d 153, 156 n.4 (5th Cir. 1980). Because Allage did not provide the district court with any evidence to support his contention that issue preclusion barred the award, there is no basis on which to conclude that the district court abused its discretion in specifically awarding the property to Muehlbauer as part of Allage's restitution.

DISMISSED.