

Cause No. PD-0792-17

In the Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
9/6/2017
DEANA WILLIAMSON, CLERK

The State of Texas,
Appellant

v.

Amanda Waters,
Appellee

On Petition for Discretionary Review from the Court of Appeals, Second District
In Cause No. 02-16-00274-CR

The State's Petition for Discretionary Review

Maureen Shelton

Wichita County Criminal District Attorney

Jennifer Ponder

Asst. Criminal District Attorney
Wichita County, Texas
State Bar No. 24083676
Jennifer.Ponder@co.wichita.tx.us

John Gillespie

First Asst. Criminal District Attorney
Wichita County, Texas
State Bar No. 24010053
John.Gillespie@co.wichita.tx.us

John Brasher

Special Prosecutor for the State
Wichita County, Texas
State Bar No. 02907800
brasherappeals@gmail.com

Dean Godfrey

Asst. Criminal District Attorney
Wichita County, Texas
State Bar No. 24082436
Dean.Godfrey@co.wichita.tx.us

Attorneys for the State
The State of Texas

Oral Argument Not Requested

IDENTITY OF THE JUDGE, PARTIES & COUNSEL

Dean Godfrey
Attorney for the State at Trial
Assistant District Attorney
900 7th Street, Third Floor
Wichita Falls, Texas 76301
Dean.Godfrey@co.wichita.tx.us

Hon. Greg King
Presiding Judge
County Court at Law No. 2, Wichita County
900 7th Street, Rm 353
Wichita Falls, TX 76301
Greg.King@co.wichita.tx.us

Jennifer Ponder
Attorney for the State on Appeal
Assistant District Attorney
900 7th Street, Third Floor
Wichita Falls, Texas 76301
Jennifer.Ponder@co.wichita.tx.us

John Gillespie
Attorney for the State on Appeal
First Assistant District Attorney
900 7th Street, Third Floor
Wichita Falls, Texas 76301
John.Gillespie@co.wichita.tx.us

John Brasher
Special Prosecutor on Appeal
Wichita County, Texas
State Bar No. 02907800
brasherappeals@gmail.com

Amanda Waters, Appellee

Scott Stillson
Attorney for Appellee Trial & Appeal
900 8th Street, Suite 1014
Wichita Falls, Texas 76301
attorney@scottstillsonlaw.com

TABLE OF CONTENTS

Identity of The Judge, Parties & Counsel	2
Table of Contents	3
Index of Authorities	5
Statement Regarding Oral Argument	8
Statement of the Case	8
Statement of Procedural History	9
Ground for Review	10
Whether this Court should explicitly overrule <i>Tarver</i> and the concept of state collateral estoppel since collateral estoppel should not bar the State from prosecuting a criminal offense following to an adverse finding at a probation revocation hearing.	
Statement of Facts	10
Applicable Law	12
Argument	15
I. This Court should explicitly overrule <i>Tarver</i> because it is not good law and it has created substantial confusion within the courts.	15
A. <i>Tarver</i> is no longer good law.	15
1. <i>Tarver</i> was decided under federal collateral estoppel.	15
2. Federal collateral estoppel does not apply in fact scenarios like this case.	16
a. Fifth Circuit.....	17
b. Other Court Interpretation of Federal Collateral Estoppel.....	18

3. This Court has implicitly overruled <i>Tarver</i> ; now it is time to explicitly overturn it.....	19
a. Assuming <i>Tarver</i> created state collateral estoppel, this Court should explicitly overturn it.	20
b. This Court should not create state collateral estoppel because the integrity of the juridical system depends upon a correct determination of guilt or innocence using a higher burden of proof than probation revocation hearings.	21
Prayer.....	24
Certificate of Compliance.....	25
Certificate of Service.....	25
Appendix A, <i>State v. Waters</i> , No. 02-16-00274-CR, 2017 WL 2877086 (Tex. App.—Fort Worth, Jul. 6, 2017) (not designated for publication)	App 001
Appendix B, Excerpt from Clerk’s Record, Cause 62,998-F.....	App 019
Appendix C, Defense Exhibit No. 3: Reporter’s Record of Revocation Hearing, Cause 62,998-F.....	App 031

INDEX OF AUTHORITIES

Federal Cases

<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970).....	15
<i>Jonas v. Wainwright</i> , 779 F.2d 1576 (11th Cir. 1986).....	18
<i>Jones v. United States</i> , 669 A.2d 724 (D.C. 1995)	18, 20
<i>Lockhart v. Fretwell</i> , 506 U.S. 364 (1993) (Thomas, J., concurring)	17
<i>Showery v. Samaniego</i> , 814 F.2d 200 (5th Cir. 1987)	passim
<i>Stringer v. Williams</i> , 161 F.3d 259 (5th Cir. 1998)	13, 17, 19, 20
<i>United States v. Miller</i> , 797 F.2d 336 (6th Cir. 1986)	18

Texas Cases

<i>Barnett v. State</i> , 615 S.W.2d 220 (Tex. Crim. App. 1981).....	15
<i>Davenport v. State</i> , 574 S.W.2d 73 (Tex. Crim. App. 1978)	15
<i>Dedrick v State</i> , 623 S.W.2d 332 (Tex. Crim. App. 1981).....	15
<i>Doan, Ex parte</i> , 369 S.W.3d 205 (Tex. Crim. App. 2012).....	passim
<i>Ex parte Doan</i> , 369 S.W.3d 205 (Tex. Crim. App. 2012) (Keller, P.J., dissenting)	14, 16, 19, 20
<i>Flournoy v. State</i> , 589 S.W.2d 705 (Tex. Crim. App. 1979).....	16
<i>Furrh v. State</i> , 582 S.W.2d 824 (Tex. Crim. App. 1979).....	16
<i>King v. State</i> , 649 S.W.2d 42 (Tex. Crim. App. 1983).....	16
<i>McDonald v. State</i> , 608 S.W.2d 192 (Tex. Crim. App. 1982).....	15
<i>Reynolds v. State</i> , 4 S.W.3d 13 (Tex. Crim. App. 1999)	16, 17
<i>Rogers v. State</i> , 640 S.W.2d 248 (Tex. Crim. App. 1982).....	15

<i>State v. Waters</i> , No. 02-16-00274-CR, 2017 WL 2877086 (Tex. App.—Fort Worth, Jul. 6, 2017) (not designated for publication).....	9
<i>Tarver, Ex parte</i> , 725 S.W.2d 195 (Tex. Crim. App. 1986).....	11, 12, 15, 16
<i>Whisenant v. State</i> , 557 S.W.2d 102 (Tex. Crim. App. 1977).....	15
<i>York v. State</i> , 342 S.W.3d 528 (Tex. Crim. App. 2011).....	16
Other State Cases	
<i>Byrd v. People</i> , 58 P.3d 50 (Colo. 2012).....	18, 20, 21
<i>Commonwealth v. Cosgrove</i> , 629 A.2d 1007 (Pa. Super. Ct. 1993), <i>appeal denied</i> 648 A.2d 786 (Pa. 1993).....	19, 20, 21
<i>Commonwealth v. Massi</i> , No. 98 EDA 2014, 2016 WL 2955577 (Pa. Super. Ct., May 19, 2016), <i>appeal denied</i> 151 A.3d 1152 (Pa. 2017) (not designated for publication).....	19
<i>Commonwealth v. States</i> , 938 A.2d 1016 (Pa. 2007).....	22, 24
<i>Coney v. State</i> , 696 S.E.2d 73 (Ga. Ct. App. 4th Div. 2010).....	18, 20
<i>Green v. State</i> , 463 So.2d 1139 (Fla. 1985).....	18
<i>Johnson v. State</i> , 235 S.E.2d 550 (Ga. Ct. App. 1977).....	18, 21
<i>Krochta v. Commonwealth</i> , 711 N.E.2d 142 (Mass. 1999).....	18, 20, 21
<i>People v. Bone</i> , 412 N.E.2d 444 (Ill. 1980), <i>cert. denied</i> , 454 U.S. 839, <i>overruled in part by People v. Colon</i> , 866 N.E.2d 207, 219-24 (Ill. 2007).....	20
<i>People v. Fagan</i> , 483 N.Y.S.2d 489 (N.Y. App. 4th Div. 1984).....	21, 22
<i>People v. Fagan</i> , 489 N.E.2d 222 (N.Y. 1985).....	18, 21
<i>People v. Hilton</i> , 745 N.E.2d 381 (N.Y. 2000).....	18, 20
<i>People v. Johnson</i> , 477 N.W.2d 426 (Mich. Ct. App. 1991), <i>appeal denied</i> Sept. 30, 1991.....	19, 20, 21
<i>People v. Kondo</i> , 366 N.E.2d 990 (Ill. App. Ct. 5th Dist. 1977).....	19

<i>State v. Bradley</i> , 626 P.2d 403 (Or. Cr. App. 1981)	20
<i>State v. Brunet</i> , 806 A.2d 1007 (Vt. 2002)	18, 20, 21
<i>State v. Chase</i> , 588 A.2d 120 (R.I. 1991), <i>overruled by State v. Gautier</i> , 871 A.2d 347 (R.I. 2005)	20
<i>State v. Donovan</i> , 751 P.2d 1109 (Or. 1988)	20
<i>State v. Dupard</i> , 609 P.2d 961 (Wash. 1980)	18, 20, 21
<i>State v. Gautier</i> , 871 A.2d 347 (R.I. 2005)	18, 20, 21, 22
<i>State v. Haagenson</i> , 232 P.3d 367 (Mont. 2010)	18
<i>State v. Jones</i> , 397 S.E.2d 209 (Ga. Ct. App. 1990)	18, 20, 21
<i>State v. McDowell</i> , 699 A.2d 987 (Conn. 1997)	passim
<i>State v. Oliver</i> , 856 So.2d 328 (Miss. 2003)	18, 20, 21
<i>State v. Rebecca B.</i> , 783 N.W.2d 783 (Neb. 2010)	18, 20
<i>State v. Reed</i> , 686 A.2d 1067 (Me. 1996)	18, 20, 21
<i>State v. Terry</i> , 620 N.W.2d 217 (Wis. Ct. App. 2000), <i>pet. denied</i> 929 N.W.2d 783 (Wis. 2001)	19, 20, 21
<i>State v. Williams</i> , 639 P.2d 1036 (Ariz. 1982)	18
<i>Thompson v. Commonwealth</i> , 147 S.W.3d 22 (Ky. 2004), <i>superseded by statute</i> <i>on other grounds Jackson v. Commonwealth</i> , 363 S.W.3d 11 (Ky. 2012)	18

Federal Statutes

28 U.S.C. § 1291	17
28 U.S.C. § 1331	17

Texas Statutes

TEX. CODE CRIM. PRO. art. 42.12	15, 16
---------------------------------------	--------

STATEMENT REGARDING ORAL ARGUMENT

The State believes the issue is adequately briefed, and that the Court would not benefit from oral argument.

STATEMENT OF THE CASE

Appellee was on community supervision for Driving While Intoxicated (“DWI”) over .15 when she was arrested for another DWI. The State then filed a Motion to Revoke Appellee’s community supervision in the original DWI, and an information on Appellee’s new DWI. After a hearing on the State’s Motion to Revoke, the trial court found the allegation of the new DWI offense not true. Not long after, the trial court granted Appellee’s writ of habeas corpus, alleging the State was barred from prosecuting the new DWI under collateral estoppel. The State appealed, and the Second Court of Appeals affirmed the judgment of the trial court. This request for a petition for discretionary review follows.

STATEMENT OF PROCEDURAL HISTORY

While on probation, Appellee was arrested for a new DWI offense, which caused the State to file a Motion to Revoke and a separate information in County Court No. 2 of Wichita County. App B 026–28; C.R. 1:6. At the conclusion of the probation revocation hearing in cause 62,998-F, the trial court found the State’s allegation of the new DWI “not true.” App C 060. After a hearing, the trial court granted Appellee’s Writ of Habeas Corpus, finding that *Ex parte Tarver* controlled and dismissed cause 68,878-F. C.R. 1:57. The State appealed. C.R. 1:58.

On July 6, 2017, the Court of Appeals, Second District ruled in favor of Appellee, holding, “the doctrine of collateral estoppel applies to bar such a relitigation. App A 007, *State v. Waters*, No. 02-16-00274-CR, 2017 WL 2877086, at *3 (Tex. App.—Fort Worth, Jul. 6, 2017) (not designated for publication). No motion for rehearing was filed.

GROUND FOR REVIEW

- I. Whether this Court should explicitly overrule *Tarver* and the concept of state collateral estoppel since collateral estoppel should not bar the State from prosecuting a criminal offense following an adverse finding at a probation revocation hearing. C.R. 1:53, 57.

STATEMENT OF FACTS

Because this case is so intertwined with cause 62,998-F, the State respectfully requests that this Court take judicial notice of the attached court documents from cause 62,998-F in Appendix B.

In cause 62,998-F, the State alleged Appellee operated a motor vehicle while intoxicated with a breath specimen showing an alcohol concentration of 0.15 or more. App B 020. On November 19, 2014, Appellee pled guilty in 62,998-F and was sentenced to one year in jail, probated for eighteen months with additional terms. App B 021. While on probation, the State filed a Motion to Revoke, alleging that Appellee violated her probation by committing another offense—specifically DWI—among other violations. App B 026–28. The State filed an information for Appellee’s new DWI. C.R. 1:6.

At the probation revocation hearing in cause 62,998-F, the State’s only witness was Appellee’s probation officer, who testified that Appellee was arrested for DWI. App C 043, 049. The State did not present further testimony or evidence regarding its

accusation of Appellee's new DWI offense. See Appendix C. At the conclusion of the hearing, the trial court found the State's allegation that Appellee had committed another DWI offense "not true." App C 060; C.R. 1:57.

Appellee filed a pre-trial Writ of Habeas Corpus in this case, alleging the State was precluded from prosecuting her under the doctrine of collateral estoppel, as held in *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986). C.R. 1:33. The trial court agreed, granted Appellee's writ, and dismissed cause 68,878-F, C.R. 1:57, based upon *Ex parte Tarver*. C.R. 1:53.

APPLICABLE LAW

Ex parte Tarver

This Court decided *Tarver* more than thirty years ago. *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986). The fact pattern in *Tarver*, is almost the same as this case (barring the specific offenses and trial court's initial ruling). The applicant was on probation when he was charged by information with an unrelated offense. *Id.* The State attempted to revoke the applicant's probation based upon that same unrelated offense, but the trial court found that new offense untrue. *Id.* The applicant then filed a writ of habeas corpus in the unrelated offense, alleging that trial on the merits subjected the applicant to double jeopardy. *Id.* This Court reversed the trial court's decision and found the State was barred from trying the new offense. *Tarver*, 725 S.W.2d at 196.

The Fifth Circuit

After the *Tarver* Court found that collateral estoppel precluded prosecution of a new offense after a revocation hearing finding that it was not true, *id.* at 197-200, a year later, the United States Court of Appeals for the Fifth Circuit considered the same issue and found the opposite. *Showery v. Samaniego*, 814 F.2d 200, 203 (5th Cir. 1987) (equating a ruling on an appeal bond to rulings on probation or parole revocations). The Fifth Circuit determined that cognizable federal collateral estoppel claims could

not be separated from double jeopardy claims and held that federal collateral estoppel did not preclude a trial on the new offense. *Id.* at 202-04. In 1998, the Fifth Circuit addressed the issue again, and reaffirmed that the United States Constitution did not allow federal collateral estoppel in fact scenarios like this. *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998).

Ex parte Doan

In 2012, this Court held that one county attorney's office is bound in a criminal prosecution by what occurred at a probation revocation by another county attorney's office through *res judicata*. *Ex parte Doan*, 369 S.W.3d 205, 212-13 (Tex. Crim. App. 2012). In reaching this conclusion, the *Doan* majority found that the Double Jeopardy clause did not apply and reasoned that probation revocation hearings are judicial proceedings, not administrative. *Id.* at 212-13. Despite relying solely on federal jurisprudence and acknowledging that no previous Court of Criminal Appeals case had applied collateral estoppel, the *Doan* majority insisted,

[I]t is not obvious whether *Tarver's* holding was based in Constitutional or common law; given *Tarver's* explicit statement that double-jeopardy principles were not implicated in revocation hearings, and given that there were no prior cases from this court applying collateral estoppel, it is possible to read *Tarver* as using the federal cases only as explanations of common-law doctrine.

Doan, 369 S.W.3d at 218 n. 33.

Presiding Judge Keller, in her dissent, stated that the *Doan* Court had implicitly overruled *Tarver*. *Ex parte Doan*, 369 S.W.3d 205, 215 (Tex. Crim. App. 2012) (Keller, P.J., dissenting); *cf. Doan*, 369 S.W.3d at 218 n. 33 (denying that its opinion overruled *Tarver*). Judge Keller argued that by holding that double jeopardy does not apply, but “the two governmental entities are nevertheless the same parties under state law” the *Doan* majority “sidestep[ped] appellant’s argument, [and] overrule[d], *sub silentio*, the holding in *Ex parte Tarver* that double-jeopardy applied to probation revocations.” *Id.*

ARGUMENT

I. This Court should explicitly overrule *Tarver* because it is not good law and it has created substantial confusion within the courts.

A. *Tarver* is no longer good law.

1. *Tarver* was decided under federal collateral estoppel.

The *Tarver* Court explained collateral estoppel using United State Supreme Court and federal circuit court case law and applied the *Ashe v. Swenson*¹ test to reach its conclusion. See *Tarver*, 725 S.W.2d at 198–199 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Dedrick v State*, 623 S.W.2d 332, 336 (Tex. Crim. App. 1981) (quoting *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979))). Although the *Tarver* Court referred to some Texas specific cases, those citations alternatively:

(1) referred to federal law;²

(2) addressed party arguments;³ or,

(3) explained the state law context for the application of federal collateral estoppel.⁴

¹ *Tarver*, 725 S.W.2d at 199 (stating “we must determine whether the *Ashe v. Swenson* test was met.”).

² *Id.* at 198–99 (using *Dedrick*, 623 S.W.2d at 336, which quotes *Mock*, 604 F.2d 341).

³ *Id.* at 197–98 (addressing the State’s argument using *Davenport v. State*, 574 S.W.2d 73 (Tex. Crim. App. 1978)).

⁴ *Id.* at 197 n.2 (citing to *McDonald v. State*, 608 S.W.2d 192 (Tex. Crim. App. 1982) to explain the reverse of the fact scenario at hand); *id.* at 198 (using *McDonald*, 608 S.W.2d at 198 and *Barnett v. State*, 615 S.W.2d 220, 222 (Tex. Crim. App. 1981) to show that the trial court is the sole trier of fact at probation revocations); *id.* at 199 (quoting *Whisenant v. State*, 557 S.W.2d 102, 104 (Tex. Crim. App. 1977) to show that courts, not administrative agencies supervise probation); *id.* at 199–200 (explaining that the trial court’s refusal to revoke probation was a final judgment using TEX. CODE CRIM. PRO. art. 42.12; *Rogers v. State*, 640 S.W.2d 248, 263 (Tex. Crim. App. 1982)); *id.* at 200 (expounding upon the great amount

This Court has indicated it is unsure *Tarver* created state collateral estoppel. See *Reynolds*, 4 S.W.3d at 21 n. 18 (citations omitted) (acknowledging the question and refusing to address it); *Doan*, 369 S.W.3d at 212 n. 33 (stating, “it is possible to read *Tarver* as using the federal cases only as explanations of common-law doctrine.”).

2. *Federal collateral estoppel does not apply in fact scenarios like this case.*

Double jeopardy protections only apply if jeopardy attaches. *Id.* at 219; *York v. State*, 342 S.W.3d 528, 551 & n. 151 (Tex. Crim. App. 2011). Jeopardy attaches to a final conviction for a particular offense. *Doan*, 369 S.W.3d at 219 (Keller, P.J., dissenting). Although the *Tarver* Court held that “basic double jeopardy protections would not be violated” because the applicant would not technically be placed in jeopardy for the same offense, it found that the doctrine of collateral estoppel barred the State from prosecuting the new offense. *Id.* at 197–200. Subsequent analysis performed by this Court made it clear that the *Tarver* Court ultimately found that double jeopardy attached because otherwise, *Tarver* could not have “decided the ‘narrow’ circumstances of that case implicated ‘one of the risks’ against which the double jeopardy clause

of discretion trial courts have regarding probation revocation hearings using TEX. CODE CRIM. PRO. art. 42.12 § 8(a); *Flournoy v. State*, 589 S.W.2d 705, 707 (Tex. Crim. App. 1979); *Furrh v. State*, 582 S.W.2d 824 (Tex. Crim. App. 1979); *King v. State*, 649 S.W.2d 42, 46 (Tex. Crim. App. 1983)). This Court has indicated it is unsure *Tarver* created state collateral estoppel. See *Reynolds v. State*, 4 S.W.3d 13, 21 n. 18 (Tex. Crim. App. 1999) (citations omitted) (acknowledging the question and refusing to address it); *Doan*, 369 S.W.3d at 212 n. 33 (stating, “it is possible to read *Tarver* as using the federal cases only as explanations of common-law doctrine.”).

protects” nor could it “have applied federal constitutional collateral estoppel principles under *Ashe*.” *Reynolds*, 4 S.W.3d at 20–21. Even this Court has recognized, “the reader might note that though the defendant in *Tarver* won in state court, he would have lost in federal court for failure to state a federal constitutional claim.” *Id.* at 20 n. 17 (citing *Showery*, 814 F.2d at 203–04).

a. Fifth Circuit

The Fifth Circuit is charged with interpreting federal law, and Texas falls within its purview. 28 U.S.C. §§ 1291, 1331.⁵ Twice since *Tarver*, the Fifth Circuit has reached the opposite conclusion of the *Tarver* Court when addressing circumstances where defendants sought to bar future prosecution of an offense based upon a favorable ruling from an earlier hearing. *Stringer*, 161 F.3d at 261–62; *Showery*, 814 F.2d at 201–04.

In each case, the Fifth Circuit held that because a defendant is not at risk for jeopardy at parole and probation revocation proceedings, the double jeopardy clause does not apply. *Stringer*, 161 F.3d at 262; *Showery*, 814 F.2d at 202. The Fifth Circuit explicitly refused to find that federal collateral estoppel existed independent from the double jeopardy clause. *Stringer*, 161 F.3d at 262; *Showery*, 814 F.2d at 203.

⁵ Although, a state court’s interpretation of federal law is no less authoritative than a federal court of appeals. *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring).

b. Other Court Interpretation of Federal Collateral Estoppel

Twenty-three jurisdictions disagree with *Tarver*.⁶ The following jurisdictions held that double jeopardy protections were not implicated—therefore, federal collateral estoppel did not apply⁷—in circumstances similar to this case:

- the Sixth and Eleventh Federal Circuit Courts;⁸
- the District of Columbia Court of Appeals;⁹
- the courts of last resort in Arizona, California, Colorado, Connecticut, Florida, Kentucky, Massachusetts, Michigan; Mississippi, Montana, Nebraska, New York, Rhode Island, Vermont, and Washington;¹⁰ and,
- intermediate courts in Georgia, Maine, Michigan, Pennsylvania, and Wisconsin.¹¹

⁶ *Infra*, nn. 8–10.

⁷ Not all courts reached the issue of federal collateral estoppel, or moved straight to state estoppel.

⁸ *United States v. Miller*, 797 F.2d 336 (6th Cir. 1986) (parole and probation revocation proceedings); *Jonas v. Wainwright*, 779 F.2d 1576 (11th Cir. 1986) (parole revocation).

⁹ *Jones v. United States*, 669 A.2d 724, 727 (D.C. 1995) (supervised release).

¹⁰ *State v. Williams*, 639 P.2d 1036 (Ariz. 1982) (probation revocation); *Lucido v. Superior Court*, 795 P.2d 1223 (Cal. 1990), *cert. denied*, 500 U.S. 920 (1991) (probation revocation); *Byrd v. People*, 58 P.3d 50 (Colo. 2012) (probation revocation); *State v. McDowell*, 699 A.2d 987 (Conn. 1997) (probation revocation); *Green v. State*, 463 So.2d 1139 (Fla. 1985) (probation revocation); *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004), *superseded by statute on other grounds Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012) (regarding punishment and the application of the death penalty); *State v. Reed*, 686 A.2d 1067 (Me. 1996) (probation revocation); *Krochta v. Commonwealth*, 711 N.E.2d 142 (Mass. 1999) (probation revocation); *State v. Oliver*, 856 So.2d 328 (Miss. 2003) (probation revocation); *State v. Haagenson*, 232 P.3d 367 (Mont. 2010) (parole and probation revocation proceedings); *State v. Rebecca B.*, 783 N.W.2d 783 (Neb. 2010) (juvenile probation revocation); *People v. Hilton*, 745 N.E.2d 381 (N.Y. 2000) (probation revocation); *People v. Fagan*, 489 N.E.2d 222 (N.Y. 1985) (parole revocation); *State v. Gautier*, 871 A.2d 347 (R.I. 2005) (probation revocation); *State v. Brunet*, 806 A.2d 1007 (Vt. 2002) (probation revocation); *State v. Dupard*, 609 P.2d 961 (Wash. 1980) (parole revocation).

¹¹ *Coney v. State*, 696 S.E.2d 73 (Ga. Ct. App. 4th Div. 2010) (probation revocation); *State v. Jones*, 397 S.E.2d 209 (Ga. Ct. App. 1990) (probation revocation); *Johnson v. State*, 235 S.E.2d 550 (Ga. Ct. App. 1977) (regarding an attempt to use an acquittal in a criminal trial at a probation revocation hearing);

- Many other cases that had agreed with *Tarver* have been explicitly or implicitly overruled.¹²

Because the double jeopardy clause does not apply to probation revocation proceedings, defendants are not entitled to relief based upon a claim of federal collateral estoppel. *Stringer*, 161 F.3d at 262; *Showery*, 814 F.2d at 203. Because the trial court based its ruling on *Tarver*, this Court should grant discretionary review and explicitly overrule *Tarver*. C.R. 1:53, 57.

3. *This Court has implicitly overruled Tarver; now it is time to explicitly overturn it.*

Five years ago, this Court implicitly overruled *Tarver*. *Doan*, 369 S.W.3d at 215 (Keller, P.J., dissenting) (recognizing that the Court of Criminal Appeals conceded that double jeopardy principles did not apply in a fact scenario similar to *Tarver* thereby implicitly overruling it); *c.f.* *Doan*, 369 S.W.3d at 212 n. 33. Since *Tarver* has been implicitly overruled by this Court, since *Tarver* is thirty years old, and since *Tarver* was

People v. Johnson, 477 N.W.2d 426 (Mich. Ct. App. 1991), *appeal denied* Sept. 30, 1991 (probation revocation); *Commonwealth v. Cosgrove*, 629 A.2d 1007 (Pa. Super. Ct. 1993), *appeal denied* 648 A.2d 786 (Pa. 1993) (probation revocation); *Commonwealth v. Massi*, No. 98 EDA 2014, 2016 WL 2955577 (Pa. Super. Ct., May 19, 2016), *appeal denied* 151 A.3d 1152 (Pa. 2017) (not designated for publication); *State v. Terry*, 620 N.W.2d 217 (Wis. Ct. App. 2000), *pet. denied* 929 N.W.2d 783 (Wis. 2001).

¹² *Chase*, 588 A.2d at 120–24; *People v. Bone*, 412 N.E.2d 444 (Ill. 1980), *cert. denied*, 454 U.S. 839, *overruled in part by People v. Colon*, 866 N.E.2d 207, 219–24 (Ill. 2007) (basing its decision on *People v. Grayson*, 319 N.E.2d 43 (Ill. 1974), which was overruled in part by *Dowling v. United States*, 493 U.S. 342); *People v. Kondo*, 366 N.E.2d 990 (Ill. App. Ct. 5th Dist. 1977) (also basing its decision on *People v. Grayson*, 319 N.E.2d 43 (Ill. 1974), which was overruled in part by *Dowling v. United States*, 493 U.S. 342).

decided on federal constitutional basis that the Fifth Circuit has twice since reached the opposite holding, this Court should explicitly overrule *Tarver*.

- a. Assuming *Tarver* created state collateral estoppel, this Court should explicitly overturn it.

Tarver forces Texas to be “out of step with other jurisdictions.”

In her dissent, Presiding Judge Keller pointed out that *Tarver*’s holding forces Texas “out of step with other jurisdictions.” *Doan*, 369 S.W.3d at 216 (Keller, P.J., dissenting). The twenty-three jurisdictions that disagree with the *Tarver* Court’s interpretation of federal collateral estoppel also hold that state collateral estoppel does not apply. Eighteen of these rulings were made after *Tarver* was decided in 1986.¹³

Only a few remaining courts agree with *Tarver*’s holding that collateral estoppel precludes future prosecutions based upon earlier probation revocation hearings.¹⁴ Of those, some cases, state statutory law provided the basis to apply state collateral estoppel. *Donovan*, 751 P.2d at 1111; *State v. Bradley*, 626 P.2d 403, 405 (Or. Cr. App. 1981).

¹³ *Stringer*, 161 F.3d at 259 (1998); *Showery*, 814 F.2d at 200 (1987); *Jones*, 669 A.2d at 724 (1995); *Lucido*, 795 P.2d at 1223 (1990); *Byrd*, 58 P.3d at 50 (2012); *McDowell*, 699 A.2d at 987 (1997); *Coney*, 696 S.E.2d at 73 (2010); *Jones*, 397 S.E.2d at 209 (1990); *Reed*, 686 A.2d at 1067 (1996); *Krochta*, 711 N.E.2d at 142; *Johnson*, 477 N.W.2d at 426 (1991); *Oliver*, 856 So.2d at 328 (2003); *Rebecca B.*, 783 N.W.2d at 783 (2010); *Hilton*, 745 N.E.2d at 381 (2000); *Cosgrove*, 629 A.2d at 1007 (1993); *Gautier*, 871 A.2d at 347 (2005); *Brunet*, 806 A.2d at 1007 (2002); *Dupard*, 609 P.2d at 961 (1980); *Terry*, 620 N.W.2d at 217 (2000).

¹⁴ *Bone*, 412 N.E.2d 444; *State v. Donovan*, 751 P.2d 1109 (Or. 1988); *Chase*, 588 A.2d at 120-24.

- b. This Court should not create state collateral estoppel because the integrity of the juridical system depends upon a correct determination of guilt or innocence using a higher burden of proof than probation revocation hearings.

Out of state jurisdictions that held state collateral estoppel from previous probation revocations should not be applied to preclude subsequent criminal prosecutions fall into three, sometimes overlapping, categories:

1. Courts holding that even assuming underlying elements of state collateral estoppel are satisfied, policy prevents its application;¹⁵
2. Courts relying on the differences between probation revocation hearings and criminal trials to preclude state collateral estoppel;¹⁶ and,
3. Courts holding that not all elements of state collateral estoppel are met.¹⁷

When determining whether application of state collateral estoppel would result in fairness to both parties and constitute sound judicial policy, courts look to the policies underlying state collateral estoppel: (1) preserving the integrity of the judicial system, (2) promotion of judicial economy, and (3) protection from vexatious litigation.

¹⁵ *Lucido*, 795 P.2d 1226-33; *McDowell*, 699 A.2d at 990-91; *Byrd*, 58 P.3d at 56-59; *Krochta*, 711 N.E.2d at 142-79; *Reed*, 686 A.2d at 1067-69; *Johnson*, 477 N.W.2d 427-29; *Oliver*, 856 So.2d at 328-32; *Fagan*, 489 N.E.2d at 222; *Fagan*, 483 N.Y.S.2d at 491-93; *Cosgrove*, 629 A.2d at 1010-11; *Gautier*, 871 A.2d 358-60; *Brunet*, 806 A.2d at 1012-14; *Dupard*, 609 P.2d at 964-65.

¹⁶ *McDowell*, 699 A.2d at 987-90; *Byrd*, 58 P.3d at 55-57; *Krochta*, 711 N.E.2d at 144-55; *Jones*, 397 S.E.2d 210-11; *Johnson*, 235 S.E.2d at 551-53; *Reed*, 686 A.2d at 1069; *Johnson*, 477 N.W.2d at 428-29; *Oliver*, 856 So.2d at 329-32; *Cosgrove*, 629 A.2d at 1008-11; *Gautier*, 871 A.2d at 354-61; *Brunet*, 806 A.2d at 1010-14; *Terry*, 620 N.W.2d at 528-32.

¹⁷ *Byrd*, 58 P.3d at 58-59; *Krochta*, 711 N.E.2d at 145-48; *Terry*, 620 N.W.2d at 218-22.

Lucido, 795 P.2d at 770–71; *Byrd*, 58 P.3d at 54; *Commonwealth v. States*, 938 A.2d 1016, 1020 (Pa. 2007) (citations omitted).

Differing Burdens of Proof & the Integrity of the Judicial System

Probation revocation hearings and criminal trials serve different purposes or public interests. *Lucido*, 795 P.2d at 1229. Criminal trials are the intended forum for determining the guilt or innocence of a defendant in a newly alleged crime. *Id.* at 1230; *McDowell*, 699 A.2d at 991. Probation revocation hearings whether a probationer is a continuing candidate for community supervision. *Doan*, 369 S.W.3d at 212; *Lucido*, 795 P.2d at 1230; *McDowell*, 699 A.2d at 989. The criminal trial process would be undermined by allowing a probation revocation hearing, designed to perform an independent legal and social task, *Lucido*, 795 P.2d at 1232; *McDowell*, 699 A.2d at 991, to preempt a criminal trial. *Lucido*, 795 P.2d at 1230; *McDowell*, 699 A.2d at 990–91; *Fagan*, 483 N.Y.S.2d at 493. A correct determination of guilt or innocence is more important to preserving the integrity of the judicial system than the possibility of inconsistent verdicts between probation revocation hearings and a criminal trial. *Lucido*, 795 P.2d at 1229–30.

Almost all other jurisdictions note that probation revocation proceedings are less formal and provide fewer protections for a defendant. *Lucido*, 795 P.2d at 1227, 1229; *McDowell*, 699 A.2d at 989; *Gautier*, 871 A.2d 359. The quality and quantum of evidence

is different in the two proceedings. Because of the lesser burden at probation revocation hearings, the State may anticipate presenting less, even when there is more; thus, the ultimate fact issue is not exactly the same in both proceedings.

Practical considerations also weigh against applying state collateral estoppel to prosecutions subsequent to probation revocation hearings. Because of the lower burden of proof in probation revocation proceedings, the State has little to no incentive to present its best evidence. *McDowell*, 699 A.2d at 990. Thus, additional evidence could be acquired after the completion of the probation revocation and before the criminal trial. *Id.* In addition, the significant differences between the purposes and procedures of a probation revocation and a criminal trial prevents the State from having a full and fair opportunity to litigate the issue at the prior proceeding.

Judicial Economy

Although the policy of judicial economy weighs in favor of state collateral estoppel, *Lucido*, 795 P.2d at 1232, these efficiencies are outweighed by the “demand for truth,” *McDowell*, 699 A.2d at 991, and “preserving the criminal trial process as the exclusive forum for determining guilt or innocence as to new crimes.” *Lucido*, 795 P.2d at 1232. “The efficiency concerns that drive the collateral estoppel policy on the civil side are not nearly as important in criminal cases because criminal cases involve a public interest that outweighs the economy concerns that undergird the estoppel

doctrine.” *States*, 938 A.2d at 1020 (quoting *Commonwealth v. Holder*, 805 A.2d 499, 508 (Pa. 2002) (Saylor, J., concurring and dissenting) (citation omitted)).

This Court should explicitly overturn *Tarver* because federal collateral estoppel does not apply to similar fact scenarios, this Court has already implicitly overruled *Tarver*, and state collateral estoppel undermines the integrity of the criminal judicial system by substituting probation revocation hearings for criminal trials.

PRAYER

The State prays that the Court of Criminal Appeals grant the State’s Petition for Discretionary Review and reverse the judgment of the Second Court of Appeals and County Court at Law No. 2 of Wichita County, Texas.

Respectfully Submitted,

Maureen Shelton
Criminal District Attorney
Wichita County, Texas

/s/ Jennifer Ponder

Jennifer Ponder
Assistant Criminal District Attorney
Wichita County
Bar No. 24083676
900 7th Street
Wichita Falls, Texas 76301
Jennifer.Ponder@co.wichita.tx.us
Tel.: (940)766-8113

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that this document was produced on a computer using Microsoft Word and contains 3,585 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Jennifer Ponder

Jennifer Ponder

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 6, 2017, I served a copy of the State's Brief on the parties listed below by electronic service and that the electronic transmission was reported as complete. My e-mail address is Jennifer.Ponder@co.wichita.tx.us.

Scott Stillson
Attorney for Appellee Trial & Appeal
900 8th Street, Suite 1014
Wichita Falls, Texas 76301
attorney@scottstillsonlaw.com

State Prosecuting Attorney
information@spa.texas.gov

/s/ Jennifer Ponder

Jennifer Ponder

Appendix A

State v. Waters, No. 02–16–00274–CR, 2017 WL 2877086 (Tex. App.—Fort Worth, Jul. 6, 2017) (not designated for publication)



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00274-CR

THE STATE OF TEXAS

STATE

V.

AMANDA LOUISE WATERS

APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF WICHITA COUNTY
TRIAL COURT NO. 68,878-F

MEMORANDUM OPINION¹

I. INTRODUCTION

The State filed an information charging Appellee Amanda Louise Waters with committing, on October 31, 2015, the offense of driving while intoxicated (DWI). Waters filed "Defendant's Pretrial Application for Writ of Habeas Corpus Seeking Relief By Collateral Estoppel and Double Jeopardy Based on Previous

¹See Tex. R. App. P. 47.4.

Probation Revocation Hearing.” Waters’s pretrial application for a writ of habeas corpus asserted that because the State had previously sought revocation of Waters’s community supervision based on her alleged commission of a new offense—the October 31, 2015 DWI the State was now attempting to prosecute her for—and because the trial court made a finding that the community-supervision-violation allegation that Waters had committed a DWI on October 31, 2015 was “not true,” the State’s prosecution of her for this offense was collaterally estopped. The trial court granted Waters’s pretrial application for writ of habeas corpus, ruled that collateral estoppel applied to bar the State from prosecuting Waters for the Wichita County DWI occurring on October 31, 2015, and dismissed the case.

The State perfected this appeal. In a single issue, the State asserts that its prosecution of Waters for the October 31, 2015 DWI is not barred by collateral estoppel because *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986) (op. on PDR), is no longer good law.² Because *Tarver* remains good law and is binding on this court, we will affirm.

²The State asserts: “This Court is not bound to follow *Ex parte Tarver* because it is no longer good law.” [Internal footnote with citation omitted.]

II. BACKGROUND³

In the order granting Waters's application for writ of habeas corpus, the trial court set forth the following findings of fact and conclusions of law, which are not challenged on appeal:

1. On December 23, 2015, the Wichita County District Attorney's Office, hereinafter DAO, filed a motion to revoke community supervision in cause number 62,988-F, styled *The State of Texas v. Amanda Louise Waters*, which contained an allegation that Defendant had violated term 1 of her community supervision by committing a new offense.

2. Specifically, the DAO alleged that on or about October 31, 2015, in Wichita County, Texas, Waters operated a motor vehicle in a public place while intoxicated.

3. On February 18, 2016, the Court called cause number 62,998-F for a hearing on the DAO's motion to revoke Defendant's community supervision.

4. The DAO called only one witness, community supervision officer Garon Jetton, to testify at the hearing.

5. Officer Jetton had no personal knowledge of the DWI alleged to have been committed by Defendant in the DAO's motion to revoke community supervision.

6. Jetton was only able to testify that Waters had been arrested for DWI.

7. The Court has previously found that the DAO's allegation that Waters had committed a DWI in Wichita County, Texas, on October 31, 2015, the alleged violation of Term One, to be "not true"

³To the extent the State has attached items to its brief that are not included in the appellate record before us, we cannot consider them. See, e.g., *Rasberry v. State*, 535 S.W.2d 871, 873 (Tex. Crim. App. 1976) (explaining court could not consider documents attached to brief but not included in appellate record).

based on the State's failure to prove its case by a preponderance of the evidence at the hearing on February 18, 2016.

**III. TARVER REMAINS GOOD LAW; COLLATERAL ESTOPPEL BARS
THE STATE FROM PROSECUTING WATERS FOR THE OCTOBER 31, 2015 DWI**

Tarver holds that when an issue of ultimate fact has been found adversely to the State in a valid and final judgment between the same parties, then the doctrine of collateral estoppel bars relitigation of that issue. *Id.* at 198, 200. In *Tarver*, a motion to revoke probation alleged commission of a new offense as a probation violation, asserting that Tarver did “unlawfully, intentionally[,] and knowingly cause bodily injury to Anthony D. Appolito, hereafter styled the Complainant, by striking the Complainant with his fist and kicking the Complainant with his feet.” *Id.* at 198. At the probation revocation hearing, the district court found this alleged probation violation to be “not true.” *Id.* The State subsequently filed an information in the county criminal court at law charging Tarver with assault using “the identical language” alleged in the motion to revoke. *Id.* After determining that the probation revocation decision of the district court was a final judgment, the court of criminal appeals held, “[T]he issue of whether [Tarver] committed the particular assault alleged in the information has been found adversely to the State, and the doctrine of collateral estoppel bars relitigating that issue in the county criminal court at law prosecution.” *Id.* at 199, 200.

Relying on the dissenting opinion in *Ex parte Doan*, 369 S.W.3d 205, 215 (Tex. Crim. App. 2012) (Keller, P.J., dissenting), the State contends that the

Texas Court of Criminal Appeals has implicitly overruled *Tarver*. The majority opinion in *Doan*, responding to the dissenting opinion, expressly stated in a footnote that it was not overruling *Tarver*: “The dissent states that we are ‘overrul[ing], *sub silentio*, the holding in *Ex parte Tarver* We are not overruling *Tarver*.” *Id.* at 212 n.33. The State has not cited, and we have not located, any case from the Texas Court of Criminal Appeals or the United States Supreme Court overruling *Tarver*.⁴ *Tarver* therefore remains good law, and we are bound to apply it to the present facts. See Tex. Const. art. V, § 5(a) (providing that Texas Court of Criminal Appeals is final authority for interpreting criminal law in Texas).

Here, the charged allegation that the State now seeks to prove—that Waters committed DWI on or about October 31, 2015, in Wichita County—has already been resolved adversely to the State in a final judgment from a probation revocation hearing. That hearing was before a county court at law judge acting as the finder of fact, and the trial court found the allegation to be “not true.” Because the State is now attempting to relitigate with the same parties the same

⁴The State asserts that two Fifth Circuit cases have held that the “United States Constitution’s federal collateral estoppel [does] not preclude a trial on the new offense” following a finding at a revocation hearing that the new offense was not true. We have reviewed the cases cited by the State, and they do not criticize or explicitly overrule *Tarver*. And the holdings of the Fifth Circuit, in any event, are not binding on the Texas Court of Criminal Appeals or this court. See *Stewart v. State*, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 866 (1985); see, e.g., *Lopez v. State*, 860 S.W.2d 938, 943 (Tex. App.—San Antonio 1993, no pet.).

fact issue that was already resolved adversely to the State—whether Waters committed DWI on or about October 31, 2015, in Wichita County—the doctrine of collateral estoppel applies to bar such a relitigation. See, e.g., *Tarver*, 725 S.W.2d at 198, 200.

We overrule the State’s sole issue.⁵

IV. CONCLUSION

Having overruled the State’s sole issue, we affirm the trial court’s “Order Granting Defendant’s Application For Writ Of Habeas Corpus” in its entirety.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, GABRIEL, and SUDDERTH, JJ.

SUDDERTH, J., filed a dissenting opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

⁵The dissent draws a distinction between a trial court’s “not true” finding on a ground alleged as a violation of a defendant’s probation that is made after the State presents evidence and a trial court’s “not true” finding made after the State fails to present any evidence or presents insufficient evidence, claiming the holding in *Tarver* applies to the former but not to the latter. This distinction does not exist. By making a “not true” finding—a finding that the State failed to meet its burden to prove the alleged probation revocation ground by a preponderance of the evidence—whether the State presents evidence or presents insufficient evidence has no impact on the preclusive, collateral-estoppel effect of the “not true” finding under *Tarver*. See, e.g., *Jaime v. State*, 81 S.W.3d 920, 927 (Tex. App.—El Paso 2002, pet. ref’d) (holding that *Tarver* precluded subsequent prosecution for offense trial court found “not true” at probation revocation when State failed to introduce any evidence of offense).

DELIVERED: July 6, 2017



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00274-CR

THE STATE OF TEXAS

STATE

V.

AMANDA LOUISE WATERS

APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF WICHITA COUNTY
TRIAL COURT NO. 68,878-F

DISSENTING MEMORANDUM OPINION¹

I agree with the majority that we are bound by *Ex parte Tarver*, but I do not agree that *Tarver* demands this result. 725 S.W.2d 195 (Tex. Crim. App. 1986). For that reason, I respectfully dissent.

In its Motion to Revoke Community Supervision, the State sought revocation of Waters's community supervision on five grounds:

¹See Tex. R. App. P. 47.4.

In violation of said terms and conditions of said probation, [Waters]:

1. Committed an offense against the laws of the State of Texas. Specifically on or about October 31, 2015 in Wichita County, Texas, [Waters] did then and there operate a motor vehicle in a public place while [she] was intoxicated [(DWI)];
10. [Waters] is in arrears 3 hours of Community Service Restitution;
- 11b. [Waters] failed to pay the Court Costs incurred herein . . . ;
- 12b. [Waters] failed to pay the Supervision Fee . . . ; [and]
- 12c. [Waters] failed to pay the Crime Stoppers Fee

By the time of the hearing, Waters had paid court costs, the supervision fee, and the Crime Stoppers fee, and the two remaining matters to be adjudicated were items 1 and 10—whether she had committed a DWI on October 31 and whether she was in arrears on her community service restitution.

At the hearing, the State called only one witness—Garon Jetton, Waters’s former probation officer—who took the position that Waters violated the first term of her probation, “not to commit another offense against the laws of this State or any other state or of the United States,” when she was arrested for DWI on October 31, 2015, because, from the probation department’s perspective, an arrest was tantamount to a conviction. Jetton testified:

Q: Mr. Jetton, it’s only a crime to commit an offense, not a crime to be accused of an offense; is that correct?

A: Well I guess the Court would look at that. We don’t look at it that way from a probation department.

Q: Were you at the scene on October 31st, 2015, when this allegation of DWI happened? Were you - - were you the arresting officer in this case?

A: No, sir.

On re-direct, Jetton testified:

Q: You said earlier that probation sees getting arrested on suspicion of DWI as an offense in probation; is that correct?

A: Yes, sir.

Q: And that would be breaking the terms of community supervision, right?

A: Yes, sir.

And then on recross-examination Jetton testified:

Q: So, in other words, you're not here to say whether or not an incident happened, you're here to say that someone got arrested for it?

A: Yes, sir.

The State later argued, “[A]t the end of the day there is still a DWI pending in the District Attorney’s Office [DAO], a second one, and probation’s rules make it pretty clear that a DWI, getting arrested for that is still an offense and could revoke your probation.” Immediately after that argument, the court announced:

. . . [T]he Court is going to find that the alleged violation; number one, is not true.

When the State alleges a new offense, they have to prove that. Now they don’t have to prove it beyond a reasonable doubt. They could have brought the officers involved in this case to court, and they would not have to prove it to a jury, they just have to prove it to me by what’s called a preponderance of the evidence; that

makes their jobs easier, but the fact that a person is arrested is insufficient to prove a new offense and so that one I will find not true.

Tarver was decided on markedly different facts. In *Tarver*, “a full hearing was held in the district court on the motion to revoke probation”:

The State called three witnesses, including the alleged complainant of the assault. After the State rested, defense counsel immediately moved that the court “find the allegation not true. I have witnesses and am prepared to go forward, but I believe it is my obligation to urge this motion just as though we were in trial . . .” Defense counsel asserted that the State had offered no “clear and convincing proof” that a crime had been committed, and again moved the court to enter a finding of not true. After hearing argument from the State the trial court granted that defense motion, adding, “I find the evidence in this case to be totally incredible.”

Id. at 198. At the habeas hearing in the subsequent criminal prosecution for assault, both sides stipulated that the complainant would testify again at trial, and that “his testimony in the assault case . . . would be the same as that testimony given . . . in the hearing on the Motion to Revoke Probation.” *Id.* On these facts, the court of criminal appeals held that the State was barred from relitigating the assault at the criminal trial. In so doing, however, the court cautioned, “We emphasize the narrowness of this holding,” and explained,

A mere overruling of a State’s motion to revoke probation is not a fact-finding that will act to bar subsequent prosecution for the same alleged offense. A trial court in a motion to revoke probation hearing has wide discretion to modify, revoke or continue the probation. A court may continue or modify the probation even though finding that the allegations in the motion to revoke probation are true. A trial court’s decision either to revoke or continue a probationer’s probation may involve no fact-finding. It is only in the particular circumstances of this case, where the trial court does make a specific finding of fact that the allegation is “not true,” that a fact has been established so as to bar relitigation of that same fact.

Id. at 200 (citations omitted).

While the majority correctly points out that here, after the June 26, 2016 habeas hearing, the trial court made a finding of fact² that it “has previously found . . . the DAO’s allegation that Waters had committed a DWI . . . to be ‘not true’ based on the State’s failure to prove its case by a preponderance of the evidence at the hearing on February 18, 2016,” this is a far cry from the finding in *Tarver*—which was made on directed verdict after a full evidentiary hearing as to the truth of the assault allegation—that the allegation against *Tarver* was “totally incredible.” See *id.* at 198.

First, the findings the majority recites here were made in an order signed four months after the probation revocation proceeding had occurred and after an order had already been signed memorializing the trial court’s decision at the probation revocation hearing. Second, the findings were made—albeit by the same judge—in an entirely separate proceeding. But most importantly, the June 29 findings clearly reflect the absence of a full evidentiary hearing on the issue of whether Waters violated the law by driving while intoxicated on October 31:

²The trial court made the findings recited in the majority’s opinion in its Order Granting Defendant’s Application for Writ of Habeas Corpus, not its prior order signed following the revocation hearing. In its February 18, 2016 Order Continuing Defendant on Community Supervision and Amending Terms of Community Supervision, the trial court merely found that term 10 was violated in that Waters was “in arrears 3 hours of Community Service Restitution,” and that “term 1, term 11b, term 12b and term 12c [were] not true.”

3. On February 18, 2016, the Court called cause number 62,998-F for a hearing on the DAO's motion to revoke [Waters's] community supervision.
4. The DAO called *only one witness*, community supervision officer Garon Jetton, to testify at the hearing.
5. Officer Jetton *had no personal knowledge* of the DWI alleged to have been committed by [Waters] in the DAO's motion to revoke community supervision.
6. Jetton *was only able to testify that Waters had been arrested for DWI*.
7. The Court has previously found that the DAO's allegation that Waters had committed a DWI in Wichita County, Texas, on October 31, 2015, the alleged violation of Term One, to be "not true" *based on the State's failure to prove its case by a preponderance of the evidence* at the hearing on February 18, 2016. [Emphasis added.]

Thus, the trial court made clear in its findings that it never had the opportunity to determine if Waters actually drove while intoxicated on October 31 because all that the State attempted to prove at the revocation hearing regarding that allegation was that she had been accused of that conduct. The State took the position that it need only prove a DWI arrest, not a conviction, in order to prevail. Rather than finding the allegation "not true" based on the litigation of the issue of Waters's guilt or innocence to the DWI charge, the court found the allegation "not true" based on the faulty legal theory advanced by the State.

Here, the record is clear that on that issue all that was litigated at the probation revocation hearing was whether Waters had been arrested for a crime. No attempt was made to prove that she actually committed a crime.

As the court of criminal appeals instructs us, to determine whether collateral estoppel³ bars a subsequent legal proceeding, we must employ a two-

³As explained in *Ex parte Doan*, the issue before us involves collateral estoppel, not res judicata, a distinction that is important in determining the reach to be given a preclusive effect:

In both civil and criminal cases, “*res judicata*” is sometimes used as a broad term to describe both claim preclusion and issue preclusion, but at other times, the term is used in a more narrow sense to refer only to claim preclusion, leaving the concept of issue preclusion to be described as “collateral estoppel.”

. . . .

And the question before us is one of issue preclusion, not claim preclusion. Whether a person should be convicted of a crime and whether his probation should be revoked are separate claims. On the other hand, whether a crime was committed is merely an issue that might arise in a probation revocation context. So, here, we are concerned with collateral estoppel.

369 S.W.3d 205, 221–22 (Tex. Crim. App. 2012) (Keller, P.J., dissenting). Although the court of criminal appeals has yet to definitively articulate the differing standards of proof between res judicata and collateral estoppel in the criminal context, since the doctrine of res judicata has its genesis in civil law, where the criminal standards are unclear, I would be guided by the standards as set forth by the Texas Supreme Court in the civil context. See *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194 (1970) (pointing out, generally, that collateral estoppel was “first developed in civil litigation”).

In civil cases, res judicata has broader application than collateral estoppel. It bars the litigation of claims that were *actually litigated* as well as those that *should have been litigated*, as long as the claims arose out of the same transaction. *Igal v. Brightstar Info. Tech. Grp.*, 250 S.W.3d 78, 86 (Tex. 2008) (emphasis added), *superseded by statute on other grounds*, Tex. Lab. Code Ann. § 61.051(c) (West Supp. 2016). However, collateral estoppel, or issue preclusion, is more restricted and bars only the relitigation of a specific issue already decided in an earlier case, focusing specifically on what was both actually litigated and essential to the judgment. *Van Dyke v. Boswell, O’Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985). For collateral estoppel to

step analysis to “determine: (1) exactly what facts were ‘necessarily decided’ in the first proceeding, and (2) whether those ‘necessarily decided’ facts constitute essential elements of the offense in the second trial.” *Ex parte Taylor*, 101 S.W.3d 434, 440 (Tex. Crim. App. 2002) (en banc) (quoting *Neal v. Cain*, 141 F.3d 207, 210 (5th Cir. 1998)). The court further cautions us that in that endeavor we must review the entire record—“with realism and rationality”—to determine the precise facts or combination of facts that the factfinder “necessarily decided.” *Id.* at 441 (quoting *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194 (1970)). Such inquiry “must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings,” *Ashe*, 397 U.S. at 444, 90 S. Ct. at 1194, and with a focus on the facts that were actually litigated in the prior proceeding –

In each case, the entire record—including the evidence, pleadings, charge, jury arguments, and any other pertinent material—must be examined to determine precisely the scope of the [factfinder’s] factual findings. In one case, for example, a jury’s acquittal might rest upon the proposition that the defendant was “not intoxicated,” while in another, that same verdict might rest upon the narrower proposition that the defendant was “not intoxicated” by a particular substance, but he might well have been intoxicated by a different substance. Generally, then ***the scope of the facts that were***

apply, the same facts sought to be litigated in the second suit must have been “fully litigated” in the first suit, and they must have been “essential to the judgment,” meaning that if the original judgment could be independently supported on more than one determination, neither determination would be essential to the judgment. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 522 (Tex. 1998) (op. on reh’g) (referencing Restatement (Second) of Judgments § 27 cmt. i (1982)), *superseded on other grounds*, by Tex. Fin. Code Ann. § 304.1045 (West 2016).

actually litigated determines the scope of the factual finding covered by collateral estoppel.^[4]

Taylor, 101 S.W.3d at 442 (emphasis added).

Applying these standards to the case here, I would hold that Waters’s guilt or innocence as to the October 31 DWI charge was not actually litigated during the probation revocation hearing and would hold that the State is not barred from prosecuting Waters on the October 31 DWI charge.

For these reasons, I respectfully dissent.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

⁴The application of collateral estoppel in the civil context is similar to the criminal standard as expressed in *Taylor*. In the civil context, collateral estoppel will only bar the relitigation of a specific issue that was “fully and fairly litigated” in the first suit in which the parties were cast as adversaries and that was “essential to the judgment.” *Sysco Food Servs. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994). Applying the civil standard to the facts here, the issue of whether Waters committed the offense of DWI would have been neither fully litigated, as explained above, nor essential to the judgment. As to the latter element, a trial court enjoys “wide discretion to modify, revoke or continue the probation” in its judgment following a revocation hearing. *Tarver*, 725 S.W.2d at 200. Here, along with the one finding of “not true” to term 1, the trial court made four other findings—a “true” finding as to term 10 and “not true” findings as to terms 11b, 12b, and 12c—any of which could have supported the trial court’s decision to continue Waters’s community supervision. See *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 722 (Tex. 1990) (op. on reh’g) (“If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result,” collateral estoppel does not bar relitigation of either issue standing alone) (quoting Restatement (Second) of Judgments § 27 cmt. (i) (1982)).

DELIVERED: July 6, 2017

Appendix B
Excerpt from Clerk's Record
Cause 62,998-F

MAR 19 2014

CAUSE NUMBER: 10-9292-M14-62998-F

LORI BOHANNON, County Clerk
Wichita County, Texas
By ACS DEPUTY

DEFENDANT: AMANDA LOUISE WATERS
ADDRESS: 610 MAGNOLIA BURKBURNETT, TX
76354

RACE: WHITE (CAUCASIAN)
SEX: Female

CHARGE: DRIVING WHILE INTOXICATED BAC >= 0.15

AGE: 27

COMPLAINANT: PAREDON, JOSE

DOB: 11/14/1986

FILING AGENCY: BURKBURNETT PD

ARREST DATE: 01/31/2014

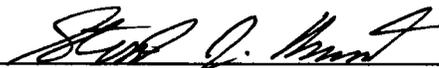
INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

Before me, the undersigned Assistant Criminal District Attorney of Wichita County, Texas, in behalf of the State of Texas, and presents in and to the COUNTY COURT AT LAW 2 of Wichita County, Texas that in Wichita County, Texas, AMANDA LOUISE WATERS, hereinafter called defendant, on or about the 31st day of January, A.D. 2014, in said county and state did then and there operate a motor vehicle in a public place while the said defendant was intoxicated.

And it is further presented in and to said Court that at the time of performing an analysis of a specimen of the defendant's breath, the analysis showed an alcohol concentration level of 0.15 or more.

AGAINST THE PEACE AND DIGNITY OF THE STATE.


Assistant Criminal District Attorney Wichita County,
Texas

FILED FOR RECORD
AT: 500 O'Clock P M

NOV 19 2014

Cause No. 10-9292-62998-F

LORI BOHANNON, County Clerk
Wichita County, Texas
By [Signature] Deputy

THE STATE OF TEXAS

§
§
§

IN THE COUNTY COURT AT

V.

LAW # 2 OF

AMANDA LOUISE WATERS
Defendant

WICHITA COUNTY, TEXAS

JUDGMENT AND ORDER OF COMMUNITY SUPERVISION

On the 19th day of November, 2014, the above numbered and entitled cause was called for trial. The State of Texas appeared by and through David Bost, an Assistant Criminal District Attorney of Wichita County, Texas. The Defendant in the above numbered and entitled cause, and whose signature is affixed to this judgment below, appeared in person and by counsel, to wit: REBECCA RUDDY. Both parties announced ready. The Defendant pled **[GUILTY / NOLO CONTENDERE]**, to the offense as charged in the information to wit: DRIVING WHILE INTOXICATED BAC >=0.15, said offense occurring on the 31ST day of JANUARY, 2014 waived a trial by jury and submitted the decision of this cause to the Court.

The Court having heard the information read; the Defendant's plea thereto, and the evidence submitted, finds that the Defendant is guilty of the offense charged in the information, and that the Defendant's punishment should be confinement in the Wichita County Jail for a period of **365** days and a fine of **\$0.00** together with all court costs within the time provided for (see attached terms and conditions of community supervision); however, if the Defendant's financial status changes, the Defendant will notify the Court before the date the fine and court costs become due. By failing to so notify the Court, the Defendant waives his/her claim of indigence.

HOWEVER, it appearing to the Court that before the Defendant's trial herein, the said Defendant applied to the Court in writing (or by agreement of the parties, orally and in open court) for community supervision herein, and it further appearing to the Court that the ends of justice; the best interest of society; and the best interest of the Defendant will be served by granting the Defendant community supervision in this cause, the Court ordered the following to wit:

IT IS THE ORDER OF THE COURT that the imposition of the jail sentence in this cause be, and the same is hereby suspended during the good behavior of the Defendant, and that the Defendant is hereby placed on community supervision in this cause for a period of **EIGHTEEN (18) MONTHS** from this date, on the terms and conditions attached hereto and set out below; a copy of the terms and conditions of community supervision are to be delivered to the probationer by the Clerk on this date.

THE COURT FURTHER FINDS that, in addition to the Defendant's right thumb print and physical description of the said Defendant, as set out below, the said Defendant also acknowledges in writing of his/her receipt on the day of entry thereof, one (1) copy of the above Order, Terms and Conditions of Community Supervision.

SEX: Male/Female; DOB: _____;
Height: _____; Weight: _____;
Race: _____; Hair Color: _____.

[Signature]
Defendant's Signature

JUDGMENT AND ORDER OF COMMUNITY SUPERVISION, PAGE 2
State v. AMANDA LOUISE WATERS, Cause No. 10-9292-62998-F

THE DEFENDANT/PROBATIONER IS HEREBY ORDERED TO:

1. Commit no offense against the laws of this State or of any other State or of the United States;
2. Avoid injurious or vicious habits; completely and totally abstain from the use or possession of all alcoholic beverages, marihuana, narcotics or other habit-forming drugs;
3. Avoid persons or places of disreputable or harmful character, including any place where alcoholic beverages are served, sold or consumed;
4. Report to the supervision officer as directed by the Judge or Community Supervision Office and obey all rules and regulations of the Community Supervision department;
5. Report to the Community Supervision and Corrections Department of Wichita County, Texas, immediately following this hearing and on a day and at a time of each month thereafter as directed by the Wichita County Community Supervision and Corrections Department, during supervision;
6. Submit a urine, saliva, hair, breath, and/or blood sample to the community supervision officer supervising the Defendant to be used for the detection of illicit drugs or alcohol, daily if required, not to exceed five samples per calendar month unless further directed by the Court, at the Community Supervision and Correction Department, 600 Scott Street, Wichita Falls, Texas, or any place of Defendant's incarceration; the urine sample shall be urine from the Defendant's own body submitted at the time the sample is required; the Defendant's urine sample shall be submitted and tested by a procedure approved by the sentencing Court; if the Defendant's supervision is transferred to another county, the urine drug testing may be done in any drug testing facility provided by such county; The defendant shall pay costs relating to such testing;
7. Permit the supervision officer to visit the Defendant at the Defendant's home or elsewhere;
8. Work faithfully at suitable employment as far as possible;
9. Remain within the limits of Wichita County, Texas, unless given permission by the Court to leave therefrom;
10. Work 100 hours without compensation in a community service project or projects to be designated by the Community Supervision and Correction Department. The defendant shall provide written proof to his supervision officer at each scheduled reporting day that he has successfully completed at least ten (10) hours of the designated community service work during each month of his supervision until the 100 hours are completed. The defendant will be given credit on the next month(s) required hours of work for any hours in excess of ten (10) hours of work;
11. Pay to the County Clerk of Wichita County, Texas, as directed by the Collection Department of Wichita County,
The following:
 - a. FINE in the amount of \$0.00;
 - b. COURT COSTS in the amount of \$377.00;

JUDGMENT AND ORDER OF COMMUNITY SUPERVISION, PAGE 3
State v. AMANDA LOUISE WATERS, Cause No. 10-9292-62998-F

IMMEDIATELY FOLLOWING THIS HEARING, the Defendant shall report to the Collection Department of Wichita County, Texas, located on the First Floor of the Wichita County Courthouse, 900 7th Street, Room 135, Wichita Falls, Texas, to make arrangements to pay fine, court costs, and attorney fees.

12. Pay to and through the Community Supervision and Corrections Department of Wichita County, Texas, the following:

- a. RESTITUTION to _____ a.m. in the amount of \$_____, at the rate of \$_____ per month and one last payment of \$_____;
- b. SUPERVISION FEE in the amount of \$50.00 each month during the supervision period;
- c. WICHITA FALLS CRIME STOPPERS in the amount of \$50.00, at the rate of \$5.00 per month;

The payments on the above are to be made on a day and at a time, and each month thereafter, as directed by the Wichita County Community Supervision and Corrections Department, during supervision.

13. Support your dependents financially;

14. Notify the Community Supervision and Corrections Department of Wichita County, Texas, of any address or employment change, within five days from the date of change;

15. Follow and abide by the terms and conditions listed below designated with an "X" or check in the box beside the term(s) or condition(s):

- a. See Exhibit A;
- b. The defendant will not directly communicate with _____, or go near _____ for the period of supervision;
- c. JAIL CONFINEMENT. The defendant will submit to a period of confinement in the County Jail of Wichita County, Texas, to serve a term of imprisonment of _____ days, to begin on the _____ day of _____, 20____. The defendant shall be given _____ days of jail credit;
- d. JAIL RELEASE. During the defendant's _____ day period of confinement ordered in term #15.c, the defendant is to be released each _____ at _____ o'clock __.m. and the defendant ordered to report back to the County Jail of Wichita County, Texas, the following _____ at _____ o'clock __.m.;
- e. The defendant will contact three potential employers per day, from Monday to Friday, and will provide verification of such applications to his or her supervision officer each Friday afternoon, until the defendant gains employment;

JUDGMENT AND ORDER OF COMMUNITY SUPERVISION, PAGE 4
State v. AMANDA LOUISE WATERS, Cause No. 10-9292-62998-F

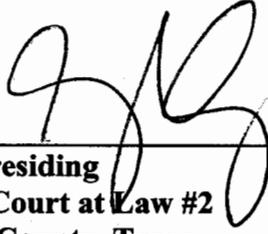
- f. The defendant will attend and successfully complete the Region IX Adult Education Program;
- g. The defendant will submit to an alcohol and drug evaluation conducted by the community supervision officer of the Wichita County Community Supervision and Corrections Department to determine the appropriateness of, and a course of conduct necessary for, alcohol or drug rehabilitation. The defendant will follow through with any referral to an alcohol and drug treatment program recommended by the community supervision officer;
- h. The defendant will submit within 30 days to a mental health assessment at the Helen Farabee Center in Wichita Falls, Texas, when directed by his community supervision officer and participate in the Community Supervision Department's mental health program if recommended by the assessment;
- i. The defendant will enroll, participate in, and successfully complete the following class(es) conducted at or at a location as directed by the Wichita County Community Supervision and Corrections Department within 180 days of this order:
- | | |
|---|---|
| <input type="checkbox"/> Cognitive Corrective Training Class; | <input type="checkbox"/> Bad Check Class; |
| <input type="checkbox"/> Employment Class; | <input type="checkbox"/> Shoplifting Class; |
| <input type="checkbox"/> Anger Management Class; | <input type="checkbox"/> Theft Class; |
| <input type="checkbox"/> Marihuana class; | <input type="checkbox"/> Driving While License Suspended Class; |
| <input type="checkbox"/> Parenting Class; | <input type="checkbox"/> Criminal Trespass Class. |
| <input type="checkbox"/> The Courage to Change Class | |
- j. Attend and successfully complete, at the defendant's own expense, the Driving While Intoxicated Intervention Program at Vernon College within one year of the date placed on probation. The defendant shall provide written verification of attendance, participation, and successful completion in the program to the supervising officer;
- Attend and successfully complete, at the defendant's own expense, the Driving While Intoxicated Education Program at Vernon College within one hundred eighty (180) days of the date placed on probation. The defendant shall provide written verification of attendance, participation, and successful completion in the program to the supervising officer
- k. Attend the Victim Impact Panel at 7:00 o'clock p.m. on a date and at a time as directed by the Wichita County Community Supervision and Corrections Department, to be held in the Wichita County Courthouse, County Court at Law No. 1 Courtroom, Wichita Falls, Texas, or as further directed.

16. The defendant shall attend the Orientation Meeting conducted by the Community Supervision and Corrections Department of Wichita County, Texas, within sixty (60) days of being placed on community supervision.

JUDGMENT AND ORDER OF COMMUNITY SUPERVISION, PAGE 5
State v. AMANDA LOUISE WATERS, Cause No. 10-9292-62998-F

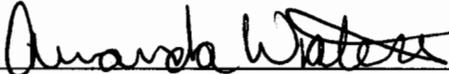
The Defendant in the above styled and number cause(s) was advised that under the laws of this State, the court has determined and imposed the above terms and conditions of community supervision and may, at any time during the period of community supervision set forth above, alter or modify them. The Defendant was further advised that the Court has the authority, at any time during the period of community supervision set forth above, to revoke the Defendant's community supervision for any violation of the above terms and conditions.

Signed on this day, November 19, 2014.



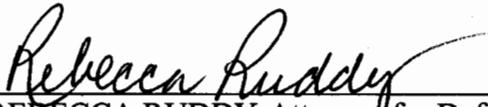
Judge Presiding
County Court at Law #2
Wichita County, Texas

I, AMANDA LOUISE WATERS, the defendant herein, acknowledge on the date set forth above that I have received a true and correct copy of the foregoing "Judgment and Order of Community Supervision," and that I fully understand the terms and conditions of community supervision contained herein and the consequences for violation of any such term or condition of community supervision.



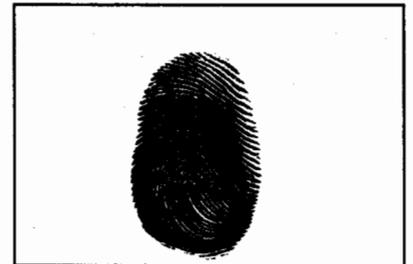
AMANDA LOUISE WATERS, Defendant

11-19-2014
Date



REBECCA RUDDY-Attorney for Defendant

11-19-2014
Date



Defendant's Right Thumbprint

Unless the context indicates otherwise, words importing the masculine gender include the feminine as well.

DEC 23 2015

CAUSE NO. 10-9292-62998-F

LORI BOHANNON, County Clerk
Wichita County, Texas
Deputy

THE STATE OF TEXAS § COUNTY COURT AT LAW #2
V. § OF
AMANDA LOUISE WATERS § WICHITA COUNTY, TEXAS

MOTION TO REVOKE COMMUNITY SUPERVISION

COMES NOW Maureen Shelton, Criminal District Attorney of Wichita County, Texas, and would respectfully show the Court that AMANDA LOUISE WATERS, the said defendant against whom judgment of conviction was rendered herein upon his plea of guilty to the offense of DRIVING WHILE INTOXICATED BAC>=0.15, a Class A Misdemeanor, on the 31ST day of January, 2014 and who was assessed a punishment of confinement in the County Jail of Wichita County, Texas for a period of three hundred sixty five (365) days; and whose judgment upon said conviction was suspended, and who was then and there probated to the Community Supervision and Corrections Officer of Wichita County, Texas, for a period of EIGHTEEN (18) MONTHS has violated the terms and conditions of said community supervision since it was granted her in that, to-wit: The Defendant shall:

1. Commit no offense against the laws of this State or of any other State or of the United States;
10. Work 100 hours without compensation in a community service project or projects to be designated by the Community Supervision and Correction Department. The defendant shall provide written proof to his supervision officer at each scheduled reporting day that he has successfully completed at least ten (10) hours of the designated community service work during each month of his supervision until the 100 hours are completed. The defendant will be given credit on the next month(s) required hours of work for any hours in excess of ten (10) hours of work;
11. Pay to the County Clerk of Wichita County, Texas, as directed by the Collection Department of Wichita County, The following:
 - b. COURT COSTS in the amount of \$377.00;

12. Pay to and through the Community Supervision and Corrections Department of Wichita County, Texas, the following:
 - b. SUPERVISION FEE in the amount of \$50.00 each month during the supervision period; and
 - c. WICHITA FALLS CRIME STOPPERS in the amount of \$50.00, at the rate of \$5.00 per month.

In violation of said terms and conditions of said probation, the said Defendant:

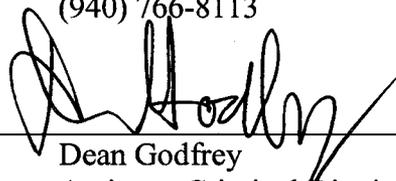
1. Committed an offense against the laws of the State of Texas. Specifically on or about October 31, 2015 in Wichita County, Texas, the defendant did then and there operate a motor vehicle in a public place while the defendant was intoxicated;
10. The defendant is in arrears 3 hours of Community Service Restitution;
- 11b. The Defendant failed to pay the Court Costs incurred herein, and the defendant has the ability to pay said fee, in that the balance on such fee is delinquent in the amount of \$101.00;
- 12b. The Defendant failed to pay the Supervision Fee, and the defendant has the ability to pay said fee, in that the balance herein on such fee is delinquent in the amount of \$300.00;
- 12c. The Defendant failed to pay the Crime Stoppers Fee, and the defendant has the ability to pay said fee, in that the balance herein on such fee is delinquent in the amount of \$20.00;

WHEREFORE, Petitioner prays that AMANDA LOUISE WATERS, Defendant herein, be cited to appear before this Honorable Court at a time and place specified by this Court to show cause, if any he may have, why community supervision heretofore granted in this cause should not be revoked; that upon final hearing the community supervision heretofore granted to said Defendant on the original judgment of conviction herein entered and suspended, be in all things revoked; that Defendant be sentenced as provided by law; that the Defendant be confined in the County Jail of Wichita County, Texas, for a period not to exceed three hundred sixty five (365) days in this cause, as the same appears on the docket of this court; that the Clerk of this

Court be ordered and authorized to issue all necessary papers, including judgment, sentence and commitment, the same as if no community supervision had ever been granted herein; and for such other orders as the Court may direct; and that this Honorable Court direct the County Clerk of Wichita County, Texas, to issue an alias capias for the arrest of said Defendant and that said capias be directed to any peace officer of the State of Texas to arrest said Defendant, and forthwith detain said Defendant and make a report to the Court of Defendant's arrest as prescribed by Art. 42.12 V.A.C.C.P.

MAUREEN SHELTON
Criminal District Attorney
Wichita Falls, Texas 76301
(940) 766-8113

By



Dean Godfrey
Assistant Criminal District Attorney
Bar No. 24082436

JAN 21 2016

LORI BOHANNON, County Clerk
Wichita County, Texas
By:  Priority

CASE NO. 62,998-F

THE STATE OF TEXAS

§ IN THE COUNTY COURT AT LAW #2

VS.

§ OF

AMANDA LOUISE WATERS
(Hereinafter called Defendant)

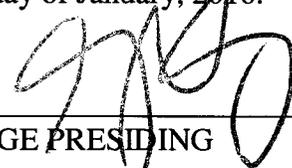
§ WICHITA COUNTY, TEXAS

ORDER OF SETTING

**IT IS HEREBY ORDERED THAT THE DEFENDANT IN THE ABOVE CAUSE
APPEAR BEFORE THIS COURT ON THE FOLLOWING DATES FOR THE
FOLLOWING DESIGNATED PURPOSES:**

_____	o'clock	___	m.	_____	Announcement Hearing
_____	o'clock	___	m.	_____	Pre-Trial
_____	o'clock	___	m.	_____	Jury Trial
_____	o'clock	___	m.	_____	Plea Hearing
_____	o'clock	___	m.	_____	Sentencing Hearing
_____	o'clock	___	m.	_____	Bench Trial
<u>3:00</u>	o'clock	<u>p</u>	m.	<u>February 18, 2016</u>	Probation Revocation Hearing

SIGNED AND ENTERED THIS THE 20th day of January, 2016.



JUDGE PRESIDING

ASSISTANT DA: DEAN GODFREY *BMC*

DEFENSE ATTORNEY: PUBLIC DEFENDER - STILLSON *BMC*

BOND COMPANY: A TO Z *BMC*

**FAILURE TO APPEAR PUNCTUALLY AT THE ABOVE HEARING WILL RESULT
IN THE IMMEDIATE ISSUANCE OF A JUDGMENT NISI (BOND FORFEITURE),
AND A WARRANT FOR THE ARREST OF THE DEFENDANT.**

Appendix C
Defense Exhibit No. 3
Reporter's Record of Probation
Revocation Hearing
Cause No. 62,998-F

REPORTER'S RECORD
TRIAL COURT NO. 62998-F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE STATE OF TEXAS) IN THE COUNTY COURT AT LAW
)
)
) NO. 2
VS.)
)
) OF
)
)
)
AMANDA LOUISE WATERS) WICHITA COUNTY, TEXAS

VIOLATION OF PROBATION HEARING

On the 18th day of February, 2016, the following proceedings came on to be heard in the above-entitled and numbered cause, before the Honorable Greg King, Judge presiding, held in Wichita Falls, Wichita County, Texas.

Proceedings reported by computerized stenotype machine; record produced by computer-assisted transcription.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

MR. DEAN GODFREY (SBOT 24082436)
ASSISTANT DISTRICT ATTORNEY
900 SEVENTH STREET, THIRD FLOOR
WICHITA FALLS, TEXAS 76301
940-766-8113

ATTORNEY FOR THE STATE OF TEXAS

MR. SCOTT STILLSON (SBOT 24047272)
OFFICE OF THE PUBLIC DEFENDER
600 SCOTT STREET, SUITE 204
WICHITA COURTHOUSE ANNEX
WICHITA FALLS, TEXAS 76309
940-766-8199

ATTORNEY FOR AMANDA LOUISE WATERS, DEFENDANT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHRONOLOGICAL INDEX

	PAGE
February 18, 2016	
Caption	1
Appearances	2
Index	3

WITNESS INDEX

STATE'S WITNESSES	DIRECT	CROSS	
Garon Jetton	11,26	19,26	
Motion for Directed Verdict			27
Court's Ruling			28
State & Defense Rest			29
State's Argument			30
Defense Argument			31
Court's Ruling			32

EXHIBIT INDEX

STATE'S EXHIBITS		OFFERED	ADMITTED
NO.	DESCRIPTION		
1	Chronos	14	
Reporter's Certificate			35

1 THE COURT: All right, let's go on the
2 record in cause number 62998-F. This is the State of
3 Texas versus Amanda Louise Waters, and Ms. Waters is
4 present today. She's joined by her attorney Scott
5 Stillson. And representing the State of Texas in this
6 proceeding will be Dean Godfrey, an Assistant District
7 Attorney. And we're here today for a hearing on the
8 State's motion to revoke the community supervision of
9 Ms. Waters.

10 It was filed December 23rd of 2015, and Ms.
11 Waters, I need to go over some things here at the front
12 end, and hopefully your lawyer covered some of this with
13 you or maybe all of it, but it's still best if I go
14 ahead and cover it with you on the record, too.

15 You have a right to remain silent. You
16 don't have to enter a plea of true; you don't have to
17 testify; you don't have to do anything which would
18 incriminate you in this matter; do you understand that?

19 MS. WATERS: Yes, sir.

20 THE COURT: You do not have a right to a
21 jury trial. You have a right to a hearing before the
22 Court, that means me.

23 MS. WATERS: Okay.

24 THE COURT: You have a right to have an
25 attorney represent you, and Mr. Stillson was appointed

1 close to four weeks ago I believe and so hopefully he
2 has had sufficient time to prepare for this hearing.
3 You have a right to confront your accusers; that just
4 means that the witnesses who are saying that you have
5 violated one or more of these terms of probation, those
6 persons would have to appear here in open court and give
7 testimony under oath.

8 And they don't have to just answer questions
9 from the State's attorney, but your attorney would have
10 an opportunity to cross-examine the State's witnesses
11 and to test their credibility. And you would also have
12 a right to call witnesses of your own, and your lawyer
13 has done this for a little while, so he knows how to
14 issue subpoenas in order to compel the appearance of
15 witnesses; and so would certainly give you an
16 opportunity to have -- give you a chance to present
17 witnesses, other than yourself, even if you chose to
18 remain silent.

19 You also have a right to know what the
20 accusation is against you. The way that occurs, is the
21 State files a written motion to revoke your community
22 supervision, and hopefully it sets out in somewhat plain
23 language what the alleged violations are, and that's to
24 help you prepare for the hearing so that you know what
25 the State intends on offering.

1 In the event that your probation is revoked,
2 you would also have the right to appeal any judgment
3 revoking your community supervision and committing you
4 to the County jail. And I would just either allow Mr.
5 Stillson to represent you on appeal in the event that
6 that occurred, or you could hire a lawyer, apply for a
7 different court-appointed lawyer, or you could even
8 represent yourself; although that would be a rather
9 foolish thing for you do. You almost certainly want to
10 have a lawyer to help you with that process. So, so far
11 do you understand what I have gone over with you?

12 MS. WATERS: Yes, sir.

13 THE COURT: The flipside also of that right
14 to remain silent is if, you, and only you decide you
15 want to testify, you may do so but, again, that's your
16 decision. Mr. Stillson can't make you testify; Mr.
17 Godfrey cannot call you as a witness; I will not make
18 you take the witness stand. The decision to testify
19 during the hearing is yours, and yours alone. And if
20 you do choose to testify, obviously, you'll be placed
21 under oath like any other witness and you don't get to
22 just answer the questions you want to answer, the State
23 will have a chance to cross-examine you, just like they
24 would any of your other witnesses; does that make sense?

25 MS. WATERS: Yes.

1 THE COURT: Okay. So the next thing I need
2 to do is inquire -- I think there may have been a
3 typographical error in the motion to revoke the
4 community supervision, because I looked at the original
5 judgment and order placing you on probation, or what we
6 call community supervision; that was actually signed by
7 the Court on November 19th of 2014; and in the motion to
8 revoke it says that you are placed on probation on
9 January 31 of 2014. So I don't know if you wanted to
10 make a trial amendment to correct that or --

11 MR. GODFREY: Yes, your Honor, I think it
12 looks like she was placed -- placed on probation the
13 31st day of January, 2014. Is that --

14 THE COURT: Why don't you approach the bench
15 and I'll show you. Unfortunately, I don't have a
16 written --

17 MR. STILLSON: Judge, I -- I have got a
18 copy of the judgment and order and it's -- and it's
19 filed on November 19th, and everybody signed it on
20 November -- well guessing this also the 19th.

21 (At the bench)

22 THE COURT: Yeah, here's what I've got.

23 MR. GODFREY: Okay.

24 MR. STILLSON: So that's what we have.

25 MR. GODFREY: That -- that looks like what

1 the correct one is.

2 MR. STILLSON: Okay.

3 THE COURT: I don't know if you want to make
4 a trial amendment?

5 MR. GODFREY: I -- that probation should
6 have said November 19th.

7 THE COURT: And I don't know if you --

8 MR. STILLSON: I don't have an objection,
9 Judge, that's fine.

10 THE COURT: Then the Court will grant leave
11 to the State to make that trial amendment. What I have
12 been talking with the lawyers about is just clarifying
13 the date you were placed on probation, and I think the
14 lawyers are in agreement now that that actually occurred
15 on November 19th of 2014, and you have -- if you like,
16 you can stipulate that you're the same person who was
17 placed on probation on that date. You don't have to do
18 that. If you -- if you just want to remain silent,
19 that's fine, then it would be on the -- the burden of
20 the State to prove that you're the same one placed on
21 probation. So I don't know if y'all want to talk about
22 that off the record?

23 MR. STILLSON: Judge, we'll stipulate,
24 that's fine.

25 THE COURT: All right. Then I'll approve

1 that stipulation and find that you were the same Amanda
2 Louise Waters placed on probation in this court on
3 November 19, 2014, here. And then the next thing I need
4 to do is just go over the motion to revoke in a little
5 more detail.

6 What I'm going to do is just read the
7 alleged violation out loud, and at that time, either you
8 or Mr. Stillson can enter a plea of either true or not
9 true. If you enter a plea of not true, that puts the
10 burden on the State to prove that that particular
11 alleged violation is not true -- is true. They have to
12 bring evidence in other words.

13 If you plead true, I don't have to hear from
14 any other witnesses. I can just take you at your word
15 that that violation did, in fact, occur.

16 So the first violation alleged is that you
17 committed an offense against the laws of the State of
18 Texas. Specifically, the State alleges that on or about
19 October 31, 2015, in Wichita County, Texas, you did then
20 and there operate a motor vehicle in a public place
21 while you were intoxicated. I'll let either one of you
22 --

23 MR. STILLSON: Not true, Judge.

24 THE COURT: All right, thank you. The next
25 violation is number ten. It's the defendant is in

1 arrears three hours of community service restitution.

2 MR. STILLSON: Not true, Judge.

3 THE COURT: Eleven-B is that you have failed
4 to pay the court costs incurred in this case, that you
5 had the ability to pay those court costs, and that your
6 court costs are delinquent in the amount of \$101.

7 MR. STILLSON: Not true, Judge.

8 THE COURT: And 12-B is the next rule of
9 probation alleged to have been violated, and that is
10 that you failed to pay the supervision fee, that you had
11 the ability to pay that fee, and that your balance on
12 such fee is delinquent in the amount of \$300.

13 MR. STILLSON: Not true.

14 THE COURT: And, lastly, that you failed to
15 pay the Crime Stoppers fee, that you had the ability to
16 pay that fee, and your balance is delinquent in the
17 amount of \$20.

18 MR. STILLSON: Not true, Judge.

19 THE COURT: All right, thank you for
20 entering those pleas. And at this point any other
21 housekeeping before we get started?

22 MR. STILLSON: Nothing from the defense,
23 Judge.

24 MR. GODFREY: Nothing, Judge.

25 THE COURT: All right. Then, Mr. Godfrey,

1 you may call your first witness.

2 MR. GODFREY: Judge, at this time we'd like
3 to call Garon Jetton.

4 THE COURT: Mr. Jetton, if you'll kindly
5 step over to the witness box. I've turned on the
6 microphone to help you out a little bit. Go ahead and
7 have a seat if you would, and may I get you to please
8 raise your hand?

9 (Witness sworn)

10 THE COURT: Mr. Jetton, I think we know you
11 pretty well, but I'm not sure we've got the correct
12 spelling of your name. So could you begin by just
13 spelling your first and last name?

14 THE WITNESS: First name is G-a-r-o-n. Last
15 name, Jetton, J-e-t-t-o-n.

16 THE COURT: Thank you, Mr. Jetton. The
17 witness is yours.

18 GARON JETTON,
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. GODFREY:

22 Q. Mr. Jetton, how are you currently employed?

23 A. I'm employed with the Wichita County Adult
24 Probation Department.

25 Q. And how long have you been with adult probation?

1 A. A little bit over eight years.

2 Q. And does this job include supervising
3 probationers?

4 A. Yes, sir.

5 Q. And what does your supervision include?

6 A. I'm sorry?

7 Q. What does the supervision include?

8 A. Well everyone that is placed on probation by the
9 courts, our position is to try to keep the probationer
10 -- to see that they're in compliance with what the Court
11 orders that have been given to.

12 Q. And you're certified by the State of Texas?

13 A. Yes, sir.

14 Q. Are you're the probation officer assigned to
15 Amanda Waters?

16 A. Not now, but I was.

17 Q. And who's assigned to her now?

18 A. Officer Michelle Green.

19 Q. But you were the probation officer when these
20 alleged violations occurred?

21 A. Yes, sir.

22 Q. Do you currently have a file containing all of
23 the community supervision records for Amanda Waters?

24 A. Yes.

25 Q. Are you a custodian of business records for the

1 Community Supervision and Corrections Department of
2 Wichita Falls, Wichita County, Texas?

3 A. What was the first part of that?

4 Q. Are you a custodian of business records for the

5 --

6 A. Yes, sir.

7 Q. Are they kept in the regular course of business?

8 A. Yes, sir, they are.

9 Q. Did you or another community supervision officer
10 make these records or transmit this information
11 regarding the acts, events, conditions, and diagnosis?

12 A. Yes, sir.

13 Q. And were these entries made at or near the time
14 of the event that occurred?

15 A. Yes, sir.

16 Q. And did you have actual knowledge of these events
17 as they occurred?

18 A. According to reports like from police departments
19 and that type of thing, yes.

20 Q. And are these records usually called chronos?

21 A. Yes, sir, the entries, uh-huh.

22 Q. And do you have the duplicates, or are they
23 originals?

24 A. These are duplicates. I printed them off of our
25 computer system from my office.

1 Q. And so the originals are back at the office?

2 A. Yes, they're on -- on file in the computer
3 system.

4 MR. GODFREY: At this time, your Honor, I'd
5 like to offer the chronos into evidence.

6 MR. STILLSON: Judge, at this time I'm going
7 to object. Well, first of all, I haven't seen the
8 chronos but --

9 MR. GODFREY: I can show -- you can -- I can
10 show you.

11 THE COURT: Why don't we go off the record.
12 I don't know how extensive they are, I'll let you review
13 them and then you can make your objections when we come
14 back on the record. So we're off.

15 (Pause)

16 THE COURT: Let's go back on the record. We
17 have taken a few moments for Mr. Stillson to take a look
18 at the documents. I'm assuming they're marked State's
19 1?

20 MR. STILLSON: They are not, Judge, but --

21 THE COURT: Would you like to have them
22 marked?

23 (Exhibit marked)

24 MR. STILLSON: Thank you, Judge. Our
25 objection is that the chronos, as marked as State's

1 Exhibit 1, and as introduced to the Court are -- contain
2 facts which are of no consequence in determining this
3 action. In other words, the chronos contain facts that
4 might be helpful to the Judge in determining the three
5 issues before the Court, the failure to pay, the lack of
6 community service hours, and DWI; and they also contain
7 other facts which are of no consequence to the Court,
8 you know, that were never alleged in the motion to
9 revoke.

10 So because the attorney for the State is
11 asking that the chronos be entered in their totality as
12 marked as State's Exhibit 1, we would object to those
13 portions of the chronos which contain irrelevant
14 information, and we'd also point out to the Judge, to
15 the Court, that even if you found the entire chronos to
16 be relevant, you can exclude relevant evidence of a
17 probative value --

18 THE COURT: Slower.

19 MR. STILLSON: I'm sorry.

20 THE COURT: You got speedy. She can only
21 write so fast.

22 MR. STILLSON: Okay, I'm sorry. We would
23 also object, Judge, if you found the entire chronos to
24 be relevant, under 403, arguing that the probative
25 value, again, of the sections of the chronos that have

1 nothing to do with the allegation before the Court;
2 would have no probative value in this case, and it's
3 substantially outweighed by the danger of unfair
4 prejudice to my client and so; therefore, we object and
5 because it is in its totality, we must object to the
6 entire chronos.

7 If the State wishes to only include the
8 parts of the chronos that contain matters relevant to
9 this proceeding, we may not have an objection in that
10 case, but as presented to the Court in State's Exhibit
11 1, we have that objection.

12 THE COURT: Sounded like two objections.

13 MR. STILLSON: Well two objections, I'm
14 sorry, Judge.

15 THE COURT: That's okay. I'm going to
16 overrule, I'm assuming it's a relevancy objection
17 pursuant to 404, and also overrule your 403 objection.
18 I'll do a -- weigh the benefits and the potential harm.
19 And what I can do, as opposed to this being a hearing
20 where there is a jury, I can disregard what's not
21 relevant and just pay attention to what is at issue in
22 this case, and I'll just -- the rest of it, unless we
23 get to a second phase of the hearing, I won't consider
24 it, okay?

25 MR. STILLSON: Okay.

1 THE COURT: May I have the exhibit, please?

2 (Complied)

3 THE COURT: Unless the witness needs it to
4 refer to?

5 MR. GODFREY: Mr. Jetton, do you need this?

6 THE WITNESS: Uh-uh.

7 THE COURT: Thank you. You may continue.

8 Q. (BY MR. GODFREY) All right, Mr. Jetton, do the
9 notes that you have confirm that the terms of community
10 supervision were discussed with Amanda Waters?

11 A. Yes, sir.

12 Q. And do the notes confirm that you or another
13 probation officer explained to her the rules that she
14 was ordered to follow?

15 A. Yes, sir.

16 Q. And do your notes, your intake notes, do they
17 show that she understood these rules?

18 A. Yes, sir.

19 Q. In her probation was she ordered not to commit
20 another offense against the laws of this State or any
21 other State or of the United States?

22 A. Yes, sir.

23 Q. And did the defendant comply with this order?

24 A. No, sir.

25 Q. And which offense did she commit?

1 A. Number one I believe is in all Court orders. She
2 was arrested twice.

3 Q. And do you know what she was arrested for?

4 A. June, 2015, she was arrested for assault, family
5 violence and --

6 MR. STILLSON: Judge, I'm going to object
7 that that -- and ask that the Court strike that
8 response, that allegation was not mentioned in the
9 motion to revoke.

10 MR. GODFREY: He's right, your Honor. I
11 just want to talk about the other offense.

12 THE WITNESS: Okay.

13 THE COURT: All right, well I will sustain
14 that objection. Go ahead.

15 Q. (BY MR. GODFREY) What was -- besides that one,
16 what was the other offense that was alleged in the --

17 A. October 31st, 2015, Ms. Waters was arrested for
18 DWI.

19 Q. And what date was that?

20 A. October 31st, 2015.

21 Q. Also in her probation was she ordered to complete
22 some type of community service restitution?

23 A. Yes, sir.

24 Q. And was it 100 hours community service?

25 A. Yes, sir.

1 Q. And has she completed all of those hours?

2 A. No, sir.

3 Q. How many hours does she lack?

4 A. Three hours.

5 Q. And I know we talked before this proceeding about
6 the fees she still owes, and could you tell the Court
7 how much she still owes in fees?

8 A. I think they were on -- oh, here they are. Her
9 current balance is through today is \$213, which includes
10 some drug testing fees.

11 MR. STILLSON: Judge, I'm going to object to
12 any mention of drug testing fees, that was not mentioned
13 as an allegation in the motion to revoke.

14 THE COURT: I'll sustain that, too.

15 Q. (BY MR. GODFREY) So 213 fees in all?

16 A. Yes, sir.

17 Q. And that includes the supervision fees, Crime
18 Stoppers fees, things like that?

19 A. Yes, sir.

20 Q. And I guess I pass the witness, your Honor.

21 THE COURT: Any questions?

22 MR. STILLSON: Yes, Judge, thank you.

23 CROSS-EXAMINATION

24 BY MR. STILLSON:

25 Q. Mr. Jetton, I just have a couple of quick

1 questions for you, be brief. First of all, let's talk
2 about the fees for a second. Now at my request did you
3 go place a phone call with adult probation a few minutes
4 before this hearing?

5 A. Yes, sir.

6 Q. And that was to get an updated amount on the
7 amounts allegedly owed, right?

8 A. Yes, sir.

9 Q. Okay, and I would like to ask you some questions
10 about some of that. Do you remember -- I would ask you
11 to confine your responses to those that deal with the
12 Court costs, supervision fees, and Crime Stoppers fees.
13 Do you have a copy of the chronos with you?

14 A. No, sir.

15 MR. STILLSON: Judge, may I approach?

16 THE WITNESS: I do now.

17 MR. STILLSON: Actually, Judge, may I
18 approach the witness?

19 THE COURT: You may.

20 Q. (BY MR. STILLSON) Mr. Jetton, I just want to
21 make sure that my copy of your chronos are the same as
22 yours. Do you have a copy of -- of a document showing
23 exactly the delinquent amounts, the balances and what-
24 not?

25 A. No, sir.

1 Q. Okay.

2 A. I didn't print that.

3 Q. Have you looked at it?

4 A. Uh-huh, yes, sir.

5 Q. Would it refresh your recollection to take a look
6 at the copy that I have?

7 A. Well these two areas, what I always look at.

8 Q. Well then let's talk about those. How much --
9 how much is Ms. Waters delinquent in this case?

10 A. When I checked on -- she's not delinquent.

11 Q. Okay. So she -- she has -- and that's because
12 she has a \$50 payment, and it's for February, but it's
13 still February, correct?

14 A. Yes, sir.

15 Q. And she could still make that payment?

16 A. Yes, sir.

17 Q. In fact, isn't she required to meet with
18 probation sometime between now and the end of February?
19 Or do you know?

20 A. She -- she is. I don't know if she's met with
21 her officer or not.

22 Q. Okay, but long story short, she's not delinquent
23 any amount of money as of this hearing, correct?

24 A. On probation fees.

25 Q. Correct, okay.

1 A. Yes, sir.

2 Q. Okay. Well let's talk about supervision fees.
3 Is she delinquent on her supervision fees?

4 A. No, sir.

5 Q. Is she delinquent on her Crime Stoppers fees?

6 A. No, sir.

7 Q. Okay. Let's talk about the community service
8 restitution. You say that she has a new probation
9 officer; is that correct?

10 A. Yes, sir.

11 Q. Have you spoken with that new probation officer
12 about this case with respect to her community
13 supervision?

14 A. Not pertaining to how she was doing, just about
15 notification of this hearing.

16 Q. Okay. So would it be fair to say that you
17 haven't spoken to her new probation officer regarding
18 any arrearages of Ms. Waters' community service
19 restitution?

20 A. That's correct.

21 Q. So you don't know if it was reported to the new
22 probation officer. You have no idea whether or not that
23 arrearage existed or didn't; is that fair to say?

24 A. Okay, I'm sorry, I just didn't hear the last
25 part.

1 Q. All right. Well let me ask -- let me rephrase my
2 question; how about that? You have no personal
3 knowledge today, because you're no longer her probation
4 officer, as to whether or not she is currently in
5 arrearage that three hours of community service
6 restitution; is that fair to say?

7 A. Well I do have knowledge, because I looked at the
8 case file before I came over here.

9 Q. But you haven't spoken to the probation officer?

10 A. No, sir.

11 Q. And, lastly, let's talk about the allegation of
12 the DWI. Do you have a copy of the judgment and order
13 of community supervision in this case?

14 A. No, sir.

15 MR. STILLSON: Okay. Judge, may I approach?

16 THE COURT: Yes.

17 Q. (BY MR. STILLSON) Okay, would it refresh your
18 recollection -- have you reviewed the judgment and order
19 of community supervision in this case?

20 A. Not since she was transferred to --

21 Q. Would it --

22 A. -- another officer.

23 Q. I'm sorry. Would it refresh your recollection to
24 take a look at it?

25 A. Yes, sir.

1 Q. Okay. Borrow my copy, and actually I needed to
2 look at it, too. The issue that we have is -- is rule
3 number one; is that correct? Is that the issue that --
4 that you have with respect to the new allegation of the
5 DWI, that she is not to commit any offense against the
6 United -- against the laws of this State, any other
7 State, or the United States?

8 A. Well rule number one and two.

9 Q. Okay.

10 A. Yes, sir.

11 Q. All right, thank you. Well, Mr. Jetton, let's
12 limit ourselves to what the allegation is that's in the
13 motion to revoke. Now it doesn't -- rule number one
14 doesn't say that you can't be arrested for a crime; is
15 that correct? Would you like to take a look at it?

16 A. Would you please?

17 Q. I'm sorry, here you go.

18 A. Okay.

19 Q. Is that correct?

20 THE REPORTER: "I'm sorry, I couldn't hear,
21 you talked over each other."

22 THE WITNESS: He -- that's correct, it does
23 not say --

24 MR. STILLSON: That you would be -- that
25 it's -- it's not against the rules of probation to be

1 arrested for a crime; is that correct?

2 THE WITNESS: Well, no, it -- it would be a
3 violation, an arrest.

4 Q. (BY MR. STILLSON) Okay, well Mr. --

5 A. That doesn't say that.

6 Q. Okay, well Mr. Jetton --

7 A. I'm sorry.

8 THE COURT: Well I think it speaks for
9 itself. I can read --

10 MR. STILLSON: Okay.

11 THE COURT: -- rules of probation.

12 Q. (BY MR. STILLSON) Mr. Jetton, it's only a crime
13 to commit an offense, not a crime to be accused of an
14 offense; is that correct?

15 A. Well I guess the Court would look at that. We
16 don't look at it that way from a probation department.

17 Q. Were you at the scene on October 31st, 2015, when
18 this allegation of DWI happened? Were you -- were you
19 the arresting officer in this case?

20 A. No, sir.

21 Q. And so you don't know. The only things that you
22 know is what someone else told you about the arrest; is
23 that correct?

24 A. What information I had through reports.

25 MR. STILLSON: Okay. Pass the witness.

1 REDIRECT EXAMINATION

2 BY MR. GODFREY:

3 Q. You said earlier that probation sees getting
4 arrested on suspicion of DWI as an offense in probation;
5 is that correct?

6 A. Yes, sir.

7 Q. And that would be breaking the terms of community
8 supervision, right?

9 A. Yes, sir.

10 MR. GODFREY: Pass the witness.

11 RECROSS-EXAMINATION

12 BY MR. STILLSON:

13 Q. So, Mr. Jetton, are you saying that if I were on
14 probation and I were wrongfully accused of a crime, I
15 would be violating the terms of probation?16 A. We don't determine innocence or guilt. If there
17 is an arrest, then we are required to file a violation
18 report for -- for the arrest.19 Q. So, in other words, you're not here to say
20 whether or not an incident happened, you're here to say
21 that someone got arrested for it?

22 A. Yes, sir.

23 MR. STILLSON: Pass the witness.

24 MR. GODFREY: I have no further questions.

25 THE COURT: Thank you, Mr. Jetton. Would

1 you be kind enough to hand those chronos to the court
2 reporter and she'll hand them to me and we'll be off the
3 record while she does that.

4 (Pause)

5 THE COURT: Thank you, and you may step
6 down. Any other witnesses?

7 MR. GODFREY: No, your Honor.

8 THE COURT: Anything else?

9 MR. STILLSON: Judge, the defense rests at
10 this time, though we'd ask for a closing. Actually,
11 Judge, if I could -- actually, Judge, at this time we'd
12 ask for a directed verdict on at least two of the
13 allegations contained in the motion to revoke.

14 THE COURT: Those being?

15 MR. STILLSON: The allegation of inability
16 to pay the fees I suppose would be 11-B, 12-B, and 12-C,
17 because there is -- the only evidence presented is that
18 she is not delinquent on any of those payments. We
19 would also ask that term one as delineated in the motion
20 to revoke about the -- that the defendant committed the
21 offense against the laws of the State of Texas.

22 There is no evidence that that happened.
23 There is only evidence of an arrest. She's presumed to
24 be innocent of that offense. There was no evidence
25 presented that she actually committed an offense, only

1 that she was arrested. So we would ask for a finding of
2 not true on those four, I guess, allegations.

3 THE COURT: Any response?

4 MR. GODFREY: Your Honor, she -- when this
5 report was generated she paid the money yesterday, and
6 so we would strike -- we can see that the fees could be
7 up-to-date now, but at the end of the day there is still
8 a DWI pending in the District Attorney's Office, a
9 second one, and probation's rules make it pretty clear
10 that a DWI, getting arrested for that is still an
11 offense and could revoke your probation.

12 THE COURT: And I guess I'd just like to be
13 correct on the community service. Do we know, Mr.
14 Jetton, you have kind of hung around, I just want you to
15 clarify that; had you checked that as of today?

16 MR. JETTON: What's been entered; yes, sir.

17 THE COURT: All right, then y'all can have a
18 seat. I'm going to make my finding then. At this time,
19 then, the Court finds that the person who is present
20 here today Amanda Louise Waters is, in fact, the same
21 person who was placed on community supervision; and the
22 Court is going to find that the alleged violation;
23 number one, is not true.

24 When the State alleges a new offense, they
25 have to prove that. Now they don't have to prove it

1 beyond a reasonable doubt. They could have brought the
2 officers involved in this case to court, and they would
3 not have to prove it to a jury, they just have to prove
4 it to me by what's called a preponderance of the
5 evidence; that makes their jobs easier, but the fact
6 that a person is arrested is insufficient to prove a new
7 offense and so that one I will find not true.

8 Number ten I will find to be true that
9 you're delinquent three hours of community service
10 restitution. Number 11-B, 12-B, and 12-C I will find to
11 be not true. So we have the one violation, and are we
12 ready to talk about the next phase of the hearing; what
13 to do about it?

14 MR. STILLSON: Yes, Judge.

15 MR. GODFREY: Yes, your Honor.

16 THE COURT: All right, then you may call any
17 witnesses, or you don't have to put on any testimony if
18 you don't want to.

19 MR. GODFREY: I think that's all I have,
20 your Honor.

21 THE COURT: Okay, anything else?

22 MR. STILLSON: Judge, the defense would rest
23 but we just ask for a brief closing.

24 THE COURT: Again, either one can go first.
25 It's a fairly simple issue.

1 MR. GODFREY: Your Honor, we ask that even
2 though they're -- you just found they're not true as far
3 as the term number one -- actually I'll just go ahead,
4 just go ahead and strike that. She still is in arrears
5 of community -- community service restitution. She is
6 up-to-date, but has been late on paying, had to pay \$400
7 yesterday before this hearing had started today.

8 MR. STILLSON: Judge, I'm going to object as
9 improper argument. I mean those allegations that he's
10 mentioning have since -- were found to be not true.

11 THE COURT: Well I think he can tell me
12 about it coming in a little late. We're beyond the
13 specifics of this. We're now talking about the person
14 as a whole and so you can continue, that's overruled.

15 MR. GODFREY: And that this, even though
16 she's up-to-date now, she was not up-to-date yesterday,
17 24 hours before the hearing and that she was put on
18 probation for, I believe, this first driving while
19 intoxicated above point one five; and even though there
20 was an offense, her term number one was found not true;
21 she was arrested for suspicion of DWI, and that we think
22 that punishment should take that into account.

23 MR. STILLSON: Judge, I would again object
24 to as improper argument to arguing that something that
25 was found not to be true should be considered in

1 sentencing.

2 THE COURT: Well rather than object, why
3 don't you just give me your argument?

4 MR. STILLSON: Okay. Judge, the only thing
5 left is three hours of community supervision. I'd point
6 out to the Court that she's still on probation. She's
7 on probation until May, that's evidenced by the
8 documents and testimony here. You know, we would ask at
9 this time that she be reinstated on probation and
10 allowed to do those three hours. She seems to complied,
11 even if late, on everything else.

12 I'd point out to the Court, by the way,
13 that, one, it's not a violation and it was already found
14 not to be true but I'll discuss it anyways, it's not a
15 violation necessarily to even be late on a payment. The
16 statute requires that -- and it's an actual element the
17 State has to prove that it's a willful failure to pay,
18 that you have the means to pay and you have failed to
19 pay.

20 There is no evidence that my client ever had
21 the means to pay before yesterday and so the State, I
22 think, asking you to take into consideration payments is
23 improper when it's their burden to show that it's a
24 willful violation when, in fact, there is no violation,
25 you know, whatsoever. And so all we are left with,

1 Judge, is the three hours of community service that she
2 hasn't done that she could still reasonably complete by
3 May, which is the end of her probation.

4 And so, Judge, we would -- you, of course,
5 have wide discretion. You're not obligated to terminate
6 someone's probation even on a finding of no -- of a --
7 of a deal of true. So we would ask, first of all, that
8 she not be revoked or, otherwise, that if you do intend
9 to revoke, that she be given time served essentially.
10 She's got one day of jail credit, but we would strongly
11 urge, Judge, that she be not revoked. Thank you.

12 THE COURT: Thank you. All right. Ms.
13 Waters, you are on probation for just a few more months.
14 If you'd just, you know, done the community service at
15 the rate that you were ordered to do, you know, this
16 wouldn't have been an issue at all today. I'm certainly
17 grateful that you got caught up on at least some of the
18 fees, the ones alleged here in court, but you need to
19 understand that this is a kind of a serious deal.

20 Based on what I've already found, do you
21 realize I could put you in jail for one year? That's a
22 long time to spend in jail thinking about how easy it
23 would have been to simply do the community service on
24 time, or even if you'd done it a little bit late. I
25 worry that some people don't take probation seriously,

1 and you've been very fortunate that I did not find a new
2 offense, because there is a real good chance, in the
3 appropriate case, not necessarily this one, that in an
4 appropriate case where that were proven, that I would
5 seriously consider a year. I'm not going to put you in
6 jail for a year, understand that, but I just want you to
7 understand how serious this is.

8 And so I am going to continue you on
9 probation, but I'm going to add something to your
10 probation which you have not had the benefit of and,
11 granted, may not be as much as I would like to do, but I
12 do think at least you should undergo some time at the
13 cognitive corrective training class.

14 Now this is a program offered through the
15 probation department. You need to sign up for it and
16 complete it on the next available date that they teach
17 it, okay?

18 MS. WATERS: Okay.

19 THE COURT: That maybe next month, it may be
20 April, it may be that Mr. Jetton can tell us when the
21 next class would be. Anything?

22 MR. JETTON: Probably one in March.

23 THE COURT: Okay. So that's the one you
24 need to sign up for and attend. There does not need to
25 be any excuse for you to fail to attend. This needs to

1 be your number one priority for the month of March is
2 signing up for and attending this class. And you also
3 need to be thanking your lucky stars that you're not
4 walking out of this courthouse in handcuffs and
5 shackles, okay?

6 MS. WATERS: Yes.

7 THE COURT: All right, we are off the
8 record.

9 (Conclusion)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE STATE OF TEXAS)
 2) SS
 3 COUNTY OF WICHITA)

4 I, Carol A. Smith, Official Court Reporter in and
 5 for the County Court at Law No. 2 of Wichita County,
 6 Texas, do hereby certify that the above and foregoing
 7 contains a true and correct transcription of all
 8 portions of evidence and other proceedings (requested in
 9 writing by counsel for the parties) to be included in
 10 this volume of the Reporter's Record in the above-styled
 11 and numbered cause, all of which occurred in open court
 12 or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
 14 the proceedings truly and correctly reflects the
 15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for this
 17 Reporter's Record is \$267.50 and will be paid for by the
 18 District Attorney's Office.

19 WITNESS MY OFFICIAL HAND this 29th day of
 20 February, 2016.

21
 22 /s/Carol A. Smith
 23 Carol A. Smith, CSR, RPR
 24 Certification No: 2033
 25 Expiration Date: 12-31-16
 County Court at Law No. 2
 Wichita County Courthouse
 Wichita Falls, TX 76301
 Telephone No. (940) 766-8111