

Affirmed and Opinion filed October 7, 1999.



In The

Fourteenth Court of Appeals

NO. 14-99-00489-CR

JOHN P. BRINK, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 801,932**

OPINION

Appellant, John P. Brink, appeals the denial of his application for writ of habeas corpus on the stated grounds that his constitutional right against double jeopardy has been violated. We affirm.

Background

In his application for writ of habeas corpus to the trial court, appellant claims he is under indictment in multiple causes for theft and fraud. He contends those indictments violate his right under the Fifth Amendment to the United States Constitution prohibiting a person from being placed twice in jeopardy for the same offense. Appellant claims that, prior to the

assertion of the charges pending against him, the United States Securities and Exchange Commission ("SEC") disciplined him after finding that he had defrauded a number of people out of several million dollars through false stock offerings otherwise known as a "Ponzi scheme." Appellant claims the allegations in the disciplinary proceeding conducted by the Securities and Exchange Commission were directed specifically at him and are the same allegations made the basis of the indictments presently pending in the 208th District Court.

The double jeopardy clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). In this case, appellant claims protection from the last of these three abuses.

The disciplinary proceeding by the Securities and Exchange Commission is not a criminal proceeding. However, double jeopardy protections may apply even if one of the proceedings under analysis is considered a civil proceeding. *Halper*, 490 U.S. at 447-48. Under *Halper*, a civil case can be deemed criminal if the government recovers a judgment not rationally related to the goal of making the government whole for the losses suffered due to the defendant's acts. *Id.* at 451. Whether a factual finding made pursuant to a prior civil proceeding creates a collateral bar to a contrary factual finding in a later proceeding is determined on a case by case basis. *State v. Aguilar*, 947 S.W.2d 257, 259 (Tex. Crim. App. 1997). Similarly, whether a subsequent criminal proceeding is barred by a prior finding in a civil case, is a factual determination.

Standard of Review

The trial court's ruling in a habeas corpus proceeding should not be overturned absent a clear abuse of discretion. *Ex parte Ayers*, 921 S.W.2d 438, 441 (Tex. App.—Houston [1st Dist.] 1996, no pet.). In determining whether the trial court abused its discretion, we not only accord great deference to the trial court's findings and conclusions, but also view the evidence

in the light most favorable to its ruling. *McCulloch v. State*, 925 S.W.2d 14, 14-15 (Tex. App.—Tyler 1995, pet. ref'd), *cert. denied*, 516 U.S. 976.

No Abuse of Discretion by the Trial Court

Appellant failed to provide the trial court or this court with copies of either his indictments for fraud, or the discipline from the Securities and Exchange Commission. In fact, appellant attached no exhibits to his application in the trial court. On the state of this record, we cannot determine the actions for which appellant has been disciplined, nor can we determine the actions for which he has been indicted. Without such information, we cannot examine the facts of the case to determine whether the SEC proceeding acts as a bar to the criminal proceeding. Accordingly, we conclude the trial court did not abuse its discretion in denying appellant's application for writ of habeas corpus.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Yates, Fowler, and Frost.

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