COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1441-CR **Cir. Ct. No. 2006CF1984**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEATH N. WASSERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed and cause remanded for further proceedings.*

Before Curley, P.J., Wedemeyer[1] and Kessler, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 WEDEMEYER, J. Heath N. Wasserman appeals from a judgment of conviction for one count of possession of a firearm by a convicted felon contrary to WIS. STAT. § 941.29(2)(a) (2005-06).[2] The judgment was entered pursuant to a negotiated no-contest plea dated October 16, 2006, after the original charge was dismissed because of a missing witness. When reissued, the new trial court took judicial notice of the original court's findings in the suppression motion. Wasserman contends that the trial court erred by taking judicial notice of earlier findings from the original trial court rather than re-hearing the suppression motion. Wasserman also challenges the original trial court's ruling on the suppression motion on the grounds that the search was unlawful. Because the trial court erred in taking judicial notice of the prior judge's discretionary decision in a dismissed case that never went to judgment, when the court should have conducted a new suppression hearing and issued its own decision, we reverse, set aside the no-contest plea, and remand for a new suppression hearing.

BACKGROUND

¶2 In December 2003, Wasserman was arrested and charged with being a felon in possession of a firearm. The arrest stemmed from a warrantless search of premises owned by Wasserman that he had leased as a tavern. Wasserman filed a pretrial motion to suppress the gun seized from the tavern inside the building he owned. In August 2005, a two-day suppression hearing was held and the trial court denied the motion at the close of the suppression hearing, concluding that the police acted reasonably when they discovered and seized Wasserman's gun. The

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

case was set for trial. However, on November 29, 2005, prior to jeopardy having attached, the trial court dismissed the case without prejudice, on the State's motion, due to the unavailability of an important witness.

¶3 Several months later, in April 2006, the State re-filed the charge of possession of a firearm by a convicted felon, and again Wasserman filed a pretrial motion to suppress the gun seized from the tavern of the building he owned. Due to rotation, the case came before a different trial court judge. The State opposed the suppression motion, arguing that the identical issue had been "fully litigated" and denied at the August 2005 suppression hearing in front of the original trial court. Wasserman filed a reply brief insisting he was entitled to a second suppression hearing.

¶4 In September 2006, the trial court denied Wasserman's motion for a second suppression hearing, noting that Wasserman offered no new evidence to justify holding a second suppression hearing. In order to protect Wasserman's appeal rights, the trial court took judicial notice of the transcript of the suppression hearing before the original trial court and adopted that court's findings and ruling as its own. In doing so, the trial court effectively denied Wasserman's motion without a hearing. The trial court also expressly found that Wasserman retained his right to challenge not only its decision to take judicial notice of the earlier ruling, but also to challenge the substantive ruling itself.

¶5 At an October 2006 hearing, Wasserman pled no contest to the charge of possession of a firearm by a convicted felon, pursuant to a negotiated plea agreement. There were no postconviction proceedings. Wasserman appeals directly from the judgment of conviction.

DISCUSSION

¶6 Wasserman claims that the trial court erred in taking judicial notice of earlier findings from the original trial court rather than independently hearing his suppression motion. For reasons to be stated, we agree that the trial court erred. We reverse, set aside the no-contest plea and remand for a new suppression hearing.

¶7 A court may take judicial notice of adjudicative facts under WIS. STAT. § 902.01. With regard to § 902.01, '"[a]djudicative facts are 'simply the facts of the particular case,' that is, 'who did what, where, when, how, and with what motive or intent.'" ***State v. Harvey***, 2001 WI App. 59, ¶7, 242 Wis. 2d 189, 625 N.W.2d 892 (citation and one set of quotation marks omitted). A judicially noted fact must be one not subject to reasonable dispute in that it is "[a] fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Sec. § 902.01(2)(b).

¶8 Here, the trial court, in taking judicial notice and citing WIS. STAT § 902.01(2)(b), implicitly contends that the original trial court's ruling was an adjudicative fact capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned. We disagree. The trial court took judicial notice of the original trial court's ruling, not particular factual findings. The trial court could have taken judicial notice of the fact that a hearing occurred, but it cannot allow a prior court's discretionary decision in a dismissed case that never went to judgment, to substitute for the discretion of the new court in a new case, albeit based on the same facts. Wisconsin case law allows a court to take judicial notice of transcripts of hearings before another judge in the *same* case, ***State v. Mazur***, 90 Wis. 2d 293, 304-05, 280 N.W.2d 194 (1979), or the court's

"own records in the cause," ***Chris Schroeder & Sons Co. v. Lincoln County***, 244 Wis. 178, 182, 11 N.W.2d 665 (1943). There is no Wisconsin statute or case that authorizes a trial court to adopt or incorporate an evidentiary ruling from a previous, dismissed criminal case in a subsequent criminal action.

¶9 The State contends that Wasserman is not entitled to a second suppression hearing because theories such as "law of the case," *res judicata*, collateral estoppel, claim preclusion, and issue preclusion apply. We disagree. Because the first case was dismissed without prejudice, and there was no decision on the merits, the aforementioned theories do not preclude a second suppression hearing. *See* ***City of Wisconsin Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 22-23, 539 N.W.2d 916 (Ct. App. 1995) ("law of the case" has no application where "two cases have proceeded separately, each before a different trial court"); ***State v. Miller***, 2004 WI App 117, ¶27, 274 Wis. 2d 471, 683 N.W.2d 485 (claim preclusion does not apply where the prior action is dismissed without prejudice; there must be a final judgment on the merits); ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) ("Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been *actually litigated* and *decided* in a prior action.") (emphasis added). Based on the foregoing, we conclude that the trial court erred in taking judicial notice and adopting the previous suppression hearing ruling as its own. Accordingly, we reverse the judgment and remand to the trial court with directions to conduct a new suppression hearing.

¶10 Wasserman also challenges the original trial court's substantive ruling on the suppression motion on the grounds that the search was unlawful. This court's decision to reverse and remand for a hearing effectively makes Wasserman's second argument moot. Therefore, we need not address it here. *See*

Gross v. Hoffman, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

Based on the foregoing, we reverse the judgment of conviction and remand for new hearing.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Recommended for publication in the official reports.