

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 8, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 01-0121-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**v.**

**PAMELA SMITH-HERZOG,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Sheboygan County:  
JAMES J. BOLGERT, Judge. *Dismissed.*

¶1 ANDERSON, J.<sup>1</sup> The State of Wisconsin seeks to appeal from an order of the circuit court dismissing with prejudice a charge of operating a motor vehicle with a prohibited blood alcohol content. The State contends that the

---

<sup>1</sup> This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

verdict rendered by the jury and a note appended to the verdict form combine to make up an inconsistent verdict. Given that the circuit judge resolved the factual elements of the affirmative coercion defense against the State, we conclude that double jeopardy precludes an appeal; therefore, we dismiss the State's appeal.

¶2 Pamela Smith-Herzog was charged with one count of operating while intoxicated (OWI), second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b) and one count of operating with a prohibited blood alcohol content (PAC), second offense, in violation of WIS. STAT. §§ 346.63(1)(b) and 346.65(2)(b). At her jury trial, she raised the affirmative defense of coercion, WIS. STAT. § 939.46. The jury acquitted her on the OWI charge and found her guilty on the PAC charge, but attached a handwritten note to the verdict form:

We agree Pamela was guilty of the drunk driving charge—  
but there was not enough evidence proved by the State that  
she was not coerced. /s/ Arlyne J. Weber

¶3 Smith-Herzog filed a motion for judgment notwithstanding the verdict (JNOV) under WIS. STAT. § 805.14(5)(b). At a hearing on the motion, the State countered that a JNOV motion was inappropriate in a criminal case. The State suggested that when the guilty verdict on the PAC charge and the handwritten note are considered together, there was the equivalent of an inconsistent verdict and, because the jury could not be brought back together for further deliberations, a mistrial should be declared.

¶4 The circuit court agreed with the State that it could not grant a JNOV under WIS. STAT. § 805.14(5)(b). The court went on to hold that a mistrial was required because the verdict form and the handwritten note did not clearly express the jury's decision. Finally, the court held that the case would be dismissed with

prejudice. The court treated the handwritten note as a request from the jury to apply the law to the facts and it reasoned that the jury found that the State did not meet its burden of proof to overcome the coercion defense.

¶5 The State appeals from the order dismissing the PAC charge with prejudice. The State argues that in dismissing the PAC charge with prejudice, the circuit court applied the wrong legal standard. It is the State's position that the guilty finding on the verdict and the accompanying note created an inconsistency that the circuit court did not have the authority to correct. The State contends that because the jury was discharged before the inconsistency was corrected, the court could not dismiss the charge with prejudice. Smith-Herzog responds that the State's appeal must be dismissed because it is an appeal from a judgment of acquittal and is therefore barred by the double jeopardy clauses of the federal and state constitutions.

¶6 The issue presented requires us to interpret the double jeopardy provisions of the federal and state constitutions. We decide questions of constitutional interpretation without deference to the circuit court. *State v. Turley*, 128 Wis. 2d 39, 47, 381 N.W.2d 309 (1986).

¶7 The resolution of the issue in this case is directly controlled by the decision in *Turley*. In that case, the State contended that the double jeopardy provisions did not bar a retrial because the circuit court premised its dismissal on an erroneous standard of review. *Id.* at 46. In answering the issue presented, the supreme court surveyed a number of United States Supreme Court cases that considered when judgments of acquittal barred a retrial and concluded:

[I]t is clear that federal constitutional law treats mislabeled or erroneous rulings as acquittals when those rulings resolve factual elements of the offense and that these *de*

*facto* acquittals bar appeal by the state when new trials would be necessitated. It is further clear that even if the circuit court based its ruling on an erroneous standard of review ... double jeopardy precludes an appeal by the state if the ruling of the court resolved factual elements of the offense in [the defendant's] favor.

*Id.* at 49-50.

¶8 *Turley* requires us to evaluate the record to determine whether the circuit court's dismissal with prejudice of the PAC charge against Smith-Herzog was a resolution of the factual elements of the offense and the affirmative coercion defense. *Id.* at 50. Our review of the record is hampered by the State's failure to provide a transcript of the trial.<sup>2</sup>

¶9 Because we lacked a transcript of the trial, and the circuit court's reasoning at the hearing on postverdict motions did not resolve whether the dismissal was based upon the facts, we issued an order asking the circuit court to clarify the basis of its decision. *Id.* at 42. In response to our order, the circuit court explained:

The jury found as a fact that Ms. Smith-Herzog was coerced. In terms of the burden, the jury found that the state did not prove that she was not coerced.

This factual finding of the jury is amply supported by the evidence. That includes the testimony of Ms. Smith-Herzog as well as the testimony presented by the state that she arrived at the police station on her own in a panic telling the same story that she told to the jury.

I did not substitute my factual finding for the factual finding of the jury. The purpose of my judgment of dismissal was to give effect to the factual finding of the jury. Had I intended to take this factual issue from the jury,

---

<sup>2</sup> In the absence of a transcript, this court will assume that every fact essential to sustain the trial judge's exercise of discretion is supported by the record. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979).

I would have done so before submitting the issue to the jury.

¶10 In *Turley*, the supreme court concluded that under decisions from the United States Supreme Court, “the rulings of the trial court ... were acquittals because the trial court based the rulings on its evaluation of the government’s evidence and its determination that the evidence was legally insufficient to sustain a conviction.” *Id.* at 50-51. Similarly, here the circuit court evaluated the evidence and found that the State failed to meet its burden of proof on Smith-Herzog’s coercion defense and prove beyond a reasonable doubt that she was not coerced.<sup>3</sup>

¶11 Consequently, we hold that the double jeopardy provisions of the federal and state constitutions bar the State’s appeal of the circuit court’s dismissal of the criminal complaint against Smith-Herzog in this case. We dismiss the State’s appeal.

*By the Court.*—Appeal dismissed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

---

<sup>3</sup> In *Moes v. State*, 91 Wis. 2d 756, 766, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the State to disprove an asserted coercion defense beyond a reasonable doubt.

