COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1368-CR **Cir. Ct. No. 2006CT865**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL J. LINDHOLM,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] On April 19, 2001, the Jefferson county circuit court, acting in part on a capitulation by the district attorney's office of that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

county, negated a prior operating while intoxicated conviction for Michael J. Lindholm, based on information that it was his brother who was driving while intoxicated, not him. Lindholm was more recently arrested for operating while intoxicated in Walworth county and the State charged him with OWI, fourth offense. But the Walworth county circuit court, giving full faith and credit to what occurred in the Jefferson county circuit court, ruled that the proper charge was OWI, third offense. The State appeals, alleging that Lindholm improperly collaterally attacked one of his convictions and that the OWI, fourth offense, should stand. But the State has the issue wrong. The question was already decided in the Jefferson county circuit court and the State is barred by issue preclusion from relitigating its validity. We affirm.

¶2 Lindholm was arrested on October 4, 2006. The officer wrote on the citation that it was for operating while intoxicated, fourth offense. He pled guilty to the charge of operating while intoxicated but filed a motion alleging that he should be sentenced for OWI, third offense, rather than an OWI, fourth offense.

¶3 In his brief to the court, Lindholm alleged the following: His brother used his identity in 1991 after being pulled over for operating while intoxicated. In 1998, he was cited for OWI, third offense, and found out for the first time that his brother had misappropriated his identity. He raised the issue with the Jefferson county district attorney's office, which agreed to reduce the matter to an OWI, second offense. Based on this, the Jefferson county circuit court convicted Lindholm of OWI, second offense.

¶4 The State filed a responsive brief arguing that Lindholm was mounting a collateral attack on his 1991 conviction and that collateral attacks are disallowed unless there is evidence that he had a right to an attorney and did not

receive assistance. Since there was no such proof, the State contended that the collateral attack must fail. The State did not address issue preclusion in its brief. The Walworth county circuit court granted Lindholm's motion and sentenced him for OWI, third offense. The State appeals.

¶5 Collateral attack has nothing to do with this case. In fact, Lindholm never collaterally "attacked" the 1991 conviction. Rather, he brought the matter of the 1991 conviction to the attention of the Jefferson county district attorney's office. That office, for whatever reason, agreed to wipe out the 1991 conviction for sentencing purposes so that Lindholm would be convicted of OWI, second offense, and not OWI, third offense, in the Jefferson county circuit court. The State and Lindholm went on the record with this agreement and the Jefferson county circuit court accepted the agreement and sentenced Lindholm as a second offender. Thus, the issue that the Walworth county district attorney now raises was already decided in another court.

¶6 This is pure issue preclusion. The doctrine of issue preclusion forecloses relitigating an issue that was actually litigated in a previous proceeding involving the same parties or their privies. ***Masko v. City of Madison***, 2003 WI App 124 ¶4, 265 Wis. 2d 442, 665 N.W.2d 391. Issue preclusion may foreclose an issue of evidentiary fact, ultimate fact, or of law. ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. Application of issue preclusion requires us to evaluate whether there is an identity of parties, which is a question of law, and whether the application of issue preclusion is consistent with fundamental fairness, which is a mixed question of fact and law. ***Masko***, 265 Wis. 2d 442, ¶¶5-6.

¶7 Here, the State of Wisconsin and Lindholm were the parties to the Jefferson county circuit court action and are the parties here. It is of no moment that the Jefferson county district attorney's office acted in one matter and the Walworth county district attorney's office is acting in another. The prosecuting authority is in one entity—the State. The respective district attorney's offices simply represent the State's interest in each county. So, the parties are identical.

¶8 On the matter of fundamental fairness, a judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity or binding effect, by parties or privies in any collateral action or proceeding, except for fraud in its procurement. ***Zrimsek v. American Auto. Ins. Co.***, 8 Wis. 2d 1, 3-4, 98 N.W.2d 383 (1959). Here, the 1991 conviction was collaterally brought up in the Jefferson county action, and successfully so. What the Walworth county district attorney now wants to do is relitigate that successful action by arguing that no full faith and credit can be given to that decision in this action. Fundamental fairness, however, requires that a circuit court not set aside the judgment of another circuit court absent fraud in that prior judgment or some other circumstance pursuant to WIS. STAT. § 806.07. Finality and the absence of successive litigation is a virtue in our justice system, a computer print out from a law enforcement agency to the contrary notwithstanding.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.