

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 5, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP30

Cir. Ct. No. 2004CF566

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE RETURN OF SEIZED FUNDS IN: STATE OF WISCONSIN V. JOSEPH P.
LAPERRE:**

JOSEPH P. LAPERRE,

APPELLANT,

V.

STATE OF WISCONSIN,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
JOHN D. McKAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joseph LaPere appeals an order implicitly denying his petition to return \$1,150 seized by police during a search of LaPere's

property.¹ Because we conclude that LaPere is judicially estopped from requesting the relief sought in his petition, we affirm the order.

¶2 The doctrine of judicial estoppel prohibits a party from taking a position that is clearly inconsistent with a position the party assumed in an earlier judicial proceeding where the facts are the same and the court adopted the party's initial position. See *Harrison v. LIRC*, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994). LaPere is estopped from seeking the return of the \$1,150 because, in earlier proceedings, he took an inconsistent position that the circuit court adopted.

¶3 At the sentencing hearing, LaPere's attorney requested that the cash be applied to restitution and court costs. The court ruled:

Whatever isn't part of these offenses will be returned to Mr. LaPere. I mean there is no reason for anyone to keep it. The cash will be applied to the extent that it is available to the Court, will be applied first to costs, and then to restitution.

LaPere's attorney then indicated that LaPere "objects to it being applied to restitution. He has no problem with it being applied to court costs." Although LaPere appealed, he did not pursue that issue. Instead, in 2007, LaPere filed a pro se motion requesting that the sheriff's department be ordered to release the \$1,150 to the Brown County Clerk's Office "where it would be applied to the court costs then any money left would then be applied to the balance of restitution." The court granted that motion.

¹ The court's order itemized the amount of restitution due and indicated that no restitution had been paid, in effect denying LaPere's request to apply that money toward restitution rather than court costs and attorney fees.

¶4 Two weeks later, LaPere asked the clerk of courts to exclude his attorney fees from the costs to which the funds would be allocated, even though his petition for appointment of counsel stated in bold print: “I understand and consent without further notice any unpaid attorney fees will be included as costs upon entry of judgment in my case.” The clerk’s office contacted the circuit court and verified that the attorney fees were part of the costs taxed in this case and informed LaPere that it would apply the money to all costs including attorney fees. LaPere took no further action until, over two years later, he filed a Petition for Return of the Seized Funds. Because the court previously granted LaPere’s requests to apply the \$1,150 to court costs after LaPere had been informed that unpaid attorney fees would be included as court costs, LaPere is estopped from taking an inconsistent position at this time.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

