COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP854-CR **Cir. Ct. No. 2008CF188**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRINITY J. KLASINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: THOMAS CANE, Reserve Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Trinity Klasinski appeals from a felony judgment of conviction for operating under the influence. The issue is whether the State should have been barred by issue preclusion from relitigating a suppression issue.

We conclude that the State should have been barred from relitigating. We reverse the judgment of conviction and remand with directions.

¶2 The State first charged Klasinski in 2007. Klasinski moved to dismiss the complaint based on a lack of probable cause to arrest. The circuit court found certain officer testimony less credible than the defendant's, and held there was no probable cause to arrest because the officer had insufficient information to conclude Klasinski was the driver. As a remedy, the court dismissed the case without prejudice.

¶3 The State refiled the case in 2008, and that case underlies this appeal. After Klasinski unsuccessfully moved to dismiss the new case on issue preclusion grounds, specifically on the ground that the court had found a lack of probable cause for arrest, the State moved for reconsideration of that probable cause decision in the 2007 case. The State argued that the court improperly failed to consider certain third-party witness information in deciding probable cause to arrest. The court denied the motion on the grounds that, even if it considered the third-party information, there was still nothing in that information to show that Klasinski was the driver.

¶4 After being bound over for trial, Klasinski filed a motion to suppress evidence. The motion laid out the procedural history of the case and argued that, because the court had found in the 2007 case that there was no probable cause to arrest, all evidence flowing from the arrest must be suppressed. That motion was heard on the day of trial. Defense counsel again laid out the history of the case, and concluded by saying the first judge's prior probable cause decision created "law of the case," and therefore no testimony on suppression would be required. The court did not invite counter-argument from the State, and stated only the

following in ruling on this motion to apply "law of the case": "Well, I'll deny that request." The court then heard testimony, found there *was* probable cause to arrest, and thus denied the suppression motion.

¶5 Klasinski was later convicted after a trial, and now appeals. He argues that the court's denial of his suppression motion in the 2008 case was in error because that court was barred by issue preclusion from redeciding whether there was probable cause to arrest.

¶6 The State first responds that Klasinski forfeited the opportunity to argue issue preclusion because he did not correctly identify that legal theory in the circuit court. It is true that Klasinski's motion did not use the phrases "issue preclusion" or "law of the case," and his oral argument mentioned only "law of the case." However, his motion and argument did describe the procedural history, and his substantive point in both of them clearly was that, as to the probable cause to arrest issue, the judge in the 2008 case was bound by the ruling in the 2007 case.

¶7 Although the correct legal label was not stated, we believe this procedural posture and argument was sufficient to apprise the court of the substance of the argument. *See* ***City of Oshkosh v. Winkler***, 206 Wis. 2d 538, 548, 557 N.W.2d 464 (Ct. App. 1996) ("[e]ven the short argument outlined gave the circuit court some idea of the City's position"; "[i]f the court did not feel comfortable making a ruling because of the limited depth of the City's analysis, it could have simply requested further briefing"). The court did not allow the State to argue, and then ruled without explanation. Accordingly, we conclude that the question of issue preclusion was placed before the court with sufficient clarity that we decline to conclude that Klasinski forfeited his right to appeal on this issue.

See ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190 (waiver rule is one of judicial administration, not jurisdictional).

¶8 We turn next to "issue preclusion." The parties agree on the applicable law, which provides for a two-part analysis. The first part presents questions of law, and requires an identity of the parties and an identity of the issues. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 224-25, 594 N.W.2d 370 (1999). The State concedes identity of the parties, but argues that Klasinski is vague about what issue he wants to bar the State from relitigating. We disagree. The issue is whether there was probable cause to arrest him. The State also argues that Klasinski's suppression motion was not actually determined in the 2007 case. This argument fails because the issue of probable cause to arrest was determined, even though Klasinski sought and was granted dismissal, not suppression, as the remedy.

¶9 The second part of the test is whether application of issue preclusion would be "fundamentally unfair." ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993). ***Michelle T.*** lists several factors that we will not repeat here, but are touched on in the State's arguments we discuss below. This second part of the test is, on the whole, within the circuit court's discretion, although some of the factors, like right to appeal, are questions of law. ***Paige K.B.***, 226 Wis. 2d at 225.

¶10 In this case, it is not clear whether the circuit court decided this second part of the test or, if it did, what its reasoning was. When a circuit court does not explain the reasons for a discretionary decision, we may search the record to determine whether it supports the court's decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We have done so in this case,

using the State's arguments. We discern no satisfactory reasons to sustain a decision that to apply issue preclusion would be unfair. While we could remand for the circuit court to exercise discretion evident on the record, we conclude it is in the interest of judicial economy to resolve the issue now. Neither party asks us to remand, and whichever circuit judge might eventually decide the issue on remand would do so on the same paper record that is now before us. And, with two years now having passed since trial, the judge would most likely have to reread the entire record to decide the matter. A decision now further advances judicial economy because it also reduces the possibility of a second appeal.

¶11 Turning now to the State's arguments, the State implies that it could not have appealed from the circuit court's decision on probable cause to arrest in the 2007 case. That is not correct.

¶12 The State's opportunity to appeal came when the circuit court denied its reconsideration motion in the 2007 case. At that point the State could have asked the court to enter a written order dismissing the 2007 case (as the court had already done orally), and then the State could have appealed. When the State decided not to appeal then, it was already on notice that Klasinski was trying to use issue preclusion to prevail on the suppression issue. It was only after Klasinski tried to use issue preclusion to dismiss the 2008 case that the State went back and moved for reconsideration in the 2007 case. It is clear that the State sought the reconsideration because it recognized that the probable cause decision in the 2007 case could have a preclusive effect in the 2008 case. The prosecutor stated at the hearing: "And I wouldn't have filed a [reconsideration] motion if there wouldn't have been an issue preclusion motion …."

¶13 The State could then have made two arguments on appeal from dismissal: the circuit court was wrong on probable cause, and even if it was right, it granted the wrong remedy by dismissing instead of suppressing. This court might have decided both issues, thus giving the State review of the probable cause issue. Or, this court might have decided only that dismissal of the complaint was not the proper remedy. This court then would have reinstated the 2007 case and remanded for further proceedings on suppression. If the circuit court then suppressed evidence, based on its finding of no probable cause to arrest, the State could have filed a second, interlocutory appeal as a matter of right under WIS. STAT. § 974.05(1)(d)2.

¶14 Therefore, regardless of what issues this court decided in the State's appeal from the dismissal, that appeal would have eventually led to this court's review of the circuit court's probable cause decision, without need to litigate that issue in circuit court for a second time. Furthermore, the State not only *could* have appealed, but it knew it had a reason to appeal, because it knew that by not appealing there was a risk that the 2007 probable cause decision would be binding in the 2008 case. We recognize that the first circuit court's decision to dismiss without prejudice, rather than suppress, may have set this case on an unusual path that could have caused the parties some degree of uncertainty. However, the State's ability to appeal the probable cause ruling was not in doubt.

¶15 Next, the State appears to argue that the standards and burdens of proof were different at the two probable cause hearings. This contention has no merit. Although the court in the 2007 case initially applied an erroneous standard, it later corrected that error. Both courts eventually applied the same standard in deciding probable cause to arrest.

¶16 Next, the State argues that there was a significant difference in the quality and extensiveness of the proceedings. The essence of this argument is that the first circuit court made some mistakes along the way. However, the State fails to mention that the only one of those alleged mistakes was adverse to the State and that was something that the State then brought to the court's attention in a motion for reconsideration. In response to that motion, the court said that even if the State was correct that the court had improperly rejected certain information, that would not have changed its final decision, because that information did not show Klasinski was the driver. By omitting that last decision of the circuit court in the 2007 case, the State leaves the inaccurate impression that the first litigation ended with an uncorrected error that affected the court's decision.

¶17 The State also briefly argues that a dismissal without prejudice does not have a preclusive effect. The argument is not well developed, but the State cites the RESTATEMENT (SECOND) OF JUDGMENTS, § 27, cmt. n (1982).[1] The State is correct that dismissal of the 2007 case without prejudice did not bar the State from filing a new criminal case. But the real question is whether an issue decided *within* the 2007 case, before dismissal, has preclusive effect on that same issue in the 2008 case. On that point, the Restatement rejects the State's position. The comment cited by the State cross-references another section describing the effect of a judgment as to issues decided before dismissal. *See* ***id.***, § 20, cmt. b, illus. 1. Furthermore, the reporter's note to the comment cited by the State states that the comment "has been modified to make clear that a judgment may preclude

[1] The State does not specifically cite comment n, but cites only to page 263. However, comment n appears to be the only relevant material on that page.

relitigation of an issue even though it does not preclude relitigation of the claim." ***Id.***, § 27, reporter's note, cmt. n.

¶18 Next, the State argues that issue preclusion does not ordinarily apply to suppression issues when a defendant is "retried." However, the case it relies on is not comparable in its procedural posture, and the ultimate conclusion was driven by its facts. *See* ***Jones v. State***, 47 Wis. 2d 642, 657, 178 N.W.2d 42 (1970).

¶19 Finally, the State argues that public policy reasons make it unfair to apply issue preclusion against it in this case. This boils down to an argument that the State has a public policy interest in convicting criminals, and in particular drunk drivers. The State relies on a case in which we held that the public policy in favor of convicting drunk drivers was a factor against applying issue preclusion to prevent the State from litigating a suppression issue. ***City of Sheboygan v. Nytsch***, 2006 WI App 191, ¶17, 296 Wis. 2d 73, 722 N.W.2d 626. However, that public policy conclusion was just one of several factors weighing in the State's favor, and our decision turned mainly on our conclusion that the suppression issue had not actually been litigated in the earlier proceeding. *See* ***id.***, ¶¶11-15.

¶20 We conclude that the State's interest in convicting drunk drivers is not, by itself, a sufficient reason to allow the State to relitigate an issue it previously litigated and lost. Drunk driving, particularly at the felony level as here, represents a serious danger to the public. However, it is a less serious offense than many others in which the State would presumably make the same policy argument. That argument, if considered sufficient by itself, would have the practical effect of creating a blanket ban on issue preclusion against the State in serious criminal cases. That would be inconsistent with the case-by-case analysis we are to apply.

¶21 For his part, Klasinski argues that the public policy interest in sustaining the initial suppression decision is in preventing relitigation to avoid judge shopping and piecemeal litigation. But, again, that policy would apply to foreclose consideration of a second judicial decision in every kind of case. Ultimately, we regard the public policy factors as not favoring either party, because neither party argues based on facts unique to this case. Both parties merely rely on general principles that compete against each other in *all* criminal cases where issue preclusion is raised.

¶22 For these reasons, we conclude that the circuit court erred by allowing the State to relitigate whether there was probable cause to arrest Klasinski. We vacate the judgment of conviction. On remand, the circuit court will need to address what evidence, if any, should have been suppressed due to lack of probable cause. If the court concludes that evidence should have been suppressed, but was instead used at trial, the court will have to determine what relief Klasinski is entitled to. If the court eventually concludes that the conviction should stand, the court should reinstate the conviction.

By the Court.—Judgment reversed and cause remanded with directions.

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