COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1428-CR **Cir. Ct. No. 01CT000484**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL S. FELLBAUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Randall Fellbaum appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, second offense. The sole issue on appeal is whether issue preclusion bars the State

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

from reissuing the OWI complaint and relitigating the suppression motion before a second court after the first court dismissed the charge without prejudice at an earlier suppression hearing. Because the second trial court reasonably exercised its discretion when declining to apply issue preclusion, the judgment is affirmed.

¶2 The procedural background is unusual and unfortunate. Initially, the State charged Fellbaum with OWI. Fellbaum moved to suppress the evidence on the grounds that there was no legal basis to stop his car and no probable cause to arrest him for OWI. After the State rested at the suppression hearing, Fellbaum renewed his motion to suppress the evidence on the basis that the State had not established probable cause for the arrest. He also asked for dismissal of the charge.

¶3 In response, the State requested permission to ask its witness a few additional questions. The court denied the request. It then concluded that although there was a legal basis to stop Fellbaum's car, the evidence was "shaky" as to whether the State had probable cause to arrest him for OWI. However, rather than ruling on the issue of whether the evidence should be suppressed on the grounds that there was no probable cause to arrest, the court suddenly dismissed the case without prejudice.[2] Consequently, the first court never made a determination as to whether the evidence should be suppressed.

[2] It is undisputed that trial courts have no authority to dismiss the charge with prejudice at a suppression hearing. *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 586, 297 N.W.2d 808 (1980) (Trial courts do not have the ability to dismiss a case with prejudice without a finding of a constitutional denial of a speedy trial.).

¶4 The State reissued the charge, and the case was assigned to a different court.[3] Fellbaum renewed his suppression motion and also moved to dismiss the renewed charge, arguing that issue preclusion barred relitigation of the probable cause issue. The court denied the motion to dismiss. Another suppression hearing was held where the court found probable cause for the arrest and denied Fellbaum's motion to suppress the evidence. A jury later found Fellbaum guilty of OWI, and it is from this conviction that Fellbaum appeals.

¶5 When the first court dismissed the complaint, Fellbaum conceded that jeopardy had not attached and that Fifth Amendment principles do not apply. However, he argues the doctrine of issue preclusion bars relitigation of the suppression motion and requires dismissal of the renewed charge.

ANALYSIS

¶6 Issue preclusion is designed to limit the relitigation of issues that have been actually litigated in a previous action. ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994). The Wisconsin courts have moved away from a formalistic approach to issue preclusion in favor of a more equity-based approach. ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687-88, 495 N.W.2d 327 (1993).

¶7 Our supreme court has set out five factors that may bear upon the question of whether issue preclusion applies. These are: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or

[3] Judge Raymond Thums presided over the first suppression hearing. Judge Vincent Howard presided over the second OWI complaint, the suppression hearing, and the trial.

intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issues; (4) have the burdens of persuasion shifted such that the parties seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? *See* ***id.*** at 689.

¶8 The State relies on the fundamental fairness factor as dispositive. It argues that public policy for prosecuting OWI cases under the fundamental fairness factor favors the State. The State reasons that to foreclose the State from prosecuting Fellbaum would violate the stated public policy found at WIS. STAT. § 967.055.[4] In other words, it argues that the public policy of removing drunk and dangerous drivers from Wisconsin highways should prevail in this case. It also reasons, correctly we would add, that if the court had any authority to dismiss the

[4] WISCONSIN STAT. § 967.055 provides in part:

> **Prosecution of offenses; operation of a motor vehicle or motorboat; alcohol, intoxicant or drug. (1)** INTENT.
>
> (a) The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a prohibited alcohol concentration, as defined in s. 340.01 (46m), or offenses concerning the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more.

case, it had to be without prejudice, citing ***State v. Braunsdorf***, 98 Wis. 2d 569, 297 N.W.2d 808 (1980). The State reasons that it was entitled to a judicial determination on this issue and, under these circumstances, issue preclusion should not apply.

¶9 On the other hand, Fellbaum contends issue preclusion is a tool for judicial management, and that it is fundamentally unfair to permit the State another opportunity to litigate the issue of whether the evidence should be suppressed because there was no probable cause for the OWI arrest. The trial court agreed with the State and relied on its public policy argument when denying Fellbaum's motion.

¶10 The determination of fundamental fairness is a matter of discretion to be determined by the trial judge on a case-by-case basis. ***Michelle T.***, 173 Wis. 2d at 698. Thus, our review of the trial court's decision is under the reasonable exercise of discretion standard. The test is not what this court would have concluded, but whether the trial court's exercise of discretion was reasonable and, if so, we must affirm. ***Wisconsin Ass'n Food Dealers v. City of Madison***, 97 Wis. 2d 426, 434-35, 293 N.W.2d 540 (1980).

¶11 After correctly reviewing all the factors to determine whether to apply issue preclusion in this case, the trial court focused on the fundamental fairness factor and reasoned:

> This court finds public policy factor to be dispositive here. There has not been a determination based upon the merits of the real controversy; … Public policy favors a full adjudication of matters on the merits rather than on technical procedural points, especially when additional evidence is available. This public policy can be found in *Wis. Stats.* § 968.03 which indicates that when the court dismisses a complaint for lack of probable cause, the dismissal is without prejudice. It is also consistent with

> *Wis. Stats.* § 970.04 dealing with re-issuance of a criminal complaint following a preliminary examination.
>
> Equally critical here is that the underlying action is one of Operating a Motor Vehicle While Under the Influence of an Intoxicant. There is a significant and substantial public interest to have such matters determined on the merits and not on preliminary procedural "points." This policy can be found in *Wis. Stats.* § 967.055(2) that requires a court to find that a dismissal or reduction of an OWI charge "is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant …." Additionally, it can be found in many cases of our Supreme and appellate courts that the interpretation of laws in this area must consider the fundamental purpose of OWI laws in securing the convictions of drunk drivers and removing them from the roads where they endanger other drivers. *See* ***State v. Brooks***, 113 Wis. 2d 347, 356, 335 N.W.2d 354 (1983) (dismissal of refusal penalties upon plea to OWI approved).
>
> Here, there was no real determination of the issue of probable cause that Fellbaum's driving behaviors may have been linked to his consumption of alcohol due to the failure of the assistant district attorney to present any evidence as to this issue. It is clear that the State has additional evidence as to this issue. It would be fundamentally unfair to the people of this State who seek safer roads to block an adjudication on the merits by application of the Doctrine of Issue Preclusion on a preliminary procedural matter. Accordingly, this court finds that while the prior dismissal without prejudice was proper, it indeed was a "pyrrhic victory" since the Doctrine of Issue Preclusion does not prevent this action. Therefore the defense motion to dismiss is hereby denied.

¶12 Under normal circumstances where the State litigated the issues in the suppression hearing and received an adverse decision from the trial court, we would agree issue preclusion should be applied to prevent the State from having a second opportunity to prove its case. However, here we agree with the trial court that under these unusual procedural circumstances, it was the first trial court that refused to decide whether the evidence should be suppressed and, consequently, the State should not be denied the right to reissue the charge and to have a hearing

and decision on this issue. Although Fellbaum argues the trial court must have found that the State had not established probable cause for the arrest at the first hearing because it dismissed the case, the uncontradicted evidence is that it never decided this issue, notwithstanding its later observations on the State's motion for reconsideration.[5]

¶13 Thus, after reviewing the trial court's rationale, the court's refusal to apply issue preclusion under these unusual circumstances was within the boundaries of a reasonable exercise of discretion. Therefore, the judgment is affirmed.

By the Court.—Judgment affirmed.

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

[5] In response to the State's motion for reconsideration, the trial court observed that it had no alternative but to dismiss the complaint without prejudice because of the failure of evidence about the arrest at the suppression hearing. Interestingly, the officer testified that he stopped Fellbaum's car after observing him driving erratically. Fellbaum told him he was coming home from Shaky's Pizza where he had been drinking. The officer also testified that Fellbaum's eyes appeared glassy and a strong odor of alcohol was coming from his car. It was after these observations the officer issued the traffic citations, including the OWI charge.