

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2012

Diane M. Fremgen
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. 2011AP1731-CR

Cir. Ct. No. 2010CT453

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANNON J. PERRONNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 REILLY, J.¹ Shannon J. Perronne appeals from a judgment of conviction for her third offense operating a motor vehicle while intoxicated

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(OWI).² The circuit court originally granted Perronne’s motion to suppress and dismissed the charges without prejudice after the prosecution’s key witness failed to show at the motion hearing. The State refiled the charges and also brought a motion to reconsider the order granting the motion to suppress. Perronne objected on the grounds that the doctrine of issue preclusion prevented the circuit court from deciding the matter again. The circuit court disagreed, vacated the suppression motion, and subsequently found there was probable cause to support the arrest. Perronne pled no contest and appealed. We hold that, as the issue of whether there was probable cause was never actually litigated at the initial motion hearing, issue preclusion does not apply. Perronne’s conviction is affirmed.

BACKGROUND

¶2 On the evening of October 22, 2009, Trooper Luke Kraemer was performing vehicle registration checks on passing cars. Kraemer pulled over Perronne after his computer system indicated that she was driving with a suspended license plate. He subsequently arrested her for operating a motor vehicle while intoxicated.

¶3 Perronne filed a motion to suppress the evidence on the grounds that her license plate was no longer suspended the night she was pulled over and thus the stop was based on inaccurate information. The motion was heard on March 23, 2010, before Judge Gary Langhoff. Judge Langhoff originally stated, “I’m not going to rule on the motion today,” but when Kraemer failed to appear at

² This case has appeared before three different circuit court judges: Judge Gary Langhoff, Judge L. Edward Stengel, and Judge James J. Bolgert. The unique procedural history of this case is laid out in the body of the opinion.

the hearing to testify, Judge Langhoff granted Perronne's motion and dismissed the action. Judge Langhoff stated that "[i]f [the State] want[s] to start over, they can." On March 30, Judge Langhoff signed an order granting Perronne's motion to suppress because "the State fail[ed] to meet its burden of proof." The order also dismissed the case without prejudice.

¶4 The State refiled the charges on April 14 and the case was assigned to Judge L. Edward Stengel. On May 6—before a status hearing was held on the refiled charges—the State filed a motion before Judge Langhoff to reconsider his order granting Perronne's motion to suppress. At a May 12 status hearing on the refiled charges, Judge Stengel rhetorically asked, "How can you reconsider a ruling in a case that has been dismissed?" Judge Stengel noted he could not consider the State's evidence as long as Judge Langhoff's motion to suppress the evidence was still valid. As the State had requested Judge Langhoff to reconsider his ruling, Judge Stengel dismissed the charges before him without prejudice. Judge Langhoff subsequently vacated his order granting the suppression motion but inexplicably dismissed the charges without prejudice.

¶5 On September 15, the State once more filed charges against Perronne and the case was assigned to Judge James J. Bolgert. A motion hearing was held on January 21, 2011, and Judge Bolgert denied Perronne's motion to suppress and ruled that Kraemer had probable cause to conduct the traffic stop. Perronne pled no contest to the OWI charge and appeals.

DISCUSSION

¶6 Perronne argues that the doctrine of issue preclusion barred the State from refiled charges against her after Judge Langhoff granted her motion to suppress and dismissed the case without prejudice. The doctrine of issue

preclusion prevents the relitigation of issues that have already been litigated by the same parties or their privies. *Flooring Brokers, Inc. v. Florstar Sales, Inc.*, 2010 WI App 40, ¶6, 324 Wis. 2d 196, 781 N.W.2d 248. We apply a two-step test to determine whether issue preclusion bars a litigant’s claim: (1) can issue preclusion apply as a matter of law?; (2) if yes, would the application of issue preclusion be fundamentally unfair? *Id.* In the first part, when examining whether issue preclusion applies to an issue or fact, a court must determine if the issue or fact was actually litigated and was necessary to the judgment. *Id.*, ¶7. If the first part of the test is not satisfied, we do not address the fairness factors in part two. *Id.*, ¶8.

¶7 We hold that Perronne’s motion to suppress was not actually litigated and thus issue preclusion does not apply. Our decision is guided by *City of Sheboygan v. Nytsch*, 2006 WI App 191, 296 Wis. 2d 73, 722 N.W.2d 626. In that case, the defendant Nytsch was arrested for OWI and for operating with a prohibited alcohol concentration. *Id.*, ¶2. The arresting officer provided Nytsch with notice of intent to suspend his driving privileges for six months. *Id.* Nytsch requested a hearing and an administrative law judge suspended Nytsch’s driving privileges. *Id.*, ¶3. Nytsch sought judicial review and a stay of the suspension of his driving privileges on the grounds that he needed to drive to care for his mother. *Id.*, ¶4. At the review hearing before the circuit court, the assistant city attorney stated that while the City of Sheboygan opposed Nytsch’s requested stay, the City was not a party to the administrative suspension and thus did not make an argument on that issue. *Id.*, ¶5. The circuit court concluded, “Since there is no one here basically to oppose the request of Mr. Nytsch, the Court will find in Mr. Nytsch’s favor pursuant to the request made by counsel.” *Id.* The circuit court subsequently vacated Nytsch’s administrative suspension. *Id.*

¶8 Nytsch then moved to suppress the evidence against him based on lack of probable cause to arrest. *Id.*, ¶6. He argued that the doctrine of issue preclusion prevented a court from considering probable cause because probable cause was already considered in the administrative and judicial hearings. *Id.* Specifically, because the City had the opportunity to litigate the issue of probable cause at the circuit court review hearing, Nytsch argued that the issue had been “actually litigated.” *Id.*, ¶12. We rejected this argument, and said that an issue is not actually litigated until it is “properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.” *Id.* (citation omitted). Just because an issue could have been raised does not mean it was actually litigated. *Id.* At Nytsch’s judicial review hearing, no testimony was taken or evidence introduced. *Id.*, ¶14. We stated that the circuit court “did not have the benefit of deciding the issue in an adversarial context. Indeed, the court’s comments suggest that the issues underlying the status of Nytsch’s driving privileges, which would include probable cause to arrest, would be litigated at a later date” *Id.* As the issue of probable cause was not actually litigated, the City was not precluded from litigating that issue on the merits. *Id.*

¶9 We hold that the issue of whether Kraemer had probable cause to pull over Perronne was not actually litigated at the March 23 motion hearing. At one point during the hearing Judge Langhoff stated, “I’m not going to rule on the motion today.” It was only after Kraemer failed to appear that Judge Langhoff granted the motion and dismissed the case without prejudice. The motion hearing was not adversarial and no testimony was taken or any evidence introduced. Furthermore, the circuit court even intimated that its ruling was not an end to the litigation when it stated, “If [the State] want[s] to start over, they can.” The March 23 hearing did not decide the merits of whether there was probable cause to stop

Perronne's vehicle. As claim preclusion does not apply as a matter of law, we need not address whether application of the doctrine would be fundamentally unfair.

¶10 Perronne also argues that issue preclusion must be applied in this case to prevent the State from "judge shopping" within a county by repeatedly dismissing and refiling charges. Her concerns are unfounded. As we have stated, "It is well established that a successor judge in a circuit court proceeding has the authority to modify or reverse decisions, judgments or rulings of a predecessor judge, so long as the predecessor judge was empowered to make such modifications." *Dietrich v. Elliot*, 190 Wis. 2d 816, 822, 528 N.W.2d 17 (Ct. App. 1995). The basis for this rule is that "the power to modify a judicial ruling belongs to the court, not to any individual judge." *Id.* As a court may reconsider its own ruling, the State was entitled to bring a motion requesting that the circuit court reconsider its order granting Perronne's motion to suppress. *See Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶44, 298 Wis. 2d 468, 727 N.W.2d 546 (WI App 2006).

CONCLUSION

¶11 We doubt we will ever see a fact pattern similar to this case. Regardless, the probable cause issue that was the basis for Perronne's motion to suppress was never "actually litigated" on March 23. While this case appeared before three different judges and was assigned three different case numbers, it nonetheless remained the same case, as each complaint was based on the same charges and the same incident. Issue preclusion does not apply here.

By the Court.—Judgment affirmed.

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

