COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2229-CR **Cir. Ct. No. 2011CF256**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY J. HARRAST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Gary J. Harrast appeals an amended judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC), tenth offense. Harrast acknowledges nine prior countable

convictions related to operating while intoxicated (OWI). The issue is whether either issue preclusion or judicial estoppel should have prohibited the trial court from imposing sentence for a tenth offense when Harrast's two most recent OWI-related offenses were sentenced as a fourth and fifth offense. We agree with the trial court that the doctrines do not apply. We affirm.

¶2 In 2011, a criminal complaint charged Harrast with sixth-offense OWI and PAC. In the information, however, the State alleged that he had nine countable prior convictions, making his current OWI and PAC tenth offenses. The information counted as convictions under WIS. STAT. § 343.307(1) (2013-14)[1] four Illinois events—two 1995 PAC suspensions and two 1996 refusals (the Illinois convictions)—that apparently had been overlooked when he was charged in 2000 and 2002 with fourth- and fifth-offense OWI.

¶3 Twice Harrast entered and withdrew guilty pleas. He was allowed to withdraw the first before sentencing because, after much vacillation, he decided to proceed to trial. He was allowed to withdraw the second after sentencing on grounds that his counsel ineffectively failed to challenge whether issue preclusion, judicial estoppel, or due process precluded his being charged with a tenth offense.

¶4 Harrast filed a motion in the trial court that argued the doctrines raised in the ineffectiveness claim. He contended that the State was in a better position than he to know what constituted a countable offense, yet incorrectly had last charged him with fourth and fifth offenses; that, having been so charged and sentenced, he reasonably believed a subsequent offense would be treated as a sixth

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

offense; and that it was unfair for the State now to seek to have him sentenced for a tenth offense, where the mandatory minimum confinement is four years in prison, as opposed to six months in jail for a sixth. The court rejected that argument, primarily reasoning that public policy favors punishing a ten-time offender with a tenth-offense sentence. Harrast entered a guilty plea to tenth-offense PAC, was sentenced accordingly, and now appeals.

¶5 Harrast argues that the trial court erred in not applying issue preclusion. "The doctrine of issue preclusion forecloses relitigation of an issue that was 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. To limit subsequent litigation, the question of fact or law sought to be precluded "actually must have been litigated in a previous action and be necessary to the judgment." ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. If so, the court then must conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand. ***Id.*** The party asserting issue preclusion has the burden of demonstrating that it applies. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). Whether issue preclusion applies to limit litigation in an individual case is a question of law. ***Mrozek***, 281 Wis. 2d 448, ¶15.

¶6 Citing ***Mrozek***, Harrast contends that "a conviction resulting from a guilty plea constitutes 'actual litigation' for the purposes of issue preclusion." The ***Mrozek*** he cites for this proposition is the court of appeals case. *See* ***Mrozek v. Intra Fin. Corp.***, 2004 WI App 43, ¶¶17, 20, 271 Wis. 2d 485, 678 N.W.2d 264. Unfortunately for him, the supreme court reversed this court on precisely that point. *See* ***Mrozek***, 281 Wis. 2d 448, ¶21. Harrast's guilty pleas to fourth-offense

OWI in 2000 and fifth-offense OWI in 2002 and his resultant sentences thus do not establish that the issue of whether the Illinois convictions are countable offenses for sentence enhancement has been "already litigated."

¶7 Trying another tack, Harrast argues that because the trial court turned immediately to the fairness analysis, it "implicitly held" that whether the Illinois convictions are countable offenses was "actually litigated." Whether an issue was actually litigated is a question of law. ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. A reviewing court owes no deference on questions of law. ***Id.***

¶8 The requirement that the issue be actually litigated is a "threshold prerequisite for application of the doctrine." ***Randall v. Felt***, 2002 WI App 157, ¶9, 256 Wis. 2d 563, 647 N.W.2d 373. "An issue is 'actually litigated' when it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" ***Id.*** Harrast points to nothing showing that such ever occurred. The trial court did not address it at all. The one case Harrast cites in his favor—this court's decision in ***Mrozek***—has been reversed on the proposition for which he cites it. He has not surmounted the threshold and so has not met his burden of demonstrating that the doctrine applies. We thus need not undertake a fairness analysis. *See* ***Mrozek***, 281 Wis. 2d 448, ¶17 (if the issue actually has been litigated the circuit court *then* must conduct a fairness analysis).

¶9 Harrast alternatively contends that applying the doctrine of judicial estoppel would have prevented the State from alleging that the Illinois convictions should be counted in this case to enhance his sentence when it did not allege that they were countable offenses for his 2000 or 2002 OWIs.

¶10 The equitable doctrine of judicial estoppel precludes a party from asserting a position in a legal proceeding and later asserting an inconsistent position in a subsequent one. ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 111-12, 595 N.W.2d 392 (1999). The doctrine may be invoked if: (1) the earlier and later positions are clearly inconsistent, (2) the same facts are at issue in both proceedings, and (3) the party to be estopped convinced the first court to adopt its position. ***Id.*** at 112. If the elements are met, the decision to invoke the doctrine is left to the trial court's discretion. ***State v. Ryan***, 2012 WI 16, ¶30, 338 Wis. 2d 695, 809 N.W.2d 37. Whether the elements are met, however, is a question of law that we review independently. ***Id.***

¶11 Harrast has not shown that the doctrine should have been applied. Granted, counting convictions as offenses four and five in 2000 and 2002 is inconsistent with counting them as eight and nine in 2011 and beyond. He does not assert, however, that the State's current stance stems from "playing 'fast and loose with the courts' by asserting inconsistent positions." *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (citation omitted).

¶12 As the State observes, the issue is whether the Illinois convictions are countable for sentence enhancement. Nothing in the record indicates that the State ever advocated otherwise or even attempted to persuade a court to adopt a contrary position. Harrast did not complain about the miscount when it worked to his benefit. He will not be heard to complain now that things have been righted.

By the Court.—Judgment affirmed.

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