COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2716-CR **Cir. Ct. No. 2013CF950**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY S. MASTRO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Anthony Mastro appeals a judgment of conviction for tenth-offense operating while intoxicated (OWI) and an order denying his postconviction motion seeking an amended judgment of conviction and resentencing. Prior to this case, Mastro's most recent OWI conviction occurred in

a 2009 case in Brown County, in which the State acquiesced to Mastro's collateral attack against four prior OWI-related convictions in Minnesota. On appeal, Mastro's only argument is the circuit court in this case erroneously refused to apply the doctrine of issue preclusion to foreclose penalty enhancement based upon the four Minnesota convictions challenged in the 2009 case. Mastro has failed to demonstrate the court erroneously exercised its discretion when it determined that fundamental fairness did not require the State in the present case to be bound by its earlier concessions. Accordingly, we affirm.

BACKGROUND

¶2 Mastro was charged with tenth-offense OWI, among other charges, on July 13, 2013. The criminal complaint described a high-speed chase with police in the City of Green Bay, during which Mastro, driving a motorcycle, repeatedly ignored traffic signals and struck a parked vehicle. Mastro eventually ran the motorcycle up a curb and was apprehended. He failed field sobriety tests and refused to submit to a blood draw. The blood draw was completed after police obtained a search warrant.

¶3 The State alleged nine prior convictions on Mastro's driving record for purposes of determining the applicable penalty for the OWI offense. *See* WIS. STAT. § 343.307[1] (defining prior offenses to be counted). Mastro pleaded not guilty to the charges at his arraignment, where his defense counsel noted that Mastro had been sentenced as a five-time offender after being convicted of OWI in Brown County Case No. 2009CF1420. The State in 2009CF1420 had originally

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

charged Mastro with a ninth offense, but, on its own motion, sought to amend the charge to fourth-offense OWI after Mastro mounted a collateral attack against four alleged prior Minnesota convictions. Judge Sue Bischel in that case corrected the State that excluding the four Minnesota convictions would result in a fifth offense, for which Mastro was ultimately sentenced.

¶4 The State used these same four Minnesota convictions in the present case to calculate a tenth offense. Defense counsel, believing the State's counting of the Minnesota convictions for purposes of determining the severity of the offense at issue was improper, argued Mastro could be convicted only of sixth-offense OWI. Meanwhile, pursuant to an agreement with the State, Mastro stipulated that the State could prove all elements of the present OWI offense and pleaded no contest, with further proceedings to determine how many convictions could be counted for purposes of determining the applicable penalty.[2]

¶5 The State then introduced Mastro's certified driving record from the Wisconsin Department of Transportation, which indicated a total of nine prior convictions. The driving record included the four Minnesota convictions that Mastro had collaterally attacked in 2009CF1420: (1) a 1990 OWI-related (implied consent) violation in Anoka County, Minnesota; (2) two 1998 OWI convictions in Washington County, Minnesota; and (3) a 2000 OWI conviction in Hennepin County, Minnesota.

[2] Although the issue of whether Mastro's plea was knowing, intelligent, and voluntary is not at issue on appeal, we observe that at the plea hearing, Mastro was apprised of the fact that the applicable maximum penalty would depend on the outcome of his collateral attack and would range between a Class H felony punishable by up to six years' imprisonment, and a Class F felony punishable by up to twelve and one-half years' imprisonment. Mastro stated he understood that was the range of maximum penalties he faced.

¶6 Mastro responded by again mounting a collateral attack against the four Minnesota convictions. Mastro asserted defense counsel could not verify the 1990 implied consent violation in Minnesota records, and he opined it was "highly unusual" that the date of the offense and the date of conviction were only one week apart. Mastro alleged the remaining OWI convictions, two in 1998 and one in 2000, were entered in violation of his right to counsel, because the plea colloquies did not comply with the requirements of Wisconsin law. Mastro observed these prior convictions were eliminated for counting purposes in 2009CF1420, and he argued the circuit court was obligated to do likewise in the present case, both on the merits and as a matter of issue preclusion.

¶7 The circuit court denied Mastro's collateral attack on the four disputed Minnesota convictions and concluded issue preclusion did not apply. The court first determined Mastro's collateral attack failed on its merits, as none of the evidence submitted pertaining to the 1990 conviction in fact demonstrated the conviction was listed in error. Further, Mastro failed to provide specific facts demonstrating the 1998 and 2000 convictions were entered without Mastro's knowing, intelligent, and voluntary waiver of his right to counsel; rather, the court concluded, he had merely pointed out the "failings of the Minnesota courts to provide sufficient colloquies." Finally, the court rejected the application of issue preclusion because the State in 2009CF1420 "conceded to reducing the charge to a

fifth-offense OWI" without Judge Bischel having ruled on the validity of the prior convictions and, hence, the matters were not "actually litigated" at that time.[3]

¶8 The circuit court sentenced Mastro for tenth-offense OWI, with a total sentence of twelve and one-half years' imprisonment. Following the conviction, Mastro filed a document entitled "Motion to Amend Judgment and for Resentencing." The motion argued, among other things, that issue preclusion required the court in this case to sentence Mastro as if it were his sixth offense, because the State was not "entitled to relitigate the same factual and legal issue that it already had the opportunity to litigate before Judge Bischel."

¶9 The circuit court denied Mastro's postconviction motion in a written, twelve-page order. The court once again determined the validity of the disputed Minnesota convictions for counting purposes had not been "actually litigated" before Judge Bischel because "the State conceded to Mastro's arguments and the Court accepted the stipulation of the parties." The court further determined that, even if the matters had been actually litigated, it would be fundamentally unfair to apply issue preclusion to the State given the "specific facts and circumstances presented by this case." Specifically, the court concluded Mastro's situation had changed significantly since the prior offense because, at the time of the present offense, he was on extended supervision and his present conduct included driving at "high rates of speed and dangerous driving behavior." The court made clear it

[3] The State, by letter dated August 2, 2010, advised Mastro's counsel that it would concede that the 1998 and 2000 OWIs could not be used for sentencing purposes in 2009CF1420. The State confirmed this concession at a motion hearing a few days later. While the State seemed ambivalent about whether it would oppose Mastro's collateral attack on the 1990 implied consent violation, it ultimately elected not to respond to Mastro's arguments at the motion hearing and, in fact, agreed with Mastro that at least one aspect of the conviction—that the date of conviction was noted as having occurred on a Saturday—was "most troublesome."

was not seeking to determine Mastro's "worthiness" in terms of applying issue preclusion, but rather it was endeavoring to articulate why it would be unfair to hold the State, in its prosecution of Mastro's current OWI offense, to its concessions in the prior OWI case. Mastro appeals.

DISCUSSION

¶10 On appeal, Mastro argues only that the circuit court erroneously refused to apply issue preclusion so as to prohibit the State from using the four Minnesota convictions he challenged in 2009CF1420 to enhance his punishment in the present case. "Issue preclusion … 'is designed to limit the relitigation of issues that have been actually litigated in a previous action.'" ***Paige K.B. ex rel. Peterson v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (quoting ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994)). The issue may be one of evidentiary fact, of ultimate fact, or of law. ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. "The burden is on the party asserting issue preclusion to establish that it should be applied." ***Id.***

¶11 Determining whether issue preclusion binds the State to its concessions in 2009CF1420 requires a two-step analysis. *See* ***Estate of Rille ex rel. Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶36, 300 Wis. 2d 1, 728 N.W.2d 693. First, the court must determine whether issue preclusion can, as a matter of law, be applied. ***Id.*** In this step, the circuit court "must determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." ***Id.***, ¶37. This presents a question of law, which we review de novo. ***Id.*** Second, the circuit court must determine whether the application of issue preclusion comports with principles of fundamental fairness. ***Id.***, ¶38. The

decision whether to apply issue preclusion "rests on the circuit court's sense of justice and equity," ***id.***, ¶63, and is therefore reviewed for an erroneous exercise of discretion, ***id.***, ¶38. Our supreme court has articulated a list of five non-exclusive factors to be considered when deciding whether the application of issue preclusion comports with fundamental fairness. ***Id.***, ¶¶38, 61-63.

¶12 It is undisputed that the parties involved in this case, and issues under consideration, are identical to those in the prior case. However, Mastro asserts the circuit court erred as a matter of law by deciding that his challenges to the alleged Minnesota convictions in the prior case were not "actually litigated." Mastro challenges the notion that the State conceded those issues, and he also contends that Judge Bischel's comments at the motion hearing demonstrate that, the State's concessions notwithstanding, she determined on the merits that Mastro had prevailed in his collateral attack. Lastly, Mastro argues he has shown that the application of issue preclusion in this case comports with fundamental fairness, such that the circuit court erroneously exercised its discretion in concluding otherwise.

¶13 We assume without deciding that Mastro has met his burden of showing that issue preclusion can be applied in this case as a matter of law. That is, we assume that even though Mastro does not dispute the State largely conceded his collateral attack in 2009CF1420, he has demonstrated, as a matter of law, that the issue of penalty enhancement based on the four alleged Minnesota convictions was "actually litigated" before Judge Bischel such that she reached a determination in the prior proceeding that was essential to the judgment. *See* ***id.***, ¶37. However, even if we presume the matter was actually litigated, we conclude Mastro has not established the circuit court erroneously exercised its discretion

when it determined the application of issue preclusion was inconsistent with fundamental fairness.

¶14 In ***Michelle T. ex rel. Sumpter v. Crozier***, 173 Wis. 2d 681, 495 N.W.2d 327 (1993), the supreme court articulated a list of factors courts are to consider as part of the "fundamental fairness" inquiry:

> (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 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 issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (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?

Id. at 688-89. "These enumerated factors are illustrative; they are not exclusive or dispositive." ***Rille***, 300 Wis. 2d 1, ¶63. The first, second and fourth factors are questions of law, while the third and fifth factors generally fall within the circuit court's exercise of discretion. ***Id.***, ¶62. The weight to be given each factor and the ultimate decision on fundamental fairness both involve the circuit court's exercise of discretion and are reviewed accordingly. ***Id.***, ¶¶38, 62.

¶15 The circuit court concluded the first four factors weighed in favor of applying issue preclusion in this case. Mastro agrees with this assessment, but the State "questions whether it could have sought review of the judgment convicting Mastro of OWI and sentencing him for a fifth offense." The State is permitted to appeal only adverse final orders or judgments. *See* WIS. STAT. § 974.05(1)(a); *see also* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992)

("We will not review invited error."). Thus, it does not appear the State, which had effectively conceded in 2009CF1420 that the four disputed Minnesota convictions could not be used for sentence enhancement, and which had requested to amend the charge in that case, could have appealed that judgment of conviction. However, the State does not dispute that the second, third and fourth factors support application of issue preclusion.[4]

¶16 The circuit court relied entirely on the fifth factor to conclude that applying issue preclusion in this case would not comport with fundamental fairness. The court reasoned that "not only did Mastro commit another OWI offense in Wisconsin, [he] did so while on extended supervision in case [2009CF1420]." This fact, together with the fact that the present offense involved "high rates of speed and dangerous driving behavior," led the court to conclude the State had ample justification in more aggressively pursuing the merits of Mastro's prior Minnesota convictions than it did in the prior case. Given the differing circumstances of the cases and Wisconsin's public policy favoring the counting of out-of-state OWI convictions for penalty purposes, the court reasonably concluded it would be fundamentally unfair to bind the State to its concessions in 2009CF1420.

¶17 Mastro argues the circuit court's reliance on the individual circumstances of the present case was done in error, because such circumstances

[4] With respect to the second factor, regarding "intervening contextual shifts in the law," the circuit court noted that there had not been a per se shift in the law between Mastro's prior OWI conviction and the present case. However, citing the authored, unpublished opinion in ***State v. Imbruglia***, No. 2011AP1373-CR, unpublished slip op. (WI App Feb. 8, 2012), the court observed that state public policy increasingly favored "broader inclusion of out-of-state OWI convictions … under our statutory scheme." We, like the circuit court, regard this as a public policy consideration under the fifth factor.

are "not germane to the question of fundamental fairness at issue here." As authority for this proposition, Mastro cites ***Aldrich v. LIRC***, 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 433, and ***Rille***. Neither case supports Mastro's argument. The portion of ***Aldrich*** that Mastro cites merely states that "the 'most important factor to be considered is fairness to the party against whom preclusion is asserted.'" ***Aldrich***, 341 Wis. 2d 36, ¶112 (quoting ***Rille***, 300 Wis. 2d 1, ¶63). ***Rille*** noted that the "fairness determination should be made on a case-by-case basis." ***Rille***, 300 Wis. 2d 1, ¶63. Contrary to Mastro's argument, these authorities *require* consideration of the individual facts of each case when determining whether the application of issue preclusion comports with fundamental fairness. *See* ***id.***, ¶93 (circuit court must exercise its discretion to determine whether "individual circumstances" render the application of issue preclusion fundamentally unfair).

¶18 Mastro asserts the "correct application of the fifth factor involves a weighing of competing interests." While this is true, the factors to be weighed are not as limited as Mastro seems to argue. A circuit court must "balance competing goals of judicial efficiency and finality, protection against repetitious or harassing litigation, and the right to litigate one's claims." ***Id.***, ¶94 (quoting ***Michelle T.***, 173 Wis. 2d at 688). Mastro argues this balancing exercise does not include "consideration of whether a better outcome for a party could be achieved if the party were allowed to relitigate the very same issue that the party had chosen not to oppose or appeal, even though it had been given a full opportunity to do both."[5]

[5] As we have stated, we are skeptical the State would have had a basis to appeal the conviction in 2009CF1420. *See supra* ¶15.

¶19 Mastro ignores that the possibility of a "better outcome" for the State on the issue of the number of his prior OWI-related convictions arose only out of his commission of a subsequent drunk driving offense in Wisconsin. While the State previously decided not to oppose, or at least not to continue to oppose, Mastro's collateral attack on his Minnesota convictions, it was reasonable and fair for the State to change its position in that regard when confronted with Mastro's commission of a subsequent, aggravated OWI offense. The State's concessions in the prior case, and its choice to amend the charge, accrued only to Mastro's benefit; the State gained nothing by them.[6] As the circuit court explained, its decision not to hold the State to those concessions was a function of the aggravating circumstances of this case—namely, the fact that Mastro was on extended supervision for a prior OWI conviction when he reoffended, and his other dangerous conduct during the offense. These considerations *do* bear on public policy and the individual circumstances of the present case, and are legitimate under the fifth factor. Accordingly, Mastro has provided no basis for us to conclude the circuit court erroneously exercised its discretion. *See* ***Rille***, 300 Wis. 2d 1, ¶39 (We will affirm a circuit court's exercise of discretion if it applied the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach.).

¶20 Mastro asserts the circuit court's decision "not to apply issue preclusion against the [S]tate is fundamentally unfair" to him. He asserts he "had a legitimate expectation that, should he commit another OWI, it would be his sixth." This contention—that Mastro could commit a subsequent OWI in reliance

[6] Nothing in the record we have reviewed suggests the State's concession was part of a plea agreement, nor does Mastro claim as much.

on the fact that it would be charged as his sixth offense—is dubious, at least insomuch as the actual number of his prior OWI-related convictions does not relate to his underlying conduct at issue, but rather the manner in which that conduct is penalized. In any event, the notion also is clearly contrary to this State's well-established policy against drunk driving, especially serial drunk driving by a particular individual. *See* ***State v. Hirsch***, 2014 WI App 39, ¶17, 353 Wis. 2d 453, 847 N.W.2d 192.

¶21 Finally, Mastro appears to claim that failing to apply issue preclusion in this case would encourage the State not to oppose collateral attacks in the future. *See* ***Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank, G.A.P., Inc.***, 224 Wis. 2d 288, 309, 592 N.W.2d 5 (Ct. App. 1998) ("To not apply issue preclusion in this case would encourage parties … to sit on their hands and wait and see what happens instead of opposing summary judgment on an issue crucial to their claims."). However, as we have explained, the State did not gain anything by its failure to oppose the motion in 2009CF1420, and therefore the risk Mastro perceives does not exist or otherwise overcome the circuit court's reasoned analysis of fundamental fairness in this case.

By the Court.—Judgment and order affirmed.

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