**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 18, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP713-CR** **Cir. Ct. No. 2012CF650**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**DONAVEN M. JACKSON,**

**DEFENDANT-RESPONDENT.**

APPEAL from an order of the circuit court for Kenosha County: MICHAEL S. WILK, Judge. *Reversed*.

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

¶1 PER CURIAM. The State appeals an order granting Donaven Jackson's motion to suppress drug evidence seized in a consent search of his residence. The circuit court granted Jackson's motion based on the doctrine of

issue preclusion because, in his parallel case, the federal district court had suppressed evidence (ammunition) on grounds that the search violated the Fourth Amendment. We reverse.

¶2 Jackson was arrested at his residence after police responded to a report of a domestic disturbance between him and Shantrice King, his live-in girlfriend and the mother of his son. King told police that Jackson told her to move out, that the argument turned physical when he began taking her clothes from her closet and her keys from a key ring, and that Jackson, a felon, had a handgun. The officers did not locate the gun.

¶3 Police called King the next day. She was not at the residence at the time, but agreed to meet them there. King indicated that she had lived at the residence with Jackson and their son for about a year. She produced a house key, let police in, and consented to a search of the home, garage, and Jackson's car. During the warrantless search, officers found ammunition, a gun lock, cocaine, drug paraphernalia, and $8000 in cash.

¶4 The State charged Jackson with possession with intent to deliver cocaine and possession of drug paraphernalia. On the same day, the federal government indicted him on one count of being a felon in possession of ammunition. Jackson filed motions to suppress evidence in federal court and in the Kenosha county circuit court. He argued that, as he was the sole lease holder, King lacked actual or apparent authority to permit a search of the residence after he kicked her out. The federal court granted his suppression motion.

¶5 Jackson then moved the state court to summarily grant his suppression motion based on the doctrine of issue preclusion. Finding that there was "clear privity" between the state and federal governments because both were

prosecuting violations of the law, had the same amount at stake in opposing Jackson's identical motions to suppress, and represented the same legal interest, the circuit court granted the motion.

¶6 The State moved for reconsideration. It contended the court's oral ruling ran counter to ***State v. Mechtel***, 176 Wis. 2d 87, 499 N.W.2d 662 (1993), a case factually similar to Jackson's but "seemingly unknown to all parties and the court" at the time of the court's ruling. The State argued that, under ***Mechtel***, issue preclusion does not bar relitigation in state court of issues previously decided in federal court. ***Id.*** at 97-98. Concluding that the facts in ***Mechtel*** were "convoluted" and sufficiently different, the court found that it did not apply and denied the motion. The State appeals.

¶7 Issue preclusion limits the relitigation of issues actually decided in a previous case. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). Relitigation may be foreclosed on an issue 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. To apply issue preclusion requires that we evaluate whether there is an identity of parties, which is a question of law, and whether applying it comports with fundamental fairness, which is a mixed question of fact and law. *See* ***Masko v. City of Madison***, 2003 WI App 124, ¶¶5-6, 265 Wis. 2d 442, 665 N.W.2d 391. "If, as a matter of law, the litigant against whom issue preclusion is being asserted is not in privity or does not have sufficient identity of interest with a party to the prior proceeding, applying issue preclusion to the litigant would violate his or her due process rights and the analysis ends." ***Paige K.B.***, 226 Wis. 2d at 224. "It is fundamental that nonparties cannot be bound by a prior litigation unless their interests are deemed to have been litigated." ***Id.*** at 226.

¶8 As the State was not a party in the federal proceeding, we must ask whether it was in privity with the federal government. "For a nonparty to an action to be in privity with a party, the nonparty must substantially control or be represented by the party." ***Mechtel***, 176 Wis. 2d at 96. One represents the other when they are "so closely aligned that they represent the same legal interest." *See* ***Kunzelman v. Thompson***, 799 F.2d 1172, 1178 (7th Cir. 1986) (citation omitted).

¶9 We reject Jackson's contention that ***Mechtel*** must be read narrowly and limited to its facts. Mechtel was convicted in state court of possessing marijuana and cocaine with intent to deliver. ***Mechtel***, 176 Wis. 2d at 91. His pretrial motion alleging a ***Franks***[1] violation had been denied after a hearing. ***Mechtel***, 176 Wis. 2d at 91. Postconviction, he was indicted for a federal firearms violation based on the same evidence. ***Id.*** After a new hearing, a federal magistrate found that there was a ***Franks*** violation and that, without the materially false statements or omissions, there was no probable cause for the warrant. ***Mechtel***, 176 Wis. 2d at 91. The district court dismissed the indictment. ***Id.***

¶10 Mechtel's subsequent motions to vacate his state conviction and the order denying his suppression motion and for a new trial with the evidence suppressed were denied. ***Id.*** at 92. He appealed. ***Id.*** at 93. This court certified to the supreme court the question "whether a federal magistrate's decision on a fourth amendment suppression issue is binding on the trial court in a state criminal prosecution, under the facts presented in this case." ***Id.*** at 89.

[1] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978).

¶11 The supreme court observed generally that "[s]tate courts are not bound by the decisions of the federal circuit courts of appeal or federal district courts" and held particularly that "the federal magistrate's decision in this case cannot and does not bind state courts." ***Id.*** at 95, 96. The court held that issue preclusion did not apply because the State was not a party to the federal firearms proceeding; it was not in privity with the federal government because it neither substantially controlled nor was represented by the federal government; state and federal governments are separate sovereigns whose prosecutors have separate jurisdiction; and, as the State dismissed its firearms charge to allow a federal prosecution, it could not be said that the State had its day in court. ***Id.*** at 96-97.

¶12 As in ***Mechtel***, the State here was not a party to the federal case, it did not control the federal proceeding, and the state and federal governments, which aimed to prosecute different crimes, are not "so closely aligned that they represent the same legal interest." ***Kunzelman***, 799 F.2d at 1178. Thus, issue preclusion does not bar the relitigation in state court of an issue previously decided in federal court. ***Mechtel***, 176 Wis. 2d at 97-98.

*By the Court.*—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).