COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1632-CR **Cir. Ct. No. 00-CT-832**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORRINE L. BRAZEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Corrine Brazee appeals her conviction for third offense operating a motor vehicle while under the influence of an intoxicant (OWI), contrary to WIS. STAT. § 346.63(1)(a). She claims that the circuit court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version.

erred by rejecting her motion to suppress blood test results on the basis of issue preclusion. Brazee argues that the State was estopped from arguing that Wisconsin's implied consent law[2] does not provide the exclusive remedy when an OWI suspect refuses to submit to chemical testing to determine blood-alcohol content. This court concludes that there are public policy factors that would render application of issue preclusion fundamentally unfair to the State. Therefore, the circuit court's judgment is affirmed.

BACKGROUND

¶2 Brazee was arrested for OWI and transported to a hospital where she refused to permit the arresting officer to obtain a blood sample. A blood sample was forcefully obtained without Brazee's consent. Brazee moved to suppress the results of a test performed on the blood sample. The trial court denied the motion,[3] Brazee pled no contest to the OWI charge, and she now appeals the judgment of conviction.

STANDARD OF REVIEW

¶3 "The application of issue preclusion doctrines to a given set of facts presents a question of law which this court reviews without deference to the trial

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[2] *See* WIS. STAT. §§ 343.305(4) and (9)(a).

[3] Brazee argued the same issue preclusion argument in the circuit court that follows in this opinion below. That court, however, did not address the argument. Rather, it ruled on the substantive issue whether the implied consent law provided the exclusive remedy under the circumstances. The court essentially held that the unpublished decision in ***State v. Morrissey***, No. 99-2624, unpublished slip op. (Wis. App. Apr. 4, 2000), also addressed below, could not overturn authority that a post-arrest warrantless blood draw from an OWI suspect may be a reasonable search under the Fourth Amendment. *See* ***Schmerber v. California***, 384 U.S. 757 (1966); ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240.

court's ruling." ***State v. Kasian***, 207 Wis. 2d 611, 615, 558 N.W.2d 687 (Ct. App. 1996).

DISCUSSION

¶4 On appeal, Brazee notes that in ***State v. Morrissey***, No. 99-2624, unpublished slip op. (Wis. App. Apr. 4, 2000), the court of appeals decided that the implied consent law provides the exclusive remedy when an OWI suspect refuses to submit to chemical testing to determine his or her blood-alcohol content. Brazee acknowledges that ***Morrissey*** was an unpublished decision, but observes that an unpublished opinion may be cited to support a claim of issue preclusion. *See* WIS. STAT. RULE 809.23(3).[4] She argues that the State should be bound by the ***Morrissey*** court's holding under the issue preclusion doctrine.

¶5 Brazee is asserting issue preclusion defensively. That is, she is seeking to prevent the State from asserting a claim it previously litigated and lost against another defendant. *See* ***In re Mayonia M.M.***, 202 Wis. 2d 460, 468, 551 N.W.2d 31 (Ct. App. 1996). The United States Supreme Court observed in ***Ashe v. Swenson***, 397 U.S. 436, 443 (1970), that issue preclusion has been a rule of federal criminal law since 1916. The Court explained that issue preclusion "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." ***Id.***

[4] WISCONSIN STAT. RULE 809.23(3) provides: "UNPUBLISHED OPINIONS NOT CITED. An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case."

¶6 Wisconsin courts have applied the doctrine in criminal cases, but they have rejected a formalistic application of the doctrine of issue preclusion in favor of an equity-based approach. The ***Kasian*** court, relying on ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 689, 495 N.W.2d 327 (1993), identified five factors in determining whether issue preclusion applies:

> (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 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 [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Kasian, 207 Wis. 2d at 615-16.

¶7 The State argues that the application of these five criteria supports its positions. Brazee does not acknowledge, and therefore does not address, the fundamental fairness factor in her brief. In determining that issue preclusion does not apply in the instant action, this court concludes that the last ***Kasian*** criterion is dispositive. Specifically, there are public policy factors that would render application of issue preclusion fundamentally unfair to the State.[5] ***Id.***

[5] Alternatively, Brazee has not shown that the first ***Kasian*** criterion is not met. *See* ***State v. Kasian***, 207 Wis. 2d 611, 615, 558 N.W.2d 687 (Ct. App. 1996). Specifically, she has not demonstrated that the State was entitled as a matter of law to supreme court review of the ***Morrissey*** decision.

¶8 After Brazee filed her appeal this court issued ***State v. Gibson***, 2001 WI App 71, 242 Wis. 2d 267, 626 N.W.2d 73, holding that the implied consent law did not provide the exclusive remedy for an OWI suspect's refusal to submit to chemical testing. This court deems it unacceptable public policy and fundamentally unfair to the State to apply issue preclusion to arrive at an effective result that is contrary to a published pronouncement concerning the underlying substantive issue. This is particularly true when viewed in the context of the OWI law's fundamental purpose, to secure convictions of drunk drivers and to get them off the highways. ***State v. Brooks***, 113 Wis. 2d 347, 356, 335 N.W.2d 354 (1983).

¶9 This court concludes that it is equally inequitable to condone application of issue preclusion that has the effect, under any circumstance, of forcing the State to appeal every adverse ruling in every lower court or run the risk of creating binding precedent. Such a result does not comport with the general prohibition in WIS. STAT. RULE 809.23(3) against arriving at a legal conclusion based upon an unpublished opinion.

By the Court.—Judgment affirmed.

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