COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2499

Cir. Ct. Nos. 2005TR7842
2005TR7843

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

CITY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

JAMES F. MURPHY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: MARK D. GUNDRUM, Judge. *Affirmed.*

¶1 CURLEY, P.J.[1] James F. Murphy appeals the judgments convicting him of operating while under the influence (OWI) as a first offense,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

contrary to WIS. STAT. § 346.63(1)(a) (2009-10), and operating with a prohibited alcohol concentration (PAC) as a first offense, contrary to WIS. STAT. § 346.63(1)(b). He also appeals the order granting the City of Waukesha's motion to reopen the aforementioned cases against him after it was determined that they no longer constituted "second" offenses bringing them under State jurisdiction, but were in fact "first" offenses and therefore required prosecution by the City. Murphy argues that the trial court erred in granting the City's motion because the statute of limitations time-bars the claims. Murphy also argues that the trial court erred in denying admission of a hearsay statement that Murphy claims should have been admitted as a hearsay exception. This court affirms.

I. BACKGROUND.

¶2 Charles Johnston was driving westbound on Moreland Boulevard at about 7:00 a.m. on June 11, 2005, when a red car sideswiped his truck. Johnston followed the car, which eventually stopped in a nearby parking lot. Johnston observed two people inside the car. The driver, a person wearing a red shirt and baggy brown pants, came out of the car first. Later the passenger, who Johnston observed to be approximately six inches taller than the driver, exited the vehicle.

¶3 About a half hour later, City of Waukesha Police Officer Paul DeJarlais received a call regarding the accident and came to the parking lot where Johnston and the red car had parked. Johnston told DeJarlais what had happened and pointed out the driver, who was identified as Murphy. The passenger was identified as Patrick Halloran.

¶4 Murphy denied driving the car and told Officer DeJarlais that Halloran was the driver. Halloran initially told the police that he was the driver, but later said that Murphy was in fact the driver.

¶5 Concluding that Murphy was the driver and that he was under the influence, Officer DeJarlais and his backup officer, Sergeant Dennis Angle, arrested Murphy, took him to a hospital to obtain a blood sample, and issued him an OWI citation. A second, PAC, citation was issued to Murphy via mail. Murphy made a timely demand for a jury trial, and—pursuant to WIS. STAT. § 800.035(5)(c), which requires a municipal court to transfer a first-offense OWI matter to a circuit court if the defendant requests a jury trial—the matter was heard by the Waukesha Circuit Court instead of the City of Waukesha Municipal Court.

¶6 While the jury trial was pending, the City discovered that Murphy had been convicted, in Milwaukee County in October 2005, of an unrelated violation of improperly refusing to submit to an alcohol test, in violation of WIS. STAT. § 343.305(9)(a). Because WIS. STAT. § 343.307(2)(g) treats an improper refusal conviction as an intoxicated-driving-related offense, and because the State has exclusive authority over "second" and subsequent drunk driving offenses, Murphy's OWI was no longer considered a "first" offense, and the City no longer had subject matter jurisdiction. *See* ***Walworth Cnty. v. Rohner***, 108 Wis. 2d 713, 722, 324 N.W.2d 682 (1982) (the State has exclusive authority over second and subsequent drunk driving offenses). The City consequently moved for dismissal without prejudice, and the trial court granted the motion, ordering the case dismissed on February 27, 2006.

¶7 After the trial court dismissed the City's case against Murphy, the State charged Murphy with "second-offense" OWI and PAC violations, as well as a hit-and-run violation. Shortly thereafter, however, the jurisdiction issue again returned to the forefront of Murphy's case. Murphy requested numerous continuances in the State's case against him because he was attempting to reopen his improper refusal case—the October 2005 Milwaukee County case—in order to

have it dismissed. That case was finally reopened and dismissed on October 26, 2009. The parties and the trial court agreed that the dismissal of the improper refusal case transformed the OWI and PAC violations back into "first" offenses. In order to prosecute them as first offenses, the City brought, pursuant to WIS. STAT. § 806.07(1)(f)-(h), a motion to reopen the original, Waukesha County, case. Murphy opposed the motion, arguing that the statute of limitations for the OWI and PAC offenses had already expired. The trial court granted the City's motion and reopened the citations alleging the first offense violations.

¶8 Before trial, the City attempted to subpoena Halloran to testify; however, after numerous attempts, its process server sent an affidavit stating that Halloran could not be found. The City informed Murphy that it intended to try the case without Halloran. Halloran did not testify at trial.

¶9 At trial, Murphy sought to admit Halloran's initial statement that he—and not Murphy—had driven the car during the accident as an excited utterance. The trial court refused to admit the statement. Murphy was convicted and now appeals.

II. ANALYSIS.

¶10 Murphy presents two arguments on appeal. He first argues that the trial court erred in granting the City's motion to reopen the original OWI/PAC case against him. Second, he argues that the trial court erred in not admitting Halloran's initial statement that Murphy was not the driver of the red car. This court will discuss each in turn.

A. The trial court correctly allowed the City to reopen the original OWI/PAC case against Murphy.

¶11 Murphy argues that the trial court erred in granting the City's WIS. STAT. § 806.07 motion to reopen the original OWI/PAC case. Whether to grant relief from a judgment under WIS. STAT. § 806.07 is a decision left to the sound discretion of the trial court. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. This court will not reverse that decision unless the trial court erroneously exercised its discretion. ***Id.*** "A discretionary decision contemplates a process of reasoning that depends on facts that are in the record, or reasonably derived by inference from facts of record, and a conclusion based on the application of the correct legal standard." ***Id.*** Therefore, this court "'will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.'" ***Brown v. Mosser Lee Co.***, 164 Wis. 2d 612, 617, 476 N.W.2d 294 (Ct. App. 1991) (citation omitted).

¶12 Specifically, Murphy argues that the trial court erred in allowing the City to reopen the case in 2009 because the statute of limitations expired in 2007. *See* WIS. STAT. § 893.93(2)(b) ("An action to recover a forfeiture or penalty imposed by any bylaw, ordinance or regulation of any … city … shall be commenced within 2 years after the cause of action accrues."). In support of this argument, he cites ***Culbert v. Ciresi***, 2003 WI App 158, ¶¶10-15, 266 Wis. 2d 189, 667 N.W.2d 825, which holds that a dismissal in federal court does not toll the statute of limitations in state court.[2] According to Murphy, his original OWI/PAC

[2] *But see* ***Johnson v. Cnty. of Crawford***, 195 Wis. 2d 374, 380, 383, 536 N.W.2d 167 (Ct. App. 1995) (plain language of WIS. STAT. § 893.13(2) tolls the statute of limitations for every cause of action when an action is filed, and includes circumstances where case is voluntarily dismissed).

case ceased to be "commenced" in Waukesha County once it was dismissed, and therefore the City was required to move to reopen the case before the statute of limitations expired.

¶13 This court disagrees. ***Culbert*** is inapposite because Murphy's case is not a case about the commencement of a new action. In ***Culbert***, the plaintiff filed a medical malpractice action in federal court within the proper statute of limitations period. ***Id.***, 266 Wis. 2d 189, ¶3. The federal suit was ultimately dismissed, and the plaintiff filed suit in state court. ***Id.***, ¶¶4-8. Although the plaintiff filed the state court action after the statute of limitations period for the state claim had expired, she argued that the filing of the federal claim tolled the statute of limitations. ***Id.***, ¶¶8, 10. This court noted, however, that under the Federal Rules of Civil Procedure, an action that is voluntarily dismissed has not been legally "commenced," and that the court was required to proceed as if the federal claim had never been filed, which meant that the filing of the federal action could not toll the statute of limitations on the state action. ***Id.***, ¶10. This court consequently concluded that the state action was barred because it was not commenced within the applicable statute of limitations. ***Id.***, ¶15. In contrast, the City commenced its action against Murphy by issuing citations well within the statute of limitations period—on the same day that the cause of action accrued. The City did not issue new citations after the statute of limitations had run; it requested that the existing citations, which had been previously dismissed without prejudice, be reopened.

¶14 Moreover, while Murphy correctly notes that a voluntary dismissal in *federal* court renders the case a nullity and effectively means that the case was never "commenced" for statute of limitations purposes, *see, e.g.*, ***id.***, ¶¶13-15, he cites no authority showing that this principle governs Wisconsin state cases;

indeed, it appears from one of Murphy's own cited cases, ***Johnson v. County of Crawford***, 195 Wis. 2d 374, 380, 383, 536 N.W.2d 167 (Ct. App. 1995) (plain language of WIS. STAT. § 893.13(2) tolls the statute of limitations for every cause of action when an action is filed, and includes circumstances where case is voluntarily dismissed), that the opposite is true. ***Johnson*** also contradicts Murphy's unsupported contention that WIS. STAT. § 806.07 does not apply to his dismissals because his dismissals were done without prejudice. *See* ***id.*** at 383-84.

¶15 Furthermore, as the trial court and the City correctly point out, ***Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 620, 622, 631-632, 511 N.W.2d 868 (1994), in which the supreme court found that a motion for relief from judgment brought more than a decade after the cause of action accrued was brought within a "reasonable time," shows that motions made under WIS. STAT. § 806.07(1)(h) should be considered separately from statute of limitations periods. In ***Cynthia M.S.***, the supreme court explained: "[s]tatutes of limitation establish 'bright line' time constraints which courts cannot freely ignore. Motions under [WIS. STAT. §] 806.07(1)(h) are not subject to such bright-line rules." *See* ***id.*** Consequently, this court rejects Murphy's arguments about the effect of the statute of limitations on the trial court's ability to reopen his original OWI/PAC case.

¶16 Thus, this court concludes that the trial court properly exercised its discretion pursuant to WIS. STAT. § 806.07 when it allowed the City to reopen the original OWI/PAC case. The trial court gave several reasons for allowing the City to reopen its claim against Murphy, including the fact that the City filed its motion to reopen just a month after the improper refusal in Milwaukee County was dismissed, and that the public would otherwise be deprived of its right to have an alleged offense prosecuted. Under the applicable standards, this court concludes that the trial court did not erroneously exercise its discretion. *See* ***Johns v. Cnty.***

of Oneida, 201 Wis. 2d 600, 608, 549 N.W.2d 269 (Ct. App. 1996) (considerations to be made when determining whether to allow a case to be reopened under WIS. STAT. § 806.07(1)(h) include "whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments"); *see also* ***Wisconsin Pub. Serv. Corp. v. Krist***, 104 Wis. 2d 381, 395, 311 N.W.2d 624 (1981) ("[T]he law prefers, whenever reasonably possible, to afford litigants their day in court."). This court also agrees with the trial court that, contrary to what Murphy argues, public policy favors allowing the City to reopen its case against him:

> The defendant argues that there is a public policy argument for the finality of judicial decisions and that this court should not grant relief from the order of dismissal. The irony of this logic is not lost on the court as it notes that the defendant himself petitioned to re-open the matter in Milwaukee which was almost equally as old.

B. The trial court did not err in denying admission of Halloran's hearsay statements at trial.

¶17 Murphy next argues that the trial court erred in excluding the hearsay testimony of police officers that when they first approached Halloran, Halloran stated that he—not Murphy—was driving the red car when it sideswiped Johnston's truck. A trial court's decision regarding the admission of hearsay evidence is discretionary and will not be reversed unless that discretion is misused or the court's decision rests upon an erroneous view of the law. ***State v. Stevens***, 171 Wis. 2d 106, 111, 490 N.W.2d 753 (Ct. App. 1992). A trial court exceeds its discretion if the discretionary choice is based upon a legal error. ***Id.*** "The question of admissibility of hearsay evidence is one of law." ***Id.*** As the issue here is admissibility under one or more of the hearsay exceptions, this court is not

bound by the trial court's conclusions, and reviews the matter *de novo*. *See* ***id.*** at 112.

¶18 As noted, Murphy's sole basis for admitting this testimony at trial was that the testimony was an excited utterance. This court agrees with the trial court that Halloran's statements cannot fall under this exception as they were made approximately one-half hour after the red car pulled into the parking lot and there is no evidence in the record showing that Halloran made the statements "under the stress of excitement caused by the event." *See* WIS. STAT. § 908.03(2). Nor will this court consider Murphy's additional arguments— presented for the first time on appeal—that the statement should be admitted under WIS. STAT. § 908.045(2) as a statement of recent perception or under § 908.045(4) as a statement against interest. As this court explained in ***State v. Rogers***, 196 Wis. 2d 817, 826-828, 539 N.W.2d 897 (1995), an appellant seeking to admit testimony over a hearsay objection must "articulate each of its theories to the trial court to preserve its right to appeal." *See* ***id.*** at 828. Furthermore:

> forcing parties to make all of their arguments to the trial court … prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal (or on remand) should their original idea not win favor. We will not, however, blindside trial courts with reversals based on theories which did not originate in their forum.

Id. at 827; *see also* ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (this court will generally not consider arguments brought up for the first time on appeal).

By the Court.—Judgments and order affirmed.

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