COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1046-CR **Cir. Ct. No. 03CT000484**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TODD D. DUERST,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] The State appeals from an order to dismiss a charge of operating while intoxicated (OWI)—fourth offense against Todd Duerst. Duerst has three prior convictions for OWI, but his most recent conviction was for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

OWI—second offense. Duerst argues that the doctrine of issue preclusion bars the State from charging the current OWI offense as his fourth. Duerst also asserts that a charge of OWI—fourth offense would violate his due process rights. Because we believe that the circuit court acted within its discretion in finding that the State was precluded from charging Duerst with OWI—fourth offense, we affirm the court's order. We do not reach the due process issue.

Background

¶2 Todd Duerst was convicted of operating a motor vehicle while intoxicated in Dane County in 1990. In 1998, he was convicted in Montana for a similar offense. In July 2000, Duerst was again charged with OWI, this time in Juneau County. Initially, the State charged Duerst with OWI—third offense. However, the prosecutor moved to amend the charge to OWI—second offense as part of a plea bargain. The court accepted Duerst's no-contest plea and ultimately entered a judgment of conviction for OWI—second offense. It is unclear why the prosecutor amended the charge, though Duerst's attorney in the prior proceeding testified in this litigation that the Montana conviction may not have been countable as a prior offense under WIS. STAT. § 343.307 (1999-2000).

¶3 In August 2003, Duerst was arrested in Dodge County for OWI. A blood analysis showed Duerst's blood alcohol content (BAC) was .069. Under WIS. STAT. § 340.01(46m)(c), a person with three prior convictions may not drive with a BAC above .02. For a person with two prior convictions, the limit is .08. Section 340.01(46m)(a). Counting each of Duerst's three prior convictions for drunk driving as prior offenses, the State charged Duerst with OWI—fourth offense.

¶4 Duerst moved to dismiss the charges. The circuit court granted his motion, finding the OWI—fourth offense charge barred by issue preclusion and violative of Duerst's due process rights. The State appeals.

Discussion

¶5 The doctrine of issue preclusion prevents the relitigation of issues decided in an earlier proceeding. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). While issue preclusion was historically applied only to parties bound by a previous judgment, courts have moved away from such formalism and now apply a "looser, equities-based interpretation of the doctrine." ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687-88, 495 N.W.2d 327 (1993).

¶6 The Wisconsin Supreme Court has established a two-step inquiry for issue preclusion. The first step requires the court to consider two threshold questions: (a) whether there exists privity or identity of interest between the party against which preclusion is asserted and a party to the prior proceeding, ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999), and (b) whether the issue was "actually litigated" in the prior proceeding. ***Mrozek v. Intra Financial Corp.***, 2004 WI App 43, ¶16, 271 Wis. 2d 485, 678 N.W.2d 264, *review granted,* 2004 WI 138, 276 Wis. 2d 26, 689 N.W.2d 55 (Wis. Sep. 29, 2004) (No. 02-2448). Both of these inquiries present questions of law, which an appellate court reviews de novo. ***Id***; ***Paige K. B.***, 226 Wis. 2d at 223. If the court finds that these threshold inquiries have been satisfied, it moves to the second step of the inquiry, whether it is fundamentally fair to apply issue preclusion in the particular case. ***Paige K. B.***, 226 Wis. 2d at 224-225.

¶7 Here, as to the threshold issues, the parties to this case (the State and Mr. Duerst) are identical to those in Mr. Duerst's conviction for OWI—second offense. The State asserts, however, that the parties did not actually litigate the issue of Mr. Duerst's number of convictions in that case.

¶8 Wisconsin courts have not decided whether a conviction based upon a no-contest plea can preclude the State from raising issues relevant to this conviction in a subsequent criminal case. In ***Crowall v. Heritage Mut. Ins. Co.***, 118 Wis. 2d 120, 122 n.2, 346 N.W.2d 327 (Ct. App. 1984), we stated that "[a] plea of guilty or *nolo contendere* in the criminal suit does not draw any issues into controversy and does not support the use of collateral estoppel." However, in ***Michelle T.***, the supreme court dismissed this statement as dicta. ***Michelle T.***, 173 Wis. 2d at 688 n.7. Nonetheless, the court noted that the Restatement (Second) of Judgments explains that:

> The rule of this Section presupposes that the issue in question was actually litigated in the criminal prosecution.... Accordingly the rule of this Section does not apply where the criminal judgment was based on a plea of *nolo contendere* or a plea of guilty. A plea of *nolo contendere* by definition obviates actual adjudication and under prevailing interpretation is not an admission.

Id. (quoting RESTATEMENT (SECOND) OF JUDGMENTS, § 85, cmt. b at 296 (1980)).

¶9 We first dealt squarely with the preclusive effect a conviction resulting from a guilty plea in ***Mrozek***. There, Mrozek, a hotel operator, pled guilty to misdemeanor theft in a prior criminal case stemming from her management of the hotel's finances. ***Mrozek***, 271 Wis. 2d 485, ¶13. In a subsequent civil suit for legal malpractice, Mrozek alleged that her reliance upon the negligent counsel of her attorney caused her conviction. ***Id.*** The trial court dismissed her claim at summary judgment on issue preclusion grounds. ***Id.***, ¶10.

It determined that Mrozek's guilty plea constituted an admission that her illegal actions were intentional, and therefore she could not allege in a later proceeding that her actions were the result of her reliance on bad legal advice. ***Id.***, ¶27.

¶10 We affirmed, noting ***Michelle T.***'s rejection of the ***Crowall*** footnote as dicta, and concluding that a conviction upon a plea of guilty *could* have a preclusive effect in a later civil proceeding. ***Mrozek***, 271 Wis. 2d 485, ¶17. In so holding, we concluded that a conviction resulting from a guilty plea constitutes "actual litigation" for the purposes of issue preclusion. ***Id.***, ¶1. "[T]he judicial determination of the existence of a factual basis for a guilty plea, together with a court's finding that the plea was entered knowingly and voluntarily, are sufficient to satisfy the requirement that issues be actually litigated in order for issue preclusion to be applied." ***Id.***, ¶20. Unlike Mrozek, who was convicted upon a plea of guilty, Duerst's conviction resulted from a no-contest plea. But because a court accepting a plea of no contest must follow the same procedures as a court accepting a guilty plea, *see* WIS. STAT. § 971.08(1)(a) and (b), we conclude that a conviction upon a plea of no contest also constitutes actual litigation for the purposes of issue preclusion.

¶11 We turn now to the second step of the issue preclusion analysis, whether to preclude litigation of an issue would be fundamentally fair. The trial court's determination of the fundamental fairness of applying issue preclusion to a particular case is generally a discretionary decision that will be reversed only for an erroneous exercise of discretion. ***Paige K. B.***, 226 Wis. 2d at 225. Wisconsin has identified five factors for determining the fairness of applying issue preclusion:

> (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?

Michelle T., 173 Wis. 2d at 688-89.

¶12 The trial court did not explicitly apply this multifactor test. However, the court did state that the OWI-fourth offense charge was "fundamentally unfair." This is the same determination the court must make under the fifth factor of the ***Michelle T.*** test, and is also the broader standard for issue preclusion. ***Michelle T.***, 173 Wis. 2d at 688-89. The trial court explained:

> Defendant—as would any reasonable defendant under the same circumstances—was led to believe, by the official pronouncements of both the executive and judicial branches of the State of Wisconsin, that he had only two OWI convictions for purposes of Wisconsin law. This set of circumstances, if followed (as here) by a subsequent effort by another representative of the same State to "correct" Defendant's status in a new case, creates unfair prejudice, not only because the Defendant reasonably believed that he faced a lighter penalty if convicted again, but also because (as noted above) the Defendant reasonably believed his blood-alcohol level was still legal up to .08. The Court, therefore, finds that the attempt by the State to now charge Defendant with an OWI-4th (PAC) is fundamentally unfair ….

Because we believe the trial court's finding that it was fundamentally fair to apply issue preclusion against the State in this case was the product of a rational process that applied the relevant facts to the appropriate legal standard, we conclude that

the court's action was a proper exercise of its discretion. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶13 Moreover, we agree with the trial court that the State's effort to renege upon its "official pronouncements" to Duerst—i.e., its entry of a judgment of conviction for the specific charge of OWI-second offense against Duerst in the first proceeding—was patently unfair. We also note that another factor, the lack of differences in the quality or extensiveness of the two proceedings, demonstrates the fairness of preclusion here. Both of the Duerst proceedings were criminal cases arising from incidents of OWI; in both cases, Duerst and the State were represented by counsel; in both, a jury trial could have resolved the relevant facts. While the prior case was resolved by a plea of no contest, the precluded issue was determined by a judicial inquiry that constituted actual litigation.[2] The remaining factors are either not relevant to the fairness inquiry in this case, or weigh neither for nor against issue preclusion here.

¶14 We therefore affirm because we conclude that Duerst's prior conviction for OWI—second offense precludes the State from charging Duerst with OWI—fourth offense. Having so concluded, we need not address Duerst's due process argument.

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[2] The State's brief urges that the "public policy" language in the fifth factor of the test calls for reversal of the trial court's decision. The State points out that the legislative intent statement expressed in WIS. STAT. § 967.055(1)(a) calls for the "vigorous prosecution of offenses concerning the operation of motor vehicles by persons ... having a prohibited alcohol concentration." But whether Duerst had a prohibited alcohol concentration is the very issue we decide today. ***Michelle T.***'s fifth factor also calls for inquiry into the "individual circumstances" of each case. The trial court's decision focused upon these "individual circumstances," and found them sufficiently compelling to support preclusion. This is a reasonable basis upon which to exercise discretion, and we will therefore uphold it.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.