COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP937-CR **Cir. Ct. No. 2006CT440**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT M. BECKWITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Brent Beckwith appeals the judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) of .08 or more, second offense, contrary to WIS. STAT. § 346.63(1)(b). He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

contends that the duration of his detention by the arresting officer was unreasonable and therefore a de facto arrest without probable cause; that the circuit court erroneously exercised its discretion in deciding to adopt the findings and ruling on this issue made in the civil case, which was dismissed; and that the circuit court erroneously exercised its discretion in deciding to apply the doctrine of issue preclusion to deny him a hearing on the issue in this action. For the reasons we explain below, we affirm.

BACKGROUND

¶2 Beckwith was driving his motorcycle when he was stopped for speeding by City of Baraboo Police Officer Mark Lee and subsequently arrested for driving while under the influence of an intoxicant (OWI). He was charged in a civil action with OWI, first offense, and PAC, first offense.[2] He filed a motion to suppress evidence, challenging the lawfulness of the stop and the arrest. The court denied the motion and denied Beckwith's motion for reconsideration. After discovering that Beckwith had a prior OWI offense, the State moved to dismiss the civil charges and the court granted the motion. The State then filed the criminal complaint in this action, alleging OWI and PAC, both second offenses. This action was assigned to a different judge.

¶3 Beckwith filed a motion in this action challenging the lawfulness of his stop and arrest. The State moved the court to deny the motion on the ground that Beckwith had filed the same motion in the civil action and the circuit court had denied that motion. Along with this motion, the State filed a transcript of the

[2] It appears one civil action was filed for each charge, but apparently they were consolidated or otherwise proceeded together. We therefore refer to them in the singular.

motion hearing from the civil action. The State contended that the doctrine of issue preclusion should bar relitigation of the issues that had already been litigated. Beckwith opposed the motion and contended that the two factors relevant to the application of issue preclusion in this case were whether the party against whom preclusion is sought could, as a matter of law, have obtained review of the prior judgment and whether matters of public policy and individual circumstances would render the application of issue preclusion unfair. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993).

¶4 The circuit court concluded that issue preclusion applied and it denied Beckwith's motion for another hearing on his motion to suppress. The court stated that the issue already decided was the same as that presented in Beckwith's motion, it was actually litigated, and Beckwith was a party in both the prior civil action and this action. The court also stated that all the parties and the persons testifying "would be exactly the same." As for the ability to appeal the prior ruling, the court explained that it was "adopt[ing] that [prior] ruling in its entirety," and Beckwith could therefore appeal it in this action. Thus, the court reasoned, Beckwith was not "forfeit[ing] any right to appeal." The court also determined that there was no difference in the quality and extensiveness of the proceedings on the motion in the civil action compared to that available in this action, and that the burden of proof was the same. The court stated that there were no public policies or individual circumstances that would make the application of the doctrine unfair, such as an inadequate opportunity or incentive to obtain a full and fair adjudication of the motion in the civil action. Finally, the court concluded that there was a strong public policy against relitigation of the same issue in identical successive proceedings.

¶5 Beckwith subsequently entered a plea of no contest to the PAC, second offense charge.

DISCUSSION

¶6 We first address Beckwith's contention that the circuit court erroneously exercised its discretion in adopting the findings and ruling on his suppression motion in the civil action. Beckwith appears to view the court as having the authority and the discretion to do this. However, he asserts, the court did not explain its reasoning process for doing so: it explained its reasoning process only for applying issue preclusion. The State responds that the circuit court did not need to state its reasons for adopting the prior findings and ruling because it was sufficient for the court in this action to properly exercise its discretion in applying the doctrine of issue preclusion. Beckwith did not file a reply brief.

¶7 Beckwith's initial argument assumes the circuit court had to provide its reasoning for adopting the prior findings and ruling in addition to providing its reasoning for applying issue preclusion, but he does not explain why this is so. Without a reply brief to refute the State's position that this is unnecessary, we have no basis on which to conclude that Beckwith's premise is correct. We conclude this is an appropriate case in which to treat the absence of a reply as a concession by Beckwith that the State is correct on this point. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct.App.1994) (we may take as a concession the failure in a reply brief to refute a proposition asserted in a responsive brief).

¶8 We next address Beckwith's contention that the circuit court erroneously exercised its discretion in applying the doctrine of issue preclusion.

Issue preclusion, formerly known as collateral estoppel, is designed to limit the relitigation of issues that have been actually litigated in a previous action. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (citations omitted). It may be applied against a party who was a party in the prior action if the application comports with fundamental fairness. *See* ***Michelle T.***, 173 Wis. 2d at 691, 698.

¶9 The overall question is one committed to the circuit court's discretion, although the application of particular factors bearing on fairness may be questions of law. ***Paige K.B.***, 226 Wis. 2d at 225.

¶10 Beckwith argues that the circuit court erroneously exercised its discretion in applying issue preclusion because one of the fairness factors—whether he could have obtained review of the ruling in the prior action—must be answered in the negative. He asserts that, because the civil action was dismissed, he had no reason to appeal within the time limit applicable in that action, and, even though the circuit court ruled he could appeal the ruling in this action, he is still deprived of his statutory right to appeal within the time limit that was applicable in the civil action.[3]

[3] The factors identified in ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 689, 495 N.W.2d 327 (1993), that courts are to consider in assessing fundamental fairness are:

> (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

(continued)

¶11 The State responds that Beckwith is exercising his right to appeal the prior ruling in this action and therefore his right to appeal the ruling has not been violated and there is no unfairness to him.

¶12 Again, we take Beckwith's failure to reply as a concession that the State is correct. The transcript of the hearing in the civil action is part of the record in this action and Beckwith has made no objection to this. Indeed, he devotes the majority of his brief to his argument that the ruling was in error. We address and decide that issue in the following paragraphs. In the absence of a reply to the State's argument, we conclude that the application of issue preclusion is not fundamentally unfair given that Beckwith has the opportunity to appeal the ruling in this action, and is, indeed, doing so.

¶13 We now turn to the issue of the lawfulness of the detention. The only witness at the hearing on the motion to suppress in the civil action was the arresting officer. He testified as follows. In addition to Beckwith, there was another motorcyclist who was speeding and the officer stopped both. As he was talking to both of them, he detected an odor of intoxicants from both and called for another squad car. Two more officers arrived. After another squad car arrived, the arresting officer administered field sobriety tests to the other motorcyclist and arrested him. During the ten minutes it took the arresting officer to administer tests to the other motorcyclist and arrest him, he had Beckwith sit on his bike or the curb. Beckwith was not free to leave. The arresting officer then administered

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> collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

(Footnote omitted.)

the field sobriety tests and the preliminary breath test to Beckwith and arrested him. On cross-examination the arresting officer acknowledged that one of the two officers who arrived at the scene was certified to do field sobriety tests.

¶14 At the close of the evidence, Beckwith's counsel argued that the length of time the arresting officer detained Beckwith was unreasonable because there was another officer present who could have administered the field sobriety tests to Beckwith while the arresting officer was occupied with the other motorcyclist. The court concluded the length of the detention was not unreasonable and also rejected Beckwith's other challenges to the stop and arrest, none of which are relevant to this appeal.

¶15 Beckwith has included in his appendix the affidavit of his counsel in the civil action. Counsel avers that, based on counsel's viewing of the videotape,[4] it was nineteen minutes from the time Beckwith stopped until the time the officer asked Beckwith his name and began administering the field sobriety tests to him.[5] Apparently counsel's affidavit was filed with a motion for reconsideration in the civil action, which the court denied, reaffirming its conclusion that the stop was not unlawfully prolonged.

¶16 Beckwith argues that it was unreasonable to detain him for nineteen minutes while the arresting officer performed tests on the other motorcyclist

[4] According to the transcript of the hearing, the portion of the videotape showing Beckwith's performance of the field sobriety tests was viewed off the record and Beckwith's counsel then cross-examined the testifying officer on that portion.

[5] The arresting officer testified that, after he turned on his emergency lights, Beckwith stopped but the other motorcyclist did not. The officer followed the other motorcyclist until he stopped. At that point, Beckwith pulled up behind the other motorcyclist. The nineteen minutes referred to in counsel's affidavit begins when Beckwith pulled up behind the other motorcyclist.

because the other officer was certified to perform the tests, too. Because he was not free to leave during this time, he asserts, it was an unlawful de facto arrest. We understand Beckwith to mean that it was an unlawful arrest because it was not supported by probable cause.

¶17 When there is reasonable suspicion to believe a person is violating a law or a traffic ordinance, a police officer may, consistent with the Fourth Amendment's protection against unreasonable seizures, detain the person for an investigative stop. *See* ***State v. Colstad***, 2003 WI App 25, ¶¶7-9, 260 Wis. 2d 406, 659 N.W.2d 394. In order to be constitutionally permissible, the length and scope of the detention must be reasonable. ***Id.***, ¶16. The detention "must be temporary and last no longer than is necessary to effect the purpose of the stop." ***Id.*** (citations omitted). In determining whether a detention is too long, the court is to consider the totality of the circumstances and decide "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain the suspect." ***Id.*** (citations omitted). There is no fixed time limit that is unacceptable, and courts "should not indulge in unrealistic second guessing." ***Id.*** (citations omitted).

¶18 We accept for purposes of this opinion that nineteen minutes elapsed from the time Beckwith pulled up to where the arresting officer was stopped until the arresting officer began administering the field sobriety tests to him. With this assumption, there are no facts in dispute and the application of the constitutional standard to these facts presents a question of law, which we review de novo. *See* ***id.***, ¶8.

¶19 We conclude the duration of the stop was reasonable. During the nineteen minutes, the arresting officer was making preliminary contact with both

motorcyclists, calling for backup and waiting for backup, as well as administering the field sobriety tests to the other motorcyclist and arresting him. While having the other certified officer administer the tests to one of the motorcyclists would have shortened the duration of Beckwith's detention, we are persuaded that it was reasonable for the officer who made the initial stop to do both. That officer was pursuing the investigation of both motorcyclists diligently. A conclusion that it was necessary for the officers to divide their time in particular ways rests on the type of "second guessing" that the courts are not to engage in. *See* ***id.***, ¶16.

By the Court.—Judgment affirmed.

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