COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1373-CR **Cir. Ct. No. 2009CM899**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. IMBRUGLIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Michael A. Imbruglia appeals from an Ozaukee county judgment convicting him of operating a motor vehicle while under the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

influence of an intoxicant (OWI) fourth offense, possession of Tetrahydrocannabinol (THC) and possession of drug paraphernalia. He further appeals from an order denying his postconviction motion. Imbruglia advances an issue preclusion argument, an argument that a prior Colorado conviction cannot be counted because it was under a statute not substantially similar to Wisconsin's statute and a collateral attack on a prior Wisconsin conviction. None of Imbruglia's arguments persuade. We affirm.

¶2 On October 5, 2009, Imbruglia was convicted of OWI second offense (the ***Ozaukee I*** conviction) before Judge Paul V. Malloy after Imbruglia successfully argued against counting a 2002 Colorado conviction as a prior conviction.[2] On October 6, 2009, the day after his ***Ozaukee I*** conviction, Imbruglia was again arrested in Ozaukee county for OWI. His resulting fourth offense conviction (the ***Ozaukee II*** conviction) is the subject of this appeal.

¶3 The facts are not in dispute. At approximately 5:12 p.m., in Ozaukee county, a police officer clocked Imbruglia driving fifty-six miles per hour in a twenty-five mile per hour zone. The officer activated his emergency lights and sirens. The officer gave chase on a curving road traveling sixty-five miles per hour and, despite reaching ninety-five miles per hour, the officer was unable to catch up to Imbruglia. Another officer eventually located Imbruglia. While speaking with Imbruglia, the officer could smell a strong odor of intoxicants and observed that Imbruglia had bloodshot eyes and slurred speech. Imbruglia

[2] Judge Malloy's decision to preclude counting the Colorado conviction was not without hesitation; he "invite[d] the State to appeal" his ruling, disclosing that he was "not sure" and that he had "been perfectly candid" about his uncertainty. He also made a point to inform the parties that he knew Imbruglia's history shows "three incidents of operating while intoxicated…. There is the Colorado conviction, there is the incident in Wauwatosa, and there is this case."

admitted he had fled from the police pursuit. Imbruglia performed unsatisfactorily in field sobriety testing and his preliminary breath test result was over the legal limit. He was arrested and his subsequent blood test result showed a blood alcohol content of .209 percent.

¶4 After Imbruglia's October 6, 2009 arrest, the State charged him with OWI fourth offense, operating a motor vehicle with a prohibited alcohol concentration (PAC) fourth offense, operating after revocation, possession of THC and possession of drug paraphernalia. The complaint detailed Imbruglia's prior record, showing as a basis for the OWI fourth and PAC fourth charges his 2009 ***Ozaukee I*** conviction, a 2005 OWI conviction in the city of Wauwatosa municipal court and his 2002 Colorado conviction.

¶5 *Issue preclusion*. In response to the criminal complaint, Imbruglia filed a motion before Judge Thomas R. Wolfgram to strike the 2002 Colorado conviction and amend the OWI and PAC counts to third offenses based on the doctrine of issue preclusion. Imbruglia predicated his issue preclusion argument on Judge Malloy's ruling in ***Ozaukee I*** that the Colorado conviction could not be counted as a prior conviction.

¶6 In ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 594 N.W.2d 370 (1999), our supreme court established a two-step analysis for issue preclusion. The first step is whether a litigant is in privity or has sufficient identity of interest with the party to the prior proceeding. ***Id.*** at 224. Whether privity exists is a question of law reviewed de novo. ***Masko v. City of Madison***, 2003 WI App 124, ¶5, 265 Wis. 2d 442, 665 N.W.2d 391. Obviously, this is only a question when issue preclusion is used against a nonparty to the former action. ***Id.***

¶7 The second step addresses whether application of issue preclusion is consistent with fundamental fairness. ***Paige K.B.***, 226 Wis. 2d at 225. The relevant factors for the court to consider are: (1) could the party against whom preclusion is sought, as 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 issue preclusion to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action. ***Masko***, 265 Wis. 2d 442, ¶6.

¶8 Whether applying issue preclusion is consistent with fundamental fairness is a mixed question of law and fact subject to both de novo review and the erroneous exercise of discretion standard. *See* ***id.***

¶9 At the motion hearing on issue preclusion, Judge Wolfgram determined that, of the five fundamental fairness considerations, one through four weighed in favor of issue preclusion. The fifth consideration, however, public policy and individual circumstances, weighed heavily against issue preclusion and drove his decision. Judge Wolfgram explained that it "would be unfair essentially or provide an inadequate opportunity to have this matter fully and fairly litigated [as to] whether it's a fourth offense." Judge Wolfgram noted that Wisconsin's policy of counting substantially similar out-of-state convictions is in place to protect public safety by imposing progressively higher penalties as the number of prior convictions rises. In declining to apply issue preclusion, Judge Wolfgram

emphasized that Imbruglia's arrest for OWI occurred a day after his ***Ozaukee I*** OWI conviction, providing "individual circumstances which in [his] view warrant[ed] a relook" in this case. Judge Wolfgram correctly applied the law and correctly exercised his discretion in declining to apply issue preclusion.

¶10 Under the two-step analysis for issue preclusion, step one looks to whether the parties were in privity. Privity is not at issue here because the State and Imbruglia were the parties in both ***Ozaukee I*** and ***Ozaukee II***. Thus, as a matter of law, privity exists. *See* ***Masko***, 265 Wis. 2d 442, ¶5.

¶11 That determined, we turn to the second step, whether application of issue preclusion is consistent with fundamental fairness. *See* ***Paige K.B.***, 226 Wis. 2d at 224-25. We address the five factors in order. *See* ***Masko***, 265 Wis. 2d 442, ¶6.

¶12 The first factor favors issue preclusion. The State had the opportunity to seek review of the ***Ozaukee I*** decision. It did not.[3]

¶13 The second factor, whether the issue is a question of law involving distinct claims or intervening shifts in the law, weighs against issue preclusion. In the intervening time since Judge Malloy's decision in ***Ozaukee I*** that the Colorado conviction is not countable as a prior conviction, recent decisions have signaled a

[3] Though we decline to comment on whether or not the prudent course for the State would have been to seek appellate review, we do note the State's explanation for not appealing. In a letter to Judge Wolfgram, the State explained that Imbruglia's arrest for another OWI offense just one day after his ***Ozaukee I*** conviction prompted it to abandon its plan to appeal ***Ozaukee I***. The State was concerned that, if it did appeal, Imbruglia would have asked for a stay of his sentence pending appeal. The State explained that it had to "get the defendant serving his sentence on the October 5 conviction immediately," and to charge him with the new OWI offense immediately, to protect the public by preventing him from being released into the community.

shift in the law to cast a wider net when determining what out-of-state prior convictions are countable. *See, e.g.*, ***State v. Carter***, 2010 WI 132, ¶63, 330 Wis. 2d 1, 794 N.W.2d 213 (where our supreme court clarified that the legislature has promulgated language in WIS. STAT. § 343.307(1)(d) "to encompass a broad array of convictions, suspensions, and revocations under the laws of another jurisdiction for counting purposes"); *see also, e.g.*, ***State v. Puchacz***, 2010 WI App 30, ¶13, 323 Wis. 2d 741, 780 N.W.2d 536 (where, in counting defendant's out-of-state convictions, this court relied on the public policy supporting Wisconsin's OWI laws and a "broad interpretation and application" of what is countable under § 343.307(1)(d)).

¶14 The third factor, whether significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue, weighs in favor of issue preclusion; there is no indication of significant differences in the quality or extensiveness between the proceedings in ***Ozaukee I*** and the case at bar, ***Ozaukee II***.

¶15 The fourth factor, have the burdens of persuasion shifted such that Imbruglia had a lower burden of persuasion in the first case than in the second, also weighs in favor of issue preclusion because the burden in both cases was the same.

¶16 Finally, we examine the fifth factor, whether matters of public policy and individual circumstances involved would render the application of issue preclusion fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action. As Judge Wolfgram noted, Wisconsin's policy of counting substantially similar out-of-state convictions is in place to protect public safety by imposing progressively higher penalties as the

number of prior convictions rises. Moreover, Imbruglia's case presented Judge Wolfgram with an individual circumstance not present in ***Ozaukee I***: a defendant who, the day after his OWI second conviction, was again arrested for OWI, in an incident that could have ended tragically given the high rates of speed at which the officer traveled in attempting to catch up to Imbruglia and given Imbruglia's PAC of over twice the legal limit.

¶17 After review of all the factors, we conclude Judge Wolfgram properly declined to apply issue preclusion.

¶18 *Countability of Colorado conviction under WIS. STAT. § 343.307(1)(d).* After the circuit court declined to apply issue preclusion, Imbruglia filed a second motion to strike his prior Colorado conviction, this time arguing that the Colorado statute he was previously convicted under, COLO. REV. STAT. § 42-4-1301(1)(b), is not substantially similar to WIS. STAT. § 346.63(1)(a) and therefore does not constitute a prior offense under § 343.307(1)(d) or a penalty enhancer under WIS. STAT. § 346.65. COLORADO REV. STAT. § 42-4-1301(1)(b) provides: "It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive a motor vehicle or vehicle."

¶19 At the motion hearing before Judge Wolfgram, Imbruglia contended that nothing had changed since his successful argument before Judge Malloy in ***Ozaukee I*** that the relevant Colorado and Wisconsin statutes were not substantially similar. Judge Wolfgram ruled that he was not bound by Judge Malloy's decision in ***Ozaukee I***. He then examined and discussed the relevant Colorado and Wisconsin laws. Judge Wolfgram denied Imbruglia's motion and held the Colorado conviction countable as a prior conviction,

concluding that the language of the Colorado and Wisconsin statutes are indeed substantially similar. In so holding, Judge Wolfgram also noted Wisconsin's strong public policy of removing and punishing repeat OWI offenders as well as the similarity of the language between Colorado and Wisconsin's OWI statutes:

> I think that the Colorado Statute is countable for the purpose of determining subsequent convictions here. And therefore the severity of the offense when you consider the strong public policy in terms of identifying and punishing repeat DWI offenders and the similarity of the language in the statutes themselves, I'm going to allow the State to count it for purposes of enhancement.

¶20 The specific issue on appeal is whether the Colorado conviction was properly counted as a prior conviction. This involves the interpretation and application of statutes to undisputed facts, which are questions of law we review independently of the circuit court. *See* ***State v. White***, 177 Wis. 2d 121, 124, 501 N.W.2d 463 (Ct. App. 1993).

¶21 In Wisconsin, prior OWI offenses are counted pursuant to WIS. STAT. § 343.307, which provides in relevant part:

> **(1)** The court shall count the following to determine the length of a revocation under [WIS. STAT. §] 343.30(1q)(b) and to determine the penalty under [WIS. STAT. §§] 114.09(2) and 346.65(2):
>
> ….
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

See § 343.307(1)(d).

¶22 Here, Imbruglia was convicted of driving while impaired, contrary to COLO. REV. STAT. § 42-4-1301(1)(b). In determining whether this Colorado conviction was properly counted, we look to the language of WIS. STAT. § 343.307(1)(d). Its final phrase directs courts to count out-of-state OWI convictions based upon laws whose "terms" are "substantially similar" to the terms used in § 343.307(1)(d). In ***Puchacz***, we concluded that the final phrase of § 343.307(1)(d) "indicates the broad scope" of the counting statute. ***Puchacz***, 323 Wis. 2d 741, ¶12. We further pointed out that when determining whether to impose an enhanced penalty, Wisconsin even counts prior offenses committed in states with OWI statutes that differ significantly from our own. ***Id.***[4]

¶23 We then held that "'[s]ubstantially similar' simply emphasizes that the out-of-state statute need only prohibit conduct similar to the list of prohibited conduct in WIS. STAT. § 343.307." ***Puchacz***, 323 Wis. 2d 741, ¶12. This understanding aligns with the policy choice of our legislature. ***Id.*** Counting offenses committed in other states furthers the purposes of the OWI laws generally. ***Id.***; *see also* ***List***, 2004 WI App 230, ¶11, 277 Wis. 2d 836, 691 N.W.2d 366. "Because the clear policy of [Wisconsin's OWI laws] is to facilitate the identification of [alcohol and/or drug impaired] drivers and their removal from the highways, the statute must be construed to further the legislative purpose."

[4] In making the observation that Wisconsin counts prior offenses committed in states with OWI statutes that differ significantly from our own, we cited to ***State v. White***, 177 Wis. 2d 121, 125, 501 N.W.2d 463 (Ct. App. 1993), which held that a Minnesota conviction was countable for sentence enhancement purposes despite the fact that Minnesota's OWI statute required proof of elements not contained in Wisconsin's OWI statute. *See* ***State v. Puchacz***, 2010 WI App 30, ¶12, 323 Wis. 2d 741, 780 N.W.2d 536.

Puchacz, 323 Wis. 2d 741, ¶12 (quoting ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980)).

¶24 Applying this broad interpretation and application of the final phrase in WIS. STAT. § 343.307(1)(d) and placing it in the context of the public policy supporting our OWI laws, we conclude that Imbruglia's Colorado conviction was properly counted.[5] *See* ***Puchacz***, 323 Wis. 2d 741, ¶13. Under Colorado's driving while impaired law, Imbruglia was convicted of operating a motor vehicle while he was "impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs." *See* COLO. REV. STAT. § 42-4-1301(1)(b). This prohibited conduct is "[s]ubstantially similar" to the type listed in § 343.307(1)(d) (permitting the counting of convictions under an out-of-state law that prohibits a person from operating while under the influence of an intoxicant or a controlled substance, or a combination thereof, and while under the influence of any drug to a degree that renders the person incapable of safely driving). The circuit court properly counted Imbruglia's prior Colorado conviction.

¶25 *Collateral attack on a prior Wisconsin conviction.* On April 7, 2010, after pleading no contest, Imbruglia was convicted of OWI fourth, possession of THC and possession of drug paraphernalia. Postconviction, Imbruglia moved the circuit court to amend his judgment of conviction from OWI

[5] We employed this same reasoning regarding the same statutes in the unpublished decision of ***State v. Burton***, No. 2008AP3010, unpublished slip op. (WI App Oct. 7, 2009). We recognize, of course, that we are not bound by an unpublished opinion of the court of appeals. *See* WIS. STAT. RULE 809.23(3)(a). We cite to ***Burton*** merely to note that we recently compared the identical Wisconsin and Colorado statutes and came to the same conclusion as we do here: the Colorado conviction under COLO. REV. STAT. § 42-4-1301(1)(b) is countable as a prior conviction. *See* RULE § 809.23(3)(b) (an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under WIS. STAT. § 752.31(2) may be cited for its persuasive value).

fourth offense to OWI third offense. Specifically, he asked the court to reconsider its decision not to apply issue preclusion and its determination that the relevant Colorado and Wisconsin OWI statutes are substantially similar. Alternatively, he argued that if his 2002 Colorado conviction is counted as a prior offense, then his 2005 Wauwatosa municipal court conviction is a second, not a first, offense, and because state courts have exclusive jurisdiction over OWI second offenses, his municipal court conviction is void and uncountable. After a hearing, the court denied the motion.

¶26 The question on appeal is whether Imbruglia is entitled to collaterally attack in state court his Wauwatosa municipal court conviction in an attempt to prevent it from being counted for purposes of sentence enhancement. This is a question of law we review de novo. *See* ***State v. Peters***, 2001 WI 74, ¶13, 244 Wis. 2d 470, 628 N.W.2d 797.

¶27 This issue is appropriately addressed by the controlling precedent of ***State v. Hahn***, 2000 WI 118, ¶¶26-28, 238 Wis. 2d 889, 618 N.W.2d 528. In ***Hahn***, our supreme court held that a defendant generally may not collaterally attack the validity of a prior conviction in order to avoid counting it for purposes of sentence enhancement, unless the offender alleges a violation of his or her constitutional right to counsel. *See* ***Peters***, 244 Wis. 2d 470, ¶1.

¶28 More recently, in ***State v. Hammill***, 2006 WI App 128, 293 Wis. 2d 654, 718 N.W.2d 747, we were guided by ***Hahn*** in addressing a case similar to Imbruglia's. There, the defendant was charged twice with first offense OWI, once in Eau Claire county and once in the Village of Cameron. ***Hammill***, 293 Wis. 2d 654, ¶15. Both charges were pending at the same time, but the defendant entered a plea on the Eau Claire county charge first, then entered his Village of Cameron

plea in municipal court. *See* ***id.*** Subsequently, when the defendant was charged with fifth offense OWI, he collaterally challenged the Village of Cameron municipal court judgment in the state court proceeding on his OWI fifth charge, contending that the Village of Cameron municipal court lacked subject matter jurisdiction over his OWI second charge and, therefore, the municipal court conviction was a nullity and not countable for penalty enhancement purposes. ***Id.***, ¶¶4, 15. The State argued that, since the defendant's challenge to the municipal court conviction was not grounded on an alleged violation of his right to counsel, he could not collaterally attack it in the OWI fifth proceedings based on a lack of subject matter jurisdiction. ***Id.***, ¶16.

¶29 We agreed with the State and rejected the defendant's collateral attack because it was not based on a violation of the right to counsel. ***Id.***, ¶17. Accordingly, we held the challenge was barred by the "bright-line rule" of ***Hahn***. *See* ***Hammill***, 293 Wis. 2d 654, ¶17.

¶30 We reject Imbruglia's claim for the same reason. Imbruglia does not allege a violation of his constitutional right to counsel. He is instead attempting to use the OWI fourth proceedings to collaterally attack the validity of his Wauwatosa municipal court conviction. This is not permissible under ***Hahn***.

¶31 We uphold the circuit court's refusal to apply issue preclusion and its decision to count Imbruglia's prior Colorado conviction. Because Imbruglia may not collaterally attack his Wauwatosa municipal court conviction in the state court OWI fourth proceedings, we further uphold the circuit court's decision not to amend Imbruglia's OWI conviction from fourth offense to third offense.

By the Court.—Judgment and order affirmed.

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