

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICHARD EUGENE IPSEN,
Defendant-Appellant.

Deschutes County Circuit Court
MI131959; A157904

Barbara Haslinger, Senior Judge. (Judgment)

Alta Jean Brady, Judge. (Amended Judgment)

Argued and submitted March 1, 2016.

Stephen A. Houze argued the cause and filed the briefs for appellant.

Andrew M. Lavin, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before DeVore, Presiding Judge, and Tookey, Judge, and Garrett, Judge.*

TOOKEY, J.

Affirmed.

* Tookey, J., *vice* Duncan, J. pro tempore; Garrett, J., *vice* Flynn, J. pro tempore.

TOOKEY, J.

Defendant appeals a judgment of conviction for 25 counts of second-degree invasion of personal privacy, ORS 163.700, assigning error to the trial court's ruling that issue preclusion barred him from litigating his motion to suppress. For the reasons that follow, we affirm.

Following the discovery and search of a hidden camera found in a bathroom at Starbucks, defendant was charged in both Washington and Deschutes County for multiple counts of second-degree invasion of personal privacy.¹ The pertinent facts leading to defendant's charges and the basis for his motion to suppress in Washington County are set forth in *State v. Ipsen (A157082)*, 288 Or App 395, ___ P3d ___ (2017). Following the denial of his motion to suppress in Washington County, defendant waived his right to a jury trial and, after a trial on stipulated facts, he was convicted of eight counts of second-degree invasion of personal privacy and two counts of attempted second-degree invasion of personal privacy.

Subsequently, in Deschutes County, defendant filed a motion to suppress that was nearly identical to the motion to suppress that he had filed in Washington County.² Rather than ruling on the merits of defendant's motion, the Deschutes County trial court denied the motion, concluding that it was precluded from making an independent determination on the merits because that issue had already been heard and decided by the Washington County trial court. Thereafter, defendant entered a conditional plea of guilty to all 25 counts of second-degree invasion of personal privacy, reserving his right to appeal pursuant to ORS 135.335(3).

On appeal, defendant argues that the trial court erred in ruling that issue preclusion barred defendant from

¹ Defendant's charges in Deschutes County stem from evidence found on the storage device of the hidden camera that depicted people using the bathroom in defendant's house in Bend.

² The only difference between defendant's motion to suppress in Deschutes County and the motion he filed in Washington County was that, in Deschutes County, defendant added a section pertaining to his Washington County prosecution and an argument that "collateral estoppel does not bar defendant from litigating this suppression motion in this proceeding."

litigating his motion to suppress. First, defendant contends that application of issue preclusion in this context infringes on defendant's right to a jury trial. Second, defendant contends that issue preclusion is inapplicable because the Washington County trial court's denial of defendant's motion to suppress was not "essential to a final decision on the merits," an element of issue preclusion. As we understand defendant's argument, because the context of a motion to suppress is different from the consideration of the elements necessary to establish defendant's charged offenses, the denial of defendant's motion to suppress was distinct from and not essential to the decision on the merits to convict defendant.

In response, the state argues that the trial court did not err. First, the state points out that defendant's motion to suppress in this case was identical in substance to the motion that he had filed in the Washington County case. Moreover, at the hearing on his motion in this case, defendant twice told the trial court that he was not intending to introduce new evidence; rather, defendant stipulated to the admissibility of the Washington County transcript as well as his identical briefing. Second, the state asserts that because a motion to suppress presents a pure legal question, the resolution of that motion would not impede defendant's right to a jury trial. Finally, the state contends that the denial of defendant's motion to suppress was essential to the defendant's judgment of conviction.

We first consider whether application of issue preclusion infringed on defendant's right to a jury trial. We conclude that it did not. Although "[u]sing the doctrine of issue preclusion to *conclusively establish facts necessary for a conviction* in a criminal prosecution impermissibly interferes with a defendant's constitutional right under Article I, section 11, to have a jury find every element of the charged offense beyond a reasonable doubt," *State v. Davis*, 265 Or App 179, 193, 335 P3d 1266 (2014) (emphasis added), the same cannot be said of a ruling on a motion to suppress. In a suppression hearing, a trial court does not conclusively establish facts necessary for a conviction; rather, it resolves preliminary questions on the admissibility of evidence. See *State v. Haynes*, 233 Or 292, 294, 377 P2d 166

(1962) (“A motion to suppress evidence is a separate issue from the question of the guilt or innocence of the defendant. The motion is addressed to the court and is made out of the hearing of the jury.” (citation omitted)). Consequently, because issues determined in a suppression hearing are decided by the trial court and do not “conclusively establish facts necessary for a conviction,” we conclude that the trial court’s application of issue preclusion did not impermissibly infringe on defendant’s right to a jury trial.³

We turn to defendant’s second argument—that issue preclusion was inapplicable because the trial court’s denial of defendant’s motion to suppress was not essential to a final determination on merits. We review a trial court’s ruling on issue preclusion for errors of law. *State v. Gipson*, 234 Or App 316, 321, 227 P3d 836, *rev den*, 349 Or 173 (2010). The doctrine of issue preclusion applies in criminal cases and bars a party from challenging an issue where the following requirements are satisfied:

“(1) the issue in the present proceeding must be identical to an issue in a prior proceeding; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded must have had a full and fair opportunity to be heard on that issue; (4) the party precluded must have been a party or in privity with a party to the earlier proceeding; and (5) the prior proceeding must have been the type of proceeding to which this court will give preclusive effect.”

Id. at 320-21 (internal quotation marks and brackets omitted).

³ We note that defendant relies on a footnote in *State v. Ratliff*, 304 Or 254, 258 n 5, 744 P2d 247 (1987), to support his argument that application of issue preclusion infringes on his right to jury trial. In *Ratliff*, in *dicta*, the Supreme Court noted “that the state would rarely, if ever, be able to assert collateral estoppel *in this situation* because of defendant’s right to a jury trial.” *Id.* (emphasis added). The situation to which the court was referring in that footnote, however, was “whether the doctrine applies when a defendant in a criminal case seeks to estop the state from litigating an issue based upon the decision of a hearings officer in an administrative proceeding.” *Id.* at 258. In *that* situation, the Supreme Court concluded that the administrative proceeding was “inadequate to justify the use of collateral estoppel” in a subsequent judicial proceeding. *Id.* However, we do not agree with defendant that *Ratliff* is applicable to the facts of this case.

Here, it is undisputed that the issue raised in defendant's motion to suppress in Deschutes County was identical, except as explained above, 288 Or App at 403 n 2, to the issue that he raised in Washington County; that defendant had a full and fair opportunity to be heard on that issue; that defendant was a party in the earlier proceeding; and that the Washington County proceeding was the type of proceeding that has preclusive effect. *See State Farm Fire and Casualty Co. v. Sallack*, 140 Or App 89, 94, 914 P2d 697, *rev den*, 324 Or 18 (1996) ("A proceeding that concludes in a judicial judgment unquestionably satisfies the final requirement of issue preclusion.").

Accordingly, the only remaining requirement concerning the application of issue preclusion in this case is whether the trial court's denial of defendant's motion to suppress was essential to a final determination on the merits in the Washington County case. "To satisfy that essentiality requirement, a prior court's resolution of an issue must either be apparent from the face of the judgment or order or, if not apparent from the face of a judgment or order, *must have been necessary to the resolution of the prior adjudication.*" *Leach v. Scottsdale Indemnity Co.*, 261 Or App 234, 240, 323 P3d 337, *rev den*, 356 Or 400 (2014) (emphasis added).

Here, the denial of defendant's motion to suppress was necessary to defendant's judgment of conviction; that denial allowed for the admission of all of the evidence demonstrating defendant's invasion of personal privacy, which allowed the state to meet its burden of proving the charged offenses beyond a reasonable doubt. Under those circumstances, the denial of defendant's motion to suppress was "necessary to the resolution" of the Washington County case. We conclude that the trial court's denial of defendant's motion to suppress was essential to a final determination on the merits; as a result, the trial court did not err in concluding that issue preclusion barred defendant from litigating the motion to suppress in Deschutes County.

Affirmed.