COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2480 **Cir. Ct. No. 2005JV689**

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

IN THE INTEREST OF PHAHEEM S.B.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PHAHEEM S.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Phaheem S.B. appeals from an order adjudicating him delinquent on charges of second-degree sexual assault, kidnapping and intimidation of a witness. He contends that the fact-finding hearing that resulted in his adjudication placed him in jeopardy twice for the same offense, which is a violation of his constitutional rights. Our review of the record reveals that this issue is resolved by reference to a prior court of appeals decision and that jeopardy did not attach prior to the fact-finding hearing. Under the law of the case doctrine, we resolve the appeal in favor of the State.

¶2 On October 17, 2005, the State filed a delinquency petition accusing Phaheem of second-degree sexual assault with use of force, kidnapping, and intimidation of a victim. The matter was set for a fact-finding hearing on May 8, 2006. That morning, the court took up several defense motions, including a motion to pierce the rape shield law and present evidence that the victim previously had made a false accusation of sexual assault and a motion to suppress statements that Phaheem had made without the benefit of a complete ***Miranda***[2] warning. At the hearing, the State indicated that its witness for the ***Miranda*** issue would be present that day and the next, but would be unavailable for the following week. The following exchange took place:

> THE COURT: … I have … indicated to counsel that I would permit the State to proceed with witnesses out of order given some of the time constraints that have been imposed … on counsel by the Court. I do understand that counsel had prepared this case for [a] two-day trial. That is, today and tomorrow. I've cleared my calendar so that we can spend all day tomorrow on this case.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> Given that, there is a motion to suppress before the Court. But … to convenience your witnesses, I am permitting you to call your witness out of order as your case-in-chief.
>
> THE STATE: [W]e're going to put on [Investigator] Jody Spiegelhoff…. The statements that were made to her are part of the issue for Miranda and then she would also be the person that's unavailable after tomorrow. So we can just do all of her testimony today and the important part of her testimony is the statements that the boys made to her. So if you suppress those statements, then … she won't be needed any more. If you don't suppress those statements, I would just ask that her testimony during the motion [hearing] be included in my case-in-chief.

The court then asked defense counsel if there were any objections to that plan, and there were none.

¶3 Court reconvened the next day, and the judge stated that "procedurally[,] we were in the middle of, and still have not concluded, a motion to suppress." The court then explained that it had given the State permission to call a witness in its case-in-chief, specifically an expert from the state crime lab. The State responded, "[A]fter thinking about it and consulting with my colleagues, if I put on my case-in-chief, then jeopardy will attach. I would rather just do the motion; renew my request for the interlocutory appeal and then have the proceedings stayed and then put on my case-in-chief." The court then agreed to proceed with the motion.

¶4 The circuit court held that evidence of the victim's prior false accusation could be admitted and that Phaheem's statements, both pre- and post-***Miranda***, should be suppressed. The State moved for leave to file an interlocutory appeal and to stay the case pending that appeal. Phaheem objected, arguing as follows:

> [J]urisdictionally, I think the cart's been placed before the horse. There[are] a couple of problems with the State's request for [a] stay. The first is harkening back to a week ago. The State requested permission, was granted permission, to examine Investigator Spiegelhoff not only as a witness on suppression statements, but as a witness on trial.
>
> So the first witness on trial has been sworn. Jeopardy attached. The trial is in progress. Not clear to me that we should be staying a trial after witnesses are … testifying ….

The court responded, "I viewed … the testimony from … Investigator Spiegelhoff as addressing the pretrial motions only. There was an issue that came up about another witness and [the prosecutor] specifically said that she did not want to commence her case-in-chief and did not want to attach jeopardy." Phaheem renewed his objection, arguing that the trial had started when the State sought permission to use Spiegelhoff's pretrial testimony at trial if Spiegelhoff was unavailable during the State's case-in-chief. The court disagreed.

¶5 The State then petitioned for leave to appeal, which we granted. On December 26, 2006, we reversed the circuit court's rape shield ruling on grounds that Phaheem had not shown the victim's prior accusation to be "untruthful," and we reversed the suppression of conversational statements Phaheem made during transport to the sheriff's department. ***State v. Phaheem S.B.***, No. 2006AP1406, unpublished slip op., ¶41 (WI App Dec. 27, 2006) (***Phaheem I***). We affirmed the exclusion of Phaheem's other statements because they were obtained without the benefit of a complete ***Miranda*** advisory. ***Phaheem I***, unpublished slip op., ¶41. We then remanded the matter to the circuit court.

¶6 While the case was pending on appeal, normal judicial rotation occurred and Judge Ptacek rotated into juvenile court to replace Judge Jude, who had presided thus far. Judge Jude wrote to the attorneys, with a copy to Judge

Ptacek, stating that he was satisfied that jeopardy had not attached during the May 8 and 9, 2006 proceedings and, therefore, the case properly moved to Judge Ptacek. Judge Jude explained, "May 8 and 9, 2006 [were] set aside for trial. Various pre-trial motions were scheduled to be heard on May 8 prior to commencement of trial. As it turned out, both days were consumed with testimony on the motions." When the court's rulings went against the State, the State "opted to appeal rather than proceed to trial."

¶7 We decided the interlocutory appeal and remanded the case to the circuit court on December 26, 2006. On February 2, 2007, the circuit court, with Judge Ptacek presiding, held pretrial conferences. Phaheem stated for the record his continued belief that jeopardy had attached with the testimony of Spiegelhoff on May 8, 2006. The circuit court disagreed and the fact-finding hearing commenced on March 28, 2007. Phaheem was adjudicated delinquent and the dispositional order was filed May 3, 2007. Phaheem appeals on double jeopardy grounds.

¶8 We note that our citation to and reliance upon ***Phaheem I*** does not run afoul of the prohibition against citing unpublished cases in WIS. STAT. RULE 809.23(3). We cite to ***Phaheem I*** only for the law of the case. "An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or *the law of the case.*" RULE 809.23(3) (emphasis added).

¶9 The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal."

State v. Stuart, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82. The purpose of the law of the case doctrine is not complex: "The doctrine of 'law of the case' is rooted in the concept that courts should generally follow earlier orders in the same case and should be reluctant to change decisions already made, because encouragement of change would create intolerable instability for the parties." ***Id.*** (citation omitted). A position adopted by an appellate court establishes the law of the case and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, or controlling authority has since made a contrary decision of the law applicable to such issues. ***Id.***, ¶24.

¶10 Here, we decline to revisit the purpose of the May 8 and 9, 2006 hearings because they were clearly characterized as pretrial proceedings in ***Phaheem I***. There, we stated that "on May 8 and 9, the trial court *took testimony on the pretrial motions*, and later granted the motions in an oral decision. The court then *stayed further proceedings* while the State pursued this interlocutory appeal." ***Phaheem I***, unpublished slip op., ¶41 (emphasis added). Although we did not include an extensive analysis of the pretrial character of the May 2006 hearings, we rested our entire discussion of the evidentiary matters on that premise.

¶11 Under certain circumstances and in the interests of justice, courts may disregard the law of the case if the evidence or controlling authority is substantially different. *See* ***Stuart***, 262 Wis. 2d 620, ¶24. Our review of the record confirms that the purpose of the May 8 and 9 hearings was to address preliminary defense motions. The circuit court's analysis of the hearing over which it presided and its description of the testimony taken is consistent with this characterization. Nothing in the record suggests that the evidence now known is

substantially different than what was known in December 2006, nor has any new controlling authority developed since that time. Accordingly, we follow our decision in ***Phaheem I*** and affirm the order of the circuit court.

By the Court.—Order affirmed.

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