

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 1, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP28-CR

Cir. Ct. No. 2004CF2729

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL ANTHONY KING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County.
REBECCA F. DALLET, Judge. *Affirmed and cause remanded for further proceedings.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Michael Anthony King petitions for leave to appeal from a non-final order denying his motion to dismiss the amended information. The issue is whether the solicitation charges relating to the

conspiracy charge for which King had been acquitted are barred by double jeopardy or collateral estoppel. We grant the petition and conclude that prosecuting King for solicitation after he was acquitted of conspiracy on much of the same evidence is not barred by double jeopardy. We also conclude that collateral estoppel does not bar the solicitation prosecution because the jury did not specify what it actually decided in its verdict of acquittal. Therefore, we affirm and remand for further proceedings.

¶2 A jury found King guilty of possessing between five and fifteen grams of cocaine with intent to deliver, and possessing marijuana as a subsequent drug offense; that same jury acquitted him of conspiring to deliver cocaine. The trial court imposed a fourteen-year sentence, comprised of nine- and five-year respective periods of initial confinement and extended supervision for the cocaine conviction, and thirty days in jail for the marijuana conviction. On direct appeal, we reversed the judgment of conviction and remanded the cause for further proceedings because we held that the warrant was invalid, necessitating suppression of the evidence. *See State v. King*, 2008 WI App 129, ¶32, 313 Wis. 2d 673, 758 N.W.2d 131.

¶3 The prosecutor then informed the trial court and King that he was amending the information and now charging King with two counts of solicitation to deliver cocaine and two counts of possessing cocaine with intent to deliver: one solicitation and one possession charge for each of two different dates, March 16, 2004 and March 30, 2004. The trial court denied King's dismissal motion, ruling that the amended charges were not precluded by double jeopardy. King petitioned for leave to appeal. We ordered further briefing on the double jeopardy issue. *See State v. Jenich*, 94 Wis. 2d 74, 97a, 288 N.W.2d 114, 292 N.W.2d 348 (1980) (opinion on reconsideration).

¶4 King now concedes that the solicitation and conspiracy charges for the same offense are not precluded by double jeopardy but contends that the State is collaterally estopped from prosecuting him for solicitation after unsuccessfully prosecuting him for conspiracy. Collateral estoppel, also known as issue preclusion, precludes relitigation of

an issue of ultimate fact [that] has once been determined by a valid and final judgment ... [as] between the same parties in any future lawsuit....

... Where a previous judgment of acquittal was based upon a general verdict ... this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Ashe v. Swenson, 397 U.S. 436, 443-44 (1970).

¶5 We therefore must examine the conspiracy charge for which King was acquitted that was litigated at trial. A summary of the facts of the conspiracy are reiterated from the testimony of a police detective at King's conspiracy trial who viewed the following events through binoculars while surveilling King. The detective testified that he saw King leave a pizzeria carrying a portable oven for deliveries and walk to a dark-colored vehicle. Samuel Caraballo arrived in a different vehicle and approached King. Caraballo's hand was cupped and King put his hand underneath Caraballo's hands. Caraballo appeared to be handing whatever he had in his cupped hands to King. King and Caraballo spoke for about thirty seconds and then each left. Caraballo returned to his vehicle; King returned to the pizzeria. King left the pizzeria sometime thereafter, but did not appear to be carrying anything with him.

¶6 At trial, defense counsel urged the jury to acquit King of conspiracy, distinguishing between a conspiracy and a buyer-seller relationship. At King's request, the trial court instructed the jury after the conspiracy instruction as follows:

The existence of a simple buyer/seller relationship between a defendant and another person without more is not sufficient to establish a conspiracy even where the buyer intends to resell the controlled substance, here cocaine. The fact that a defendant may have bought the controlled substance cocaine from another person or sold the controlled substance to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy. In considering whether a conspiracy or just a simple buyer/seller relationship existed, you should consider all the evidence including the following factors: Number one, whether the transaction involved large quantities of the controlled substance cocaine; number two, whether the parties had a standardized way of doing business over time; number three, whether the sales were on credit or on consignment; number four, whether the parties had a continuing relationship; number five, whether the seller had a financial stake in a resale by the buyer; and number six, whether the parties had an understanding that the controlled substance cocaine would be resold. No single factor necessarily indicates by itself that a defendant was or was not engaged in a simple buyer/seller relationship.

The jury acquitted King of conspiracy to deliver cocaine. These same facts give rise to the amended solicitation charge.

¶7 To collaterally estop the State from now prosecuting King for solicitation after he was acquitted of conspiracy for the same incident, King must demonstrate that the jury decided that a drug transaction did not occur between King and Caraballo, as arguably evidenced by the jury's verdict of acquittal on the conspiracy charge. See *Schiro v. Farley*, 510 U.S. 222, 233 (1994). Unlike at trial where the State sought to prove a conspiracy and King sought to avoid that finding and instead suggest a mere drug transaction, the parties' appellate

contentions change. The State now contends that the jurors may have acquitted King because they thought that King and Caraballo were a buyer and seller in the alleged transaction, and that the State simply did not prove that there was an agreement between King and Caraballo necessary for a conspiracy conviction. King now contends that the jury acquitted him of conspiracy because the State failed to prove that he purchased cocaine from Caraballo. The parties then argue their respective appellate contentions, speculating on what the jury's findings were implicit to its verdict of acquittal.

¶8 The test to apply collateral estoppel however, does not “focus[] on what the jury *might* have decided in acquitting [the defendant] ... rather than what the jury *must* have decided in order to reach its decision. Collateral estoppel applies only where an issue was *necessarily* decided in a previous proceeding.” *Jacobs v. Marathon County*, 73 F.3d 164, 168 (7th Cir. 1996). Consequently, collateral estoppel does not preclude a solicitation charge following King's acquittal for conspiracy.

¶9 The jury acquitted King of conspiracy to deliver cocaine. In its verdict however, it was not asked nor did it specify its finding leading to the acquittal for conspiracy. The jury may have implicitly found that King was not involved in a sale transaction for the cocaine; it may have found that there was no agreement between King and Caraballo relating to the cocaine. Collateral estoppel requires King to demonstrate whether the completed crime of delivering cocaine was “actually decided” at trial incident to his acquittal for conspiracy. *Schiro*, 510 U.S. at 233. King's explanations about the likelihood of that issue having been decided are not sufficient to collaterally estop a solicitation prosecution. *See Jacobs*, 73 F.3d at 168. We therefore affirm the trial court's order and remand the matter for further proceedings.

By the Court.—Order affirmed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

