

FILED**DEC 02 2022****CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT ONE

State of Wisconsin,

Plaintiff – Respondent,

vs.

APPEAL # 22 AP 1202

22 AP 1203

Aman Deep Singh,

22 AP 1204

Defendant – Appellant.

On Appeal From Orders Entered in the Circuit Court of
Milwaukee County, Judge Jack Davila, Presiding, Denying
Various Post-Dismissal Motions.

(L.C. #17CT341, 17CM3327, 18CM3479)

APPELLANT BRIEF IN CHIEF

Aman Deep Singh

Defendant – Appellant

TABLE OF CONTENTS

ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	3
CONCLUSION	

TABLE OF AUTHORITIES

<i>Amek bin-Rilla v. Israel</i> , 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983)	4
<i>Harris v. Reivitz</i> , 142 Wis. 2d 82, 88, 417 N.W.2d 50 (Ct. App. 1987)	5
<i>Kroll v. Bartell</i> , 101 Wis.2d 296, 302, 304 N.W.2d 175 (Ct.App.1981)	8
<i>State v. Davis</i> , 2001 WI 136, ¶ 22, 248 Wis.2d 986, 637 N.W.2d 62	6
<i>State v. Kollross</i> , 2019 WI App 30, 388 Wis. 2d 135, 931 N.W.2d 263	5
<i>State v. Braunsdorf</i> , 98 Wis. 2d 569, 572, 297 N.W.2d 808 (1980)	5

ISSUES PRESENTED

- 1.Does a judgment for court appointed attorney fees levied against an indigent criminal defendant have to be vacated if all charges are dismissed? The trial court answered no.
- 2.If criminal charges are dismissed due to a statute of limitations, should the dismissal be with prejudice? The trial court answered no.
- 3.Is initiating a subsequent proceeding in deliberate disregard of issue preclusion a contempt of court towards the earlier judgment? The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is welcome but likely not necessary. Publication is recommended because the issues above are novel in the sense they have never been directly addressed before in published cases.

STATEMENT OF THE CASE AND FACTS

On 02/24/2017, the State of Wisconsin filed a misdemeanor case against Singh for one count of third offense OWI. [R3] While this case was pending, on 09/12/2017, the State filed a second misdemeanor case, alleging another third offense OWI and a bail jumping. [R1 in 22AP1203] While those two cases were pending, on 10/28/2018, the State filed a third case, alleging yet another third offense OWI and two counts of bail jumping. [R1 in 22AP1204] In all three OWI cases, the alleged prior offenses were a 2005 OWI conviction in Dane County and a 2001 Illinois Implied Consent blood test refusal. All three cases were informally joined for disposition in the circuit court. Singh was determined to be indigent by the State Public Defender and counsel was appointed. [R9]

On 11/13/2018, Singh's attorney at the time, Patrick Wait, orally moved to withdraw. [R43] The court permitted Attorney Wait to withdraw, but instead of referring the case back to the SPD to appoint successor counsel, Judge Kies

appointed Edward Hunt to represent Singh at county expense with Singh to reimburse the county. [R43, R19] Two weeks later, Singh moved to proceed *pro se*. [R21] On 03/11/2019, the court signed an order directing the clerk of circuit court to pursue reimbursement against Singh for attorney costs. [R26]

Meanwhile on 02/15/19, Singh filed a motion which among other claims, argued that the repeater allegation should be dismissed because it is unconstitutional to count blood test refusals as prior offenses for OWI sentence enhancement. [R25] The State filed a response. [R27] A motion hearing was held. [R39] The trial court denied the motions. [R30].

Singh filed a motion for reconsideration on the prior offenses issues on 07/03/2019. [R35] The State filed a response on 10/28/2020. [R45] Following a motion hearing, the motion for reconsideration was orally denied by the trial court on 12/18/2020. [R66] In April 2021, this court issued a published decision in *State v. Forrett*, 2021 WI App 31, holding that the counting of blood test refusals for OWI sentence enhancement indeed was unconstitutional. Following *Forrett*, Singh filed a motion to dismiss. [R49] In the motion, Singh argued as he had in the earlier motions that after *Forrett*, the earlier refusal could not count as a prior offense so his third offense OWI charges had to be amended to a civil OWI first (since the other alleged 2005 prior was outside the 10 year lookback window for second offense OWI); but since the statute of limitations for amending to a OWI 1st had expired, the charges must be dismissed outright. The State filed a response. [R45] A motion hearing was held on 10/14/21. [R78] The trial court granted Singh's motion to dismiss in court on 02/17/22. [Transcript filed as R76 in 22AP1204]

Milwaukee Assistant District Attorney William Ackell informed Singh's counsel at the time, Nelida Cortes, that he would pursue first offense OWI charges against Singh in municipal court anyways and has so far successfully encouraged municipal officials to file OWI 1st citations against Singh in the Hales Corners and Greenfield matters. On 04/01/2022, Singh filed three motions in the trial court. First, Singh moved for return of bail funds. [R51] Second, Singh moved for the

judgment for attorney fees be vacated. [R52] Third, Singh moved for the court to issue show cause orders against ADA Ackell and others as part of a remedial sanctions for contempt of court petition. [R53] The trial court granted the first motion but denied the second and third in a written order. [R55] Singh filed a timely notice of appeal. [R65]

Singh also filed a motion to reconsider the attorney fees. [R57] Singh filed a motion to reconsider the contempt issue as well as an amended motion for remedial sanctions. [R58, R59] Singh also filed an additional motion to modify the dismissal without prejudice to with prejudice. [R56] The State filed a response to all motions. [R70]. Singh filed a reply. [R74] The trial court issued a written decision denying all motions. [R80] Singh filed a timely notice of appeal from this second order. [R99 in 22AP1204] All appeals have been consolidated for disposition in this court.

ARGUMENT

I. THE JUDGMENT FOR COURT APPOINTED ATTORNEY FEES SHOULD BE VACATED BECAUSE HE WAS IMPROPERLY DENIED SPD REPRESENTATION AND BECAUSE THE CHARGES WERE DISMISSED.

Singh makes two arguments for why the judgment to pay attorney fees should be vacated. In the original motion, Singh argued that he was improperly shifted from the State Public Defender to the court appointed counsel track. [R52] In its decision denying this motion, the trial court concluded there was no requirement for the court to send Singh back to the SPD for appointment of successor counsel. [R55]

Singh moves the court to take judicial notice of the *amicus* brief filed on behalf of the SPD by Katie York on 08/20/2021 in Appeal # 19AP221 (State v. Nhia Lee). Singh quotes from that brief here and adopts the passage as his own argument. "The SPD, alone, was given the authority to appoint cases for SPD-eligible clients. Wis. Stat. §§ 977.05(1)&(5)(a), 977.08(1). However, there are circumstances where the SPD is not authorized to appoint counsel but the client is

still indigent, therefore the court is permitted to appoint counsel at county expense. See *State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991). The most common example is where a criminal defendant does not meet the SPD's statutorily mandated eligibility standards, but is still considered indigent. *Id.*"

Through the statutes creating the SPD, the legislature gave the SPD sole authority to appoint counsel for SPD eligible defendants. Only in situations where the SPD is unable or unwilling to assign counsel does the court appointed track come into play. There is nothing in the transcript [R43] explaining why Judge Kies did not simply send Singh back to the SPD for successor counsel after allowing Attorney Wait to withdraw. Singh should not be facing an additional attorney fee judgment from the county when the SPD would have appointed successor counsel.

The second argument Singh made (in the reconsideration motion) for vacating the judgment is that there is no authority to order costs against an indigent defendant in a case where all charges have been dismissed. [R57] The orders relating to court appointed counsel [R19, R26] specify that costs would be recovered under sec. 973.06. However, that is a sentencing statute that only comes into play after a defendant has been convicted. It does not apply in cases where all charges were dismissed. In its response, the State conceded that costs should not have been levied against Singh. [R70]

Despite the State's concession, the trial court denied the motion to vacate the judgment for costs anyways. [R80] The trial court reasoned that because this argument was different from the one Singh had made in his original motion to vacate the judgment, that it was beyond the scope of a reconsideration motion. This is error in two ways. First, Singh is *pro se* so the trial court should have looked to the substance of the motion instead of denying relief based on labeling. See *Amek bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Second, there is no rule that new grounds cannot be raised in a motion for reconsideration. In fact, the opposite is true. What is not permitted are reconsideration motions that raise the same issues. Only those reconsideration motions that do actually raise

new issues are appealable. See *Harris v. Reivitz*, 142 Wis. 2d 82, 88, 417 N.W.2d 50 (Ct. App. 1987).

II. THE DISMISSAL WITHOUT PREJUDICE ORDER SHOULD BE AMENDED TO WITH PREJUDICE.

A. DISMISSALS FOR A VIOLATION OF A STATUTE OF LIMITATIONS ARE NECESSARILY WITH PREJUDICE.

Relying on *State v. Braunsdorf*, 98 Wis. 2d 569, 572, 297 N.W.2d 808 (1980), the trial court concluded there is no authority to dismiss a criminal case with prejudice prior to the attachment of jeopardy other than for a violation of the constitutional right to a speedy trial. [R80] That reasoning seems to be in conflict with *State v. Kollross*, 2019 WI App 30, 388 Wis. 2d 135, 931 N.W.2d 263, where this court remanded an interlocutory appeal "with directions that the State's prosecution be dismissed with prejudice due to the expiration of the applicable statute of limitations." *Id* at ¶ 12. *Braunsdorf* only dealt with the question of whether trial courts have *inherent authority* to dismiss with prejudice. Statutes of limitations, by their very nature, provide specific *statutory authority* to dismiss with prejudice.

"We agree with the court of appeals that the State's reliance on *Braunsdorf* is misplaced. In *Braunsdorf* there was no statute that authorized or required the dismissal of a criminal case. The *Braunsdorf* court held that in the absence of a statute, the "power to dismiss a criminal case with prejudice prior to jeopardy on nonconstitutional grounds is not ... an inherent power of the trial courts of this state." Because *Braunsdorf* addressed only a circuit court's inherent power to dismiss criminal cases, we conclude that it cannot be interpreted, as the State urges, to mean that a circuit court's authority to dismiss a criminal case is limited to a dismissal of the case without prejudice unless a statute explicitly authorizes a

dismissal with prejudice." *State v. Davis*, 2001 WI 136, ¶ 22, 248 Wis.2d 986, 637 N.W.2d 62.

Braunsdorf does not hold that pending prosecutions where a statute of limitations has expired cannot be dismissed with prejudice; the issue never came up in that case. *Kollross* on the other hand dealt with the question directly and demonstrates that cases dismissed due to an expiration of a statute of limitations are to be with prejudice. A dismissal for violation of a statute of limitations must necessarily be with prejudice since time only moves forward, not backwards. A statute of limitations, once expired, is impossible to 'unexpire'.

B. THE RECORD CONCLUSIVELY DEMONSTRATES THAT THE OWI CHARGES WERE DISMISSED FOR A VIOLATION OF THE STATUTE OF LIMITATIONS.

In Singh's pretrial Motion to Dismiss, he argued that *Forrett* required not counting the prior Illinois blood test refusal and without that, the OWI charge could only continue as a first offense. [R49] In that motion at #11 and 12, Singh also argued that the two-year statute of limitations for first offense OWI had run. Singh asked the court to follow the reasoning in the unpublished but citable opinion in *Waterford v. Pye*, 2020 WI App 41, and hold that the two-year statute of limitations for first offense OWI was never tolled. Since the statute of limitations had expired, the OWI charges should all be dismissed outright instead of merely amended to first offense.

In its response, the State agreed that *Forrett* applied here and the third offense OWI charges had to be amended to first offense. The only objection the State raised was to whether the statute of limitations permitted the amendment to first offense charges. [R61 in 22AP1204] "While the State agrees that the 2001 implied consent conviction cannot be counted, the State does not agree that it should result in the defendant's four open OWIs being dismissed." [R61 in 22AP1204]

The motion hearing transcript is included in the record. [R78] Defense counsel points out that the parties are in agreement that the 2001 refusal cannot count as a prior offense. "I did see that in the State's response they conceded that we could not count the 2001 OWI implied consent conviction." (pg2, ln 15-19) Then defense counsel explains that not counting the refusal means the charges have to be amended to first offense. "When we apply *Forrett*, Your Honor, and we look at how the penalty scheme must be affected, we're no longer looking at criminal cases. Now we are looking at civil matters." (pg4, ln 10-13) The State agrees. "I do agree with Counsel there in terms of we cannot count that implied consent conviction." (pg7, ln 22-24) "I agree with Counsel that there is a two-year statute of limitations to file civil forfeiture matters." (pg8, ln 22-24) "I think the main disagreement is whether or not the statute of limitations was violated." (pg19-20, ln 24-1)

On 02/17/21 orally in court, the trial court granted Singh's motion and dismissed all charges. The transcript of that hearing is included. [R76 in 22AP1204] "At that last court date, I had pretty much -- you know, I let the parties know that I agreed with Attorney Cortes' analysis in the brief she submitted." (pg4, ln 2-4) "And so, given that set of circumstances and the fact that the Court does agree with the analysis that Attorney Cortes did in her motion to dismiss,..." (pg5, ln8-10) "So the Court is going to grant the Defense motion to dismiss. These cases will be dismissed without prejudice." (pg6, ln 5-6)

Based on this record, Singh fails to see how anyone could conclude anything other than that the OWI charges were dismissed because it would violate the statutes of limitations to allow further prosecution. Based on *Kollross*, when statutes of limitations are violated, the dismissals should be with prejudice. *Braunsdorf* is not violated because the dismissal with prejudice comes not from the trial court's inherent authority, but the statutory authority contained within the statute of limitations itself. A dismissal for violation of a statute of limitations must necessarily be with prejudice since time does not move backwards, only forward.

C. AT THIS POINT, THE STATUTE OF LIMITATIONS FOR MISDEMEANOR THIRD OFFENSE OWI HAS PERMANENTLY EXPIRED AS WELL WITH REGARD TO THESE INCIDENTS.

Because the trial court decided the motion solely based on *Braunsdorf*, it did not address Singh argument in reply that at this point the three-year statute of limitations for misdemeanors had expired as well. [R74] The tolling provision in sec. 939.74(3) cannot apply because these were never valid prosecutions since the criminal complaints never stated probable cause in the first place. Also, the sec. 939.74(3) tolling provision would not apply in the future if the State tried to refile third offense charges for these incidents but allege different prior offenses because it would no longer be the 'same act'.

In sum, the statute of limitations precluded amending these charges to first offense OWI so the trial court granted Singh's motion to dismiss. Furthermore, the three-year misdemeanor statute of limitations for this OWI has now expired as well and this prosecution would not legally toll it. Since the statute of limitations now wholly prevents any further prosecution for these OWIs, the dismissal orders should be with prejudice.

III. FURTHER MUNICIPAL PROSECUTIONS FOR OWI WITH REGARD TO THESE INCIDENTS ARE IN CONTEMPT OF THE DISMISSAL ORDER.

In his original motion for remedial sanctions [R53] along with his amended motion for sanctions [R58 and R59], Singh alleged that the dismissal orders in these cases have issue preclusive effect regarding whether further municipal court prosecutions for first offense OWI violate the statute of limitations. Because Singh seeks remedial sanctions against non-parties for contempt of court, Singh followed the procedure outlined in *Kroll v. Bartell*, 101 Wis.2d 296, 302, 304 N.W.2d 175 (Ct.App.1981). Specifically, Singh petitioned the trial court to issue an order to show cause to the non-parties which Singh could then perform service on them to make them parties in the contempt special proceeding.

In its decisions denying an order to show cause as well as the reconsideration, the trial court concluded the threshold issue here is whether the dismissal orders have preclusive effect on further municipal prosecutions. [R55 and R80] The trial court then determined the dismissal orders did not have preclusive effect because the dismissals were without prejudice. The trial court also noted that Singh can simply argue the issue preclusion issue in the municipal prosecutions.

The trial court erred because it misstates the standard. Wis. Stat. 785.01(1) provides the definition. ["Contempt of court" means intentional: (b)Disobedience, resistance or obstruction of the authority, process or order of a court."] The dismissal orders do not preclude the filing of municipal prosecutions, but they do have issue preclusive effect as far as relitigating the statute of limitations. As Singh explains especially in his motion for reconsideration [R58], dismissals without prejudice are final and appealable by the State under Wis. Stat. 974.05, which the State did not do here. Because municipalities are considered privies of the State, issues decided against the State in a criminal prosecution may have preclusive effect against municipalities seeking to relitigate the same issues in municipal court. See *Karlin v. State*, 47 Wis.2d 452, 459, 177 NW2d 318 (1970). The issue of whether the statute of limitations for first offense OWI was fully litigated here and decided in favor of Singh, as the discussion in the previous section amply demonstrates. There have been no intervening changes in the law. All preconditions for applying issue preclusion on the question of whether the statute of limitations has passed for first offense OWI are present.

Therefore, while dismissal orders do not legally prevent the named contemnors from filing new first offense OWI charges against Singh in various courts across Wisconsin regarding these incidents, the dismissal order does preclude them from arguing that the statute of limitations has not expired. And yet that is exactly what the named contemnors have been doing in those municipal prosecutions, arguing that the statute of limitations has not expired after the trial court held against them that it did. What is the purpose of filing these municipal

citations immediately after the trial court here determined that further first offense OWI prosecutions would violate the statute of limitations? The sole purpose is harass Singh by forcing him to repeatedly make court appearances in various courts and repeatedly relitigate the same statute of limitations issue that was determined in Singh's favor by the dismissal order here. This is plainly disobedience, resistance or obstruction of the trial court's dismissal order on statute of limitations grounds. The contemnors are behaving as though the trial court's statute of limitations based dismissal order never existed. Singh is aggrieved as a result by this contempt by having to repeatedly litigate the same issue over and over.

III. CONCLUSION

Singh requests this court reverse the trial court orders, and remand with directions to vacate the judgment for attorney fees, modify the dismissal order to with prejudice, and issue show cause orders against the named contemnors for continuing contempt of court.

Dated this 24st day of November 2022,

A handwritten signature in black ink, appearing to read 'Singh, A' with a stylized flourish at the end.

Aman Deep Singh