

prosecution. It is a violation of the defendant's right of due process and on that ground and on the motion of the defense, the defense motion to dismiss on that ground is granted. This case is dismissed with prejudice.

Transcript of hearing, p. 82. The criminal charge was dismissed on June 7, 1993, and the order was appealed. This appeal is still pending.

On August 19, 1993, appellant filed a motion for continuance of the hearing on this appeal until after the disposition of the criminal matter. This motion was granted in a ruling entered on September 10, 1993.

Appellant also filed on August 19, 1993, a motion for an order directing his reinstatement, on the ground that respondent's misconduct has made it impossible for him to have a fair hearing on his appeal. A hearing on this motion was scheduled for October 8, 1993.

In a supplemental brief in support of the aforesaid motion for reinstatement, filed September 13, 1993, appellant contends that the Court's ruling quoted above should be given preclusive collateral estoppel effect "on the issues of whether the Department's agents unlawfully interfered with the appellant's witnesses and whether such interference deprived appellant of due process of law." Appellant's supplemental brief, p. 1. Appellant goes on to contend that: "[t]herefore, there is no need for a hearing on this matter [the motion for reinstatement] and the Commission is bound by the court's judgment to find that, for purposes of this proceeding, the appellant has been deprived of due process of law by the same unlawful interference with his witnesses." id.

The principle of collateral estoppel "precludes litigation of an issue of ultimate fact previously determined by a valid final judgment in an action between the same parties. Ashe v. Swenson [397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L.Ed. 2d 469 (1970)]." State ex rel Flowers v. H&SS Dept., 81 Wis. 2d 376, 387, 260 N.W. 2d 727 (1978). The primary issues raised on this motion with respect to the elements of collateral estoppel involve identity of parties and identity of issues.

The criminal proceeding in the Calumet County Circuit Court involved the district attorney (DA) as the prosecuting official, while this personnel appeal involves the respondent Department of Justice (DOJ) as the employer. Both governmental entities are arms of the state. The parties appear to agree on the general statement of the controlling law in this area provided by the

Restatement (Second) of Judgments, §36, comment f,¹ but disagree as to its application. Respondent contends that the agencies' functions are separate and distinct -- the DA being responsible for the prosecution of the criminal charge and DOJ being responsible for its disciplinary action as employer -- and therefore cases such as People v. Sims, 651 P. 2d 321, 333, 32 Cal 3d 468 (1982) (DA and county welfare agency in privity because of their close relationship in the area of welfare fraud) are inapposite. While respondent's position has some force, it is also true that the Division of Narcotics Enforcement, where appellant was employed, has police power and a law enforcement function. Also, the Calumet County Circuit Court's ruling on the motion before it involved a similar issue of privity. Notwithstanding that DOJ, not the DA, was responsible for the witness intimidation and interference that was found, the Court dismissed with prejudice the charge that the state, through the DA, was prosecuting. The Court's conclusion necessarily had to be based on a finding of privity between the DA and DOJ.

With respect to the question as to the identity of the issues involved in these proceedings, the Court in Flowers held that collateral estoppel applies only: "when the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." 81 Wis. 2d at 387 (citation omitted). The Calumet County Circuit Court ruled not only that DOJ improperly interfered with prospective witnesses and that this was part of a course of prosecutorial misconduct that violated appellant's constitutional right to due process in that criminal proceeding, but that these circumstances required the dismissal of the criminal charge against him. Appellant now seeks, through the application of collateral estoppel, a ruling from this agency not only that respondent improperly interfered with prospective witnesses in violation of his right to due process, but also that this violation prevents him from getting a fair hearing on his appeal and mandates his reinstatement to employment:

¹ In some circumstances, a prior determination that is binding on one agency and its officials may not be binding on another agency and its officials. The problem is analogous to that in determining the capacity in which the underlying transactions were conducted where private parties are concerned. If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.

Finally, the issues to be precluded were specifically and necessarily determined in the Circuit Court's final judgment on the merits dismissing the Criminal Case with prejudice. After hearing the same testimony that Appellant would expect to adduce at any hearing on the present Motion, Judge Mickiewicz found that the Department had "handicapp[ed] or hinder[ed] prospective witnesses," that such conduct was unlawful and that it violated Appellant's right to due process of law, necessitating the dismissal of the Criminal Case. That dismissal was made a final judgment on June 7, 1993. Even though it has been appealed, that judgment still stands as a final and binding judgment until such time as it may be reversed.

Supplemental brief, p. 7.

It can be inferred with respect to the first part of the Court's ruling, that the kind of witness intimidation and interference that was found to be improper involves the same "controlling facts and applicable legal rules," 81 Wis. 2d at 387, that are involved on this motion. That is, governmental intimidation of, and interference with prospective witnesses of the nature found here impairs an opposing party's due process rights in either a criminal or an administrative forum. However, the same kind of inference cannot be drawn on this record with respect to the second part of the Court's ruling -- that the improper witness interference mandates plenary resolution against the state of the underlying proceeding. This is particularly the case in light of representations by appellant's counsel that the DOJ witnesses in question had no firsthand knowledge about appellant's alleged misconduct, but would be testifying about appellant's character and work record, and that the outside police officer, Mr. Lamb, would be testifying about an incident other than the gun incident which figured in the criminal charge. Also, the legal principles which govern an appeal of this nature are not the same as those governing criminal trials.

Therefore, while it may be that reinstatement is warranted in this case, this conclusion is not mandated by the Court's determination that the criminal charge had to be dismissed. Rather, such a conclusion would require a specific showing of prejudice with respect to appellant's ability to pursue this appeal, cf., United States v. Morrison, 449 U.S. 361, 364-66, 66 L. Ed. 2d 564, 568-69, 101 S. Ct. 665 (1981):

Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests ... certain violations of the right to counsel may be disregarded as harmless error...

One approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial....

More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. (citations and footnote omitted)

Analysis of this issue under the criteria set forth recently by the Wisconsin Supreme Court in Michelle T. v. Crozier, 173 Wis. 2d 681, 688-89, 495 N.W. 2d 327 (1993), does not lead to a different result:

Today, federal and state courts balance competing goals of judicial efficiency and finality, protection against repetitious or harassing litigation, and the right to litigate one's claims before a jury when deciding whether to permit parties to collaterally estop one another. Courts may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the action: (1) could the party against whom preclusion is sought, as a 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 collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? (footnotes omitted)

As to the first factor, the question of whether DOJ had a legal right to review of the adverse decision in the criminal case is essentially moot since an appeal is in fact now in process.

With respect to the second factor, the questions of whether DOJ involvement with prospective witnesses requires resolution against the state of the two different underlying proceedings involve different legal questions. On the other hand, the question of whether DOJ improperly intimidated and interfered with prospective witnesses is a factually-oriented inquiry which is essentially the same for both proceedings.

With respect to the third element, there is no basis on which to conclude that the parties to the criminal proceeding did not have as complete an opportunity to litigate the issues presented by the motion to dismiss as would be available on a hearing before this agency on the motion for reinstatement. Respondent argues that there was a "significant difference between the quality of the presentation at the criminal case and that which respondent

means to present here," brief in opposition, p. 17. Respondent bases its contention primarily on the strategic or tactical decisions made in defending the motion, which it contends were related to the different issues involved in the two proceedings -- whether interference with the prospective witnesses made it impossible for appellant to receive a fair criminal trial, and whether interference with the respective witnesses make it impossible for appellant to have a fair administrative hearing in this case. Laying to one side whether these considerations really fit under this factor, these arguments are unpersuasive with respect to the narrower issue of whether respondent improperly interfered with and intimidated prospective witnesses, in light of the testimony presented at the hearing² and the court's findings. The statements attributed to respondent's agents tended to be general in nature -- e.g., "Mr. Hamilton told me that Eugene Williams [Director of the Division of Narcotics Enforcement] did not like Randy Gibas ... Director Larson told me that Special Agent Gibas will eventually run out of money, the state never will." Transcript, pp. 9, 20. The court's findings were general in nature -- that respondent's actions "conferring with prospective witnesses, handicapping or hindering prospective witnesses," Transcript p. 82, were improper and contributed to a denial of appellant's right to due process. Under the circumstances, the court's findings apply as well to this administrative proceeding as to the criminal proceeding. As discussed above, collateral estoppel will not be applied to the Court's determination that resolution of the underlying proceeding against the state is necessary.

As to the fourth factor (whether there has been a shift in the burden of persuasion), while respondent contends the burdens may be different, neither party has cited any authority with respect to the burden and standard of proof on the motion to dismiss the criminal charge. While the Commission has been unable to reach any clear conclusion on this matter, it has not found any authority that the state had the burden of proof with respect to appellant's assertion of prosecutorial misconduct, although it may have had the burden to show lack of prejudice once a violation of due process had been established. See State v. Saternus, 122 Wis. 2d 439, 443, 361 N.W. 2d 728 (Ct. App. 1984) (accused has burden of persuasion by a preponderance of the evidence on affirmative defense); Whitty v. State, 34 Wis. 2d 278, 289, 149 N.W. 2d 557 (1967)

² Appellant filed a transcript of the hearing in support of his motion for reinstatement.

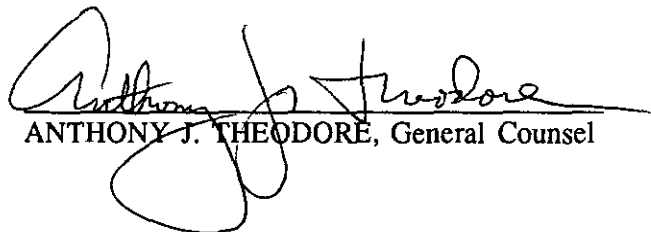
("the prosecution has the burden of showing a constitutional error was harmless beyond a reasonable doubt rather than the accused the burden of showing it was prejudicial."). This formulation is consistent with limiting the application of collateral estoppel to the first phase of the Court's ruling (improper witness interference occurred), and not applying it to the second phase (this interference so prejudiced appellant's rights to a fair proceeding that dismissal of the underlying case is mandated).

As to the fifth factor (whether there are "matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair," 173 Wis. 2d at 689), these have already been discussed.³

ORDER

Appellant's request that preclusive effect be given to the ruling of the Calumet County Circuit Court in Case No. 92-CM-1 rendered on May 18, 1993, as reflected on p. 82 of the transcript of that hearing, based on the principle of collateral estoppel, is granted to the extent of the Court's findings that respondent's activities with respect to the witnesses referred to constituted improper intimidation of and interference with those witnesses, but is otherwise denied.

Dated: OCTOBER 5, 1993 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, General Counsel

AJT:rcr

³ Again, with respect to respondent's contention that it has not had the opportunity to attempt to show that a less draconian approach to reinstatement would be sufficient to cure any misconduct with respect to prospective witnesses, the Commission's limited application of collateral estoppel will leave this door open.