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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-331 / 89-1500

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BENJAMIN ANTHONY HARRIS,

Plaintiff-Appellant,

vs.

RICHARD JONES, JOHN LEPORTE, RICHARD BROICH, and CITY OF DES MOINES,

Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael J. Streit, Judge.

Plaintiff appeals claiming the trial court erred in failing to give preclusive effect in this case to a suppression ruling in a prior criminal case and in granting defendant's motion in limine which prohibited him from offering the ruling of his criminal case into evidence. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Thomas Mann, Jr. of Mann & Mann, Des Moines, for appellant.

Patrick J. Hopkins of Austin, Gaudineer, Austin, Salmons & Swanson, Des Moines, for appellees.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

This suit claims damages for civil rights violation as a result of police officers searching a car without a warrant. The issues before us concern the effect of an order of a district associate judge in a criminal case finding the search illegal.

Plaintiff-appellant Benjamin Anthony Harris was driving a friend's car. Defendants-appellees Richard Jones, John LePorte, and Richard Broich, police officers employed by the defendant-appellee City of Des Moines, searched the car and found a loaded revolver in a purse in the spare tire compartment. Plaintiff was arrested and charged with carrying a weapon in violation of Iowa Code section 724.4.

Plaintiff filed a motion in the criminal proceedings to suppress the gun as a product of an illegal search. The issue was tried to District Associate Judge Tom Renda. Judge Renda sustained the motion and dismissed the charge. Plaintiff sued the city for violation of his civil rights.. A jury returned a verdict for the defendant.

Plaintiff has appealed contending (1) the trial court erred in failing to give the ruling in the criminal case preclusive effect, and (2) in failing to allow the ruling in the criminal case to be introduced into evidence.

We agree with the trial court's refusal to give the ruling in the criminal case preclusive effect. We find, however, the trial court erred in refusing to allow the

plaintiff to enter Judge Renda's ruling in evidence. We affirm in part, reverse in part and remand for new trial.

To employ issue preclusion, four prerequisites must be established with reference to the issue in the prior proceedings: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action, and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981).

The pivotal issue is whether the interest of the State and those of the defendants are so similar that the issue determined in criminal case should be binding on the defendants in this cause. The question is whether these defendants, nonparties to the criminal action, were sufficiently connected with the interest of the State in the criminal action so that they had a full and fair opportunity to litigate the relevant issue, or if other circumstances must justify affording them an opportunity to relitigate the issue. See Hunter, 300 N.W.2d at 125; Garesky v. Derby, 189 N.W.2d 909, 913-17 (Iowa 1971).

Additionally, we must determine whether (1) treating the issue as conclusively determined would be incompatible with the applicable scheme of administering the remedies in

the actions involved; (2) the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined; (3) the person seeking to revoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary; (4) the determination relied on as preclusive was itself inconsistent with another determination of the same issue; (5) the prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding; (6) treating the issue as conclusive determination may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto; and (7) other circumstances make it appropriate that the party be permitted to relitigate the issue. Hunter, 300 N.W.2d at 125; Restatement (Second) of Judgments § 88 (Tent. Draft No. 2, 1975) (footnote added).

Duncan v. Clements, 748 F.2d 48 (8th Cir. 1984), addresses a similar issue. Duncan filed an action alleging a violation of his civil rights after a Missouri State Court ruled a search illegal. 748 F.2d at 50. Duncan

argued the State Court ruling should be given preclusive effect in the civil rights action against a police officer. Id.

The court in Duncan held collateral estoppel was not appropriate because the police officer, the party against whom collateral estoppel was asserted, was neither a party nor in privity with a party to the criminal proceedings. Duncan, 748 F.2d at 51. Looking to Duncan, and applying Iowa law, we find insufficient mutuality between the State of Iowa and these defendants to apply issue preclusion. We affirm the trial court on this issue.

The second issue is directed to a claim the trial court prevented plaintiff from introducing evidence of the trial court's ruling in the suppression hearing. The trial court has broad discretion on these matters. State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986). Plaintiff first sought to have the trial judge who ruled on the motion testify. The trial court refused this request. We agree with this refusal. Plaintiff also argues he was not allowed to introduce Judge Renda's ruling. Some argument is made that plaintiff was not precluded from doing so. However, we find the trial court very clearly communicated that the ruling would not be allowed in evidence.

When plaintiff's counsel inquired of the court what the court's ruling was on its admission, the trial court said:

> It is not admissible. That proceeding is not admissible in evidence for the reasons urged by the City. * * * I'm just ruling that it's not

admissible, Judge Renda's finding, for the reason is what purpose would it serve?

The ruling of Judge Renda is competent evidence and should not have been excluded. The trial court has broad discretion in determining the admission of evidence. However, discretion does not sanction the exclusion of competent evidence without a sound practical reason. Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 340 (5th Cir. 1980), clarified rehearing denied 620 F.2d 464, cert. denied 449 U.S. 1112 (1981); Bailey v. Kawasaki-Kisen K.K., 455 F.2d 392, 398 (5th Cir. 1972).

Plaintiff's assertion was he had been subjected to an illegal search and seizure. At the suppression hearing, the trial court suppressed the evidence, finding there was neither consent for the search nor a warrant authorizing the search. Plaintiff sought to introduce evidence at the trial court level. These findings were relevant to plaintiff's contention that there was an illegal search and seizure. This evidence was clearly probative. As such, the evidence was admissible. See Norton v. Adair County, 441 N.W.2d 347, 358 (Iowa 1989).

The question is whether defendants were able to show how this relevant evidence was excludable under rule 403 because of prejudice. See Norton, 441 N.W.2d at 358. The trial court ruled the evidence was not admissible because it serves no useful purpose, and for reasons stated in

defendants' motion in limine which included general allegations of relevancy and prejudice.

Prejudice does not simply mean damage to an opponent's cause. Unfair prejudice cannot be equated with evidence that is simply adverse to the opposing party. Borden, Inc. v. Florida East Coast Ry. Co., 772 F.2d 750, 756 (11th Cir. 1985). See also Dollar v. Long Manufacturing, N.C. Inc., 561 F.2d 613, 618 (5th Cir. 1977), cert. denied 435 U.S. 996, 98 S. Ct. 1648, 560 L. Ed. 2d 85 (1978). Evidence that facts are contrary to one party's contentions always damages his or her case but cannot be grounds for excluding the evidence. See United States v. Monahan, 633 F.2d 984, 985 (1st Cir. 1980). Virtually all evidence is prejudicial or it is not material. Ramos, 615 F.2d at 340, Dollar, 561 F.2d at 618. The prejudice must be unfair prejudice. Dollar, 561 F.2d at 618. The question is whether the failure to admit the evidence substantially prejudices the rights of plaintiff. See Borden, 772 F.2d at 756.

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. Ramos, 615 F.2d at 340.

Failing to find support for a finding that this relevant evidence was excludable under Rule of Evidence 403 because of prejudice, we reverse and remand for a new trial. See Norton, 441 N.W.2d at 358.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

Hayden, P.J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

I concur with the majority that collateral estoppel does not apply to this situation. I disagree with the majority that the trial court's failure to admit the suppression hearing ruling constituted reversible error.

I.

The defendant's motion in limine states the testimony and decision of Judge Renda, who presided at the suppression hearing, is not relevant or controlling to the issues presented in the civil case. In the alternative, the defendants assert admission of the ruling would be highly prejudicial to them. The majority agrees that not allowing Judge Renda to testify was not an abuse of discretion but asserts that not allowing admission of his his ruling was abuse of discretion. I find no abuse in not allowing either the testimony or the document into evidence and I see little difference in the prejudice either would have upon the defendants. I find them both unduly prejudicial.

The majority has set forth but a part of the dialogue that took place between counsel and the court. I will set forth the final remark on the subject by counsel and the court as it appears in the appendix. Harris' attorney, Mr. Mann, requested clarification of the defendants' motion in limine:

> MR. MANN: And, frankly, Judge, we are somewhat concerned about having to go through this

process without being able to tell the jury that the charges against the plaintiff were subsequently dismissed. We don't want to leave it hanging that these charges were filed and leave them speculating as to whether they were dismissed or not. And we think it would be prejudicial if they were left to speculate about whether or not he was guilty of some criminal offense and that at some point we're going to have to --

THE COURT: There is no motion pending on that Counsel.

* * *

THE COURT: Because I don't see what's wrong with telling the jury this man was never convicted of the crime, it was eventually dismissed. That's different than telling the jury Judge Renda ruled this way and that's why it was dismissed. I mean, both those things are irrelevant; but the ruling of Judge Renda has more damage to a sense of fair play in this case than the disclosure that he did not become a felon by this arrest.

Isn't it implicit, though, Counsel, by bringing this lawsuit the man wasn't convicted of the crime? Can't they assume that, well, he was never convicted otherwise what would we be here for today?

MR. MANN: It's just a layperson jury out there, Your Honor.

THE COURT: Depending how it comes in, there is no motion in limine as such filed on that issue. If there is an objection made as it being irrelevant, I'll probably grant it. But Judge Renda's ruling, I've granted the motion in limine that is not to come in, the results of that hearing, what he said or what he found. I've granted the motion in limine as regards to that. How you try to manipulate the dismissal of the information is up to you. And if I hear an objection, I may grant it, may sustain the objection. We'll see what happens. <u>But there is no ruling on that.</u>[1]

I just am unable to find how the court could make it any more clear as to its position in this matter. The trial judge said unequivocally, "there is no ruling on that." To

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1. These are the final remarks of the court on the subject at hand according to the appendix.

reverse on the grounds urged by the majority has the effect of blind-siding the trial judge.

Harris did not provide us with any record of the civil trial, therefore I do not know if he attempted to present evidence that the criminal charges against him were ultimately dropped. Since I have no record of any such attempt, objection or ruling on that matter I must limit myself to the ruling provided to me.

I do not believe that sustaining the defendant's motion in limine regarding Judge Renda's ruling was improper. Judge Renda's ruling set out his findings of fact and conclusions of law and his ruling the gun and testimony concerning the search could not be admitted at trial. Harris speaks about the relevancy of "the ruling" but I am not clear on what Mr. Harris is referring to. Whether he means the ultimate ruling requiring suppression of evidence or the three pages of material before the one sentence ruling. I see no error in refusing to place a judge's findings of fact and conclusions of law before a jury required to evaluate the same set of facts. As discussed in the collateral estoppel issue, the testimony introduced at the suppression hearing did not include testimony from several of the individuals who participated in the search. Those same individuals were defendants in the civil trial and their testimony would complete the story of the events surrounding the search.

I find it difficult to believe a jury could read Judge Renda's ruling without being unduly prejudiced by it. The evidence of the events surrounding the search were admissible in the civil trial. Requiring Harris to present to the jury the evidence he presented to Judge Renda at his suppression hearing did not prejudice him. I feel fair play calls for fresh presentation of the facts to the jury, thereby allowing the jury to begin its deliberations from a clean slate instead of from one Judge Renda has already written upon.

I might feel differently if Harris had attempted to bring in evidence that the charges against him were ultimately dropped and the trial court did not allow presentation of that evidence, but that issue is not before me.

II.

Although I concur with the majority that collateral estoppel does not apply to this situation, I will set forth under this division my separate reasoning.

As noted, this is a civil action brought under 42 U.S.C. section 1983. The plaintiff seeks money damages from the defendants for an alleged illegal search and seizure committed upon him by the defendants. Essentially, plaintiff first claims he did not consent to the search of the vehicle then in his possession. He then argues that since he did not consent, his constitutional rights as guaranteed him under the fourth amendment of the United States Constitution were violated.

As it relates to the search of the vehicle and the seizure of the revolver in the criminal action, the plaintiff's motion to suppress was sustained. We are now confronted with the issue of the preclusive effect, if any, that is to be given to the ruling on the motion to suppress in the criminal action to this civil suit. As I discuss below, I conclude that the "offensive" use of the doctrine of issue preclusion in this context does not bar these defendants from relitigating the issues involved in this dispute.

As we stated in Harrison v. State Bank of Bussey, 440 N.W.2d 398, 399 (Iowa App. 1989):

> Res judicata in its meaning as claim preclusion is a bar to further litigating a claim, while res judicata in its meaning as issue preclusion is a bar to further litigation of a specific issue. See Goolsby v. Derby, 189 N.W.2d 907, 913 (Iowa 1971).

This doctrine of law may be utilized either "offensively" or "defensively." The difference was noted in Goolsby and confirmed in Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981):

> The phrase "defensive use" of the doctrine of collateral estoppel is used here to mean that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.
>
> On the other hand, the phrase offensive use or affirmative use of the doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim.

> In other words, defensively a judgment is used as a "shield" and offensively as a "sword."

Hunter, 300 N.W.2d at 123.

There is not a serious dispute that plaintiff relies on "issue preclusion." In this respect, "the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action." Hunter, 300 N.W.2d at 123. As stated in the Restatement (Second) of Judgments:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

See also Restatement (Second) of Judgments 68 (Tent. Draft No. 4 1977). Citing Hunter, 300 N.W.2d at 123.

Traditionally, the presence of three prerequisites was required before the doctrine of issue preclusion could properly be applied in any given case: (1) identity of issues raised in the successive proceedings; (2) determination of these issues by a valid final judgment to which such determination is necessary; and (3) identity of the parties or privity[2] (mutuality of estoppel). Hunter

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2. A "privity" in this context has been identified as "one who after rendition of the judgment has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." Goolsby v. Derby, 189 N.W.2d 909, 914 (Iowa 1971), citing Hunter, 300 N.W.2d at 123.

v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981).

As pointed out in Hunter, subsequent cases developed from these traditional prerequisites a four-factor standard to be utilized in determining the applicability of the doctrine. Id. Thus, before employing issue preclusion, four prerequisites must be established:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. (citation omitted).

Our supreme court has modified the traditional requirement of privity where the doctrine of issue preclusion is invoked defensively. Goresky v. Derby, 189 N.W.2d 909 at 913-17 (Iowa 1971). Under present law, issue preclusion may properly be applied defensively as between nonmutual parties where the four prerequisites set forth above are satisfied and when the party against whom the doctrine is invoked defensively "was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution." Id.

But until Hunter v. City of Des Moines, the supreme court declined to modify the traditional requirement of mutuality with respect to the offensive use of issue preclusion. Id. at 123. In that case, the supreme court

had to determine whether the requirement of mutuality should in all instances remain a bar to the offensive use of issue preclusion by a litigant not a party or in privity with a party to the prior adjudication relied upon. Id. at 123.

The supreme court in Hunter resolved the issue by abandoning for the most part the strict adherence to the traditional requirement of mutuality in connection with the offensive use of issue preclusion and held the offensive application of issue preclusion "should not invariably be precluded where mutuality of parties is lacking. Rather we adopt as ours the position taken by the Restatement (Second) of Judgment, Section 88, with respect to the use of issue preclusion in this context." Id. at 125.

With these general statements of the law in mind, I turn now to the problem at hand. For the purposes of this opinion, I will assume the four general prerequisites necessary for the utilization of the doctrine of issue preclusion have been established. In this respect, I conclude the plaintiff is using the doctrine offensively.

Although the plaintiff does not take the position that mutuality of parties exists, he does argue that the interests of the State of Iowa and the defendants are so similar in scope and so intertwined in purpose that a judgment against the State of Iowa in the criminal action should be binding upon the City and upon the police officers employed by the City.

It is clear the defendants here were not parties to the previous action. Thus, for us to estop the defendants from litigating the constitutional issue, we would first have to find them in privity with the State of Iowa for it is clear that it was the State of Iowa, not the defendants, who was the party to the criminal prosecution. This I am unable to do.

I find the logic of the Duncan v. Clements, 744 F.2d 48 (8th Cir. 1984), decision helpful. Duncan, like this case, was a 42 U.S.C. section 1983 action. Duncan, in the civil action, attempted to foreclose police officer Shaeffer from relitigating the constitutionality of his arrest and search and seizure of items from him. The State of Missouri had instituted criminal proceedings against Duncan for carrying a concealed weapon. The state court ruled in favor of Duncan on his motion to suppress.

Duncan argued, as does the plaintiff here, that Shaeffer should be estopped because he was "virtually represented" by the State of Missouri at the state suppression hearing and because he fully and fairly litigated the constitutional issue by testifying[3] at that hearing. The court in Duncan held that collateral estoppel was not appropriate because Shaeffer, the party against whom collateral estoppel was asserted, was neither a party nor in privity with a party to the criminal proceedings.

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3. Only the defendant, Sergeant Jones, testified at the suppression hearing in the case at bar.

I reach the same conclusion here. But because mutuality is lacking, this does not completely resolve the issues.

In evaluating the record, I find that even though the issue of whether Harris consented to the search was decided at the suppression hearing, since the plaintiff in this case is attempting to offensively use issue preclusion, we must address whether the defendants were given a full and fair opportunity to litigate the consent issue. As I noted earlier, the absence of mutuality no longer invariably bars the offensive application of issue preclusion. In cases where the four general requisites of the doctrine are satisfied, issue preclusion may be applied offensively where mutuality is lacking if it is determined that the party sought to be precluded (1) was afforded a full and fair opportunity to litigate the issue in the action relied upon and (2) that no other circumstances justify affording him an opportunity to litigate that issue. Hunter, 300 N.W.2d at 126.

In the criminal suppression hearing, the defendants were not represented by their own attorneys, only one defendant testified, and the defendants did not actively participate nor control the presentation of the case. In that suppression hearing, the State represented the interests of the public and Officer Jones served only as a witness.

The State of Iowa and not the defendants was the party to Harris's criminal prosecution. The interests of the

State of Iowa in a criminal proceeding are not identical to an individual officer such as the individual defendants or the City. Only the State of Iowa, not the defendants, had an interest in the outcome of the criminal proceedings against Harris; the personal interest of the defendants was not at stake.

Moreover, as in Duncan, the defendants clearly had no control over nor did they substantially participate in control of the State's presentation of its case. See Restatement (Second) of Judgments § 39 (1982). Although Sergeant Jones testified at the hearing, he had no control over the prosecution for he testified simply as a witness. None of the defendants could have appealed the court's decision on the motion to suppress. In this context, I would hold the defendants did not have a full and fair opportunity to litigate at the suppression hearing the constitutionality of the search of Harris and the seizure of items from him.

Additionally, I agree with the defendants that the issue of whether they acted with good faith also precludes a grant of summary judgment because the defense of good faith would have been irrelevant at the suppression hearing even though of great importance in the subsequent civil case.

Thus, I would hold that collateral estoppel is not appropriate in this case. I, of course, would affirm the

district court's denial of plaintiff's summary judgment motion.

I would affirm the trial court in all respects.