COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1383-CR **Cir. Ct. No. 2004CF6179**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN R. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO and MEL FLANAGAN, Judges.[1] *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

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[1] The Honorable Jean W. DiMotto presided over the jury trial and sentencing. The Honorable Mel Flanagan conducted the postconviction motion evidentiary hearing and decided the postconviction motion.

¶1 CURLEY, P.J. John R. Brown appeals the judgment, entered following a jury trial, convicting him of armed robbery, use of force, contrary to WIS. STAT. § 943.32(2) (eff. Feb. 1, 2003).[2] Brown also appeals the order denying his postconviction motion. Brown argues that his attorney was ineffective for failing to file a motion challenging the "show-up" identification and in-court identifications.[3] Because a motion to suppress, had it been filed, would have been unsuccessful under the then-current law, Brown's attorney was not ineffective for failing to file one. Also, Brown was not entitled to application of the new standard, enunciated in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, which severely curtailed the admissibility of "show-up" identifications because it was not preserved on appeal. Consequently, we affirm.

I. BACKGROUND.

¶2 June Stahl, then eighty-six years of age, told police that on November 12, 2004, a man came to the door of her Wauwatosa home at about 10:15 a.m. and asked her about a person named "Rose." When Stahl told the man she knew of no such person, the man left. According to Stahl, about ten or fifteen minutes later, the same man came back to her door as Stahl was talking on the

[2] Brown was charged with a penalty enhancer due to the victim being elderly. *See* WIS. STAT. § 939.647(2) (2001-02). This statute was repealed effective February 1, 2003. 2001 Wis. Act 109, § 580. Although the jury verdict contained a reference to Stahl's age, the judgment of conviction reflects only the charge of armed robbery, use of force.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] "A 'show[-]up' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." ***State v. Dubose***, 2005 WI 126, ¶1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582 (citation and one set of quotation marks omitted). "The term 'show[-]up' itself denotes a police procedure." ***State v. Hibl***, 2006 WI 52, ¶33, 290 Wis. 2d 595, 714 N.W.2d 194.

phone. Stahl put the phone down and went to the door. The man, later identified by Stahl as Brown, opened the storm door and pushed in the inner door and grabbed Stahl's arm. At the time, the robber was wearing gloves. She yelled to her friend on the other end of the phone to call 911. Brown pulled her through the dining room and covered her neck and mouth with his arm. Next, he took her to the rear bedroom doorway, where he told her he wanted money. While in the doorway, Stahl looked down and saw a knife in Brown's hand. Brown then took her into the kitchen. When they got to the kitchen, Brown spotted Stahl's purse containing her wallet, money, checkbook, and credit cards. He grabbed the purse and ran out of the house. Stahl called the police.

¶3 Stahl later testified that she saw Brown again that day when a detective drove her to North 60th Street (several blocks away from Stahl's home) where she identified Brown as the robber as he was standing at the curb. She stated that he looked the same, except he was not wearing a jacket. When shown a jacket, recovered from the area where the robber fled, Stahl testified it was the same color as the one Brown was wearing during the armed robbery, but she did not recall there being writing on it. She also told the jury that the knife recovered along the route taken by the robber looked the same as the knife used in the robbery. As to the gloves, Stahl said they could have been the gloves worn by the robber, but she was unsure.

¶4 A Wauwatosa police officer testified at trial that at approximately 10:25 a.m. his dispatcher advised him that there had been a robbery in the 2300 block of North 66th Street. The officer said that, as a result, he drove his squad car to 61st Street and North Avenue where, approximately three minutes later, he spotted a man, later identified as Brown, who matched the description given by the dispatcher. The description given of the robber was a "black male with a light

blue jacket and blue jeans." When the officer pulled his squad over and told Brown he needed to talk with him, Brown ran away. The officer followed in his squad car until Brown ran through several yards, at which time the officer gave chase. After losing sight of Brown, the officer kept watch and waited until other officers radioed him that they had a subject in custody who was hiding behind a garage. The man they discovered matched the description of the person the original officer had been chasing. When the officer next saw Brown, he was not wearing the jacket the officer had seen him wearing earlier. The police then retraced the areas where Brown tried to elude the police and recovered Stahl's purse, a pair of gloves, a blue jacket, and a knife.

¶5 Also testifying at the trial was a Wauwatosa detective who recounted that he went to Stahl's residence shortly after the robbery was reported, and observed that at first Stahl had trouble catching her breath, and he was concerned about her health. He stated that after awhile Stahl recovered, and about an hour after he arrived, he drove her to North 60th Street, where a suspect was being detained in a police car. He described what he did when he reached the area where the suspect was being held. He stated: "I pulled my car up on the opposite side of the street facing south so that we wouldn't be too close." He testified that he gave the following instructions to Stahl:

> [Detective:] I told her that we were going to go see a person who had been stopped by the police that we thought might be the person who robbed her, and that we would have this man get out of the car and that she would have to – if she recognized him, she would have to tell me whether it was the person or not, and I encouraged her to tell if she didn't recognize him. I didn't want her to identify this man simply because he was getting out of a police car and simply because the police had stopped him.
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> [Prosecutor:] Did she have any questions of you about this procedure?

> [Detective:] Not really. She seemed to understand it. She was – she was very concerned that this person didn't see her. That's what I most distinctly recall. She wanted to be able to hide or hunch down in the back seat so that this man couldn't see her if it was, in fact, the robber.

The detective said that after viewing the man, Stahl said: "That's the man."

¶6 After Brown was charged, his lawyer never brought a motion seeking the suppression of his "show-up" identification.[4] However, his attorney did bring a motion seeking a speedy trial, and later, a ***Miranda-Goodchild*** hearing was held.[5] Also, the attorney filed a motion seeking to withdraw as counsel, which was denied. A jury trial was held. At trial, Brown's attorney attacked the "show-up" identification, claiming this was a case of misidentification.

¶7 The jury found Brown guilty, and Brown's attorney withdrew before sentencing. Brown, now represented by new counsel, was sentenced to twenty years of initial confinement and five years of extended supervision. Brown filed a postconviction motion moving for the vacation of the judgment of conviction and for the suppression of the show-up and in-court identifications based upon ineffective assistance of counsel for failing to file a motion to suppress the "show-up" identification.

¶8 In the interim, between the sentencing on June 9, 2005, and the deciding of the postconviction motion, the Wisconsin Supreme Court decided the ***Dubose*** case, which severely curtailed the admissibility of show-up

[4] Brown complained to the police about the show-up procedure at the time it was conducted, and maintained at trial this was a case of misidentification.

[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

identifications. After ordering supplemental briefs regarding the applicability of ***Dubose*** and holding an evidentiary hearing, the postconviction court denied the motion. In a supplemental brief, Brown argued that the holding in ***Dubose*** applied to his case. The trial court concluded that, under the then-existing law embodied in ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 507 (1995), a motion seeking suppression of the "show-up" identification would not have been granted. Further, the trial court ruled that because no suppression motion was filed, the issue was not preserved on appeal, and the holding in ***Dubose*** would not apply retroactively. Therefore, the trial court reasoned that there was no deficient performance for failing to bring a motion which would have been unsuccessful. This appeal follows.

II. ANALYSIS.

¶9 Brown argues that his attorney was ineffective for not challenging the "show-up" identification or the possibly tainted in-court identifications. He submits that his attorney's failure to file a motion to suppress the "show-up" identification or the in-court identifications, coupled with his argument to the jury that these identifications were unreliable and what actually occurred was the victim misidentifying her assailant, highlights the attorney's deficient performance. Brown contends that his trial attorney's failure to file a motion to suppress the identifications resulted in ineffective assistance of counsel under either the pre-***Dubose*** standard set forth in ***Wolverton***, or the new standard announced in ***Dubose***. He also claims that his attorney's failure to file a motion to

suppress the identifications, resulting in the issue not being preserved for appeal, was ineffective assistance of counsel.[6] We disagree.

¶10 To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We review a claim for ineffective assistance of counsel under a mixed standard of review. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Thus, the trial court's findings of fact … will not be overturned unless clearly erroneous. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which [we] review[] independently." ***Id.*** at 127-28 (citations omitted).

¶11 We first address whether Brown's attorney was ineffective for failing to file a motion to suppress the "show-up" identification under then-prevailing case law. We, like the postconviction court, are satisfied that had such a motion been filed, it would have been rejected.

[6] Brown argues in passing that trial counsel's failure to investigate Stahl's 911 call also constituted ineffective assistance. The transcript was introduced into evidence at the postconviction evidentiary hearing. At the conclusion, the postconviction court concluded there was no ineffective assistance of counsel.

¶12 ***Wolverton*** sets forth the prior law with regard to "show-up" identifications. The holding in ***Wolverton*** was that "show-up" identifications were admissible unless they were "impermissibly suggestive" and, under the totality of the circumstances, the identifications were unreliable. ***Id.***, 193 Wis. 2d at 264. Here, no evidence was presented that the "show-up" identification by Stahl was "impermissibly suggestive." Stahl had ample opportunity to observe Brown, both the first time he came to her door, and the second time, when he barged into her home, dragged her through several rooms, and robbed her at knifepoint; and Stahl was able to give the police a detailed description of her assailant. Further, the detective who accompanied Stahl to the location where Brown was being detained testified that he did not tell Stahl that they had caught the robber. Rather, he testified that he told her a suspect had been apprehended. Moreover, there is nothing in the record that suggests that the identification was unreliable. Stahl saw Brown in person and, after looking at him, now jacketless, standing on the curb, exclaimed: "That's the man." Clearly, under the ***Wolverton*** standard, had a motion to suppress been filed, it would have been denied. When a suppression motion would have been denied, the defense was not prejudiced by counsel's failure to file the motion. ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). Consequently, Brown's trial attorney was not ineffective for failing to bring a motion to suppress.[7]

[7] No testimony was ever elicited from Brown's trial attorney. The parties assumed what the trial attorney would have testified to. It is entirely possible that his attorney would have testified that he chose not to bring such a motion for strategic purposes as the defense at trial was misidentification. Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984). "We will in fact [only] second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). Here, Brown's lawyer could have reasonably believed that Brown's (continued)

¶13 Next, we examine Brown's argument that the failure to preserve the "show-up" identification issue for appeal was deficient performance. As the State points out, this argument is a recasting of the actual issue; that is, whether the attorney should have anticipated the change in the law. This is so because Brown's attorney cannot be faulted for failing to file an identification suppression motion that would have been unsuccessful unless he can be held responsible for anticipating a change in the law. There can be little doubt that ***Dubose*** abrogated the holding in ***Wolverton***, as the supreme court in ***Dubose*** concluded that "show-up" identifications are "inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." ***Dubose***, 285 Wis. 2d 143, ¶33.

¶14 We determine that Brown's trial attorney was not ineffective. As noted in ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994), "[c]ounsel is not required to object and argue a point of law that is unsettled" in order to avoid an ineffective assistance of counsel charge. Here, Brown's trial attorney cannot be faulted for failing to file a motion to suppress the "show-up" identification prior to the decision curtailing its admission, even though the issue was percolating in the Wisconsin Supreme Court. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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best chance for an acquittal was to attack the identification. Had the motion been successful and the "show-up" identification been suppressed, the physical evidence collected along Brown's attempted escape route would have played a more prominent part in the trial, and perhaps a case based on circumstantial evidence would have been more difficult to defend than a misidentification defense with an elderly victim.