COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1470 **Cir. Ct. No. 2007CV3229**

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

STATE OF WISCONSIN EX REL. JOHNNIE L. BURNS, JR.,

PETITIONER-APPELLANT,

V.

PHIL KINGSTON, WARDEN, WAUPUN CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Johnnie L. Burns appeals *pro se* from the circuit court's denial of his petition for a writ of *habeas corpus*. In his petition, Burns, who was convicted in 1989 of several armed robberies and other crimes, challenged as impermissibly suggestive his identification by victims at a police

"showup."[1] The circuit court denied the petition because it concluded that the record was insufficient to support Burns' claims. We affirm the circuit court's decision, but we reach that result on different grounds than those employed by the circuit court. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). We conclude that to the extent Burns litigated the propriety of the show-up in prior postconviction proceedings, he was procedurally barred from re-litigating the issue. More importantly, we conclude that the supreme court's opinion in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, on which Burns relies, is not retroactively applicable to this matter.

¶2 The record provides little background because in a writ proceeding only those materials filed with the circuit court are included in the record. Burns provided the circuit court with very little documentation to support his claims, and the background we can provide is consequently circumscribed by the limited record. What is clear is that a jury convicted Burns in 1989 on eight counts of armed robbery, one count of operating an automobile without the owner's consent, and one count of being a felon in possession of a firearm. He received consecutive sentences that total somewhere in the neighborhood of sixty-five years.

¶3 Burns pursued direct postconviction and appellate relief under WIS. STAT. RULE 809.30, but the appeal was denied in 1991. Among other things, Burns argued that the showup procedure was unconstitutionally suggestive. He noted that after police apprehended him "alone in the stolen car allegedly used in the robberies," he was immediately returned to the crime scene and "dressed up by

[1] "A 'showup' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." ***State v. Wolverton***, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167 (1995) (citation omitted).

the police to look like the perpetrator." He also claimed that witnesses overheard police call him "the culprit, thus leading several victims to falsely identify petitioner in a one person show-up." In 1998, he filed a postconviction motion under WIS. STAT. § 974.06, but once again Burns did not obtain relief.

¶4 In the petition that is the subject of this appeal, Burns described the issues presented as follows:

> Was the one-on-one (show-up) identification process utilized in the case at bar unnecessarily suggestive? And did that unnecessarily suggestive behavior by [the] Milwaukee Police Department lead to mistaken identification of petitioner.

The State opposed the petition by arguing, among other things, that Burns' earlier postconviction motions and appeal barred him from seeking relief by *habeas corpus*. The circuit court agreed with the State's argument, but also noted that it could not conduct *habeas corpus* review because the record was insufficient to support Burns' claims.

¶5 On appeal, Burns contends that his *habeas corpus* petition was not procedurally barred. He also argues for the first time that the supreme court's opinion in ***Dubose*** applies retroactively to his case and invalidates his conviction. We disagree with both arguments.

¶6 As the State notes, Burns argued in his direct appeal that his showup "was unconstitutional because it was unnecessarily suggestive and, therefore, should have been excluded from evidence." Burns argued that the showup was unconstitutionally suggestive because the witnesses were asked to identify him within an hour of the last robbery when they were still "traumatized," and they saw him get out of a police vehicle while wearing handcuffs and made the

identification as a group. We rejected that argument, reasoning that the showup was "only mildly suggestive," and that the circuit court did not erroneously exercise its discretion in rejecting Burns' claim. Burns' current claim is simply a rehash of the arguments this court rejected in 1991. It is therefore barred. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (citation omitted) (matter decided on direct appeal may not be relitigated in postconviction proceedings even if movant offers a different legal theory).

¶7 Moreover, the heart of Burns' argument—that ***Dubose***, which casts doubt on the validity of showup procedures like the one used in his case—does not apply in this instance. The supreme court in ***Dubose*** held that showup identifications are inherently suggestive and inadmissible unless, under the totality of the circumstances, the show-up procedure was "necessary," such as when the police lacked probable cause to arrest, or exigent circumstances prevented a lineup or a photo array. ***Dubose***, 285 Wis. 2d 143, ¶33. The supreme court did not, however, address whether its holding applies retroactively. Burns argues that it must. We disagree.

¶8 New rules merit retroactive application on collateral review only if: (1) the rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) the rule requires observance of those procedures that are implicit in the concept of ordered liberty. ***State v. Howard***, 211 Wis. 2d 269, 282, 564 N.W.2d 753 (1997) (citations omitted), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765. In addition, a holding that does not explicitly apply retroactively generally does not apply to challenges on collateral review. ***State v. Lo***, 2003 WI 107, ¶¶77-85, 264 Wis. 2d 1, 665 N.W.2d 756. ***Dubose*** does

not explicitly apply retroactively and it does not meet either circumstance warranting retroactive application on collateral review.

¶9 Here, Burns unsuccessfully litigated the propriety of the showup in direct postconviction and appellate proceedings. He is therefore barred from rearguing it, even on the basis of a new legal theory. Moreover, Burns' contention that ***Dubose*** mandates the relief he requests is incorrect because ***Dubose*** does not apply retroactively to this appeal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).