COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1021 **Cir. Ct. No. 1996CF961748**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON HENRIQUE WALKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Vernon Henrique Walker appeals from an order denying his postconviction motion for a new trial. The issue is whether the supreme court's decision in ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582, applies retroactively to Walker's 1997 judgment from which he

seeks collateral review. We conclude that ***Dubose*** does not meet either of the two exceptions that merit its retroactive application on collateral review. Therefore, we affirm.

¶2 A jury found Walker guilty of armed robbery while concealing his identity as a repeater. The trial court imposed a thirty-five-year sentence. This court affirmed the judgment of conviction after an independent review of the record incident to a no-merit appeal. *See* ***State v. Walker***, No. 98-0502-CRNM, unpublished slip op. (Wis. Ct. App. July 9, 1998). Walker moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2001-02). The trial court denied the motion; this court affirmed that denial. *See* ***State v. Walker***, No. 2001AP3255, unpublished slip op. (WI App Oct. 17, 2002). Walker filed a second postconviction motion to challenge, among other things, the show-up identification procedure. The trial court denied the motion; this court affirmed the trial court's denial. *See* ***State v. Walker***, No. 2004AP2823, unpublished slip op. (WI App July 11, 2006).

¶3 Walker filed his third postconviction motion, pursuant to WIS. STAT. § 974.06 (2005-06), seeking to apply ***Dubose*** retroactively to his judgment, which would result in a new trial.[1] The trial court denied the motion. Walker appeals.

¶4 Preliminarily, Walker alleged that he failed to raise this issue in his prior postconviction motions because he did not foresee the new rule announced in

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

Dubose.[2] We conclude that Walker's alleged reason is sufficient to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). *See* WIS. STAT. § 974.06(4).

¶5 ***Dubose*** does not explicitly hold whether it applies retroactively. Under these circumstances, the new rule (the Wisconsin Supreme Court's holding in ***Dubose***) does not apply retroactively on collateral review.

> New rules merit retroactive application on collateral review only in two instances. In the first instance, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Second, a new rule should be applied retroactively if it 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 and internal quotation marks omitted), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765.

¶6 ***Dubose*** does not meet either of the two exceptions that merit retroactive application on collateral review. Walker acknowledges that ***Dubose*** does not meet the first exception, but contends that it meets the second because it implicates a defendant's due process rights. The ***Dubose*** court was guided by the Supreme Court in ***Stovall v. Denno***, 388 U.S. 293 (1967), which held that "the exclusion of identification evidence which is tainted by exhibiting the accused to

[2] ***Dubose*** was decided more than nine months after Walker filed his second postconviction motion. *See* ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. In ***Dubose***, the court held that show-up 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. *See* ***id.***, ¶33.

identifying witnesses before trial in the absence of his counsel" does not apply retroactively to cases on collateral review. ***Id.*** at 294, 296. We likewise do not view ***Dubose*** as a watershed rule of criminal procedure that is "implicit in the concept of ordered liberty." ***Teague v. Lane***, 489 U.S. 288, 307 (1989) (citation omitted). A holding that does not explicitly apply retroactively generally does not apply to challenges on collateral review. *See* ***State v. Lo***, 2003 WI 107, ¶¶77-85, 264 Wis. 2d 1, 665 N.W.2d 756; ***Howard***, 211 Wis. 2d at 282. Therefore, we conclude that ***Dubose*** does not meet either exception, and does not apply retroactively on collateral review to Walker's 1997 judgment of conviction.

By the Court.—Order affirmed.

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