

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP2085-CR

Cir. Ct. No. 2005CF4620

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM LEE WUERZBERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 KESSLER, J. After entering a guilty plea to one count of fleeing an officer and one count of operating a vehicle without the owner's consent, William Lee Wuerzberger appeals from the judgment of conviction and the denial of his postconviction motion. The appeal is grounded on denial of his motion to

suppress evidence of his identification, which he asserts was obtained in violation of *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. We conclude that *Dubose* is not controlling and affirm the judgment.

BACKGROUND

¶2 The facts in this case might be mistaken for a television crime show chase scene. According to the criminal complaint,¹ at about 3:25 a.m. on August 11, 2005, City of Franklin Police Officer Rebecca Fletcher turned on her emergency lights to stop a red Ford van for traffic violations. The driver of the van moved to the shoulder of the road as though to comply but then sped away instead of stopping. A chase ensued with Fletcher's lights and siren activated. The driver turned in to a cul-de-sac and Fletcher stopped her squad car at the mouth of the cul-de-sac. Instead of cooperating with police, the driver of the van drove directly toward Fletcher, out of the cul-de-sac and onto the street. Fletcher did a U-turn and again pursued the red van, which again turned in to a cul-de-sac. The van crashed into a utility pole, and the driver escaped into a nearby wooded area. Fletcher did not see the driver leave the vehicle, but heard noises in the woods that she presumed were made by the driver running away. In the abandoned van she found a motel key for a motel she knew was located a few blocks from where she first saw the van.

¶3 Fletcher later testified that when the driver exited the first cul-de-sac she saw the driver about ten feet from her squad for three to five seconds, when he

¹ Upon entering his guilty plea, Wuerzberger stipulated that the facts in the complaint could be used to establish the factual basis for his plea. This opinion uses those facts and the undisputed testimony from the suppression hearing to provide the relevant background.

was traveling no more than ten to fifteen miles per hour. Fletcher said the driver was a white male with dark-colored hair and was wearing a white T-shirt. Fletcher described Wuerzberger as “very pointy – pointed facial features.”

¶4 Other officers followed up with investigation of the motel key. They discovered that the red Ford van was registered to a specific room. The occupant of that room, Wuerzberger’s wife, identified Wuerzberger (who was not then in the room) and said the van had recently been purchased. Neither the hotel room nor the red van were registered to Wuerzberger.

¶5 Meanwhile, in the same early morning hours of August 11, at approximately 6:30 a.m., a gold Dodge Caravan was reported stolen from the parking lot of a business that was surrounded by woods. The parking lot was approximately three blocks from where the red van crashed into a utility pole. Officer Robert Michalski, a City of Oak Creek police officer, spotted the Dodge van on a public street and followed it as the driver pulled into a gas station. As Michalski followed the van into the station and turned on his squad’s emergency lights, the Dodge van pulled out of the gas station. A high speed chase, with flashing lights and sirens, erupted.

¶6 The driver of the Dodge van ultimately turned in to an industrial cul-de-sac and drove behind a building. Michalski parked so as to block the van’s exit from behind the building, got out of his squad and approached the driver, who was still in the driver’s seat. Michalski had his gun drawn. Michalski was about eight to ten feet from the driver and observed him during “an awkward pause” that lasted for five to ten seconds. It was daylight, almost seven in the morning.

¶7 Next, the driver put the Dodge van in reverse, backed into the building, then drove over the grass to get back on a public road. Michalski got

back in his squad and another high speed chase ensued, but was discontinued shortly thereafter. The Dodge van was found abandoned shortly after Michalski discontinued the chase.

¶8 Although neither officer apprehended the driver they chased, both subsequently identified the same man as the driver. At the suppression hearing, Fletcher testified that later in the morning of August 11, she was still investigating at the scene of the abandoned Ford van. Another officer who had obtained a copy of a West Allis Police Department photo of Wuerzberger showed it to Fletcher. The photo was undated. Fletcher did not identify Wuerzberger from this photograph because, as she described it, “I believed it to be the driver, but I wanted ... a more current photograph because the driver I had seen had more hair than this photograph shows.” Another officer obtained a booking photograph of Wuerzberger from the Department of Corrections dated August 20, 2003, and showed it to Fletcher. On the basis of the second photo, Fletcher stated: “I made a positive identification that the driver was Wuerzberger.” Six days later she was notified that Wuerzberger had been arrested, so she went to the Milwaukee County Criminal Justice Facility to interview him. Fletcher testified that she recognized him, stating: “Without a doubt that was the subject I saw driving.”

¶9 Michalski was also shown the West Allis booking photo on the morning of August 11. Michalski was not positive the photo was of the driver of the Dodge van, because the man in the photo had a buzz cut, which was less hair than the Dodge driver had. Sometime on August 12, someone from the Franklin Police Department showed Michalski the same Department of Corrections photo that Fletcher had seen. Michalski made a positive identification based on the second photo, stating: “That subject’s hair was much more familiar with what I had seen ... and I was able to make a positive identification based on that.” Like

Fletcher, Michalski later learned that Wuerzberger was in custody in the Milwaukee County Criminal Justice Facility, and went there to interview him. Michalski stated that when he met Wuerzberger, Michalski “was very positive ... that it was the same person that I had seen driving the van.”

¶10 After testimony from both Fletcher and Michalski, the trial court made the following findings with respect to the motion to suppress the police officers’ identifications of Wuerzberger:

The officer is in really no different position in looking at a photograph than a nonpolice witness, and certainly a photo array should have been used, and it would have resolved the issue of being suggestive.

Here the officer specifically knew that this was someone that was a suspect as a result of the hotel key and information that had been gleaned from visiting the hotel.

....

Officer Fletcher indicated that she followed the defendant’s vehicle into a cul-de-sac, came to a stop, watched the vehicle make a turn in the cul-de-sac.

The vehicle was lit by a light at the end of it.... [T]he vehicle came straight towards her. She had a view only three to five seconds. It was 10 feet away.

She was able to indicate that he had short dark hair, was a white male, although there’s nothing distinctive other than he has pointy features [and] that once she saw the second picture, that it was positively the defendant who was driving the vehicle....

....

Officer Michalski ... stood with his weapon eight to 10 feet away. It was light out. The defendant was right in front of him sitting behind the wheel of the car.

[Michalski] had adequate opportunity to see [Wuerzberger] before the defendant backed up, and [Michalski] watched him as he was backing up.

[Michalski] was able to identify positively that the defendant was the driver of the vehicle.

¶11 The trial court concluded that using a single photo for each identification was “impermissibly suggestive” and that “a photo array should have been used.” However, the trial court also concluded that the identifications were admissible because overall they were reliable. The trial court noted: “Reliable is sufficient to be ... admissible. The weight of the evidence is to be determined by the jury under the circumstances.”

¶12 Wuerzberger pled guilty and was sentenced. He then filed a motion for postconviction relief, arguing that his motion to suppress the officers’ identifications should have been granted and that his sentence was unduly harsh. The trial court denied the motion without a hearing. This appeal follows.²

DISCUSSION

¶13 At issue is the admissibility of out-of-court identifications, which implicate Wuerzberger’s right to due process. *See State v. Drew*, 2007 WI App 213, ¶12, 305 Wis. 2d 641, 740 N.W.2d 404. A threshold question is whether analysis of the out-of-court identifications, which in this case were made by looking at photographs, should be governed by our supreme court’s decision in *Dubose*, 285 Wis. 2d 143.³ Wuerzberger based his motion on *Dubose*, and argues

² On appeal, Wuerzberger does not contend that his sentence was unduly harsh.

³ *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, held that

evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.

(continued)

that the analysis is applicable. However, we have previously recognized that the analysis established in *Dubose* was limited to cases involving in-person “showups,” rather than cases involving photo arrays. *Drew*, 305 Wis. 2d 641, ¶¶2, 19 (concluding that *Dubose* was limited to showups and “did not alter the standard determining whether admission of an out-of-court identification from a photo array violates due process”); *see also State v. Hibel*, 2006 WI 52, ¶32, 290 Wis. 2d 595, 714 N.W.2d 194 (emphasizing that *Dubose*’s test applies to cases concerning the admissibility of showup identifications).

¶14 Thus, “until the supreme court indicates otherwise, the correct standard for photo arrays is that articulated in *Powell* [*v. State*, 86 Wis. 2d 51, 64-66, 271 N.W.2d 610 (1978)] and [*State v.*] *Mosley*[, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981)].” *Drew*, 305 Wis. 2d 641, ¶19. Under that standard, the defendant “has the burden to demonstrate the out-of-court photo identification was impermissibly suggestive.” *Id.*, ¶13. Next, “if the defendant meets this burden, the State has the burden to show that the identification is nonetheless reliable under the totality of the circumstances.” *Id.*

¶15 In this case, it is unclear whether the trial court applied the test articulated in *Powell* and *Mosley*, or instead relied on *Dubose*. Although the trial court and parties discussed the *Dubose* case, when the trial court issued its oral ruling it seemed to apply the test from *Powell* and *Mosley*, which includes considering whether the identification was reliable. *See Drew*, 305 Wis. 2d 641, ¶13. In any event, we need not decide whether the trial court relied on *Dubose*, because the applicable standard of review requires us to accept the trial court’s

Id., ¶33.

findings of fact unless they are clearly erroneous, but independently apply the constitutional principles to those facts. See *Drew*, 305 Wis. 2d 641, ¶11. In this case, no one disputes the testimony of officers Fletcher and Michalski. Therefore, like the trial court, we will accept their testimony as the findings of fact for purposes of analyzing the suppression motion.

¶16 The first step in the test used in *Powell* and *Mosley* requires us to consider whether each officer's identification of Wuerzberger's photograph was "impermissibly suggestive." See *Drew*, 305 Wis. 2d 641, ¶13. When determining whether each photo identification was impermissibly suggestive, it is important to note that the fact only one photograph was shown to the officers when each of the identifications was made does not automatically make the identifications impermissibly suggestive. See *Kain v. State*, 48 Wis. 2d 212, 219, 179 N.W.2d 777 (1970) (single photo identifications are not, *per se*, impermissibly suggestive). The court in *Mosley* articulated the factors to consider when considering an identification by photograph: "Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." *Id.*, 102 Wis. 2d at 652.

¶17 Here, Wuerzberger offers no explicit argument concerning the *Mosley* factors, having erroneously concluded that *Dubose* controls. However, his overall concern is with the lack of a photo array. Even assuming that Wuerzberger could show that the photo array was impermissibly suggestive, he is nonetheless not entitled to relief because, we conclude, applying the second part of the test used in *Powell* and *Mosley*, that the State has met its burden of showing that the identification is nonetheless reliable under the totality of the circumstances. See *Drew*, 305 Wis. 2d 641, ¶13.

¶18 Both Fletcher and Michalski had a good opportunity to view the man they saw driving. They each declined to identify Wuerzberger based on the first photograph presented because each concluded separately that Wuerzberger looked significantly different in that photo than the driver they observed because of significantly different hair. When each was presented with a second photo, each identified Wuerzberger as the driver. Subsequently, when both met Wuerzberger at the jail, they were positive it was the same man they had seen driving.

¶19 There is no evidence that either officer was pressured into identifying Wuerzberger. Indeed, both declined to positively identify Wuerzberger from the first photo because they could not be sure. All indications are that the officers had a good look at Wuerzberger and were absolutely certain after seeing him in person that they had the right driver. Under the totality of the circumstances, we are convinced that the identifications were reliable, even though both officers were presented with only a single photograph when they made their positive identifications.

By the Court.— Judgment and order affirmed.

Not recommended for publication in the official reports.

