COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP563 **Cir. Ct. No. 2001CF6659**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Derrick D. Brown appeals from an order denying his postconviction motion seeking relief for the alleged ineffective assistance of trial counsel. The issue is whether trial counsel was ineffective for failing to move to suppress the show-up identification as constitutionally impermissible pursuant

to ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582, and for failing to inform Brown of that challenge. We conclude that trial counsel was not ineffective because: (1) he filed a motion to suppress the identification that Brown later waived by pleading guilty; and (2) ***Dubose*** was decided over two years after Brown was convicted and does not retroactively apply to Brown's suppression motion. Therefore, we affirm.

¶2 Brown was charged with three counts of armed robbery with the threat of force, each as a party to the crime, and for possessing marijuana. Trial counsel moved to suppress the "on-scene showup lineup" and the "anticipated in-court identification" as "unnecessarily suggestive and conducive to misidentification." Five months later incident to a plea-bargain, Brown pled guilty to the three armed robberies, in exchange for the dismissal of the marijuana charge and the State's sentencing recommendation of incarceration of unspecified duration. During the plea colloquy, the trial court asked Brown whether he understood that "by signing [the guilty plea questionnaire and waiver of rights form that he] underst[oo]d that [he was] giving up the right to bring any motions to challenge the evidence, or to have it suppressed, or to raise any affirmative defenses in this matter; [and was asked,] do you understand that," to which Brown responded personally, "Yes, sir. I do." The trial court accepted Brown's guilty pleas and imposed three concurrent seventeen-year sentences, each comprised of seven- and ten-year respective periods of initial confinement and extended supervision. Brown did not appeal from the judgment of conviction.

¶3 Six years after the judgment of conviction was entered, Brown moved for postconviction relief on a variety of issues, including trial counsel's alleged ineffectiveness for failing to move to suppress his identification pursuant to ***Dubose***, and for failing to allegedly tell Brown of the availability of seeking

suppression. The trial court summarily denied Brown's postconviction motion. Brown appeals, and pursues only the ineffective assistance issue on the applicability of ***Dubose***.

¶4 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). For a number of reasons, Brown is unable to prove either deficient performance or resulting prejudice, much less both. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990).

¶5 First, the record belies Brown's allegations of ineffective assistance because trial counsel had moved to suppress the show-up identification as "unnecessarily suggestive and conducive to misidentification," essentially the same basis on which ***Dubose*** was later decided.[1] Brown's admission to the trial court, that by pleading guilty he understood that he was forfeiting his right to challenge any evidence, to move for suppression, and to raise any affirmative defenses, demonstrates his awareness of the right to seek suppression, regardless of whether Brown actually knew that he had already moved to suppress his identification.

¶6 Second, insofar as the applicability of ***Dubose*** is concerned, ***Dubose*** was not pending during Brown's case; trial counsel was not obliged to predict that change in the law. *See* ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d

[1] ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582, held that show-up identifications are inherently suggestive and inadmissible unless, under the totality of the circumstances, the show-up procedure was "necessary."

621 (Ct. App. 1994) ("ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue"). Additionally, ***Dubose*** was decided over two years after Brown's case was final, and does not apply retroactively to suppress Brown's identification.[2] *See* ***State v. Lo***, 2003 WI 107, ¶¶77-85, 264 Wis. 2d 1, 665 N.W.2d 756. Generally (unless stated otherwise in the decision announcing the new rule), the new rule applies to all pending cases. *See* ***id.*** Brown's case had become final over two years before ***Dubose*** was decided.[3]

¶7 Most significantly, by pleading guilty Brown waived his right to pursue this challenge even if ***Dubose*** would have applied retroactively. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983) (by entering a guilty plea, a defendant waives the right to challenge nonjurisdictional defects and defenses).[4] Brown has not shown that his trial counsel rendered ineffective assistance by negotiating a plea-bargain that compelled Brown to waive litigating his suppression motion on pre-***Dubose*** law.

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[2] ***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. *See* ***State v. Lo***, 2003 WI 107, ¶¶77-85, 264 Wis. 2d 1, 665 N.W.2d 756.

[3] A conviction becomes final after a direct appeal from that judgment or any right to directly review the related appellate decision is no longer available. *See* ***Griffith v. Kentucky***, 479 U.S. 314, 321 n.6 (1987).

[4] Had Brown litigated his suppression motion prior to pleading guilty, the guilty-plea-waiver rule would not have applied. *See* WIS. STAT. § 971.31(10) (2001-02). Brown criticized his trial counsel for not filing the motion. As shown by the record, however, trial counsel had filed a motion to suppress Brown's identification on the same basis as that challenged in ***Dubose***, albeit over two years later.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).