State of Wisconsin
Court of Appeals
District 2
Appeal No. 2010AP002966 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Kenneth O. Davis,

Defendant-Appellant.

On appeal from a judgment of the Kenosha County Circuit Court, The Honorable Mary Kay Wagner, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is a matter of state-wide importance in that it provides the court with an opportunity to clarify the the "necessity" standard for permitting police officers to conduct a show-up identification procedure. Therefore, both oral argument and publication are recommended..

Statement of the Issue

Is a "show-up" identification procedure automatically *necessary* in every case where the police lack probable cause to arrest a suspect?

ANSWERED BY THE TRIAL COURT: Yes.

Summary of the Argument

The parties approached the motion hearing in this case under the misapprehension that, under the Supreme Court's holding in, *State v. Dubose*, 2005 WI 126, P16 (Wis. 2005), if there was not probable cause to arrest Davis, then the show-up procedure was automatically *necessary.* As such, Davis's due process rights were not violated by the procedure. The trial court's bench decision adopted this reasoning. The judge found that, "They didn't have probable cause him [Davis]", and,

therefore, the motion to suppress was denied was denied. (R:28-75, 76)

As will be set forth in more detail below, in *Dubose* the Supreme Court simply did not hold that a show-up procedure is automatically necessary whenever there is not probable cause to arrest an individual. Although the language of the Supreme Court is somewhat murky on this point, the court gave an example that plainly establishes that, in order for a show-up to be necessary, there must first be a reasonable suspicion to believe that the subject of the show-up committed the crime in question; and, further, it must be impossible to later conduct the more reliable photo-array identification procedure.

Here, there was no reasonable suspicion to believe that Davis committed the armed robbery in question. He was an African American in an African American neighborhood. The description of the robber was generic, and Davis' clothing did not match. Thus, the show-up procedure was not necessary because there was no reasonable suspicion that Davis committed the robbery.

Moreover, during their contact with Davis, the police identified him, they determined where he lived, and they learned that he was on probation. Thus, it would have been easy to later include Davis in a more reliable photo-array identification procedure. For this additional reason, the show-up procedure was not necessary.

Statement of the Case

I. Procedural History

The defendant-appellant, Kenneth O. Davis (hereinafter "Davis"), was charged in the Kenosha County Circuit Court with two counts of armed robbery, contrary to Sec. 943.32(2), Stats., and one count of being a felon in possession of a firearm, contrary to Sec. 941.29(1)(f), Stats.

Following a preliminary hearing, Davis was bound over for trial, and he entered not guilty pleas to all charges.

Davis filed a pretrial motion to suppress evidence (R:8; Appendix B). The court heard the motion in two parts. The first part was on November 13, 2009; and the second part was on March 5, 2010. The court denied the motion, reasoning as follows:

> Circumstances gets set up in that Mr. Davis walks up to the police and says how are you, you, what are you doing out here or what's going on or why are you fellows out here, some imagined conversation to that effect. He approaches them. They then talk to him, look for reasons to arrest. *They find none*. Apparently, he was on probation . . . .
>
> And I can believe that they couldn't smell the alcohol because it's a summer night, late in the night. Mr. Davis' contact was very cooperative with the officers. It's within a hundred minutes. They it has to be within-- under case law it should be within 24 hours of the event. It shouldn't be done unless it's absolutely necessary. It was reasonable. I do not find that it was highly impermissably suggestive based on the testimony that was

> received.
>
> *They didn't have probable cause to arrest him.* The money didn't match up. It was a generic description. They were being cautious about not jumping to conclusions about someone. And it's just an interesting circumstance when you hear the arguments if they went through a neighborhood and arrested everybody that they saw in the street and said, well, you know, we've got enough probable cause, the arrests would be thrown out. so it's a tight line as you indicate Mr. Perz, in these circumstances.
>
> The Court denies the motion to suppress identification of both of these individuals.

(emphasis provided; R:28-75, 76; Appendix C).

Thereafter, Davis reached a plea agreement with the State. In exchange for a guilty plea to count one (armed robbery), the State would dismiss the remaining counts, and both sides would be free to argue as to sentence. (R:30-2) Thereafter, Davis entered a guilty plea.

The trial court sentenced Davis to eighteen years in prison, bifurcated as ten years initial confinement, and eight years extended supervision. (R:14)

Davis timely filed a notice of intent to pursue postconviction relief (R:22). There was no postconviction motion. Instead, Davis timely file a notice of appeal. (R:24)

II. Factual Background

A. The criminal complaint

The criminal complaint (R:2) alleges that in the early

morning hours of August 22, 2009, Lynier Cole and Felandrius Jackson were walking to their car when they were approached by a man who was later identified by the two men as the appellant, Kenneth O. Davis. According to the two men, the robber approached them with a gun drawn, and then he fired it into the ground. The robber ordered Cole and Jackson to "come here." The men approached the robber and, at that point, the robber pointed the pistol in Cole's face and demanded their property. The men gave the robber their money and their cell phones. The robber then told the men not to call the police; and then he added, "You're lucky. I could have killed you."

B. The motion to suppress evidence

Testimony at the hearing on Davis' motion to suppress established that on August 22, 2009, at about 1:50 a.m., City of Kenosha police officer Mark Poffenberger was dispatched to a call regarding a possible robbery. (R:27-8). A witness, Ronnie Orr, told Poffenberger that a robbery had occurred at about the intersection of 22nd Avenue and 53rd Street. (R:27-8) Poffenberger knew that the neighborhood was predominantly populated by African Americans. (R:27-9) Orr described the robber as being five-foot-six inches tall, a black male, with a medium build and a light goatee. (R:27-9, 10). Additionally, Orr told Poffenberger that the robber was wearing a dark hooded sweatshirt and dark pants. (R:27-10) Orr said that the

robber ran behind the house at 2108 53rd Street. (R:27-10, 11), so police set up a perimeter around the house. *Id.*

As part of the investigation, Kenosha police officer Brian Ruha interviewed one of the victims, Felandrius Jacksion. (R:28-4) Jackson said that the robber was a black male, approximately five-feet-eight inches tall, medium build, light complexion, and wearing a black hooded sweatshirt and dark pants. *Id.*

After about twenty to thirty minutes, a man came around from the side of a house near where the police had set up the perimeter, and he walked on to the front porch. (R:27-12) The man, who Poffenberger identified as the appellant, Davis, then began walking toward Poffenberger. (R:27-16) Poffenbeger ordered Davis to "show your hands", and he complied. (R:27-17) Poffenberger estimated that Davis, who is black, was about five-feet-six inches tall with a medium build and a goatee. (R:27-23) Davis, though, was not wearing a black hooded sweatshirt. (R:27-24) He had on a white teeshirt.

Poffenberger searched Davis, and he found a "large wad" of cash in Davis' pants pocket. (R:27-20, 21) At about that time, other officers were talking to the victims of the robbery, and through radio contact, Poffenberger learned that cash had been taken in the robbery. (R:27-21) Poffenberger ordered Davis to sit on the curb, and he did. *Id.*

Davis told Poffenberger that he (Davis) lived on 75th Street in Kenosha, but that he had ridden his bike over to the

area to visit friends. (R:27-22)

Additionally, Poffenberger learned that Davis was on probation and, therefore, Poffenberger tried to determine whether Davis had been drinking. The officer was attempting to "put a hold" on Davis for a violation of the absolute sobriety condition of probation. (R:27-28) Davis denied that he had been drinking. (R:27-29) Later, though, while Davis was in the police station, Officer Krein noticed the smell of alcohol on Davis. (R:28-55) Davis admitted to Krein that he had been drinking. *Id.*

The issue of a show-up was discussed among the officers involved in the investigation. (R:28-5). Lt. Larson told the investigators that, since "we had nothing to hold him on, and he fit the description, to perform a show-up." (R:28-5, 35; R:27-30). According to Lt. Larson, "There was absolutely no probable cause to make any type of arrest on Mr. Davis at that time, none whatsoever." (R:28-35)

The officers then walked Davis to 53rd Street and 21st Avenue, and had him sit on the curb. *Id.* The victim, Jackson, after being instructed by Officer Ruha as to how the show-up would proceed (R:28-10), was placed in a squad car (R:27-48), driven to where Davis was sitting, and from about fifteen feet away (R:28-23), he viewed Davis. The squad car headlights were illuminating Davis. (R:28-24) Ruha got out of his squad car, approached Davis, and asked him to stand. (R:28-16). Davis did so, but then he covered his face with his hands. *Id.*

Ruha then had Davis lower his hands. *Id.* Jackson identified Davis as the robber. (R:28-11, 17)

Argument

I. A show-up identification procedure is not automatically "necessary" in every case where the police lack probable cause to arrest a suspect.

The parties approached the motion hearing in this case under the misapprehension that, under the Supreme Court's holding in, *State v. Dubose*, 2005 WI 126, P16 (Wis. 2005), if there was not probable cause to arrest Davis, then the show-up procedure was automatically *necessary.* As such, Davis's due process rights were not violated by the procedure. The trial court's bench decision adopted this reasoning. The judge found that, "They didn't have probable cause him [Davis]", and, therefore, the motion to suppress was denied was denied. (R:28-75, 76)

As will be set forth in more detail below, in *Dubose* the Supreme Court simply did not hold that a show-up procedure is automatically necessary whenever there is not probable cause to arrest an individual. Although the language of the Supreme Court is somewhat murky on this point, the court gave an example that plainly establishes that, in order for a show-up to be necessary, there must first be a reasonable suspicion to

believe that the subject of the show-up committed the crime in question; and, further, it must be impossible to later conduct the more reliable photo-array identification procedure.

Here, there was no reasonable suspicion to believe that Davis committed the armed robbery in question. He was an African American in an African American neighborhood. The description of the robber was generic, and Davis' clothing did not match. Thus, the show-up procedure was not necessary because there was no reasonable suspicion that Davis committed the crime.

Moreover, during their contact with Davis, the police identified him, they determined where he lived, and they learned that he was on probation. Thus, it would have been easy to later include Davis in a more reliable photo-array identification procedure. For this additional reason, the show-up procedure was not necessary.

A. Standard of Appellant Review

> On review of a motion to suppress, this court employs a two-step analysis. *State v. Eason*, 2001 WI 98, P9, 245 Wis. 2d 206, 629 N.W.2d 625. First, we review the circuit court's findings of fact. We will uphold these findings unless they are against the great weight and clear preponderance of the evidence. *State v. Martwick*, 2000 WI 5, P18, 231 Wis. 2d 801, 604 N.W.2d 552. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998); *see also State v. Harris*, 206 Wis. 2d 243, 249-50, 557 N.W.2d 245 (1996). Next, we must review independently the application of relevant constitutional principles to those facts. *State v. Vorburger,* 2002 WI 105, P32, 255 Wis. 2d 537, 648 N.W.2d 829. Such a

> review presents a question of law, which we review de novo, but with the benefit of analyses of the circuit court and court of appeals. *See Kieffer,* 217 Wis. 2d at 541.

State v. Dubose, 2005 WI 126, P16 (Wis. 2005)

B. The analysis of a "show-up" Identification procedure.

A show-up identification procedure may be employed only where it is "necessary". In *Dubose*, the Wisconsin Supreme Court explained.

> We conclude 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 show-up 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. A lineup or photo array is generally fairer than a show-up, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification.

Dubose, 2005 WI 126, P33. In a footnote, the Supreme Court gave the following example of when a show-up might be be *necessary:* "[w]hen the police apprehend a suspect during a *Terry* stop. If that person is suspected of committing a crime, but the police do not have the requisite probable cause to arrest and then to conduct a lineup or photo array, a showup *could be considered necessary*." (emphasis provided) *Dubose*, 2005 WI 126, P34 .

The Supreme Court's holding in *Dubose* leaves unanswered the question presented by this appeal: Is a show-

up procedure automatically *necessary* in every case where the police lack probable cause to arrest?

C. The Supreme Court certainly could not have meant to hold that a show-up is automatically *necessary* whenever the police lack probable cause to arrest a suspect.

In *Dubose,* the Supreme Court wrote,, "A show-up will not be necessary, however, *unless the police lacked probable cause to make an arrest* . . . " The Supreme Court, though, could not possibly have meant that *whenever* the police lack probable cause to arrest a person, a show-up identification procedure is *ipso facto* "necessary"*.*

Firstly, the Supreme Court generally condemned the show-up procedure because, according to the court, modern research confirms that misidentification is the primary source of wrongful convictions, and "It is now clear to us that the use of unnecessarily suggestive evidence resulting from a show-up procedure presents serious problems in Wisconsin criminal law" *Dubose,* 2005 WI 126, P32

Why then, would the Supreme Court want to visit this "serious problem" upon all of the innocent persons who happen to be in the area where a crime is committed? If a show-up is "necessary" for all of the persons for whom there is no probable cause to arrest, then the police could simply round up everyone who happened to be in the area during the commission of a crime, and then subject them to the

procedure.

Obviously, something more than a mere lack of probable cause is required before a show-up will be necessary.

The Supreme Court's example of "necessity", sheds some light. The Supreme Court wrote that where the police, "[a]pprehend a suspect during a *Terry* stop," and that person, "[i]is suspected of committing a crime, but the police do not have the requisite probable cause to arrest *and then to conduct a lineup or photo array,* a show-up *could be considered necessary*."

It stands to reason, then, that in order for a show-up to be necessary, the police must first have a "reasonable suspicion" that the person has committed the crime (i.e., a reason to conduct a Terry stop); and, secondly, it must not be possible to later conduct a line-up or a photo array. In the absence of at least a reasonable suspicion, the police cannot conduct a show-up on any individual they happen to encounter during the investigation, otherwise, innocent persons get less protection under the law than do persons who are reasonably supected of committing a crime. Also, unless a later photo array is impossible, the court would apparently be giving preference to the more unreliable of the two identification procedures-- that is, if it is possible to later conduct a photo array, then that is the procedure that ought to be employed.

D. There was no reasonable suspicion to detain Davis

According to Lt. Larson, the police "had nothing to hold him [Davis] on . . . " (R:28-5, 35; R:27-30) The point could not be more eloquently stated than it was by the prosecutor at the motion hearing:

> He is in a location where the individual who is suspected, based in terms of description . . . would be a common person within the neighborhood in terms of build, in terms of race, would not be in any way uncommon for the neighborhood . . . [t]his is not an individual who emerged specifically from the house and that this person had contact with the police in a highly cooperative, basically inquiry type fashion.
>
> The person approaches the officer, as Officer Poffenberger told this Court, and asked what was going on, essentially the kind of private citizen kind of questioning that happens to officers every day in the field *and* ***is inconsistent with factual circumstances officers associate with a person who is to be suspected*** . . . for a serious crime like armed robbery.
>
> The clothing description *is simply not the same.* The time period that has elapsed is substantial. We're talking about well over an hour . . . We're talking about a person emerging from an area that could also be inconsistent with coming from the street . . . In other words, it's not a-- it's not a definitive location in terms of being the very same spot that this prior reporting witness says this individual came from.

(emphasis provided; R:28-60-61).

The judge agreed, "The money didn't match up. It was a

generic description. They were being cautious about not jumping to conclusions about someone . . . if they went through a neighborhood and arrested everybody that they saw in the street . . . the arrests would be thrown out. " (R:28-75, 76)

Plainly, there was no reasonable suspicion to detain Davis and, therefore, for this reason alone, the show-up procedure was not necessary.

E. It certainly was possible to later conduct a photo array identification procedure.

Evidence was presented at the motion hearing that, at the scene, the police identified Davis and, further, they determined that he lived in Kenosha *and he was on probation.* Thus, a reasonable inference-- if not a concrete fact-- is that Davis had been arrested, and he had been photographed. Thus, the police could easily have later conducted the more reliable photo-array identification procedure with the victims. Moreover, if further investigation were required, Davis was very likely to be in the area.

There simply was no reason to believe that, if the police declined to conduct a show-up procedure, Davis would simply disappear, never to be found again. This was not an exigent circumstance. Quite the contrary, the police knew Davis' name, they knew his address, and they knew how to find him if they needed to do so later (through the probation officer).

For this additional reason, the show-up procedure was not necessary.

Conclusion

It is respectfully requested that the court reverse the order of the trial court denying Davis' motion to suppress the identification evidence. Additionally, Davis should be permitted to withdraw his guilty plea.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2011.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3333 words.

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Dated this _____ day of _____, 2011:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
Appeal No. 2010AP002966 - CR

State of Wisconsin,

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Defendant-Appellant's Appendix

A. Record on Appeal

B. Appellant's Motion to Suppress

C. Transcript of court's bench decision

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an

administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of February, 2011.

_____

Jeffrey W. Jensen