

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP492

Cir. Ct. No. 2002CF4938

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON R. DODD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 WEDEMEYER, P.J. Jason R. Dodd appeals from a judgment of conviction for armed robbery, party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2003-04).¹ Dodd claims the trial court erroneously exercised its discretion when it denied his motion seeking to suppress the showup identification. Because the trial court did not have the opportunity to apply the requisites set forth in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, before it ruled that the showup identification was admissible, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 On August 25, 2002, at approximately 9:35 p.m., a pizza restaurant located at 700 East Kilbourn Avenue in Milwaukee, was robbed by two armed, masked men wearing hooded sweatshirts and dressed in all black. At the same time, three adult men were stopped at the stoplight next to the pizza restaurant. These three men saw two pizza employees running out of the restaurant, yelling to call 911 because the restaurant was being robbed. One of the three men in the car dialed 911 on his cell phone. The driver of the vehicle drove to the front of the restaurant, while his passenger, John Arvan, looked through the windows. Arvan saw one man dressed in black and wearing a mask. He then saw two men appear from the back of the building and walk away. Arvan observed that these two men were dressed in black and looked like they were taking their hoods off.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 The vehicle Arvan was in circled around the block and observed the two men again. The vehicle came within ten-to-fifteen feet of the men dressed in black. Arvan provided descriptions of the two men to the police. The police asked Arvan to wait in the parking lot of the pizza restaurant.

¶4 Meanwhile, the police had arrested Dodd about four blocks from the robbery at about 9:40 or 9:45 p.m. He was wearing the same type of black clothing that witnesses had described the robbers wearing. The police brought Dodd back to the pizza restaurant's parking lot where a showup identification procedure was conducted at about 11:02 p.m. Arvan identified Dodd as one of the robbers.

¶5 Dodd told police that he had gone to the pizza restaurant with two other men who planned to rob the restaurant, but that he walked away before the robbery took place because there were too many people around. Dodd stated that he was arrested as he was walking home.

¶6 Dodd was charged with conspiracy to commit armed robbery and armed robbery, party to a crime. He moved to suppress the identification. After conducting a hearing, the trial court denied the motion, ruling that there was nothing impermissible or suggestive about the identification procedure.

¶7 Arvan identified Dodd at trial and evidence was introduced about the showup identification on the night of the robbery. The jury found Dodd guilty of both counts. Because Dodd could not be convicted of both conspiracy to commit the crime and the completed crime, the judgment was entered only on the armed robbery conviction. Dodd was sentenced to seventeen years in prison, consisting

of seven years of initial confinement, followed by ten years of extended supervision. Dodd now appeals.

DISCUSSION

¶8 Dodd requests that we reverse his conviction and direct the trial court to suppress the showup identification on the basis that the trial court did not comply with the standards set forth in *Dubose*. Dodd points out that *Dubose* should apply to his case, despite the fact that it was decided *after* he was sentenced, because new constitutional rules of criminal procedure are applied retroactively to any cases not yet final on appeal. See *State v. Koch*, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993). We agree that *Dubose* should apply to this case.

¶9 In *Dubose*, our supreme court announced new procedures regarding admissibility of showup identifications. The court adopted the “standards for the admissibility of out-of-court identification evidence similar to those set forth in ... *Stovall v. Denno*, 388 U.S. 293 (1967).” *Dubose*, 285 Wis. 2d 143, ¶2. Those standards state that:

[E]vidence obtained from such a showup will not be admissible unless, based on the totality of the circumstances, the showup 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.

Id.

¶10 In ruling on Dodd’s suppression motion, the trial court did not apply the procedures set forth in *Dubose*, because it was not the law at the time. In applying *Dubose* principles to the instant case, we are unable to conclude whether the showup was *necessary*. Although it is conceded that the police had probable cause to arrest Dodd, it is not clear whether “as a result of other exigent circumstances,” the police were unable to conduct a lineup or photo array. *See id.*

¶11 Accordingly, this case needs to be remanded to the trial court for a hearing to determine whether exigent circumstances justified the use of the showup procedure. In the event the trial court concludes that exigent circumstances did exist, the judgment stands. In the event the trial court concludes that exigent circumstances did not exist, then the showup identification evidence was improperly admitted. Such a conclusion, however, will not automatically result in a reversal of the judgment. Rather, consistent with *Dubose*, if the trial court concludes on remand that the showup identification was not necessary, it must then proceed to review any identification of Dodd made by a witness during the trial. *See id.*, ¶38.

If the court determines that any such identification was based on the unnecessarily suggestive showup[] ... then the conviction must be set aside and a new trial ordered, unless any in-court identification was independent or untainted. The court may uphold any in-court identification if the circuit court determines that it “had an origin independent of the lineup or was ‘sufficiently distinguishable to be purged of the primary taint.’” In other words, if the circuit court determines that any in-court identification of [the defendant] was not tainted by out-of-court identifications, then the conviction should stand. “[T]he in-court identification is admissible if the State carries the burden of showing ‘by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [out-of-court] identification.’”

Id. (citations omitted).

¶12 Based on the foregoing, we reverse and remand this matter for further proceedings consistent with this opinion. On remand, the State should be given an opportunity to prove that the showup identification was justified by exigent circumstances and, if there were no exigent circumstances, the trial court must determine whether Arvan's in-court identification of Dodd was independent of, or not tainted by, the showup identification. If the in-court identification is sufficiently distinct from the showup, then the judgment stands. If the in-court identification was based on the showup, then the judgment must be set aside and a new trial ordered. In the event that the armed robbery conviction is set aside, the trial court should also consider whether it may enter a judgment of conviction on the conspiracy to commit armed robbery charge for which the jury found Dodd guilty.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

