COURT OF APPEALS
DECISION
DATED AND FILED

December 04, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1424-CR **Cir. Ct. No. 2004CM3300**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Reversed and cause remanded.*

¶1 KESSLER, J.[1] Michael R. Cooper appeals from the denial of two postconviction motions brought after his conviction by a jury on two misdemeanor

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

battery charges, and his acquittal on three misdemeanor battery charges, all charges having arisen out of the same incident. Because we conclude that ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, applies to this case, that trial counsel was ineffective for failing to move for reconsideration of Cooper's motion to suppress the showup identification based on ***Dubose***, and that the trial court erred in denying Cooper's postconviction motions, we reverse and remand for a new trial.

Background

¶2 A neighborhood argument degenerated into a physical altercation. A person, alleged to be the defendant, returned to the scene with a baseball bat and is alleged to have hit five people—three people with a bat and two others with his hand or fist. The assailant was described to the police by two of the victims (Ester Hodges and Ida Hollins) as "a black male, about six one, and 180 to 200 pounds" and "in his twenties." A showup identification procedure for Ester Hodges and Ida Hollins (who are sisters) was conducted the following day in the area near the home of one of them and a few blocks from Cooper's home. Although testimony regarding the showup differed as to some details, it is not disputed that:

- The showup was arranged by the police twenty-three hours after the neighborhood incident.
- The police station was seven blocks from the house where they located Cooper.
- There was no imminent danger to the victims that would discourage having a line up.
- A line-up was a readily available means of identification.

- Police said they took Cooper to the victims because "at a police station … he would believe he was under arrest. We wanted him to feel as free as possible."
- Police called the victims to tell them the police "had someone that we wanted them to identify."
- Police were in uniform, driving a marked squad car.
- Cooper arrived at the showup location in the back of a squad car.
- Cooper was handcuffed while in the car.
- Cooper was moved outside the squad for the victims to view.
- The victims, Ester and Ida, in the presence of each other, were each asked "Is this the person that battered you?"
- Both victims identified Cooper from approximately twenty feet away.
- Two police officers, in uniform, stood beside Cooper when the victims identified him.
- The victims recalled that Cooper was handcuffed.

¶3 Cooper moved pretrial to suppress the showup identification. Relying on ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), the trial court found that the showup was necessary and was not unduly suggestive based on the totality of the circumstances. The trial court then denied the motion to suppress.

¶4 Except for the police officers, all of the State's witnesses were family members. According to trial testimony by a non-victim witness, Catherine Hollins, Cooper: hit Catherine's aunt, Ester Hodges, in her knee with a bat; "smacked" Tonanisha Hodges (Catherine's cousin and Ester Hodges' daughter) in the face with "an open hand"; hit Catherine's mother, Ida Hollins, in the upper leg with a bat; hit Catherine's brother, Antoine Hollins, near the eye with a bat; and accidentally hit Catherine's cousin, Tashonda Hodges, with his fist.

¶5 The trial court summarized the trial evidence as follows: In response to the State's questions, Catherine Hollins and Ester Hodges specifically identified Cooper as the assailant. The State did not ask Ida Hollins to specifically identify Cooper, but in response to defense counsel's questions, Ida told the jury that she identified Cooper at the showup the police organized. Antoine Hollins and Tashonda Hodges did not testify at trial.

¶6 Cooper was acquitted as to the charges relating to each of the victims who did not testify, and of the charge as to Tonanisha Hodges (who testified and identified Cooper at trial, but had not been present at the showup). Cooper was convicted, however, on the charges relating to Ida Hollins and Ester Hodges.

¶7 The trial court sentenced Cooper to nine months in the House of Correction and two years' probation, staying the House of Correction portion of the sentence. After sentencing, Cooper filed two postconviction motions. One postconviction motion renewed the request to suppress the showup identification, and later identifications based thereon, relying on our supreme court's holding in

Dubose. ***Dubose*** was decided after Cooper's pretrial suppression motion was denied, but several months before trial of this matter began. A ***Machner***[2] hearing was held. At this hearing, trial counsel acknowledged that he was unaware of the ***Dubose*** decision until he received notice of the ***Machner*** hearing and, thus, never renewed the suppression motion.

¶8 The second postconviction motion sought a new trial on the ground that trial counsel's failure to raise the showup and related identification restrictions imposed by ***Dubose*** constituted ineffective assistance of counsel under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). At the ***Machner*** hearing, trial counsel admitted that, had he known of the ***Dubose*** decision, he would have renewed the suppression motion.

¶9 In its decision on the postconviction motions, the trial court recognized the applicability of ***Dubose*** to this case, and twice acknowledged that if trial counsel had raised ***Dubose*** after the original suppression hearing, the court "likely" would have suppressed the showup identifications. However, the trial court concluded that, even if an improper showup occurred, the additional ***Dubose*** requirement—that the State establish by clear and convincing evidence that subsequent in-court identifications were untainted by the showup[3] identification—was inapplicable in this case because, under ***Strickland***, the defendant has the burden of proving both that counsel's performance was deficient and that the defendant was prejudiced.

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[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] *See* ***State v. Dubose***, 2005 WI 126, ¶38, 285 Wis. 2d 143, 699 N.W.2d 582.

¶10 The trial court, in applying first the ***Strickland*** requirement that the defendant show prejudice,[4] concluded that the defendant was not prejudiced by trial counsel's performance. The trial court explained that it reached this conclusion because: (1) a witness, Catherine Hollins, not present at the showup identification and not a victim of battery, identified Cooper at trial; (2) the State did not ask one of the showup witnesses, Ida Hollins,[5] to specifically identify Cooper at trial; and (3) the trial court found the other showup witness, Ester Hodges, was credible and certain about her in-court identification such that Hodges' in-court identifications were untainted by her showup identification of Cooper.[6] The trial court then denied both motions. This appeal followed.

Standard of Review

¶11 "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. We review a question of constitutional fact utilizing a two-step process. ***Id.*** First, we uphold a circuit court's findings of fact unless they are clearly erroneous. Second, we apply the law to those facts without deference to the circuit court. ***Id.***; *see also* ***State v. Eckert***, 203 Wis. 2d

[4] Under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), a defendant must prove both that counsel's performance was deficient and that the defendant was prejudiced thereby; accordingly if the defendant cannot prove prejudice, then the defendant did not receive ineffective assistance of counsel. ***Id.*** at 687, 697.

[5] Identification of Cooper by Ida Hollins was before the jury because she referred to Cooper by name in her testimony in response to multiple State questions, and the State likewise asked her questions specifically referring to Cooper.

[6] In its oral decision regarding the effect of the showup on subsequent identifications of Cooper, the trial court stated: "the in-court identification made by only Hodges, in my mind was not tainted by out-of-court identification."

497, 518, 553 N.W.2d 539 (Ct. App. 1996); ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶12 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325. "Whether the facts … fulfill a particular legal standard is a question of law which we review de novo." ***Ide v. LIRC***, 224 Wis. 2d 159, 166, 589 N.W.2d 363 (1999).

¶13 The trial court's conclusion that the State's burden of proving untainted subsequent identifications imposed by ***Dubose*** was obviated by the burden imposed on Cooper when he relied on ***Strickland*** to establish ineffective assistance of counsel, for counsel's failure to raise ***Dubose***, is a conclusion of law which we review *de novo*. *See* ***Landwehr v. Landwehr***, 2006 WI 64, ¶8, 291 Wis. 2d 49, 715 N.W.2d 180 ("Whether the circuit court has applied the correct legal standard is a question of law reviewed de novo."). A conclusion of law will be reviewed as such even if the trial court mislabeled it as a finding of fact. ***Crowley v. Knapp***, 94 Wis. 2d 421, 429-30, 288 N.W.2d 815 (1980).

Discussion

I. Effect of ***Dubose***

¶14 ***Dubose*** was decided on July 14, 2005. ***Dubose*** establishes new procedural rules regarding the procedures to be used by police in obtaining identification of defendants. ***Id.***, 285 Wis. 2d 143, ¶¶33, 35. This matter did not

go to trial until September 27, 2005. As the trial court recognized, new rules of criminal procedure generally apply to all cases not yet final. *See* ***State v. Koch***, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993). At the suppression hearing, which occurred on December 4, 2004, the trial court properly relied on the showup analysis described in ***Wolverton***.

¶15 The ***Wolverton*** standard for suppressing identification from a showup was discussed by our supreme court in ***Dubose***, with considerable emphasis on the criticisms of the ***Wolverton*** method which have been expressed in numerous articles and research. *See* ***Dubose***, 285 Wis. 2d 143, ¶¶30-31. "Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness." ***Id.***, ¶31. "It is now clear to us that the use of unnecessarily suggestive evidence resulting from a showup procedure presents serious problems in Wisconsin criminal law cases." ***Id.***, ¶32. At a minimum, the new standards announced in ***Dubose*** significantly modify the teachings of ***Wolverton*** and its progeny.[7] The court held:

> 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

[7] The court in ***Dubose*** held, at note 9:

> As a result of our return to the United States Supreme Court's *Stovall* approach, we now withdraw any language in [*State v.*] *Wolverton*, 193 Wis. 2d [234,] 533 [N.W.2d 167 (1995)], in *State v. Streich*, 87 Wis. 2d 209, 274 N.W.2d 635 (1979), as well as in the court of appeals' decision in *State v. Kaelin*, 196 Wis. 2d 1, 538 N.W.2d 538 (Ct. App. 1995), and in cases cited therein, that might be interpreted as being based on the Wisconsin Constitution. Those cases were based on the United States Constitution and focused more on the reliability of the identification than on the necessity for a showup.

> 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. A lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification. *See* Richard Gonzalez et al., *Response Biases in Lineups and Showups*, 64 J. of Personality & Soc. Psych. 525, 527 (1993). In a showup, however, the only option for the witness is to decide whether to identify the suspect. *See id.*

Dubose, 285 Wis. 2d 143, ¶33 (footnote omitted).

¶16 The presumption described in ***Dubose*** is that a showup identification is not generally admissible unless the State affirmatively establishes exigent circumstances necessitating a showup and the showup is conducted with scrupulous attention to minimizing the suggestiveness inherent in the process. To prevent "the suggestiveness of the police procedures used in garnering an individual's identification," ***Dubose*** requires a new approach to showup identifications. *See* ***id.***, ¶14. The court explains:

> - [A]n out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. ***Id.***, ¶33.
>
> - 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.***
>
> - If and when the police determine that a showup is necessary, special care must be taken to minimize potential suggestiveness. ***Id.***, ¶35.
>
> - [I]t is important that showups are not conducted in locations, or in a manner, that implicitly conveys to the witness that the suspect is guilty. ***Id.***
>
> - Showups conducted in police stations, squad cars, or with the suspect in handcuffs that are visible to

> any witness, all carry with them inferences of guilt, and thus should be considered suggestive. ***Id.***
>
> - [A]n eyewitness should be told that the real suspect may or may not be present, and that the investigation will continue regardless of the result of the impending identification procedure. ***Id.***

¶17 The record demonstrates that each factor the ***Dubose*** court described as suggestive was present here. There was no imminent danger to the victims. There were no exigent circumstances prohibiting a lineup. A lineup was an easily-available alternative. Cooper lived seven blocks from the police station and the showup occurred only four blocks from either Cooper's house or the station. The showup was conducted the day after the incident. The showup was conducted in a location implicitly suggesting guilt—i.e., Cooper was in the back of or near a squad car near the victims' residence. The witnesses were told the police "had someone that we wanted them to identify." The witnesses saw Cooper in a squad car and recalled that Cooper was in handcuffs. When Cooper was out of the squad car, there was a uniformed officer on each side of Cooper. The police question implicitly suggested guilt, in that the police asked each witness "Is this the person that battered you?" Each witness heard and saw the other's response because they made their identifications orally in the presence of each other, and both were about twenty feet from Cooper at that time.

¶18 The State argues that the showup was necessary under ***Dubose*** because, before the showup, the police did not have probable cause to arrest Cooper as the description of the assailant which the police had obtained the previous day from the showup witnesses (i.e., a black male, six feet one, weighing 180-200 pounds, in his twenties) could easily apply to a very large percentage of the male population of Milwaukee County. The State relies on the supreme court's statement that: "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.***, 285 Wis. 2d 143, ¶33 (emphasis added). The State invites us to read that language in isolation from the rest of the analysis to conclude that our supreme court authorized a showup any time the police lack probable cause to make an arrest. We are not persuaded that ***Dubose*** can be so narrowly read.

¶19 Our supreme court announced the new rules although the facts before it in that case established probable cause to arrest Dubose. ***Id.***, ¶36. If the lack of probable cause to arrest is to be an automatic exemption from the requirements of ***Dubose***, while the failure to comply with the ***Dubose*** safeguards can be used to supply the missing probable cause, a perverse incentive is created to conduct more, rather than fewer, showups and, thus, frustrates the search for reliable identifications which ***Dubose*** makes clear is the objective. *See* ***id.***, ¶29-30 ("Over the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore…. These studies confirm that eyewitness testimony is often 'hopelessly unreliable.'" (citation omitted)). We decline to adopt such a narrow reading of the court's decision. If the State does not establish exigent circumstances which make a showup necessary, the State must show by clear and convincing evidence that subsequent identification of the defendant was not tainted by the showup. ***Id.***, ¶38 ("[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.'").

¶20 Here, the record contains no evidence that the in-court identifications of Cooper by Ida Hollins and Ester Hodges were the result of

anything other than the showup. When the trial court found that "in my mind" the identification was not tainted, the court appears to have based that conclusion on the firmness with which Ester Hodges announced in trial her belief that Cooper was the assailant, and on the court's own conclusion that she was credible. Credibility and expression of firm belief in court before the jury by the witness begs the question of how the witness came by that belief. Nothing in the record except the showup provides an explanation for how Ester Hodges came to conclude that Cooper was the assailant. Nothing that either witness told police before the showup uniquely described Cooper as distinct from thousands of other men of the same general age, race and build who live in Milwaukee County. There is no evidence that either showup witness had any prior acquaintance with Cooper before the showup. In short, nothing in the record explains their identifications of Cooper in court other than their participation in the showup.[8]

¶21 The State cannot be relieved of its obligation to prove that the in-court identification was untainted by the showup as ***Dubose*** requires simply because Cooper has also alleged ineffective assistance of counsel. To ignore a burden on the State under ***Dubose*** because a defendant claims he is represented by ineffective trial counsel would effectively erase the holdings of ***Dubose***. This court may not ignore our supreme court's holdings. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997).

[8] Because of the unusual situation here where all of the State's civilian witnesses are family members, the reach of the effect of the showup may be broader than subsequent identification by the showup participants. We express no opinion on this question because the trial court will have the pretrial opportunity to determine whether the State can establish by clear and convincing evidence that there is an independent basis for in-court identifications by persons participating in or having knowledge of the showup identifications.

¶22 Cooper's postconviction ***Dubose*** motion to suppress the showup and the subsequent in-court identifications should have been granted. Cooper satisfied all of the requirements established by ***Dubose***. The record establishes that there was no exigent circumstance necessitating the showup and that the showup was inherently suggestive. Ester Hodges identified Cooper in response to a specific question. In her testimony, Ida Hollins and the State repeatedly referred to Cooper by name in the presence of the jury which has the same effect as directly asking whether she saw the assailant in the courtroom. The State produced no clear and convincing evidence that Ida Hollins' and Ester Hodges' in-court identifications were based on independent sources free from the showup confrontation.

II. ***Strickland*** *standards applied to the* ***Dubose*** *violation*

¶23 In order to prove an ineffective assistance of counsel claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland***, 466 U.S. at 687; ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. ***Pitsch***, 124 Wis. 2d at 636-37. As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. ***Id.*** A claim of ineffective assistance of counsel presents a mixed

question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶24 Here, the trial court did not decide whether trial counsel's performance was deficient. Trial counsel admitted that he was completely unaware of ***Dubose***, the controlling law applicable to this case. Failure to be aware of controlling law, in the jurisdiction in which one is practicing, is deficient performance. *See* ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305 (trial counsel's failure to understand statute is deficient performance as a matter of law); ***State v. Felton***, 110 Wis. 2d 485, 504, 329 N.W.2d 161 (1983) (ignorance of statutorily-authorized defense and subsequent failure to investigate constitutes ineffective assistance of counsel); ***State v. DeKeyser***, 221 Wis. 2d 435, 451, 585 N.W.2d 668 (Ct. App. 1998) ("Trial counsel is expected to know the law relevant to his or her case."), *overruled on other grounds by* ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

¶25 Deficient performance based on ignorance of the law cannot be excused as a "strategic" choice. *See* ***Thiel***, 264 Wis. 2d 571, ¶51. "Strategic choices made after counsel's thorough investigation of the facts *and law* are nearly unchallengable." ***Strickland***, 466 U.S. at 690 (emphasis added). Here, trial counsel elicited damaging testimony *about the showup* which the State had avoided. He explained as strategy eliciting this damaging testimony in which he allowed both Ida Hollins and Ester Hodges to support their in-court identification by explaining that they had each previously identified Cooper to the police. Trial counsel explained this testimony as part of a challenge to the witnesses'

credibility. How advising the jury that each witness had previously identified the defendant as her assailant could possibly have a negative effect on her credibility is an incomprehensible suggestion and cannot be a reasonable strategic choice.

¶26 Catherine Hollins and Tonanisha Hodges testified about batteries to five members of their family. The only two for which Cooper was convicted involved Ida Hollins and Ester Hodges. The record shows that Ida Hollins and Ester Hodges both identified Cooper for the first time in the showup which, as we have seen, violated the requirements of ***Dubose***. It is impossible to say that the outcome of the trial would probably have been the same if identifications that originated with the showup had not been allowed during the trial. *See* ***State v. Mayo***, 2007 WI 78, ¶47, ___ Wis. 2d ___, 734 N.W.2d 115 (Our inquiry in determining whether a constitutional error was harmless is: "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" (citation omitted)); ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74 (holding that an "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'" (citation omitted)).

¶27 Because the trial court improperly relieved the State of its burden of proof under ***Dubose***, and because there is no evidence that the in-court identifications were totally independent of the showup identification, Cooper is entitled to a new trial under ***Dubose***. In addition, Cooper is entitled to a new trial under ***Strickland*** because he has established deficient performance and prejudice. The trial court will have the opportunity pretrial to insure that the trial will be free from identifications influenced by the showup identification.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT RULE 809.23(1)(b)4.