COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2008

David R. Schanker
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. 2007AP350

Cir. Ct. No. 2002CF166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN A. LIMEHOUSE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Steven A. Limehouse appeals from related orders summarily denying his motions for postconviction relief and for reconsideration. The issue is whether Limehouse's belated realization that he could have sought to apply ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582, on

direct appeal constitutes a sufficient reason for failing to previously raise ***Dubose***'s potential applicability while representing himself on direct appeal. We conclude that Limehouse's failure to "foresee" or timely raise the potential applicability of ***Dubose*** prior to his judgment becoming final is not a sufficient reason to circumvent the general rule that collateral review should not be used to retroactively apply a new rule that was not expressly intended to apply retroactively. Therefore, we affirm.

¶2 A jury found Limehouse guilty of two counts of robbery and one count of fleeing from a police officer. The trial court imposed consecutive sentences resulting in an aggregate sentence of thirty-eight years, comprised of a twenty-four-year, nine-month aggregate period of initial confinement and a thirteen-year, three-month aggregate period of extended supervision. Limehouse explicitly admitted that he "completely underst[oo]d" the perils of proceeding *pro se* before he terminated his representation on direct appeal, and was allowed to dismiss his direct appeal. He then represented himself in postconviction proceedings and on direct appeal. This court affirmed the trial court's judgment of conviction and order denying his motion for postconviction relief. ***State v. Limehouse***, No. 2004AP2480-CR, unpublished slip op. (WI App Oct. 13, 2005). Limehouse unsuccessfully sought reconsideration from us, and supreme court review. His conviction became final on March 16, 2006.[1]

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[1] A conviction becomes final after a direct appeal from that judgment and any right to directly review the related appellate decision are no longer available. *See* ***State v. Howard***, 211 Wis. 2d 269, 282 n.8, 564 N.W.2d 753 (1997) (citing ***Griffith v. Kentucky***, 479 U.S. 314, 321 n.6 (1987)), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765.

¶3 Limehouse was initially identified as a perpetrator in one of the robberies in a show-up identification. Limehouse moved to suppress that identification, however, the trial court explained why it summarily denied his suppression motion. In his direct appeal, Limehouse did not pursue his suppression challenge. While Limehouse's direct appeal was pending, the supreme court decided ***Dubose***, in which it held that show-up identifications are inherently suggestive and inadmissible unless, under the totality of the circumstances, the show-up procedure was "necessary," such as when the police lacked probable cause to arrest, or exigent circumstances prevented a lineup or a photo array. *See* ***Dubose***, 285 Wis. 2d 143, ¶33. Although it is only arguable that ***Dubose*** would have changed the outcome for Limehouse on direct appeal, ***Dubose*** would have permitted Limehouse to pursue the trial court's denial of his suppression motion, which he had preserved in the trial court. ***Dubose*** was decided July 14, 2005; we decided Limehouse's direct appeal on October 13, 2005. Remittitur occurred on March 16, 2006.

¶4 ***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.

> New rules merit retroactive application on collateral review only in two instances. In the first instance, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Second, a new rule should be applied retroactively if it requires observance of those procedures that are implicit in the concept of ordered liberty.

State v. Howard, 211 Wis. 2d 269, 282, 564 N.W.2d 753 (1997) (citations omitted), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765. ***Dubose*** does not meet either of the two exceptions

that merit retroactive application on collateral review. Generally (unless stated otherwise in the decision announcing the new rule), the new rule arguably applies to all pending cases (that are not yet final); consequently, ***Dubose*** could have been applied to Limehouse's suppression challenge before he had exhausted all avenues of direct review of his judgment. *See* ***Howard***, 211 Wis. 2d at 282. A holding that does not explicitly apply retroactively, however, generally does not apply to challenges on collateral review. *See* ***State v. Lo***, 2003 WI 107, ¶¶77-85, 264 Wis. 2d 1, 665 N.W.2d 756; ***Howard***, 211 Wis. 2d at 282.

¶5 Limehouse did not request this court or the supreme court to consider ***Dubose***'s applicability and seek to pursue the denial of his suppression motion while his direct appeal was pending. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) (requiring a defendant seeking to initially raise an issue on collateral review to allege a "sufficient reason" for failing to previously raise that same issue on direct appeal). Limehouse's reason for failing to alert this court (or the supreme court while his petition for review was pending) to ***Dubose***'s potential applicability was that "[h]e did not foresee [***Dubose***'s] subsequent effect" (essentially because of his *pro se* status); however, he had affirmatively elected to proceed *pro se* on direct appeal. Limehouse had not pursued the denial of his suppression motion in his direct appeal; consequently, we could not have divined the applicability of the recent ***Dubose*** holding to Limehouse's appeal unless we had been affirmatively notified.[2]

[2] Although Limehouse had not raised the suppression issue in his direct appeal, ***Dubose*** would have arguably provided good cause to grant Limehouse leave to raise that issue and file supplemental briefing.

¶6 Limehouse had several months to alert the appellate courts to ***Dubose***'s potential applicability to his direct appeal, which was not decided or final until three and eight months respectively after the ***Dubose*** decision. His unawareness of ***Dubose*** is one of the risks he assumed when he elected to terminate his representation and proceed *pro se*. Limehouse's reason for failing to alert us or the supreme court to ***Dubose***'s potential applicability to his direct appeal while it was pending, namely, his ignorance of ***Dubose*** because he elected to proceed *pro se*, is not sufficient to circumvent the general rule preventing retroactive application of a new rule on collateral review. *See* **Howard**, 211 Wis. 2d at 282. If it were, the rule precluding retroactive application on collateral review would be circumvented by every defendant alleging his or her ignorance of the new rule while his or her direct appeal was pending.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).