

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP802-CR

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 and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Jason R. Dodd appeals from a judgment of conviction for armed robbery, and from a post-remand order confirming the denial of his suppression motion applying *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. The issue is whether the showup identification conducted

prior to *Dubose* would have nevertheless been valid pursuant to *Dubose*'s exigent circumstances exception. We conclude that the showup identification was justified under the totality of the circumstances pursuant to the exigent circumstances exception in *Dubose*. Therefore, we affirm.

¶2 We reiterate the facts of this case from our previous opinion.

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.

The vehicle Arvan was in circled around the block and [he] 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.

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.

State v. Dodd, No. 2005AP492, unpublished slip op., ¶¶2-4 (WI App Apr. 4, 2006).

¶3 Before trial, Dodd moved to suppress the showup identification, which the trial court denied. After Dodd had been found guilty by a jury, sentenced, and was pursuing his direct appeal, the Wisconsin Supreme Court announced new procedures for the admissibility of showup identifications in *Dubose*, which we agreed should apply to Dodd's case. See *Dodd*, No. 2002AP492, unpublished slip op., ¶¶8-9. *Dubose* held that show-up identifications are inherently suggestive and inadmissible unless, under the totality of the circumstances, the showup 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. We therefore remanded this matter to the trial court to give the State "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." *Dodd*, No. 2002AP492, unpublished slip op., ¶12.

¶4 The trial court conducted an evidentiary hearing at which Milwaukee Police Lieutenant Detective Alfonso Morales testified. Morales was the detective who interviewed Arvan at the scene. Following Morales's testimony and counsels' arguments, the trial court reviewed *Dubose* and ultimately determined that "under the totality of the circumstances the decision that this [showup identification] was necessary due to exigent circumstances is supported by the record and the evidence." Dodd appeals from the post-remand order.

¶5 The issue at the evidentiary hearing was whether "the showup identification was justified by exigent circumstances." *Dodd*, No. 2002AP492, unpublished slip op., ¶12. Exigent circumstances are defined as:

- (1) An arrest made in “hot pursuit,”
- (2) a threat to safety of a suspect or others,
- (3) a risk that evidence would be destroyed, and
- (4) a likelihood that the suspect would flee.

State v. Smith, 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986) (citation omitted). *Smith* further reminded “that a review of exigent circumstances be directed by a flexible test of reasonableness under the totality of the circumstances.” *Id.* (citations omitted).

¶6 At the remand hearing, Morales testified that Arvan and the two other recruiters he was with were witnesses who had observed the scene and the aftermath of the robbery. All three were military recruiters from Michigan. Morales explained why he conducted the showup identification as he did. Morales testified:

I mean, to hold a witness – this incident occurred approximately 9:35 in the evening. I had responded to help out on witness interviews at 10:30. They’re already – you have cooperative witnesses that are there over an hour. The line-up [presumably Morales meant the showup] wasn’t executed till 11:00. It was – I mean it’s a big inconvenience when you have cooperative witnesses standing around. Furthermore, holding on to a witness for multiple hours to conduct a line-up at the jail, that would not have been practical.

During re-cross-examination, Morales testified that he could not have conducted a line-up identification within a couple of hours, although he could have conducted a line-up within a day. He also explained that “[t]hese people, this witness as well as others would have been out of the city by then.”

¶7 The trial court recalled the significant testimony in its oral decision. “[Arvan] was an active military duty recruiter,” who was in Milwaukee for “a very

short period of time and was leaving in the morning.” The armed robbery occurred at approximately 9:30 on a Sunday evening. Police interviewed Arvan shortly after 10:30 p.m., and asked if he thought he could identify the suspect; Arvan thought that he could. Arvan was leaving Milwaukee Monday morning and “was not going to be available, it was unclear what the availability of [Arvan] was going to be in the future because of the – his military duty.” Police asked Arvan and the other recruiters to return to the scene of the robbery to wait for them. Arvan waited at the scene and shortly after 11:00 p.m., Dodd returned to the scene with police, and Arvin identified Dodd with certainty as the person he saw.

¶8 The trial court was mindful that Arvan was “a disinterested witness” who “was not under the stress ... of the incident.” Arvan “simply stepped forward and gave his observations objectively to the Police Department and they acted upon that information while he was available.”

¶9 The trial court focused on the third definition of exigent circumstances, namely, “the risk that evidence would be destroyed,” and concluded that the police acted reasonably “under the pressure of the circumstances that existed at that time, they needed to act and ... make a record of this identification while it could be made, while it was available to them.” The trial court was also mindful that the police department was investigating this incident prior to *Dubose*. Nevertheless, the trial court concluded that the police had complied with *Dubose* while conducting this investigation and identification. The trial court determined that nothing indicated that due process was violated, or that the identification was unreliable. The trial court concluded “that under the totality of the circumstances the decision that this [the showup identification] was necessary due to exigent circumstances is supported by the record and the evidence.”

¶10 Had Morales not sought a showup identification, he risked the loss of identifying the suspect. Arvan was in the military and was leaving the area the next morning, and Morales testified that he could not have constructed a line-up within a couple of hours. We independently conclude that the totality of the circumstances justified a showup identification because the exigent circumstances of Arvan's immediate but highly limited availability to identify the suspect was likely to be lost absent a showup identification. Despite the fact that *Dubose* had not been decided at the time of this showup identification, this identification nevertheless complied with *Dubose*. See *Dubose*, 285 Wis. 2d 143, ¶33. We therefore affirm the trial court's remand order determining the existence of exigent circumstances justifying the showup identification, and affirm the judgment of conviction.

By the Court.—Judgment and order affirmed.

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

