

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2010

A. John Voelker
Acting 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. 2009AP2559

Cir. Ct. No. 2003CF359

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS L. RILEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Marcus Riley, pro se, appeals from the denial of his postconviction motion alleging ineffective assistance of counsel. We reject Riley's arguments and affirm.

¶2 Riley was convicted by a jury of one count of armed robbery as a habitual criminal. The circuit court sentenced him to thirteen years' initial confinement and ten years' extended supervision. On direct appeal, Riley filed a postconviction motion alleging trial counsel was ineffective for failing to file a motion to suppress his identification pursuant to a show-up procedure. He relied upon *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, which was decided after his trial. The circuit court denied the postconviction motion on the grounds it did not constitute ineffective assistance to rely upon the law as it stood at the time of pretrial motions and throughout trial. We affirmed. *State v. Riley*, No. 2007AP1946-CR unpublished slip op. (April 8, 2008).

¶3 Riley subsequently filed a postconviction motion pursuant to WIS. STAT. § 974.06.¹ In that motion, Riley conceded that trial counsel could not have raised the *Dubose* issue pretrial or during trial, but claimed that postconviction counsel was ineffective for failing to challenge the show-up procedures at sentencing. The circuit court denied the motion without a hearing. Riley now appeals.

¶4 In his WIS. STAT. § 974.06 proceeding, Riley attempts to revisit the ineffective assistance argument we decided on direct appeal. Postconviction counsel on direct appeal argued that trial counsel should have raised the *Dubose* issue. Postconviction counsel recognized that *Dubose* was decided after Riley's trial, but contended that counsel should have filed a suppression motion once our supreme court issued its decision in *Dubose*. We rejected that argument,

¹ References to Wisconsin Statutes are to the 2007-08 version unless noted.

concluding that counsel's performance had to be judged with respect to the law as it stood at trial:

Though he concedes *Dubose* was not decided at the time, he states the case was on appeal and his counsel therefore should have filed a suppression motion. We judge counsel's performance based on the state of the law at the time counsel acted. *Smith v. Murray*, 477 U.S. 527, 536-37 (1986). Riley's attorney's actions were reasonable given the state of the law at the time. Additionally, Riley's attorneys called an expert witness at trial to challenge the reliability of the identification. This was a strategic choice that was reasonable in light of the law at the time. There was no deficiency.

Riley, supra, slip op. at 4 (footnote omitted).

¶5 A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Because Riley raises an issue that he previously litigated and lost, the argument is barred by issue preclusion. *Id.*

¶6 Riley insists his claim is not duplicative because "postconviction counsel did not argue that trial counsel was ineffective for failing to brief the *Dubose* issue at sentencing but rather focused on trial counsels' errors prior to trial." Riley asserts that *Dubose* was decided prior to sentencing, "and counsel should have and could have filed a motion with the courts citing the new procedural law prior to sentencing." We are unpersuaded that postconviction counsel's claims on direct appeal were significantly different from Riley's present claim. In addition, challenging the show-up procedure at sentencing would not have been relevant to the proceeding, which was to decide the proper sentence once the jury had determined Riley's guilt. In fact, at sentencing, Riley admitted his guilt and asked the victim for forgiveness.

¶7 Riley also claims his counsel was ineffective for failing to object at trial to the admission of a gray T-shirt that police found with a gun hidden near the place where Riley was apprehended. When the State offered the T-shirt as evidence at trial, defense counsel did not object. Riley now claims the T-shirt differed in description from the T-shirt the victim said the robber was wearing.² In addition, Riley contends DNA testing proved the T-shirt was not his.

¶8 During a trial for armed robbery, a shirt of the same color as described by the victim, found with a gun near the apprehension of the defendant is certainly relevant. *See* WIS. STAT. § 904.01. Riley’s arguments merely go to the weight of the evidence. In that regard, defense counsel used the discrepancies in the victim’s description to attempt to discredit the victim’s identification, instead of objecting to the admission of the T-shirt. Counsel also argued that there was nothing connecting Riley to the shirt and, further, that the shirt may not even have been involved in the robbery.

¶9 Riley insists, “The t-shirt was tested for DNA, Riley’s DNA was not on this t-shirt and postconviction counsel was ineffective in failing to allege that trial counsel was ineffective for failing to challenge this evidence in any way.” Riley fails to provide citations to the record on appeal indicating the results of DNA testing on the shirt. Even assuming Riley’s DNA was not recovered from the shirt, however, such a fact would not prove he was not wearing the shirt. The evidence suggested that Riley was wearing two other shirts under the gray shirt – a

² The victim described a gray T-shirt with black symbols, whereas the T-shirt admitted at trial had a yellow and orange Harlem Globetrotters logo.

blue one and a white one.³ Contrary to Riley's perception, it does not necessarily follow that any perspiration would have been absorbed by the gray shirt. Furthermore, the State submitted testimony showing that it is very common that no DNA is recovered from evidence.

¶10 It did not constitute deficient performance for counsel to refrain from objecting to the admission of the gray T-shirt. Evidence that no DNA was recovered from the gray T-shirt would not have been a reason for objecting to the admission of the shirt into evidence. At most, it would have provided counsel with an argument that the State had insufficient proof the shirt belonged to Riley. In fact, counsel argued that the State had no DNA evidence connecting Riley to the shirt. Moreover, counsel argued that the discrepancies in the victim's description of the gray T-shirt suggested the shirt was not even the one involved in the robbery. Thus, counsel was able to use the discrepancies in the description of the gray T-shirt and the lack of DNA evidence to argue that the State had not proven Riley was connected to the robbery. In closing argument, counsel argued:

There's no DNA, there's no fingerprints, there's no videotape. They don't show up at every case, and that's understood. But there is nothing other than Ms. Galyardt, what she described as a fairly common blue bandana, railroad type, and that you see all over, and the fact that Marcus Riley ran from the police and wasn't entirely truthful with people he encountered.

³ Police officers testified that they responded to a report of an armed robbery of a gas station. An officer observed an individual matching a description of the robber. After twice being commanded to stop, the individual ran from police. Officers established a perimeter and apprehended Riley behind a residence. When officers approached, Riley was taking off a blue T-shirt. Riley had a white undershirt underneath the blue T-shirt. Riley also had a bandana in the pocket of his blue jeans when taken into custody, matching the description provided by the victim. Officers found the gray T-shirt described by the victim and the gun located near some broken-down fencing lying beneath some trees.

¶11 Riley was not prejudiced in any event by counsel's failure to object to admission of the T-shirt at trial. As we recognized in denying Riley's ineffective assistance of counsel claim on direct appeal, the evidence of guilt at trial was overwhelming:

Riley matched the description of the suspect given to police. He was roughly the same height as described and wearing similar clothing. A weapon matching the eyewitness' description was found close to where the officers found Riley. Riley was found near the scene of the crime within twenty minutes of the offense. Additionally, he was in the possession of a blue and white bandana that matched the eyewitness description of the bandana the perpetrator wore to partially cover his face.

Riley, supra, slip op. at 4-5. The circuit court properly denied Riley's motion.

By the Court.—Order affirmed.

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

