COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2966-CR **Cir. Ct. No. 2009CF996**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH O. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Kenneth O. Davis appeals a judgment of conviction entered on his guilty plea to a charge of armed robbery. Davis argues the circuit court erred in denying his motion to suppress the results of a show-up identification procedure. For the reasons that follow, we affirm.

BACKGROUND

¶2 In the early morning hours of August 22, 2009, Kenosha police officer Mark Poffenberger received a dispatch of a possible robbery. Upon arriving at the scene of the alleged robbery, the two victims reported that, as they were going to their car behind their house, a man they later identified as Davis approached them with a gun drawn and took their money and cellphones. A witness at the scene reported that he saw Davis run behind a house about two blocks away from where the robbery took place. The witness provided a detailed description of the alleged robber.

¶3 Within five minutes after arriving on the scene, police, including Poffenberger, set up a perimeter around the house identified by the witness. Approximately twenty to thirty minutes thereafter, Davis appeared on the east side of the house centered within the perimeter, going first onto the house's front porch and then approaching police standing on the street.[1] Complying with Poffenberger's directions, Davis stopped eight to ten feet in front of him, then turned around with his hands behind his back and backed up toward the officer, agreeing to allow Poffenberger to search him. Poffenberger found a "wad of cash" in Davis's back pocket in various denominations; the total amount was more than the amount reported stolen in the robbery.[2]

[1] In explaining why he was there, Davis claimed he had ridden his bike over earlier in the evening to visit another friend, and came to this house because he knew some of the residents.

[2] Davis initially told police that this money was collected for him and his family at a family reunion held earlier in the day.

¶4 As part of the investigation, Davis was detained (sitting unrestrained on the street curb) because he matched part of the description of the robber. Poffenberger maintained a distance of approximately five to six feet from Davis during this time. Upon running his identification, police discovered Davis was on probation. Crime scene supervisor Lieutenant Steven Larson directed Poffenberger to ask Davis if he had been drinking as this would have been a probation violation and would have permitted police to hold Davis for a potential line-up. Davis answered no and as Poffenberger noted no signs of intoxication, the police concluded they had no probable cause to hold Davis on a probation violation or to take him into custody for any purpose.[3]

¶5 At this point, Larson ordered a show-up identification procedure. In concluding that the show-up was necessary, Larson testified at the motion hearing that: "I'm missing probable cause to arrest for a state statute violation, ordinance violation. There were no active commitments, no warrants, no probation holds. There's no establishment for foundation for a no drink hold." "There was absolutely no probable cause to make any type of arrest on Mr. Davis at that time, none whatsoever."

¶6 Officer Brian Ruha was taking a statement from one of the victims when he was told to conduct a show-up identification. In conducting the show-up identification procedure, Ruha followed the Kenosha Police Department Show-Up Eyewitness Identification Instructions form. Ruha drove the victim to Davis, had Davis stand up from the curb and shined the squad car's headlights onto him.

[3] Officer Poffenberger testified that in his experience if an individual on probation did not admit drinking, the Wisconsin Department of Corrections would not authorize a probation hold.

Upon seeing Davis's face, one victim immediately stated, "that's who robbed me" and that he was "one hundred percent sure." The second victim also identified Davis during a separate show-up identification procedure conducted shortly after the first procedure and in the same location as the first. Davis was then placed under arrest.

¶7 After his arrest, police first noticed the smell of intoxicants on Davis's breath. In assisting Davis enter the door of the police station, Officer James Krein held Davis's arm and spoke to him at close quarters. Krein then informed Davis that he could smell intoxicants on his breath and asked Davis if he had been drinking. Davis replied yes.

¶8 Davis was charged with two counts of armed robbery and one count of being a felon in possession of a fire arm. Davis filed a motion to suppress the identifications (both the show-up identification and any subsequent in-court identification). He argued that (1) the show-up identification procedure was not "necessary" within the meaning of ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, because there was probable cause to arrest him; and that (2) the show-up identification procedure was impermissibly suggestive under ***Dubose***. After hearing evidence over two days,[4] the circuit court denied Davis's motion. The court found the testimony of witnesses called by the State to be "very credible," and specifically credited testimony that the police did not notice intoxicants on Davis's breath before the show-up identification procedure was administered. It then concluded that, because the money found on Davis did not

[4] The circuit court heard testimony on the motion on November 13, 2009 and March 5, 2010.

match up exactly with the money reported taken in the robbery and the suspect's description was "generic," police correctly determined that they did not have probable cause to arrest and therefore utilizing the show-up identification procedure was necessary. Finally, the court concluded that the show-up procedure, as conducted, was not impermissibly suggestive and well within the time limits required by law.

¶9 Under a plea agreement, Davis was convicted of one count of armed robbery. Davis appeals his judgment of conviction.

DISCUSSION

¶10 On appeal, Davis does not pursue the arguments he made in the circuit court. That is, he does not contend that there was probable cause to arrest him and therefore the identification procedure was not "necessary" under ***Dubose***. He also does not challenge the procedure as being impermissibly suggestive. Instead, his argument on appeal is that, even if there was not probable cause to arrest him, a show-up identification procedure is not "necessary" under ***Dubose*** unless there was both reasonable suspicion for the stop and it would have been impossible to later conduct a photo-array identification procedure. According to Davis, there was no reasonable suspicion to stop him and that it would not have been impossible to later conduct a photo-array identification. Davis did not make any of these arguments he now raises on appeal in the circuit court.

¶11 Generally, we do not consider issues raised for the first time on appeal. ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We apply this rule when the circuit court has not had the opportunity to "pass" on the issue. ***Hopper v. Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). This rule is one of judicial administration and we may

choose to address an issue raised for the first time on appeal in the exercise of our discretion, depending upon the facts and circumstances of each case. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (judicial administration); ***Hopper***, 79 Wis. 2d at 137 (depending upon the facts and circumstances of each case).

¶12 For instance, we have considered issues raised for the first time on appeal where "compelling circumstances" exist, or where there is a reason to do so. *See* ***Sears v. State***, 94 Wis. 2d 128, 140, 287 N.W.2d 785 (1980) (compelling circumstances); ***Segall***, 114 Wis. 2d at 489-90 (a reason to do so). We may also consider arguments raised for the first time on appeal when the issue is solely a question of law that is not dependent upon further fact finding to resolve the issue, or the forfeited issue is a matter of state-wide importance or interest. *See* ***Helgeland v. Wis. Municipalities***, 2006 WI App 216, ¶9 n.9, 296 Wis. 2d 880, 724 N.W.2d 208 (matter of law); ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300, ¶¶11-12, 249 Wis. 2d 142, 638 N.W.2d 355 (state-wide importance; we may review a question of law raised for the first time on appeal if not dependent on the facts developed in the circuit court).

¶13 This case does not meet any of the above circumstances. We acknowledge that the issue of whether the absence of probable cause to arrest "automatically" renders a show-up identification procedure necessary under ***Dubose*** is a question of interpreting the supreme court's decision in ***Dubose*** and therefore a question of law. However, a resolution of this legal issue and the other legal issues Davis discusses will not resolve the appeal. Davis's argument also depends upon a conclusion that there was no reasonable suspicion to detain him and that it would be impossible to later conduct a photo-array. Our review of the record shows that Davis had the opportunity to raise these issues in his motion to

suppress and during the hearing on his motion, and he failed to do so.[5] Whether reasonable suspicion exists to stop and detain an individual requires factual findings, as does whether it would be impossible to later conduct a photo-array, and the record reveals that the court made no such findings. Thus, the circuit court did not have the opportunity to "pass" on these issues. *See* ***Hopper***, 79 Wis. 2d at 137.

¶14 Accordingly, because none of Davis's arguments raised in this appeal were first presented to the circuit court, and because the arguments he did raise in the circuit court are not raised in this appeal, we conclude that Davis has forfeited all arguments in support of his appeal of the circuit court's order denying Davis's motion to suppress evidence. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[5] We also observe that, not only did Davis not argue in the circuit court that there was no reasonable suspicion, the argument he did make was inconsistent with no reasonable suspicion. He argued there was probable cause to arrest him and therefore the show-up identification was not necessary.