COURT OF APPEALS
DECISION
DATED AND RELEASED

October 2, 1996

No. 95-2052-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY MC MORRIS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. Ricky McMorris is charged with armed robbery contrary to § 943.32(1) and (2), STATS. Prior to trial, law enforcement officers conducted a postindictment lineup at which the victim identified McMorris. However, the lineup was conducted without the knowledge or presence of McMorris's attorney. McMorris filed a motion to

suppress both the out-of-court lineup identification and any ensuing in-court identification. The trial court denied the motion. We previously granted McMorris's petition for leave to appeal the trial court's ruling.

We hold that the postindictment lineup identification must be suppressed because McMorris's attorney was not present at the lineup. We therefore reverse this portion of the trial court's ruling. However, we agree with the court's further ruling that the victim's in-court identification was not tainted by the lineup identification. We therefore affirm this portion of the court's ruling.

FACTS[1]

On December 3, 1994, Patricia Jordan was working as a cashier at the Pet Dairy Grocery Store in the Town of Mount Pleasant in Racine County. At approximately 5:00 p.m., a man entered the store, laid change on the counter and asked for a quarter. When Jordan opened the register, the man produced a large knife and directed Jordan to leave the cash drawer open. The man then removed the cash drawer, took approximately $50 and exited the store. Jordan called the police. A videotape taken by a surveillance camera reveals that the incident lasted approximately twenty-five seconds.

Mount Pleasant Officer Jason Wortock responded to the report of the robbery and interviewed Jordan. Jordan described the robber to Wortock as an African-American male, approximately six feet tall, wearing a white golf cap

[1] Most of these facts are taken from the trial court's written findings entered after the suppression hearing. Other facts are from the evidence presented at the hearing.

and a brown jacket. Wortock's testimony is unclear as to whether Jordan told him that the robber had facial hair. Wortock first testified that Jordan said that the robber did not have facial hair. Later, he testified that Jordan did not say one way or the other whether the robber had facial hair. Still later, Wortock testified that he did not recall asking Jordan whether the robber had facial hair or whether Jordan had made any description about facial hair. Jordan's testimony, however, is that she did not notice whether the robber had facial hair. Jordan also stated that she was wearing her glasses at the time of the robbery and that the lighting conditions in the store were bright.

Jordan also told Wortock that the robber's knife was a large kitchen knife with a thirteen- to fourteen-inch single-edged blade and a wooden handle. She said that the knife and the robber's golf cap were the two things she best remembered.

That same day, the police displayed six photos to Jordan. McMorris's photo was included in this array. Jordan did not identify any of the persons depicted in the photo array.

Later, the case investigator and another officer viewed the surveillance tape. Based on these viewings, both officers suspected that McMorris was the robber. McMorris was charged with the robbery, and Attorney John Campion was appointed as counsel for McMorris.

The Racine County District Attorney's Office arranged for a lineup to be held on January 9, 1995. The lineup array consisted of five African-

American males, including McMorris, who were of approximately the same height, weight and age. All of the men had facial hair. After first asking another man in the lineup to step forward, Jordan then identified McMorris as the robber. Although the district attorney's office knew that McMorris was represented by Campion, it failed to inform Campion of the lineup. As a result, Campion was not present at the lineup.

McMorris filed a motion to suppress the lineup identification because it was conducted in the absence of his appointed counsel. Despite the constitutional violation, the trial court denied the motion to suppress. The court held that suppression was not appropriate because the police had acted in good faith and the lineup procedure was not otherwise impermissibly suggestive. Instead, the court held that McMorris's remedy was for the court to advise the jury of the constitutional violation.

McMorris also moved to suppress the victim's in-court identification, claiming that it had been tainted by the illegal out-of-court lineup and did not stem from an independent origin.[2] The trial court also denied this motion. McMorris appeals.

DISCUSSION

The Lineup Identification

McMorris argues that the postindictment, pretrial lineup conducted in the absence of his appointed counsel was in violation of his Sixth

[2] Jordan, in fact, later identified McMorris at the preliminary hearing and the suppression hearing.

Amendment right to counsel and his Fourteenth Amendment right to due process. Although we "independently review the trial court's finding of constitutional facts and independently apply the constitutional principles involved to the facts as found by the trial court," we will not reverse unless the trial court's evidentiary findings are clearly erroneous. ***State v. Maday***, 179 Wis.2d 346, 353, 507 N.W.2d 365, 369 (Ct. App. 1993).

In this case, however, none of the trial court's factual findings regarding the lineup identification are disputed. The question before us is of constitutional dimension, and it is clear and succinct: may an out-of-court lineup identification be admitted as evidence when the lineup occurred after the defendant has been charged and is represented by counsel?

The answer is equally clear and succinct and it does not support the trial court's ruling. "[A] post-indictment pretrial lineup at which the accused [is] exhibited to identifying witnesses is a critical stage of the criminal prosecution; [the] police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel …." ***Holmes v. State***, 59 Wis.2d 488, 500, 208 N.W.2d 815, 821 (1973) (quoting ***Kirby v. Illinois***, 406 U.S. 682, 683 (1972), and citing ***Gilbert v. California***, 388 U.S. 263 (1967), and ***United States v. Wade***, 388 U.S. 218 (1967)). In ***Gilbert***, the Supreme Court said, "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." ***Gilbert***, 388 U.S. at 273. "[T]he

desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence." ***Id***.

No authority supports the trial court's "good faith exception" to the exclusionary rule fashioned by the ***Wade/Gilbert*** line of cases. The State apparently concedes this point because it does not directly defend the trial court's ruling on this issue.[3] Nonetheless, we will briefly explain our disagreement with the trial court's reasoning, and our explanation comes directly from ***Wade*** itself.

Regarding the trial court's "good faith" analysis, the ***Wade*** Court observed that subtle improper suggestions during pretrial identification can be created intentionally or *unintentionally*. ***Wade***, 388 U.S. at 229. Unintentional acts are routinely taken in good faith. Yet the Supreme Court brought such acts within the ambit of the exclusionary rule.

The trial court also decided to admit the lineup identification because the procedure was not unfair or suggestive. However, this reasoning overlooks the fact that there are two perspectives from which the fairness of an identification procedure is viewed: the prosecution and the defense. The State has the opportunity to reconstruct the procedure via the testimony of the officers who conducted the procedure. The defendant has a similar opportunity via the testimony of trained counsel. However, the defendant lost that opportunity in this case because his counsel did not attend the lineup

[3] Instead, the State simply says that it "will rely on the trial court's explanation to defend the trial court's ruling."

proceeding. ***Wade*** holds that "the accused's inability … to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." ***Id***. at 231-32. Because "neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect," the presence of the accused's counsel is indispensable. ***Id***. at 230.

Thus, the exclusionary rule fashioned by the United States Supreme Court for a postindictment lineup conducted without the presence of counsel is a prophylactic rule which does not rest on any intentional misconduct or bad faith by the authorities. Nor does it turn on whether the lineup was nonetheless conducted in a nonsuggestive fashion as measured by the State's evidence. We therefore conclude that Jordan's lineup identification of McMorris must be suppressed. We reverse the trial court's order to the contrary.

The In-Court Identification

McMorris also contends that Jordan's in-court identification is tainted by the illegal lineup and should therefore be inadmissible. The trial court also denied this request. We will not upset a trial court's historical factual findings unless they are clearly erroneous. *See* ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984). However, the application of constitutional principles to the facts as found are subject to our independent review. ***Id***.

The law governing an in-court identification in the face of an illegal lineup was summarized by our supreme court in ***Holmes***, 59 Wis.2d at 496, 208 N.W.2d at 819:

> The law is clear that an in-court identification must not be the result of an exploitation of illegality or tainted by a violation of due process of law. … [T]he [United States] supreme court followed the test laid down in ***Wong Sun v. U.S***. (1963), 371 U.S. 471, 83 Sup. Ct. 407, 9 L.Ed.2d 441, in determining the admissibility of in-court identifications following an illegal lineup or illegal confession. The ***Wong*** test is simply whether the evidence is acquired as the result of exploitation of illegality instead of by means sufficiently distinguishable and independent to be purged of any primary or prior taint of illegality. Consequently, although there may be an illegal out-of-court identification, if the in-court identification can stand independently of such an out-of-court identification, it is admissible. [Citations omitted; quoted source omitted.]

Before an in-court identification can be admitted in the face of an illegal out-of-court identification procedure, the State must establish by clear and convincing evidence that the in-court identification is based upon observations of the suspect other than the lineup identification. ***Wade***, 388 U.S. at 240; *see also* ***Holmes***, 59 Wis.2d at 496, 208 N.W.2d at 819. In other words, the in-court identification must come from an independent origin. ***Gilbert***, 388 U.S. at 272.

The ***Wade*** Court set out the factors which a court must consider when determining whether the out-of-court identification impermissibly tainted or influenced the in-court identification:

> [1] the prior opportunity to observe the alleged criminal act, [2] the existence of any discrepancy between any pre-lineup description and the defendant's actual description, [3] any identification prior to lineup of another person, [4] the identification by picture of the defendant prior to the lineup, [5] failure to identify the defendant on a prior occasion, and [6] the lapse of time between the alleged act and the lineup identification.

Wade, 388 U.S. at 241; ***Holmes***, 59 Wis.2d at 498-99, 208 N.W.2d at 821. We now address the six ***Wade*** factors.[4]

Here, Jordan was able to provide a description of the robber. The surveillance video establishes that she had approximately twenty seconds to view the robber. Her observations were made under bright lighting conditions and with the aid of her glasses. During this time, the robber's face came within a couple feet of Jordan's face. Like her other testimony at the suppression hearing, Jordan's identification of McMorris at the suppression hearing was certain and unequivocal.[5] In addition, Jordan has not identified anyone else as the robber.

Finally, although the nonsuggestive nature of the lineup procedure is irrelevant to whether the lineup identification is admissible, the lineup procedure is relevant to whether that process has tainted Jordan's ability to identify McMorris. *See* ***Wade***, 388 U.S. at 241 (when the trial court examines

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[4] The trial court's bench ruling and its later written findings of fact and order do not expressly address these factors item by item. However, since the parties argued the applicable factors, we presume the court had these factors in mind when it made its ruling.

[5] The same is true of Jordan's identification of McMorris at the preliminary hearing conducted on January 24, 1995.

the admission of an *in-court* identification following an illegal lineup, it is advised to consider any facts disclosed concerning the conduct of the lineup). Here, as previously noted, the trial court determined that the lineup procedure was not impermissibly suggestive.

We conclude that the foregoing factors support the trial court's decision to send the ultimate question of the reliability of Jordan's in-court identification to the fact finder.

McMorris cites to other factors which he contends impugn Jordan's ability to identify him. These include Jordan's failure to identify McMorris's photograph from the photo array,[6] Jordan's principal focus on the robber's white hat and knife, and the limited period of time during which Jordan observed the robber. We disagree that these factors disqualify Jordan as an identification witness as a matter of law. Rather, we conclude that these factors are properly for the fact finder when weighing the reliability of Jordan's in-court identification. In fact, the standard jury instruction on identification invites the jury to consider these kinds of factors when performing this task. *See* WIS J I—CRIMINAL 141.

McMorris also contends that Jordan's in-court identification should be suppressed because the record is murky as to whether the robber had facial hair. However, this uncertainty is due principally to the vagaries of Wortock's, not Jordan's, recollections on this point. Jordan's testimony was that

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[6] We note, however, that the trial court found that McMorris's photo depicted him in "a lighter color than he is."

she did not notice whether the robber had facial hair and that she so advised Wortock. An identification challenge properly focuses on the identifying witness's ability to observe the suspect and the description later given. If the witness passes muster on those considerations, the witness should not be precluded from testifying because the investigating police officer's recollections of the witness's description are inconsistent or uncertain.

We conclude that the trial court properly ruled that Jordan's identification of McMorris stemmed from an independent origin, not from the illegal lineup procedure. As such, the court properly decided to submit the reliability of the identification to the fact finder. We affirm this portion of the court's ruling.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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