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DISTRICT IV

January 27, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2786-CR State of Wisconsin v. William Russell McKinney
(L.C. # 2011CF1697)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

William Russell McKinney appeals a judgment of conviction for robbery. McKinney contends that the circuit court erred by denying McKinney's motion to suppress any identification by the victim of McKinney as his assailant. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm.

In July 2011, City of Janesville Police arrested McKinney for a recently reported robbery. The State filed a criminal complaint charging McKinney with robbery with use of force and bail-jumping.

The victim of the robbery testified at the preliminary hearing and made an in-court identification of McKinney as his assailant. McKinney moved to suppress any identification of McKinney by the victim.[2] The circuit court denied the motion, and McKinney pled guilty to robbery with use of force.

McKinney argues first that the victim's identification of McKinney at the preliminary hearing was the fruit of the poisonous tree of an illegal seizure. *See* ***State v. Felix***, 2012 WI 36, ¶¶22, 30, 339 Wis. 2d 670, 811 N.W.2d 775 (unreasonable seizures by police are unconstitutional, and the exclusionary rule "extends to both tangible and intangible evidence that is the fruit of the poisonous tree, or, in other words, evidence obtained 'by exploitation of' the illegal government activity" (quoted source omitted)). McKinney argues that the taint of the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We note that McKinney did not fully develop his suppression argument in the circuit court. On appeal, McKinney's arguments are more developed but still less than entirely clear. So far as we can tell, McKinney is arguing for suppression of both the victim's identification of McKinney at the preliminary hearing and the victim's prospective identification of McKinney at trial. It appears, though, that the only identification at issue would be the trial identification, because the State asserted at the suppression hearing that it did not intend to make any reference to the victim's preliminary hearing identification. In any event, our analysis applies equally to both types of identification, and we thus address both in this opinion.

illegal seizure would also extend to any prospective identification of McKinney at trial. Thus, McKinney asserts, any identification of McKinney by the victim must be suppressed.

The problem with McKinney's argument is that it rests on the faulty premise that an in-court identification is analogous to being identified while in custody following an illegal seizure. In other words, McKinney relies on the false premise that an illegal seizure results in a defendant's illegal presence in court in the same way that an illegal seizure by police results in the illegal detention of a suspect. Contrary to McKinney's argument, however, a defendant's presence in court pursuant to a valid criminal complaint is not rendered illegal based on an illegal arrest. *See* ***State ex rel. Zdanczewicz v. Snyder***, 131 Wis. 2d 147, 151-52, 388 N.W.2d 612 (1986) (holding that, even if the underlying arrest was illegal, "a complaint supported by probable cause serves as 'the jurisdictional requirement for holding a defendant for a preliminary examination or other proceedings'" (quoted source omitted)). Because McKinney was held for the preliminary hearing pursuant to a valid criminal complaint,[3] the victim's identification of McKinney at that hearing was not the fruit of an illegal seizure.[4]

Next, McKinney contends that the preliminary hearing identification was an impermissible showup identification under ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582. McKinney cites the supreme court's holding in ***Dubose*** "that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless,

[3] McKinney does not challenge the validity of the criminal complaint.

[4] Because McKinney was validly held for the preliminary hearing, we need not address the parties' arguments as to the legality of the seizure.

based on the totality of the circumstances, the procedure was necessary." ***Id.*** He suggests that the same would be true of an in-court identification.

The problem with McKinney's second argument is that the identification by the victim at the preliminary hearing was not a showup identification. ***Dubose*** defined a "'showup'" as "'an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.'" ***Id.***, ¶1 n.1 (citation omitted). In ***State v. Ziegler***, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238, the supreme court explicitly held that ***Dubose*** does not apply to an in-court identification during trial. The court reiterated that "[a] showup, by definition, is an out-of-court pre-trial identification." ***Id.***, ¶81. That court explained further that a showup involves a "suspect," and an in-court identification involves a "charged defendant." ***Id.***, ¶¶81-82. Here, as in ***Ziegler***, McKinney was in court as a charged defendant during the preliminary hearing, and thus the identification was not the result of a showup.

McKinney acknowledges that ***Dubose*** involved an out-of-court identification, but contends that the rationale in ***Dubose***—that "[a] lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification"—applies equally to a first identification by a victim at the preliminary hearing. *See* ***Dubose***, 285 Wis. 2d 143, ¶33. However, both the supreme court and this court have limited ***Dubose*** to showup identifications. *See* ***Ziegler***, 342 Wis. 2d 256, ¶81; ***State v. Hibl***, 2006 WI 52, ¶¶32-35, 290 Wis. 2d 595, 714 N.W.2d 194 (explaining that ***Dubose*** is limited to showup identifications); ***State v. Drew***, 2007 WI App 213, ¶¶18-19, 305 Wis. 2d 641, 740 N.W.2d 404 (recognizing that the supreme court has limited the holding in ***Dubose*** to showups). We cannot extend ***Dubose*** to this case because doing so would

be contrary to prior case law. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). For the same reasons, we reject McKinney's argument as to an in-court identification.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals