COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2004AP2526 **Cir. Ct. No. 1996CF960649**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL L. DUKES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Order reversed and cause remanded*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Nathaniel Dukes appeals from the order of the circuit court denying his motion for postconviction relief. Dukes argues that the circuit court erred when it denied the motion without holding a hearing. By an opinion dated December 27, 2006, we affirmed the order of the circuit court. On

July 2, 2007, the supreme court summarily vacated our opinion and remanded the matter back to this court for reconsideration in light of its decision in ***State v. Howell***, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48. The parties have filed supplemental briefs. We conclude that under ***Howell***, Dukes is entitled to a hearing on his motion. Consequently, we reverse the order and remand the matter back to the circuit court for a hearing consistent with this opinion and with ***Howell***.

¶2 The facts relevant to this appeal were discussed in detail in our previous opinion. Briefly, Dukes moved the circuit court to withdraw his guilty plea to three counts of armed robbery as a party to a crime. He argued that during the plea colloquy he did not understand what was meant by "party to a crime," the circuit court misled him about its meaning, his counsel did not explain it to him, and the plea questionnaire did not explain it. The circuit court denied the motion without holding a hearing, finding that it had not misled him, and the record demonstrated that he understood what was meant by party to a crime. We affirmed, and the supreme court reversed and remanded the matter back to us.

¶3 In ***Howell***, the supreme court considered whether the circuit court erred when it refused to hold a hearing on the defendant's postconviction motion. ***Id.***, ¶2. The supreme court held that a defendant is entitled to a hearing under ***State v. Bangert***, 131 Wis. 2d 246, 261-72, 389 N.W.2d 12 (1986), if the defendant makes a *prima facie* showing that the plea colloquy was inadequate, and the motion alleges that "in fact the defendant did not know or understand the information that should have been provided at the plea colloquy." ***Howell***, 301 Wis. 2d 350, ¶27 (citation omitted). The supreme court explained:

> The requirements for a ***Bangert*** motion are relatively relaxed because the source of the defendant's misunderstanding, the plea colloquy defect, should be clear from the transcript of the hearing at which the plea was taken. We require less from the allegations in a ***Bangert*** motion because the circuit court bears the responsibility of preventing failures in the plea colloquy.

Id., ¶28. "If the defendant's motion meets both prongs of [the test], the State has the burden to prove at the evidentiary hearing that the plea was knowing, intelligent, and voluntary." ***Id.***, ¶29 (citation omitted). We review the decision whether to hold an evidentiary hearing independently of the circuit court, but benefit from its analysis. ***Id.***, ¶30. If the motion establishes a *prima facie* violation of the plea colloquy requirements, WIS. STAT. § 971.08, the court must hold an evidentiary hearing. ***Howell***, 301 Wis. 2d 350, ¶70. The State then has the opportunity to prove that the defendant understood his liability. ***Id.***

¶4 In ***Howell***, the defendant alleged that the circuit court did not establish a sufficient factual basis for the party to a crime liability, and that he would not have pled guilty if he had properly understood what party to a crime liability entailed. ***Id.***, ¶57. The court held that the plea colloquy was deficient because the court's description of party to a crime fell far short of the Wisconsin Jury Instruction. ***Id.***, ¶¶45-47. The court held that "[s]imply stating that the State would have to prove that Howell 'assisted' or 'intentionally assisted' the shooter" was insufficient to explain party to a crime liability. ***Id.***, ¶48. The court further held that "nothing in the plea colloquy demonstrates that Howell received correct information about this charge from other sources." ***Id.***, ¶49. The court stated that to satisfy ***Bangert***, the court "should have established not only that Howell had the proper information but also that he understood that information." ***Howell***, 301 Wis. 2d 350, ¶50. The court went on to recommend that to establish this knowledge:

> a circuit court might summarize the nature of the charge by reading the jury instructions, might ask defendant's counsel about his or her explanation to the defendant and ask counsel or the defendant to summarize the explanation, or might refer to the record or other evidence of the defendant's understanding of the nature of the charge.

Id., ¶51. The supreme court held that the circuit court had not used any of these methods to ascertain Howell's understanding of the charge, and had not established that Howell was properly advised by his counsel. ***Id.***, ¶¶51-54. The supreme court concluded that the plea colloquy was defective for these reasons. ***Id.***, ¶55.

¶5 As in ***Howell***, the circuit court here did not adequately explain the nature of party to a crime liability to Dukes. The circuit court asked Dukes:

> And you understand that in all of these you're charged as a party to a crime which means that you did along with other people, sometimes one, sometimes two, three or four people committed these crimes as a party to a crime; that is, you assisted in their handling of those? In other words, you may have been next to the people that were being robbed or you may have been in a vehicle that was there to have the people rob, etc. You understand that?

Dukes argued in his motion that he believed this meant he just had to be near the place where the crime was taking place to be charged as a party to a crime. We conclude, based on ***Howell***, that Dukes established a *prima facie* violation of WIS. STAT. § 971.08.

¶6 Because Dukes' motion for postconviction relief established a *prima facie* violation of WIS. STAT. § 971.08, Dukes is entitled to an evidentiary hearing. We do not decide at this point whether Dukes is entitled to withdraw his pleas. Consequently, we reverse the order of the circuit court and remand for an evidentiary hearing consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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