

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2007

David R. Schanker
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. 2006AP3204-CR

Cir. Ct. No. 2003CF583

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. HAWK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Daniel Hawk appeals a judgment convicting him of theft and an order denying his postconviction motion. He argues that the trial court denied his constitutional right to counsel when it refused to appoint counsel after Hawk was found financially ineligible by the State Public Defender's office.

He also argues that he should not have been convicted of theft because the State instead proved embezzlement. We reject these arguments and affirm the judgment and order.

¶2 Hawk was charged with retaining possession of the Oneida Indian Tribe's funds that came into his possession in his capacity as an independent insurance agent. When the SPD's office determined Hawk was not financially eligible for public defender representation, he asked the court to appoint counsel under *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). A court commissioner and later the trial court determined that Hawk failed to meet his burden of proving inability to hire counsel. Hawk argues the trial court made no specific findings of fact and merely adopted the commissioner's decision. He argues that the commissioner failed to follow the methodology set out in *Dean* by inappropriately relying on the public defender's eligibility evaluation form, rigidly applying the federal poverty guidelines, failing to address whether Hawk had sufficient assets to retain private counsel at the market rate prevailing in the community, and failing to consider the complexity of the case because it involved tribal law as well as criminal law.

¶3 The parties disagree about the standard of review on this issue. Hawk argues that whether he established indigency is a question of constitutional fact this court reviews independently. See *Dean*, 163 Wis. 2d at 511; *State v. Haste*, 175 Wis. 2d 1, 23, 500 N.W.2d 78 (Ct. App. 1993). The State argues that appointment of counsel is discretionary and this court should defer to the trial court's decision. See *State v. Nieves-Gonzalez*, 2001 WI App 90, ¶10, 242 Wis. 2d 782, 625 N.W.2d 913. We need not resolve conflict because, regardless of the standard of review, Hawk's application papers establish that he had sufficient funds to retain his own attorney.

¶4 Hawk had contacted three attorneys, the least expensive of which required a \$5,000 retainer. The forms indicated that Hawk earned \$1,112 take-home pay every two weeks, plus \$106 in monthly disability payments. Hawk requested time to consult with an attorney at his initial appearance December 2, 2003. The case was repeatedly adjourned until April 22, 2004, to give Hawk an opportunity to retain counsel. During that twenty weeks, Hawk had take-home pay of over \$11,000 plus four disability checks, over three times the federal poverty guidelines. Hawk indicated that he had monthly payments totaling \$658 for a second mortgage, credit cards and business debts.¹ Federal poverty guidelines indicate that Hawk should have been able to live on \$776 per month. Hawk's income, along with the assets listed on his indigency forms were sufficient to allow him to live at the federal poverty level, meet all of his stated monthly payments and pay a \$5,000 retainer.

¶5 Hawk's complaint that the trial court failed to make specific findings provides no basis for relief. The facts are not in dispute. The information Hawk provided establishes that he was neither totally nor partially indigent.

¶6 The court commissioner and the trial court properly relied on Hawk's public defender eligibility evaluation form. They did not defer to the public defender's determination of eligibility. Rather, they appropriately used the forms Hawk executed to determine his income, assets and debts. Nothing in *Dean*

¹ Although our decision does not turn on the necessity of Hawk making these monthly payments, two of the payments appear questionable. Hawk lists a \$318 monthly payment for a second mortgage for a property that was in foreclosure on the first mortgage. He also lists \$200 per month payments on a business debt. The business is apparently Hawk's insurance corporation. It is not evident why he is personally responsible for the corporate debts. In addition, he lists \$15,000 in household furnishings although he lived in his car. The need to retain those furnishings is questionable.

precludes the court from utilizing information that was also presented to the public defender.

¶7 The record does not support Hawk's contention that the commissioner rigidly applied the poverty guidelines. A person whose income exceeds the poverty guidelines may still be indigent for purposes of appointing counsel. However, the federal poverty guidelines are a proper consideration in making an indigency determination. Hawk's take-home income exceeded the poverty guidelines by such a large amount, no "rigid" or mechanistic application of the guidelines is necessary to conclude that Hawk could afford to retain his own attorney.

¶8 Hawk's argument that the commissioner failed to address Hawk's ability to retain private counsel at the market rate prevailing in the community fails because Hawk provided that information in his application when he indicated he could retain an attorney with a \$5,000 retainer. Likewise, Hawk's argument that the commissioner failed to consider the complexity of the case fails because the \$5,000 retainer reflects the complexity.

¶9 Finally, there is no merit to Hawk's argument that he was improperly convicted of theft under WIS. STAT. § 943.20(1)(a)² because the State actually proved embezzlement under § 943.20(1)(b). The fact that the State could have charged Hawk with embezzlement does not provide a basis for relief. If an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all of the provisions. *See* WIS. STAT.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

§ 939.65. A person may be prosecuted under a general section even though there is a specific section that covers the conduct. *See State v. Davison*, 2003 WI 89, ¶51 n.19, 263 Wis. 2d 145, 666 N.W.2d 1. The State established that Hawk retained moveable property,—that is, checks—with intent to permanently deprive the owner of possession. This constitutes theft under § 943.20(1)(a) irrespective of whether the State also proved embezzlement.

By the Court.—Judgment and order affirmed.

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

