COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP573 **Cir. Ct. No. 2006CV7883**

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

EDDIE BAKER,

PLAINTIFF-APPELLANT,

ERIC M. WALKER, MARTIS D. ODEMS, ANTHONY RUSSELL, DONALD D. PATTERSON AND DANNY CONNER,

PLAINTIFFS,

V.

STATE OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 PER CURIAM. Eddie Baker appeals from an order dismissing his class action seeking a declaratory judgment. The issues are whether the party to a crime statute, WIS. STAT. § 939.05 (2005-06), is unconstitutional as violative of the double jeopardy, due process, and equal protection clauses of the United States and Wisconsin Constitutions, and whether § 939.05 deprives Baker of his right to the effective assistance of counsel, and deprives the circuit court of subject matter jurisdiction.[1] We conclude that § 939.05 is constitutional, and does not deprive Baker of the effective assistance of counsel, or the circuit court of subject matter jurisdiction. Therefore, we affirm.

¶2 Baker and other inmates convicted of various offenses as a party to the crime, filed a declaratory judgment action seeking a declaration on the constitutionality of WIS. STAT. § 939.05.[2] The circuit court dismissed the action, concluding that there were other "more appropriate remedies available at law" that would avert an award under the declaratory judgment statute, WIS. STAT. § 806.04. The circuit court also concluded that the substantive constitutional claims lacked merit. Baker appeals.[3]

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[1] All references to the Wisconsin Statutes are to the 2005-06 version.

[2] Baker and his co-plaintiffs were convicted at different times, and thus, under different biennial versions of WIS. STAT. § 939.05. Their challenge to § 939.05's constitutionality is the same regardless of the biennial version applicable to each plaintiff's specific judgment of conviction. Thus, we address this challenge to the 2005-06 version of § 939.05 because the specific biennial version pursuant to which each plaintiff was charged and convicted is legally inconsequential to the constitutional challenge raised.

We generically refer to the substantive crime because each plaintiff convicted of being a party to the crime, pursuant to WIS. STAT. § 939.05, was necessarily convicted of a substantive crime. The particular substantive crime is inconsequential to our resolution of the constitutionality of § 939.05.

[3] Baker appeals in his individual and "representative" capacities. None of the other plaintiffs appealed.

¶3 We first address the principal basis for the circuit court's dismissal, the propriety of a declaratory judgment action for challenging WIS. STAT. § 939.05's constitutionality. The existence of an alternative adequate remedy is preferable to seeking declaratory relief. *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 307-08, 240 N.W.2d 610 (1976). "To preclude declaratory relief, the alternative remedy should be speedy, effective and adequate or at least as well-suited to the plaintiffs' needs as declaratory relief." ***Id.*** We proceed to the merits not because declaratory relief is the most appropriate remedy for this challenge, but simply because the posture of this class action is now available for a "speedy, effective and adequate" resolution. ***Id.***

¶4 At their essence, all of Baker's claims challenge the constitutionality of WIS. STAT. § 939.05. Section 939.05 provides:

> **Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
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> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a

> reasonable time before the commission of the crime so as to allow the others also to withdraw.

¶5 A party challenging the constitutionality of a statute bears a heavy burden, namely to prove unconstitutionality beyond a reasonable doubt. *See* ***Aicher v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶19, 237 Wis. 2d 99, 613 N.W.2d 849. Moreover, "[t]he court indulges every presumption to sustain the [constitutionality of the] law if at all possible." ***Id.***, ¶18. The constitutionality of a statute is a question of law entitled to independent review. *See* ***id.***

¶6 Baker's lead claim is that convicting a defendant of a crime as a party to that crime violates the constitutional preclusion against double jeopardy.[4] Double Jeopardy precludes successive prosecutions and multiple punishments for the same crime. *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 515, 509 N.W.2d 712 (1994) (quoting ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969)).[5] Baker claims that he was punished multiple times for the same crime because he was convicted of the substantive crime and also for being a party to that same crime. Being convicted of a substantive crime as a party to the crime does not subject a defendant to multiple punishments because being a party to the crime is not a substantive crime, it is a mechanism to extend criminal liability to an accomplice or co-conspirator for participating in a substantive crime. *See* WIS. STAT. § 939.05. Likewise, Baker was punished for being convicted of committing the substantive crime; he did not receive any additional punishment for being a party to that substantive crime. We reject Baker's double jeopardy challenge.

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[4] *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1).

[5] ***North Carolina v. Pearce***, 395 U.S. 711 (1969), was overruled in part on other grounds by ***Alabama v. Smith***, 490 U.S. 794 (1989).

¶7 Baker's alleged deprivation of due process of law, insofar as we can interpret it, is substantially similar to his claimed deprivation of the effective assistance of counsel. His essential claims are that his alleged participation in the substantive offense as a party to the crime was so vague and indefinite that he was unable to identify and understand the charge against him to prepare his defense. Alternatively, he seemingly concedes that he can be held liable as a party to the substantive crime as either an accomplice or as a co-conspirator, but that he was unable to prepare or assist in his defense because the State failed to specify which theory of liability it was pursuing under WIS. STAT. § 939.05(2). We reject these claims.

¶8 WISCONSIN STAT. § 939.05 describes precisely the conduct that subjects the accused to liability as a party to the crime. The statutory description refers to "the commission of the crime" in relationship to liability pursuant to § 939.05. Although § 939.05 does not require that another individual necessarily be charged with committing that same substantive crime as a principal, it clearly authorizes the imposition of criminal liability for the accused's status as a party to a substantive crime; the accused cannot be charged merely as a party to a crime pursuant to § 939.05 without being also charged with a separate substantive crime relating to his or her accomplice or co-conspirator status. *See* ***State v. Horenberger***, 119 Wis. 2d 237, 243, 349 N.W.2d 692 (1984) ("there is no such separate offense as aiding and abetting") (citation omitted). We reject Baker's due process and ineffective assistance claims that the party-to-a-crime charge did not sufficiently notify him of the criminal conduct for which he was being charged and was compelled to defend against. The language of § 939.05 adequately and amply defines the conduct for which an accomplice or co-conspirator may be held

liable, along with the statutory language of the substantive offense with which the accused was also necessarily charged.

¶9 Baker's alternative claim, that the State deprived him of due process of law and the effective assistance of counsel, has already been rejected. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 687-88, 211 N.W.2d 421 (1973) ("it is often difficult to tell in advance of filing the information whether to charge the defendant as the principal or … as a party to the crime") (citation omitted); *see also* ***Hardison v. State***, 61 Wis. 2d 262, 270-72, 212 N.W.2d 103 (1973) (it is unnecessary to identify whether the State's theory of criminal liability is predicated on the defendant's alleged status as an accomplice or as a co-conspirator). Our rejection of this direct claim supports our correlative rejection of Baker's indirect claim of his resulting inability to defend or assist in his defense.

¶10 We are at a loss to understand Baker's equal protection claim. He claims that he was deprived of equal protection along with due process because he was not charged with a "specific" offense, and was not "informed of the nature and cause of the accusation that [would] allow for preparation of a defense, and to have constructive assistance of counsel." Insofar as Baker's equal protection claim is incident to his due process of law and effective assistance of counsel deprivations, we reject it for the same reasons we rejected those claims. Insofar as Baker's equal protection claim is something else, we reject it for his failure to develop it in a comprehensible fashion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.") (citations omitted).

¶11 Baker also contends that the circuit court had no subject-matter jurisdiction to entertain a claim pursuant to WIS. STAT. § 939.05 because that was

"a non-charge." While affording Baker's contention the benefit of every doubt would still not result in a lack of subject matter jurisdiction, Baker was not charged solely as a party to the crime; he was charged as a party to a substantive crime, as well.

By the Court.—Order affirmed.

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