

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP1374-CR

Cir. Ct. No. 2007CM59

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHANIE J. BANDY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County:
WILLIAM M. MCMONIGAL, Judge. *Reversed and cause remanded with
directions.*

¶1 BROWN, C.J.¹ Stephanie Bandy appeals from an order denying her motion to withdraw her guilty plea on grounds that her waiver of counsel was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

improper. Bandy argues that the Green Lake County Circuit Court erroneously exercised its discretion when it denied her petition for appointment of counsel without applying the federal poverty guidelines. *State v. Nieves-Gonzalez*, 2001 WI App 90, ¶8, 242 Wis. 2d 782, 625 N.W.2d 913, held that a court must explain why it has found that an individual can afford counsel when the individual's income is well below the federal guidelines. Bandy's petition for court appointment and her declarations during her postconviction hearing showed that her income fell at least \$11,550 below the federal poverty guidelines. The circuit court did not apply the federal guidelines to Bandy's income nor explain how it found that Bandy could afford counsel. We reverse.

¶2 Bandy sought counsel after she was charged with misdemeanor battery and disorderly conduct. Bandy was interviewed for a public defender, but her declaration of three dependants and a monthly income of \$920 made her ineligible. After her initial appearance, Bandy completed a petition for appointment of counsel. Bandy declared that she received take-home pay of \$350 every two weeks, owned a \$300 car, and owed \$800 on a credit card. Bandy listed four other members of her household and commented that she was providing for her fiancé's five children. The circuit court denied the petition and found that Bandy was not indigent.

¶3 At her plea hearing, Bandy waived her right to an attorney. The circuit court asked whether she understood that an attorney could be available through hire, court appointment, or public defender services. Bandy responded that she did not qualify for any of those and could not afford an attorney. Bandy pled guilty to a plea diversion agreement.

¶4 Due to noncompliance with the deferred prosecution agreement, the agreement was revoked and Bandy was placed on twelve months of probation. Bandy filed a notice of intent to pursue postconviction relief. On January 19, 2009, she filed a motion to withdraw her guilty plea.

¶5 During the postconviction hearing, Bandy argued that (1) her income was well below the federal poverty guidelines and (2) her income did not allow her to retain a Green Lake county attorney. The court noted the discrepancies between Bandy's declarations on her public defender eligibility form and on her petition for court appointment of counsel. The circuit court found that Bandy was not improperly denied appointment and rejected Bandy's motion to withdraw her guilty plea.

¶6 Statutory interpretation and application are questions of law, which are reviewed de novo. *See State v. Dean*, 163 Wis. 2d 503, 510, 471 N.W.2d 310 (Ct. App. 1991).

¶7 The issue presented is whether the circuit court accurately assessed Bandy's indigency.² *Dean* requires courts to consider all relevant evidence when determining if the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community. *Id.* at 514. *Nieves-Gonzalez* agreed with the Wisconsin Judicial Benchbook's recommendation to consider the federal poverty guidelines when determining indigency for purposes of court-appointed counsel. *Nieves-Gonzalez*, 242 Wis. 2d 782, ¶¶7-8. Therefore, if an individual is able to show that her assets and income are well below the federal guidelines, the

² WISCONSIN STAT. § 977.06(4)(a) states, in part: "A circuit court may review any indigency determination upon its own motion or the motion of the defendant...."

trial court should set forth findings explaining why it has determined that she can nevertheless afford counsel. *Id.*, ¶8. In *Nieves-Gonzalez*, the individual's income was \$8,000 below the federal poverty guidelines. *Id.*, ¶11. Because Nieves-Gonzalez had an income well below the federal guidelines, the court found that his situation warranted a hearing to determine whether he was still able to afford an attorney. *Id.*, ¶12. We are bound by the analysis used in *Nieves-Gonzalez* unless or until the Wisconsin Supreme Court overrules it.

¶8 In this case, Bandy's disclosures on her petition for appointment of counsel showed that her income fell well below the federal poverty guidelines. In her petition, Bandy noted that she had three dependents and a biweekly income of \$350 or approximately \$9100 annually. The 2007 federal property guideline for a household of four was \$20,650. 72 Fed. Reg. 3147-48 (Jan. 24, 2007). Bandy's income was \$11,550 below the federal guidelines. At her postconviction hearing, Bandy provided a letter from her employer, stating that her actual biweekly net pay was \$198.60, or approximately \$5163 annually. This placed her income at \$15,487 below the federal guidelines.

¶9 The record does not show why the circuit court, pre-plea, determined that Bandy could afford a private attorney even though Bandy presented documents showing that her income was well below the federal poverty guidelines. The court's denial of her petition simply stated that "[t]he Court finds that you are not indigent." When a court denies appointment of counsel to an individual with income below the federal guidelines, *Nieves-Gonzalez* requires courts to set forth findings and explain why it has found that the individual can nonetheless afford counsel. *Nieves-Gonzalez*, 242 Wis. 2d 782, ¶8. Without an explanation, we are hindered in determining whether the trial court exercised proper discretion. *Id.*

¶10 At the later motion hearing, instead of determining whether Bandy could afford an attorney, the circuit court improperly focused on its belief that Bandy “clearly lied” and provided “unreliable information” on her application to the public defender’s office. Initial appearances can be very stressful for many defendants, especially those who are subject to the criminal justice system for the first time. And it is unfortunately typical that some individuals come to the courthouse unaware of their exact net incomes. Courts can ensure that petitions for appointment of counsel are accurately completed by requiring individuals to use pay stubs or other materials when preparing their petitions. To reduce the number of petitions which have been completed in haste, courts can encourage individuals to complete the petitions at home instead of haphazardly filling out the petitions immediately after initial appearances.

¶11 While we understand the fiscal constraints placed on counties when courts appoint counsel to indigent defendants, the law has established that courts have an independent duty to provide counsel for indigents. The duty to furnish representation to indigent defendants derives from constitutional provisions that place the responsibility upon courts. *State ex rel. Fitas v. Milwaukee County*, 65 Wis. 2d 130, 134, 221 N.W.2d 902 (1974). Therefore, when the state public defender does not provide counsel, “the ‘necessities of the case’ and the demands of ‘public justice and sound policy’ require that the county be obligated to pay for appointed stand-by counsel.” *Dean*, 163 Wis. 2d at 515-16. We note that the Wisconsin State Legislature currently has bills in both houses that would change the criteria for public defender determinations of eligibility. *See* 2009 S.B. 263, 2009 A.B. 395. Both bills propose to increase the income threshold for eligibility to 115% of the federal poverty line. *See* 2009 S.B. 263, Analysis by the

Legislative Reference Bureau; 2009 A.B. 395, Analysis by the Legislative Reference Bureau.

¶12 We acknowledge the State's apparent assertion that, because Bandy received a deferred prosecution agreement, she did as well as she possibly could without the need for an attorney. The State seems to be chafing at the idea that she only now asserts her right to an attorney after she failed to perform her part of the deferred prosecution bargain. We agree that Bandy received a favorable plea bargain. But the waiver of counsel and the results thereof do not preclude review of the trial court's authority to appoint counsel when required. *See Dean*, 163 Wis. 2d at 516.

¶13 It is clear from the record that Bandy waived her right to an attorney because she believed she was not eligible for appointed counsel by the public defender or the court. Bandy had a right to an accurate assessment of whether she qualified for court-appointed counsel. Because Bandy did not receive an accurate assessment and was denied assistance of counsel, there was error. *See id.* That is the law and we are bound to follow it.

¶14 The question remains whether this court should reverse outright or whether we should reverse and remand to inquire once more into Bandy's financial status. We take our cue from *Nieves-Gonzalez*. There, the court stated:

We remand so that the trial court may (1) hold a hearing at which it can inquire further into Nieves-Gonzalez's financial and marital status if necessary and (2) reapply the federal poverty guidelines properly. We note that, even including spousal income, Nieves-Gonzalez's household income is still well below the federal guidelines. Unless, upon further inquiry by the trial court, evidence comes to light showing that Nieves-Gonzalez has additional resources available, it would be difficult to conclude that he is not entitled to court-appointed counsel.

Nieves-Gonzalez, 242 Wis. 2d 782, ¶14 (footnote omitted). Consistent with *Nieves-Gonzalez*, we do the same.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

