STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED
v	No. 183324 St. Clair Circuit Court
DANIEL WADE CAMERON, Defendant-Appellant.	LC No. 94 002176 FH

Before: Corrigan, P.J., and J.B. Sullivan* and T.G. Hicks,**

SULLIVAN, J. (dissenting).

I dissent.

At a preliminary examination, two questions must be answered in the affirmative before a defendant can be bound over for trial: (1) has the crime with which the defendant has been charged been committed and (2) is there probable cause to believe that the defendant committed that crime? *People v Garcia*, 31 Mich App 447, 452-453; 187 NW2d 711 (1971). This Court reviews a circuit court's decision regarding a motion to quash by determining if the district court abused its discretion in binding over the defendant. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

As the circuit court noted, the statute proscribing the crime of unlawful assembly has two alternative bases for criminal liability. MCL 752.543; MSA 29.790(3) provides:

> It is unlawful and constitutes an unlawful assembly for a person [1] to assemble or act in concert with 4 or more persons for the purpose of engaging in conduct constituting the crime of riot, *or* [2] to be present at an assembly that either has or develops such a purpose and to remain thereat with intent to advance such purpose (emphasis and enumeration added).

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* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
** Circuit judge, sitting on the Court of Appeals by assignment.

The crime of riot is defined as "5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm." MCL 752.541; MSA 28.709(1).

At the preliminary examination, there was evidence that defendant was part of or possibly was even leading the "beat-in" initiation of a gang member on a school playground. At the conclusion of the initiation, the group dispersed. Defendant was subsequently observed walking with a large group of juveniles which ultimately assembled at the basketball courts at White Park after apparently grouping near Vollmer's Pharmacy where a fight ensued between two individuals. At White Park, defendant was arrested for spitting in public and was conveyed to the police department. There was expert testimony that a public initiation of a gang member is an intimidation factor "to show how big your gang is getting."

In binding defendant over on the charge of unlawful assembly, the district court specifically found that the elements of the offense of riot had not been met. Hence, the focus is on the second alternative: being "present at an assembly that either has or develops [the purpose to riot] and to remain thereat with intent to advance such purpose." Since defendant was arrested and taken into custody on his arrival with the group at White Park, only the activities prior to his arrest, i.e., at the initiation and proceeding to White Park, are relevant. On this record, I agree with defendant that there is no evidence that the group assembled for the purpose or developed the purpose to riot. Even assuming that the expert testimony is accurate, such generalized intimidation cannot be equated with the specific act of having the purpose to riot.

Moreover, if defendant had properly preserved the issue, I would find he was denied effective assistance of counsel for entering an unconditional guilty plea to the charged offense. *People v Reid*, 420 Mich 326; 362 NW2d 655 (1984); *People v Vonins (Aft Rem)*, 203 Mich App 173; 511 NW2d 706 (1993).

I would reverse.

/s/ Joseph B. Sullivan