2019AP002321-CR

WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF WAUPACA COUNTY
HONORABLE VICKI L. CLUSSMAN

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
JONATHAN N. REIHER,
DEFENDANT-APPELLANT.

BRIEF AND ARGUMENT OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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ISSUE PRESENTED FOR REVIEW

I. Does a person engage in criminally reckless conduct if the person engages in conduct that creates an unreasonable and/or substantial risk of death or great bodily harm but immediately engages in further conduct by taking affirmative steps for the purpose of eliminating the risk?

Mr. Reiher raised this issue in his motion for postconviction relief, arguing that his pleas to second degree recklessly endangering safety lacked a factual basis. Mr. Reiher argued that the facts of record do not support a finding that he created a substantial risk of death or great bodily harm by engaging in criminally reckless conduct.

The circuit court denied the motion after a postconviction motion hearing. Mr. Reiher filed a timely Notice of Appeal.

STATEMENT OF REASONS FOR ORAL ARGUMENT AND PUBLICATION

Mr. Reiher does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE

Mr. Reiher was originally charged with three counts of First Degree Recklessly Endangering Safety, contrary to Wis. Stats. §941.30(1); two counts of misdemeanor battery, contrary to Wis. Stats. §940.19(1).[1] Mr. Reiher was also charged with two counts of Criminal Damage to Property, two counts of Disorderly Conduct, and one count of Stalking.

The three counts of First Degree Recklessly Endangering Safety were subsequently amended to Second Degree Recklessly Endangering Safety. A plea hearing was held on April 10, 2018. Pursuant to the negotiated plea agreement, the defendant entered pleas of no contest to counts one, two, and five of the Amended Information. The remaining counts were dismissed and read-in. At sentencing, the court imposed a bifurcated sentence on counts one and two (second degree recklessly endangering safety) consisting of four years initial confinement and four years of extended supervision on each count, to run consecutively. On count five (battery), the court imposed a concurrent sentence of nine months.

Mr. Reiher filed a motion for postconviction relief, seeking to withdraw his pleas to second degree

[1] All references to Wisconsin Statutes are to the 2017-2018 Edition unless otherwise specified.

recklessly endangering safety. The motion argued that the record did not establish a factual basis for the pleas because the facts do not establish that Mr. Reiher created an unreasonable and substantial risk of death or great bodily harm by engaging in criminally reckless conduct.

The circuit court held a hearing. No testimony or evidence was introduced; the parties each submitted oral arguments. At the conclusion of the hearing the circuit court denied the motion. The court found a factual basis for the pleas.

Mr. Reiher subsequently filed a timely Notice of Appeal.

STATEMENT OF FACTS

According to the criminal complaint, on July 23, 2016, Special Agents Liethen and Heimerl, WI DOJ Division of Criminal Investigations, Arson Unit, reported information provided by A.R.R. (DOC 5:4; Appendix B:4). On July 25, 2016, ARR came into the Waupaca County Sheriff's Office and made a report to Deputy Durrant. (DOC 5:4; Appendix B:4).

According to the complaint, ARR reported an incident that occurred on March 27, 2016, in which Jonathan Reiher struck her in the face and caused damage to her residence and belongings. (DOC 5:4; Appendix B:4). On April 25, 2016, Deputy Lewinski

reported an incident in which Jonathan Reiher had allegedly struck ARR, threw her to the ground, and kicked her. (DOC 5:5; Appendix B:5). Officer Flatoff reported an incident on June 2, 2016, in which Jonathan Reiher was allegedly harassing ARR and threatening to take their children. (DOC 5:8; Appendix B:8).

According to the complaint, ARR had filed an eviction action against Jonathan Reiher in Waupaca Co. case 16SC389. (DOC 5:9; Appendix B:9). According to the transcript of the hearing held on 06/09/2016, Mr. Reiher was ordered to vacate the premises at E1566 Erickson Rd., Waupaca, Wisconsin by 06/19/2016. (DOC 5:9; Appendix B:9).

On June 12, 2016, Deputy Lewinski was notified of a vandalism complaint being reported at E1566 Erickson Rd. (DOC 5:9; Appendix B:9). When Deputy Lewinski arrived at the residence, he was able to identify the property owner, ARR, as well as ARR's father, RJC. (DOC 5:9; Appendix B:9). Deputy Lewinski and Deputy Santiago entered the residence. (DOC 5:9; Appendix B:9). There was substantial damage to the kitchen area. (DOC 5:9; Appendix B:9). The cabinets and appliances had been smashed. (DOC 5:9; Appendix B:9). The bathroom had sustained severe damage. (DOC 5:9; Appendix B:9). There were several

holes punched in the drywall throughout the residence. (DOC 5:9; Appendix B:9).

Deputy Santiago entered the basement of the residence with RJC. (DOC 5:10; Appendix B:10). He observed the outer metal shell of the furnace to be severely dented in. (DOC 5:10; Appendix B:10). There were also pieces of PVC venting pipe torn off of the furnace. (DOC 5:10; Appendix B:10).

On July 22, 2016, Deputy Kraeger of the Waupaca County Sheriff received a complaint that a large explosion had occurred at E1566 Erickson Rd. (DOC 5:10; Appendix B:10). Two males were injured; Deputy Kraeger observed that they had been severely burned. (DOC 5:10; Appendix B:10). Deputy Kraeger questioned the complainant, SJB, and BLB. (DOC 5:10; Appendix B:10).

They advised that the house had been trashed inside and that they were working on cleaning it up and renovating. (DOC 5:10; Appendix B:10). They had decided to cook brats and the men had turned on the gas to the residence. (DOC 5:10; Appendix B:10). The gas was propane, and there was a large 500 gallon tank on the west side of the residence. (DOC 5:10; Appendix B:10). When they began to smell gas, they immediately shut the gas off. (DOC 5:10; Appendix B:10). The men instructed them not to light anything. (DOC 5:10;

Appendix B:10). The men went downstairs; a short time later a large explosion occurred. (DOC 5:10; Appendix B:10).

Deputy Kraeger spoke with ARR. (DOC 5:10; Appendix B:10). ARR advised that the damage to the residence had been caused by her ex-boyfriend, Jonathan Reiher. (DOC 5:10; Appendix B:10). ARR also advised that Reiher had never "outright admitted" to doing the damage, but had stated that she would be punished for evicting him. (DOC 5:10; Appendix B:10). ARR further advised that she never went into the basement after Reiher moved out. (DOC 5:10; Appendix B:10). ARR advised that Reiher had told her the gas was shut off when he moved out. (DOC 5:10; Appendix B:10). ARR advised that the furnace had been installed in 2014 after Mr. Reiher told her the furnace needed to be replaced. (DOC 5:10; Appendix B:10).

At the preliminary hearing, Deputy Durrant testified that he had listened to a telephone conversation between Mr. Reiher and ARR that occurred while Mr. Reiher was in the Wauapca County jail. (DOC 86:13; Appendix D:13). Deputy Durrrant testified that he believed Mr. Reiher had admitted to causing the damage to the residence. (DOC 86:14; Appendix D:14). According to Deputy Durrant, Reiher had stated to ARR that he knew there was a gas leak and that he had shut

the gas off. (DOC 86:14; Appendix D:14). Deputy Durrant further testified that although he did not know for sure, he believed that the gas tank was empty when Mr. Reiher had left the residence. (DOC 86:16; Appendix D:16).

APPELLANT'S ISSUE ON APPEAL

I. Does a person engage in criminally reckless conduct if the person engages in conduct that creates an unreasonable and/or substantial risk of death or great bodily harm but immediately engages in further conduct by taking affirmative steps for the purpose of eliminating the risk?

A. Summary of the Argument

Mr. Reiher submits that the factual record in this case does not establish a factual basis for his pleas to second degree recklessly endangering safety, in violation of Wis. Stats. §941.30(2).

One of the essential elements of the offense is that the defendant endangered the safety of another human being by criminally reckless conduct. See WI JI-CRIMINAL 1347. In order to establish that element, among other things the facts must support a finding that the defendant engaged in conduct that created a risk of

death or great bodily harm to another person, and that the risk was unreasonable and substantial.

Assuming that the facts support a finding or inference that Mr. Reiher damaged the residence at E1566 Erickson Rd. and that he was aware that his conduct in causing the damage created a substantial and/or unreasonable risk of death or great bodily harm to another person, the factual record is insufficient to establish a factual basis for his pleas to second degree recklessly endangering safety.

The factual record indicates that Mr. Reiher took immediate steps to eliminate any risk he had caused in creating a gas leak in the house by turning off the gas. The facts of record indicate that when Mr. Reiher moved out of the residence after being evicted, there was no active risk as a result of damage to the furnace and/or venting pipes because the flow of gas had been stopped and the propane gas tank emptied.

Mr. Reiher's conduct is inconsistent with the concept of recklessly endangering safety. His entire course of conduct includes caution. His entire course of conduct includes his efforts to eliminate any risk he might have caused. By shutting off the gas and eliminating any active risk caused by a gas leak, his conduct was not criminally reckless.

B. Standard of Review

The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion; the reviewing court will only reverse if the circuit court has failed to properly exercise its discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997) An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997).

C. Relevant Law

When a defendant seeks to withdraw a plea after sentencing, he must establish by clear and convincing evidence that refusal to allow withdrawal of the plea would result in a manifest injustice. State v. Brown, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (2006).

Wis. Stats. § 971.08(1)(b) provides that before a circuit court accepts a defendant's guilty plea, it must make such inquiry as satisfies it that the defendant in fact committed the crime charged; establishing a sufficient factual basis requires a showing that the conduct which the defendant admits constitutes the offense charged. State v. Lackershire, 2007 WI 74, ¶33, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

The purpose of the statutory requirement for a court inquiry as to basic facts is to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not constitute the charged crime. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007). A defendant's failure to realize that the conduct to which he pleads guilty does not fall within the offense charged is incompatible with that plea being knowing and intelligent. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

A factual basis may be established through testimony by witnesses, reading of police reports or statements of evidence by the prosecutor. White v. State, 85 Wis.2d 485, 490, 271 N.W.2d 97 (1978). In applying the manifest injustice test on review, the court may consider the whole record since the issue is no longer whether the guilty plea should have been accepted, but rather whether there was an abuse of discretion in the trial court's denial of the motion to withdraw; facts adduced at the preliminary hearing and at the motion hearing may be considered in evaluating the denial of the motion to withdraw. White v. State, 85 Wis.2d 485, 491, 271 N.W.2d 97 (1978).

A person acts with criminal recklessness when he creates an unreasonable and substantial risk of death or

great bodily harm to another human being, and he is aware of that risk. State v. Blair, 164 Wis.2d 64, 71, 473 N.W.2d 566 (Ct.App.1991).

D. Argument

Mr. Reiher respectfully submits that the circuit court erroneously exercised its discretion in denying his motion for postconviction relief to withdraw his pleas in this case. The circuit court concluded that denying Mr. Reiher's request to withdraw his pleas would not constitute a manifest injustice because the pleas were supported by a factual basis.

The facts forming the basis for the pleas were that Mr. Reiher had resided at E1566 Erickson Rd., and that the property was owned by ARR/RJC (the father of ARR). Mr. Reiher was evicted from the residence, and moved out in June, 2016. Law enforcement investigated a report of vandalism to the residence, and observed significant damage to the interior of the residence. Law enforcement observed damage to the furnace located in the basement, as well as the venting piping. Subsequently, some individuals came to the residence in order to do repairs and renovation. They turned on the gas to cook on the stove, smelled gas, and turned it off. There was an explosion in which individuals were severely injured.

An officer listened to recordings of telephone calls placed from the Waupaca County jail after Mr. Reiher had been arrested and confined there. In one call, Mr. Reiher purported to admit to causing the damage in the residence. Mr. Reiher also indicated that he had shut the gas off in the house and emptied the propane gas tank before moving out.

Mr. Reiher was originally charged with multiple counts of first degree recklessly endangering safety. He eventually plead to an amended information and was convicted of two counts of second degree recklessly endangering safety pursuant to the plea.

1. Plea hearing.

The plea hearing was held on April 10, 2018. (DOC 90; Appendix E). The circuit court confirmed with Mr. Reiher that he had gone over the plea questionnaire form with his attorney and that he understood it. (DOC 90:4-5; Appendix E:4-5). The court also confirmed that Mr. Reiher had gone over the elements of the offense with his attorney. (DOC 90:6; Appendix E:6).

However, the court neglected to make a determination regarding factual basis. The court did not obtain any stipulation from counsel that a factual basis existed for the pleas. If a circuit court fails to establish a

factual basis for the offense pleaded to, a manifest injustice has occurred. State v. Thomas, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836 (2000).

2. Postconviction motion hearing

At the conclusion of the postconviction motion hearing, the circuit court concluded that a factual basis existed for Mr. Reiher's pleas to second degree recklessly endangering safety based on the criminal complaint, testimony at the preliminary hearing, "as well as the motions that were addressed throughout this case." (DOC 92:15-16; Appendix F:15-16).

They key finding made by the circuit court in response to Mr. Reiher's motion and argument that he did not engage in criminally reckless conduct, was that even if he had shut the gas off, it was reasonable to believe (and foreseeable) that at some point the gas would be turned back on, and that event could cause great bodily harm. (DOC 92:16; Appendix F:16). Respectfully, Mr. Reiher disagrees with the conclusion of the circuit court.

3. The circuit court erroneously exercised its discretion in denying Mr. Reiher's motion for postconviction relief.

The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion; the reviewing court will only reverse if the circuit court has failed to properly exercise its discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997) An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997).

One of the purposes of the court's obligation to establish a factual basis for the plea is to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not constitute the charged crime. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

Mr. Reiher respectfully submits that the conduct documented by the record does not constitute the offense of second degree recklessly endangering safety. Mr. Reiher's conduct, considered in its entirety, did not create a substantial and unreasonable risk of death or great bodily harm to another human being.

In its decision to deny his motion, the circuit court found that Mr. Reiher's conduct "could" cause great bodily harm. (DOC 92:16; Appendix F:16). However, criminally reckless conduct is not based on what is possible or what "could" happen. Instead, the conduct must be such as to create a risk that is substantial and unreasonable. The circuit court made no specific finding that after Mr. Reiher shut off the gas, there remained an unreasonable and substantial risk of death or great bodily harm to another human being due to the damage he had caused.

Mr. Reiher respectfully submits that the circuit court erroneously applied the law, and accordingly, the circuit court's denial of his motion to withdraw his pleas was an erroneous exercise of discretion.

The fact that Mr. Reiher did indeed shut off the gas at E1566 Erickson Rd. prior to moving out does not appear to be in dispute. Deputy Durrant testified at the preliminary hearing that he listened to a conversation from the Waupaca County jail in which Mr. Reiher told ARR that he had shut the gas off. (DOC 86:14; Appendix D:14). According to Deputy Durrant, ARR had told investigators that Mr. Reiher had run the propane tank dry. (DOC 86:16; Appendix D:16). During his allocution, Mr. Reiher stated that he "shut everything off" and "I did everything I could possibly

do to make sure nothing happened." (DOC 91:40; Appendix H:40).

It is also worth noting that when Deputy Santiago first discovered the basement damage, including the furnace and venting pipes, he did not indicate that he noticed a gas leak. According to the criminal complaint and preliminary hearing testimony, there was no mention made of a gas leak or the odor of gas when the damage was investigated.

According to the complaint, ARR had stated that Mr. Reiher had told her the electricity and gas were shut off when he moved out. (DOC 5:11; Appendix B:11). Deputy Durrant testified that ARR had given a statement in which she had indicated that Mr. Reiher told her that he had shut all the utilities off when he moved out. (DOC 86:16; Appendix D:16). During his allocution, Mr. Reiher stated that he had informed ARR. (DOC 91:40-41; Appendix H:40-41).

Did Mr. Reiher really create a substantial and unreasonable risk of death or great bodily harm when he damaged the furnace and caused a gas leak, but then turned off the gas (stopping the flow of gas)? Was it foreseeable that the propane tank would be refilled and that the gas would be turned back on before the furnace and piping was repaired?

Mr. Reiher would respectfully submit that the answer is 'no.' Mr. Reiher took affirmative steps to eliminate whatever risk he had created. He could not have reasonably expected that the propane tank would be refilled and the gas flow turned back on before the damage had been repaired.

The elements of the offense of conviction require that Mr. Reiher created a risk of death or great bodily harm to another human being, that the risk was unreasonable and substantial, and that he was aware of the risk. WIS JI-CRIMINAL 1347. By taking the affirmative step of shutting off the gas, Mr. Reiher's conduct did not create such a risk, nor was the recreation of the risk foreseeable. Moreover, if the existence of the risk was determined by someone subsequently reversing Mr. Reiher's actions of shutting off the gas, it cannot be said that he was aware of the risk at the time of his conduct.

If a person places a "MacGyver bomb" in a mailbox, it is foreseeable that it might explode. See State v. Brulport, 202 Wis. 2d 505, 551 N.W.2d 824 (Ct.App.1996). If a person hits someone over the head with a loaded gun, it is foreseeable that the gun might discharge. See State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct.App.1991). If a person throws a rock at the head of another person, it is foreseeable that the rock

might strike and injure the other person. See State v. Williams, 190 Wis. 2d 1, 527 N.W.2d 338 (Ct.App.1994). If a person with a prohibited BAC gets behind the wheel, it is foreseeable that the person might cause an accident with injuries. See State v. Lechner, 217 Wis. 2d 392, 576 N.W.2d 912 (1998).

However, if a person damages a residential furnace and vents, but then turns off the gas flow, empties the gas tank, and tells the owner, it cannot be said that the person has created an unreasonable risk of great bodily harm or death and is aware of that risk. In contrast to Blair, it would take a bit of clairvoyance to recognize that someone might refill the gas tank and turn on the flow of gas before repairing the furnace damage. See State v. Blair, 164 Wis.2d 64, 73, 473 N.W.2d 566 (Ct.App.1991).

In further contrast to the above referenced cases, in the present case there was an intervening factor which changed the nature and character of the situation that had been created by Mr. Reiher. The existence of the intervening factor was not reasonably predictable or foreseeable. Without the intervening factor, it is unlikely that there would have been an explosion at E1566 Erickson Rd. on the day of July 22, 2016.

Mr. Reiher's own conduct did not create an unreasonable and substantial risk of death or great

bodily harm. Since the explosion hinged on someone else filling up the propane tank and someone else turning on the gas flow, it cannot be said that Mr. Reiher was aware that his own conduct created such a risk. The circuit court made no factual basis determination at the plea hearing, and arguably applied the incorrect standard at the postconviction motion hearing. If the correct legal standard is applied to the totality of facts, Mr. Reiher's conduct does not provide a factual basis for his convictions on two counts of second degree recklessly endangering safety. By clear and convincing evidence, it would constitute a manifest injustice not to permit him to withdraw his pleas to those counts of conviction. State v. Black, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363 (2001).

CONCLUSION TO BRIEF AND ARGUMENT

Mr. Reiher respectfully requests that this court reverse the denial of his postconviction motion, vacate the judgment of conviction, and withdraw his plea in this case to one count of second degree recklessly endangering safety.

Dated this 12th day of February, 2020.

Respectfully submitted,

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Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3796 words.

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Certification of Appendix Compliance with Wis. Stats. § Wis. Stats. 809.19(2)(a).

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an Appendix that complies with Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last initials instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.

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