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SUPREME COURT

STATE OF WISCONSIN SUPREME COURT

CASE NO. 2019AP002321-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN N. REIHER,

DEFENDANT-APPELLANT-PETITIONER.

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

- I. In the context of second degree reckless endangerment, can the state satisfy the elements that the defendant was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm if the defendant's mitigation makes the harm unforeseeable?

Pursuant to his plea, Mr. Reiher was convicted of second degree reckless endangerment. The facts set forth in the complaint alleged that Mr. Reiher caused damage to a residence from which he had been evicted, including damaging the home's furnace and the pipes connecting the furnace to the outside propane tank.

The facts also indicated that Mr. Reiher shut off the gas flow and emptied the outdoor gas tank, and informed the owner. Subsequently, two men who had been hired to repair the damage throughout the home were severely injured in an explosion.

At his plea hearing, the circuit court failed to find or ascertain that a factual basis existed for the pleas to second degree reckless endangerment. Mr. Reiher filed a postconviction motion seeking to withdraw his plea on the grounds that no factual basis could be established for the conviction because his overall course of conduct included steps that mitigated the risk and made the

potential harm unforeseeable. The circuit court denied the motion after a hearing, and the court of appeals affirmed.

STATEMENT OF CRITERIA FOR REVIEW

In order to establish a factual basis for a plea to second degree reckless endangerment, the state must establish that the defendant endangered the safety of another human being by criminally reckless conduct. In order to satisfy the elements of the offense, 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, that the risk was unreasonable and substantial, and that the person was aware of the risk. WIS JI-CRIMINAL 1347.

The published caselaw in Wisconsin indicates that in order for a defendant to be aware that his conduct has created an unreasonable and substantial risk of death or great bodily harm, the potential harm arising from the risk must be foreseeable. See State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct.App.1991).

In the present case, the facts in support of Mr. Reiher's plea indicate that he damaged the interior of the house in which he had been residing, including damage to the furnace in the basement and the pipes connecting the furnace to the propane tank outside the

home. The facts further indicate that Mr. Reiher shut off the flow of gas and informed the homeowner that he had done so. The facts establish that the homeowner's father was aware of the damage to the furnace.

The circuit court found that it was foreseeable that the gas flow would be turned back on prior to the furnace being repaired and that an explosion could occur causing serious injuries. The decision of the court of appeals cast doubt on whether the concept of foreseeability is relevant to the existence of an unreasonable and substantial risk of which the defendant was aware, characterizing it as a concept "borrowed from tort law." As such, the decision of the court of appeals is contrary to the controlling opinions of this court and the court of appeals. Wis. Stats. § 809.62(1r)(d).

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)¹; two counts of misdemeanor battery, contrary to Wis. Stats. §940.19(1). Mr. Reiher was also charged with two

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

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 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.

ARGUMENT

This court should grant Mr. Reiher's petition in order to establish the legal elements of second degree reckless endangerment, and ultimately conclude that the court of appeals erroneously affirmed the circuit court's denial of Mr. Reiher's motion for postconviction relief.

A. Factual background and summary

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). On July 25, 2016, ARR came into the Waupaca County Sheriff's Office and made a report to Deputy Durrant. (DOC 5:4).

According to the complaint, ARR had filed an eviction action against Jonathan Reiher in Waupaca Co. case 16SC389. (DOC 5:9). 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).

On June 12, 2016, Deputy Lewinski was notified of a vandalism complaint being reported at E1566 Erickson Rd. (DOC 5:9). 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). Deputy Lewinski and Deputy Santiago entered the residence. (DOC 5:9). There was substantial damage to the kitchen area. (DOC 5:9; Appendix B:9). The cabinets and appliances had been smashed. (DOC 5:9). The bathroom had sustained severe damage. (DOC 5:9). There were several holes punched in the drywall throughout the residence. (DOC 5:9).

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

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). Two males were injured; Deputy Kraeger observed that they had been severely burned. (DOC 5:10). Deputy Kraeger questioned the complainant, SJB, and BLB. (DOC 5:10).

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

Deputy Kraeger spoke with ARR. (DOC 5:10). ARR advised that the damage to the residence had been caused by her ex-boyfriend, Jonathan Reiher. (DOC 5:10). 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). ARR further advised that she never went into the basement after Reiher moved out. (DOC 5:10). ARR advised that Reiher had told her the gas was shut off when he moved out. (DOC 5:10). ARR advised that the furnace had been installed in 2014 after Mr. Reiher told her the furnace needed to be replaced. (DOC 5:10).

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). Deputy Durrant testified that he believed Mr. Reiher had admitted to causing the damage to the residence. (DOC 86:14). 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). 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).

Mr. Reiher entered pleas to the reduced charges of second degree reckless endangerment. Mr. Reiher subsequently filed a motion for postconviction relief, seeking to withdraw his pleas to second degree reckless endangerment on the basis that the pleas lacked a factual basis.

The circuit court held a postconviction 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 B:15-16).

The 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 B:16).

B. Argument

In his appeal, Mr. Reiher argued that a factual basis could not be established for his pleas because the facts in the record did not indicate that he had created an unreasonable and substantial risk of death or great bodily harm, and that he was aware of the risk. Specifically, Mr. Reiher argued that the full course of his conduct included his efforts to mitigate the effects of the damage to the furnace. Although a damaged furnace may have created a gas leak which posed an unreasonable and substantial risk, shutting off the gas flow and informing the homeowner functioned to eliminate the risk of a gas leak. The fact that the gas flow was turned back on and that there was a spark which caused an explosion could not have been reasonably foreseeable to Mr. Reiher. Accordingly, he did not knowingly create an unreasonable and substantial risk of death or great bodily harm.

The applicability of the concept of foreseeability is both logical and legal. As a matter of logic, a person could not be aware that his conduct created such a risk if

the potential harm arising from the risk could not be reasonable foreseen. Awareness of a possible outcome must encompass some aspect of foreseeability or predictability.

The court of appeals appeared to acknowledge as much in State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct.App.1991). In assessing criminal recklessness, the court of appeals concluded that one need not have “clairvoyance” to recognize that hitting someone over the head with a loaded gun creates a substantial risk of discharge. State v. Blair, 164 Wis.2d 64, 73-74, 473 N.W.2d 566 (Ct.App.1991). In other words, the harmful result was foreseeable.

The court of appeals dismissed Mr. Reiher’s argument because the cases he cited did not actually discuss the concept of “foreseeability.” (Decision of Court of Appeals, ¶21 and FN7; Appendix A). However, Mr. Reiher submits that foreseeability of the potential harm is an inherent part of the requirement that the defendant be aware that his conduct has created an unreasonable and substantial risk, and is implicit in the court’s decision in Blair.

However, the decision of the court of appeals states “we need not decide whether that concept has any application in this context.” (Decision of Court of Appeals, ¶21; Appendix A). Without significant

elaboration, the court of appeals goes on to agree with the circuit court finding that “it was foreseeable that the gas tank would be refilled and turned back on at some point.” (Decision of Court of Appeals, ¶21; Appendix A). Unfortunately, the decision of court of appeals offers no further clarification of whether foreseeability is a relevant criteria for second degree reckless endangerment, or further explanation as to how Mr. Reiher could reasonably have been aware that prior to being repaired, the gas tank would be refilled, the gas flow turned on, and a spark would ignite the gas and cause an explosion.

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).

Mr. Reiher’s plea to second degree reckless endangerment in this case was neither knowing nor intelligent. When his full course of conduct is

considered in the context of other intervening factors, he did not create an unreasonable and substantial risk of death or great bodily harm. Indeed, he took specific steps to mitigate any risk such that the result harm could not have been known to him at the time of his actions.

The decision of the court of appeals, to the extent that it analyzes the concept of foreseeability of harm in the context of the risk, does so in single sentence, essentially dismissing the relevance of the concept. Mr. Reiher respectfully requests that this court accept this case for review in order to ensure that lower courts apply the correct legal standard to cases involving allegations of criminal recklessness.

CONCLUSION

Mr. Reiher respectfully requests that this court, for all of the above reasons, grant review and reverse the court of appeals' decision affirming the circuit court's denial of his motion for postconviction relief, and remand the case back to the circuit court.

Dated this 24th day of November, 2020.

Respectfully submitted,

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Certification of Petition Compliance with Wis. Stats. § 809.62(4)(a).

I hereby certify that this petition conforms to the rule contained in Wis. Stats. § 809.62(4)(a) for a petition and appendix produced with a proportional serif font. The length of this petition is 2420 words.

Electronic Filing Certification pursuant to Wis. Stats. §809.62(4)(b) and (d).

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the petition.

Certification of Appendix Compliance with Wis. Stats.
§ 809.62(2)(f).

I hereby certify that this petition conforms to the rule contained in Wis. Stats. § 809.62(2)(f) in that it contains an appendix consisting of (in order) the decision and opinion of the court of appeals, the judgments, orders, and decisions of the circuit court necessary for an understanding of this petition, and other portions of the court record necessary for an understanding of this petition.
