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The Wisconsin Court of Appeals District IV

2019AP001138 CR

State of Wisconsin,
Plaintiff-Respondent

v.

Scott A. Walker
Defendant-Appellant

Appeal from The Circuit Court of Grant
The Honorable Robert P. VanDeHey, presiding

Brief of Appellant Scott A. Walker

Steven Roy
Attorney for the Defendant-Appellant
Wisconsin State Bar No. 1115155
1310 O'Keeffe Ave. #315
Sun Prairie, WI 53590

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Statement of the Issues

Did the Circuit Court err in its conclusion Dr. Walker was not entitled to a new trial due to ineffective assistance of counsel?

Statement on Publication and Oral Argument

This case is appropriate for publication under Wis. Stat. Rule §809.23(1)(a)(1, 2, 5). Counsel is aware of no published opinion of this Court or the Wisconsin Supreme Court which clearly states the standard trial courts are to apply when considering a claim of defense of property. This case involves exactly that question and would provide clarity for judges and practitioners. This case also provides this Court an opportunity to apply the standards of *State v. Carter* and *State v. Domke* in a factual scenario which does not involve the sexual abuse of a child. The use of firearms, "castle doctrine", and the duty to retreat are also topics of much public debate and clarification of the standards in Wisconsin would serve the public's interest in having a clear understanding of the applicable laws.

As this case is a good candidate for publication, oral argument would likely be of significant value. As noted, there is a dearth of case law on the standard for a claim of defense of property. While Dr. Walker contends it is logical to apply the same standards as a claim of self-defense, the State of Wisconsin may differ. Oral argument would allow this court the opportunity to develop the legal theories further than the parties briefs.

Statement of the Facts and Case

The facts of this case are relatively straightforward. In November of 2017 Dr. Scott Walker hired Dianne Alm to clean his house. (28:27). Dr. Walker then filed for bankruptcy before paying Ms. Alm. (28:29). Ms. Alm received a notice regarding this bankruptcy from the federal bankruptcy court. (28:29-30). Ms. Alm texted and left voice mails for Dr. Walker about the unpaid bill. (28: 29). She had suggested he could use his personal property rather than money to pay the bill. (Exhibit 1, Interview with Dianne Alm, 6:42-6:56[1]) On July 11, 2018, Ms. Alm went to Dr. Walker's home to confront him over the unpaid bill. (28:30-31). Dr. Walker did not have his phone with him. (Exhibit 1, Scott Walker Arrest, 7:30-7:34). Dr. Walker then told Ms. Alm to leave his property. (28:26). When she didn't leave, Dr. Walker told her he was going to get his gun. (28:26). When Dr. Walker returned from his house with his firearm, Ms. Alm was in her car, but had not started her car. (28:36-37). Dr. Walker then raised his firearm, and Ms. Alm left the property.

A criminal complaint was filed on July 17, 2018, charging Dr. Walker with one count of Pointing a Firearm at Another. (1:1). The case was tried before a jury on October 22, 2018. (28:1). The jury found Dr. Walker guilty. (28:87). The same day the circuit court sentenced him to a $700 fine plus court costs. (28:95). On November 6, 2018, Dr. Walker filed a timely notice of intent to pursue post-conviction relief. (16:1). On May 13, 2019 Dr. Walker filed a motion for Post-Conviction relief, alleging he had received ineffective assistance of counsel and requesting a *Machner* hearing. (19:1-4). The Circuit Court held a *Machner* hearing on June 5th. (29:1). The Court ruled there was not ineffective assistance of counsel. (29:17; App. 26). The Court supplemented its oral ruling with a final order denying the request for a new trial on June 10, 2018. (20:1-3). Dr. Walker filed a timely notice of appeal on June 21, 2019. (21:1).

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[1] Officer: "What's he owe ya" Alm: "$750" Officer: "Were you attempting to trade?" Alm: "Yeah, yeah, I even said 'You got somethin' that' his garage is full of stuff".

Argument

I. Standard of Review

It is axiomatic the right to counsel is the right to effective counsel. *State v. Johnson*, 153 Wis. 121, 126 (1990) The standard for reviewing trial counsel's performance is well established; counsel must have performed deficiently and this deficiency must have prejudiced the defendant's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The case is reviewed from counsel's perspective at the time of trial, and there is a strong presumption counsel acted reasonably within professional norms. *Johnson*, 153 Wis. 127. The ultimate benchmark is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. 686.

The standard of review of the ineffective assistance of counsel components is a mixed question of law and fact. *Id*, at 698. The trial court's underlying findings of what happened will not be overturned unless clearly erroneous. *Johnson*, 153 Wis. 127. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. *Id*. at 128.

II. The Circuit Court's Conclusion Counsel Had Considered Defense of Property is Clearly Erroneous

In Dr. Walker's motion for post conviction relief, he argued his trial counsel was ineffective for failing to raise a claim of defense of property[2]. In its order denying Dr. Walker's request for a new trial, the Circuit Court wrote, "The allegation of ineffectiveness for failing to request a jury instruction on self-defense is refuted because that defense was properly rejected as a matter of trial strategy." (20:1) The Court is correct trial counsel considered and discarded self-defense as a matter of strategy. However, Dr. Walker has argued counsel was ineffective due to a failure to raise a defense of property claim, not a self-defense claim.

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[2] In the filed motion, heading I. erroneously states Self Defense, but the text throughout the motion refers to the defense of property, including the statutory citation immediately after the erroneous heading

For the purposes of argument, Dr. Walker assumes the Circuit Court actually meant to state, "The allegation of ineffective assistance of counsel for failing to request a jury instruction on *Defense of Property* is refuted because that defense was properly rejected as a matter of trial strategy."[3] This conclusion does not accurately reflect trial counsel's testimony, and is without a doubt erroneous.

Trial counsel had testified about his concerns with the retreat instruction at length. (29:5; App. 21). Counsel stated, "I decided not to go with self-defense because I was worried that the retreat instruction would have been requested." (29:5; App. 21). When asked specifically about defense of property counsel admitted, "I don't think I gave it sort of independent thought process in this case it probably deserved....In looking at it since then, I think there still might have been the retreat issues, but that's all after the fact. That wasn't in my preparation".[4] (29:5-6; App. 21-22).

When reviewing trial counsel's performance, court's must use counsel's perspective at the time of trial. *Johnson*, 153 Wis. 127. The Circuit Court's factual finding counsel had considered defense of property due to the concerns regarding the retreat instruction are clearly erroneous. Either the Court forgot counsel had said the concerns came after the fact and not in his preparation, or the Court confused self-defense and defense of property. No matter which case, the factual conclusion trial counsel had dismissed defense of property as a matter of trial strategy is clearly refuted by counsel's testimony.

III. Counsel's Failure to Consider the Privilege of Defense of Property Falls Below an Objective Standard of Reasonableness

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[3] This would conform with the Court's oral ruling at the *Machner* hearing. The court discussed the interference with Dr. Walker's property, then turned to trial counsel's testimony he was concerned with the retreat instruction. (29:15-17; App. 24-26)

[4] Counsel did state he had lumped defense of property in with self defense, followed with a statement he ultimately decided not to go with self-defense and defense of property, and then immediately clarified to say he decided not to go with self-defense, not the combination of the two defenses. (29:5; App. 21)

When presenting a claim of ineffective assistance of counsel the defendant must demonstrate counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 688. Counsel has a duty to reasonably investigate the law or make a reasonable strategic decision which makes further investigation unnecessary. *State v. Carter* and *State v. Domke* are instructive regarding the extent to which counsel is required to know or investigate the relevant law.

In *Carter*, the defendant argued his attorney was deficient for not presenting evidence of the victim's prior sexual assault. *State v. Carter*, 2010 WI 40, 324 Wis. 2d 640, 649 (2010). The attorney viewed a videotaped interview with the victim, and followed up with this information by arranging for an investigator to contact the victim's mother. *State v.* Carter, 324 Wis. 2d 668. The mother did not permit the investigator to speak with the victim. *Id.* The attorney noted the video taped interview depicted a "very sympathetic child" and he intended to pursue what he considered a wiser defense strategy, attacking the mother's credibility. *Id.* at 669. At this point, the attorney determined he did not need to investigate the alleged previous assault further. *Id.* The Wisconsin Supreme Court held it was not deficient for the attorney to further investigate the facts and admissibility of a prior sexual assault *Id.*

In *State v. Domke*, Domke argued his trial counsel was deficient for failing to object to hearsay statements made to a counselor or social worker. *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 290 (2011) The victim had made statements to an outpatient therapist regarding alleged sexual contact from Domke. *Id.* These statements could have been objected to under *State v. Huntington*, 216 Wis. 2d 671 (1988). *Domke*, 337 Wis. 2d 293. The Court noted the trial attorney did not articulate a strategic reason as to why he allowed the testimony, and as such, a reasonable attorney should have investigated if it was admissible. *Id*, at 291. The Court then held the trial attorney performed deficiently by failing to object to the hearsay testimony because he had failed to investigate the relevant limitations on hearsay statements made for the purpose if diagnosis or treatment. *Id*, at 293.

Dr. Walker's case is much closer to the failure in *Domke* than it is to the reasonable attorney's actions in *Carter*. Counsel

admitted he did not give the defense the independent thought process it probably deserved, and in reflection, stated he probably would have used the defense. He made no attempt to defend his failure to investigate the law, and gave no reason why a court should consider his decision to not investigate the law to be reasonable. There was evidence Ms. Alm wanted to take Dr. Walker's property, and evidence he threatened force to prevent this taking; a reasonable attorney would have investigated whether this threat was priviledged. Dr. Walker's trial counsel did not, and thus performed deficiently.

A. Consideration of Retreat in the Context of Self Defense Does not Constitute a Reasonable Investigation of Law Relieving him of the Duty to Investigate Defense of Property

Trial Counsel testified he was concerned about the retreat jury instruction in terms of self-defense. The Trial Court's order also deals with the possibility of retreat. In the context of self-defense, this concern is appropriate. Dr. Walker's ability to remove himself from a potentially dangerous situation would likely make his reemergence unreasonable.

Dr. Walker was not concerned with his personal well-being, but the possibility of Ms. Alm taking some of his property as payment for cleaning his house. The potential for interference with his property had not concluded when he went into his house. When Dr. Walker came back out from his house with his gun, Ms. Alm was in her car. She had not started it, or told Dr. Walker she was leaving. Dr. Walker could have no idea as to what Ms. Alm was intending to do. She very well could have exited the car to try and obtain his property. The unlawful interference Dr. Walker was defending from had yet to terminate. Dr. Walker had no reason to know it would terminate until Ms. Alm started her car after he raised his gun. As such, the two considerations are quite different, and Counsel's analysis of one, does not relieve him of the analysis of the other.

IV. Counsel's Error Undermines Confidence in the Outcome of This Case

In addition to showing his trial counsel was deficient, Dr. Walker must also demonstrate counsel's deficiency was

prejudicial to his defense. *Strickland*, 466 U.S. 691-692. Prejudice is demonstrated when the defendant shows there is a reasonable probability that but for the errors, the result of the proceeding would have been different. *State v. Dillard*, 2014 WI 123, 358 Wis.. 2d 543, 572 (2014). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Prejudice from trial counsel's failure to raise the privilege of defense of property is quite easy to follow logically. Had the defense been raised, the jury should have been instructed on the privilege of defense of property.[5] The jury could then find Dr. Walker's actions were reasonable, thus privileged and not criminal.

In its order denying Dr. Walker's motion for a new trial, the Circuit Court determined even if counsel was deficient, there was no prejudice. The Circuit Court's order states:

> [T]he court would not have given a defense of property instruction if requested. It was objectively unreasonable for the defendant to believe that once any unlawful interference with his property had been terminated, and he was safely in his home, it was reasonable to reemerge and point a firearm at the victim who was already in her vehicle fumbling with her keys (20:2)

The Circuit Court's order is problematic for three reasons. As discussed above, the unlawful interference with Dr. Walker's property had not terminated when he went into his house. Secondly, Dr. Walker had no reason to know Ms. Alm was fumbling with her keys in an attempt to leave. Third, the Court overstepped into the province of the jury when it declared Dr. Walker's actions to be unreasonable.

When raising the privilege of self-defense, a circuit court must instruct the jury on the defense when a reasonable jury

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[5] Wis. Stat. §939.49(1) states "A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent to terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property."

could find a prudent person in the position of the defendant under the circumstances existing at the time of the incident could believe he was exercising the privilege of self-defense. *State v. Stietz*, 2017 WI 58, 375 Wis. 572, 583 (2017). A court may deny the instruction only when no reasonable basis exists for the defendant's belief another person was unlawfully interfering with his person. *Id.* Court's are not to weigh or to look at the totality of the evidence, this is the province of the jury. *Id.*, 584. While Dr. Walker is not aware of any published appellate decisions which deal with this standard regarding the privilege of defense of property, it is logical to apply the same standard of self-defense to defense of property. *See County of Fond Du Lac v. Gregoriou*, 1988 Wisc. App. Lexis 941, 3-4, (1988) ("We conclude that the proper standard to apply for all defenses to criminal liability recited in secs. 939.42 through 939.49, Stats., logically requires application of the same rule.").

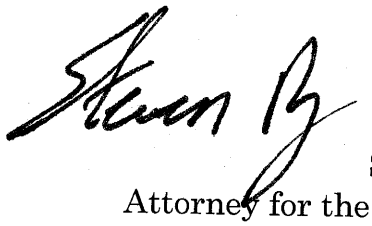
Ms. Alm had ignored a federal bankruptcy courts order to not try and collect this debt. She continued to leave messages try to collect, and when that did not work, she surprised Dr. Walker with a visit. When asked to leave, she didn't. In fact, she was still present after Dr. Walker came back with the gun he told her he was getting. A jury, viewing the evidence from Dr. Walker's perspective could easily have determined his actions were reasonable. If this defense had been argued and the Circuit Court failed to give the requested instruction, the failure to give the instruction would have been addressed at the appellate level as well. Without a jury to deliberate on whether Dr. Walker's actions were reasonable, no reasonable person can be confident this trial provided a just result.

Conclusion

For the reasons stated above, Dr.Walker respectfully requests this court reverse the Circuit Court's ruling and order the Circuit Court to set a new trial in this case.

Dated: Monday, September 2, 2019

Respectfully submitted,



Steven Roy
Attorney for the Defendant
Wisconsin State Bar No. 1115155

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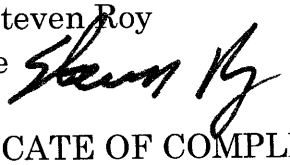
Signature 

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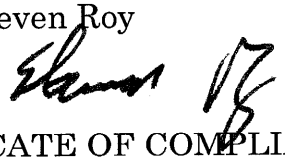
Signature 

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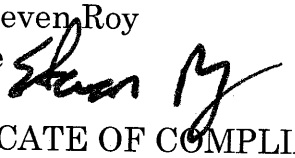
Signature 

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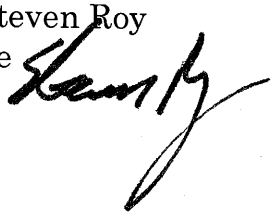
Signature 

Appendix