COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1624 **Cir. Ct. No. 2006CF27**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVE L. TRATTNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Steve Trattner appeals from an order denying his WIS. STAT. § 974.06 (2009-10),[1] motion to withdraw his no contest plea to first-

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

degree reckless homicide. He contends that his plea was not knowingly, voluntarily and intelligently entered because he was not aware, as illustrated in ***State v. Miller***, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, *review denied*, 2010 WI 5, 322 Wis. 2d 123, 779 N.W.2d 176 (No. 2007AP1052-CR), that imperfect self-defense can negate the "utter disregard for human life" element of first-degree recklessness. The trial court concluded that ***Miller*** did not make new law and, therefore, Trattner's § 976.06 motion was procedurally barred because he failed to establish a sufficient reason for not challenging his plea in his first appeal. We agree and affirm.

¶2 In 2006, Trattner killed his wife in a physical confrontation during which he strangled her. Trattner reported that he believed his wife, who had become increasingly agitated and aggressive toward him in the weeks leading to the confrontation and his wife's request for a divorce, was grabbing for a knife to harm him. He entered a no contest plea to first-degree reckless homicide. During the plea colloquy, Trattner's trial counsel acknowledged that the defense had "explored a number of possible factual and legal defenses to the charge, including self-defense, including adequate provocation under [WIS. STAT. §] 939.44," that the defense had the assistance of two forensic psychiatrists who evaluated Trattner, and that ultimately the defense concluded that Trattner did not have a viable defense to the charge at trial.

¶3 Trattner filed a postconviction motion under WIS. STAT. RULE 809.30, only challenging his forty-five-year sentence. He sought to establish by expert testimony that he was suffering from a mental disorder that caused him to irrationally believe he was being threatened by his wife and had to kill her in self-defense. The denial of his postconviction motion and his conviction were

affirmed on appeal. ***State v. Trattner***, No. 2007AP1124-CR, unpublished slip op. (Wis. Ct. App. Sept. 3, 2008).

¶4 In 2009, ***Miller*** was decided. A jury convicted Miller of first-degree reckless injury while armed with a dangerous weapon. ***Miller***, 320 Wis. 2d 724, ¶15. In ***Miller***, a guest in Miller's home, a highly intoxicated, physically imposing male ex-Marine, slapped Miller two times, threatened Miller with a screwdriver twice, slapped another occupant, and harassed and threatened others in the home. ***Id.***, ¶¶5-10. Eventually, Miller retrieved a shotgun and shot the man in the hip to end the confrontation. ***Id.,*** ¶¶11-12. After firing the shot, Miller called 911 to report it. ***Id.***, ¶14. On Miller's motion under WIS. STAT. § 974.06, the trial court granted Miller a new trial based, in part, on its conclusion that Miller's trial counsel was ineffective for not challenging the sufficiency of the evidence on the first-degree reckless injury conviction because the evidence did not prove that Miller's conduct showed an "utter disregard for human life." ***Id.***, ¶18. The State appealed. On appeal the court wrote:

> While the jury rejected Miller's claim of self-defense and defense of others under WIS. STAT. § 939.48, the prosecutor acknowledged in his closing argument that Miller "was acting in self-defense, but he wasn't acting in lawful self-defense." It would appear undisputed that a reason, if not *the* reason, for Miller's conduct was to protect himself and his friends. This reason is inconsistent with conduct evincing utter disregard. *See* ***Seidler v. State***, 64 Wis. 2d 456, 465-66, 219 N.W.2d 320 (1974) ("depravity of mind exists when the conduct causing [injury] demonstrates an utter lack of concern for the life and safety of another *and for which conduct there is no justification or excuse*").

Miller, 320 Wis. 2d 724, ¶40. After considering that the victim in Miller was not blameless or vulnerable and that Miller had called 911 when the confrontation escalated and again after the shot was fired, the court concluded that the undisputed evidence demonstrated that Miller showed some regard for human life

and directed that a judgment of acquittal be entered on the first-degree reckless injury charge. ***Id.***, ¶¶41-44.

¶5 On appeal, Trattner argues that ***Miller*** recognized for the first time that one's belief in the need for self-defense, even if not sufficient to establish the privilege to act in self-defense under WIS. STAT. § 939.48, could negate the utter disregard for human life element of first-degree reckless homicide. Essentially he claims that ***Miller*** created a defense he did not know was available to him at the time of his plea and consequently he did not fully understand the charge against him, rendering his plea constitutionally invalid. He further asserts that his failure to understand that a viable defense existed directly impacted his decision to plead to the charge.

¶6 Whether the procedural bar encompassed in WIS. STAT. § 974.06(4), as explained in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), applies to a postconviction claim is a question of law entitled to independent review. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). A subsequent change in the law may be a sufficient reason for allowing a new issue to be raised by a § 974.06 motion. ***State v. Howard***, 199 Wis. 2d 454, 460-62, 544 N.W.2d 626 (Ct. App. 1996), *aff'd*, 211 Wis. 2d 269, 287-88, 564 N.W.2d 753 (1997), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765.

¶7 ***Miller*** was a sufficiency of the evidence case. It did not create any new defense. Rather, it applied existing law to a unique and novel set of facts. The ***Miller*** court first looked to ***State v. Bernal***, 111 Wis. 2d 280, 330 N.W.2d 219 (Ct. App. 1983), which stated that pointing a loaded gun at another is not conduct evincing an utter disregard if it is "otherwise defensible" even if it is not

privileged. ***Miller***, 320 Wis. 2d 724, ¶37 (quoting ***Bernal***, 111 Wis. 2d at 285). The ***Miller*** court cited 1974 precedent to support the crux of its holding—that conduct evincing utter disregard must be conduct for which there is no justification or excuse. ***Miller***, 320 Wis. 2d 724, ¶40 (citing ***Seidler***, 64 Wis. 2d 465-66). At the time of his plea, the defense would have known to evaluate Trattner's conduct in terms of justification or excuse, even if not privileged as self-defense.[2]

¶8 Additionally, ***Miller*** has no application to Trattner as the cases are factually distinct. ***Miller*** involved undisputed facts of Miller's conduct which evinced some regard for human life in that Miller did not engage the victim physically for the first several hours, even after the victim struck Miller, Miller intended only to shoot the victim in the leg, he called 911 after the shot was fired, and he inquired as to the victim's well-being. ***Miller***, 320 Wis. 2d 724, ¶42. In great contrast, Trattner brutally beat his victim and then engaged in conduct for a sufficient amount of time to strangle her to death. He then moved his wife's body into the living room, put a pillow under her head and covered her with blankets, and went to his bedroom. In the morning, he helped his children get to school, and went to a business meeting and lunch. After returning home, he placed sleeping pills by his wife's body and called 911, misleading the dispatcher with a claim that his wife had killed herself and falsely reporting that his wife was conscious after their fight the night before. These are not facts like ***Miller*** which would allow a court or jury to conclude that as a matter of law that Trattner's conduct was inconsistent with a disregard for human life or otherwise defensible.

[2] Trattner does not argue that his trial counsel was ineffective in the evaluation of the viability of defenses.

¶9 Trattner cannot rely on ***Miller*** as providing a sufficient reason for his failure to challenge his plea in his direct appeal. We conclude that Trattner's WIS. STAT. § 974.06 motion was procedurally barred.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.