State of Wisconsin
Court of Appeals
District I
Appeal No. 2010AP000399 -CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Michael M. Miller,

Defendant-Appellant.

Appeal from an order of the Milwaukee County Circuit Court, the Hon. Jeffrey Conen, presiding, denying the appellant's postconviction motion for a new trial

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Defendant-Appellant's Brief

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Statement on Oral Argument and Publication

The issues presented by this appeal are constitutional in nature, and, therefore, the appellant recommends oral argument and publication.

Statement of the Issues

I. Whether the trial court erred in denying Miller's postconviction motion for a new trial on the grounds that he received ineffective assistance of counsel; where trial counsel failed to file a motion to suppress, on Fourth Amendment grounds, Miller's confession to police for the reason that the statement was obtained as a result of the warrantless and unreasonable search of the home of Golda Randolph, where Miller was arrested?

Answered by the trial court: No.

II. Whether the trial court erred in denying Miller's postconviction motion for a new trial on the grounds that he received ineffective assistance of counsel where, at the Miranda-Goodchild hearing, trial counsel failed to present evidence (including Miller's own testimony), and to argue, that Miller invoked his right to counsel.

Answered by the trial court: No.

Summary of the Argument

I. Trial counsel's failure to challenge the admissibility of Miiler's confession on Fourth Amendment grounds. The first claim in Miller's postconviction motion was that his trial attorney was constitutionally ineffective for failing to challenge the admissibility of Miller's confession on Fourth Amendment grounds. In a nutshell, Miller claimed that the warrantless entry into the Randolph home, where Miller was arrested, was unreasonable. Thus, Miller's confession was the result of this illegal police activity. Following the evidentiary hearing on the motion, the trial court found that the police entry into the home was, in fact, unreasonable. Nonetheless, the trial court denied Miller's motion for a new trial because, according to the judge, Miller's confession was attenuated from the original illegal search by the passage of sixteen hours.

During the sixteen hours that passed between Miller's arrest and his confession, Miller was incarcerated at the Milwaukee City Jail. There was no evidence that he was permitted to communicate with anyone, nor that he had access to a lawyer. The appellate courts are clear that being custody is, itself, a coercive circumstance. Thus, the passage of sixteen hours hardly attenuated Miller's confession from the original illegality. Rather, keeping Miller in custody certainly prompted the confession.

For these reasons, trial counsel was ineffective for failing to challenge Miller's confession on Fourth Amendment grounds. Counsel's error was prejudicial because no witness that testified at trial was able to identify Miller as a shooter. Only Miller's own words placed himself at the scene of the shooting with a

gun in his hand. Had Miller's confession not been admitted into evidence, the result of the trial would have been different.

II. Trial counsel's failure to present evidence that Miller invoked his right to counsel. Trial counsel was ineffective for failing to call Miller as a witness at the hearing on the motion to suppress his statement, which prevented Miller from testifying that he directly invoked his right to counsel to Detective Hernandez. The record contains no indication that Miller waived his right to testify at the motion hearing. Had Miller testified at the suppression hearing, the result of the hearing would likely have been different.

Statement of the Case

I. Procedural Background

The appellant, Michael M. Miller (hereinafter "Miller"), on February 6, 2004, was charged with first degree intentional homicide arising out of the shooting death of Marquis Messling in Milwaukee on June 12, 2003. (R:1). Following a preliminary hearing, Miller was bound over for trial. (R:021204-22). Miller entered a not guilty plea.

Miller challenged the admissibility statements he made while in police custody. The trial court held a hearing into the admissibility of the statements and, at the conclusion of the hearing, the court ruled that Miller's statements were admissible. (R:36-46) Miller was not called as a witness at the

hearing; but the trial court never examined Miller on the record about his decision not to testify. (R:36)

Beginning on June 27, 2005, the matter was tried to a jury. On July 1, 2005, the jury returned a verdict finding Miller guilty of first degree intentional homicide. (R:070105-81)

On September 12, 2005, the trial court sentenced Miller to life in prison, with eligibility for parole after serving fifty years. (R:091205-21).

Miller timely filed a notice of intent to pursue postconviction relief. Appointed postconviction counsel, though, filed a no merit report pursuant to Sec. 809.32, Stats. The Court of Appeals rejected the no merit report (2007AP665CRNM), and new postconviction counsel was appointed.

On September 15, 2008, Miller filed a postconviction motion for a new trial. (R:60; Appendix B) In the motion, Miller alleged that he was entitled a new trial because he was afforded ineffective assistance of trial counsel. This was based on two separate claims. Firstly, Miller alleged that trial counsel was constitutionally ineffective for failing to file a motion to suppress, on Fourth Amendment grounds, Miller's confession to police. Miller alleged that the confession was obtained by exploitation of the original warrantless search of the home of Golda Randolph where Miller was arrested. Additionally, Miller alleged that trial counsel was ineffective for not presenting evidence at the hearing on the motion to suppress statements that Miller had invoked his right to counsel.

Eventually, on December 4, 2009, the trial court conducted a hearing into Miller's postconviction motion. Later, on January 26, 2010, the trial court denied the motion in all respects. (R:83-8; Appendix C)

Miller then timely appealed the matter to the Court of Appeals.

II. Factual Background

A. Pretrial Motion to Suppress Statement ("Miranda-Goodchild")

Milwaukee police detective, Scott Gastrow, testified that he conducted an additional interview of Miller on June 16, 2003 (R:36-4) According to Gastrow, Miller was read the *Miranda* warning at the start of the interview. (R:36-6) Gastrow told the court that Miller waived his rights, and gave no indication that he was confused about the purpose of the interview. (R:36-7) Nonetheless, during the interview, Miller was uncooperative, and he used foul language. (R:36-8) Miller denied that he played any role in the Messling homicide. Ibid.

Four months later, another Milwaukee police detective, Mark Walton, reinterviewed Miller. According to Walton, he conducted a an interview with Miller on February 2, 2004. (R:36-12) Walton testified that, at the start of the interview, he read the *Miranda* warning to Miller. (R:36-14) Walton commented that Miller was probably the most distasteful person he had talked to in eighteen years as a police detective. (R:36-18) Nonetheless, Miller denied that he was involved in the Messling homicide. (R:36-16)

Finally, Miller was reinterviewed on February 3, 2004 by Milwaukee police detective Gilbert Hernandez. (R:36-21) Once again, Miller was given the *Miranda* warning. (R:36-23) Hernandez admitted that Miller told him that he (Miller) had hired attorney Michael Jackelen (R:36-24). Hernandez claimed,

though, that Miller was willing to proceed with the interrogation without Jackelen being present. *Ibid.* This interrogation went on for approximately seven hours. (R:36-25) According to Hernandez, Miller initially denied involvement in the shooting but, halfway through the process, Miller indicated that he wanted to admit his involvement. (R:36-29)

The trial court ruled that Miller's statements were admissible because there was "overwhelming" evidence that Miller was given the Miranda warning, and that his statements were voluntary. (R:36-46)

B. Jury Trial

On June 12, 2003, traffic was stopped on Capitol Drive in the area of 31st Street. Two men ran up to one of the automobiles that was stopped, and they began firing shots into the vehicle. (R:43-42-43) Their arms were actually extended into the stopped car. *Ibid.* The two men then fled, waving their guns and firing shots. (R:43-45)

Police arrived at the scene of the shooting shortly after 5:00 p.m. (R:43-92) Emergency personnel were working on Marques Messling, who was apparently dead. (R:43-93) Later, Messling was officially pronounced dead of gunshot wounds. (R:47-80)

Jack Smith testified for the state. Smith told the jury that he is a member of the "2-9 Hardheads" street gang. (R:43-118) According to Smith, Miller is also a member of the 2-9 Hardheads. *Ibid.* In June, 2003, there had been "bad blood" between the Hardheads and Marques Messling, because Messling had fired shots at some Hardheads. (R:43-122) Smith was asked about statements he had made to police detectives;

however, at trial, Smith testified that he did not remember making any statements to the police about Miller being involved in the shooting. (R:47-150)

Similarly, the State called Brandon Burnside as a witness. Burnside denied being a Hardhead, and he denied telling police who was involved in the shooting of Messling (R:46-27)

Milwaukee police detective Scott Benton testified that he interviewed Smith and Burnside, and that neither of them was under the influence of drugs or alcohol at the time. (R:46-60)

Earnest Knox, who is Miller's cousin (R:47-6), testified that on the day of the shooting he was driving a burgundy colored Chevy Lumina, and that Miller, Jack Smith, and Dominic Addison were riding in the car with him. (R:47-12) They eventually parked in an alley, and Miller and Addison got out to "go get some pizza." *Ibid.* According to Knox, he and Jack Smith had been waiting in the car for approximately fifteen minutes (R:47-15); so they decided to begin walking to the pizza restaurant. (R:47-16) Before they got out of the alley, though, Knox heard gunshots. (R:47-17) Moments later, Addison and Miller came running back to the car. (R:47-19) Once Addison and Miller got back into the car, Knox asked who had been shooting. Miller said that he did not know who had been shooting. (R:47-20) Knox had seen Miller with a gun earlier that day, though. *Ibid.*

Detective Gilbert Hernandez testified at trial. (R:50-48). Hernandez told the jury that he had interviewed Miller, and during the interview Miller admitted that he was a member of the two-nine Hardheads. According to Miller's statement, there had been a fight between the 2-9 Hardheads and Marques Messling. Regarding the shooting of Messling, Miller said that he had been in a burgundy Chevy Lumina with Earnest Knox

driving, Jack Smith in the front passenger seat, and with him and Dominic Addison in the back. Miller stated that Brandon Burnside drove up in a white Chrysler with Marcus Sneed and told them that they just saw Messling in a blue Chevy on Capitol and that Knox said they should go talk to him about stopping the fighting. Miller stated that he had a gun, but he did not know that Addison also had one. They parked in the alley because they did not want Messling to see their car, and that he and Addison went to go talk to him. Miller stated that he was approaching a bridge that goes over Capitol, and that while he was under the bridge, he saw a blue four door Chevy with tinted windows going westbound. At that point, according to Miller's statement, he heard two shots fired so he pulled out his gun and he fired at the blue auto heading westbound. He fired six times. After his gun was empty, he ran southeast and saw Dominic at a yield sign on Hopkins and Capitol. He stated that while he was running away he saw a second blue two-door Chevy heading eastbound and realize he was shooting at the wrong Chevy and that when he got back in the car Dominic said “I got him good, he ain't going to make it” and that when they got back in the area of 29th and Melvina Dominic was shouting for everyone to get out of the area. He said that he sold his gun to an unknown black male and that he doesn't know what Addison did with his gun and that Addison was shooting his mouth off about the killing and that he never talked to anyone about it.

C. The Postconviction Motion

Miller filed a postconviction motion for a new trial pursuant to Sec. 809.30, Stats. The motion alleged that, after a four month long investigation, Miller was charged with first degree

intentional homicide. Thereafter, the police determined that there was a municipal warrant for Miller's arrest, and they also learned that he could be located at the home of Golda Randolph. (R:60) The police went to Randolph's home, kicked in the door, and arrested Miller. *Ibid.* Later, Golda Randolph signed a written consent for the police to search her home for weapons.

After his arrest, the motion alleged, Miller was interrogated three times. During the first two interrogations Miller denied any involvement in the shooting; however, probably because Miller's behavior was so obnoxious during these first two interviews the prosecutor decided to present evidence of these interrogations to the jury. The third interview was conducted by detective Gilbert Hernandez. During this interview Miller admitted that he was present during the shooting but claimed that he only fired in self-defense.

Thus, in the postconviction motion, Miller alleged that his subsequent confession to police was subject to suppression on Fourth Amendment grounds (i.e. it was obtained by exploitation of the unreasonable warrantless search of the Randolph home where Miller was arrested).

Additionally, Miller alleged in the postconviction motion that trial counsel was ineffective for the additional reason that, although, prior to trial, Miller's attorney, Ann Bowe ("Bowe") made a "statutory" challenge to the admissibility of Miller's statements to the police; trial counsel made no specific argument concerning the basis for the challenge. Particularly, Bowe did not make any argument that Miller had invoked his right to counsel. The trial court ruled that Miller's statement was admissible.

The trial court conducted a fact-finding hearing into Miller's postconviction motion. At the outset of the hearing, the State conceded that, on the day of the search, Miller had been an overnight guest at the home of Golda Randolph for several days; and, therefore, that Miller had standing to challenge the search of the Randolph home. (R:82-11)[1]

Thereafter, Miller testified that after he was arrested at the Golda Randolph residence, within ten minutes he was placed into the back of a squad car and he was taken to police headquarters. (R:82-14) Once at the police station, apparently while he was being escorted to the interrogation rooms, Miller told Officer Johnson that he (Miller) had a lawyer, and he did not want to talk to police without his lawyer. (R:82-15). Officer Johnson, predictably, responded by reminding Miller that he (Johnson) was just doing his job. *Id.* According to Miller, once he got to the interrogation room, he met Detective Jason Smith. Miller reiterated to Detective Smith that he (Miller) had a lawyer, and he did not want to speak to any detectives. (R:82-17) Miller had retained attorney Michael Jackelen with regard to the homicide investigation. (R:82-18)

The arrest at issue here (at Randolph's home) was actually the second time that Miller had been arrested regarding the matter. *Id.* The first arrest had occurred approximately six months earlier. *Id.* A note written by Asst. District Attorney William Molitor in February, 2004 (the time of Miller's second arrest), was received into evidence. In that note, Molitor recorded that he had been contacted by Attorney Jackelen, that

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1. An "overnight guest" is entitled to raise a Fourth Amendment challenge under *Minnesota v.*

Olson, 495 U.S. 91, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990).

Jackelen confirmed that he represented Miller with regard to the homicide, and that this information was conveyed to Detective Louis Johnson on the Milwaukee Police Department. (R:82-50)

Although the questioning lasted for approximately two hours, despite Miller's request for counsel, he made no incriminating statements.

Miller testified that the next day, as he was being led back to the interrogation room, he encountered Detective Gilbert Hernandez, and he told Detective Hernandez, too, that he (Miller) wanted his lawyer. (R:82-23) Once in the interrogation room, Detective Hernandez read Miller the *Miranda* warning, but Miller could not recall if he again mentioned his lawyer. It was during this interrogation that Miller made incriminating statements.

Miller testified that he told his trial attorney, Ann Bowe, that he had invoked his right to counsel prior to the interrogations. (R:82-27). Miller suggested that Bowe should call Michael Jackelen about the issue. *Id.* Bowe did talk to Jackelen about the situation. (R:82-59) Curiously, though, Bowe left that conversation with the understanding that, despite Molitor's notes to the contrary, Jackelen claimed that the did not represent Miller on the homicide. (R:82-60) According to Miller, Bowe's response was that he should not worry about the statement because it was helpful to the defense. *Id.* On cross-examination, Miller admitted that he could not recall specifically telling Bowe that he (Miller) had invoked his right to counsel to Officer Johnson, however, Miller was clear that he told Bowe that Jackelen was representing him at the time. (R:82-36) He claimed that Bowe never interviewed him about the circumstances of his statement. (R:82-48) Miller did admit that

he signed the written summary of his statement, and that this statement includes a paragraph in which it is recorded that "Miller has an attorney but he wants to make a statement without him." (R:82-41)

Bowe pursue a motion to suppress the statement, however, Miller's recollection was that he and Bowe never seriously discussed the issues that would be raised at the hearing on the motion.

Bowe also testified at the postconviction motion hearing. She confirmed that Miller did express concern about the legality of his arrest at Randolph's home. (R:82-57-58) Bowe explained that she did not file a motion to suppress evidence because she was aware that there was a warrant for Miller's arrest, she believed that Randolph consented to a search of home, and, finally, that any statement Miller made was attenuated from the original arrest. *Id.*

Bowe flatly denied that Miller ever told her that he had invoked his right to counsel to Officer Johnson or to Detective Hernandez. (R:82-61)

On cross-examination, Bowe admitted that the consent form signed by Randolph permitted a search for weapons, and, further, it was signed after Miller was already in custody. (R:82-66-67) In other words, the consent form had nothing to do with the entry into Randolph's home to arrest Miller.

At the conclusion of the postconviction motion, the trial court made the following findings and legal conclusions; addressing first the claim that trial counsel was ineffective for failing to challenge the search of the Randolph home:

> The first issue is that Mr. Miller was arrested on a municipal warrant in a home where he had an expectation of privacy. The municipal warrant in and of itself allows for the arrest of somebody, but it does not allow for an incursion into private property without some extenuating circumstances; and my understanding is that there were no real arguable extenuating circumstances. here

(R:83-4). The judge then moved on to consider whether Miller's confession was attenuated from the illegality of the unreasonable search of the Randolph home, and the seizure of Miller's person. The judge said:

> What happened here is that Mr. Miller was arrested. About two hours later he was taken to the police administration building where he was questioned the first time around.
>
> I believe that it is the agreement of all the parties, including based on the testimony, that nothing much came out of that statement. There was no admission that was made.
>
> Then the second time around, Detective Hernandez, Gilbert Hernandez, came by, spoke to Mr. Miller about 16 hours later.
>
> . . . . .
>
> . . . When we look at the *Anderson* case, I believe the *Anderson* case had to do with illegal searches. . . . the Court said that because of the length of time that had passed and the fact that there was something that actually happened in between that there was attenuation.

> I would liken that to the same, to this case, . . . That statement was given after Mr. Miller being Mirandized at that time, it was some 16 hours later.
>
> The Court believes that there is sufficient attenuation at this point and this is an attenuated set of circumstances. . . . . So the Court believes that there was a sufficient attenuation in that matter and the Court will deny the motion with regard to that issue.

Ibid.

Regarding Miller's claim that trial counsel was ineffective for failing to challenge the admissibility of his confession on the grounds that he invoked his right to counsel, the trial court said:

> [I]t is kind of an interesting set of circumstances. We did have--it's my understanding there was a Miranda-Goodchild hearing, there was testimony that was given at that MIranda Goodchild hearing; however, Mr. Miller didn't testify. And it was a little concerning because the Court did not go through the colloquy on Mr. Miller's testimony, but Ms. Bowe is an experienced lawyer, and I don't really understand why Mr. Bowe would go through a Miranda Goodchild hearing and not put Mr. Miller on the stand if indeed she knew about the fact that he had requested a lawyer.
>
> Mr. Miller was represented by Attorney Michael Jackelen at one point. Mr. Jackelen had indicated, I believe, to the police and to Assistance District Attorney Bill Molitor that he had represented him on some other matters, I think it's disputed as to whether he actually represented Mr. Miller on the homicide,

> but that in an of itself is not a request for a lawyer.
>
> The right to counsel is client-specific and has to be invoked by the defendant himself, not by some lawyer without the defendant acquiescing to it specifically and making that demand.
>
> Ms. Bowe testified that she did not-- was not made aware of the fact that Mr. MIller had requested counsel on multiple occasions before he actually gave his statement. . . .
>
> I know people make mistakes, but this is such a-- it would be such a situation where there would have to be a purposeful, glaring error that she would do this on purpose, and I don't see any reason why that would be the case.

(R:83-7). Thus, the judge found that trial counsel was not ineffective for failing to introduce evidence that Miller had invoked his right to counsel. *Ibid.* p. 8

Argument

I. Miller was afforded ineffective assistance of counsel when trial counsel failed to file a motion to suppress the evidence seized as a result of the search of the Golda Randolph residence.

The first claim in Miller's postconviction motion was that his trial attorney was constitutionally ineffective for failing to challenge the admissibility of Miller's confession on Fourth Amendment grounds. In a nutshell, Miller claimed that the warrantless entry into the Randolph home, where Miller was arrested, was unreasonable. Thus, Miller's confession was the

result of this illegal police activity. Following the evidentiary hearing on the motion, the trial court found that the police entry into the home was, in fact, unreasonable. Nonetheless, the trial court denied Miller's motion for a new trial because, according to the judge, Miller's confession was attenuated from the original illegal search by the passage of sixteen hours.

As will be set forth in more detail below, during the sixteen hours that passed between Miller's arrest and his confession, Miller was incarcerated at the Milwaukee City Jail. There was no evidence that he was permitted to communicate with anyone, nor that he had access to a lawyer. The appellate courts are clear that being custody is, itself, a coercive circumstance. Thus, the passage of sixteen hours hardly attenuated Miller's confession from the original illegality. Rather, keeping Miller in custody certainly *prompted* the confession.

For these reasons, trial counsel was ineffective for failing to challenge Miller's confession on Fourth Amendment grounds. Counsel's error was prejudicial because no witness that testified at trial was able to identify Miller as a shooter. Only Miller's own words placed himself at the scene of the shooting with a gun in his hand. Had Miller's confession not been admitted into evidence, the result of the trial would have been different.

A. Standard of Appellate Review

Where a fact-finding hearing has been held, as here, a claim of ineffective assistance of counsel presents a mixed question of fact and law on appeal. *State v. O'Brien*, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). The Court of Appeals must affirm the trial court's findings of historical fact concerning counsel's performance, unless those findings are clearly

erroneous. *Id.* at 324-25. However, the question of whether evidence is the fruit of a prior constitutional violation, or whether 'the evidence was sufficiently attenuated so as to be purged of the taint', is one of constitutional fact." *State v. Anson*, 282 Wis. 2d 629, 698 N.W.2d 776 (2005). The ultimate question of ineffective assistance is one of law, subject to independent review. *O'Brien,* 223 Wis.2d at 325.

B. The Trial Court's Finding of Facts and Conclusions of Law

The trial court found that it was unreasonable, and illegal, for the police to make a warrantless entry into the Randolph home to search for Miller, and to arrest him. However, the trial court reasoned, the inculpatory statement given by Miller was not given until sixteen hours after he was arrested. Thus, according to the trial judge, the statement was attenuated from the illegality of Miller's arrest. Consequently, trial counsel was not ineffective for filing to file a motion challenging the search of the Randolph home.

C. Standard for Ineffective Assistance of Counsel

The familiar two-pronged test for ineffective assistance of counsel claims requires a defendant to prove (1) deficient performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *see also State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the Strickland test applies equally to ineffectiveness claims under the State constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of

professionally competent assistance." *Strickland*, 466 U.S. at 690. To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. If the court determines that the defendant has not proven one prong, it need not address the other prong. *See id*. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

D. The failure to file a motion to suppress Miller's statement on Fourth Amendment grounds was ineffective.

Warrantless searches "are per se unreasonable under the Fourth Amendment,
subject to a few carefully delineated exceptions" that are "jealously and carefully drawn." *State v. Boggess*, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citations omitted). "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984). A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all governmental agents who seek to enter the home for purposes of search or arrest. *Id.* It is not surprising, then, that the United States Supreme Court has recognized that all warrantless

searches and seizures inside a home are presumptively unreasonable. *Welsh,* 466 U.S. at 748-49.

Here, the trial court found that there simply were no exigent circumstances that would permit a warrantless entry into the Randolph home. The police were not in hot pursuit, and they had no reason to believe that Miller posed an immediate threat to the persons within the home. There was no specific reason to believe that Miller would flee if the police took the time to obtain a search warrant. Just as significantly, Randolph's "consent" to search the home was limited to weapons, and it was not given until Miller was already under arrest. Thus, the warrantless entry into the Randolph home was patently unreasonable.

The critical question, then, is whether Miller's confession was "attenuated" from this original illegality. The State bears the burden of establishing attenuation. *United States v. Ienco*, 182 F.3d 517, 526 (7th Cir. 1999). This is a question of law. The appellate court need not pay any deference to the conclusion of the trial court.

Under the attenuation doctrine, the relevant inquiry is, "[W]hether [the] statements were obtained by exploitation of the illegality of [the police conduct]." *Brown v. Illinois*, 422 U.S. at 600. If there is a close causal connection between the illegal conduct and the statements, the statements are inadmissible under the Fourth Amendment. *Dunaway v. New York*, 47 U.S.L.W. at 4640; *See Brown v. Illinois*, 422 U.S. 603-04. To permit the admission of a statement and evidence obtained by police exploitation of their own illegal conduct would destroy the policies and interests of the Fourth Amendment. *Dunaway v. New York*, 47 U.S.L.W. at 4640-41; *Brown v. Illinois*, 422 U.S. at 602.

In an attenuation analysis, the court must consider both the temporal proximity, and any intervening circumstances. "Under the temporal proximity factor, [the court must] analyze both the amount of time between the prior searches and the conditions that existed during that time." *State v. Anderson*, 165 Wis. 2d 441, 449 (Wis. 1991). If the defendant was in custody, for example, even a lengthy period may not be enough to attenuate the statement. As the United States Supreme Court has noted, "[I]nterrogation in certain custodial circumstances is inherently coercive." *New York v. Quarles*, 467 U.S. 649, 654 (1984).

Here, the facts are undisputed. Miller was arrested, taken to the police administration building, and he was almost immediately questioned. During this first interrogation, he made no admissions. Thereafter, Miller was kept in the Milwaukee city jail overnight. (R:82-23) Sixteen hours later, Miller was questioned again, and this time he admitted involvement in the shooting.

The trial court found, almost purely by virtue of the passage of sixteen hours, that the second statement was attenuated from the illegal arrest. It is significant that, in its conclusions of law, the trial court specifically relied upon, *State v. Anderson*, 165 Wis. 2d 441, 450 (Wis. 1991) for the proposition that the passage of sixteen hours was sufficient to attenuate the original illegality. In *Anderson,* the defendant was not in custody; rather, he was passing the time by frequenting several taverns. Thus, the Supreme Court wrote, "Given the length of time and *the nonthreatening conditions* that existed between the illegal searches and the defendant's statement, we find that the temporal proximity factor of the *Brown* analysis leans toward

a finding of attenuation." (emphasis provided) 165 Wis. 2d at 450.

In the present case, Miller was kept overnight in the Milwaukee City Jail. The State bore the burden of establishing attenuation, and the State presented no evidence at the postconviction motion hearing that Miller was in communication with any person, that there were any intervening circumstances (such as communication with a lawyer), or, for that matter, the circumstances of Miller's detention.

As such, the record utterly fails to demonstrate that Miller's confession was in any way attenuated from the original illegality of his arrest. He was held in custody the entire time-- which is, itself, inherently coercive-- and he was not permitted to speak to any person. Thus, had trial counsel filed a motion challenging the admissibility of Miller's statement, the trial court would have been obliged to grant it. Thus, trial counsel was ineffective for failing to file such a motion.

E. The ineffective assistance of counsel was prejudicial

Even though trial counsel was ineffective for failing to challenge the admissibility of Miller's statement, Miller is not entitled to a new trial unless counsel's errors were prejudicial. To demonstrate prejudice, "[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In other words, a defendant must show that counsel's errors were so serious that the defendant

was deprived of a fair trial and a reliable outcome. *See Id.* at 687.

Here, not one eye-witness to the shooting testified that Miller was involved. Rather, each of the state's witnesses testified that Miller was *not* involved. Thereafter police detectives took the stand and related to the jury prior inconsistent statements from these witnesses that implicated Miller.

Nonetheless, it was Miller's own words that placed himself at the scene of the crime with a gun in his hand. Miller's claim that he shot only in self-defense may be easily disregarded by a reasonable juror in light of the totality of the remaining evidence.

However, in the absence of Miller's confession, the jury would have left to weigh the sworn trial testimony of the witnesses that Miller was not involved in the shooting against the detectives' claims that the witnesses said something else on another occasion. This is hardly the sort of evidence that is likely to convince a jury beyond a reasonable doubt.

II. Trial counsel was ineffective for failing to present evidence at the pretrial motion to suppress Miller's statement, that Miller had invoked his right to counsel.

As will be set forth in more detail below, Bowe was ineffective for failing to call Miller as a witness at the hearing on the motion to suppress his statement so that Miller could have testified that he directly invoked his right to counsel to Detective Hernandez. The record contains no indication that Miller waived his right to testify at the suppression hearing. [2]

A. Appellate Standard of Review of Ineffective Assistance

Once again, the standard of appellate review is mixed. The trial court's findings of fact are reviewed under the clearly erroneous standard. Whether those facts meet the constitutional standard is reviewed without deference to the conclusion of the trial court. An attorney renders ineffective assistance of counsel if her performance is deficient, and if that deficient performance causes prejudice.

B. The Trial Court's Findings of Fact and Conclusions of Law

The trial court, in denying Miller's motion for a new trial, found as a matter of fact that Miller never personally invoked his right to counsel; and, he never told his lawyer that he had invoked his right to counsel. The trial judge asked, rhetorically, why trial counsel would have ignored Miller if Miller had actually told her that he had invoked his right to counsel.

C. Trial Counsel was ineffective

In, *Rock v. Arkansas,* 483 U.S. 44 (1987), the United States Supreme Court clearly indicated that the constitutional right to

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2. In his postconviction motion, Miller argued that the record of the hearing on the motion to suppress demonstrated that he was entitled to relief because it was clear that he had hired Attorney Jackelen to represent him on another criminal matter. (R:36-24). Miller argued that, under *State v. Dagnall,* 2000 WI 82, this was sufficient to invoke his right to counsel. This, in fact, was the law at the time of the motion hearing. On December 29, 2009. though, *Dagnall* was overruled by *State v. Forbush,* 2010 WI App 11

testify in one's own defense in a criminal case must be treated as fundamental in nature.

On this point, though, the court of appeals observed in *State v. Wilson*, 179 Wis. 2d 660, 670-672 (Wis. Ct. App. 1993) that:

> Our inquiry, however, is not complete. Rock did not address the issue of how and when a criminal defendant may waive his or her right to testify. Wilson, citing the cases of *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Krueger v. State*, 84 Wis. 2d 272, 267 N.W.2d 602 (1978), asserts that the right to testify, as a fundamental right, cannot be waived unless the defendant, personally on the record, makes a voluntary, knowing, and intelligent waiver. In *Johnson*, a case that among other issues considered waiver of the right to counsel, the United States Supreme Court stated "we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464. n1 In Krueger, the Wisconsin Supreme Court considered whether, based upon the trial and supplemental records, the defendant validly waived his right to a jury trial when defense counsel entered an oral waiver and the defendant remained silent. *Krueger*, 84 Wis. 2d at 274-82, 267 N.W.2d at 603-07. The court concluded that the defendant had indeed waived his right to a jury trial but held "that henceforth a record demonstrating the defendant's willingness and intent to give up the right to be tried by a jury must be established before the waiver is accepted." *Id.* at 282, 267 N.W.2d at 607. n2 To the extent that Wilson argues that *Johnson* and *Krueger* mandate that the record support a knowing and voluntary waiver of the defendant's right to testify, we agree.

Here, the court did not engage Miller in a colloquy on the record to determine whether Miller understood that he had the right to testify, and whether he was waiving that right voluntarily. Rather, nothing was said except that defense counsel told the court that Miller's testimony would be in accord with the detectives' testimony.

At the postconviction motion hearing, Miller testified vociferously that he had invoked his right to counsel on a number of occasions to a number of different officers. Significantly, though, Miller testified that he told Detective Gilbert Hernandez that he (Miller) had a lawyer, and that he did not want to talk to the police without the lawyer present. (R:82-23) Moreover, Miller testified that he told Attorney Bowe about the fact that he had invoked his right to counsel-- he said he even showed Ms. Bowe the card that Jackelen had given him. (R:82-27) According to Miller, Bowe assured Miller that he should not worry about the statement because it was helpful to the defense. *Ibid.*

Nonetheless, the trial court denied Miller's claim in this regard, essentially asking, rhetorically, if Miller had told Bowe about his testimony, why would she purposely not call him as a witness?

There are other rhetorical questions that come to mind, though. Why would Bowe go through the process of a *Miranda-Goodchild* hearing if Miller's statement were helpful? Why would Miller go to the trouble of hiring Attorney Jackelen, but then not employ his services when they were needed the most? Why did attorney Bowe not argue that Miller's invocation of his right to counsel on another criminal case was sufficient to invoke his right to counsel in the present case (which was the law at the time, *See, Dagnall*, *supra*, subsequently overruled)?

Plainly, trial counsel was ineffective for failing to present Miller's testimony. Miller never waived his right to testify on the record.

D. Trial counsel's error was prejudicial

Had Miller testified at the suppression hearing in the manner he testified at the postconviction motion, the findings of fact of the trial court would almost certainly have been different. This case, unlike many other cases, does not present a naked claim by the defendant that he invoked his right to counsel. In such cases, the trial court's finding of fact that the police officers were more credible when they testified that the defendant did not invoke his right to counsel, are virtually unassailable on appeal. Here, though, the record is clear that Miller had retained attorney Jackelen, and that Jackelen was actively representing Miller at the time of his interrogation. It is practically inconceivable that Miller would hire a lawyer but then not employ the services of the lawyer during a police interrogation regarding a homicide. The detective's testimony is simply unbelievable in that regard.

For these reasons, trial counsel's error was prejudicial.

Conclusion

For the foregoing reasons, it is respectfully requested that the Court of Appeals reverse the order of the trial court denying Miller's motion for a new trial; and, further, the Court of Appeals should remand this matter to the trial court with orders for a new trial.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2010.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6715 words.

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Dated this _____ day of
_____, 2010:

_____
Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District I
Appeal No. 2010AP000399 -CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Michael M. Miller,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Miller's Postconviction Motion for a New Trial

C. Exerpt of Trial Court's Bench Ruling on Postconviction Motion

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral

or written rulings or decisions showing the circuit 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 the record is 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 including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2010

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