COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3377

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY J. RITTENHOUSE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Jeffrey J. Rittenhouse appeals from orders denying his postconviction motions. He seeks to have his convictions dismissed based upon the denial of a speedy trial. In the alternative, he claims entitlement to

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

withdraw his pleas of no contest to seven misdemeanor convictions because his counsel was ineffective in failing to litigate the illegal seizure and subsequent search of an automobile containing evidence of his crimes. We are not persuaded by Rittenhouse's arguments and affirm the orders.[2]

BACKGROUND

¶2 Rittenhouse was charged with five misdemeanors and one felony on April 7, 1997.[3] A preliminary hearing occurred on April 23, 1997, and the court bound the felony charge over for trial. On July 2, 1997, the State filed an amended information alleging eight Class A misdemeanors. Rittenhouse entered pleas of no contest to seven of the eight misdemeanors.[4] The trial court accepted the pleas and entered judgment on the seven misdemeanor charges.

SPEEDY TRIAL DENIAL

¶3 Rittenhouse, born July 11, 1977, was charged with criminal acts that occurred while he was a juvenile in May 1995. On August 3, 1995, Rittenhouse was waived from juvenile court to criminal court on the charges. A criminal complaint was filed in the adult court on April 7, 1997. Rittenhouse claims that he was denied a speedy resolution of the criminal charges because of the two-year delay.

¶4 The right to a speedy trial is guaranteed under the Sixth Amendment to the United States Constitution and under article I, section 7 of the Wisconsin

[2] The trial court denied a reconsideration motion as well as the initial motion for postconviction relief.

[3] The complaint alleged five Class A misdemeanors and one Class E felony.

[4] The remaining misdemeanor was read in and dismissed.

Constitution. Under those provisions the right to a speedy trial begins with the criminal complaint and warrant. ***State v. Ziegenhagen***, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). In order to show undue delay in prosecution, rather than denial of a speedy trial, Rittenhouse must demonstrate that the State deliberately delayed filing the charges to obtain a tactical advantage over the defense and that this delay caused him prejudice in presenting a defense to the criminal charges. ***State v. Monarch***, 230 Wis. 2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999). The trial court found that Rittenhouse had failed to so demonstrate. We agree and affirm.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

¶5 Rittenhouse next contends that he is entitled to withdraw his pleas of no contest because his trial counsel was ineffective in failing to seek the suppression of evidence obtained from an automobile. He maintains that a suppression motion would have resulted in the evidence being suppressed and, therefore, he could not have been convicted of any crimes. His contention is two-fold: (1) the automobile exception to the warrant requirement does not apply to an immobile automobile, and (2) his mother's consent to search the automobile in question was invalid. The trial court addressed Rittenhouse's postconviction motions to withdraw his pleas and held that the evidence that Rittenhouse sought to suppress was legally obtained.

¶6 Whether a search or seizure occurred and, if so, whether it passes statutory and constitutional muster are questions of law which we review de novo. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to specifically established and well-delineated exceptions. ***Katz v. United States***, 389 U.S. 347, 357 (1967). Among the

recognized exceptions to the constitutional warrant requirement is the automobile exception. ***State v. Callaway***, 106 Wis. 2d 503, 510, 317 N.W.2d 428 (1982). Before the automobile exception applies, two criteria must be met: (1) there must be probable cause to believe that the vehicle contains evidence, and (2) there must be some exigent circumstances which warrant the search. ***Thompson v. State***, 83 Wis. 2d 134, 141, 265 N.W.2d 467 (1978). The automobile exception is not dependent on the right to arrest. ***Chambers v. Maroney***, 399 U.S. 42, 47 n.6 (1970).

¶7 While a suppression hearing did not occur, the record contains testimony from the April 23, 1997 preliminary hearing concerning the investigation and circumstances leading to the charges filed against Rittenhouse. Whether probable cause for a search exists is determined by analyzing the "totality of the circumstances." ***State v. DeSmidt***, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990).

¶8 Sheboygan County Sheriff's Detective Robert Shield testified that he had received information that Rittenhouse and others had been involved in breaking into vehicles, and that some of the stolen electronic equipment from those vehicles was stored in the Rittenhouse vehicle.

¶9 Sheriff's Detective Leroy Nennig testified that on May 17, 1995, he went to 835-A Oakland Avenue in the City of Sheboygan "to see if Jeffrey Rittenhouse was home and get permission to look in his vehicle at some stereo equipment he had in it." Nennig was going to ask Rittenhouse for consent to search the vehicle, but Rittenhouse was not at home. The vehicle, a 1986 Ford Escort station wagon, was parked on a grassy area just off of the alley behind 835 Oakland. Nennig could view "numerous stereo equipment, speakers and

radios" in the station wagon. Nennig had been instructed to have the vehicle towed if he could not make contact with Rittenhouse, and that a search warrant would be obtained if needed. Nennig had the Ford Escort towed to the sheriff's department.

¶10 Shield testified that he first observed the Rittenhouse vehicle at "the impound area at the Sheriff's Department." Shield stated that he took an inventory of the items in the vehicle after getting consent from Cheryl Rittenhouse, the title owner of the vehicle, to search the vehicle.[5] The inventory search disclosed that the Rittenhouse station wagon contained stolen electronic equipment.

¶11 In addressing Rittenhouse's postconviction motions, the trial court relied upon ***State v. Pozo***, 198 Wis. 2d 705, 544 N.W.2d 228 (Ct. App. 1995), in holding that the evidence from the Rittenhouse vehicle was legally obtained. Pozo was stopped for a speeding violation and asked to step out of his vehicle and submit to a series of sobriety tests. ***Id.*** at 708. After Pozo exited his vehicle, the officer could see a rolled-up sandwich bag and a piece of shiny blue paper on the car seat that the officer determined, based upon his law enforcement experience, could be a "bindle" used to package marijuana. ***Id.*** at 708-09. The officer confiscated the "bindle" and the substance later tested positive for cocaine. ***Id.***

¶12 Pozo moved to suppress the cocaine evidence and we held that "[w]hen police have probable cause to believe that a vehicle contains evidence of a crime, the vehicle may be searched without a warrant and without a showing of exigent circumstances." ***Id.*** at 710. Rittenhouse contends that the trial court erred in relying upon the ***Pozo*** holding. We disagree. The trial court used the exact

[5] Cheryl Rittenhouse is the mother of the appellant.

language from ***Pozo***, and we may not overrule, modify or withdraw language from a previously published decision of this court. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶13 Rittenhouse does not dispute that the police officers had probable cause to believe that the automobile contained evidence of a crime. Nor does Rittenhouse dispute that the evidence was viewable from the outside of the vehicle by Detective Nennig. Rittenhouse contends, however, that unlike the vehicle in ***Pozo***, the Rittenhouse vehicle was not being operated, or operable, at the time of the seizure and was being used only for storage. Rittenhouse asserts that a vehicle being used for storage and not operable does not qualify for the automobile exception because of the absence of the exigent circumstance of mobility. Rittenhouse's argument fails.

¶14 The Wisconsin Supreme Court has concluded that the exigency requirement of the automobile exception has been weakened and that only a slight showing will suffice. ***Thompson***, 83 Wis. 2d at 142 (warrantless search of automobile upheld where specific aim was obtaining evidence rather than inventory of vehicle contents). Warrantless searches of automobiles have been upheld even in cases where the possibilities of the vehicle being removed or evidence in it being destroyed were remote, if not nonexistent. ***Cady v. Dombrowski***, 413 U.S. 433, 439-40 (1973).[6] The slight exigency requirement is

[6] We note that Cheryl Rittenhouse, the registered owner of the Ford Escort, filed an affidavit dated July 11, 2000, in support of Rittenhouse's postconviction motions stating that in the early part of 1995 she told Sheboygan County Sheriff's Detective Robert Shield that "my vehicle did not run but I was working on getting it fixed and registered, and at this time my son just stores stuff in there."

justified by the lesser expectation of privacy in an automobile. ***Thompson***, 83 Wis. 2d at 143.

¶15 The law now recognizes multiple exceptions to the general proscription against warrantless searches. ***State v. Pallone***, 2000 WI 77, ¶30, 236 Wis. 2d 162, 613 N.W.2d 568, *cert. denied*, ***Pallone v. Wisconsin***, ___ U.S. ___, 121 S. Ct. 1148 (U.S. Feb. 20, 2001) (No. 00-7747). One of the exceptions allows law enforcement officers to search a motor vehicle without a warrant if the officers have probable cause to believe that the vehicle contains the object of the search. ***Id.*** We conclude that the police had probable cause to believe that the vehicle at issue contained stolen property and that the warrantless impounding of the vehicle to allow an opportunity to obtain either a search warrant or consent to search was justified under the automobile exception.

¶16 Rittenhouse also contends that the consent to search the Ford Escort that was obtained from his mother Cheryl was invalid. In support of his contention, he submitted an affidavit dated October 6, 2000, from his mother stating that the Ford Escort was his car even though it was titled and registered in her name. Cheryl filed an affidavit on July 11, 2000, that contradicts her later contentions. The July affidavit avers, in relevant part, that she is Rittenhouse's mother, and further that:

> In the early part of 1995 my son and I were called down to the Sheboygan Sheriffs Department to talk about possible stolen stereo equipment. Upon arrival Detective Shield requested me to give consent to search my 1986 Ford Escort station wagon, which was towed from behind my house.…
>
> At this time I signed the consent to search … and I did not believe anything in my vehicle was stolen.

Rittenhouse contends that Cheryl was not authorized to provide such consent because of his greater interest in the Ford Escort. The trial court did not directly address the question of Cheryl's authority to consent to the search of the vehicle, and we must therefore make an independent determination of this issue based upon the record before us.[7] We have set forth the facts adduced at the preliminary hearing and contained in the affidavits filed by Cheryl.

¶17 In her affidavits, Cheryl concedes that she owns the Ford Escort, that it was located on her property and that she gave consent to search the vehicle. Cheryl does not contend that her consent to search the Ford Escort was other than free, intelligent, unequivocal, and specific. She states that the consent to search was provided to Detective Shield at the Sheboygan County Sheriff's Department and concedes that Rittenhouse was present with her at that time and location. We conclude, based upon the contents of Cheryl's affidavits, that she could lawfully give consent to search the Ford Escort vehicle.

¶18 Rittenhouse raised the above suppression of evidence issue in the context of ineffective assistance of counsel. To succeed in an ineffective assistance of counsel claim, the defendant must satisfy the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). Thus, "a defendant must show that counsel's performance was both deficient and prejudicial." ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. ***Strickland***, 466 U.S. at 690. Counsel is strongly presumed to have rendered

[7] The trial court determined that Rittenhouse lacked standing to challenge the search of the Ford Escort vehicle. For purposes of this appeal, we will assume that Rittenhouse had standing based upon his mother's October 6, 2000, affidavit supporting her son's separate interest in the vehicle.

effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. ***Id***. To show prejudice, Rittenhouse must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled no contest and would have insisted on going to trial. *See* ***Bentley***, 201 Wis. 2d at 312.

¶19 Rittenhouse has the burden to show a reasonable probability that, but for counsel's failure to seek a suppression hearing, the result of his criminal proceeding would have been different. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). Defense counsel cannot be faulted for not bringing a motion that would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). We are satisfied that Rittenhouse's suppression motion would have failed and that the representation by Rittenhouse's defense counsel was not deficient.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.