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DISTRICT IV

January 13, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP624-CR State of Wisconsin v. Andrew J. Scoles (L.C. # 2010CF189)

Before Lundsten, Higginbotham and Sherman, JJ.

Andrew J. Scoles pled no contest to one count of disorderly conduct and one count of possession of tetrahydrocannabinols (THC), second or subsequent offense. *See* WIS. STAT. §§ 947.01 and 961.41(3g)(e) (2013-14).[1] The circuit court sentenced Scoles to ninety days in jail for the disorderly conduct matter and withheld sentence and placed Scoles on probation for three years for the THC possession. In a postconviction motion, Scoles argued that his trial counsel

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

had been ineffective and he moved to withdraw his plea. The circuit court denied the motion. Based upon our review of the briefs and record we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

"A defendant is entitled to withdraw a guilty [or no-contest plea] after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (quoted source omitted). "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***Id.***

To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, the defendant must demonstrate that counsel's errors were so serious that, but for the errors, "there is a reasonable probability that … 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. We uphold the circuit court's factual findings regarding deficient performance and prejudice unless they are clearly erroneous. ***Johnson***, 153 Wis. 2d at 127. Determining deficiency and prejudice, however, are questions of law that we review independently. ***Id.*** at 128. We need not consider both prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

The circuit court held an evidentiary hearing on Scoles's motion. The dispositive facts are few and undisputed. Scoles, his girlfriend, H.M., and their child, lived together. David Kahl

also lived with the couple. When Scoles and Kahl returned from a night of bar-hopping, a physical confrontation ensued and H.M. called the police. Scoles and Kahl were both arrested.

When a deputy returned to the property later in the day, H.M. showed him a black duffle bag inside of a truck parked outside the house. H.M. told the deputy that Scoles kept his drugs and pipes inside that bag. The truck was titled in H.M.'s name. H.M. gave the deputy consent to enter and search the truck. The deputy removed the duffle bag from the truck, took it into the garage, and waited for a detective to arrive. When the detective arrived, he opened the duffle bag and found the contraband that led to the THC possession charge.

Prior to his plea, Scoles did not challenge the legality of the seizure or search of the duffle bag. In his postconviction motion and on appeal, Scoles contends that his trial attorney was ineffective for not filing a suppression motion. We disagree.

A search conducted pursuant to a voluntarily given consent does not violate the Fourth Amendment's proscription against unreasonable searches and seizures. ***State v. Luebeck***, 2006 WI App 87, ¶7, 292 Wis. 2d 748, 715 N.W.2d 639. "Consent searches are standard, accepted investigative devices used in law enforcement, and are not in any general sense constitutionally suspect." ***State v. Williams***, 2002 WI 94, ¶19, 255 Wis. 2d 1, 646 N.W.2d 834.

Police may conduct a warrantless search based upon a third-party's consent when the third party has common authority over the premises to be searched. ***State v. Matejka***, 2001 WI 5, ¶19, 241 Wis. 2d 52, 621 N.W.2d 891. Common authority derives from:

> mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection

> in his own right and that *the others have assumed the risk that one of their number might permit the common area to be searched*.

Id., ¶32, *quoting* ***United States v. Matlock***, 415 U.S. 164, 171 n.7 (1974). The power to consent to a search "turns on 'widely shared social expectations' and 'commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.'" ***State v. Sobczak***, 2013 WI 52, ¶15, 347 Wis. 2d 724, 833 N.W.2d 59, *quoting* ***Georgia v. Randolph***, 547 U.S. 103, 111 (2006). The principles of ***Matlock*** "are fully applicable to … third-party consent automobile searches." ***Matejka***, 241 Wis. 2d 52, ¶34. The standard is objective, and the question is whether the facts available to the officer at the moment would warrant a reasonable person to believe that the consenting party had authority over the premises. *See* ***Illinois v. Rodriguez***, 497 U.S. 177, 188 (1990). Thus, the first inquiry is whether H.M. had common authority over the truck so that her consent rendered the search constitutionally valid.

It is undisputed that Scoles was the primary driver of the truck. However, it is also undisputed that H.M. was the legal owner of the truck because it was titled in her name. Scoles had shown H.M. how to drive the truck and the spare key was kept in the couple's bedroom. Scoles considered H.M. to be his "long-term" girlfriend and the couple had a child together. H.M.'s relationship to Scoles is important, and a romantic relationship supports an inference of common authority. *See* ***Sobczak***, 347 Wis. 2d 724, ¶20. The undisputed facts establish that H.M. had joint access to the truck so that police could reasonably rely on her consent to enter the truck.

The next question concerns the search of the duffle bag that was found in the truck. At the postconviction hearing, H.M. testified that the duffle bag was normally kept in the couple's bedroom and that she had seen Scoles put a vaporizer, scale and pipes used for smoking

marijuana into the bag. H.M. testified that she saw Scoles put the duffle bag in the truck before police came to the house and arrested Scoles and Kahl. When a deputy returned to the property after the arrest, H.M. pointed out the duffle bag inside of the truck and the deputy removed the bag from the truck. When the detective arrived, H.M. told him what was inside the duffle bag.

Police may search a container found in an automobile if the search is supported by probable cause. ***California v. Acevedo***, 500 U.S. 565, 579 (1991). Here, H.M. had told police that Scoles kept his drug paraphernalia inside the duffle bag, thus giving the detective probable cause for a warrantless search of the duffle bag. *See* ***id.*** at 579-80.

If Scoles had moved to suppress the fruits of the search of the truck and the duffle bag, the motion would have been denied. Therefore, Scoles's argument that trial counsel was ineffective for not filing a suppression motion fails. *See* ***State v. Wheat***, 2002 WI App 153, ¶¶14, 23, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge to a search is not deficient if the challenge would have been rejected).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals