

FILED
07-01-2021
Clerk of Circuit Court
Kenosha County
2020CF000983

STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY

State of Wisconsin, Plaintiff,

**MOTION TO DISMISS
COUNT SIX**

-vs-

Kyle H. Rittenhouse, Defendant.

Case No. 2020CF983

The defendant, Kyle H. Rittenhouse, by and through his attorneys and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing Count 6 of the Information: Possession of a Dangerous Weapon by a Person Under 18, in violation of Wis. Stat. § 948.60(2)(a) because the State brought this charge against Mr. Rittenhouse under a misreading of the plain language of the statute. Wis. Stat. § 948.60(3)(c) makes clear that it is only a crime under sec. 948.60 for a person under 18 to possess a rifle or shotgun *if* that person is in violation of Wis. Stat. § 29.304 and § 29.593. Mr. Rittenhouse was not engaged in hunting activities and therefore was not in violation of § 29.304 and § 29.593. As the State has altogether failed to address the requirements of § 948.60(3)(c), there is no probable cause to support Count 6 and that charge should be dismissed pursuant to Wis. Stat. § 971.31(2) and (5); U.S. Const. Amends. IV, V, and XIV; Wis. Const. Art. 1 §§ 1, 8; *State v. Chagnon*, 2015 WI App. 66, 364 Wis. 2d 719, 870 N.W.2d 27; *State v. Smaxwell*, 2000 WI App 112, 235 Wis. 2d 330, 612 N.W.2d 756; *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020 (2010); the attached Affidavit of Counsel; and the attached memorandum of law.

Electronically Signed: 7/1/2021

By: s/Mark D. Richards
Mark D. Richards, # 1006324
RICHARDS & DIMMER, S.C.
209 EIGHTH STREET
RACINE, WI 53403

(262) 632-2200 (P)

(262) 632-3888 (F)

mdr@racinedefense.com

beth@racinedefense.com

s//Corey Chirafisi

Corey Chirafisi, #1032422

CHIRAFISI & VERHOFF, S.C.

411 W. MAIN ST. SUITE 201

MADISON, WI 53703

(608) 250-3500 (P)

(608) 250-3503 (F)

corey@cvlawoffice.com

STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY

State of Wisconsin, Plaintiff,

AFFIDAVIT OF COUNSEL

-vs-

Kyle H. Rittenhouse, Defendant.

Case No. 2020CF983

COUNTY OF RACINE)
)ss
 STATE OF WISCONSIN)

I, MARK D. RICHARDS, being first sworn on oath, hereby depose and state the following:

1. I am an attorney duly licensed to practice law in the state of Wisconsin.
2. I am the lead attorney of record for Kyle Rittenhouse in the above-captioned matter.
3. I have reviewed all discovery provided by the State in this matter.
4. As seen in the Criminal Complaint, Mr. Rittenhouse was born on January 3, 2003.
5. The allegations which form the basis for Count 6 of the Criminal Complaint occurred "on or about August 25, 2020."
6. I am aware that on August 25, 2020 Mr. Rittenhouse was 17 years old.
7. Count 6 alleges a violation of Wis. Stat. § 948.60(2)(a)1. That statute states "Any person under 18 years of age who possesses or goes armed with a dangerous weapon is guilty of a class A misdemeanor."
8. The weapon at issue in Count 6 of the Criminal Complaint is a Smith & Wesson .223 rifle and is referred to as being a "long gun" on page 3 of the complaint. Photographs included in discovery definitively establish that the barrel of this weapon is 16-inches long.
9. The plain language of § 948.60(3)(a) sets forth an *exception* to criminal liability under § 948.60(2)(a). Subsection (3)(a) makes it clear that § 948.60(2)(a) does not apply to individuals under 18 who possess or are armed with a dangerous weapon when: 1) the weapon is being used in target practice under the supervision of an adult; or, 2) when the weapon is being used in a course of instruction in the traditional and proper use of the dangerous weapon under the supervision of an adult. This subsection does not apply

¹ All statutes refer to the 2019-2020 version unless otherwise indicated.

to Mr. Rittenhouse.

10. The plain language of § 948.60(3)(b) also sets forth an *exception* to criminal liability under § 948.60(2)(a). It states that § 948.60(2)(a) “does not apply to a person under 18 years of age who is a member of the armed forces or national guard and who possesses or is armed with a dangerous weapon in the line of duty.” This section also does not apply to Mr. Rittenhouse.
11. Alternatively, the plain language of Wis. Stat. § 948.60(3)(c) states *who is affected by* § 948.60(2)(a). It states that § 948.60(2)(a) “applies only to a person under 18 years of age who possesses or is armed with a rifle or shotgun if the person is in violation of s. 941.28 or is not in compliance with ss. 29.304 and 29.593.” (Emphasis added)
12. A plain reading of subsection (3)(c) clearly states that a person under 18 years of age who possesses or is armed with a rifle or shotgun can *only* be in violation of § 948.60(2)(a) if: 1) they are in violation of s. 941.28; or, 2) they are not in compliance with both s. 29.304 and s. 29.593.
13. Wis. Stat. § 941.28 is entitled “Possession of short-barreled shotgun or short-barreled rifle.” Subsection (2) states that “No person may sell or offer to sell, transport, purchase, possess or go armed with a short-barreled shotgun or short-barreled rifle.”
14. Wis. Stat. § 941.28(1)(b) defines “short-barreled rifle” to mean a rifle “having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches...” There is also a length requirement for shotguns under the statute.
15. There is nothing in the Criminal Complaint alleging that Mr. Rittenhouse was in violation of § 941.28. Therefore, under § 948.60(3)(c) the *only* way § 948.60(2)(a) could possibly apply to Mr. Rittenhouse is if he was not in compliance with *both* ss. 29.304 and 29.593.
16. Wis. Stat. § 29.304 is entitled “Restrictions on hunting and use of firearms by persons under 16 years of age.” It contains various subsections restricting a person’s ability to hunt based upon age.
17. For example, § 29.304(1) and all subsections below it set forth restrictions on hunting and use of firearms for persons under the age of 12. Those subsections do not apply to Mr. Rittenhouse because he was over the age of 12 when he possessed the firearm at issue in Count 6.

Sec. 29.304(2) and all subsections below it set forth restrictions on hunting and use of firearms for persons aged 12-13. Those subsections do not apply to Mr. Rittenhouse because he was not aged 12-13 when he possessed the firearm at issue in Count 6.

Sec. 29.304(3) and all subsections below it set forth restrictions on hunting and use of firearms for persons aged 14-16. Those subsections do not apply to Mr. Rittenhouse because he was not aged 14-16 when he possessed the firearm at issue in Count 6.

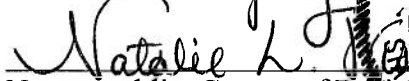
18. Wis. Stat. § 29.304 provides *no* prohibitions against persons who are at least 17 years of age under *any* of its subsections. Therefore, it is impossible for Mr. Rittenhouse to have been in violation of § 29.304.
19. Because the plain language of § 948.60(3)(c) requires violations of both s. 29.304 *and* s. 29.593 in order for Mr. Rittenhouse to face criminal liability in this matter under § 948.60(2)(a), the fact that Mr. Rittenhouse cannot—and did not—violate § 29.304 should end the court's inquiry.

Dated this 1st day of July, 2021


Mark D. Richards, #1006324

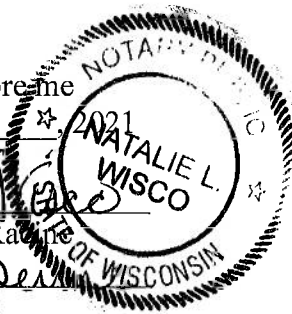
Subscribed and sworn before me

This 1st day of July, 2021


Natalie L. Wisco

Notary public, County of Racine

My commission expires: per



STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY

State of Wisconsin, Plaintiff,

-vs-

Kyle H. Rittenhouse, Defendant.

**MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS COUNT 6**

Case No. 2020CF983

INTRODUCTION

The defendant, Kyle H. Rittenhouse, has been charged in a six-count complaint with various offenses related to the shootings of Joseph Rosenbaum, Anthony Huber, and Gaige Grosskreutz, on August 25, 2020 during civil unrest in the City of Kenosha. Here, the Criminal Complaint fails to allege facts within its four corners which could allow a reasonable person to conclude that Mr. Rittenhouse was in violation of Wis. Stat. § 948.60(2)(a)²- Possession of a dangerous weapon by a person under 18 as alleged in Count Six. Wis. Stat. § 948.60(3)(c) sets forth an additional requirement of proof necessary for conviction under § 948.60, which has been entirely ignored by the state. Accordingly, the complaint fails to allege facts which would allow a reasonable person to conclude that Count Six was committed and must be dismissed.

I. Wis. Stat. § 948.60(3)(c) sets forth an additional requirement of proof for criminal liability under § 948.60(2)(a).

The State has failed to address the requirements set forth in Wis. Stat. § 948.60(3)(c). While Wis. Stat. §§ 948.60(3)(a) and (b) provide exceptions to the applicability of the statute, § 948.60(3)(c) sets for an additional *requirement* of applicability. This distinction is best illustrated by comparing the language of the different subsections of §948.60(3).

Wis. Stat. § 948.60(3)(a) and (3)(b) provide *exceptions* to § 948.60 as follows:

² All statutes cited refer to the 2019-2020 version unless otherwise specified.

§ 948.60(3)(a)- “This section does not apply to a person under 18 years of age who possesses or is armed with a dangerous weapon when the dangerous weapon is being used in target practice under the supervision of an adult or in a course of instruction in the traditional and proper use of the dangerous weapon under the supervision of an adult...”

§ 948.60(3)(b)- “This section does not apply to a person under 18 years of age who is a member of the armed forces or national guard and who possesses or is armed with a dangerous weapon in the line of duty...”

However, § 948.60(3)(c) departs entirely from the format of (3)(a) and (3)(b) and sets forth an additional *requirement of proof*. It provides:

§ 948.60(3)(c)- “This section *applies only* to a person under 18 years of age who possesses or is armed with a rifle or a shotgun if the person is in violation of s. 941.28 or is not in compliance with ss 29.304 and 29.593...”

(Emphasis added). Plainly, § 948.60 would therefore *only* apply to Mr. Rittenhouse if he were: 1). in violation of 941.28; or 2). not in compliance with § 29.304, *and* § 29.593. This, therefore, requires the state prove the presence of an additional factor(s) in order to sustain a finding of probable cause for violation of § 948.60. The difference between the *exceptions* to the statute under subsections (3)(a) and (3)(b), and the *additional factor* proscribed by (3)(c) is clearly evidenced when considering prior versions of the statute.

As noted, the current grammatical structure of § 948.60(3)(c) is entirely different than the exceptions to § 948.60 provided in subsections (3)(a) and (3)(b). These differences are intentional, as prior versions of (3)(c) included language akin to that currently found in (3)(a) and (3)(b). Previously, the language of subsection (3)(c) read as follows:

§ 948.60(3)(c)- “This section does not apply to a person under 18 years of age who possesses or is armed with a firearm having a barrel 12 inches in length or longer and who is in compliance with ss. 29.304 and 29.593...”

However, in 2005, Wisconsin Act 163 amended the statute to read:

§ 948.60(3)(c)- “This section applies only to a person under 18 years of age who possesses or is armed with a rifle or shotgun if the person is in violation of s. 941.28 or is not in compliance with ss. 29.304 and 29.593.”

This deliberate change in language indicates that the intention of subsection § 948.60(3)(c), as amended by 2005 Wisconsin Act 163, is to do exactly as it proscribes—to create an additional requirement of proof under § 948.60.

II. Mr. Rittenhouse was not in violation of either section 29.304 or 29.593.

On the night of August 25, 2020, Rittenhouse was not engaging in conduct that could be found in violation of § 29.304 nor § 29.593, because neither section was applicable to Rittenhouse at that time.

A. Section 29.304

Section 29.304 does not apply to Mr. Rittenhouse, and therefore he could not have been in violation of that statute. Section 29.304 only governs the firearm usage of hunters under 16 years of age. Mr. Rittenhouse was 17 years old at the time he possessed the firearm at issue in Count 6, making section 29.304 inapplicable to him. Accordingly, Mr. Rittenhouse’s conduct on August 25, 2020 does not fall under the purview of this statute.

B. Section 29.593

Section 29.593 does not apply to Mr. Rittenhouse and therefore Rittenhouse could not have been in violation of the same. Section 29.593 sets forth the requirement for a certificate of accomplishment to obtain hunting approval. Mr. Rittenhouse was not seeking to obtain a certificate of accomplishment in a hunter’s education program, nor was Rittenhouse seeking to obtain hunting approval with said certificate. Therefore, section 29.593 is inapplicable to him.

Mr. Rittenhouse was not engaging in the pursuit of a wild animal, nor was he attempting to obtain any approval for hunting activities. By definition under Wis. Stat. § 29.001(42),

“hunting” includes “shooting, shooting at, pursuing, taking, capturing or killing or attempting to capture or kill any wild animal.” Furthermore, “approval” means “any type of approval, privilege, or authorization issued or conferred by the department under this chapter including any license, permit, certificate, card, stamp, preference point, or tag.” Wis. Stat. § 29.001(12). Thus, Mr. Rittenhouse’s conduct on August 25, 2020 does not fall under the purview of this statute and thus was not in violation of the same. As he would have had to have been in violation of either both § 29.593 and § 29.304 to face criminal liability for underage possession of a firearm under Wis. Stat. § 948.60(3)(c), the only way Mr. Rittenhouse cannot be found criminally liable for possession of the Smith & Wesson rifle on August 25, 2020 unless he was in violation of Wis. Stat. § 941.28.

III. Mr. Rittenhouse was not in violation of section 941.28.

Wis. Stat. § 941.28 is entitled “Possession of short-barreled shotgun or short-barreled rifle.” Subsection (2) states that “No person may sell or offer to sell, transport, purchase, possess or go armed with a short-barreled shotgun or short-barreled rifle.” Wis. Stat. § 941.28(1)(b) defines “short-barreled rifle” to mean a rifle “having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches...” Accordingly, in order for him to face liability under § 941.28, the rifle Mr. Rittenhouse was in possession of was under 26 inches in overall length or had a barrel less than 16 inches long. The state has provided no information that this requirement has been met, and therefore § 941.28 does not apply to Mr. Rittenhouse.

IV. The state cannot prove that Mr. Rittenhouse was in violation of Wis. Stat. § 948.60(3)(c), so Count 6 must be dismissed.

To be legally sufficient, a criminal complaint must “set forth facts within its four corners that, together with reasonable inferences from those facts, would allow a reasonable person to

conclude that a crime has been committed and that the defendant was probably the person who committed it.” *State v. Chagnon*, 2015 WI App. 66, ¶7, 364 Wis. 2d 719, 870 N.W.2d 27. When weighing a complaint for sufficiency, it is evaluated in “a common sense, rather than a hypertechnical manner. *Id.* Here, common sense rules that there is no factual basis to support Count 6.

As detailed above, Wis. Stat. § 948.60(3)(c) confers an additional requirement of proof in order to sustain a conviction for possession of a firearm by a minor under § 948.60(2)(a). Here, neither of the conditions conferring criminal liability under § 948.60(3)(c) exist and Mr. Rittenhouse, therefore, could not have been in violation of § 948.60(2)(a). Moreover, the state has completely failed to allege *any* facts in the criminal complaint which speak to § 948.60(3)(c). Accordingly, it would be impossible for a reasonable person to conclude that Mr. Rittenhouse was in violation of § 948.60(2)(a) on August 25, 2020. Accordingly, Count 6 of the criminal complaint must be dismissed.

Electronically Signed: 7/1/2021

By: s/Mark D. Richards

Mark D. Richards, # 1006324
RICHARDS & DIMMER, S.C.
209 EIGHTH STREET
RACINE, WI 53403
(262) 632-2200 (P)
(262) 632-3888 (F)
mdr@racinedefense.com

s//Corey Chirafisi

Corey Chirafisi, #1032422
CHIRAFISI & VERHOFF, S.C.
411 W. MAIN ST. SUITE 201
MADISON, WI 53703
(608) 250-3500 (P)
(608) 250-3503 (F)
corey@cvlawoffice.com