IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

LYNN W. OSMUNDSON,

Applicant-Appellant,

vs

STATE OF IOWA,

Respondent-Appellee.

Filed November 30, 1987

7-403
86-1637

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Appeal from the Iowa District Court for Story County (No. 32524) - Milton D Seiser, Judge.

Applicant appeals from the district court's denial of postconviction relief.

AFFIRMED

Lawrence E. Jahn of Smith, Nutty, Sharp, Benson and Jahn, Ames, for applicant-appellant.

Thomas J. Miller, Attorney General; Pamala Greenman Dahl, Assistant Attorney General; Mary E. Richards, County Attorney; and Douglas R. Marek, Assistant County Attorney, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, and Sackett, JJ.

SACKETT, J.

Applicant, Lynn W. Osmundson, appeals from the district court's denial of postconviction relief. He was convicted by a jury of one count of third-degree sexual abuse and pled guilty to another count of third-degree sexual abuse and a reduced charge of prostitution.

Applicant contends he was denied effective assistance of counsel. He claims his trial attorney (1) failed to file a motion to suppress evidence seized pursuant to an allegedly improper search warrant, (2) failed to request the court to instruct the jury that lack of cohabitation is an element of sexual abuse in the third degree, see Iowa Code §709.4, and (3) improperly advised applicant he would be subject to habitual offender penalties if he were tried and convicted of the charges to which he pled guilty.

The general test applied to a claim of ineffective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Mott v. State, 407 N.W.2d 581, 582 (Iowa 1987) (quoting Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)). When the claim is grounded on counsel's failure to take some action, the claimant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Id.; Munz v. State, 382 N.W.2d 693, 697 (Iowa App. 1985). In examining counsel's conduct we review de novo the totality of relevant circumstances. State v. Burrell, No. 86-681, slip op. at 6 (Iowa September 23, 1987).

I.

Applicant contends his counsel was ineffective for failing to file a motion to suppress evidence, including seven pornographic magazines, seized in a search of applicant's home.

Several months after the alleged act of sexual abuse for which applicant was awaiting trial, the victim saw marijuana and pornographic materials at applicant's home. That day, police obtained and executed a search warrant based on the victim's observations. The evidence seized included pornographic magazines allegedly connected to the prior incident of sexual abuse. The magazines were used as evidence at applicant's trial.

Applicant raises two challenges to the search. First, he argues his home was too remote in time and place from the scene where the sexual abuse occurred to justify a search; second, he argues the police misrepresented to the magistrate their objective in searching the home.

A warrant may only be issued upon a finding of probable cause. See Munz, 382 N.W.2d at 698. Based on our review of the record, we conclude the warrant was based on probable cause: the victim's timely observation. We reject applicant's contention the warrant is invalid because the officers failed to connect the items sought to be seized to the prior sexual abuse complaint. There is no question the victim's observation established probable cause to believe applicant possessed marijuana and pornographic magazines in violation of Iowa Code sections 204.401(3) and 728.2 (1985). Applicant has also failed to offer any proof the affidavit of the officer who applied for the search warrant contained material misrepresentations of fact. See Munz, 382 N.W.2d at 702.

A strategic decision not to file a suppression motion, based on the belief the motion would not prevail, is not necessarily an indication of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 565 (Iowa 1980). Because the search warrant was valid, applicant was not denied effective assistance of counsel when his attorney failed to challenge it. See Munz, 382 N.W.2d at 703.

II.

Applicant contends his counsel was ineffective in failing to request an instruction requiring the jury to find applicant and the victim were not cohabiting as husband and wife. See Iowa Code §709.4 (element of sexual abuse in third degree is that defendant and victim "are not at the time cohabiting as husband and wife"). The victim in this case was applicant's nephew. Applicant makes no claim suggesting his nephew was cohabiting with him as his spouse. See State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). The evidence is clear both applicant and the victim are male and do not live together.

Applicant fails to show how counsel's failure to raise the nonspousal issue prejudiced him. Id. Counsel is under no obligation to engage in an obviously useless act. Id. We reject this aspect of applicant's claim of ineffective assistance of counsel.

III.

Applicant contends he received ineffective assistance of counsel because his attorney allegedly misinformed applicant he would be subject to habitual offender penalties if he chose to go to trial rather than take the plea bargain. In fact, applicant's prior convictions were not sufficient to bring him within the definition of an habitual offender, see Iowa Code §902.8, even if he were found guilty of the two additional felony charges.

Applicant's attorney testified she knew applicant could not have received an enhanced penalty for habitual offender status and told him so; applicant claims he pled guilty because his attorney told him he would be subject to habitual offender status if he went to trial and were convicted. The prosecutor testified at the postconviction relief hearing and corroborated the attorney's version of the facts surrounding the habitual offender question. In fact, the prosecutor

testified he was considering pursuing a habitual offender claim until applicant's trial attorney pointed out to him that applicant did not qualify for habitual offender status

The record does not support applicant's contention he was misled by trial counsel Applicant has failed to show counsel's performance was outside the range of normal competency

Finding no ground for relief, we affirm

AFFIRMED