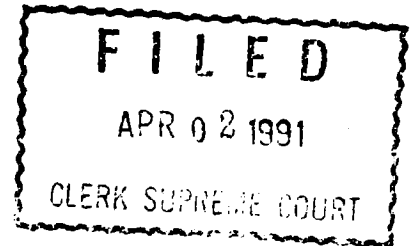


IN THE COURT OF APPEALS OF IOWA

No. 0-563 / 89-1774



STATE OF IOWA,

Appellee,

vs.

RICHARD JAMES DAVIS,

Appellant.

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Appeal from the Iowa District Court for Polk County,
A. M. Critelli and Rodney Ryan, Judges.

Defendant appeals his conviction on a charge of possession of a controlled substance with intent to deliver. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Roxann M. Ryan, Assistant Attorney General, James Smith, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Defendant Richard Davis appeals his conviction by a jury on the charge of possession of a controlled substance with intent to deliver. Defendant contends that the police violated Iowa Code section 808.6 and the fourth amendment to the United States Constitution. We agree, and therefore, reverse the conviction and remand for a new trial.

On April 28, 1989, Des Moines police served a search warrant. The police did not knock or announce themselves, but simply opened the door and entered. The police officers believed they were not required to knock. They did not contend that there were exigent circumstances.

Defendant was present when the police served the warrant. Police found fourteen ounces of marijuana and a scale. Defendant and another individual were charged with possession of a controlled substance with intent to deliver. The evidence found during the search was seized and introduced at trial. Defense counsel failed to object to the admission of the evidence. Defendant was found guilty by a jury and given a five-year suspended sentence and probation.

Defendant argues that the execution of the search was in violation of the fourth amendment and that the search violated a statutory "knock and announce" requirement in Iowa Code section 808.6. Defendant contends that the evidence seized in the search should be suppressed. He

notes that a specific instance of ineffective assistance of counsel justifies raising this issue for the first time on appeal.

When considering a claim of ineffective assistance of counsel, we consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). Defendant must show (1) that counsel failed to perform an essential duty and (2) that prejudice resulted. Id. at 131-32.

In proving the first prong of this test, defendant must overcome a presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test, defendant must show 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 State v. Brown the supreme court recognized that the "knock and announce" requirement was a part of our common

law. 352 N.W.2d 601, 603 (Iowa 1977). The Brown court stated that the concept was adopted in Iowa Code section 751.9 (1977), the predecessor of the current forcible warrant execution statute in Iowa Code section 808.6. Id.; see State v. Farber, 314 N.W.2d 365, 368 (Iowa 1982) (section 808.6 prescribes "knock and announce" rule). The supreme court has explained the statute as follows:

The statute authorizes an officer to break into premises when reasonably necessary after notice and nonadmittance. The only notice which is prescribed is "notice of [his] authority and purpose." This is the traditional knock and announce requirement.

. . .

The traditional purposes of the knock and announce requirement are to avoid property damage resulting from forcible entry, to prevent violence and personal injury, and to protect the privacy of the occupants. . . .

. . . The statute applies even when peaceful entry is possible, but this does not make force irrelevant. If the officer can enter through an unlocked door or with a passkey, it would not be reasonably necessary to break in. Various forms of peaceful entry are the legal equivalent of a breaking, but an actual breaking is authorized only when reasonably necessary. . . .

Farber, 314 N.W.2d at 369-70 (citations omitted; brackets in original).

The evidence here is not controverted. The police made no effort whatsoever to announce themselves or their purpose. We find that the police entry into the house was the legal equivalent of breaking in. The breaking in was not reasonably necessary or authorized. The police irrefutably failed to comply with the knock and announce requirements of Iowa Code section 808.6 and the fourth amendment. Although the State cites three general

exceptions to the knock and announce requirement,¹ it has not argued that this case is within those exceptions. Consequently, the fruits of the search the police conducted should have been suppressed upon proper motion by defense counsel.

The exclusionary rule is, by now, a familiar concept in our law. By excluding "the fruit of the poisonous tree" from evidence, it is one of the means by which we protect the rights of citizens against illegal police conduct. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963). Indeed, it has become a mainstay to, as the court in Strickland v. Washington termed it, "the proper functioning of the adversarial process [such] that the trial . . . produce[s] a just result." 466 U.S. at 686.

While it has often been said that a criminal defendant is not guaranteed a perfect trial, the defendant is entitled to counsel within the normal range of professional competency. We think it safely can be said that defendant has carried his burden to show that trial counsel fell well below that range in failing to seek suppression of the

1. As cited by the State, an exception applies when: (1) there is a potential for harm to the police or others, (2) there is a potential for destruction of evidence, and (3) the requirement amounts to a useless gesture. See generally State v. Farber, 314 N.W.2d 365, 368 (Iowa 1982); State v. Iverson, 272 N.W.2d 1, 4 (Iowa 1978); State v. Brown, 253 N.W.2d 601, 603 (Iowa 1977). As we have noted, we see nothing in the record to indicate that the police believed themselves in peril, that the evidence would be destroyed, that the defendant was aware of the police presence and their purpose, or that the police believed the building to be unoccupied.

fruits of the illegal search. See Hildebrant, 405 N.W.2d at 841. Likewise, we think there is more than a reasonable probability that, "but for counsel's unprofessional errors," this case would ever have come to trial, much less resulted in a guilty verdict. See Strickland, 466 U.S. at 694.

We hold that the search was in violation of the fourth amendment and Iowa Code section 808.6 and that the evidence seized in that search was tainted. Having examined trial counsel's conduct de novo, we conclude that counsel failed to perform an essential duty in seeking suppression of tainted evidence and that this resulted in prejudice to defendant. Risdal, 404 N.W.2d at 131-32. We therefore reverse the judgment of the trial court and remand for a new trial.

REVERSED AND REMANDED.