IN THE COURT OF APPEALS OF IOWA

No. 8-609 / 97-0832
Filed January 27, 1999

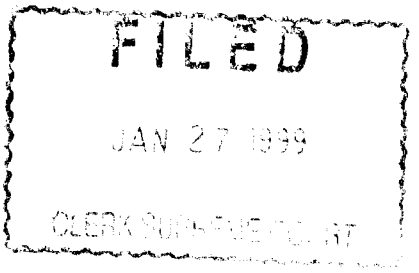
ORLEY I. FARNUM,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Orley Farnum appeals from the district court ruling denying his second application for postconviction relief. **AFFIRMED.**

Linda De Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

HUITINK, J.

Orley Farnum appeals from the district court's denial of his second application for postconviction relief. He contends the district court erred by failing to find the police conducted an illegal search of his home, and that his prior counsel were ineffective in failing to raise this issue. We affirm.

In 1985, Farnum was convicted of three counts of second-degree sexual abuse, three counts of administering harmful substances to minors, and three counts of dissemination and exhibition of obscene material to minors. He was sentenced to three consecutive indeterminate twenty-five year prison terms for the sexual abuse convictions, concurrent with the sentences on the other convictions. His convictions were affirmed on appeal. *State v. Farnum*, 397 N.W.2d 744 (Iowa 1986). Farnum brought a postconviction relief action in 1987, which was denied.

In 1995, Farnum filed a second application for postconviction relief. Farnum asserted in his application that a warrantless search of his residence was illegal, and evidence obtained should have been suppressed. He further contended his trial counsel, appellate counsel, and first postconviction relief counsel were ineffective by failing to raise the issue. The district court denied Farnum's application. The court found the search was not illegal because Farnum's live-in girlfriend consented to the search. The court consequently found Farnum's trial counsel was not ineffective.

Ineffective assistance is measured by 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-93 (1984); *see Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1987).

On appeal, Farnum contends the evidence indicates the police searched his home without his girlfriend's consent. He reiterates his prior counsel were ineffective in failing to raise the issue. At the postconviction relief hearing, Farnum's trial counsel testified he did not file a motion to suppress evidence obtained from Farnum's home without a warrant because the record demonstrated Farnum's girlfriend consented to the search. From our de novo review of the record, we agree. Because the search was not improper, trial counsel had no duty to file a motion to suppress. Without a duty, counsel cannot be ineffective. We conclude Farnum has failed to meet his burden of proof to demonstrate counsel was ineffective.

The determination Farnum's trial counsel was not ineffective is dispositive on the claims relating to appellate and postconviction counsel. They cannot be ineffective in not raising the claim trial counsel was ineffective. Also, having determined the search was not improper, we conclude appellate and postconviction

counsel need not have raised that issue. We affirm the district court's denial of Farnum's second postconviction relief application in all respects.

AFFIRMED.