IN THE COURT OF APPEALS OF IOWA

No. 3-092 / 11-0422
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

COREY VERNON RUDEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull, District Associate Judge, (motion to suppress) and Jeffrey A. Neary, Judge (trial).

Corey Ruden appeals from his conviction of possession of marijuana, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson and David Adams, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Corey Ruden appeals from his conviction of possession of marijuana, third offense, contending his attorney was ineffective in not challenging the voluntariness of his confession. We affirm.

In April 2010 Deputy U.S. Marshall McCormick and Sergeant Te Brink of the Plymouth County Sheriff's office conducted a sex offender compliance check at Ruden's registered residence. When Ruden opened the door, McCormick smelled a strong odor of burnt marijuana. When Te Brink came closer to the door, he also smelled the strong odor. The officers questioned Ruden about the odor. He denied anyone had been smoking marijuana and said the odor was from his cleaning a tortoise tank and cleaning mold in the house. Te Brink asked Ruden if they could enter. As Ruden stepped aside, the officers entered. Upon entering officers saw a man and woman in a room to the left of the entrance. Te Brink went into the room and asked them if they had been smoking marijuana; they denied it. Te Brink saw an ashtray containing ashes and a small amount of a green leafy substance in the side room. Ruden denied the ashtray contained marijuana, claiming the ashes were from cigarettes.

Sergeant Te Brink asked Ruden for permission to search the residence. The two went into the kitchen while McCormick stayed with the man and woman in the other room. Ruden asked if he could call an attorney to come during the search. Te Brink replied Ruden was free to call an attorney, but the attorney could not be present during a search. Ruden asked about a warrant for the search. Te Brink responded, "[W]e can do this the easy way or the hard way," and if Ruden did not consent, the officers would obtain a search warrant. Ruden

indicated to Te Brink he wanted to talk with him privately, and they went to the back staircase of the residence. Ruden told Te Brink he had just started a new landscaping business, he wanted to turn his life around and go straight, he did not want any trouble, and he had some marijuana in a tin under the couch in the other room. Ruden and Te Brink then returned to the other room, and with Ruden's help, Te Brink retrieved a tin containing marijuana from under the couch.

Te Brink took Ruden outside to the front porch, read him his *Miranda* rights, and obtained Ruden's signature on a written consent to search.

After he was charged with possession of marijuana, third offense, Ruden filed a motion to suppress, alleging the officers did not have consent to enter the residence, they had no reasonable grounds to enter without consent or to search the residence, the search was illegal, and all evidence and statements obtained by the officers should be suppressed. Following a hearing, the court denied the motion, concluding Ruden's consent to search was voluntary, Ruden initiated the private conversation with Te Brink in which he told Te Brink about the marijuana, Ruden helped Te Brink retrieve the marijuana, and the odor of burnt marijuana and the ashes and residue in the ashtray would have supported issuance of a search warrant had one been sought. Ruden's motion to reconsider was denied. The judge who considered and ruled on the motion to suppress then recused himself from further participation in this case.

To preserve the suppression issue for appeal, Ruden consented to a trial to the court, during which he re-urged the motion to suppress. The court found Ruden guilty of possession of marijuana, third offense. Concerning the motion to suppress, the court concluded:

> The Court here has been urged to review and in essence overrule the ruling on the Motion to Suppress made by Judge Dull. This would constitute in essence an appeal of Judge Dull's ruling over which this Court does not have jurisdiction in this setting. Therefore the Court does not overturn Judge Dull's ruling on the Motion to Suppress.

Ruden appealed, contending his attorney was ineffective in not challenging the voluntariness of his confession in the motion to suppress.

Our review of ineffective assistance of counsel claims is de novo. *State v. Madsen*, 813 N.W.2d 714, 721 (Iowa 2012). We give deference to the trial court's findings of fact because of its ability to assess the credibility of witnesses, but we are not bound by them. *State v. Crawford*, 659 N.W.2d 537, 541 (Iowa 2003). To prove ineffective assistance, a defendant must demonstrate his trial counsel failed to perform an essential duty, resulting in prejudice. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). A defendant's inability to prove either element is fatal; thus, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

"Ineffective-assistance claims are an exception to our normal rules of error preservation." *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Such claims are normally considered in postconviction relief proceedings. *Id.* Even though such claims need not be raised on direct appeal, a defendant may do so if he or she has "'reasonable grounds to believe that the record is adequate to address the claim.'" *State v. Johnson*, 784 N.W.2d 192, 197 (Iowa 2010) (citation omitted). If we determine the record is adequate, we resolve the claim. *Id.* We conclude the record here is adequate for us to resolve the claim.

Ruden argues his attorney should have challenged his confession as involuntary because "police threats to detain [him] and tear his house apart if they had to secure a search warrant before conducting a search led to Ruden's confession" he possessed a quantity of marijuana.

We consider the totality of the circumstances in determining whether a statement is voluntary. *See State v. Bowers*, 661 N.W.2d 536, 541 (Iowa 2003). "[S]tatements are voluntary if the defendant's will is not overborne or his capacity for self-determination is not critically impaired." *Madsen*, 813 N.W.2d at 722.

> A number of factors help in determining voluntariness. Among them are: defendant's age, whether defendant had prior experience in the criminal justice system, whether defendant was under the influence of drugs, whether *Miranda* warnings were given, whether defendant was mentally "subnormal," whether deception was used, whether defendant showed an ability to understand the questions and respond, the length of time defendant was detained and interrogated, defendant's physical and emotional reaction to interrogation, [and] whether physical punishment, including deprivation of food and sleep, was used.

State v. Payton, 481 N.W.2d 325, 328-29 (Iowa 1992) (citations omitted).

Ruden was thirty-six at the time the officers came to his residence. He had prior experience in the criminal justice system concerning possession of marijuana, as evidenced by two prior convictions of possession and his comments about calling an attorney and asking about a search warrant and what he could do to make things go easier on him. He said he had not smoked marijuana, and he does not contend he was under the influence of any other drugs. He understood what the officers said to him and their request to search the house. His admission was in his own house, where he was not restrained. The officers described his demeanor as calm and "laid back." The challenged

admission came during a conversation Ruden himself initiated. Ruden's version of events differs from the officers', but the court believed the officers' version. We give deference to the court's credibility assessment because it observed the witnesses' testimony and demeanor. *See Crawford*, 659 N.W.2d at 541.

Considering the totality of the circumstances, we conclude Ruden's admission was voluntary. Therefore his attorney did not have a duty to challenge the voluntariness of the admission.[1]

AFFIRMED.

Bower, J., concurs; Danilson, J., concurs specially.

[1] We note the motion to suppress sought to exclude all statements Ruden made.

DANILSON, J. (concurring specially)

I concur specially as I agree with the majority's result, but I believe that even if the confession were inadmissible that there was no prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (concluding "the court need not address both components" of the ineffective assistance of counsel inquiry "if the defendant makes an insufficient showing on one"). Officer Te Brink had already observed marijuana in the ashtray and had smelled marijuana in Ruden's residence before Ruden's confession. The confession only assisted the State in establishing possession by Ruden as two other individuals were in the residence. However, there was adequate evidence to support Ruden's constructive possession without the confession. The entry by the officers into the residence is troubling, but that issue has not been raised on appeal.