

**IN THE COURT OF APPEALS OF IOWA**

No. 2-859 / 11-1662  
Filed December 12, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ZEDCLIFF ODOYO KICHE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Marsha Bergan (motion to suppress) and Douglas S. Russell (guilty plea and sentencing), Judges.

Defendant appeals his convictions for possession of a controlled substance (cocaine) with intent to deliver and child endangerment, and also his conviction for failure to affix a drug tax stamp. **AFFIRMED.**

Eric D. Tindal of Nidey Wenzel Erdahl Tindal & Fisher, Williamsburg, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Janet M. Lyness, County Attorney, Meredith Rich-Chappell, Assistant County Attorney, and Phil Van Liew, Student Legal Intern, for appellee.

Considered by Vaitheswaran, P.J., Potterfield, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**HUITINK, S.J.****I. Background Facts & Proceedings.**

The record includes evidence of the following: On July 2, 2010, Zedcliff Kiche was granted a deferred judgment after entering a guilty plea to failure to affix a drug tax stamp. The terms and conditions of his resulting probation included the following provision:

I understand and agree that my person, property, place of residence, vehicle and personal effects may be searched at any time, with or without a search warrant or warrant of arrest, by any probation officer or law enforcement officer having reasonable grounds to believe contraband is present. I further understand that a refusal to consent to such a search constitutes a violation of this agreement.

Kiche was also ordered to refrain from using or possessing any illegal or controlled substances and was further required to submit to drug testing to verify his compliance.

On August 3, 2010, Kiche tested positive for marijuana. He also failed to report for a drug test on October 4, 2010, and on October 22, 2010, he tested positive for cocaine. On October 26, 2010, probation officer Cora Dixon and correctional services officer Juan Santiago visited Kiche's home to verify his compliance with the terms of his probation. Upon arrival, they encountered Kiche outside of his home, and based on his appearance and behavior, both believed Kiche was under the influence of an unspecified illegal controlled substance.

When Dixon asked permission to enter Kiche's home, Kiche, according to Dixon, replied "there was no problem; they could enter the home." Santiago's version of the conversation is essentially the same as Dixon's. Kiche denied giving either officer express permission to enter his home. A subsequent search

of Kiche's person produced a small plastic bag of a white powdery substance. Evidence found inside the home included drug paraphernalia and other items commonly associated with distribution of a controlled substance. Kiche's minor child was also present inside the home at the time these events occurred. As a result, Kiche was charged with possession of a controlled substance (cocaine) with intent to deliver, possession of controlled substance (marijuana) with intent to deliver, maintaining a drug house, and child endangerment. Kiche entered not-guilty pleas to all of the charges against him.

In an untimely filed motion to suppress, Kiche alleged the search of his home violated his protections against unreasonable search and seizures under both the Iowa and the United States Constitutions. Because the trial court found good cause for defense counsel's failure to timely file the motion to suppress, the motion was heard and decided on its merits. The trial court denied Kiche's motion to suppress, citing his status as a probationer, the earlier-quoted conditions of his probation, and the officers' reasonable suspicion that criminal activity was occurring in Kiche's home. The court also found Kiche had expressly consented to the search based on the officers' versions of their conversations with Kiche before they entered his home.

Kiche thereafter entered into a plea agreement whereby he pleaded guilty to possession of a controlled substance (cocaine) with intent to deliver, and child endangerment. He was sentenced to a term not to exceed ten years on the possession-with-intent-to-deliver count and two years on the child-endangerment count. The trial court ordered the sentences of confinement be served

concurrently. Both sentences were suspended, and Kiche was placed on probation for three years.

As an additional result of these convictions, Kiche's deferred judgment for the earlier referred to offense was revoked, and a judgment of conviction was entered against him on that charge. He was sentenced to a term of confinement not to exceed five years. The sentence of confinement was suspended, and Kiche was placed on probation for three years to be served concurrently with his probation on the possession-with-intent-to-deliver and child-endangerment convictions. Kiche appeals his convictions in both cases. His appeals have been consolidated for our review.

## **II. Untimely Motion.**

It is clear the motion to suppress filed by defense counsel was untimely. See Iowa R. Crim. P. 2.11(4). Defense counsel filed a motion seeking an extension of the time to file the motion, and the court granted the motion, finding there was good cause to grant the extension. See Iowa R. Crim. P. 2.11(3) (providing court may consider an untimely motion if it finds "good cause shown" to excuse the untimely filing); *State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1997).

On appeal, the State asserts the court abused its discretion in granting the motion to extend time. See *State v. Ball*, 600 N.W.2d 602, 604-05 (Iowa 1999). Kiche responds that if we find the motion should not have been considered because it was untimely, then he asserts he received ineffective assistance due to counsel's failure to file a timely motion to suppress. We conclude the district court did not abuse its discretion in determining the motion should be considered on the merits. See *State v. Ortiz*, 766 N.W.2d 244, 250 (Iowa 2009) (noting court

properly considered untimely suppression motion rather than waiting for merits to be determined in a postconviction relief hearing).

### **III. Ineffective Assistance.**

The next issue is whether Kiche's claims regarding the suppression hearing survive the entry of the guilty plea. Generally, a defendant's guilty plea waives all defenses and objections which are not intrinsic to the plea. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). In a claim regarding a failure by defense counsel to investigate or file a motion to suppress, however, a court should "determine whether counsel in the particular case breached a duty in advance of a guilty plea, and whether any such breach rendered the defendant's plea unintelligent or involuntary." *Id.* at 644. A defendant must show he would not have entered a guilty plea but for the breach of duty by counsel. *Castro v. State*, 795 N.W.2d 789, 793 (Iowa 2011).

Kiche claims he received ineffective assistance because defense counsel failed to present an argument at the suppression hearing based on the Iowa constitution in light of *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010). Under *Carroll*, 767 N.W.2d at 644, therefore, we proceed to address whether Kiche received ineffective assistance of counsel prior to entering his guilty plea.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Carroll*, 767 N.W.2d at 641. In the context of a guilty plea proceeding, a defendant must show a reasonable probability that, but for counsel's errors, he

would not have pleaded guilty, but would have insisted on a trial. *State v. Straw*, 709 N.W.2d 128, 136 (Iowa 2006). A party must show both elements by a preponderance of the evidence. *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011).

While defense counsel cited to the Iowa constitution in the motion to suppress and in a brief in support of the motion, no separate argument concerning the Iowa constitution was made. At the time of the suppression hearing the Iowa Supreme Court had recently decided *Ochoa*, 792 N.W.2d at 267, based specifically on Iowa constitutional law. In that case, the State asserted that based on a written agreement the defendant, a parolee, could be subjected to a search at any time for any reason. *Ochoa*, 792 N.W.2d at 263. The court concluded “a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search,” and determined the search was invalid. *Id.* at 291.

The court in *Ochoa* recognized the search could have been valid if the defendant had consented to the search, although the court found based on the facts of that case the defendant had not consented. *Id.* at 291-92. The State has the burden to show consent was free and voluntary. *Id.* at 292. “Consent is considered to be voluntary when it is given without duress or coercion, either express or implied.” *State v. Reinier*, 628 N.W.2d 460, 465 (Iowa 2001). A court considers the totality of the circumstances to determine whether consent was voluntary. *Id.* at 466.

On our de novo review, and after considering the totality of the circumstances, we agree with the district court's conclusion that "Kiche consented on the evening of the probation check to the officers' entry into his home." Dixon testified that when she asked for permission to enter the home, Kiche responded, "there was no problem, that we could enter the home." Officer Santiago testified, "We told him that we needed to do a check and asked him if it was all right for us to come inside; and he said, 'Yes.'" Kiche himself testified, "I just remember saying—agreeing to them saying they were going to do a house check. And I said, 'Okay, and then they followed behind me into the home.'"

There is no evidence Dixon and Santiago used deception, a show of force, or coercion to enter the home. See *id.* at 465 (listing factors that may be considered in determining the validity of consent). There is also no evidence they claimed authority to search prior to obtaining consent. See *id.* While at one point Kiche testified he did not believe he could refuse, he also testified that based on the written probation agreement he believed officers could not search his home without a warrant unless they had reasonable grounds to believe contraband was present. Based on his later statement, a court could infer Kiche knew he had the right to refuse to consent. See *id.*

Even if defense counsel had raised an argument based on the Iowa constitution, as discussed in *Ochoa*, we determine the court would have denied the motion to suppress based on Kiche's consent to the search.<sup>1</sup> A consent

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<sup>1</sup> Due to the fact we have determined the search was valid as a consent search, we do not address the issue of whether the search was valid under the probation agreement because the officers had reasonable grounds to believe contraband was present.

search is an exception to the general prohibition against warrantless searches. *State v. Lowe*, 812 N.W.2d 554, 568 (Iowa 2012). Because he has failed to show his defense counsel breached an essential duty by failing to raise an Iowa constitutional argument, he has not shown he received ineffective assistance of counsel. See *Carroll*, 767 N.W.2d at 641.

Kiche further claims he received ineffective assistance because his defense counsel did not file a motion to suppress in his probation revocation proceedings. His arguments on this issue are the same as those raised above, based on the Iowa constitution as interpreted in *Ochoa*. We reach the same conclusion, that even if a motion had been filed, it would not have been successful. We will not find counsel breached an essential duty by failing to pursue a meritless issue. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

We affirm Kiche's convictions.

**AFFIRMED.**