

IN THE COURT OF APPEALS OF IOWA

No. 6-831 / 05-2136
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHEILA DAWN MCCALLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Kim M. Riley,
Judge.

Sheila McCalley appeals from her convictions for child endangerment,
possession of methamphetamine, possession of marijuana, and unlawful
possession of prescription drugs. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert Ranschau,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney
General, Jennifer Miller, County Attorney, and Paul G. Crawford, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Sheila McCalley appeals from her convictions for child endangerment, possession of methamphetamine, possession of marijuana, and unlawful possession of prescription drugs. She contends her trial counsel was ineffective in failing to object to a question regarding her pre-arrest, post-*Miranda* silence. We review her claim de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). Although such claims are ordinarily preserved for postconviction relief actions, we will consider them on direct appeal if the record is adequate. See *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). We conclude the record is adequate to decide the issue on this direct appeal.

Charges were brought against McCalley after her two sons, on a weekend visitation, informed their father of their mother's suspected drug use and an incident in which the younger child suffered second-degree burns on his hand. The older child, eleven years of age, had found a marijuana pipe in the home, and hid it inside a birdhouse. He also described the home as being littered with small scraps of tinfoil, which he had learned in school were associated with drug use. The boy further related that he had seen McCalley take a marijuana bong into the basement where a man named Roger was staying. Through the vent in his bedroom, the child heard coughing and tinfoil rustling. The boy had also seen marijuana at various locations in the home.

Based on this information, a search warrant was obtained for the apartment. The warrant was executed on November 8, 2004. The marijuana pipe described by the eldest child was discovered in the birdhouse as had been reported. While officers continued to search the apartment, McCalley arrived home. Officer Jeremy Linsenmeyer told McCalley that she was not under arrest, but informed her of her *Miranda* rights. He also told her they had found the marijuana pipe her son had hidden. McCalley cooperated with the search and led the officer to a marijuana bong in the apartment. She also informed him of a bag containing drug paraphernalia, which she claimed was left by a friend.

Officer Linsenmeyer then searched the bathroom and discovered prescription drug bottles that were not prescribed for McCalley. McCalley claimed she had found them outside and brought them in the home to prevent the neighborhood children from finding them. Officer Linsenmeyer also discovered a cosmetic bag that contained numerous pieces of tinfoil that had been burned. What occurred next was the subject of the following exchange between the prosecutor and Officer Linsenmeyer at trial:

Q. Did you talk to the Defendant about your discovery of this bag and its contents? A. Yes, I did.

Q. What did she tell you? A. Well, I was quite honest. I – From my practices, I described why it alarmed me and what I knew – I let her know that I knew what it was used for. I asked her if it was her bag and she stated she just got it at Goodwill and she stated the tinfoil is used for her hair.

Q. She elaborate on that or? A. No, that's when I informed her I know the common way to smoke methamphetamine, explained the whole process to her and I asked her when the last time she had smoked methamphetamine.

Q. It's my understanding at that point she decided not to talk to you anymore? A. Correct, she invoked her rights.

McCalley contends her trial counsel should have objected to the last question by the prosecutor. She contends it elicited an answer that improperly commented on her right to remain silent. Testimony about defendant's silence post-arrest and post-*Miranda* is a violation of due process. *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91, 94 (1976). Neither our supreme court or the United States Supreme Court has determined whether the use of a defendant's pre-arrest, post-*Miranda* silence is a violation of due process. Assuming arguendo that it is and McCalley's attorney failed to perform an essential duty in not objecting, we conclude McCalley has failed to show prejudice because of the overwhelming evidence of her guilt. McCalley's eleven-year-old son testified regarding his observations of drugs and paraphernalia in the apartment. He also testified regarding the coughing and rustling of tinfoil he heard after witnessing his mother go into the basement with a marijuana bong. This testimony was corroborated by the evidence obtained during the search of the apartment. Had McCalley's attorney objected to the testimony regarding her silence, the result of the trial would not have been different. Accordingly, we affirm.

AFFIRMED.