

**IN THE COURT OF APPEALS OF IOWA**

No. 6-929 / 06-0530  
Filed December 13, 2006

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

**vs.**

**OLDEN (NMN) BUTLER, JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Mark J. Smith,  
Judge.

Olden Butler, Jr. appeals his conviction and sentence for violation of the  
Drug Tax Stamp Act, Iowa Code section 453B.12 (2005). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney  
General, William E. Davis, County Attorney, and Robert Cusack, Assistant  
County Attorney, for appellee.

Considered by Huitink, P.J., Vogel, J., and Brown, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**HUITINK, P.J.**

Olden Butler, Jr. appeals his conviction and sentence for violation of the Drug Tax Stamp Act, Iowa Code section 453B.12 (2005). We affirm.

***I. Background Facts and Proceedings.***

Butler was originally charged with possession of crack cocaine with intent to deliver, in violation of Iowa Code section 124.401(1)(c) (Count I); violation of the Drug Tax Stamp Act, section 453B.12 (Count II); and possession of marijuana, in violation of section 124.401(5) (Count III). Following a jury trial, he was convicted of the lesser-included offense of possession under Count I, violation of the Drug Tax Stamp Act (Count II), and possession of marijuana (Count III).

On appeal Butler contends he was denied effective assistance of trial counsel because counsel failed to challenge the State's proof that he was in constructive possession of a taxable substance. He also contends trial counsel was ineffective because counsel failed to request a jury instruction defining the term "possession," an element of all three counts submitted to the jury.

***II. Standard of Review.***

We review ineffective assistance of counsel claims de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

***III. Merits.***

A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In assessing counsel's conduct we note that "[i]mprovident trial strategy,

miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel.” *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). We generally presume counsel is competent, and we are reluctant to subject a reasonable trial strategy to a critique based on hindsight. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

Butler bears the burden of demonstrating ineffective assistance of counsel, and both prongs of the claim must be established by a preponderance of the evidence before relief can be granted. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To prove prejudice from an alleged breach, Butler must convince us “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If Butler fails to meet his burden with respect to either prong, his claim is without merit, and will be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Ineffective assistance of counsel claims are generally preserved for postconviction relief in order to allow full development of the facts surrounding counsel’s conduct. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). However, when the record is adequate, we will consider such claims on direct appeal. *State v. Leckington*, 713 N.W.2d 208, 217 (Iowa 2006).

*Motion for Judgment of Acquittal.*

Butler claims trial counsel breached an essential duty by failing to challenge the sufficiency of the evidence supporting the State’s constructive

possession theory in counsel's motion for judgment of acquittal. We disagree. "A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence to sustain a conviction." *State v. Allen*, 304 N.W.2d 203, 206 (Iowa 1981). Resolving conflicts in the evidence, passing upon the credibility of witnesses, and weighing the evidence are issues for the jury and not issues to be resolved by motions for judgments of acquittal. *State v. Hutchinson*, \_\_\_\_\_ N.W.2d \_\_\_\_\_, \_\_\_\_\_ (Iowa 2006). We note that evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State, "there is substantial evidence in the record to support a finding of the challenged element." *State v. Reynolds*, 670 N.W.2d. 405, 409 (Iowa 2003).

Butler maintains his defense counsel did not argue that Butler was not in constructive possession of the controlled substances. To prove Butler violated the Drug Tax Stamp Act, the State must show that Butler knowingly or intentionally possessed the taxable substance. *State v. Maghee*, 573 N.W.2d 1, 9 (Iowa 1997). "Possession can be either actual or constructive." *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005). "Actual possession occurs when the controlled substance is found on the defendant's person." *Id.* "Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it." *Id.* "If the premises on which such substances are found are in the exclusive possession of the accused, knowledge of their presence of such premises coupled with the ability to maintain control over such substances may be inferred." *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973). However, where the

accused has not been in exclusive possession, “knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof.” *Id.* This proof may include “evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the substance on the premises.” *Id.*

Here, counsel challenged the “sufficiency of the evidence regarding whether or not there is [sic] indicators that Mr. Olden Butler was not in fact the one who had custody and control of the drugs under the mattress in question, if at all . . . .” Contrary to Butler’s claim, we find this reference sufficient to alert the court to Butler’s challenge to the sufficiency of the evidence concerning the State’s constructive possession theory. Counsel did not breach an essential duty in the manner claimed, and we therefore affirm on this issue.

*Jury Instruction.*

As noted earlier, Butler claims counsel was ineffective for failing to object to the trial court’s failure to define the term “possession” in the court’s jury instructions. Because we find the record is not adequate to resolve either prong of Butler’s ineffective assistance of counsel claim concerning the jury instructions, we preserve this issue for postconviction relief. *See, e.g., State v. Ondayag*, \_\_\_\_\_ N.W.2d \_\_\_\_\_, \_\_\_\_\_ (Iowa 2006) (court declines to consider counsel’s failure to object to jury instruction on direct appeal).

Butler’s conviction is therefore affirmed.

**AFFIRMED.**