

IN THE COURT OF APPEALS OF IOWA

No. 7-468 / 06-0958
Filed August 22, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CAROLYN SUE WELCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

Carolyn Sue Welch appeals from her conviction for being a felon in
possession of a firearm. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney
General, Jennifer Miller, County Attorney, and James Scheetz, Assistant County
Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Carolyn Sue Welch appeals from her conviction following a jury trial for being a felon in possession of a firearm. Because the record is insufficient to address her ineffective assistance claims on direct appeal, we affirm her conviction and preserve her ineffective assistance claims for postconviction relief.

I. Background Facts and Proceedings

On July 6, 2005, officers with the Mid-Iowa Drug Task Force executed a search warrant at the home of Len Richerodt in Marshalltown, Iowa. They believed Carolyn Sue Welch, who was living with Richerodt, had some connection with the red phosphorous they had discovered in searching another house.¹ Officers entered the Richerodt house and observed firearms in an open closet in a room. They found Welch in the backyard, brought her inside, and questioned her for three hours. In the house they discovered methamphetamine, small quantities of marijuana, and paraphernalia. Officers questioned Welch, a convicted felon,² about the guns in the house. She stated she had told Richerodt she could not be in a house with guns and the two had discussed him securing the guns. She stated she had not yet obtained the locking device for Richerodt to install. On July 8, 2005, after a second interview, officers arrested Welch.

On July 18, 2005, Welch was charged with numerous drug offenses and with being a felon in possession of a firearm under Iowa Code section 724.26 (2005). A jury trial commenced on March 21, 2006. The jury rendered guilty

¹ According to Tama County Deputy Sheriff Bruce Rhoads' trial testimony, red phosphorous labs, which are rare in Iowa, are used to manufacture methamphetamine.

² For sentence enhancement purposes, at trial Welch stipulated to having prior drug convictions, including a felony.

verdicts on the charges. Welch was sentenced to a total term of incarceration not to exceed twenty-five years. She appeals her conviction for being a felon in possession of a firearm.³ She contends her trial counsel rendered ineffective assistance by failing to obtain a ruling on the defense motion for judgment of acquittal and failing to request a jury instruction on the “possession” alternative.

II. Merits

A claim of ineffective assistance of counsel requires a de novo review because the claim is derived from the Sixth Amendment of the United States Constitution. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). When an ineffective assistance claim is raised on direct appeal, “the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination” under postconviction relief procedures. Iowa Code § 814.7(3).

Although we prefer to address ineffectiveness of counsel claims in postconviction proceedings where counsel has an opportunity to respond, we may resolve them on direct appeal if, . . . “the record is clear and plausible strategy and tactical considerations do not explain counsel’s actions.”

State v. Neuzil, 589 N.W.2d 708, 710-11 (Iowa 1999) (quoting *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998)). Because the trial record is often inadequate to allow us to resolve the claims, however, we frequently preserve ineffective assistance claims for possible postconviction proceedings to enable a complete

³ The jury also rendered guilty verdicts for possession of methamphetamine with intent to deliver under Iowa Code sections 124.401(1)(b)(7), 124.413, and 901.10(2); failure to affix an Iowa drug tax stamp in violation of sections 453B.3, 453B.1(3)(a), 453B.1(10), and 453B.12; possession of a precursor substance (red phosphorous) in violation of sections 124.401(4)(e), 703.1, and 703.2; possession of marijuana in violation of section 124.401(5); failure to affix a drug tax stamp for the marijuana in violation of sections 453B.3, 453B.1(3)(b), 453B.1(8), 453B.1(10), and 453B.12; and keeping a place for using or selling controlled substances in violation of sections 706A.2(4), 706A.1(5), and 706A.4. Welch is not challenging these other criminal convictions on direct appeal.

record to be developed. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Here, we find the record is inadequate to resolve Welch's claims.

To prevail on a claim of ineffective assistance of counsel, Welch "must demonstrate both ineffective assistance and prejudice." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). "The test is 'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency.'" *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citation omitted). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance." *Ledezma*, 626 N.W.2d at 143 (citation omitted). Welch must also show prejudice – "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Artzer*, 609 N.W.2d at 531. It is not enough to show counsel's errors "had some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 695 (1984).

At the close of evidence, Welch's counsel made a motion for judgment of acquittal. The court stated it would take the motion under advisement, but it never made an oral or written ruling on the motion. Welch contends that her counsel breached an essential duty by not obtaining a ruling, thereby preserving the sufficiency of the evidence claim for appellate review, and that she was prejudiced by the breach.⁴ See *Truesdell*, 679 N.W.2d at 616, ("The failure of trial counsel to preserve error at trial can support an ineffective assistance of

⁴ We reject the State's argument that, while the court did not "formally" deny the motion, it indicated its intent to deny the motion and its denial "is implicit because the trial continued." A mere indication of the leanings of the judge does not constitute a ruling. See *Wolf v. Murrane*, 199 N.W.2d 90, 95 (Iowa 1972) ("[A] judgment must be certain and in intelligible form so the parties understand the adjudication.").

counsel claim.”); *see also Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“[I]ssues must ordinarily be both raised and decided by the district court before we will decide them.”).

We are unable, however, to fully evaluate Welch’s claims. Her trial counsel may have had a tactical reason for not obtaining a ruling. “Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned.” *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). A postconviction relief proceeding is the proper venue to address Welch’s claim of ineffective assistance of counsel. *See Ledezma*, 626 N.W.2d at 143 (holding ineffective assistance claim involving counsel’s tactical or strategic decisions “must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney”); *see also Coil*, 264 N.W.2d at 296 (finding no basis for ineffective counsel claim where there was “nothing in counsel’s conduct so obviously wrong that it defies explanation or excuse” and counsel may “have had good reason for each step he took or failed to take”).

Welch also contends that her trial counsel breached an essential duty by failing to request a jury instruction on the “possession” alternative of the firearm charge. Because the record is insufficient, a postconviction relief proceeding is also the proper venue for this claim.

“We can only address ineffective assistance claims on direct appeal if the record is sufficient.” *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001) (citation omitted). We conclude Welch’s ineffective assistance of counsel claims should be preserved for possible postconviction relief proceedings to permit the

development of a complete record and to allow her trial counsel an opportunity to respond to the charges. We affirm her conviction and sentence.

AFFIRMED.