

**IN THE COURT OF APPEALS OF IOWA**

No. 7-574 / 06-0345  
Filed October 12, 2007

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

**vs.**

**PERRY DUANE CLARK,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Don C. Nickerson,  
Judge.

Perry Duane Clark appeals from his conviction of second-degree burglary.

**CONVICTION AFFIRMED; SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elizabeth Reynoldson, Assistant  
Attorney General, John P. Sarcone, County Attorney, and Jeff Hunter, Assistant  
County Attorney, for appellee.

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

**ZIMMER, J.**

Perry Duane Clark appeals from his conviction of second-degree burglary in violation of Iowa Code sections 713.1 and 713.5 (2005). He contends his defense counsel rendered ineffective assistance of counsel by failing to timely file a notice of witnesses, the court erred in denying his motion for a new trial, and the court erred in imposing an illegal sentence by ordering him to pay a drug abuse resistance education (DARE) surcharge. We affirm Clark's conviction, preserve his ineffective assistance of counsel claim for possible postconviction proceedings, and vacate the surcharge imposed by the sentencing court.

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

On July 15, 2005, the State charged Clark with first-degree burglary for acts which occurred on June 8, 2005. Clark pled not guilty, and trial was scheduled for September 19, 2005. Clark subsequently waived his right to a speedy trial, and his defense counsel orally moved for a continuance of the trial date. On September 19 Clark and his attorney appeared for a status hearing, during which the district court admonished Clark to stay in contact with his attorney. The court continued the trial to November 28, 2005, and scheduled another status hearing for November 15. Defense counsel conducted discovery depositions on October 7 and November 4, 2005.

Clark failed to appear for the status hearing on November 15, and a warrant was issued for his arrest. At that time, Clark had escaped from the Fort Des Moines Correctional Facility where he was being held on an unrelated charge. Clark was back in custody on November 16, 2005. On November 21, defense counsel became aware that Clark had been arrested on the warrant and

had an investigator interview Clark at the jail. After this interview, defense counsel filed a witness list on November 23, 2005.

On November 28, the date of trial, defense counsel filed a motion for continuance and an amended notice of witnesses. The court denied the motion to continue. The State objected to the late notice of witnesses, from both the original and amended filings, and the court ultimately excluded all but two of the witnesses listed.

A jury trial commenced as scheduled on November 28. On December 2 the jury found Clark guilty of the lesser-included offense of second-degree burglary.

Clark's counsel filed a motion for new trial on January 13, 2006. One of the grounds asserted in the motion was that the "verdict was contrary to the great weight of the evidence." See *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). Prior to sentencing, the district court heard the motion for new trial and denied it.

On January 26, 2006, Clark was sentenced to a term of incarceration not to exceed ten years. The court also imposed a DARE surcharge, pursuant to Iowa Code section 911.2. Clark has appealed.

## ***II. Discussion.***

Clark first contends his attorney was ineffective in failing to give timely notice of intent to call defense witnesses. He has asked that his claim be preserved if we find the record inadequate to address it on direct appeal.

Ineffective assistance of counsel claims are generally preserved for postconviction proceedings to allow trial counsel an opportunity to defend his or her conduct of the trial. See *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981).

However, we may address such a claim on direct appeal if the record is sufficient. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). The scope of our review of a claim of ineffective assistance of counsel is de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

Upon our review of the record in this case, we conclude that postconviction proceedings are necessary to address trial counsel's effectiveness. The record suggests that the defendant's own actions may have played a role in the manner witnesses were listed in this case.<sup>1</sup> Consequently, we preserve this claim for possible postconviction proceedings so the parties can create a full record on this issue.

Clark next contends the district court erred in denying his motion for a new trial by failing to apply the contrary to the weight of the evidence standard set forth in *Ellis*. He claims the court erred in failing to make its own determination of whether the verdict was contrary to the weight of the evidence, and incorrectly applied a sufficiency of the evidence standard. The State argues Clark failed to preserve error on this claim because he did not raise any objection to the manner in which the court addressed his motion during the hearing held on his motion for new trial. Upon review of the record, we agree that error was not preserved on this issue.

Fairness and considerations of judicial economy dictate that we do not consider a claim for the first time on appeal. *State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997). Issues must be presented to and passed upon by the district

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<sup>1</sup> The record also suggests that tactical considerations played a role in the naming of potential witnesses.

court before they can be raised and decided on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). In this case, the trial court orally ruled on the defendant's motion for new trial in the presence of Clark and his counsel. In addition, before proceeding to sentencing, the court specifically asked Clark's counsel if the court had "covered the entirety of your motion for new trial?" At that point, counsel responded, "I believe so, Your Honor. I assume that in addressing the first issue, the Court addressed the matter of whether the jury heard sufficient evidence regarding my client's intent to commit a felony." The court responded, "Okay. I did address that, in the eyes of the Court. So is there any reason why sentencing cannot now proceed?" Counsel raised a concern with the pre-sentence investigation report and concluded by saying, "And beyond that, Your Honor, I have no corrections to make to the pre-sentence investigation report and know of no reason why sentence could not now issue." Clark made no challenge to the standard applied by the district court. Because he did not raise such an objection, Clark did not preserve any alleged error on this issue, and there is nothing for us to review.<sup>2</sup> *State v. Mannall*, 534 N.W.2d 642, 644 (Iowa 1995).

Finally, Clark contends the district court erred in imposing an illegal sentence by ordering him to pay a DARE surcharge, pursuant to Iowa Code section 911.2. The State concedes the court erred by imposing this surcharge as part of Clark's sentence. We reach the same conclusion.

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<sup>2</sup> Generally, ineffective assistance of counsel claims operate as an exception to our error preservation requirements. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). However, because Clark did not raise his challenge to the standard applied by the trial court in its denial of his motion for new trial in the context of an ineffective assistance claim, we will not review it as such.

We review a challenge to the legality of a sentence for errors at law. *State v. Carstens*, 594 N.W.2d 436, 437 (Iowa 1999). Iowa Code section 911.2 provides:

In addition to any other surcharge, the court or clerk of the district court shall assess a drug abuse resistance education surcharge of ten dollars if the violation arises out of a violation of an offense provided for in chapter 321J or chapter 124, division IV.

Iowa Code § 911.2(1). Clark was convicted of second-degree burglary in violation of section 713.5, which is not listed under section 911.2. Therefore, we vacate this portion of Clark's sentence.

### ***III. Conclusion.***

We affirm Clark's conviction for second-degree burglary, and vacate the imposition of the DARE surcharge. We preserve Clark's ineffective assistance of counsel claim for possible postconviction relief proceedings.

**CONVICTION AFFIRMED; SENTENCE VACATED IN PART.**