

**IN THE COURT OF APPEALS OF IOWA**

No. 8-519 / 07-1204  
Filed July 30, 2008

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

**vs.**

**KATHLEEN JEAN TAUBER,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Story County, Lawrence E. Jahn,  
District Associate Judge.

Kathleen Tauber appeals from her conviction for operating while  
intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney  
General, Stephen Holmes, County Attorney, and Timothy C. Meals, Assistant  
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**HUITINK, J.**

Defendant Kathleen Tauber appeals from judgment following a jury trial finding her guilty of operating while intoxicated (OWI) in violation of Iowa Code section 321J.2 (2007). We affirm.

**I. Background Facts and Proceedings**

The record indicates Tauber was stopped for speeding by a Huxley police officer on October 20, 2006. Because Tauber displayed “exaggerated body movement” and “had difficulty concentrating,” the officer requested her to complete several sobriety tests. She was arrested and charged with operating while intoxicated after she failed the sobriety tests, and an evaluation by a drug recognition officer indicated she was under the influence of a central nervous stimulant. A subsequent urine test confirmed the presence of both methamphetamine and amphetamines in Tauber’s person. Tauber was also charged with possession of drug paraphernalia based on the discovery of a small glass pipe and a Benzomatic torch in or near her car.

The trial information, as amended, charged Tauber with operating while intoxicated under two alternatives: operating while under the influence of a controlled substance or operating with any amount of a controlled substance in her person. Tauber pleaded not guilty.

At trial the arresting officer and drug recognition officer testified in conformity with their earlier described observations and investigatory findings. On cross-examination, Tauber’s lawyer asked both witnesses whether Tauber admitted using methamphetamine. Both answered that Tauber told them she

used methamphetamine in the past. The trial court sustained counsel's resulting objection and admonished the jury to disregard the witness's answers.

Tauber denied she was under the influence of a controlled substance. She testified the symptoms of impairment cited by the arresting officer were attributable to a physical disability and medication. Tauber also testified the controlled substances found in her urine sample were accidentally ingested when she carried or otherwise came into contact with a box containing methamphetamines, and she did not intentionally operate with a controlled substance in her person.

As noted earlier, the jury found Tauber guilty of operating while intoxicated. Tauber moved for a new trial, claiming the jury's verdict was contrary to the weight of the evidence. The trial court denied Tauber's motion and entered judgment and sentence in accord with the jury's verdict.

Tauber argues on appeal that (1) the district court erred in denying her motion for new trial, and (2) she was denied the effective assistance of counsel.

## **II. Motion for New Trial**

The district court may grant a new trial when "the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(b)(6). We review the district court's denial of a motion for a new trial for an abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). "An abuse of discretion occurs when the trial court 'exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.'" *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005).

Even if we assume without deciding Tauber's plausible and innocent explanation for her symptoms of intoxication and urine test results constitute a

defense, we are unable to say the trial judge abused his discretion in denying Tauber's motion for a new trial. Contrary to Tauber's claims, the testimony of the arresting officer and drug recognition officer, as well as the drug paraphernalia discovered in or near her car and urine test results, provides sufficient and credible evidence supporting her conviction. We accordingly affirm on this issue.

### **III. Ineffective Assistance of Counsel**

Tauber claims trial counsel was ineffective in failing to move for a mistrial after the two police officers testified she admitted past methamphetamine use. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective assistance of counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

We conclude the record before us is inadequate to address Tauber's claim of ineffective assistance on direct appeal. We therefore decline to rule on the issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). Accordingly, we affirm Tauber's conviction and preserve her claim of ineffective assistance of counsel for a possible postconviction proceeding.

**AFFIRMED.**