

**IN THE COURT OF APPEALS OF IOWA**

No. 8-978 / 08-0145  
Filed January 22, 2009

**STATE OF IOWA,**  
Defendant-Appellee,

**vs.**

**LAURENCE AUGUSTUS LEWIS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals his conviction and sentencing for drug offenses.  
**AFFIRMED; NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

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

**EISENHAUER, J.**

On August 5, 2005, Laurence Augustus Lewis was adjudged guilty of possession of cocaine with intent to deliver and possession of marijuana and sentenced to prison for a term not to exceed ten years. Subsequently, on December 7, 2006, the court entered a nunc pro tunc order imposing a one-third mandatory minimum sentence.

Lewis appeals arguing: (1) his counsel was ineffective; (2) the court failed to thoroughly inquire into Lewis's claim of a breakdown of the attorney-client relationship; and (3) the court erred in imposing a mandatory minimum sentence using an order nunc pro tunc. We preserve Lewis's first two claims for postconviction relief proceedings and vacate the nunc pro tunc order.

Lewis argues his trial counsel was ineffective because he did not make a specific challenge to the sufficiency of the evidence regarding Lewis's possession of the drugs. Lewis was a passenger in the car where the drugs were found and contends the evidence was not sufficient to establish his constructive possession of the drugs. See *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004).

In order to prevail on his claims of ineffective assistance of counsel, Lewis must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. 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). We prefer to leave

ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to 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.

An adequate record is important because “[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel.” *State v. Aldape*, 307 N.W. 2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000).

Lewis’s trial attorney has had no opportunity to offer an explanation which could render the lack of an objection appropriate. This is not the “rare case” which allows us to decide ineffective assistance on direct appeal without an evidentiary hearing. See *State v. Straw*, 709, N.W.2d 128, 138 (Iowa 2006). We preserve Lewis’s claim of ineffective assistance of counsel for possible postconviction relief proceedings.

Lewis’s second argument concerns his letters to the court requesting new counsel. Lewis contends the trial court did not give him an opportunity to explain the alleged communication breakdown. Our review is de novo. *State v. Tejada*, 677 N.W.2d 744, 749 (Iowa 2004). We note “there is a duty of inquiry once a defendant requests substitute counsel on account of an alleged breakdown in communication.” *Id.* at 750. The State admits “there is no record of any inquiry

by the district court into defendant's allegation of a breakdown in communication. The proper remedy is to preserve defendant's claim for a possible postconviction action." See *id.* at 752-53. We agree and preserve this claim.

Lewis's final argument is the court erred in modifying the sentencing order to impose a mandatory minimum sentence using an order nunc pro tunc. We review challenges to the legality of a sentence for errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). The State agrees the original sentence was illegally lenient. See Iowa Code § 124.413 (2005). However, the State argues correcting Lewis's sentence through an order nunc pro tunc rather than through an amended and substituted sentencing order is harmless error.

While the State's position is logical, it cites no Iowa authority. Iowa law provides a nunc pro tunc order cannot be entered to change a prior order, but only to "show what took place." *State v. Onstot*, 268 N.W.2d 219, 220 (Iowa 1978). A nunc pro tunc order is not available "to modify or correct a judgment, but [rather] to make the record show truthfully what judgment was actually rendered." *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995). Therefore, "a nunc pro tunc order is not available to correct a judicial, as distinguished from a clerical, error." *State v. Steffens*, 282 N.W.2d 120, 122 (Iowa 1979). Accordingly, we vacate the nunc pro tunc order and remand for resentencing.

**AFFIRMED; NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.**