

**IN THE COURT OF APPEALS OF IOWA**

No. 9-383 / 08-1393  
Filed June 17, 2009

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

**vs.**

**EMANUEL SANTANA McMULLEN,**  
Defendant-Appellant.

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

Emanuel Santana McMullen appeals following conviction and sentence for possession with intent to deliver a schedule II controlled substance, enhanced as a second or subsequent offender; failure to possess a drug tax stamp; carrying weapons; and felon in possession of a firearm. **CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

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

**MAHAN, P.J.**

Emanuel Santana McMullen was arrested on August 18, 2007, when an officer stopped the van he was traveling in for an apparent noise violation. After initially lying to the officer about his identity because he had outstanding warrants, McMullen was searched and a clear plastic bag of crack cocaine fell from his pant leg. He also possessed \$180 in cash and a cell phone, items consistent with street level dealing. Upon a search of the car in the area McMullen had been seated, the officer also recovered McMullen's identification card, a clear plastic bag containing a significant amount of crack cocaine, and a handgun loaded with one cartridge in the chamber and six in the clip.

After a jury trial, McMullen was convicted and sentenced for possession with intent to deliver a schedule II controlled substance (crack cocaine), a class C felony enhanced as a second or subsequent offender; failure to possess a drug tax stamp, a class D felony; carrying weapons, an aggravated misdemeanor; and felon in possession of a firearm, a class D felony. McMullen now appeals, contending his trial counsel was ineffective in failing to obtain a jury finding on the "felony" element of his felon in possession of a firearm charge.

We conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Id.* Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her

conduct, strategies, and tactical decisions. See *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008); *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We conclude the record here is inadequate to address McMullen's claim. We therefore preserve his claim for possible postconviction relief proceedings.

McMullen further claims the district court erred in imposing an illegal sentence when it levied a ten-dollar D.A.R.E. surcharge for his failure to affix a drug tax stamp charge. He contends the surcharge is not authorized by law because Iowa Code section 911.2 does not permit imposition of the surcharge for a violation of Iowa Code chapter 453B. Our review of challenges to the legality of a sentence is for correction of errors at law. *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006); *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). In this case, the State concedes the D.A.R.E. surcharge portion of McMullen's sentence was not authorized under section 911.2 and states it should be vacated. See Iowa Code § 911.2 (2007); *Tindell*, 629 N.W.2d at 359 (noting that an "illegal" sentence is one not authorized by statute). We agree. We conclude the D.A.R.E. surcharge imposed on the drug tax stamp conviction must be vacated.

We therefore preserve McMullen's claim of ineffective assistance of trial counsel for possible postconviction proceedings, and we vacate the ten-dollar D.A.R.E. surcharge imposed on the drug tax stamp conviction.

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