**IN THE COURT OF APPEALS OF IOWA**

No. 0-340 / 99-1339
Filed June 28, 2000

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

vs.

**L. PAUL RENAUD,**
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Dallas County, William H. Joy, Judge.

Defendant appeals from the judgment and sentence following a bench trial on the charge of failure to affix a drug tax stamp in violation of Iowa Code sections 453B.1 and 453B.12 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Wayne Reisetter, County Attorney, and Deborah J. Shelby, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

**MAHAN, J.**

Defendant L. Paul Renaud appeals from the judgment and sentence following a bench trial on the charge of failure to affix a drug tax stamp in violation of Iowa Code sections 453B.1 and 453B.12 (1997). Renaud contends he received ineffective assistance of counsel due to his attorney's failure to make an adequate record of his waiver of jury trial. Renaud requests this issue be preserved for postconviction relief. We affirm.

On October 7, 1998, Deputies Doug Lande and Chad Leonard, from the Dallas County Sheriff's office responded to a witness complaint that a male driving a red El Camino was pulling marijuana plants out of the ditch. When the deputies located and stopped the vehicle, they observed marijuana plants in the back of the vehicle as described by the witness. Renaud admitted he had picked the plants from the ditch, and he was placed under arrest.

An inventory of the vehicle was then conducted and three individually packed baggies containing approximately 100 grams of marijuana were found. Drug paraphernalia was also discovered. No tax stamps were affixed to the marijuana. Renaud was charged by trial information on October 25, 1998. Renaud waived a jury and stipulated to a bench trial on the minutes of testimony. The district court found him guilty of the tax stamp violation and sentenced him to an indeterminate five-year term of imprisonment. The sentence was suspended, and he was placed on probation for a period of two years. Renaud appeals.

**I. Ineffective Assistance of Counsel.** We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We find the record in this case adequate to decide the issue in this direct appeal.

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 606, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Renaud's conviction based on his failure to prove prejudice without

deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

Renaud claims he was deprived of his right to effective assistance of counsel when his trial attorney failed to make an adequate record of his waiver of jury trial. Initially, we note Renaud does not specifically claim he did not knowingly and voluntarily waive his right to a jury trial. He simply claims counsel was ineffective in failing to make a proper record of the waiver. Therefore, we question whether Renaud has a valid claim. However, we will address the issue. He contends the record is inadequate to determine if his waiver was knowing and voluntary as required under Iowa Rule of Criminal Procedure 16(1). Renaud admits error was not preserved on this issue. However, because this claim inheres to Renaud's contention of ineffective assistance of counsel, we consider the argument. *State v. Thai*, 575 N.W.2d 521, 526 (Iowa App. 1997). A claim of ineffective assistance of counsel is an exception to the general rule that in order to preserve error for appeal, an issue must be raised timely and adequately. *State v. Shortridge*, 589 N.W.2d 76, 84 (Iowa App. 1998).

Even if we were to assume Renaud's trial attorney failed in an essential duty, we find no prejudice resulted. The test for prejudice is whether trial counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable probability exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998). A reasonable probability is

one sufficient to undermine confidence in the outcome. *Id.* (citing *Kone*, 557 N.W.2d at 102).

There was overwhelming evidence to convict Renaud for the offense of tax stamp violation. A witness complained of someone picking marijuana in the ditch. When deputies stopped Renaud, they observed marijuana plants in the back of his car. Renaud, himself, admitted to the deputies he had picked the marijuana. More marijuana, along with drug paraphernalia, was found when deputies searched Renaud's vehicle. None of the marijuana found contained a tax stamp.

We have carefully reviewed the evidence in the record and find Renaud has failed to show he has suffered any prejudice even if trial counsel failed to make an adequate record of his waiver of jury trial and even if this failure would be considered one of an essential duty. *State v. Buck,* 510 N.W.2d 850, 853 (Iowa 1994) (defendant suffered no prejudice by counsel's failure to preserve his claim he did not voluntarily and intelligently waive his right to a jury trial where no reasonably probability existed the jury would have rendered a different verdict).

We conclude Renaud has failed to show he received ineffective assistance of counsel based on the issue he raised in this appeal. We affirm Renaud's conviction.

**AFFIRMED.**

Vogel, P.J., concurs; Miller, J., specially concurs.

**JUDGE MILLER** (specially concurs)

I concur in the result, but would find it unnecessary to consider the minutes of evidence and whether overwhelming evidence of guilt shows Renaud suffered no prejudice.

The trial court's ruling finding Renaud guilty is clearly a part of the record. *See* Iowa R. App. P. 10(1). It recites jury trial was waived and the charge was tried to the jury on the minutes of testimony. Further, Renaud acknowledges these facts in his brief on appeal, stating, "The defendant in the instant case waived jury trial and stipulated to trial on the minutes."

Renaud correctly points out that a waiver of a jury trial must be a voluntary, knowing, and intelligent act, done with awareness of the relevant circumstances and likely consequences. *See State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). His claim is that defense counsel was ineffective in failing to make an adequate record of his waiver of a jury trial, resulting in a record that "is inadequate to determine if his waiver was knowing and voluntary." No prejudice can exist, however, by reason of the lack of a verbatim record of his waiver unless the waiver was in fact not knowing and voluntary, and he makes no claim that it was not. He therefore cannot show any prejudice from the alleged breach of duty by defense counsel. I therefore concur in the rejection of his claim of ineffective assistance and the affirmance of his conviction.