A View from the Bench

Justice Daryl Hecht

Public Defender Conference

June 15, 2016

I. Tips for Trial and Appeal.

A. Awareness of the needs of audiences.

1. Court reporter
2. Trial judge
3. Jurors
4. Appellate judges

B. Making the record.

1. Mark and identify!
2. Motions for judgment of acquittal
3. Side bars

C. Further review applications.

II. Recent Opinions.

A. *State v. Sweet*, ___ N.W.2d ___ (Iowa 2016).

B. *State v. Richards*, ___ N.W.2d ___ (Iowa 2016).

C. *State v. Jackson*, ___ N.W.2d ___ (Iowa 2016).

D. *State v. Olutunde*, ___ N.W.2d ___ (Iowa 2016).

E. *State v. Hill*, ___ N.W.2d ___ (Iowa 2016).

III. Error Preservation.

A. Vigilance During Trial

1. Timeliness of objections.

2. Voir dire conduct. *See State v. Martin*, ___ N.W.2d ___, 2016 WL 1533515 (Iowa 2016).

3. Substance of objections. Generally, "unless the reasons for an objection are obvious a party . . . has the duty to indicate the specific grounds to the court so as to alert the judge to the question raised." *State v. Decker*, 744 N.W.2d 346, 353 (Iowa 2008); *State v. Clay*, 213 N.W.2d 473, 476 (Iowa 1973); *accord State v. Williams*, 207 N.W.2d 98, 110 (Iowa 1973).

5. Motion for mistrial? If the court overrules an objection to alleged prosecutorial error, the ground is preserved for appeal without a subsequent motion for mistrial. *State v. Neiderbach*, 837 N.W.2d 180, 209 (Iowa 2013). In *Neiderbach*, the court clarified that if the court *sustains* an objection, counsel must make a motion for mistrial to preserve error because otherwise the court has no reason to believe counsel desires any further remedial efforts. *See id.*

B. "Error" Preservation Versus "Argument" Preservation

1. Magic words generally not required.

2. *State v. Howse*, 875 N.W.2d 684, 689 (Iowa 2016) ("[W]hether addressed as a matter of statutory interpretation or sufficiency of the evidence, the question argued and decided by the trial court was whether the stun gun found in Howse's purse comes within the statutory definition of a "dangerous weapon.").

3. *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015). The defendant alleged primarily that a juror committed misconduct but "also stated that the juror was biased. In its ruling, the district court followed Webster's word usage, generally referring to 'juror misconduct' but seemingly including juror bias within this larger concept." *Id.* The supreme court concluded the juror bias claim was "preserved based on the theory that the substance of the claim, rather than its label, controls." *Id.*

4. But there are limits. See *State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015) (concluding a defendant's objection that a jury instruction was duplicative and unnecessary did not preserve a claim that the instruction misstated the law). *See also State v. Paulsen*, 293 N.W.2d 244, 247 (Iowa 1980); *State v. Nelson*, 329 N.W.2d 643, 645 (Iowa 1983) ("An objection in trial court based on hearsay does not preserve an issue of a constitutional right of confrontation . . . ."); *State v. Sparks*, 238 N.W.2d 777, 779 (Iowa 1976) (concluding a relevancy objection does not preserve the argument a proffered piece of evidence is also unfairly prejudicial). Relatedly, a defendant who argued the rational basis standard in the district court did not preserve the argument that strict scrutiny applied. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002); *see also State v. Frei*, 831 N.W.2d 70, 80 (Iowa 2013) (concluding an equal protection argument was not preserved when "the record made . . . advanced only a due process argument"); *State v. Briggs*, 666 N.W.2d 573, 575 (Iowa 2003) (concluding a defendant who raised Fourteenth Amendment claim did not also preserve an Eighth Amendment claim just by raising the constitution).

6. Specificity of objections is strongly advised. *See State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997) (defendant's attempt to merge a vagueness challenge with the allegation that a law enforcement officer "did not have a reasonable, articulable suspicion to make [a] stop [was] unavailing" because those arguments "are separate and distinct bases for suppression of the evidence and both arguments should have been raised at the district court level."). "Every ground of exception which is not particularly specified is to be considered . . . abandoned." *State v. Washington*, 257 N.W.2d 890, 895 (Iowa 1977); *see also State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981) ("A party cannot announce one reason for an objection at trial and on appeal rely on a different one to challenge an adverse ruling."); *State v. Droste*, 232 N.W.2d 483, 487 (Iowa 1975) ("A specific objection . . . cannot avail the objector except as to the ground specified since the court is not bound to look beyond the ground of the objection thus stated.").

C. Independent State Grounds

1. **RAISE IT.**

a. "[C]ounsel should be attentive to the possibility that we might not follow Supreme Court precedent in cases involving the interpretation of the Iowa Constitution." *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., specially concurring). "When a defendant has a potential claim under

both the United States and Iowa Constitutions, counsel should ordinarily . . . determine if there is a solid legal basis for asserting an independent interpretation of the Iowa Constitution . . . ." *Id.*

b. State v. Prusha, 874 N.W.2d 627 (Iowa 2016). Trial counsel raised the United States Constitution and Iowa Constitution as grounds for suppressing statements, but only raised Iowa *statutes* and the United States Constitution as grounds for suppressing evidence obtained through an allegedly involuntary consent search. *Id.* at 629–30. The supreme court only applied the federal consent search standards because the motion to suppress did not even cite the Iowa Constitution as grounds for suppression. *Id.* at 630.

c. State v. Rimmer, 877 N.W.2d 652 (Iowa 2016). Defendants made a due process argument on appeal, but not in the district court. *Id.* at 664 n.9. Instead, the defendants argued in district court only that exercise of territorial jurisdiction over them violated the Vicinage Clause. *Id.* The supreme court concluded the defendants "failed to preserve any claim under the Iowa due process provision." *Id.*

d. State v. Vance, 790 N.W.2d 775, 780 (Iowa 2010). "Vance's counsel failed to raise the legality of the stop under the Iowa Constitution." *Id.* Thus, the court limited "discussion regarding the legality of the stop to the Fourth Amendment." *Id.*

2. **Recent Cases .**

a. "When a party does not indicate the specific constitutional basis for a claim to which parallel provisions of the federal and state constitutions apply, we regard both the federal and state constitutional claims as preserved." *State v. Ary*, 877 N.W.2d 686, 699 (Iowa 2016). Thus, it may be enough to assert simply that some action "violates due process" or generically "was an illegal search." *See State v. DeWitt*, 811 N.W.2d 460, 467 (Iowa 2012); *see also State v. Cox*, 781 N.W.2d 757, 761 n.2 (Iowa 2010) (concluding a due process argument under the Iowa Constitution was preserved when trial counsel argued generically that a statute "violates due process because it is overly broad and vague").

b. In some cases, a mere citation of a provision of the Iowa Constitution preserved error where counsel supplemented it with discussion of general constitutional principles. *See State v. Gaskins*, 866 N.W.2d 1, 6 (Iowa 2015) (concluding a

state constitutional claim was preserved when counsel cited both constitutions and, at the suppression hearing, "spoke generally about exceptions to the warrant requirement"); *see also State v. Short*, 851 N.W.2d 474, 480–81 (Iowa 2014) (concluding a defendant preserved a state constitutional argument when trial counsel cited both constitutions and the district court extensively discussed and relied upon another case decided under the Iowa Constitution).

c. But again, specificity is advised in raising independent state grounds. *See State v. Stone*, 764 N.W.2d 545, 550 (Iowa 2009) (concluding an attorney who merely referred to "due process" and "fair trial" during argument "failed to preserve error on . . . constitutional claims"); *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008); (concluding a person asserting unconstitutionality must point out the particular provision that is allegedly violated); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002) ("[A] mere assertion that a statute is 'unconstitutional' does not encompass every conceivable constitutional violation."); *State v. Wilson*, 124 Iowa 264, ___, 99 N.W. 1060, 1061 (1904).

3. **IMPORTANCE OF DEVELOPING AN ARGUMENT.**

a. "[C]ounsel should do more than simply cite the correct provision of the Iowa Constitution. When fashioning an interpretation of a state constitutional provision independent of federal case law, the adjudicative process is best advanced on reasoned argument which has been vetted through the adversarial process." *Effler*, 769 N.W.2d at 895 (Appel, J., specially concurring).

b. If counsel does not "advance a distinct analytical framework" under the Iowa Constitution, the court typically applies the federal framework. *Ary*, 877 N.W.2d at 699–700.

c. The court "may diverge from federal caselaw." *Id.* at 699; *State v. Pals*, 805 N.W.2d 767, 771–72 (Iowa 2011). But, it of course is not required to do so. *See DeWitt*, 811 N.W.2d at 467 ("We decline to consider a different state standard . . . and resolve DeWitt's state and federal unreasonable seizure claims under the existing federal standards."); *State v. Harrington*, 805 N.W.2d 391, 393 n.3 (Iowa 2011); *Hensler v. City of Davenport*, 790 N.W.2d 569, 579 & n.1 (Iowa 2010); *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009); *State v. Dudley*, 766 N.W.2d 606, 624 (Iowa 2009); *State v. Fremont*, 749 N.W.2d 234, 236 (Iowa 2008); *In re Detention of Garren*, 620 N.W.2d 275, 280 n.1 (Iowa 2000).

d. Don't leave for appellate lawyers the task of crafting a persuasive independent state constitutional argument. *Cf. Prusha*, 874 N.W.2d at 630 ("Prusha forcefully argues in his appellate brief for a different standard under the Iowa Constitution, but we conclude this argument comes too late.").