Making a Record that Supports Your Arguments

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General Rules of Error Preservation

Issues must be presented to and ruled upon by the district court before they can be raised and decided on appeal. State v. Jefferson, 574 N.W.2d 268, 278 (Iowa 1997). Objections must be raised at the earliest time the error becomes apparent. State v. Reese, 259 N.W.2d 771, 775 (Iowa 1997).

"Notwithstanding our error preservation requirement, we have consistently applied an exception to it. That exception applies to evidentiary rulings, whether the error claimed involved rulings admitting evidence or not admitting evidence. See, e.g., Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978) ("Here, defendant's objection was sustained; therefore, the ruling will be upheld if the evidence could be held inadmissible on any theory, even though not urged in the objections."); State v. Hinkle, 229 N.W.2d 744, 748 (Iowa 1975) ("We further note our rule there is no reversible error if trial court's ruling which admitted the evidence in controversy may be sustained on any ground."). Perhaps, one reason for the exception is the realization that on retrial the error could easily be corrected. So for judicial economy purposes and to advance finality, we ignore the error preservation requirement. " DeVoss v. State, 648 N.W.2d 56 (Iowa 2002).

Iowa does not recognize the plain error rule. Lamphere v. State, 348 N.W.2d 212, 218 (Iowa 1984).

Ineffective assistance of counsel is a sufficient reason for not raising an issue before the district court. State v. Escobedo, 573 N.W.2d 271, 277 n.5 (Iowa Ct. App. 1997). In order to prove a claim of ineffective assistance of counsel, a defendant must show trial counsel breached an essential duty and prejudiced the defendant's right to a fair trial. State v. Biddle, 652 N.W.2d 191, 203 (Iowa 2002). This means that there must be a reasonable probability that the outcome of the trial would have been different had trial counsel acted competently. Nguyen v. State, 707 N.W.2d 317, 324 (Iowa 2003).

Defendants can raise claims of ineffective assistance of counsel in postconviction proceedings without having first raised the claim on direct appeal. Iowa Code § 814.7 (2015). Iowa Code section 814.7 was adopted in 2004, but applies retroactively. Hannan v. State, 732 N.W.2d 45, 50-51 (Iowa 2007).

"If the defendant requests that the court decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim. If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court's view of the potential viability of the claim." State v. Johnson, 784 N.W.2d 192, 198 (Iowa 2010).

Even constitutional errors are waived for appeal if not first presented to the District Court!! State v. Biddle, 652 N.W.2d 191, 202-03 (Iowa 2002). They are not, however, subject to the 40-day deadline for pretrial motions under Iowa Rule of Criminal Procedure 2.11(4). State v. Milner, 571 N.W.2d 7, 11-12 (Iowa 1997). Nonetheless, such challenges should be raised at the earliest possible time after counsel becomes aware of the issue. Id. at 12.

Don't forget to raise both federal and state constitutional law claims! Raising only a federal constitutional issue will not preserve a state constitutional issue for appeal. State v. Wilkins, 687 N.W.2d 263, 265 (Iowa 2004). At the same time, if you raise a state constitutional law argument, make sure you can support it with authority. Merely making a claim that the residency restriction violates the Iowa Constitution, without providing any Iowa authority interpreting the applicable Iowa constitutional provision, will permit the appellate courts to reject your claim. See generally State v. Allen, 690 N.W.2d 684 (Iowa 2005)(finding no reason presented to interpret the Iowa constitutional provision regarding the right to counsel differently than the United States Constitution).

The Iowa Supreme Court addressed its framework for consideration of constitutional claims in State v. Ary, No. 14–1112, 2016 WL 1391878 at *9 (Iowa Apr. 8, 2016):

"To preserve error on a constitutional claim, counsel should inform the district court of the constitutional basis for any motion a party makes. When a party raises only a specific federal constitutional basis for a claim in district court and does not raise the question of ineffective assistance of counsel on appeal, the parallel state constitutional question is not preserved. State v. Prusha, 874 N.W.2d 627, 630 (2016). However, 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. DeWitt, 811 N.W.2d 460, 467 (Iowa 2012); State v. Harrington, 805 N.W.2d 391, 393 n .3 (Iowa 2011); King v. State, 797 N.W.2d 565, 571 (Iowa 2011). When counsel does not advance a distinct analytical framework under a parallel state constitutional provision, we ordinarily exercise prudence by applying the federal framework to our analysis of the state constitutional claim, but we may diverge from federal caselaw in our application of that framework under the state constitution. See In re Det. of Matlock, 860 N.W.2d 898, 903 (Iowa 2015); State v. Short, 851 N.W.2d 474, 491 (Iowa 2014); State v. Baldon, 829 N.W.2d 785, 822–23 (Iowa 2013) (Appel, J., concurring specially); State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009); Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 6–7 (Iowa 2004)."

What if an attorney raises several issues in a motion and the court rules on the motion but does not address one or more issues? The attorney should ask the court to expand its ruling to specifically address the omitted issue(s). Iowa R. Civ. P. 1.904(2). A ***proper*** motion filed under Rule 1.904(2) will toll the time for appeal. The motion is proper if it (1) addresses a ruling made upon trial of an issue of fact without a jury or (2) is used as a vehicle to preserve error on issues that were raised but not ruled upon by the district court. Hedlund v. State, 875 N.W.2d 720, 725-27 (Iowa 2016). By rule, the first category includes summary judgment rulings (if the court granted summary judgment on the entire case) and rulings in a petition for judicial review of agency action. See Iowa R. Civ. P. 1.981(3) and 1.603. A Rule 1.904(2) motion is not proper if it merely rehashes the legal issues. State v. Hedlund, 875 N.W.2d at 726.

Making Your Legal Record

It is important to ensure that your legal arguments have been fully presented to the trial court and that you obtain a definitive ruling on each point. Here are some of the more important procedural steps for preserving your legal arguments:

Pretrial motions must be filed within 40 days of arraignment. Iowa R. Crim. P. 2.11(4) . There is an exception if the movant can show good cause for going beyond the deadline. Id. ***If you have good cause for filing an untimely pretrial motion, place the reason in the motion and make a record before the District Court so the appellate attorneys know what the "good cause" is.*** If there is no indication in the record as to whether there was good cause for an untimely filing, the appellate courts may find a pretrial motion untimely even if the State did not object below. State v. Ball, 600 N.W.2d 602, 604 (Iowa 1999); State v. McCowen, 297 N.W.2d 226, 227 (Iowa 1980).

Pretrial motions under Iowa Rule of Criminal Procedure 2.11 are the proper vehicle to use when challenging the constitutionality of a statute. State v. Munz, 355 N.W.2d 576, 584 (Iowa 1984).

Motions in limine, standing alone, will not preserve error for appeal. State v. Schaer, 757 N.W.2d 630, 634-35 (Iowa 2008); State v. Howard, 509 N.W.2d 764, 768-69 (Iowa 1983). ***The attorney must also make timely and specific objections at trial in order to preserve error.*** State v. Howard, 509 N.W.2d at 768-69. A late objection will not suffice. State v. Wells, 522 N.W.2d 304, 310 (Iowa Ct. App. 1994). The only exception to this rule is when the district court has issued a final, unequivocal ruling on the record. State v. Harlow, 325 N.W.2d 90, 91-92 (Iowa 1982). ***A motion in limine must be filed no later than nine days before trial.*** Iowa R. Crim. P. 2.11(4).

Challenge the sufficiency of the evidence through a motion for judgment of acquittal. ***Remember that motions for judgment of acquittal must specify the way in which the evidence was insufficient in order to preserve error for appeal; general motions will not preserve error!!!*** State v. Geier, 484 N.W.2d 167, 170-71 (Iowa 1992). This rule does not apply if the record shows the grounds for the motion were obvious to

the parties and the court. State v. Williams, 695 N.W.2d 23, 27-28 (2005). A motion for judgment of acquittal is not necessary to preserve a sufficiency challenge to evidence presented in a trial to the court. State v. Abbas, 561 N.W.2d 72, 73-74 (Iowa 1997).

Object to the lesser included offenses, particularly statutory lesser includeds because their elements do not match up with the greater offense. State v. Couser, 567 N.W.2d 657, 659 (Iowa 1997) ("Defendant's failure to object to the submission of the lesser included offense of which he was convicted results in both an absence of error preservation and the application of law of the case consequences."); State v. Hepperle, 530 N.W.2d 735, 739 (Iowa 1990) (general objection to lesser includeds did not alert the trial court to defendant's specific objection).

Object to jury instructions before closing arguments. Olson v. Sumpter, 728 N.W.2d 844, 848 (Iowa 2007). Be specific as to the matter objected to and on what grounds. Id.; Iowa R. Civ. P. 1.924. The objection must be sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct the error before placing the case in the hands of the jury. Olson v. Sumpter, 728 N.W.2d at 848. Failure to timely object to an instruction not only waives the right to assert error on appeal, but also "the instruction, right or wrong, becomes the law of the case." State v. Taggert, 430 N.W.2d 425 (Iowa 1988).

Making Your Factual Record

It's not enough to make a legal record for appeal. You also have to make a factual record. A good trial record should be self-explanatory and an appellate attorney should have no questions after reading it.

If the district court will not permit you to introduce evidence you believe is admissible, make an offer of proof on the record to secure a preliminary ruling. Iowa R. Evid. 5.103(a)(2) and (b). This allows the appellate court to see what evidence was excluded, its potential effect on the outcome, and the theory of admissibility. Johnson v. Interstate Power Co., 481 N.W.2d 310, 317 (Iowa 1992); Strong v. Rothemal, 523 N.W.2d 597, 599 (Iowa Ct. App. 1994).

If you are playing a portion of video or audio as part of your case, provide some method for alerting the appellate court to the portion you played. For videos, you can often refer to the timer on the video.

If a witness is describing movements, make sure you are providing some way for the appellate court to understand the movement the witness is describing. For example, if a witness is describing their travel on city streets, have the witness mark their direction of travel on a map or at least provide the map as an exhibit and have the witness use the street names and directions.

And we should not have to say this, but apparently we do – MAKE SURE ALL SUBSTANTIVE PROCEEDINGS ARE REPORTED!!! Every once in a while we will get a case on appeal with an unreported hearing on a motion to dismiss or a motion to suppress. For appellate purposes, an unreported hearing might as well be no hearing at all.

The Rules of Appellate Procedure provide a mechanism for recreating the record when a hearing has not been reported, but it is not fun. The appeal will be stayed while the appellate attorneys, trial counsel for both sides, and the defendant provide statements as to what transpired at the unreported hearing. The District Court will then be required to issue a ruling resolving the pending statements. That ruling becomes the official record of the unreported hearing. Iowa R. App. P. 6.807.

Post-trial Challenges

Where applicable, you can challenge the weight of the evidence through a motion for new trial. Iowa R. Crim. P. 2.24(2). A "weight of the evidence standard" allows the district court to consider the credibility of the witnesses in determining whether the weight of the evidence preponderates against the verdict. State v. Ellis, 578 N.W.2d 655, 658 (Iowa 1998).

You do not need to renew a challenge to the sufficiency of the evidence in a motion for new trial. In fact, doing so can cause problems on appeal. If your motion for new trial raises a sufficiency argument instead of challenging the weight of the evidence, the appellate courts may find that you waived any challenge to the weight of the evidence!

Counsel must object to prosecutorial misconduct and/or move for mistrial at the time of the misconduct. State v. Rutledge, 600 N.W.2d 324, 326 (Iowa 1999).

A motion for new trial must specify the basis for the motion and must cite authority. The moving attorney must also receive a ruling from the court on the grounds listed in the motion. If the court does not rule on a particular ground, the attorney must file a motion for expanded ruling. State v. Webster, 865 N.W.2d 223, 232-33 (Iowa 2015); Iowa R. Civ. P. 1.904(2). A Rule 1.904(2) motion is one means of asking the court to address an overlooked issue, but it's not only one; it's the substance of the motion that matters. Lamasters v. State, 821 N.W.2d 856, 863 (Iowa 2012). "If the court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved". Id. at 864.

Challenges to an illegal sentence may be made at any time. Iowa R. Crim. P. 2.24(5)(a). "[A] challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the

sentence itself is unconstitutional." State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009).

Guilty Pleas

To preserve a challenge to a guilty plea, a defendant must file a motion in arrest of judgment within 45 days of the plea and at least 5 days before sentencing. Iowa R. Crim. P. 2.24(3). At the plea proceeding "[t]he court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal." Iowa R. Crim. P. 2.8(2)(d).

An appellate court will review a district court's grant or denial of a motion in arrest of judgment for abuse of discretion. State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008).

Claims of breach of duty by plea counsel are not waived by the entry of a guilty plea. State v. Carroll, 767 N.W.2d 638, 644 (Iowa 2009). The defendant may claim his plea was invalid due to ineffective assistance of counsel, though the claim may require further development of the record in a postconviction proceeding. Id. at 644-46.

If a defendant wants to challenge his guilty plea on appeal even though he did not file a motion in arrest of judgment before the District Court, he must meet the Strickland prejudice standard for an ineffective assistance claim. "[I]n order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial." State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006). Mere conclusory statements are not enough to establish prejudice – it requires a true review of circumstances surrounding the plea. Id. at 137.

Record on Appeal

Once an appellate attorney is appointed, we will file a combined certificate ordering all of the relevant transcripts from the court reporters. Iowa R. App. P. 6.803(1). We will also order any necessary physical exhibits (DVDs) from the district court clerk. The court docket is now electronic, so we no longer have a need to request the physical court file or the majority of exhibits.

Anything that was not formally admitted is not part of the appellate record!!! Most commonly, this means depositions; we can't use them on appeal if they are not admitted. Motions to supplement the appellate record are generally not granted. This may make a difference as to whether we can raise something on appeal or have to preserve the issue for postconviction.

"Only the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket and court calendar entries prepared by the clerk of the district court ***in the case from which the appeal is taken*** shall constitute the record on appeal." Iowa R. App. P. 6.801. This means that if you are handling a postconviction action, make sure the underlying criminal file is made part of the record by judicial notice or otherwise.

If you want to help us out: 1) make any plea offers that are not accepted part of record; 2) have opening/closing arguments and jury selection reported; 3) if you think something may be helpful on appeal, admit it for purposes of the appellate record only.