

IN THE COURT OF APPEALS OF IOWA

No. 3-822 / 12-1028
Filed October 23, 2013

CORTEZ MCCULLOUGH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

The applicant appeals the district court decision denying his application for
postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Jacob Marshall, Student Legal Intern, John Sarcone, County Attorney,
and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., Doyle, J., and Sackett, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

SACKETT, S.J.

After a night of drinking and using drugs, McCullough sped through downtown Des Moines and crashed his car into a parked vehicle. When two Per Mar security guards approached to offer help, McCullough pointed a gun at them and ran away. McCullough, with the gun tucked in the waistband of his pants, approached a truck waiting at a stop light. After opening the door, McCullough ordered the driver, Matthew Wignall, out of the truck. When Wignall reached for his radio instead of exiting immediately, McCullough grabbed Wignall's arm, pulled him out of the truck, and entered the vehicle. After McCullough was inside the truck, he pulled the gun out of his waistband and pointed it at Wignall. Wignall was afraid he was going to be shot or killed. McCullough drove away and was later apprehended by the police. *State v. McCullough*, No. 08-1028, 2009 WL 4842802, at *1 (Iowa Ct. App. Dec. 17, 2009).

Cortez McCullough was convicted of first-degree robbery for stealing a truck from its owner at gunpoint, two counts of intimidation with a weapon, possession of a controlled substance, and possession of a firearm as a convicted felon. His convictions were upheld on appeal. *Id.* McCullough filed an application for postconviction relief, claiming he received ineffective assistance from trial counsel when counsel failed to request an instruction on operating a motor vehicle without the owner's consent. The district court denied his application, and he appeals.

SCOPE OF REVIEW. Claims of ineffective assistance of counsel are reviewed de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

PRESERVATION OF ERROR. The district court ruled on the issue raised in this appeal, and consequently error is preserved. See *DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002).

DISCUSSION. The right to counsel is the right to effective counsel and means the accused is entitled to conscientious, meaningful representation wherein the accused is advised of his rights and able counsel is given a reasonable opportunity to perform the tasks assigned to him or her. See *State v. Williams*, 207 N.W.2d 98, 104 (Iowa 1973).

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). An attorney has no duty to raise an issue that has no merit. *State v. Schaer*, 757 N.W.2d 630, 637 (2008).

DUTY TO REQUEST AN INSTRUCTION. McCullough contends he received ineffective assistance because defense counsel did not request an instruction on the offense of operating a vehicle without the owner's consent as a lesser-included offense of the first-degree robbery charge. He claims operating a vehicle without the owner's consent is a lesser-included offense of theft, theft is an element of first-degree robbery, and therefore, operating a vehicle without the owner's consent is a lesser-included offense of first-degree robbery.

Courts are required to provide jury and marshaling instructions for lesser-included offenses. *State v. Shearon*, 660 N.W. 2d 52, 56 (Iowa 2003) (citing Iowa Rule of Criminal Procedure 2.6(3)). A jury should be instructed on all

lesser-included offenses of a public offense. See *State v. Spates*, 779 N.W.2d 770, 773 (Iowa 2010).

An offense is not a lesser-included offense unless “the greater offense cannot be committed without also committing all elements of the lesser offense.” *Shearon*, 660 N.W.2d at 56. An offense is not a lesser-included offense if it has an element not included in the “main offense.” See *State v. Jeffries*, 430 N.W.2d 728, 730 (Iowa 1988). Robbery in the first degree does not require the defendant to take possession, but rather, that he or she acts with “intent to commit theft.” Iowa Code § 711.1; *State v. Rich*, 305 N.W.2d 739, 746 (Iowa 1981). Theft is not a lesser-included offense of robbery, since theft requires an element of taking, an element not needed to constitute robbery. *State v. Holmes*, 276 N.W.2d 823, 825 (Iowa 1979). Operating without the owner’s consent requires that the defendant “take possession or control of any . . . vehicle.” Iowa Code § 714.7. It therefore follows that while operating without the owner’s consent is a lesser-included offense of theft, it is not a lesser-included offense of robbery. McCullough was not charged with theft but rather with robbery. A theft instruction was not given to the jury. Consequently, McCullough was not entitled to a operating without owner’s consent instruction and his trial attorney was not ineffective in failing to request it. The district court was correct in rejecting McCullough’s ineffective-assistance-of-counsel claim.

Furthermore, McCullough has failed to show that had the instruction been given the jury’s verdict would have been different. There is strong evidence that McCullough committed robbery. The testimony was that McCullough forcibly

stole a truck and pointed a gun at the victim causing him to fear for his life. McCullough has shown no evidence that the jury in this case, under the facts presented, would have acquitted him of robbery. He has failed to meet his burden to show prejudice.

In conclusion, McCullough has not shown he received ineffective assistance due to counsel's failure to object to the jury instructions on the ground the court did not instruct the jury on the lesser-included offense of operating a vehicle without the owner's consent. Counsel has no duty to pursue a meritless issue. See *State v. Brothorn*, 832 N.W.2d 187, 192 (Iowa 2013). Furthermore, McCullough has failed to show prejudice.

We affirm the decision of the district court denying McCullough's application for postconviction relief.

AFFIRMED.