**IN THE COURT OF APPEALS OF IOWA**

No. 1-080 / 10-0661
Filed February 23, 2011

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

**vs.**

**TEIJAE PATRICK SCOTT,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Teijae Scott appeals from his conviction for first-degree robbery. **AFFIRMED.**

Kimberly M. Murphy of Law Office of Kimberly M. Murphy, Altoona, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

**POTTERFIELD, J.**

**I. Background Facts and Proceedings**

On August 10, 2009, Teijae Scott spent time with his friends T.J. Marquand and Cody Thomas playing video games and using marijuana. At some point in the evening, Scott also consumed several Xanax, though the details surrounding his use of Xanax are in dispute. Scott testified that he took a shot into which, unbeknownst to him, his friends had slipped ten Xanax pills. However, Marquand testified that Scott voluntarily took six Xanax pills.

Subsequently, the three young men went to a convenience store. Scott admits, "The trial record and physical evidence indicate that [Scott] did rob a convenience store while suffering from the affects of Xanax." Scott did not deny that he may have robbed the convenience store. Scott testified that he blacked out from the Xanax and had no recollection of the events of that night. The State offered eyewitness and accomplice testimony that Scott committed the robbery as well as a video surveillance tape of the crime.

Scott was apprehended shortly after the robbery was reported. Officers found on Scott's person a plastic bag from the convenience store containing cash. Scott was charged with first-degree robbery. On September 24, 2009, Scott, through appointed counsel, gave notice of his intent to assert defenses of diminished responsibility and intoxication. The notice indicated Scott would rely upon an expert witness not identified at the time. Also on September 24, 2009, Scott, through appointed counsel, filed a motion to sever his trial from the trial of his co-defendants, Thomas and Marquand. At a hearing on the motion to sever, Scott's counsel stated, "[I]n order to further our defense it would be imperative

that we would be able to subpoena Mr. Thomas. In a joint trial that would not happen." The court granted Scott's motion to sever.

At the hearing on the motion to sever, the court also heard from Scott regarding a pro se request he had filed on October 7, 2009, to remove his court-appointed counsel. At the hearing, Scott withdrew his request for other counsel.

On November 20, 2009, Scott filed another pro se request for appointment of new counsel, alleging his current counsel was not able to spend a proper amount of time on his defense because of his overwhelming caseload. On December 11, 2009, the court granted Scott's request and appointed James Moriarty to represent Scott.

On February 9, 2010, Scott filed a pro se request for new counsel, raising the following as grounds for removal: (1) "counsel has stated that defendant should admit he is guilty when the defendant gets to court"; and (2) "counsel and the defendant DO NOT AGREE about how this case should be presented. I am innocent and counsel is pressuring the defendant into saying that the defendant is guilty." Scott therefore concluded a conflict of interest existed and the client-attorney relationship had been exhausted.

The court entered an order setting the motion for hearing at the time of the pretrial conference on February 19, 2010. No written orders were entered after the pretrial conference ruling on Scott's motion for substitute counsel. However, at the start of trial on February 23, 2010, the following conversation took place:

> COURT: One other thing we should note for the record, we had our pretrial conference on Friday. . . . That was not reported. Typically pretrial hearings are not reported . . . . However, there was one thing that we should note for the record which occurred during the course of that, and that's that we took up Mr. Scott's

> motion to have a different lawyer. We did that off the record because we didn't have a court reporter available. I informed Mr. Scott that he did not, in my view, raise legal grounds, and it appears to me that Mr. Scott understands that now. He's pleased with Mr. Moriarty's progress, is that right?
>
> DEFENDANT: Yes, sir.
>
> COURT: You're no longer wanting to have a different lawyer, I take it?
>
> DEFENDANT: No, sir.
>
> COURT: All right. It struck me as simply an issue that Mr. Moriarty was raising plea bargain issues and talking to Mr. Scott as to whether perhaps he should plead or go to trial. Mr. Moriarty is obviously prepared to go to trial and is representing you in this case, and you're satisfied with that now, Mr. Scott, is that right?
>
> DEFENDANT: Yes, sir.
>
> COURT: All right. I'll consider the motion then withdrawn.
>
> MR. MORIARTY: Thank you.

Scott then proceeded to trial. The only evidence presented in the defense's case was Scott's own testimony. No expert testified regarding Scott's asserted defenses, and Thomas was not subpoenaed as a witness in furtherance of Scott's involuntary intoxication defense. The jury found Scott guilty of first-degree robbery in a verdict filed February 26, 2010.

On March 4, 2010, Scott filed a renewed pro se motion to remove and replace attorney Moriarty, alleging Moriarty was "set on the defendant being guilty," did not exhaust all possibilities, and repeatedly called Scott stupid. On March 5, 2010, Moriarty filed a request for withdrawal of counsel. On March 5, 2010, the court ordered Moriarty's withdrawal.

Scott now appeals, arguing: (1) the district court erred in failing to fully inquire regarding the breakdown of communication between Scott and Moriarty and in denying Scott's request for substitute counsel; and (2) Moriarty was ineffective in failing to consider appropriate witnesses and in failing to properly communicate with and advise Scott.

**II. Motion for New Counsel**

Scott asserts the district court erred in failing to fully consider and denying his request for substitute counsel. The State asserts, and we agree, that Scott has failed to preserve error on this issue. Scott filed a motion for new counsel, which was heard at the pretrial conference. No record was made because a court reporter was not available. Before trial, the court summarized on the record the hearing that had taken place at the pretrial conference. The court twice specifically asked Scott on the record whether he was satisfied with his counsel and Scott answered that he was and that he no longer wanted to have a different lawyer. The court concluded that it considered the motion to be withdrawn, and Scott did not object. Accordingly, we will not consider on appeal Scott's arguments relating to his motion for new counsel. *See State v. Hobson*, 284 N.W.2d 239, 241 (Iowa 1979) (finding error was waived where counsel "orally notified the trial court the motion was withdrawn before obtaining a ruling on it").

**III. Ineffective Assistance of Counsel**

Scott argues his counsel was ineffective in: (1) failing to subpoena Thomas, a witness alleged to be crucial to Scott's defense; (2) failing to present expert evidence regarding the defenses of diminished capacity and intoxication; and (3) failing to appropriately communicate with and advise him.

Because Scott asserts a constitutional violation, we review the totality of the circumstances de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). In order to prove that his counsel was ineffective, Scott must show that: (1) his counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id*. We can affirm on appeal if either element is lacking. *Id*. Generally,

we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings where an adequate record of the claim can be developed. *Id.*

We find the record on these three issues is inadequate for us to rule on direct appeal. We preserve these claims for postconviction relief.

**AFFIRMED.**