

**IN THE COURT OF APPEALS OF IOWA**

No. 9-893 / 08-1028  
Filed December 17, 2009

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

**vs.**

**CORTEZ ANTIONE MCCULLOUGH,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Don C. Nickerson,  
Judge.

Defendant appeals his first degree robbery conviction alleging ineffective  
assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant  
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant  
County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**EISENHAUER, P.J.**

Cortez McCullough appeals his robbery conviction<sup>1</sup> entered after a jury trial. He alleges ineffective assistance of counsel. We preserve McCullough's claims for possible postconviction relief proceedings.

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. McCullough was convicted of first-degree robbery.

On appeal, McCullough argues his counsel was ineffective by failing to request jury instructions defining theft and operating without an owner's consent. McCullough's claims are reviewed de novo. See *State v. Lane*, 726 N.W.2d 371, 392 (Iowa 2007). We presume "counsel acted competently and the representation fell within the wide range of reasonable professional assistance."

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<sup>1</sup> McCullough does not appeal his convictions for two counts of intimidation with a weapon and one count of possession of a controlled substance. McCullough's plea of guilty to possession of a firearm as a convicted felon is also not before us on appeal.

*Hannan v. State*, 732 N.W.2d 45, 53 (Iowa 2007). In order to prevail, McCullough must show: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *id* at 393. 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. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed “and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant’s claims.” *Biddle*, 652 N.W.2d at 203.

This is not the “rare case” that allows us to decide McCullough’s ineffective assistance claims on direct appeal without an evidentiary hearing. See *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve McCullough’s claims for possible postconviction relief proceedings.

**AFFIRMED.**