

**IN THE COURT OF APPEALS OF IOWA**

No. 0-326 / 99-1104

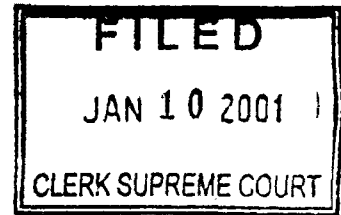
January 10, 2001

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

vs.

**CONRAD LAMONT JAMES, JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Gary G. Kimes  
Judge.

Conrad James appeals from his conviction and sentence for first-degree  
robbery in violation of Iowa Code sections 711.1 and 711.3 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant  
Attorney General, John P. Sarcone, County Attorney, and Frank Severino,  
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

**HECHT, J.**

The defendant-appellant, Conrad James, alleges his trial counsel was ineffective for failing to challenge the restitution order of the district court entered at sentencing following his conviction for theft arising from a bank robbery. We affirm.

**I. Factual Background and Proceedings.** James robbed two tellers at knifepoint. At trial, one testified she gave him about \$1200. The other teller did not testify to an amount. No testimony or exhibits in the record reveal the total amount taken from the bank. At the sentencing hearing, the primary focus was given to whether the sentence should be concurrent with or consecutive to an earlier sentence in another case. At the end of the hearing, the judge ordered James to pay restitution of \$11,852.87 to the bank. His attorney did not object or otherwise challenge the restitution order. On appeal, James claims his attorney was ineffective in failing to challenge the restitution order because there is no support in the record for the amount ordered. The State agrees "the record in this case is void of evidence which would support the amount of restitution ordered by the court," yet claims appellant was not prejudiced because he can request a hearing to challenge the plan of restitution at any time prior to the expiration of the sentence. See Iowa Code § 910.7.

**II. Standard of Review.** Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was

prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). We may affirm because a defendant has failed to prove prejudice without deciding whether there was a failure of duty. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.*

**III. The Merits.** We are unable to discern a factual basis for the precise amount of the restitution ordered by the district court. The record is therefore insufficient to allow us to determine whether trial counsel failed in an essential duty by failing to object to the restitution order. However, James may petition the district court for a hearing on “any matter related to the plan of restitution . . . and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.” See Iowa Code § 910.7. The court may modify the plan at any time prior to the expiration of the offender’s sentence. *Id.* Our supreme court has stated a preference for giving the district court the opportunity to modify or correct inappropriate restitution orders before challenging them on appeal. *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984) (“We suggest that counsel always consider asking the sentencing court to modify inappropriate restitution plans and orders before raising such questions on appeal”). Under the circumstances of this case, we conclude James has not suffered cognizable prejudice as a result of trial counsel’s failure to object to the factual basis for the

restitution order because he has an adequate statutory remedy to correct error, if any there may be, in the district court. Accordingly, his claim of ineffective assistance of counsel is without merit.

**AFFIRMED.**