FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
JOHN DAVID LONG,) Filed August 30, 1983
Defendant-Appellant.)

JOHN DAVID LONG,)
Petitioner-Appellant,)
vs.) 3-64
64180 and 68509
STATE OF IOWA,)
Respondent-Appellee.)

Appeal from Marshall District Court - George G. Fagg, Judge, and Hardin District Court - Carl D. Baker, Judge.

Defendant appeals from the denial of his petition for postconviction relief following his conviction of theft in the second degree. AFFIRMED.

Patrick R. Grady, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

DONIELSON, J.

Defendant appeals from the denial of his petition for postconviction relief following his conviction of theft in the second degree. Defendant contends his attorney rendered ineffective assistance by failing to move for a directed verdict, by failing to request an instruction on an alleged lesser included offense, and by failing to find and present a witness who could allegedly support defendant's assertions of innocence. We affirm.

Defendant was convicted, after a jury trial, of the crime of theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2). He was accused of exercising control over a stolen automobile, knowing it to have been stolen by acquaintances of his. The State's evidence showed that defendant had not known of the theft until after it occurred and had reacted to it with anger and disapproval, but had nonetheless helped his acquaintances to sell the car. Defendant acknowledged learning of the theft and responding with anger and disapproval, but he testified that he had not helped to dispose of the car and had not in any way "exercised control" over the car within the meaning of section 714.1(4).

Defendant filed a direct appeal of his conviction. During the pendency of that appeal he also filed a petition for postconviction relief alleging that he had received ineffective assistance of counsel in his trial. He applied to the supreme court for a stay of the direct appeal pending the outcome of the postconviction proceeding, and asserted that the only issues he could raise in the direct appeal would also concern ineffective assistance. The supreme court granted a stay of the direct appeal.

The postconviction court later denied postconviction relief, and defendant appealed from that denial. The direct appeal and the appeal from the denial of postconviction relief have now been consolidated.

The test for judging counsel's effectiveness is whether, under the entire record, his performance fell "within the range of normal competency" for attorneys. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981), State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). When we review claims of ineffective assistance of counsel, we make an independent evaluation of the totality of the circumstances to determine whether or not defendant has met his burden of showing that counsel has failed to perform some essential duty, and that defendant was prejudiced as a result. State v. Adalpe, 307 N.W.2d 32, 42 (Iowa 1981), Snethen, at 14.

Defendant has failed to meet his burden of showing that he was prejudiced by counsel's failure to move for a directed verdict. Had counsel made such a motion, it would have certainly been denied. A directed verdict of acquittal may be granted only if, after viewing the evidence in the light most favorable to the State, there is clearly insufficient evidence to sustain a conviction. See State v. Traas, 230 Iowa 826 (1941), and State v. Holderness, 293 N.W.2d 226 (Iowa 1980). In the present case, witnesses for the State testified that defendant contacted a person who was interested in purchasing the stolen automobile, and arranged a meeting to discuss the terms of the sale. Testimony also indicated that when the purchaser took possession of the car, defendant gave him the keys. Iowa Code section 714.1(4) provides that a person commits theft when he "[e]xercises control over stolen property, knowing such property to be stolen, or having reasonable cause to believe that such property has been stolen." There was clearly sufficient evidence to support a conviction for second degree theft. Defense counsel is not required to make frivolous motions, and will not be criticized for failing to do so. See Kellog v. State, 288 N.W.2d 561, 565 (Iowa 1980).

Defendant contends that he was denied effective assistance of counsel because his attorney failed to request an instruction on the lesser included offense of Operating a Vehicle Without the Owner's Consent. Counsel testified that he

considered requesting such an instruction, and even discussed the issue off the record with the trial judge, but subsequently decided that the facts presented in defendant's case did not warrant such an instruction.

The trial court may only instruct the jury on a lesser included offense if the lesser offense is legally included in the greater offense and the evidence supports inclusion. State v. Morgan, 322 N.W.2d 68, 69 (Iowa 1982). Clearly, the offense of Operating a Vehicle Without the Owner's Consent is legally included in the offense of theft, and differs from the offense described in Iowa Code section 714.1(4) only in the requisite intent. See Iowa Code section 714.7. However, defendant's defense to the charge of theft centered entirely around his contention that he never exercised the requisite control over the stolen vehicle. Defendant did not pursue the issue of intent.

> The principle that a not guilty plea controverts all elements is not strictly applied when courts come to applying the factual test of included offenses. In the included offense setting the courts apply a principle that when the major offense consists of elements A, B, and C, the lesser offense consists of elements B and C, and the record does not contain substantial evidence from some quarter controverting element A, the State's case stands or falls on the major offense.

State v. Morgan, at 69-70. Because there was no evidence to warrant submission of operating a vehicle without the owner's consent as an included offense, counsel was not ineffective for failing to request its submission.

Defendant finally alleges that counsel was ineffective because he failed to compel the appearance of a witness to testify for defendant. Counsel testified that he didn't compel the witness' appearance because the witness was strung out on drugs at the time of the offense, his testimony would have been merely cumulative of the testimony of other defense witnesses, and counsel had determined that the witness would not help his client. Generally the decision as to which witnesses to call at trial is a matter of trial strategy and is left to

counsel's professional judgment. We do not second guess the exercise of counsel's professional judgment unless his actions can only be viewed as an abdication of that judgment. See Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). We also point out that counsel has no obligation to use witnesses if, in his professional judgment, he has determined that they will not help his client's case. See generally Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981).

For the reasons stated above, the judgment of the postconviction court is affirmed. There being no other issues raised on direct appeal, defendant's conviction is also affirmed.

AFFIRMED.