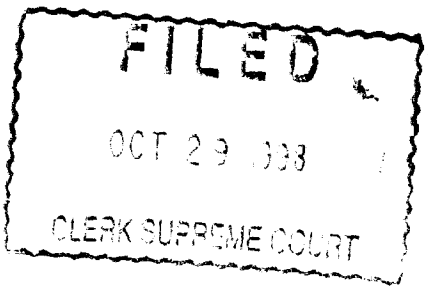
**IN THE COURT OF APPEALS OF IOWA**

No. 8-489 / 97-1979

**STATE OF IOWA,**
Appellee,

vs.

**DAWN ANN COLE,**
Appellant.




---

Appeal from the Iowa District Court for Black Hawk County, Walter W. Rothschild, Judge.

Dawn Cole appeals her conviction, following a jury trial, for fourth-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and John C. Lammers, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

**VOGEL, J.**

Dawn Cole appeals her conviction and sentence, following a jury trial, for fourth-degree theft, claiming her trial counsel was ineffective. We find Cole suffered no prejudice as a result of her trial counsel withdrawing a request for a "claim of right" instruction. We therefore affirm.

***Background facts.*** Cole and her children had been living with her grandfather, Robert Lauer, and his wife, Joyce, for approximately two years when, in January of 1997, Cole and the Lauers applied for rental assistance from the Department of Human Services (DHS). Later that month, Robert received two checks for $250.00 each, payable to "Lauer, Robert for Dawn Cole." Robert endorsed the checks and placed them on a table for Joyce to deposit into their bank account. When Joyce next had the opportunity to do so, she found the two checks missing.

Cole accompanied her grandfather to a DHS office to determine if the checks have been cashed. Approximately one week later, Robert found out that the checks had been endorsed and cashed by Cole.

Cole was subsequently charged with theft in the fourth degree. Trial commenced in August of 1997; the jury returned a verdict finding Cole guilty as charged. Cole now appeals.

***Scope of review.*** Our standard of review as to the constitutional issue of effective assistance of counsel is de novo. *See State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994).

***I. Ineffective assistance.*** Cole claims she was denied effective assistance of counsel because of her counsel's failure to request a "claim of right" instruction.

To prevail on her claim of ineffective assistance of counsel, the burden rests with Cole to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997). It is not necessary for us to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996); *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference is the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* We find the record in this case sufficient to allow us to address Cole's claim on direct appeal.

Cole's theory of defense at trial was that she had a right to the checks because she had applied for the aid, the aid was to be used on her behalf, and her name appeared on the checks. At the close of all evidence, Cole's trial counsel made an argument for a "claim of right" instruction.[1] The trial judge responded:

---

[1] Iowa Crim. Jury Instruction 1400.19 (1988) provides:

> I agree with your basic premise, but it seems to me that that all falls in the ambit of intent. In other words, if she believed that she had a legal right to them then she had no intent to deprive Mr. Lauer of them. So I think that those matters which you raise are covered in the instructions. . . .

The court then provided counsel an opportunity to review the uniform jury instructions, after which Cole's counsel withdrew his request for the instruction. The final jury instructions imparted the law on specific intent, the "intent to deprive," and on the elements of the offense. Instruction No. 14 specifically provided:

> The State must prove all of the following elements of Theft:
>
> 1. During the month of January, 1997, the defendant took possession or control of rental assistance checks.
>
> 2. The defendant did so with the intent to deprive Robert Lauer of the rental assistance checks.
>
> 3. The property, at the time of the taking, belonged to Robert Lauer.
>
> If the State has proved all of the elements, the defendant is guilty. You must then determine the degree of Theft, as explained to you in Instruction No. 17. If the State has failed to prove any of the elements, the defendant is not guilty.

We find that trial counsel's withdrawal of the request did not prejudice Cole. Given the statements made to counsel in regard to the initial request, it was unlikely that the trial court would have allowed a "claim of right" instruction. Furthermore, the evidence at trial clearly established that Cole took possession of checks belonging

---

> A person who [takes] [disposes of] [uses] [acquires] property is not guilty of Theft if [he] [she] reasonably believes [he] [she] has a right, privilege, or permission to do so, or if [he] [she] does in fact have such right, privilege or permission.

to her grandfather with the intent to deprive him of them. Cole's defense that she reasonably believed she had a right to the checks was negated by the fact that she went so far as to take her grandfather to a DHS office to find out what happened to the checks. She did not admit to cashing them until after she was confronted with the evidence approximately one week later. Cole further admitted that she did not use the money for rent or a rental deposit, which she knew was its intended purpose. Finally, Rosie Topping, who provided child care for Dawn's children, testified that Dawn had told her she had taken checks from her grandparents and given her mother $200 to keep quiet about it. Cole's claim of ineffective assistance must therefore fail.

Having considered all issues properly before us on appeal, we affirm Dawn Cole's conviction and sentence.

**AFFIRMED.**