FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 27, 1988
vs.	)	253
IVORY OWENS,	)	8-08
Defendant-Appellant.	)	87-266

Appeal from the Iowa District Court for Polk County (No. 32525), Theodore H. Miller, Judge.

Defendant appeals from judgment and sentence, following a bench trial, for the crimes of robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (1985), and carrying a weapon, in violation of section 724.4 (1985). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Nan M. Horvat, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ. Schlegel, J., takes no part.

PER CURIAM

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Defendant appeals from judgment and sentence, following a bench trial, for the crimes of robbery in the first degree and carrying a weapon. We affirm.

Defendant Ivory Owens was charged with first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 and carrying a weapon in violation of section 724.4. After a bench trial, Owens was convicted of both charges. He was sentenced to a mandatory twenty-five-year term of incarceration on the robbery conviction and a concurrent two-year term on the weapons conviction. The trial court also imposed a five-year mandatory minimum sentence under the firearm provision of section 902.7. After the trial, Owens, pro se, sought a new trial on the ground that he received ineffective assistance of counsel. After a hearing, at which Owen's trial counsel was present, the trial court overruled the motion for a new trial.

I. Owens claims that the trial court erred in imposing a five-year mandatory minimum sentence under section 902.7 because such a sentence cannot be imposed unless expressly charged in the indictment or information. He states that the firearm provision was not charged in the trial information. He relies on Iowa Rule of Criminal Procedure 6(6). That rule provides in pertinent part:

> **6. Allegations of use of a firearm.** If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to a minimum sentence because of use of a firearm, the allegation of such use, if any, shall be contained in the indictment.

The term "indictment" as used above is synonymous with the term "trial information." See Iowa Rule of Criminal Procedure 5(5).

Owens also refers us to the case of State v. Luckett, 387 N.W.2d 298 (Iowa 1986). That decision held that since the trial information contained no allegation of firearm possession, there was no compliance with rule 6(6). Id. at 301.

The trial information in this case alleged defendant did

COUNT I: commit, or aid and abet in the commission, of Robbery in the First Degree against Donna Wing at Wendy's Restaurant while Ivory Owens was armed with a dangerous weapon in violation of Sections 711.1 and 711.2 of the Code of Iowa; and

COUNT II: on the 16th day of July, 1986, Ivory Charles Owens knowingly transported a pistol or revolver in a vehicle in violation of Section 724.4 of the Code of Iowa. (emphasis added)

The minutes of testimony stated in pertinent part, "The man brandished a large revolver . . . ."

We find that the foregoing recitation complies with rule 6(6). A dangerous weapon includes a firearm. See generally Iowa Code § 702.7. "Allegation" is defined in Black's Law Dictionary 99 (Rev'd. 4th ed. 1968) as "the assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove." Owens urges us to interpret Luckett as requiring notice that the State seeks penalty enhancement by reason of the use of a firearm. However, rule 6(6) and the specific language in Luckett refer only to the principle that an "allegation" of firearm possession be contained in the trial information. As such, we find compliance by the State with rule 6(6).

II. Owens' second argument is that the trial court should have appointed *new counsel for the posttrial claims of ineffective assistance of counsel. He* asks that the posttrial hearing should not operate as a waiver of the right in the future to present ineffective assistance of counsel claims against his trial counsel. This appeal does not pursue the issue of ineffective assistance of trial counsel. As such, we find it waived since Owens "has made no attempt to demonstrate why further proceedings are necessary or what he hopes to establish by them." State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1987). Since appellate counsel is different from trial counsel for this appeal, we can find no reason

why the merits of this issue should be preserved, rather than raised now in direct appeal. See State v. Turner, 345 N.W.2d 552, 558 (Iowa App. 1983).

When a defendant asserts a claim of ineffective assistance of counsel, an evidentiary hearing is usually required. Foster v. State, 395 N.W.2d 637, 638 (Iowa 1986). Trial counsel does not usually represent defendant when it is trial counsel's performance that is being challenged. See Turner, 345 N.W.2d at 558.

We have reviewed the hearing transcript in this case on Owens' motion for new trial. Although Owens was not represented by other counsel during this hearing, we cannot find that he was demonstrably prejudiced by such a failure. There is extensive colloquy between the trial court and Owens, as well as between Owens and his trial attorney, in setting forth the facts about Owens' various claims of ineffective assistance of trial counsel. Owens' appellate counsel urges that the record is inadequate because there was no independent investigation. We find the record is adequate. Owens received a full and fair opportunity to voice his complaints about the alleged ineffective assistance of his trial counsel. Owens has not shown he was prejudiced by failure to appoint substitute counsel. Hence, even if there was a violation of his right to have new counsel appointed, the error was harmless. See United States v. Morrison, 449 U.S. 361, 365, 101 S. Ct. 665, 668, 66 L. Ed. 564, 568 (1981).

AFFIRMED.