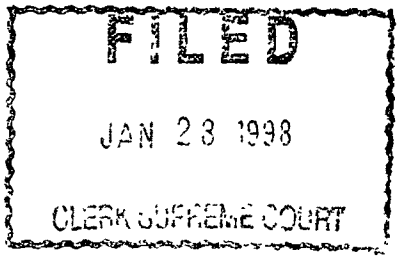
**IN THE COURT OF APPEALS OF IOWA**

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No. 7-618 / 97-0033
Filed January 28, 1998




**ROBERT GLENN BOLEY,**
Appellant,

vs.

**STATE OF IOWA,**
Appellee.

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Appeal from the Iowa District Court for Jasper County, Dale B. Hagen, Judge.

On Boley appeals from the denial of his application for postconviction relief alleging ineffective assistance of counsel. **AFFIRMED.**

Steven J. Holwerda of Selby, Updegraff, Smith & Holwerda, Newton, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Steve Johnson, County Attorney, and John Heineke, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Sackett and Streit, JJ.

**STREIT, J.**

Defendant appeals the trial court's denial of his application for postconviction relief based on ineffective assistance of trial counsel. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court rule 9.

In January 1996, Robert Boley pled guilty to third-degree burglary in exchange for the State's agreement not to seek a habitual offender enhancement against him. In fact, Boley only had one prior felony conviction and could not have been convicted as a habitual offender.[1] He did not file a motion in arrest of judgment or an appeal.

In July 1996, Boley filed an application for postconviction relief. He alleged he was denied the effective assistance of counsel because his counsel failed to discover and advise him the habitual offender enhancement could not have applied to him. The district court denied his application.

In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant must show his claim was preserved for review by being made on direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). Boley did not assert an ineffective assistance of counsel claim by making a direct appeal. His claim, therefore, can only be brought in a postconviction proceeding if Boley establishes by a preponderance of the evidence "sufficient

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[1] Boley has not contended, and it is not shown in the record, the State intentionally misrepresented Boley's prior felonies. Rather, it appears both the Jasper County Attorney and Boley's counsel interpreted Boley's criminal record as having had two prior felony convictions, when in fact he only had one.

reason" or "cause" for not having raised the issue on direct appeal. *Id.*; *see also* Iowa Code § 822.8 (1993).

Boley argues his "sufficient reason" for not raising his claim is that it was not until after his appeal time had run he knew the habitual offender statute could not have applied to him. Boley claims his counsel did not discuss the requirements for filing habitual offender or his prior criminal record with him. His trial counsel's testimony contradicts Boley's contention. Although she did not specifically remember telling Boley the requirements of the habitual offender statute, she testified it was her normal practice to explain the statute to her clients. She did recall Boley had other reasons for accepting the guilty plea other than to avoid a habitual offender charge. Boley has not convincingly established his trial counsel did not counsel him regarding the requirements for habitual offender in relation to his criminal record. Further, Boley can not depend on his own lack of knowledge to provide "sufficient reason" for not bringing his claim on direct appeal. *See Hogan v. State*, 454 N.W.2d 360 (Iowa 1990) (interpreting the time limitation in section 822.3 and finding lack of knowledge was not the sort of factual circumstance reasonably triggering the exception to the time limitations in section 822.3). Because Boley has not raised his claim on a direct appeal and has not shown sufficient reason for not doing so, his claim is waived. *See Legrand v. State*, 540 N.W.2d 667, 669 (Iowa 1996).

**AFFIRMED.**