FILED
FEB - 5 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 5, 1980

vs.)

GARY LEE DIPPLE,) 339
63434

Defendant-Appellant.)

Appeal from Wright District Court - David R. Hansen, Judge.

Defendant appeals denial of postconviction relief, asserting he should not have been subjected to an enhanced penalty as an habitual criminal when the information alleging this status did not comply with section 769.6, The Code 1975. Affirmed.

Bruce M. Dunlap, Clarion, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas F. Staskal, Assistant Attorney General, and Lee E. Poppen, Wright County Attorney, for plaintiff-appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant appeals denial of postconviction relief, asserting the enhanced penalty for habitual criminals was inapplicable because the information alleging such status did not comply with section 769.6, The Code 1975. We affirm.

I.

Defendant was charged by an information filed November 17, 1975, with larceny in the nighttime, in violation of section 709.4, The Code 1975. A second information, filed December 31, 1975, alleged defendant was a habitual criminal under section 747.1, The Code 1975. This charging procedure thus differed from section 769.6, The Code 1975, which requires allegations of prior convictions be contained in the information charging the crime, with a supplemental information--omitting mention of the habitual offender allegation--to be used for trial of the offense. Id.

The postconviction court found defendant did not have actual knowledge of the second information until after the jury returned a guilty verdict on the larceny charge. Defendant, however, did not object to the filing thereof, did not ask that it be stricken, and did not object to proceeding with a supplemental hearing, wherein the jury considered the habitual offender issue. Upon finding of the jury, the trial court sentenced defendant to an indeterminate fifteen-year prison sentence; defendant did not appeal.

Defendant filed his application for postconviction relief February 6, 1978. The State's resistance did not raise either waiver issue they now assert on appeal. The postconviction court held the State had not complied with section 769.6, The Code 1975, in the charging process, but denied relief because defendant was not prejudiced by the error.

II.

The State contends defendant is barred from raising this issue in his application for postconviction relief since he neither challenged it at trial nor on direct appeal. Failure to appeal does not alone constitute a waiver of the right to attack a conviction by a postconviction action. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979) (quoting Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979). However, failure to appeal bars relief in a postconviction action on the ground of abuse of process as to

factual and legal considerations the postconviction applicant knew of at the original trial, but deliberately and inexcusably failed to pursue on appeal. Id.; Horn v. Haugh, 209 N.W.2d 119, 120-21 (Iowa 1973) (approving ABA Standard, Post-Conviction Remedies, § 6.1(c)); see Bledsoe v. State, 257 N.W.2d 32, 33-34 (Iowa 1977). Under this analysis, we believe defendant has waived review by a postconviction relief action of his claim since the error could have been attacked by direct appeal.

III.

We also reject defendant's claims for other reasons. In Wessling v. Bennett, 290 F. Supp. 511, 517-18 (N.D. Iowa 1968), aff'd, 410 F.2d 205 (8th Cir.), cert. denied, 396 U.S. 945, 90 S. Ct. 384, 24 L. Ed. 2d 248 (1969), it is suggested that imposition of an enhanced penalty under similar circumstances is not such an irregularity as to sustain a collateral attack against the sentence. See Oyler v. Boles, 368 U.S. 448, 452, 82 S. Ct. 501, 503, 7 L. Ed. 2d 446, 450 (1962); Graham v. State, 224 U.S. 616, 629, 32 S. Ct. 583, 588, 56 L. Ed. 917, 923 (1911). But we need not reach the merits of that issue. On the record in this case, the second information may be considered as an amendment to the first information as it was proceeded on without objection. Under such circumstances, the procedure substantially complied with section 769.6, The Code 1975, by reason of this amendment. Because defendant did not resist the procedure at the time of trial, it affords no basis for relief in a postconviction proceeding. See State v. Holbrook, 261 N.W.2d 480, 483-84 (Iowa 1978).

We affirm the trial court's judgment.

AFFIRMED.