

IN THE COURT OF APPEALS OF IOWA

No. 6-221 / 94-1646

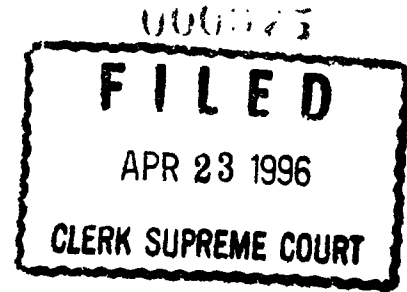
LARRY DITHMART,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Clinton County, Margaret S. Briles,
Judge.

Larry Dithmart challenges the order denying his application for postconviction relief from his convictions of three counts of delivery of a controlled substance and two counts of failure to affix drug tax stamps. **AFFIRMED.**

Mary Lynn Steger and John J. Wolfe, Jr., of the Law Offices of John J. Wolfe, Jr., Clinton, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce A. Ingham, Assistant County Attorney, for appellee.

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

PER CURIAM.

This is an appeal by a convicted criminal claiming he is entitled to postconviction relief because he received ineffective assistance of trial counsel and because his convictions violated double jeopardy. The district court denied relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Larry Dithmart was convicted of three counts of delivery of cocaine and two counts of failure to affix a drug tax stamp. The supreme court affirmed these convictions on appeal. *State v. Dithmart*, No. 92-1783 (Iowa Nov. 1, 1993) (Unpublished).

On three occasions, Dithmart sold cocaine to Daniel Howard, an undercover police officer. Linda Sanderson, who was a confidential informant for Howard, had acted as an intermediary. At trial, Dithmart raised a defense of entrapment. He claimed he had believed he was working with Sanderson and the police in order to catch drug dealers.

In postconviction proceedings, Dithmart claimed he received ineffective assistance of counsel because his attorney failed to obtain all exculpatory evidence. He believed Sanderson kept a notebook of people she intended to turn in to the police, and she destroyed the notebook after a deposition but before the criminal trial. He now alleges that if his trial attorney had acted quickly enough the notebook

would have been preserved, and if produced at trial, would have contained exculpatory evidence.

To establish a claim of ineffective assistance of counsel, an applicant must show that (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent that it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992).

We determine Dithmart failed to show he received ineffective assistance of trial counsel. At the criminal trial, Sanderson testified she never kept a written record. Dithmart's present claim that there was a notebook and that it contained exculpatory evidence is based entirely on speculation. In addition, we find Dithmart has failed to show that production of the notebook, if it existed, would have changed the result of the trial.

Dithmart also claims he was subjected to double jeopardy due to his convictions for delivery of cocaine and failure to affix a drug tax stamp. The supreme court rejected similar arguments in *State v. Lange*, 531 N.W.2d 108, 117 (Iowa 1995). We conclude defendant was not subjected to double jeopardy due to his conviction for failure to affix a drug tax stamp.

We affirm the decision of the district court denying Dithmart's application for postconviction relief. Costs of this appeal are assessed to Dithmart.

AFFIRMED.