

IN THE COURT OF APPEALS OF IOWA

No. 7-737 / 96-1875

000035

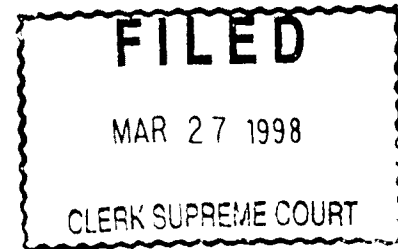
RANDY STEVEN BOOSE,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Randy Boose appeals from the district court order denying his second
postconviction relief application. **AFFIRMED.**

Thomas J. McCann, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County
Attorney, for appellee.

Considered by Cady, C.J., and Huitink, and Mahan, JJ.

CADY, C.J.

This is an appeal by an applicant claiming the district court should have granted his application for postconviction relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On July 26, 1991, Randy Boose sold 3.4 grams of crack cocaine to a confidential informant and an undercover agent. On August 2, 1991, he sold 3.4 grams of crack cocaine to the same undercover agent. On August 13, 1991, he sold .9 grams of crack cocaine to the undercover agent. Boose was charged with delivery of a controlled substance, in violation of Iowa Code section 124.401(1)(b) (formerly section 204.401(1)(b)). Boose was subject to an enhanced penalty under section 124.411 because this was his second drug offense. Under section 124.411 he could be sentenced to a term not to exceed three times the term otherwise authorized.

Boose pled guilty to the charge against him. In exchange, his sentence was doubled under section 124.411, instead of tripled. Because Boose pled guilty to delivery of more than 5 grams of crack cocaine, he was guilty of a class B felony, which carries a sentence of twenty-five years. Boose was thus sentenced to a term of imprisonment not to exceed fifty years on the delivery charge. Boose's direct appeal of his conviction was dismissed as frivolous. *State v. Boose*, No. 92-765 (Iowa Nov. 6, 1992).

Boose filed an application for postconviction relief, claiming he received ineffective assistance of counsel. The district court denied his request for relief. His

appeal of this case was also dismissed as frivolous. *Boose v. State*, No. 94-702 (Iowa Nov. 18, 1994).

Boose filed a second application for postconviction relief. He claimed he received ineffective assistance because his trial counsel failed to object when the State considered the three sales in the aggregate and charged him with a class B felony instead of separate class C felonies. He claims his guilty plea was not voluntary because he did not realize he was only guilty of a class C felony. The district court denied Boose's application. He now appeals.

The State claims this issue was previously considered in the first postconviction proceeding. We are unable to determine if this is the case because we have not been provided with the district court decision from that proceeding.

To show ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted therefrom. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996).

We find Boose was not prejudiced by his counsel's failure to object because Boose was charged with one class B felony. He could have been charged with three class C felonies, each carrying a ten year sentence. Under the enhancement provision of section 124.411 he could have been sentenced to a term of imprisonment not to exceed ninety years. Boose was actually charged with a class B felony, which carries a twenty-five year sentence. Under the enhancement provision, he could have been

sentenced to a term of imprisonment not to exceed seventy-five years. Boose benefitted ~~by~~ being charged with one class B felony.

We determine Boose has failed to show he received ineffective assistance of counsel. We affirm the decision of the district court denying Boose's second application for postconviction relief. Costs of this appeal are assessed to Boose.

AFFIRMED.