IN THE COURT OF APPEALS OF IOWA

No. 7-040 / 96-0651 000284

ALBERT PHILLIPS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Albert Phillips appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Robert J. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Joseph Grubisich, Assistant County Attorney, for appellee.

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

PER CURIAM

Albert Phillips appeals the district court's denial of his application for postconviction relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

In April 1994 Phillips was charged by trial information with possession with intent to deliver, a class "B" felony, and failure to affix a drug tax stamp. In a separate action, the State also filed a notice of forfeiture pursuant to Iowa Code section 809.8. An order of forfeiture was entered June 6, 1994. On June 16, 1994, pursuant to a written plea agreement, Phillips pleaded guilty to a lesser-included class "C" felony possession with intent to deliver and to failure to affix a drug tax stamp. Phillips did not appeal the criminal convictions.

Phillips filed this application for postconviction relief in January 1995 alleging his counsel was ineffective for failing to properly advise him of the nature and consequences of his plea and for failing to move to dismiss the criminal charges on double jeopardy grounds. At the postconviction hearing Phillips testified he understood the plea agreement and the sentences to be imposed. He also testified, however, that it was his understanding the failure to affix a drug stamp offense would be "taken off his sentence" and that if he had known this was not possible he "probably wouldn't" have entered into the plea agreement. Phillips also complained that his trial counsel was ineffective in not moving to dismiss the criminal charges on double jeopardy grounds following entry of the forfeiture order.

Phillips's trial counsel testified that he and Phillips talked "at some length" about a possible double jeopardy challenge to the tax stamp conviction. Counsel testified he explained to Phillips that a plea of guilty would "negate that issue on a direct appeal," but if the Iowa courts followed the reasoning in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), Phillips' consequently illegal sentence could be adjusted in postconviction proceedings.

The district court denied Phillips' application and Phillips appeals. The State argues that Phillips has failed to preserve error on either claim of ineffective assistance. We agree. In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant ordinarily must show that his claim was preserved for review by being made on direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). However, an ineffectiveness claim may be made in a postconviction proceeding if the applicant establishes "sufficient reason" or "cause" for not having raised the issue on appeal. *Id.* Phillips has not even attempted to do so. He is thus barred from asserting his ineffectiveness claims in postconviction proceedings. *Id.* at 377

Even were we to assume we could reach the merits of Phillips' ineffectiveness claims, he has failed to establish sufficient prejudice. *See Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984) (person claiming ineffective assistance of trial counsel must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom). Our supreme court has rejected both double jeopardy claims raised by Phillips. *See State v. Predka*, 555 N.W.2d 202 (Iowa 1996) (Iowa's civil in rem forfeiture is neither punishment nor criminal for double jeopardy purposes); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995) (convictions of both drug offense and failure to affix drug tax stamp does not constitute double jeopardy).

We affirm the denial of Phillips' application for postconviction relief.

AFFIRMED.