

**IN THE COURT OF APPEALS OF IOWA**

No. 7-891 / 04-1788  
Filed December 28, 2007

**STEVE COOLEY,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, David M. Remley,  
Robert Sosalla, and L. Vern Robinson, Judges.

Steven Cooley appeals the district court's ruling and sentencing order in  
his postconviction relief proceeding. **AFFIRMED.**

Philip Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Martha Boesen, Assistant Attorney  
General, Harold Denton, County Attorney, and Brain Claney, Assistant County  
Attorney, for appellee State.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

**MAHAN, J.**

Steven Cooley appeals the district court's ruling and sentencing order in his postconviction relief proceeding. He argues the State should have been prohibited from retrying the habitual offender phase of his trial. We affirm.

**I. Background Facts and Proceedings**

This appeal arises out of Cooley's 2001 charge and jury conviction for forgery in violation of Iowa Code section 715A.2 (2001). In the habitual offender phase of the trial the jury found Cooley to be a habitual offender in violation of Iowa Code section 902.8.

Cooley represented himself with some assistance from stand-by counsel. Before evidence was presented, stand-by counsel objected to the admission of State's Exhibit 1, a certified record from the Iowa Department of Corrections. Specifically, stand-by counsel asked that the portions showing convictions not specified in the minutes of testimony be excluded. The district court did not rule on the motion, construing it as a motion in limine. Stand-by counsel made the same objection when the State moved to admit Exhibit 1. The objection was overruled, and the exhibit was admitted.

The State then called John Marsh Graham, an identification officer from the Cedar Rapids Police Department. Officer Graham testified to his training and experience in fingerprinting. He was then shown State's Exhibit 2, which he identified as a ten-print fingerprint card recorded as the fingerprints of the defendant. Officer Graham testified it was a copy he obtained from the Linn County Sheriff's Department. Upon the State's offer of Exhibit 2, stand-by counsel objected on the grounds of hearsay, lack of foundation because Officer

Graham is not the custodian for the Linn County Sheriff's Department, and that the fingerprint card contained information not specified in the trial information or minutes of testimony. The fingerprint card was dated February 9, 1970. Officer Graham testified that he was not a police officer until 1973 and had no first-hand knowledge regarding who was booked in at the time the fingerprint card was made. The court admitted State's Exhibit 2. Cooley's evidence consisted of only a procedendo establishing that the Iowa Supreme Court reversed the 1998 Linn County conviction.

The jury verdict form listed three convictions: (1) a 1973 Linn County conviction for breaking and entering, (2) a 1989 Scott County conviction for forgery, and (3) a 2000 Linn County conviction for third-degree burglary. The jury found Cooley had been convicted of all three. Cooley unsuccessfully appealed his conviction.

In 2003 Cooley filed for postconviction relief. Judge David Remley found Cooley had received ineffective assistance of counsel on direct appeal because his appellate counsel failed to raise issues regarding the admission of the evidence at the trial on the habitual offender issue. Judge Remley granted Cooley's application for postconviction relief, vacated the habitual offender portion of his sentence, and granted him a new trial on the habitual offender phase of the case. He found Cooley's objections to the evidence in the habitual offender phase of the trial were valid objections to Exhibits 1 and 2. Judge Remley ruled that a new trial on the habitual offender phase of the case was appropriate because:

[t]he habitual offender statute is a sentencing enhancement and not a separate criminal charge. Therefore, the Double Jeopardy Clause does not apply in this case since there was sufficient evidence, although erroneously admitted, that Defendant was a habitual offender, having been convicted of the felony offense of Breaking and Entering in 1974 and the felony offense of Forgery in 1989. The Defendant's conviction of the felony offense of Forgery in 2000 in case number FECR 019164 was properly admitted.

Cooley moved to amend or enlarge the district court's findings, asking it to deny a retrial on the habitual offender phase of the case. The motion was denied. Cooley appealed but the appeal was stayed to allow the retrial to take place on the habitual offender phase because the appeal might be unnecessary if the result of the retrial was in Cooley's favor.

Prior to retrial, Cooley filed a motion to dismiss claiming the State should not be given a chance to retry the issue. The motion was denied. The State filed a bill of particulars stating that it would prove two convictions: (1) a 1998 Linn County conviction for burglary; and (2) a 1986 Mahaska County conviction for third-degree burglary. The jury was unable to come to a unanimous conclusion on whether Cooley was the same person who was convicted of the Mahaska County charge. A second trial was set in which the jury found Cooley to be a habitual offender. Cooley appealed. This appeal is a consolidation of the appeal from Judge Remley's postconviction ruling and the habitual offender retrial.

## **II. Standard of Review**

Normally we review postconviction proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when constitutional issues are raised, we must make an independent evaluation of the

totality of the evidence and our review is de novo. *Brummer v. Iowa Dep't of Corrs.*, 661 N.W.2d 167, 171 (Iowa 2003).

### III. Merits

On appeal from his postconviction proceedings, Cooley argues the State should have been prohibited from retrying the habitual offender phase of his trial.

In its postconviction ruling the district court ruled:

The Applicant has proven by a preponderance of the evidence that if the trial court had sustained the Applicant's objections to those portions of Exhibit 1 which did not pertain to the felonies alleged in the Minutes of Testimony and the Defendant's objections to Exhibit 2, the fingerprint card, both of which were valid objections, the State would not have been able to prove the Applicant was a habitual offender. Appellate counsel's conduct, although well intentioned, so undermined the proper functioning of the adversarial process that the trial and appeal cannot be relied on as having produced a just result. Therefore, the Applicant has proven by a preponderance of the evidence that he was prejudiced.

Cooley does not take issue with this part of the district court's ruling. His appeal lies with the court's remedy. The district court granted the State a new trial on the habitual offender issue because "the habitual offender statute is a sentencing enhancement and not a separate criminal charge. Therefore, the Double Jeopardy Clause does not apply in this case since there was sufficient evidence, although erroneously admitted, that Defendant was a habitual offender. . . ." Cooley argues that the relevant case law requires his case to be remanded to district court for resentencing, but not as a habitual offender, and that the retrial violated the Constitution's Double Jeopardy Clause. We disagree.

When the evidence is sufficient, but the district court erred procedurally, the correct remedy is to grant a new trial. *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S. Ct. 285, 289, 102 L. Ed. 2d 265, 272 (1988). A defendant is not put in

double jeopardy when he is retried due to some procedural error at the district court. *Id.* at 38, 109 S. Ct. at 289, 102 L. Ed. 2d at 272. In determining whether the evidence is sufficient “all the evidence admitted during the trial, including erroneously admitted evidence, must be considered.” *State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003). If the State presented sufficient evidence to rest a conviction on, the case must be remanded for a new trial. *See id.* It is only when the State failed in meeting its burden of producing sufficient evidence that it must be denied a second bite at the apple. *See Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51, 57 L. Ed. 2d 1, 14 (1978).

The district court correctly granted a new trial on the habitual offender phase of Cooley’s trial. It considered all the evidence, even Exhibits 1 and 2, which it found to be admitted in error at trial, and determined the evidence was sufficient to find Cooley to be a habitual offender. Given this conclusion, the proper remedy was to grant a new trial on the habitual offender phase of trial.

Cooley relies on *State v. Gordon*, 732 N.W.2d 41 (Iowa 2007), for his position that the State should not have been granted a new trial on the habitual offender issue. However, in *Gordon*, the defendant admitted to committing two prior felonies, both of which occurred on the same day and thus do not constitute habitual offender status. *Gordon*, 732 N.W.2d at 43. Because there was no other evidence admitted showing any other prior felonies, the evidence was insufficient to find Gordon to be a habitual offender. *Id.* at 44-45. In addition, there was no procedural error at trial. *Id.* at 44. Thus, the State was not entitled to a second chance to prove their case. *Id.* at 44-45. These facts are opposite of

the facts we have in this case. *Gordon* cannot, therefore, support Cooley's argument. The district court acted properly.

**AFFIRMED.**