IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CLARK ANDREW BREWSTER, Defendant-Appellant.	)	S.CT. NO. 16-0372

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE JANE F. SPANDE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On March 2, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Clark Andrew Brewster, 1838 12th Avenue S.E. Cedar Rapids, IA 52403.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes and Court Rules:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was Brewster's stipulation to a prior OWI offense void as it was not made voluntarily or intelligently? Did the record fail to establish that the previous conviction qualified under Iowa Rule of Criminal Procedure 2.19(9) for enhancement purposes? Did the district court commit reversible error by failing to substantially comply with all of the plea-taking requirements of Rule 2.8(2)(b)(2) when accepting Brewster's stipulation?

Authorities

State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004)

Iowa R. Crim. P. 2.24(3)(a)

Iowa R. Crim. P. 2.8(2)(d)

State v. Oldham, 515 N.W.2d 44, 46 (Iowa 1994)

State v. Brady, 442 N.W.2d 57, 58 (Iowa 1989)

State v. Popes, 290 N.W.2d 926, 927 (Iowa 1980)

State v. Smith, 282 N.W.2d 138, 143 (Iowa 1979)

State v. Kukowski, 704 N.W.2d 687, 693 (Iowa 2005)

State v. Peterson, No. 11-1409, 2012 WL 3860730, *4 (Iowa Ct. App. Sept. 6, 2012)

Iowa R. App. P. 6.907

Iowa R. Crim. P. 2.19(9)

State v. McBride, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001)

State v. Loye, 670 N.W.2d 141, 151 (Iowa 2003)

State v. Finney, 834 N.W.2d 46, 55 (Iowa 2013)

U.S. Const. amend. V

U.S. Const. amend. XIV

Iowa Const. art. I, § 9

Iowa Const. art. 1, §10

State v. Carter, 165 P.3d 687, 690 (Ariz. 2007)

State v. Morales, 157 P.3d 479, 481 (Ariz. 2007)

Boykin v. Alabama, 395 U.S. 238, 242-43 & n.5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)

Iowa R. Crim. P. 2.8(2)(b)

State v. Sisco, 169 N.W.2d 542, 546 (Iowa 1969)

State v. Oetken, 613 N.W.2d 679, 688 (Iowa 2000)

Iowa R. Crim. P. 2.8(2)(b)(1)

Iowa Code § 321J.2(2)(b) (2015)

Iowa Code § 321J.2(4)(a)-(d) (2015)

State v. Rodriguez, 804 N.W.2d 844, 849 (Iowa 2011)

Rhoads v. State, 848 N.W.2d 22, 29 (Iowa 2014)

State v. Bumpus, 459 N.W.2d 619, 626 (Iowa 1990)

State v. Vesey, 482 N.W.2d 165, 168 (Iowa Ct. App. 1991)

II. Was defense counsel ineffective for failing to file a motion in arrest of judgment or to otherwise challenge Brewster's prior-offense stipulation on the ground that the record did not establish that the conviction qualified under Iowa Rule of Criminal Procedure 2.19(9) for enhancement purposes?

Authorities

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015)

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

Iowa Const. article I, section 10

State v. Palmer, 791 N.W.2d 840, 850 (Iowa 2010)

Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984)

State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015)

State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015)

State v. Philo, 697 N.W.2d 484–85 (Iowa 2005)

State v. Hack, 545 N.W.2d at 262, 263 (Iowa 1996)

State v. Carroll, 767 N.W.2d 638, 641 (Iowa 2009)

State v. Straw, 709 N.W.2d 128, 136 (Iowa 2006)

Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985)

State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999)

State v. Mitchell, 650 N.W.2d 619, 621 (Iowa 2002)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues in this appeal present substantial questions of enunciating or changing legal principles in Iowa. Iowa Rs. App. P. 6.903(2)(d) and 6.1101(2)(c), (e).

This case raises the question of whether the district court is *required* to comply with all of the plea-taking requirements of Rule 2.8(2)(b)(2) when accepting a defendant's stipulation to prior offenses for purposes of enhancement under Iowa Rule of Criminal Procedure 2.19(9).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Clark Andrew Brewster, from his conviction and sentence for OWI 2nd, following jury trial, judgment, and sentencing in the Linn County District Court, the Honorable Jane E. Spande presiding.

Course of Proceedings and Disposition in the District Court: On August 24, 2015, the State filed a trial information charging Brewster with the crime of OWI 2nd, an aggravated in

violation of Iowa Code sections 321J.2(1)(a) and 321J.2(2)(b) (2015). (Trial Information – 08/24/15) (App. pp. 5-7). He was charged with OWI 2nd based upon a prior OWI conviction entered on April 11, 2008, in Linn County. (Trial Information – 8/24/15) (App. pp. 5-7). Jury trial in this matter commenced January 4, 2016. (Trial Transcript Cover Vol. I – 1/04/16). Before the case was submitted to the jury, Brewster stipulated in open court that he had a prior OWI conviction for enhancement purposes. (Trial Vol. II – 1/05/16 Tr. p. 108, L. 13-p. 110, L. 16). On January 6, 2016, the jury found Brewster guilty of OWI. (Verdict – 1/06/16) (App. pp. 11-12).

On February 25, 2016, the district court imposed judgment for OWI 2nd and sentenced Brewster to a jail term of thirty-seven days, with all but seven days suspended, and placed him on unsupervised probation with conditions. (Sentencing Order – 2/25/16) (App. pp. 13-15). The court also assessed a fine, applicable surcharges, court costs, and attorney fees. (Sentencing Order – 2/25/16) (App. pp. 13-15).

Notice of appeal was timely filed on February 26, 2016; this appeal followed. (Notice of Appeal – 2/26/16) (App. p. 16).

Facts: Any facts relevant to the issues raised on appeal will be mentioned below.

ARGUMENT

I. Brewster's stipulation to a prior OWI offense was void as it was not made voluntarily or intelligently and the record failed to establish that the previous conviction qualified under Iowa Rule of Criminal Procedure 2.19(9) for enhancement purposes. The district court committed reversible error by failing to substantially comply with all of the plea-taking requirements of Rule 2.8(2)(b)(2) when accepting Brewster's stipulation.

Preservation of Error: In the context of a guilty plea, a defendant must generally file a motion in arrest of judgment to preserve a challenge to the plea on appeal. State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004); see also Iowa R. Crim. P. 2.24(3)(a). However, "this requirement does not apply where a defendant was never advised during the plea proceedings, as required by Rule 2.8(2)(d), that challenges to the plea must be made in a motion in arrest of judgment and that the failure to challenge the plea by filing the motion within the time

provided prior to sentencing precludes a right to assert the challenge on appeal." Meron, 675 N.W.2d at 540; see also Iowa R. Crim. P. 2.8(2)(d). The court's failure to comply with rule 2.8(2)(d) "operates to reinstate the defendant's right to appeal the legality of his plea." State v. Oldham, 515 N.W.2d 44, 46 (Iowa 1994).

An admission by a defendant of prior convictions cannot be said to be a plea of guilty to an habitual offender "charge," moreover, habitual offender statutes do not charge a separate offense. State v. Brady, 442 N.W.2d 57, 58 (Iowa 1989). They only provide for enhanced punishment on the current offense. See State v. Popes, 290 N.W.2d 926, 927 (Iowa 1980); State v. Smith, 282 N.W.2d 138, 143 (Iowa 1979).

But because a defendant's admission of prior convictions for purposes of a sentencing enhancement "is so closely analogous to a plea of guilty," our courts "refer to our rules governing guilty pleas" in determining the procedure which must be followed in accepting such admissions. Brady, 442 N.W.2d at 58; see also State v. Kukowski, 704 N.W.2d 687,

693 (Iowa 2005) (indicating that once it is "determined that the defendant desires to admit the prior convictions" under Rule 2.19(9) the court must "make a personal inquiry" as outlined in Rule 2.8(2)(b)). Brewster contends that the challenge to the stipulation of his prior offense for purposes of enhancement should be reviewed the same as challenges to guilty plea proceedings; that is, in accordance with our motion in arrest of judgment principals. Cf. State v. Peterson, No. 11–1409, 2012 WL 3860730, *4 (Iowa Ct. App. Sept. 6, 2012) (where district court made insufficient motion in arrest of judgment advisement, challenge to prior-offense stipulation would be decided directly).

In the present case, Brewster did not file any motion in arrest of judgment challenging his stipulation to the prior OWI offense for purposes of enhancement. However, such failure does not preclude a challenge to his stipulation on direct appeal because the district court failed to advise Brewster either (1.) of the right to challenge defects in his stipulation by filing a motion in arrest of judgment or (2.) that the failure to

file a motion in arrest of judgment would preclude him from challenging his stipulation on appeal, as required under Rule 2.8(2)(d).

Standard of Review: Claims of error in guilty plea proceedings are reviewed for correction of errors at law. See Iowa R. App. P. 6.907; see also Meron, 675 N.W.2d at 540. Since the prior-offense stipulation procedure is analogous to guilty plea proceedings, review is likewise for correction of errors at law. Cf. Brady, 442 N.W.2d at 58 (holding that a defendant's admission of prior felony convictions which provide the predicate for sentencing as an habitual offender is so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas). And to the extent the claims involve the interpretation of a statute or rule, review is similarly for corrections of errors at law. See Iowa R. App. P. 6.907.

Discussion: Brewster respectfully submits that the district court erred in accepting his stipulation to a prior OWI conviction for purposes of enhancement. The court failed to

engage in a sufficient colloquy to ensure that Brewster's affirmation was entered voluntarily and intelligently. Further, the record did not establish that Brewster's prior conviction qualified for enhancement under Iowa Rule of Criminal Procedure 2.19(9).

In this case, Brewster was charged with OWI 2nd predicated upon a prior conviction entered on April 11, 2008, in Linn County. (Trial Information – 8/24/15) (App. pp. 5-7). The case proceeded to a jury trial on the current OWI offense. After the final defense witness testified and before the case was submitted to the jury, the court accepted Brewster's stipulation to the prior OWI conviction. The court engaged in the following colloquy with Brewster.

> THE COURT: I do need to make a brief record, and I think this is the best time to do so.
> Mr. Brewster, you are charged with Operating While Under the Influence as second offender.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: The jury will be asked to decide in the event they find you guilty whether or not you are the same person who has previously been convicted of the offense of Operating While Under the Influence as alleged in the Trial Information unless

you are willing to enter into a stipulation with regard to that prior conviction. Have you talked to your attorney about that fact?

(A discussion was held off the record.)

THE DEFENDANT: Yes, ma'am.

THE COURT: So you and Mr. Davis have discussed the fact that the separate trial will be required to determine whether or not you had the prior conviction in the event the jury finds you guilty in this case?

THE DEFENDANT: Yes, ma'am.

THE COURT: My question to you is whether or not you are willing to admit that you have previously been convicted of the offense of Operating While Under the Influence in Linn County with the past 12 years or whether or not you wish the jury to find whether or not you are the same person who has that prior conviction?

THE DEFENDANT: Yes. Because – yes, ma'am.

THE COURT: You are the same person?

THE DEFENDANT: Yes, ma'am.

THE COURT: So you are willing to admit at this time that in the event the jury finds a verdict of guilty in this case, that it would be a second offense?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you do not need the jury to decide that separate element.

THE DEFENDANT: Okay.

THE COURT: Does the State wish any further record with regard to the enhancement?

MS. SLAUGHTER: Not from the State.

MR. DAVIS: No, Your Honor.

(Trial Vol. II – 1/06/16 Tr. p. 108, L. 25-p. 110, L. 16).

Where a defendant is alleged to be subject to enhanced punishment based on prior offenses, the defendant must first be convicted of the underlying offense and then, if found guilty, is entitled to a second trial on the prior convictions. Kukowski, 704 N.W.2d at 691. The State is held to the same "beyond a reasonable doubt" burden of proof in the trial on the enhancement as in the trial on the underlying conviction. Id. In addition to establishing that "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." Kukowski, 704 N.W.2d at 691.

Iowa Rule of Criminal Procedure 2.19(9) provides that "the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel." Iowa R. Crim. P. 2.19(9). Thus, the rule "gives the defendant an opportunity to affirm or deny the allegations the State is obligated to prove at the second trial." Kukowski, 704 N.W.2d at 692.

However, "[a]n affirmative response by the defendant under [Rule 2.19(9)]... does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender." Id. Rather, "[t]he court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent." Kukowski, 704 N.W.2d at 692. This is because, although Rule 2.8(2)(b) governing guilty pleas does not *expressly* apply to enhancements, a "defendant's admission of prior... convictions which provide the predicate for sentencing [enhancements] is

so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas...." Brady, 442 N.W.2d at 58. Rule 2.19(9) does not specifically address the court's responsibility to ensure an admission by an offender to a prior conviction is voluntary and intelligent. See Iowa R. Crim. P. 2.19(9). Nevertheless, "trial courts have a duty to ensure that defendants knowingly and voluntarily stipulate to having prior convictions," State v. McBride, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001), and Iowa "Rule [of Criminal Procedure] 2.8(2)(b) codifies [the] due process mandate" courts must follow in accepting admissions of guilt, State v. Loye, 670 N.W.2d 141, 151 (Iowa 2003).

In State v. McBride, 625 N.W.2d 372, 374 (Iowa Ct. App. 2001), the Court of Appeals determined that a full Rule 2.8(2)(b) colloquy is not required when a defendant stipulates to prior convictions for the habitual offender enhancement. Brewster asserts that this portion of McBride should be abrogated as it is inconsistent with the principles underlying Brady and Kukowski; that is, our rules governing guilty pleas

should be applied to such stipulations. See Brady, 442 N.W.2d at 58; Kukowski, 704 N.W.2d at 692. A prior-offense stipulation for enhancement purposes and a guilty plea both involve the relinquishment of constitutional rights. Due process requires a trial court to determine the defendant made a knowing and intelligent choice to waive constitutional rights. State v. Finney, 834 N.W.2d 46, 55 (Iowa 2013); U.S. Const. amend. V; U.S. Const. amend. XIV; Iowa Const. art. I, § 9; Iowa Const. art. 1, §10. Without a full plea-type colloquy for the stipulation, there is no other means to ensure that the defendant's admission regarding prior convictions is made voluntarily and intelligently and comports with the defendant's right to due process. See e.g. State v. Carter, 165 P.3d 687, 690 (Ariz. 2007) (*citing* State v. Morales, 157 P.3d 479, 481 (Ariz. 2007) (holding that before a superior court may accept defense counsel's stipulation to a prior conviction on behalf of his client, it must engage in a plea-type colloquy to ensure that the stipulation is voluntary and intelligent); cf. Boykin v.

Alabama, 395 U.S. 238, 242-43 & n.5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

With respect to guilty pleas, it is well-established that for an admission of guilt to be voluntary or intelligent a defendant must first be informed of the various trial rights being given up, the nature of the offense being admitted, and the minimum and maximum punishments. See Iowa R. Crim. P. 2.8(2)(b); State v. Sisco, 169 N.W.2d 542, 546 (Iowa 1969). Before a court accepts a guilty plea, it must also ensure the plea is made with a factual basis. See Iowa R. Crim. P. 2.8(2)(b). A substantial compliance standard is applied in assessing whether the trial court has adequately informed the defendant of the matters listed in the rule. State v. Loye, 670 N.W.2d 141, 151 (Iowa 2003). " 'Substantial compliance' requires at a minimum that the defendant be informed of these matters and understand them." Id.

Since a stipulation to prior offenses for enhancement purposes is comparable to a guilty plea, it logically follows that substantial compliance with the plea-taking procedures under

Rule. 2.8(2)(b) is required in this context as well. Substantial compliance with the rule ensures that the defendant's admission is voluntarily and intelligently made. See Kukowski, 704 N.W.2d at 692 ("In order to knowingly stipulate, a defendant should have an adequate grasp of the implications of his or her stipulation."); see also State v. Oetken, 613 N.W.2d 679, 688 (Iowa 2000) (noting the court "discharged its duty to inform the defendant as to the *ramifications* of an habitual offender adjudication" (emphasis added)).

In the present case, Brewster's stipulation was neither voluntary nor intelligent since the district court did not engage in a sufficient colloquy. Brewster was not informed that in order for the prior conviction to qualify under Rule 2.19(9) it must have been entered with the assistance of counsel or following a valid waiver of counsel. (Trial Vol. II – 1/06/16 Tr. p. 108, L. 25-p. 110, L. 16). See Iowa R. Crim. P. 2.8(2)(b)(1); see also Kukowski, 704 N.W.2d at 691 (stating in addition to establishing "the defendant is the same person named in the

convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel."); Iowa R. Crim. P. 2.19(9) (similarly reciting requirements). Additionally, the court did not advise Brewster of the penalties applicable for the enhanced sentence of OWI 2nd. (Trial Vol. II – 1/06/16 Tr. p. 108, L. 25-p. 110, L. 16). See Iowa Code §§ 321J.2(2)(b), 321J.2(4)(a)-(d) (2015). The court also did not inform Brewster of the various trial rights he had and was giving up by stipulating to the prior offense for enhancement purposes. See Iowa R. Crim. P. 2.8(2)(b)(4)-(5). Although the court indicated that Brewster was entitled to a "second trial" on his second-offender status, he was not advised that all the same trial rights applying to the underlying offense would continue to apply at the enhancement phase as well. (Trial Vol. II – 1/06/16 Tr. p. 108, L. 25-p. 110, L. 16).

Furthermore, the record of the stipulation did not establish that Brewster's prior conviction qualified under Iowa Rule of Criminal Procedure 2.19(9). See Iowa R. Crim. P.

2.19(9). Cf. State v. Rodriguez, 804 N.W.2d 844, 849 (Iowa 2011) (the factual basis for a guilty plea must be disclosed in the record). During the court's colloquy on the stipulation, Brewster merely admitted to having a predicate OWI conviction within the last twelve years to support the second-offender enhancement under Iowa Code section 321J.2(2)(b) (2015). (Trial Vol. II – 1/06/16 Tr. p. 108, L. 25-p. 110, L. 16). But the court did not conduct a further inquiry to determine whether that prior conviction was entered with the assistance of counsel or following a valid waiver of counsel. See Iowa R. Crim. P. 2.8(2)(b)(1); see also Kukowski, 704 N.W.2d at 691 (stating in addition to establishing "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel."); Iowa R. Crim. P. 2.19(9) (similarly reciting requirements).

According to the minutes of testimony, the State intended to introduce records from the Clerk of Court for Linn County establishing that Brewster had been previously convicted of

OWI in Linn County on April 11, 2008. (Minutes – 8/24/15, p. 2) (App. pp. 8-10). However, there is nothing else in the minutes showing that Brewster was either represented by counsel or validly waived his right to counsel on his prior OWI. (Minutes – 8/24/15, p. 2) (App. pp. 8-10). Cf. Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014)("At the time of the guilty plea, the record must disclose facts to satisfy all elements of the offense."); State v. Finney, 834 N.W.2d 46, 62 (Iowa 2013) ("On a claim that a plea bargain is invalid because of a lack of accuracy on the factual-basis issue, the entire record before the district court may be examined"). The present case is distinguishable from State v. Bumpus, 459 N.W.2d 619, 626 (Iowa 1990) and State v. Vesey, 482 N.W.2d 165, 168 (Iowa Ct. App. 1991), where there was no finding of prejudice when the minutes affirmatively showed the defendant was represented by counsel on the prior convictions. In Bumpus, the State introduced a judgment entry of the previous conviction and the minutes of testimony indicated the State intended to call the defendant's former attorney to testify as to his identity in

connection with the earlier conviction. Bumpus, 459 N.W.2d at 626. In Vesey, the "Notice of Introduction of Witnesses" included the clerk of court of two counties and the defendant's parole officer to testify to the defendant's prior conviction, his identity, and his prior representation by counsel. Vesey, 482 N.W.2d at 168.

In light of the foregoing infirmities, Brewster's stipulation was void as it was neither voluntary nor intelligent and the record on the stipulation did not establish that his prior conviction qualified under Iowa Rule of Criminal Procedure 2.19(9). Kukowski, 704 N.W.2d at 692; Loye, 670 N.W.2d at 151; Sisco, 169 N.W.2d at 546. The district court's failure to substantially comply with the requirements of Rule 2.8(2)(b)(2) in the context of a stipulation to prior offenses constitutes reversible error. Consequently, the proper remedy is to vacate his conviction and sentence for OWI 2nd and remand the case for further stipulation proceedings pursuant to Rule 2.19(9) and 2.8(2)(b) or a trial on Brewster's second-offender status.

II. Defense counsel was ineffective for failing to file a motion in arrest of judgment or to otherwise challenge Brewster's prior-offense stipulation on the ground that the record did not establish that the conviction qualified under Iowa Rule of Criminal Procedure 2.19(9) for enhancement purposes.

Preservation of Error: Ineffective-assistance-of-counsel claims are not bound by traditional rules of error preservation. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). "To the extent error is not preserved on an issue, any objections must be raised within an ineffective-assistance-of-counsel framework." State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015).

Standard of Review: Review of ineffective-assistance-of-counsel claims is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012).

The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to "effective" assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). Claims of ineffective-assistance-of-counsel claims

are normally preserved for postconviction relief proceedings. State v. Palmer, 791 N.W.2d 840, 850 (Iowa 2010). Nonetheless, the merits of these claims may be considered on direct appeal as long as the record is adequate. See id. Brewster asserts that the record is adequate in this case.

To establish his claim of ineffective assistance of counsel, Straw must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984); State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015). The defendant has the burden of proving both elements by a preponderance of the evidence. See State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

Discussion: As previously asserted, the record of stipulation in this case failed to establish that Brewster's prior conviction qualified for the sentencing enhancement under Rule 2.19(9). More specifically, there was insufficient evidence that Brewster was either represented by counsel or knowingly waived counsel on his previous conviction. There was nothing

in the record before the court that addressed this element. At the stipulation proceeding, Brewster merely admitted to having a prior OWI conviction within the last twelve years. (Trial Vol. II – 1/06/16 Tr. p. 108, L. 25-p. 110, L. 16). See Rule 2.8(2)(b); see also Kukowski, 704 N.W.2d at 691 (stating in addition to establishing "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel."); Iowa R. Crim. P. 2.19(9) (similarly reciting requirements). Brewster asserts that defense counsel was ineffective for failing to file a motion in arrest of judgment or to otherwise challenge the defective stipulation on this ground.

Defense counsel breached an essential duty by not challenging the stipulation when the record failed to establish that Brewster's prior conviction could be used for enhancement purposes pursuant to Rule 2.19(9). Because a defendant's admission of prior convictions for purposes of a sentencing enhancement "is so closely analogous to a plea of

guilty," Brady, 442 N.W.2d at 58; the rationale of the cases addressing ineffective-assistance-of-counsel claims arising out a guilty plea that lacks a factual basis should be adopted here. See State v. Philo, 697 N.W.2d 484–85 (Iowa 2005)(holding defense counsel violates an essential duty when counsel permits the defendant to plead guilty and waive his right to file a motion in arrest of judgment when there is no factual basis to support the defendant's guilty plea); State v. Hack, 545 N.W.2d at 262, 263 (Iowa 1996)(stating that endorsing a trial strategy which allows a client to plead guilty notwithstanding the lack of factual basis erodes the integrity of all pleas and the public confidences in the criminal justice system).

In order "[t]o establish prejudice, a claimant must demonstrate 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " State v. Carroll, 767 N.W.2d 638, 641 (Iowa 2009) (citation omitted). "In the context of a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not

have pleaded guilty and would have insisted on going to trial. State v. Straw, 709 N.W.2d 128, 136 (Iowa 2006) (*quoting* Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985)). However, we have not applied the Strickland prejudice requirement in evaluating a claim of ineffective assistance of counsel stemming from a guilty plea that is unsupported by a factual basis. Prejudice is presumed under these circumstances. See State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999). Similarly, a prejudice per se rule should be applied where, as here, the record does not establish that the defendant's prior conviction could be used to enhance the defendant's current offense under Rule 2.19(9).

The appropriate remedy for a finding of ineffective assistance of counsel under these circumstances is to vacate Brewster's conviction and sentence and remand his case for further stipulation proceedings pursuant to Rules 2.19(9) and 2.8(2)(b) or a trial on the sentencing enhancement. Cf. State v. Mitchell, 650 N.W.2d 619, 621 (Iowa 2002) (per curiam) (stating that if it is possible that a factual basis could be

shown for the defendant's guilty plea, the appropriate remedy is to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis).

CONCLUSION

For the reasons expressed above, Defendant-Appellant, Clark Andrew Brewster, respectfully requests that his conviction and sentence for OWI 2nd be vacated and his case remanded for further stipulation proceedings pursuant to Rules 2.19(9) and 2.8(2)(b) or trial on the sentencing enhancement.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.65, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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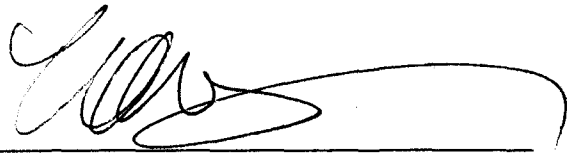

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