

IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1112

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON GENE WEITZEL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
THE HONORABLE PETER B. NEWELL, JUDGE

APPELLANT'S BRIEF

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FINAL

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issue Presented for Review 1

Routing Statement..... 2

Statement of the Case 2

Argument 5

THE COURT ERRED IN ACCEPTING THE DEFENDANT’S PLEA OF GUILTY AS HE WAS NOT INFORMED OF THE CONSEQUENCES OF THE PLEA AS REQUIRED BY IOWA RULE OF CRIMINAL PROCEDURE 2.8

Conclusion 11

Request for Submission 11

Certificate of Compliance 12

Certificate of Mailing..... 12

TABLE OF AUTHORITIES

Cases

Commonwealth v. Persinger, 615 A.2d 1305 (Pa. 1992)..... 10

State v. Boone, 298 N.W.2d 335 (Iowa 1980)..... 10

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)..... 7

State v. Clay, 824 N.W.2d 488 (Iowa 2012)..... 7

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)..... 2, 5, 6, 8, 10

<i>State v. Hinners</i> , 471 N.W.2d 841 (Iowa 1991)	6
<i>State v. Kress</i> , 636 N.W.2d 12 (Iowa 2001)	9
<i>State v. LaRue</i> , 619 N.W.2d 395 (Iowa 2000).....	7
<i>State v. Velez</i> , 829 N.W.2d 572 (Iowa 2013)	5
<i>State v. White</i> , 587 N.W.2d 240 (Iowa 1998).....	9

Iowa Statutes

Iowa Code section 321J.2(3)(c)	9
Iowa Code section 911.1.....	8
Iowa Code section 911.2B.....	8

Iowa Court Rules

Iowa R.Crim.P. 2.8	6, 7
Iowa R.Crim.P. 2.24	5

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

THE COURT ERRED IN ACCEPTING THE DEFENDANT’S PLEA OF GUILTY AS HE WAS NOT INFORMED OF THE CONSEQUENCES OF THE PLEA AS REQUIRED BY IOWA RULE OF CRIMINAL PROCEDURE 2.8

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)

State v. Velez, 829 N.W.2d 572 (Iowa 2013)

Iowa R.Crim.P. 2.24

State v. Hinners, 471 N.W.2d 841 (Iowa 1991)

Iowa R.Crim.P. 2.8

State v. LaRue, 619 N.W.2d 395 (Iowa 2000)

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)

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

Iowa Code section 911.1

Iowa Code section 911.2B

Iowa Code section 321J.2(3)(c)

State v. Kress, 636 N.W.2d 12 (Iowa 2001)

State v. White, 587 N.W.2d 240 (Iowa 1998)

Commonwealth v. Persinger, 615 A.2d 1305 (Pa. 1992)

State v. Boone, 298 N.W.2d 335 (Iowa 1980)

ROUTING STATEMENT

This case would allow the Supreme Court to resolve an important legal question which was left unanswered by its opinion in *State v. Fisher*, 877 N.W.2d 676 (Iowa 2016); therefore, retention by the Supreme Court would be appropriate. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

Jason Gene Weitzel appeal from the judgment and sentence entered against him following his plea of guilty in district court.

Course of Proceedings

Weitzel was charged by a five count trial information. (Trial Information; App. p. 1) After plea negotiations, he entered pleas of guilty to four of the five counts on May 17, 2016. (Plea Change Order; App. p. 7) On June 28, 2016, he was sentenced. (Judgment and Sentencing; App. p. 10) Weitzel timely filed a notice of appeal. (Notice of Appeal; App. p. 16)

Facts

The underlying facts of the crime are irrelevant to this appeal as this appeal is based on the procedural matters arising from the plea change procedures.

On March 11, 2016, Weitzel was charged by a five count trial information. (Trial Information; App. p. 1) He entered pleas of guilty in open court to the following counts:

Count I: Domestic abuse assault impeding the normal breathing or circulation of blood resulting in injury, a class “D” felony, in violation of Iowa Code section 708.2A(1) and 708.2A(5).

Count III: Possession of methamphetamine, a schedule II controlled substance, second offense, an aggravated misdemeanor, in violation of Iowa Code section 124.401(5).

Count IV: Carrying weapons, an aggravated misdemeanor, in violation of Iowa Code section 724.4(1).

Count V: Operating while intoxicated, first offense, a serious misdemeanor, in violation of Iowa Code section 321J.2. (Plea Change Order; App. p. 7)

Weitzel did not file any written pleas of guilty and the only record established about the plea change was the court transcript (Plea trans.) Weitzel did not file a motion in arrest of judgment. He was sentenced on June 28, 2016 to a indeterminate five year prison sentence on Count I to run consecutively to the two concurrent two year prions sentences on Count III and IV as well as the mandatory minimum sentence on Count V. (Judgment and Sentence; App. p. 10)

The sentence also included various financial provision including fines, suspended fines, surcharges, and court costs which are discussed more in detail in the argument. In fairness, it should be noted that the Weitzel does not contest the legality of the financial obligations imposed by the court.

The following are excerpts from the court's colloquy with Weitzel where the court set forth the minimum and maximum fines for each of the counts.

Count I: Domestic abuse assault impeding the normal breathing or circulation of blood resulting in injury:

...a maximum possible fine of \$7,500. This charge would have a mandatory minimum \$750, but that fine could be suspended, meaning you would not have to pay that. (Plea trans. p. 9 ls. 9-12)

Count III: Possession of methamphetamine, a schedule II controlled substance, second offense:

...a maximum possible fine of \$6,250. Each of those (counts III and IV) would carry a mandatory minimum penalty of a \$625 fine, but the Court could suspended those fines, meaning you would not have to pay them. (Plea trans. p. 10 ls. 7-10)

On the charge in Count 3, there is a mandatory Law Enforcement surcharge, and that is \$125; and I believe that there is also a mandatory DARE surcharge in that case of \$10. (Plea trans. p. 10 ls. 11-13)

Count IV: Carrying weapons:

“...\$6,250 - - \$625 fine, that can be suspended.” (Plea trans. p. 10 l. 19)

Count V: Operating while intoxicated, first offense:

...carries a maximum possible fine of \$1,500. Carries with it a mandatory minimum penalty of \$1,250. That can be cut in half or half of it could be suspended if, prior to sentencing, you obtain a temporary restricted license... (Plea trans. p. 11 ls. 6-10)

Additional facts will be set forth in the argument.

**ISSUE: THE COURT ERRED IN ACCEPTING THE DEFENDANT'S
PLEA OF GUILTY AS HE WAS NOT INFORMED OF THE
CONSEQUENCES OF THE PLEA AS REQUIRED**

Standard of Review: The standard of review for guilty pleas is for correction of errors at law. *State v. Fisher*, 877 N.W.2d 676, 680 (citing *State v. Velez*, 829 N.W.2d 572, 575 (Iowa 2013))

Preservation of Error: Iowa R.Crim.P. 2.24 requires a defendant to file a motion in arrest of judgment in order to preserve error in order to challenge to a guilty plea. However, the defendant must be advised as to the substance of that rule. The Court in *Fisher* found the following acknowledgement contained in the written plea of guilty to be deficient:

I have been advised of my right to challenge this plea of guilty by filing a Motion in Arrest of Judgment at least five (5) days prior to the date that the Court sets for sentencing and within forty-five (45) days after the Court accepts my plea. *Fisher*, 877 N.W.2d at 679

The court informed Weitzel with strikingly similar language:

Now Mr. Weitzel, because we've not gone to Sentencing today, I need to advise you that you have the right to file a motion, called a motion in arrest of judgment. And you would file that

motion if you believe I have made any mistakes or error in accepting your plea here today.

If you are going to file that motion, you have to do so within 45 days of today's date, or in any case, not later than five days before the date set for sentencing.

If you have any questions about that motion, please speak to your attorney. (Plea Trans. p. 22, ls. 8-18)

Just as in *Fisher*, Weitzel was not advised that a failure to file a motion in arrest of judgment would prevent him from filing an appeal challenging the guilty plea. Therefore, Weitzel is not precluded from challenging his guilty plea on appeal. *See, Fisher*, 722 N.W.2d at 682

Although the plea change order did indicate the full implication of not filing the motion in arrest of judgment, there is no indication the defendant understood or even read that paragraph. (Plea change order; App. p. 7) A mere inclusion of this right in a written order does not rise to the level of assurance that the defendant knew about the rights afforded under the motion in arrest of judgment and voluntarily and intentionally waived the right to appeal. *See, State v. Hinners*, 471 N.W.2d 841, 845 (Iowa 1991) If the requirement in Iowa R.Crim.P. 2.8 is that the court "...determine the defendant understands..." the provisions specifically listed out in the rule, then this requirement should also apply to the other rights included in the plea proceeding required, but not enumerated in the rule.

Alternatively, if the court finds that error was not preserved, the appeal may still be prosecuted. An exception to the preservation of error requirements in

ineffective assistance of counsel. *State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000). The standard of review on an ineffective assistance of counsel is de novo. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). The defendant must show his attorney failed to perform an essential duty and that he suffered prejudice. *State v. Clay*, 824 N.W.2d 488 (Iowa 2012).

Argument

Iowa R.Crim.P. 2.8(2)(b). Pleas of guilty. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

The colloquy with the defendant was deficient in several aspect regarding the financial implications to the defendant.

A. Failure to inform the defendant of the mandatory surcharge for each count pursuant to Iowa Code section 911.1.

Weitzel entered pleas of guilty to four of the five counts of the trial information. As part of the plea process, Weitzel was to be informed of the minimum and maximum fines with the mandatory surcharges for each of the counts.

[W]e need not decide today whether failure to disclose the surcharges *alone* would have meant the plea did not *substantially comply* with rule 2.8(2)(b)(2). Regardless, we hold that *actual compliance* with rule 2.8(2)(b)(2) requires disclosure of all applicable surcharges. *Fisher*, 877 N.W.2d at 686, footnote 6 (emphasis in original)

The court never mentioned in its colloquy with Weitzel that he was required to pay the thirty-five percent surcharge pursuant to Iowa Code section 911.1. Since this is clearly not actual compliance with the rule 2.8 as held in *Fisher*, the question before this court on this case is whether this meets the substantial compliance required under Iowa R.Crim.P. 2.8.

B. Failure to disclose the mandatory surcharge on count I pursuant to Iowa Code section 911.2B.

Iowa Code section 911.2B requires a \$100 domestic abuse surcharge for violations of Iowa Code section 708.2A. Count I is such an offense and requires the surcharge. It was omitted in the colloquy. Just as the driver's license revocation for a violation of Iowa Code chapter 124 is a direct and mandatory consequence of a plea of guilty, so is this surcharge; therefore, the court was required to disclose it. *Fisher*, 877 N.W.2d at 684. The failure to disclose this surcharge as a "mandatory, immediate, and part of the punishment" requires the plea to be set aside as it was involuntary. *Id.*

C. Failure to correctly identify the correct maximum possible fine on count V pursuant to Iowa Code section 321J.2.

The court stated the maximum possible fine for operating while intoxicated, first offense was \$1,500. (Plea trans. p. 10 ls. 6-7) The fine for operating while intoxicated, first offense is set by the legislature at \$1,250. Iowa Code section 321J.2(3)(c). The court did not correctly inform the defendant of the maximum fine. There is no substantial compliance with rule 2.8(2)(b) when incorrect information is given. *State v. Kress*, 636 N.W.2d 12 (Iowa 2001)

D. Failure to inform the defendant the fines are cumulative.

By entering pleas of guilty to four counts, Weitzel was facing total fines in the amount of \$21,250 (7,500+6,250+6,250+1,250). The court did inform Weitzel the prison sentences could run consecutively. (Plea trans. p. 13 ls. 13-16) The court however, did not inform him that the maximum fines would be cumulative. Had this been a failure of the court to advise the prison sentences could be ordered to run consecutively, there is no room to argue the colloquy was in substantial compliance with rule 2.8(2)(b). *State v. White*, 587 N.W.2d 240 (Iowa 1998)

In order to understand the consequences of his plea it is clear that a defendant must be informed of the maximum punishment that might be imposed for his conduct. To hold that the term "maximum" does not include the total possible aggregate sentence is clearly incorrect. And to hold that a plea was intelligently and understandingly entered where a defendant was not informed that consecutive sentences could be imposed upon his multiple convictions is equally incorrect. *Id.* at

245 quoting *Commonwealth v. Persinger*, 615 A.2d 1305, 1308 (Pa. 1992)

Each of the aforementioned issues deprived Weitzel from having a full understanding of the true implications of his decision to enter a plea of guilty.

A defendant who enters a plea of guilty waives several constitutional rights. For the waiver to be valid under the Due Process Clause ... there must be an intentional relinquishment of known rights or privileges. If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of constitutional guarantees of due process and is therefore void. The defendant must have a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently. *State v. Boone*, 298 N.W.2d 335 (Iowa 1980)

As the colloquy with the defendant through the failure to disclose the mandatory surcharges, the correct fine amounts, and the cumulative nature of the fines, the pleas violated due process and are void. Therefore, the entirety of the guilty pleas should be vacated. *See, State v. Fisher*, 877 N.W.2d 676 (Iowa 2016)

Alternatively, the failure of the Weitzel's attorney to allow the plea to proceed without ensuring he had a full understanding of the financial implications was error which prevented him from intelligently entering his pleas of guilty.

CONCLUSION

The defendant-appellant respectfully request that this Court vacate the pleas of guilty entered in this matter and remand to the district court for further proceedings.

REQUEST FOR SUBMISSION

Defendant-appellant hereby respectfully requests that this matter be submitted with oral argument.

/s/ David A. Kuehner

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[x] this brief contains 2145 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF MAILING

I certify that on the date of filing a copy of this brief was also mailed to the following person the address listed:

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