

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

APPELLEE'S BRIEF

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**STATEMENT OF THE ISSUES PRESENTED FOR
REVIEW**

I. Whether the Defendant Has Established That His Trial Counsel Was Ineffective For Failing to File a Motion In Arrest of Judgment Challenging the Adequacy of the District Court’s Advice Regarding the Guilty Plea.

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Brewer v. State, 444 N.W.2d 77 (Iowa 1989)
King v. State, 797 N.W.2d 565 (Iowa 2011)
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Iowa R. Crim. P. 2.8(2)
Iowa R. Crim. P. 2.8(2)(b)
Iowa R. Crim. P. 2.8(2)(d)

II. Whether, Alternatively, the District Court Substantially Complied With the Requirements of Iowa Rule of Criminal Procedure 2.8(2)(b).

Authorities

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)
State v. Fluhr, 287 N.W.2d 857 (Iowa 1980)
State v. Velez, 829 N.W.2d 572 (Iowa 2013)
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Iowa R. Crim. P. 2.8(2)
Iowa R. Crim. P. 2.8(2)(b)
Iowa R. Crim. P. 2.8(2)(b)(2)

ROUTING STATEMENT

Although the defendant requests that this case be retained by the Iowa Supreme Court, his claim must be addressed as one of ineffective assistance of counsel and therefore involves the application of existing legal principles to the facts. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Jason Weitzel, appeals from the judgment and sentence entered following his plea of guilty to domestic abuse assault impeding the normal breathing or circulation of blood resulting in bodily injury, in violation of Iowa Code sections 708.2A(1) and 708.2A(5), a class “D” felony; possession of methamphetamine, second offense, in violation of Iowa Code section 124.401(5), an aggravated misdemeanor; carrying weapons, in violation of Iowa Code section 724.4(1), an aggravated misdemeanor; and operating while intoxicated, first offense, in violation of Iowa Code section 321J.2, a serious misdemeanor.

The defendant claims on appeal that the district court did not adequately advise him of the matters set forth in Iowa Rule of Criminal Procedure 2.8(2)(b) regarding his guilty plea or, alternatively, that his trial counsel rendered ineffective assistance by failing to file a motion in arrest of judgment challenging the adequacy of the court’s advice regarding the guilty plea.

Course of Proceedings and Disposition

On March 11, 2016, the State filed a trial information charging the defendant with domestic abuse assault impeding the normal

breathing or circulation of blood resulting in bodily injury, in violation of Iowa Code sections 708.2A(1) and 708.2A(5), a class “D” felony (Count I); threat of terrorism, in violation of Iowa Code sections 708A.5 and 708A.1, a class “D” felony (Count II); possession of methamphetamine, a Schedule II controlled substance, second offense, in violation of Iowa Code section 124.401(5), an aggravated misdemeanor (Count III); carrying weapons, in violation of Iowa Code section 724.4(1), an aggravated misdemeanor (Count IV); and operating while intoxicated, first offense, in violation of Iowa Code section 321J.2, a serious misdemeanor (Count V). Trial Information (3/11/16); App. 1. The defendant pleaded not guilty to those charges. Written Arraignment and Plea of Not Guilty (3/21/16); App. --. The State later amended the trial information to change Count II to intimidation with a dangerous weapon, in violation of Iowa Code section 708.6, a class “D” felony. Motion to Amend Trial Information (4/12/16); Amended Trial Information (4/12/16); App. --, 4.

On May 17, 2016, pursuant to a plea agreement, the defendant entered Alford pleas to Counts I, III, IV, and V. Plea Tr. (5/17/16) p. 18, line 20 – p. 19, line 20; Record of Plea Change (5/17/16); App. 7.

In return, the State dismissed Count II. Plea Tr. (5/17/16) p. 11, line 24 – p. 12, line 24; Record of Plea Change (5/17/16); App. 7.

At a later sentencing proceeding, the district court imposed a term of incarceration not to exceed five years and a fine of \$750.00 plus the statutory 35% surcharge and domestic abuse surcharge on Count I; terms of incarceration not to exceed two years and a fine of \$625 plus the statutory 35% surcharge on Counts III and IV; and a two-day term of incarceration in the county jail and a fine of \$1250 plus the statutory 35% surcharge on Count V. Judgment and Sentence (6/28/16); App. 10. The court ordered that the prison terms on Counts I, III, and IV be served consecutively but that the two-day jail term on Count V be served concurrently. Judgment and Sentence (6/28/16); App. 10.

The defendant filed a timely notice of appeal. Notice of Appeal (6/30/16); App. 16.

Facts

The State will set forth relevant facts in the course of its argument.

ARGUMENT

I. **The Defendant Has Not Established That His Trial Counsel Was Ineffective For Failing to File a Motion In Arrest of Judgment Challenging the Adequacy of the District Court’s Advice Regarding the Guilty Plea.**

Preservation of Error

Generally, “[a] defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal.”

Iowa R. Crim. P. 2.24(3)(a). There is an exception to this rule where a defendant is not 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.

State v. Fisher, 877 N.W.2d 676, 680 (Iowa 2016) (citing *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004)); *State v. Loye*, 670 N.W.2d 141, 150 (Iowa 2003) (excusing error preservation when the “court’s comments in no way conveyed the fact that the defendant’s failure to file a motion attacking the adequacy of her plea would forfeit her right to challenge the plea on appeal”).

Iowa Rule of Criminal Procedure 2.8(2)(d) provides:

The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

Iowa R. Crim P. 2.8(2)(d). This Court employs a substantial-compliance test in determining whether the rule has been satisfied.

State v. Myers, 653 N.W.2d 574, 577-78 (Iowa 2002).

Because the defendant failed to file a motion in arrest of judgment challenging his guilty plea and the district court substantially complied with Iowa Rule of Criminal Procedure 2.8(2)(d), direct consideration of this claim on appeal is barred. Iowa R. Crim. P. 2.24(3)(a); *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980) (“Where the trial court informs the defendant of this procedural requirement, we will not hesitate to preclude challenges to plea proceedings on appeal.”).

During the plea proceeding, the district court advised the defendant as follows:

Now, Mr. Weitzel, because we’ve not gone to Sentencing today, I need to advised 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 errors 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 Tr. p. 22, lines 8-18. The court's statement during the proceedings did not inform the defendant that if he failed to file a motion in arrest of judgment, he would be precluded from challenging any defect in the plea proceedings on appeal. *See Meron*, 675 N.W.2d at 541 (stating that the court must inform the defendant (1) "that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment" and (2) "that failure to so raise such challenges shall preclude the right to assert them on appeal").

However, on the same day the defendant entered his guilty pleas, the district court filed a written memorandum of the plea proceedings that included the following paragraph:

Defendant is advised by the Court pursuant to Rule 2.24, Iowa Rules of Criminal Procedure, that a Motion in Arrest of Judgment must be made not later than 45 days after plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction may be rendered, but in any case

not later than five (5) days before the date set for pronouncing judgment. A Motion in Arrest of Judgment is an application by the Defendant that no judgment be rendered on a finding, plea, or verdict of guilty. A Defendant's failure to challenge the adequacy of a guilty plea proceeding by Motion in Arrest of Judgment shall preclude his or her right to assert such challenge on appeal.

Record of Plea Change (5/17/16); App. 7. That written statement provided all of the information required under Iowa Rule of Criminal Procedure 2.8(2)(d). Thus, the court's comments during the plea colloquy coupled with the written statement in the record of plea change substantially complied with rule 2.8(2)(d). *Cf. State v. Oldham*, 515 N.W.2d 44, 46-47 (Iowa 1994) (finding that colloquy and written application to withdraw plea of not guilty considered together were sufficient to notify the defendant of the consequences of failing to file a motion in arrest of judgment); *State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990) (considering written plea and oral sentencing comments together to determine whether there was substantial compliance with rule 2.8(2)(b)); *State v. Beeman*, No. 14-1792, 2016 WL 3269527, *2 (Iowa Ct. App. June 15, 2016) (concluding that the written pleas coupled with the court's in-court advisory constituted substantial compliance with rule 2.8(2)(d)).

The function of rule 2.8(2) is to ensure a defendant understands that he has the right to appeal the plea proceedings within the applicable time frame. So long as that concept is conveyed, the failure to file a motion in arrest of judgment precludes a direct challenge to the guilty plea. *Fisher*, 877 N.W.2d at 680. That principle promotes finality, which is an important component of justice. *State v. Mann*, 602 N.W.2d 785, 789 (Iowa 1999).

Because the district court substantially complied with rule 2.8(2)(d) and the defendant failed to file a motion in arrest of judgment, error was not preserved. This Court therefore should address the defendant's claim as one of ineffective assistance of counsel. The general error-preservation rule does not apply to such a claim. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982).

Standard of Review

Ineffective-assistance-of-counsel claims involve a constitutional challenge and therefore are reviewed de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Merits

A defendant claiming ineffective assistance of counsel must prove both of the following elements: (1) counsel failed to

perform an essential duty; and (2) the defendant was prejudiced by counsel's errors. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996); *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996). To prove that counsel failed to perform an essential duty, the defendant must "overcome the presumption counsel is competent and show counsel's performance is not within the range of normal competency." *State v. Thornton*, 498 N.W.2d 670,675 (Iowa 1993). The reviewing court "will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail." *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). To prove prejudice, the defendant must show a reasonable probability that the outcome of the trial would have been different. *King v. State*, 797 N.W.2d 565, 574 (Iowa 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). 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, 138 (Iowa 2006) (citing *Hill v. Lockhart*, 474 U.S.52, 59 (1985)). The reviewing court may dispose of an ineffective assistance claim if the defendant fails to satisfy either the breach of duty or the prejudice

prong of the *Strickland* test. *State v. Cook*, 565 N.W.2d 611,614 (Iowa 1997).

Ordinarily, postconviction proceedings are the preferred forum for resolving ineffective assistance of counsel claims. *State v. Johnson*, 445 N.W.2d 337, 339 (Iowa 1989); *State v. Poyner*, 306 N.W.2d 716, 719 (Iowa 1981). Such proceedings afford an opportunity for a full evidentiary hearing where counsel may respond to the defendant's charges. *Johnson*, 445 N.W.2d at 339. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *Id.* (quoting *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)). Nevertheless, when the record is adequate to address an ineffective assistance claim, the reviewing court may do so on direct appeal. *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999).

In the present case, the defendant claims his trial counsel was ineffective for failing to challenge several alleged deficiencies in the plea colloquy: (1) the court's failure to inform the defendant of the 35% surcharge under Iowa Code section 911.1; (2) the court's failure to inform the defendant of the \$100.00 domestic abuse surcharge under 2015 Iowa Acts chapter 96, section 15 (codified at Iowa Code section 911.2B); (3) the court's inaccurate statement about the

amount of the fine for operating while intoxicated, first offense; and (4) the court's failure to inform the defendant that the fines were cumulative.

The defendant cannot establish that his counsel was ineffective. With regard to the 35% surcharge, the defendant cannot show that he would have insisted on proceeding to trial had he known of the surcharge. *See Straw*, 709 N.W.2d at 138. Under the terms of the plea agreement, the defendant avoided a conviction of a class "D" felony – intimidation with a dangerous weapon, in violation of Iowa Code section 708.6, which carried a possible five-year term of incarceration. *See Iowa Code § 902.9(e)*. It is unlikely knowledge of the surcharge would have led him to proceed to trial. With regard to the domestic abuse surcharge, the district court did advise him of that consequence of his plea. Although the court initially did not discuss the domestic abuse surcharge, it did inform the defendant of the surcharge a short time later after the prosecutor made reference to it. *See Plea Tr.* p. 11, line 24 – p. 13, line 7. As to the amount of the fine for operating while intoxicated, first offense, the court incorrectly advised the defendant that the maximum possible fine was \$1,500.00, when in fact it is \$1,250.00. *Plea Tr.* p. 11, lines 4-19; *see*

Iowa Code section 321J.2(3)(c). The defendant cannot credibly argue that the court's overstatement of the amount of the fine influenced his decision to plead guilty. Finally, the State is aware of no authority that requires the district court to inform a defendant that fines on different counts will be cumulative. Although the district court has the discretion under Iowa Code section 901.8 to order sentences imposed on different counts to be served concurrently or consecutively, there is no corresponding provision for fines. Unless the court suspends the fine (and in some cases it cannot), the defendant is responsible for paying the fines for each offense.

The defendant has not established his claim of ineffective assistance.

II. The District Court Substantially Complied With the Requirements of Iowa Rule of Criminal Procedure 2.8(2)(b).

Preservation of Error

As discussed above, the defendant did not preserve this claim of error.

Standard of Review

Review of challenges to guilty pleas is ordinarily for correction of errors at law. *State v. Fisher*, 877 N.W.2d 676, 680 (Iowa 2016) (citing *State v. Velez*, 829 N.W.2d 572, 575 (Iowa 2013)).

Merits

If this Court directly addresses the defendant's claims, it should find the district court substantially complied with the requirements of Iowa Rule of Criminal Procedure 2.8. As set forth above, the defendant claims the plea colloquy was deficient in the following regards: (1) the court failed to inform the defendant of the 35% surcharge under Iowa Code section 911.1; (2) the court failed to inform the defendant of the domestic abuse surcharge under 2015 Iowa Acts chapter 96, section 15 (codified at Iowa Code section 911.2B); (3) the court made an inaccurate statement about the amount of the fine for operating while intoxicated, first offense; and (4) the court failed to inform the defendant that the fines were cumulative. As set forth above, the district court did inform the defendant of the \$100.00 domestic abuse surcharge, and there is no requirement that the court advise the defendant that fines on different counts will be cumulative. There were no deficiencies in the plea colloquy with respect to those matters, so the State will not address the second and fourth matters here.

With regard to the statutory surcharge under Iowa Code section 911.1, the Iowa Supreme Court has held that "*actual compliance* with

rule 2.8(2)(b)(2) requires disclosure of all applicable chapter 911 surcharges” but has declined to address “whether failure to disclose the surcharges *alone* would have meant the plea did not “*substantially comply* with rule 2.8(2)(b)(2).” *Fisher*, 877 N.W.2d at 680. This Court should determine that the district court substantially complied with the rule in this case. When the court informs a defendant of the maximum possible term of incarceration, which directly implicates the defendant’s liberty interest; the maximum fine; and the other matters set forth in rule 2.8, the defendant has an adequate basis for deciding whether to proceed with the plea. Information regarding a surcharge is less likely to have an impact on the defendant’s decision, so that the failure to advise of the surcharge should not invalidate the plea.

As to the fact the district court informed the defendant the fine for operating while intoxicated, first offense, was \$1,500.00 instead of \$1,250.00, “a plea-taking error which raises no doubt as to the voluntariness or factual accuracy of the plea may be properly disregarded, provided the defendant is unable to prove prejudice.” *State v. Fluhr*, 287 N.W.2d 857, 864 (Iowa 1980), *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801, 804-05 (Iowa 1990).

Because the maximum fine was actually less than the amount stated by the court, the defendant cannot show that he was prejudiced by the inaccuracy.

The plea colloquy conducted by the district court in this case substantially complied with the requirements of Iowa Rule of Criminal Procedure 2.8(2)(b).

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm Jason Weitzel's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

The State requests that this matter be submitted nonorally.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:
 - This brief contains **2,976** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)
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Dated: January 9, 2017


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