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

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: May 3, 2017)

THOMAS J. MILLER
Attorney General of Iowa

JEAN C. PETTINGER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
jean.pettinger@iowa.gov

RACHEL GINBEY
Floyd County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

QUESTION PRESENTED FOR REVIEW

Whether Automatic Reversal is Required When the District Court Fails During the Plea Colloquy to Advise the Defendant that His Fines, If Imposed, Will Carry 35% Surcharges.

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals' decision in this matter modifies this Court's well-established substantial compliance standard by replacing it with a bright-line strict compliance standard. *See State v. Weitzel*, No. 16-1112, 2017 WL 1735743, at *3-10 (Iowa Ct. App. May 3, 2017) (establishing a bright-line rule requiring automatic reversal for any misstatement or omission during maximum punishment warning, including omissions of surcharges); *see also State v. Diallo*, No. 16-0279, 2017 WL 1735628, at *2-4 (Iowa Ct. App. May 3, 2017) (finding the failure to include surcharges with maximum punishment advisement necessitates automatic reversal). The Court of Appeals decision therefore is in direct conflict with cases requiring substantial compliance review. Iowa R. App. P. 6.1103(1)(b)(1); *see, e.g., State v. Fisher*, 877 N.W.2d 676, 681 (Iowa 2016) ("[W]e utilize a substantial compliance standard to determine whether a plea crosses the rule 2.8(2)(b)(2) threshold.") (citing *State v. White*, 587 N.W.2d 240, 242 (Iowa 1998)); *State v. Meron*, 675 N.W.2d 537, 542 (Iowa 2004) ("Substantial compliance is required."); *State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2002) ("Substantial – not strict – compliance with

[rule 2.8(2)(b)] is all that is required.") (citing *State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001)).

In *State v. Fisher*, this Court left open the question of whether failure to inform a defendant about surcharges is by itself a failure to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2). *Fisher*, 877 N.W.2d at 686 n.6 ("[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)." In answering that question in the affirmative, the Court of Appeals in effect rejected the substantial compliance standard and replaced it with strict compliance. Under the *Weitzel* decision, even minor deviations in the advisory required will result in mandatory reversal. *See Weitzel*, No. 16-1112, 2017 WL 1735743, at *12 (Tabor, J., dissenting) ("[W]e are now saying *any minor variance* in the information provided by the district court concerning the financial obligations owed by a defendant as a result of pleading guilty is cause for vacating the convictions. If a plea-taking court forgets to tell a defendant about the $10 DARE surcharge mandated by Iowa Code section 911.2(1), that is grounds for vacating a drunk-driving conviction. If a plea-taking court misstates the amount of any

maximum or minimum fine, even slightly, that is grounds for vacating the conviction. Such eventualities mark a radical departure from the substantial-compliance standard.").

The State respectfully requests that this Court grant further review to clarify these changing legal principles and to provide guidance on the continued applicability of the substantial compliance standard.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals, *en banc*, held that the district court failed to substantially comply with the requirement that Jason Weitzel be advised, before entering his guilty plea, of the maximum and minimum possible punishments because the court failed to inform him that his fines, if imposed, would carry 35% surcharges. The State seeks further review on this issue.

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 $625.00 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 $1,250.00 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.

On appeal, the defendant claimed that the district court did not adequately advise him of matters set forth in Iowa Rule of Criminal Procedure 2.8(2)(b) regarding his guilty plea, including the minimum and maximum punishments for his offense, specifically the 35% surcharge under Iowa Code section 911.1. Alternatively, he claimed his trial counsel was ineffective for failing to ensure the district court's compliance with rule 2.8(2)(b).

The Court of Appeals determined that the district court did not adequately advise the defendant of the necessity of filing a motion in

arrest of judgment if he later wanted to challenge the adequacy of the plea proceeding, and thus he could directly challenge his plea on appeal. *State v. Weitzel*, No. 16-1112, 2017 WL 1735743 at *2 (Iowa Ct. App. May 3, 2017). The Court of Appeals concluded that in failing to advise the defendant of the 35% surcharge, the district court did not substantially comply with rule 2.8(2)(b) and that the proper remedy was "to vacate the defendant's guilty plea and convictions and remand the matter for further proceedings." *Id.* at *10.

Facts

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

ARGUMENT

I. The Iowa Court of Appeals Erred in Determining That Failure During the Plea Colloquy to Advise the Defendant that His Fines, If Imposed, Would Carry Surcharges of 35% Required Automatic Reversal.

Preservation of Error

Although the State initially argued that the defendant was adequately advised of the necessity of filing a motion in arrest of judgment and that he failed to preserve error because he did not file such a motion, the Court of Appeals concluded that the district court provided an inadequate advisory regarding a motion in arrest of

judgment and therefore that the defendant could directly challenge his guilty plea. *State v. Weitzel*, No. 16-1112, 2017 WL 1735743 at *2 (Iowa Ct. App. May 3, 2017). The State does not challenge that conclusion on further review.

Standard of Review

Review of guilty plea proceedings is for correction of errors at law. *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004). The district court must substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b). *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). "Substantial compliance is met unless the court's disregard for the requirements of rule [2.]8(2)(b) raises doubt as to the voluntariness of the plea." *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995) (citation omitted).

Merits

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. However, the district court substantially complied with the requirements of Iowa Rule of Criminal Procedure 2.8.

The Court of Appeals focused on the defendant's first complaint – that the district court failed to inform the defendant of the 35% surcharge under Iowa Code section 911.1. *Weitzel*, No. 16-1112, 2017 WL 1735743. With regard to that surcharge, this 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)." *State v. Fisher*, 877 N.W.2d 676, 680 Iowa 2016). 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.

The Court of Appeals relied on *State v. Meron* to find that the district court must separately address each part of the punishment (i.e. terms of incarceration, fines, license revocation, and surcharges) and substantially comply with rule 2.8(2)(b)(2) as to each of those parts separately. *See Weitzel*, No. 16-1112, 2017 WL 1735743, at *5 (citing *Meron*, 675 N.W.2d at 542). The State submits that this is a misapplication of the *Meron* decision. *Meron* discussed the application of rule 2.8(2)(b) as a whole, and the reference to "each requirement" meant each subsection – rule 2.8(2)(b)(2) was one of the requirements that needed to be essentially captured in any colloquy. *See Meron*, 675 N.W.2d at 542.

To parse the requirements of the rule 2.8(2)(b) to the degree the Court of Appeals did in this case is to require strict rather than substantial compliance. If one considers surcharges to be a separate category under the rule, then the district court failed to substantially comply with the rule when it failed to advise the defendant of the surcharge under Iowa Code section 911.1. However, if surcharges are considered part of the financial-obligations component of the

defendant's sentence (and the amount of the surcharges are indeed calculated by reference to the fines), then understating those obligations by failing to include the surcharges is a much less substantial omission. *See Weitzel*, No. 16-1112, 2017 WL 1735743, at *12 (Tabor, J., dissenting). Under the latter approach, the district court substantially complied with rule 2.8(2)(b) in this case.

The Court of Appeals found that the proper remedy for the lack of substantial compliance with the rule is mandatory reversal. *Weitzel*, No. 16-1112, 2017 WL 1735743, at *10. This bright-line rule favors form over substance and undermines confidence in our judicial system:

> The majority's "bright-line rule" – reversing for any error in the information delivered by the plea-taking court concerning the potential penalties – undermines the ability of crime victims and members of the public to have confidence that valid convictions will not be vacated merely to remind plea-taking courts of the importance of "conducting a rule-compliant plea colloquy." The majority's refusal to consider whether a minor omission may, in context, be insubstantial, which is "directed at technical and literal compliance by our brothers [and sisters] on the district bench with [*Fisher*'s elaborations on rule 2.8(2)(b)], somewhat in the spirit of the exclusionary rule's attempt to deter police misconduct, seems to [me] inappropriate."

Weitzel, No. 16-1112, 2017 WL 1735743, at *16 (Tabor, J., dissenting) (alterations in original) (quoting *U.S. v. Dayton*, 604 F.2d

931, 940 (5th Cir. 1979)). Determining whether a plea colloquy substantially complies with the rule and determining a remedy for lack of substantial compliance should involve a commonsense evaluation of whether the deficient advisory rendered the defendant's plea involuntary and unintelligent. "[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). In the present case, the State submits that in light of the fact the defendant faced terms of incarceration and several fines, the failure to mention the surcharges would not have had a significant impact on the voluntariness of the defendant's guilty plea. *See* Plea Tr. (5/17/16) p. 9, line 5 – p. 11, line 22.

The defendant is not entitled to relief based on his other claims of deficiencies in the plea colloquy. Although the court initially did not discuss the domestic abuse surcharge, it did inform the defendant of that 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 § 321J.2(3)(c). The defendant cannot credibly argue that the court's overstatement of the amount of the fine rendered involuntary his decision to plead guilty. Finally, the State is aware of no authority requiring 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 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 grant further review, vacate the decision of the Court of Appeals, and affirm Jason Weitzel's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

The State requests that this matter be submitted nonorally.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

Jean C. Pettinger

JEAN C. PETTINGER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
jean.pettinger@iowa.gov

CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

- This application has been prepared in a proportionally spaced typeface using Georgia in size 14, and contains **2,411** words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*).

Dated: May 22, 2017

JEAN C. PETTINGER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
jean.pettinger@iowa.gov