ELECTRONICALLY FILED OCT 06, 2016 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0279

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THIERNO YAYA DIALLO,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE DEBORAH FARMER MINOT, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Written Plea Substantially Complied with Rule 2.8(2)(b)(2).

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Iowa Code § 814.7(2)

ROUTING STATEMENT

In *State v. Fisher*, the Supreme Court left open the question if failure to inform a defendant about surcharges is alone a failure to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2). 877 N.W.2d 676, 686 n.6 (Iowa 2016) ("[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)."). This may be such a case where that question needs to be addressed. Retention by the Supreme Court would therefore be appropriate to resolve this open question. Iowa Rs. App. P. 6.1101(2)(c), (2)(f).

STATEMENT OF THE CASE

Nature of the Case

Thierno Yaya Diallo was charged by trial information with assault causing bodily injury or mental illness, in violation of Iowa Code sections 708.1(2) and 708.2(2). *See* Trial Information; App. 6-7. Diallo filed a written plea of guilty and was sentenced to 90 days jail with 80 of those days suspended. *See* Disposition Order; App. 17-20.

On appeal, Diallo asserts that the court failed to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2) by failing

to advise him of the maximum and minimum punishment in three respects: (1) immigration consequences; (2) surcharges; and (3) restitution. Diallo also argues ineffective assistance of counsel for counsel's failure to advise Diallo of the immigration consequences.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The facts are not particularly relevant to this appeal which is primarily procedural in nature. On September 26, 2015, Diallo was involved in an argument with another male. *See* Minutes; App. ____. During the argument, Diallo punched the other male's friend, Victoria Felt, in the face with such force that she fell to the ground. *See* Minutes; App. 3. The force of the strike caused swelling and pain around Felt's eye. *See* Minutes; App. 3.

ARGUMENT

I. The Written Plea Substantially Complied with Rule 2.8(2)(b)(2).

Preservation of Error

The State concedes that error is preserved.

Thierno Yaya Diallo's challenges to his guilty plea were not presented to the district court, nor did he file a motion in arrest of judgment. Iowa Rule of Criminal Procedure 2.24(3)(a) clearly precludes a challenge of a guilty plea from being addressed on appeal when no motion in arrest of judgment is made: "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." However, Diallo asserts that his case is exempt from the preclusive effects of this rule. The State agrees.

The court failed to satisfy its obligation under Iowa Rule of Criminal Procedure 2.8(2)(d), "The court shall inform the defendant . . . that failure to so raise such challenges shall preclude the right to assert them on appeal." The failure by the court to do so results in an appellate challenge to a guilty plea being permitted even when the defendant failed to challenge the plea below. *See State v. Loye*, 670 N.W.2d 141, 149-50 (Iowa 2003) (holding that failure to adequately advise a defendant of their right to file a motion in arrest of judgment will cause the challenge to not be precluded in future proceedings). The district court merely needs to substantially comply with its obligation under rule 2.8(2)(d) to inform him about the

preclusive effect of failing to file a motion in arrest of judgment. *See State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006).

Diallo pled guilty through a written plea, without a hearing, which contained the following language regarding the need to file a motion in arrest of judgment:

> 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.

Written Plea of Guilty at p.4; App. 15. The written plea further certified that counsel "carefully explained to the defendant the procedural steps of filing a Motion in Arrest of Judgment, the definition and grounds thereof and the time within which such Motion should be filed." Written Plea of Guilty at p.5; App. 16. These statements are inadequate.

The written plea form used in this case was identical to the form in *State v. Fisher*, which was found to contain an inadequate warning regarding the preclusive effect of failing to file a motion in arrest of judgment. 877 N.W.2d 676 (Iowa 2016). The plea form in *Fisher* was identical to the form in this matter:

> In the plea form Fisher also acknowledged, in writing, as follows:
>
> > 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's counsel certified in the plea form that he had "carefully explained to the defendant the procedural steps of filing a Motion in Arrest of Judgment, the definition and grounds thereof and the time within which such Motion should be filed."

Id. at 679. The Supreme Court in *Fisher* concluded that the "written plea was deficient" by failing to inform Fisher about the preclusive effect of failing to file a motion in arrest of judgment, and that "he is not precluded from challenging his guilty plea on direct appeal." *Id.* at 682. The same is necessarily true here.

Standard of Review

Review of guilty plea proceedings are for correction of errors of law. *See State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004). The district court's substantial compliance with Iowa Rule of Criminal Procedure 2.8(2)(b) is required. *See 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) (citing *State v. Fluhr*, 287 N.W.2d 857, 864 (Iowa 1980), *overruled on other grounds by Kirchoff*, 452 N.W.2d at 804).

Merits

Iowa Rule of Criminal Procedure 2.8(2)(b) requires that a defendant be advised of certain matters before a guilty plea can be accepted. Diallo asserts that the court failed to satisfy one of those obligations, that the court failed to advise him of the maximum possible punishment. *See* Iowa R. Crim. P. 2.8(2)(b)(2). Diallo asserts that the court failed to advise him of the immigration consequences, that there would be restitution, and that there would be surcharges. *See* Appellant's Br. at 14-18. As discussed above, the district court was required to substantially comply with its obligation to inform Diallo of the maximum possible punishment. *See Kirchoff*, 452 N.W.2d at 804.

A. The Record Shows Sufficient Indication that Diallo was Advised of Any Possible Immigration Consequences.

Diallo first asserts that he was not advised of the immigration consequences he may face if he pled guilty. *See* Appellant's Br. at 14-16. Diallo asserts "there was no information that he should consult with an immigration attorney prior to agreeing to the plea, about what his immigration consequences could be, or how soon the consequences would take place." Appellant's Br. at 16. Diallo further asserts that the only mention of discussing the immigration consequences is the handwritten line on the front of the written plea of guilty which states "Defendant has been advised of any possible immigration consequences," which Diallo notes has "nothing to indicate that this was added prior to Diallo's signature on the form." Appellant's Br. at 16; *see* Written Plea of Guilty at p.1; App. 12.

On appeal, however, Diallo fails to notice that there is an entire paragraph of the written plea of guilty relating to immigration consequences. There Diallo certified that:

> I understand that, if I am not a citizen of the United States, I may suffer adverse immigration consequences as a result of this guilty plea, including deportation. I understand that I have the right to contact an immigration attorney and my consulate.

Written Plea of Guilty at p.4; App. 15. Directly below this paragraph is Diallo's signature. *See* Written Plea of Guilty at p.4; App. 15.

Diallo certified that he was advised of his possible immigration consequences, and his counsel further indicated that he was so advised by making an indication on the front of the form. *See* Written Plea of Guilty; App. 12-16. The court substantially complied with ensuring that Diallo was informed that there may be immigration consequences. Diallo's claim is frivolous.

B. Restitution is Not Punitive.

Diallo next asserts that he should have been advised of victim restitution because it is a "necessary and automatic consequence of the charge." Appellant's Br. at 18. However, Diallo simultaneously cites *Fisher* which confirmed that restitution is not punitive. Appellant's Br. at 18; 877 N.W.2d at 686. The Court in *Fisher* noted that "surcharges can be distinguished from other court-ordered payments, *such as restitution*, court costs, and reimbursement for the cost of court-appointed counsel, which we regard as nonpunitive." *Id.* (emphasis added) (citing *State v. Brady*, 442 N.W.2d 57, 59 (Iowa 1989)). Restitution is "compensatory and 'do[es] not fit the generally

understood definition of punishment.' " *Id.* (quoting *Brady*, 442 N.W.2d at 59).

Diallo asserts because restitution would likely be automatic in an assault causing injury case, it should therefore be required as part of the rule 2.8(2)(b)(2) maximum punishment disclosure. *See* Appellant's Br. at 17-18. But the Court explicitly rejects the notion that merely because a court orders a person to pay money it constitutes punishment. *Brady*, 442 N.W.2d at 59 ("Payment of money under a court order, standing alone, does not make it punishment. If it did, a civil judgment for compensatory damages could be considered to be punishment."). Although surcharges may be considered punitive, court costs and restitution are not. Diallo's argument regarding restitution should be rejected.

C. Although the Failure to Advise Diallo of Surcharges did Not Fall Within Actual Compliance of Rule 2.8(2)(b)(2), it Constituted Substantial Compliance.

Diallo's final rule 2.8(2)(b)(2) challenge relates to surcharges. Diallo correctly notes that the written plea fails to inform Diallo of the surcharges that were ultimately assessed during sentencing. *See* Appellant's Br. at 17. The State concedes that the Supreme Court explicitly decided the issue of whether surcharges constituted

punishment and therefore should be disclosed under rule 2.8(2)(b)(2) in *Fisher*. *See* 877 N.W.2d at 685-86. However, the Court left open a question which must be addressed in this case.

The State concedes that the failure to advise Diallo of the application of mandatory surcharges violated *actual* compliance with rule 2.8(2)(b)(2), but asserts that failure to advise Diallo of the surcharges alone still constituted *substantial* compliance with the rule. *See id.* at 686 n.6 ("Because we are vacating Fisher's plea and sentence and remanding for further proceedings anyway based on failure to disclose the mandatory license suspension, we 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 chapter 911 surcharges."). Actual compliance with rule 2.8(2)(b) is not required, but instead the court needs to substantially comply when informing the defendant of the maximum punishment possible. *See Kirchoff*, 452 N.W.2d at 804. The State asserts that the mere failure to inform Diallo of the existence of surcharges is insufficient on its own to fall below substantial compliance.

Although *Fisher* made clear that surcharges constitute a direct consequence and are punitive, it does not fall within the main areas of concern with which a defendant would be focused such as a term of jail or imprisonment. Diallo was certainly advised of the term of incarceration and the fines, but the written plea simply forgot to include the matter of surcharges. *See* Written Plea of Guilty; App. 12-16. Considering the overall punishments a defendant is facing, the mandatory surcharges are of relatively small consequence. The Court should find that the singular omission of the matter of surcharges should not permit a defendant to have their conviction and sentence overturned. It is difficult to imagine that Diallo truly would not have pled guilty had he known that there would be surcharges in addition to the fines. Conversely, if the court failed to inform a defendant of a mandatory prison term, that certainly would affect the voluntariness of the plea on its own. There is a distinct difference between failing to inform a defendant on the applicable surcharges and other matters such as maximum terms of incarceration.

The Court should find that the written plea substantially complied with informing Diallo of the maximum punishment he faced. Although it does not constitute actual compliance, the primary

consequences of pleading guilty were conveyed to Diallo. *See* Written Plea of Guilty; App. 12-16. Diallo's conviction should not be overturned on a technicality.

II. The Record Does Not Support Diallo's Ineffective Assistance of Counsel Claim.

Preservation of Error

Ineffective assistance of counsel can represent "an exception to the general rules of error preservation" because failure to preserve error can form the basis for a claim. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003) (citing *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982)), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). Iowa appellate courts are permitted to address these claims on direct appeal "when the record is sufficient to permit a ruling." *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005) (citing *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000)).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *See State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (citing *Stallings*, 658 N.W.2d at 108).

Merits

To prove ineffective assistance of counsel, a defendant must show that his trial counsel breached an essential duty and that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Judicial scrutiny of counsel's performance is highly deferential with a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *Anfinson v. State,* 758 N.W.2d 496, 499 (Iowa 2008) (quoting *Strickland*, 466 U.S. at 689). In addition, a showing of prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ledezma*, 626 N.W.2d at 134 (citing *Strickland,* 466 U.S. at 694).

"The crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Whitsel v. State*, 439 N.W.2d 871, 873 (Iowa Ct. App. 1989) (*quoting Strickland*, 466 U.S. at 694). Specifically, when a defendant challenges their plea proceedings through an ineffective assistance of counsel framework, "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." *Straw*, 709 N.W.2d at 138 (citing *Myers*, 653 N.W.2d at 578). If the Court determines defendant has failed to prove prejudice, it need not consider whether a breach of duty occurred. *Ledezma*, 626 N.W.2d at 142.

A defendant may raise such a claim on direct appeal if they have "reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2).

Here, the record does not support Diallo's claims. Diallo asserts that his counsel failed to advise him of the possible immigration consequences associated with pleading guilty. *See* Appellant's Br. at 19. However, this is in direct conflict with the written plea of guilty. As stated above, Diallo expressly certified that:

> I understand that, if I am not a citizen of the United States, I may suffer adverse immigration consequences as a result of this guilty plea, including deportation. I understand that I have the right to contact an immigration attorney and my consulate.

Written Plea of Guilty at p.4; App. 15. Directly below this paragraph is Diallo's signature. *See* Written Plea of Guilty at p.4; App. 15. Further, there is a handwritten statement on the written guilty plea

which states, “Defendant has been advised of any possible immigration consequences.” Written Plea of Guilty at p.1; App. 12.

The record simply does not support Diallo’s claim that he was not advised of the immigration consequences he may face and thus Diallo fails to establish the breach of any duty. Diallo’s claim should be rejected, and at the most, should be preserved for postconviction relief.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the judgment and sentence of Thierno Yaya Diallo.

REQUEST FOR NONORAL SUBMISSION

The issues raised in this appeal are not complex and therefore oral argument is not necessary to dispose of these claims. In the event argument is scheduled, the State respectfully requests to be heard.

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:

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