

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
IN AND FOR JOHNSON COUNTY

No. SRCR109756

Hon. DEBORAH FARMER MINOT, Assoc. Judge

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The State agrees with the Appellant's assertion that the Written Plea of Guilty was inadequate to warn Diallo of the effects of failing to file a Motion in Arrest of Judgment, and he can, therefore, challenge the guilty plea on appeal.

Diallo asserts that Written Plea of Guilty also failed to warn Diallo of the surcharges, fines and restitution he would incur, and was inadequate to advise him of the potential immigration effects of a guilty plea. The Plea did not meet substantial compliance with Iowa Rule of Civil Procedure 2.8(2)(b).

Diallo further asserts that his counsel was ineffective, and he was prejudiced by the errors made by counsel.

ARGUMENT

I. THERE WAS NOT SUBSTANTIAL COMPLIANCE WITH IOWA CODE 2.8(2)(b), AND THE WRITTEN PLEA SHOULD BE SET ASIDE

STANDARD OF REVIEW:

The parties are in agreement regarding the Standard of Review is for corrections of error at law. *State v. Ortiz*, 789 N.W.2d, 761, 764 (Iowa 2011). Substantial compliance with Iowa Rule of Criminal Procedure

2.8(2)(b) by the district court is required. State v. Straw, 709 N.W.2d 128, 132 (Iowa, 2006).

SUMMARY OF ARGUMENT:

The State is in agreement that the form used by Mr. Diallo's attorney for the Written Plea of Guilty (Appx. 12-16) was inadequate to advise Diallo of his right to file a Motion in Arrest of Judgment. Diallo is not precluded from challenging his guilty plea on direct appeal.

Like in State v. Fisher, 877 N.W.2d 676 (Iowa 2016) however, the Written Plea of Guilty used by Diallo's attorney did not substantially comply with the Rule 2.8(2)(b) threshold by notifying Diallo of the fine, surcharges, and of the immigration consequences of the plea.

MERITS:

A. THERE WAS NO SUBSTANTIAL COMPLIANCE OF RULE 2.8(2)(b)(3) REGARDING THE IMMIGRATION CONSEQUENCES

While the otherwise deficient Written Plea of Guilty (Appx. 12) does include a statement regarding the Defendant having been advised of his immigration consequences, there is nothing in the record that shows the court substantially complied with its obligation to ensure that Diallo knew of

such consequences before signing the form. Under Padilla v. Kentucky, 559 U.S. 356 (2010), a criminal defendant must be competently advised of immigration consequences before entering a plea. Accepting the Written Plea of Guilty (Appx. 12) and complying with Iowa Rule of Criminal Procedure 2.8(2)(b) would require the Court to ensure that the Defendants' counsel had complied with the immigration advisories. Because counsel would have been aware that his client was not a native English speaker and that he had a non-citizen immigration status, the State's argument that because the form had a paragraph regarding immigration consequences near Diallo's signature is not a definitive argument that Diallo was actually made aware of certain immigration consequences, including revocation of his green card and deportation, of his guilty plea. Even following the more relaxed substantial compliance standard rather than the actual compliance standard, the Written Plea, without a colloquy, was insufficient to ensure that Mr. Diallo was made aware of the consequences. Counsel should have made the Court aware that Mr. Diallo was a non-citizen and requested the court hold a colloquy hearing. Instead, the court merely took the Written Plea on its face when filed and there is no record of court proceedings in which the court verified with Diallo he had been advised of the immigration

consequences of his plea. Thus, there was no substantial compliance with Rule 2.8(2)(b)(3).

B. THERE WAS NO SUBSTANTIAL COMPLIANCE OF RULE 2.8(2)(b)(2) REGARDING THE FINE, SURCHARGES, AND VICTIM RESTITUTION BEFORE ENTERING HIS GUILTY PLEA

The State asserts that Fisher leaves open the issue of whether there must be actual compliance or substantial compliance with Rule 2.8(2)(b)(2), regarding minimum and maximum punishments that the Defendant must be made aware of before the court can accept a guilty plea. The State further asserts that substantial compliance with the Rule is sufficient to withstand a challenge under State v. Kirchoff, 452 N.W.2d at 804 (Iowa 1990). Here, the State asserts that mere failure to inform Diallo of the existence of surcharges is insufficient on its own to fall below substantial compliance. The State's argument that the surcharge was simply forgotten on the Written Plea of Guilty and are of a relatively small consequence minimalizes the reasoning behind implementing those items, particularly in a simple misdemeanor case, where the statutory fine can be as low as \$65.00 (Iowa Code 903.1(1)) but the surcharges of 35%, plus court costs can cause a substantial hardship for an indigent criminal defendant. Since the court is not allowed to waive those items, it must be disclosed to a defendant when

contemplating a plea agreement. For many truly indigent defendants, the additional costs may, in fact, cause them to consider a potential guilty plea more carefully. Further, the Written Plea of Guilty (Appx. 12) also failed to detail the possibility of restitution. Even if the court accepts the state's argument that the neglecting the surcharges still met the substantial compliance threshold, the lack of disclosure of restitution has to fail the threshold. Particularly in an assault case, where restitution can include medical expenses, the restitution order could potentially be in the thousands of dollars. In contrast, substantial compliance can be found in the instance where the court used plain language rather than quoting the rule verbatim. Straw, 709 N.W.2d at 132; State v. Nootenboom (No. 15-1265) (Iowa 2016). While paraphrasing to make a defendant understand is substantial compliance, the absence of an important facet of the defendant's sentence cannot meet that standard. Whatever the additional amount of fines, restitution or surcharges (even if an amount which the state asserts is a trivial amount) Diallo should have been able to consider when agreeing to a guilty plea.

II. TRIAL COUNSEL WAS INEFFECTIVE DESPITE THE LACK OF FORMAL RECORD

STANDARD OF REVIEW:

Claims of Ineffective Assistance of counsel are constitutional in nature, and, therefore, reviewed *de novo*. State v. Utter, 803 N.W.2d 647,649 (Iowa 2011).

SUMMARY OF ARGUMENT:

Due to the amount of errors made by Diallo's counsel, both prongs of Strickland are present, in that counsel breached essential duties and prejudice resulted.

MERITS:

The State argues that the record is insufficient to establish whether Diallo's trial counsel was ineffective because there was a mention of immigration consequences on the Written Plea of Guilty (Appx. 12). There was no colloquy wherein the Court confirmed with Diallo that he was aware of the immigration consequences, the additional surcharges, or the deficiency regarding the failure to file a Motion in Arrest of Judgment.

Because there were no reported proceedings, there is no record *per se*, however, the review of the facts of this case clearly demonstrate a failure of counsel to meet his constitutional duties, and that prejudice resulted, as required by Strickland v. Washington, 466 U.S. 668, 687-88 (1984)

Diallo would not have pled guilty had he been made known of the consequences of his plea, not only of the immigration consequences but also of the surcharge, fine and restitution he was ordered to pay. The combination of the failure of counsel to properly inform Diallo that there were the additional consequences fails both prongs of the Strickland test.

Diallo's case should be remanded to the associate district court due to his counsel's errors, or at least, such claims should be preserved for post-conviction relief.

CONCLUSION

The state agrees that the form used in Mr. Diallo's guilty plea was deficient and inadequate to inform him of his right to file a Motion in arrest of Judgment.

Diallo's guilty plea to the simple misdemeanor charge of Assault Causing Bodily Injury should be vacated and remanded back to the Johnson County Associate District court. The plea he made was on an outdated form, with no colloquy with the sentencing judge, and he was not sufficiently informed of the consequences of his plea to make a voluntary, knowing and intelligent decision. He was not informed of the financial consequences or the immigration consequences of his plea. The plea was wholly inadequate to advise the defendant of his rights and consequences of the plea. Also, counsel was ineffective in that his performance was constitutionally deficient in that he did not adequately explain the consequences of the plea to Diallo. This case should be remanded to the District Associate Court for further proceedings.

Respectfully Submitted,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Anne K. Wilson, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Reply Brief as \$0.00.

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Reply Brief, was served on the 4th Day of October 2016, upon the following persons and upon the Clerk of the Supreme Court:

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1620 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word 2016 in 14 point font.



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