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

APPLICATION FOR FURTHER REVIEW

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

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QUESTIONS PRESENTED FOR REVIEW

(1) The Iowa Court of Appeals, *en banc*, found that a mere omission of applicable surcharges from the pre-plea advisement of the maximum possible punishment required by rule 2.8(2)(*b*)(2) was error requiring automatic reversal because it undermined the knowing and voluntary nature of the guilty plea; the court found that if surcharges are required for actual compliance they must be required for substantial compliance as well.

Is the mere failure to advise a defendant of applicable surcharges alone failure to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(*b*)(2)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

State Cases

State Codes

State Rules

STATEMENT SUPPORTING FURTHER REVIEW

Clarification is needed from this Court on this area of changing legal principles. *See* Iowa R. App. P. 6.1103(1)(*b*)(3). Further, the State submits that 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 or actual compliance standard. *See State v. Diallo*, No. 16-0279, 2017 WL 1735628, at *2-4 (Iowa Ct. App. May 3, 2017) (finding a mere failure to include surcharges with maximum punishment advisement sufficient to necessitate automatic reversal); *see also 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, explicitly including omissions of surcharges). Accordingly, the Court of Appeals decision in this matter 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))).

As previously explained in the State's routing statement, in *State v. Fisher*, this Court left open the question of whether 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). *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)." (emphasis in original)). As anticipated, the Court of Appeals agreed that the surcharge question was the only issue remaining to be resolved after rejecting Thierno Yaya Diallo's other claims.

The Iowa Court of Appeals found that even when the court advises a defendant of every other possible punishment, it was still not substantial compliance with rule 2.8(2)(*b*)(2) to fail to inform them of applicable surcharges, and reversal is required. *See Diallo*, 2017 WL 1735628, at *3-4. The State respectfully submits that the Court of Appeals has, in effect, rejected the substantial compliance

standard and replaced it with actual or "strict compliance." Doing so goes against this Court's precedent and holds the district court to a much higher standard than has ever been required. *See, e.g.*, *Fisher*, 877 N.W.2d at 681; *Meron*, 675 N.W.2d at 542; *Myers*, 653 N.W.2d at 578. Without clarification, the result of the opinion in this case—and the related cases simultaneously decided—will be a flood of litigation over mere misstatements during plea colloquies now necessitating automatic reversals under this "iron rule of review." *See Weitzel*, 2017 WL 1735743, at *11-13 (Tabor, J. dissenting).

Going forward, in order for guilty pleas to survive appellate review under the newly minted *Weitzel–Diallo* regime, district courts will likely be held to strict verbatim scripts, and any deviation—even minor, innocent deviation—will warrant mandatory reversal. *See id.* 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." (emphasis in original)).

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 substantial compliance review.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals, *en banc*, held (1) Diallo was adequately warned of the possible immigration consequences and (2) the court failed to substantially comply with the requirement that Thierno Yaya Diallo be advised of the maximum and minimum possible punishment because the court failed to advise him of the applicable surcharges. The State seeks further review on whether mere failure to advise a defendant on applicable surcharges undermines substantial compliance.

Course of Proceedings

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 asserted 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.[1] Diallo also argued ineffective assistance of counsel for counsel's failure to advise Diallo of the immigration consequences.

The Court of Appeals agreed that the district failed to adequately advise Diallo of his right to file a motion in arrest of judgment and therefore proceeded to determine if the court substantially complied with rule 2.8(2)(*b*). The Court of Appeals found there was substantial compliance with regard to immigration consequences, but reversed and remanded finding there was not substantial compliance on the matter of advising Diallo of the maximum possible punishment because the applicable surcharges were omitted.

[1] The Court of Appeals agreed that restitution is not a punishment and did not evaluate the restitution claim further.

Facts

The underlying facts are not particularly relevant to this appeal. On September 26, 2015, Diallo was involved in an argument with another male. *See* Minutes; App. 3. 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 Iowa Court of Appeals Erred in Determining that Mere Failure to Advise a Defendant of Applicable Surcharges is Not Substantial Compliance with Rule 2.8(2)(*b*)(2) Such That Automatic Reversal is Required.

Preservation of Error

The State concedes that error is preserved. *See Diallo*, 2017 WL 1735628, at *1 ("The advisory [on the right to file a motion in arrest of judgment, and the preclusive effect of waiving or failing to do so,] given to Diallo in the written guilty plea form was identical to the advisory given to the defendant in [*Fisher*] . . . . '[Diallo] is not precluded from challenging his guilty plea on direct appeal.' " (quoting *Fisher*, 877 N.W.2d at 682)).

Standard of Review

Review of guilty plea proceedings are for correction of errors of law. *See Meron*, 675 N.W.2d at 540. 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—and the Court of Appeals agreed—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). Specifically, while the court correctly advised Diallo of all other maximum possible punishments, the court failed to ensure Diallo was aware of the applicable 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 this 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.

The State also concedes that the failure to advise Diallo of the application of mandatory surcharges violated *actual* compliance with rule 2.8(2)(*b*)(2). *See id.* at 686 n.6. However, the State asserts that failure to advise Diallo of the surcharges alone did not undermine *substantial* compliance with the rule. *See id.* ("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. But the mere failure to inform Diallo of the existence of surcharges is insufficient on its own to bring this guilty plea below substantial compliance.

The Court of Appeals found in *State v. Weitzel*—in a decision filed simultaneously with the decision in this matter—that if surcharges are necessary for actual compliance, "[i]t cannot follow that the district court's failure to communicate any information regarding the 'additional penalty' is substantial compliance with the rule." *Weitzel*, 2017 WL 1735743, at *5. The Court of Appeals in this matter and in *Weitzel* essentially established a bright-line actual or "strict compliance" standard and turns away from a true "substantial compliance" review. This Court should reject the new rule of law adopted by the Court of Appeals and reaffirm the maxim that misstatements and omissions in plea proceedings are not *always* fatal errors requiring automatic reversal.

The Court of Appeals correctly noted that "[t]he substantial compliance standard provides 'a trial court is not required to advise a defendant of his rights using the precise language of the rule; it is sufficient that the defendant be informed of his rights in such a way that he is made aware of them.' " *Diallo*, 2017 WL 1735628, at *3

(quoting *Myers*, 653 N.W.2d at 578). However, the standard that the Court of Appeals ultimately applied was stricter than what substantial compliance requires.

The Court of Appeals relied on *State v. Meron* to find that "the essence of each requirement of the rule be expressed" meant that *each* part of the punishment (i.e. term of incarceration, fines, license revocation, and surcharges) must separately be addressed and substantially complied with. *See id.* (citing *State v. Meron*, 675 N.W.2d 537, 544 (Iowa 2004)); *see also Weitzel*, 2017 WL 1735743, at *5 (citing *Meron* to find that omitting surcharges was the equivalent of "totally ignor[ing]" a number of requirements of rule 2.8(2)(*b*)). However, the State submits that this is a misapplication of the *Meron* decision. *Meron* discussed rule 2.8(2)(*b*)'s application as a whole, and the reference to "each requirement" was referring to the subsections—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 532. Parsing down the requirements of rule 2.8(2)(*b*) to the degree the Court of Appeals has in this case, and in *Weitzel*, goes far beyond substantial compliance and it becomes more akin to actual or strict compliance.

In order to inform the defendant of the maximum punishment it cannot be that the court needs to perfectly recite the maximum punishment that the defendant may face, but instead it should simply be that the defendant is made aware of the essential penal consequences.

Rule 2.8(2)(*b*)(2) requires merely that the defendant be advised of the maximum possible punishment, and trial courts must substantially comply with this rule. The rule does not, however, specify certain categories that must be addressed before substantial compliance is met. Although *actual* compliance would require surcharges be addressed, *substantial* compliance can be met when everything is addressed (including imprisonment, fines, license revocations, etc.) and merely surcharges are overlooked.

Here, Diallo was warned he could face a maximum of one-year in jail and a fine of $1,875. *See* Written Plea p.1; App. 12. Certainly when considering surcharges and fines in isolation (as the Court of Appeals did in this case) this warning would appear to fall below substantial compliance. *See Diallo*, 2017 WL 1735628, at *3. However, doing so does not consider the entire picture of the maximum possible punishment before determining if substantial

compliance was satisfied. While Diallo may not have been warned of the applicable surcharges, he was nevertheless "informed . . . in such a way . . . he was made aware" of the essential penal consequences because in context the error or omission was relatively minor and thus does not fall below substantial compliance. *See Myers*, 653 N.W.2d at 578.

Judge Tabor's dissent in *Weitzel* discussed the distinction between considering each subset of punishment in isolation and ensuring the essential penal consequences were conveyed, noting: "we must not overlook that the more important aspect of informing the defendant about 'the maximum possible punishment' is providing an accurate picture of the potential loss of liberty resulting from the plea bargain." *Weitzel*, 2017 WL 1735743, at *12 (Tabor, J. dissenting). Judge Tabor's dissent highlights the flaw in the majority opinion. The majority focused too closely on the surcharges as a separate category of punishment—without considering the totality of the maximum punishment—and as a result, the majority misconstrued *Fisher*.

The Court of Appeals found in *Weitzel* that because *Fisher* noted actual compliance required a recitation of the surcharges,

substantial compliance must require the same. *See id.* at *5 ("The *Fisher* court further held that actual compliance with the rule required the additional criminal penalty be disclosed during the guilty plea proceeding. It cannot follow that the district court's failure to communicate any information regarding the "additional penalty" is substantial compliance with the rule."). The Court of Appeals followed similar logic in this matter finding that simply because the surcharges were not included, "Diallo was misinformed as to the mandatory minimum and maximum possible fine." *See Diallo*, 2017 WL 1735628, at *3. These opinions misconstrue the standard—when they should look for substantial compliance they instead seek actual or strict compliance.

Actual or strict compliance would require that the total and complete maximum possible punishment be conveyed to the defendant without omission or misstatement. Substantial compliance permits variances in what is said and acknowledges that minor, non-prejudicial, misstatements will inevitably be made. Judge Tabor's dissent in *Weitzel* explains the flaw with moving to actual compliance in this context:

> [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.

Weitzel, 2017 WL 1735743, at *13 (Tabor, J. dissenting). Such examples are not extreme or far-fetched, as that is precisely what happened in this case. It was precisely because the Court of Appeals found what it concluded amounted to a misstatement of the maximum and minimum fines (through failure to include surcharges) that reversal was deemed necessary. *See Diallo*, 2017 WL 1735628, at *3. Without clarification, these cases open the door to a new era of rule 2.8(2)(*b*) review.

The State additionally submits that the Court of Appeals has failed to consider the effect of the omission when determining if substantial compliance was met or if reversal is required. The Court of Appeals adopted a bright-line rule requiring automatic reversal in *Weitzel*, which was applied in this matter. *See id.* at *3; *Weitzel*, 2017 WL 1735743, at *6-10, 15-16. This bright-line rule favors form over

substance and undermines victims' and the public's confidence in our primarily plea-based 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, 2017 WL 1735743, at *16 (Tabor, J. dissenting) (alterations in original) (quoting *U.S. v. Dayton*, 604 F.2d 931, 940 (5th Cir. 1979)).

Substantial compliance and the remedy for failing to meet the requirements of rule 2.8(2)(*b*)(2) should, at the very minimum, require a commonsense approach of evaluating whether the misstated or omitted punishment actually prejudiced the defendant or would have caused them to not plead guilty. The State submits that no such prejudice exists and a reversal following such a minor

omission does little more than give dissatisfied defendants an automatic chance to take additional bites at the apple.

This Court should grant further review and clarify the distinction between actual and substantial compliance, and should find that substantial compliance can be found in the absence of a warning of applicable surcharges.

In this case, substantial compliance should be found because Diallo was sufficiently advised of the essential penal consequences. *See* Written Plea of Guilty; App. 12-16. This Court should vacate the decision of the Court of Appeals and affirm Diallo's conviction and sentence.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court grant further review, vacate the decision of the Court of Appeals, and affirm the judgment and sentence of Thierno Yaya Diallo.

REQUEST FOR NONORAL SUBMISSION

The State submits that oral argument will be of little value in assisting this Court clarify these changing legal principles. However, in the event oral argument is scheduled, the State respectfully requests to be heard.

Respectfully submitted,

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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 **3,163** words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*).

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