

IN THE COURT OF APPEALS OF IOWA

No. 0-795 / 10-0291
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN EUGENE FRANK,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, David R. Danilson (guilty plea) and William C. Ostlund (motion in arrest of judgment, sentencing), Judges.

Defendant appeals following his guilty plea and sentence on a charge of incest. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Jim Robbins, County Attorney, and Adria Kester, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., Doyle, J., and Mahan, S.J.* Danilson and Tabor, JJ., take no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, J.

I. Background Facts & Proceedings

Kevin Frank was charged with sexual abuse in the third degree and incest. He entered into a plea agreement whereby he would enter a guilty plea to the charge of incest,¹ in violation of Iowa Code section 726.2 (2007), a class “D” felony, and the charge of third-degree sexual abuse would be dismissed. The guilty plea proceedings were held on September 15, 2009, and the district court accepted Frank’s guilty plea.

On October 27, 2009, Frank sent a pro se letter to the court stating he wanted to change his plea to not guilty. His attorney then filed a formal motion in arrest of judgment. The court set the matter for hearing and ordered that a transcript of the guilty plea proceeding be prepared. At the hearing Frank argued that during the guilty plea proceeding he was not advised of his right against self-incrimination and his plea was therefore invalid. The court denied the motion in arrest of judgment, stating:

While the Defendant argues he was not advised of the privilege against self-incrimination using the precise language of the rule, he provides no evidence that he was not aware of the right at the time of the guilty plea nor that he would have foregone his guilty plea had the court used the precise language of the rule.

After a sentencing hearing, the court sentenced Frank to a term of imprisonment not to exceed five years. The court also imposed a special

¹ The charge of incest was based on the State’s allegation that Frank engaged in a sex act with his niece, who was then seventeen years old.

sentence pursuant to section 903B.2.² Frank appeals his guilty plea and sentence.

II. Guilty Plea Proceeding

Due process requires that a defendant's guilty plea be given voluntarily, knowingly, and intelligently. See *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). "A defendant waives a variety of constitutional rights by pleading guilty to a criminal offense, and it is fundamental that a plea of guilty is valid only if it is given voluntarily, knowingly, and intelligently." *State v. Meron*, 675 N.W.2d 537, 542 (Iowa 2004). Because a defendant's claim that a guilty plea was not voluntary, knowing, and intelligent implicates the Due Process Clause, our review is de novo. *State v. Loye*, 670 N.W.2d 141, 150 (Iowa 2003).

In order to determine whether a guilty plea is voluntary, knowing, and intelligent, the court must inquire if the defendant is aware of the constitutional protections being given up.³ *Meron*, 675 N.W.2d at 542. Iowa Rule of Criminal Procedure 2.8(2)(b) provides a blueprint to the court for making this inquiry. *Straw*, 709 N.W.2d at 133.

Rule 2.8(2)(b) provides:

The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

.....

² The judgment entry and amended judgment entry both refer to section 903B.1, but section 903B.2 specifically applies to a conviction under section 726.2.

³ One of the constitutional protections is a person's right not to be "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *Brainard v. State*, 222 N.W.2d 711, 717 (Iowa 1974).

(4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, *the right not to be compelled to incriminate oneself*, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.

(Emphasis added.)

During the guilty plea proceedings the district court advised Frank of the following rights he would be giving up by pleading guilty: (1) he would be "entitled to a speedy and public trial by jury," and by pleading guilty he waived that right; (2) he "would be entitled to have an attorney present, and if [he] couldn't afford one, the court would appoint one"; (3) "the State would have to confront [him] with the witnesses upon whose testimony it relied to obtain a conviction, and [Frank] would have the right to cross-examine"; (4) the State would have to establish his "guilt by competent evidence to the satisfaction of a jury beyond a reasonable doubt"; and (5) at a trial he would be "entitled to compulsory process to call witnesses."

The State concedes the court did not advise Frank of his right against self-incrimination, but argues the court substantially complied with the requirements of rule 2.8(2)(b) because it informed him of his other rights. The State asserts, "[t]his one omission in an otherwise flawless colloquy does not render the defendant's plea unintelligent and involuntary."

Substantial compliance with rule 2.8(2)(b) is required. *Meron*, 675 N.W.2d at 542. Under this standard, a 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." *State v.*

Myers, 653 N.W.2d 574, 578 (Iowa 2002). “The record must confirm the existence of substantial compliance in listing each right.” *Meron*, 675 N.W.2d at 542. “Substantial compliance requires that the essence of each requirement of the rule be expressed to allow the court to perform its important role in each case.” *Id.* at 544. The district court misapplied the law by finding Frank needed to show he was not aware of his rights at the time of the guilty plea. Under rule 2.8(2)(b), it is the court’s obligation to inform the defendant of the rights listed within the rule.

The Iowa Supreme Court has determined that where a court failed to advise the defendant of one of the rights—the right to compulsory process—there had not been substantial compliance with the requirements of the rule. *Myers*, 653 N.W.2d at 578. We conclude the district court did not substantially comply with the requirements of rule 2.8(2)(b) because the court failed to advise Frank of the right against self-incrimination. Frank was not informed of this right in such a way that he was made aware of it. *See id.* There must be substantial compliance in listing *each* of the rights found in the rule. *See Meron*, 675 N.W.2d at 542.

Generally, noncompliance with the rule constitutes reversible error. *Id.* Where a guilty plea violates the Due Process Clause it must be set aside. *Loye*, 670 N.W.2d at 154. Within the context of a motion in arrest of judgment, we have found no requirement that a defendant show he would have not plead guilty

if the court had fully informed him of his rights.⁴ We determine the district court should have granted Frank's motion in arrest of judgment. We reverse the judgment and sentence⁵ and remand to the district court for further proceedings.

REVERSED AND REMANDED.

⁴ In cases where prejudice has been a component, the issue has been raised within the context of a claim of ineffective assistance of counsel. See *Straw*, 709 N.W.2d at 134-38, *Myers*, 653 N.W.2d at 578-79.

⁵ Frank also appealed on the ground that the district court abused its discretion in imposing sentence. We do not address this issue based on our finding that the case should be remanded for new plea proceedings.