

**IN THE COURT OF APPEALS OF IOWA**

No. 0-954 / 10-0764  
Filed January 20, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**CHRISTOPHER SEAN DREW,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, William A. Price,  
District Associate Judge.

Christopher Drew appeals from his conviction and sentence following his  
written guilty plea to first-degree harassment. **SENTENCE VACATED AND  
REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Thomas DeSio, Assistant  
County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J.,  
takes no part.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

Christopher Drew was charged by trial information with the crime of harassment in the first degree. A police report attached to the trial information as the minutes of testimony reveals the following information. On November 6, 2009, police were summoned to a Des Moines trailer park because Christopher Drew was threatening a resident and refusing to leave. As the officers arrived, Drew was exiting the residence and appeared to be intoxicated. The resident claimed that Drew had threatened her, but Drew denied this. Police explained to Drew that he needed to leave because he could not establish residency at the trailer. According to the police report, Drew then “became belligerent and started making threats toward” the resident. The only threat specifically stated in the police report was Drew’s statement: “I know niggers with guns so you better watch out.” Because Drew continued to be aggressive toward the resident, officers arrested him.

On March 2, 2010, Drew pleaded guilty to first-degree harassment by signing a written guilty plea form, which was presented to and accepted by the court the same day. Drew’s guilty plea form contained the following preprinted language: “I understand that to contest this plea I must file a Motion In Arrest of Judgment no later than 45 days after plea and no later than 5 days prior to sentencing.”<sup>1</sup> Drew’s guilty plea also included his handwritten statement, “On or

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<sup>1</sup> The preprinted form continued:

By seeking immediate sentencing, I give up my right to attack this plea and therefore waive the right to file this Motion and forever waive my right

around Nov 6 2009 I threaten [sic] intimidated or alarmed [victim] with personal contact without a legitimate purpose.”

In accepting the plea, the court’s form order states: “The Court has reviewed Defendant’s signed petition to plead guilty, is satisfied Defendant understands the charge, its penal consequences and the constitutional rights being waived. There is a factual basis for the plea and the plea is voluntary.”

Drew waived the presence of a court reporter and no further record of the proceedings was made. Sentencing was scheduled to take place in April 2010.

After a sentencing hearing, the court sentenced Drew to serve two years in prison. He now appeals, arguing the record failed to establish a factual basis for his guilty plea, and the plea therefore was not knowing and voluntary.

## **II. Error Preservation**

The State asserts Drew failed to preserve error because he never filed a motion in arrest of judgment. See Iowa R. of Crim. P. 2.24(3)(a) (“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.”). Drew asserts this requirement does not apply because the district court did not satisfactorily inform him that failure to file a motion in arrest of judgment would preclude him from later raising issues regarding his guilty plea on appeal. See Iowa R. Crim. P. 2.8(2)(d) (“The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea

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to challenge this plea, to directly appeal my plea and to have a pre-sentence investigation. However, this sentence was crossed out on Drew’s guilty plea because he did not request immediate sentencing.

proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.”); *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994) (“Failure by a judge to comply with [rule 2.8(2)(d)] operates to reinstate the defendant’s right to appeal the legality of his plea.”). Drew alternatively claims trial counsel was ineffective for failing to object to the lack of a factual basis for his guilty plea.

To comply with rule 2.8(2)(d), the court must inform the defendant that: “(1) any challenge to the plea based on alleged defects in the plea proceeding must be raised in a motion in arrest of judgment and (2) the failure to do so will preclude the right to appeal.” *Oldham*, 515 N.W.2d at 46. We employ a substantial compliance standard in determining whether the requirements of rule 2.8(2)(d) have been met. *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006). “The court must ensure the defendant understands the necessity of filing a motion [in arrest of judgment] to challenge a guilty plea *and the consequences of failing to do so.*” *Straw*, 709 N.W.2d at 132 (emphasis added).

The court’s acceptance of Drew’s guilty plea involved no personal colloquy, so the only information he received from the court regarding rule 2.8 was contained in his written plea. Drew’s written plea did not inform him that the failure to file a motion in arrest of judgment would preclude his right to appeal. Drew’s written plea of guilty did not substantially comply with the requirements of rule 2.8(2)(d); therefore, Drew’s failure to file a motion in arrest of judgment does not prevent him from challenging his guilty plea on appeal.

### III. Standard of Review

We review a claim of error in a guilty plea proceeding for correction of errors at law. *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004).

### IV. Merits

Iowa Rule of Criminal Procedure 2.8(2)(b) provides that a court should not accept a guilty plea unless it is “made voluntarily and intelligently and has a factual basis.” “In deciding whether a factual basis exists, we consider the entire record before the district court . . . .” *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Drew cites several cases to support his assertion that because the record does not indicate the district court relied upon anything other than the plea form in accepting his plea, we must conclude the court relied only upon his plea form, which does not show a factual basis for his guilty plea. See *State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005) (“[I]f the district judge finds it necessary to look to evidence other than the defendants’ statements to establish the factual basis for the plea in any situation, these additional facts or evidence must be specifically articulated on the record.”); *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975) (“Whatever the source, the record must disclose the factual basis relied on.”); *State v. Greene*, 226 N.W.2d 829, 831 (Iowa 1975) (“It is essential, whatever source is used, that the factual basis be identified and disclosed in the record.”). Neither the guilty plea form nor the order accepting plea, which is page two of the plea form, refer to the minutes of testimony or elements of the crime. The record does not indicate the district court relied on any evidence other than Drew’s plea form.

We conclude Drew's plea form alone does not show a factual basis for Drew's guilty plea to the charge of first-degree harassment. First-degree harassment must involve "a threat to commit a forcible felony." Iowa Code § 708.7(2)(a) (2009). Drew's admission on the plea form does not constitute evidence of a threat to commit a forcible felony.

Where a guilty plea has no factual basis in the record but it is possible that a factual basis might be established, we have found it appropriate to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis. See *Schminkey*, 597 N.W.2d at 792 (remanding to allow the State an opportunity to establish that defendant intended to permanently deprive owner of motor vehicle). Because we believe the State may be able to supplement the record to provide a factual basis for first-degree harassment, we vacate the sentence entered and remand for further proceedings. If a factual basis is not shown, Drew's plea must be set aside.

**SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**