

IN THE COURT OF APPEALS OF IOWA

No. 2-061 / 11-0773
Filed February 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BERNARD NYABUGULU,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan (plea) and Mitchell E. Turner (sentencing), Judges.

Defendant appeals his conviction and sentence claiming his guilty plea was not knowing and voluntary when the district court failed to inform him of the special sentence provisions of Iowa Code Section 903B.1 (Supp. 2009).

CONVICTION AND SENTENCE VACATED; CASE REMANDED.

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Nicholas L. Scott, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Danilson and Bower, JJ.

BOWER, J.

Defendant, Bernard Nyabugulu, appeals from his conviction and sentence following his *Alford* plea to lascivious acts with a child, in violation of Iowa Code section 709.8(1) (2009). Nyabugulu contends his plea was not knowing and voluntary because he was not advised he would be subject to the special sentence provision of Iowa Code section 903B.1 (Supp. 2009).¹ We agree and vacate Nyabugulu's conviction and sentence, and remand the case for further proceedings.

I. BACKGROUND AND PROCEEDINGS. On June 22, 2010, the State charged Nyabugulu with sexual abuse in the second degree, a class B felony. The parties reached a plea agreement whereby Nyabugulu would enter an *Alford* plea to the charge of lascivious acts with a child, a class C felony, in

¹ Iowa Code section 903B.1 (Supp. 2009) provides:

A person convicted of a class "C" felony or greater offense under chapter 709, or a class "C" felony under section 728.12, shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906. The board of parole shall determine whether the person should be released on parole or placed in a work release program. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole or work release. The person shall be placed on the corrections continuum in chapter 901B, and the terms and conditions of the special sentence, including violations, shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and chapter 908, and rules adopted under those chapters for persons on parole or work release. The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation. A special sentence shall be considered a category "A" sentence for purposes of calculating earned time under section 903A.2.

exchange for the State dismissing the sexual abuse charge. In addition, the plea agreement permitted Nyabugulu to argue for the imposition of probation at the time of sentencing.

Nyabugulu entered his *Alford* plea on February 20, 2011, and was sentenced on April 15, 2011, to a term of incarceration not to exceed ten years, a special lifetime sentence under Iowa Code section 903B.1, and ordered to register as a sex offender under section 692A.5 (2009). He was also ordered to pay a fine of \$1000 plus applicable surcharges, victim restitution, a probation enrollment fee, and court costs. In addition, the court entered a no-contact order protecting the victim for five years.

Nyabugulu appeals claiming his *Alford* plea was not knowing and voluntary when the district court failed to inform him that he would be subject to the special sentence under section 903B.1 (Supp. 2009). Thus, he claims the district court failed to comply with the requirements of Iowa Rule of Criminal Procedure 2.8(2)(b)(2), which requires the district court to inform him of “[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.”

II. ERROR PRESERVATION. As an initial matter, the State argues Nyabugulu failed to preserve error because he failed to file a motion in arrest of judgment before sentencing. See Iowa R. Crim. P. 2.24(3)(a) (providing a defendant’s failure to file a motion in arrest of judgment precludes his ability to challenge the adequacy of a guilty plea proceeding on appeal). While Nyabugulu concedes he did not file a motion in arrest of judgment as required under the

rules, he contends this does not preclude his claim because the district court failed to properly advise him of the preclusive effect of failing to file the motion under rule 2.8(2)(d).² We agree.

In *State v. Worely*, the Iowa Supreme Court held that no defendant should suffer the sanction of rule 23(3)(a) [now 2.24(3)(a)] unless the court has complied with rule 8(2)(d) [now 2.8(2)(d)] during the plea proceedings by telling the defendant that he must raise challenges to the plea proceeding in a motion in arrest of judgment and that failure to do so precludes challenging the proceeding on appeal.

297 N.W.2d 368, 370 (Iowa 1980). Rule 2.8(2)(d) imposes two requirements on the district court: (1) inform the defendant that any challenges to a guilty plea based on defects in the proceedings must be raised in a motion in arrest of judgment, and (2) inform the defendant that failure to raise such a challenge precludes his ability to raise the issue on appeal. *State v. Meron*, 675 N.W.2d 537, 541 (Iowa 2004).

In this case, the record discloses the following colloquy:

THE COURT: Okay. Now, in order for the Defendant to appeal—in order for him to appeal any judgment and sentence based on any ground or defect which may have occurred during these guilty plea proceedings, it is required that these claimed defects be raised by what is known as a Motion in Arrest of Judgment. He got that?

INTERPRETER: Yes, he understands that.

THE COURT: A Motion in Arrest of Judgment must be filed within 45 days of today's date or, in any event, not later than five days prior to the date and time set for sentencing.

INTERPRETER: He understands.

² Iowa Rule of Criminal Procedure 2.8(2)(d) provides:

The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea 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.

THE COURT: Okay. His attorney can go over in more detail with him the ramifications of a Motion in Arrest of Judgment.

THE DEFENDANT: Yes.

The court clearly informed Nyabugulu of his need to raise any challenge to the plea proceedings in a motion in arrest of judgment, but failed to inform him of the consequences of his failure to do so. Instead, the court stated Nyabugulu's attorney could discuss with him the ramifications of such a motion. As a result we find Nyabugulu's failure to file a motion in arrest of judgment does not preclude him from challenging his guilty plea on appeal. *Meron*, 675 N.W.2d at 541.

III. ALFORD PLEA. Turning to the merits of the appeal, Nyabugulu maintains his plea was not knowing and voluntary because the district court failed to inform him he would be subject to the special lifetime sentence under Iowa Code section 903B.1. We review a claim of error in a guilty plea proceeding for correction of errors at law. *Id.* at 540.

Iowa Rule of Criminal Procedure 2.8(2)(b) provides the court, in accepting a guilty plea, must inform the defendant of a number of items including, "(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." In this case the court informed Nyabugulu he could receive a punishment of up to ten years in prison, pay a fine between \$1000 and \$10,000, and have to register as a sex offender. However, the court never mentioned he would be subject to the special lifetime sentence under section 903B.1. Because section 903B.1 is a sentencing provision, the district court had an obligation to inform Nyabugulu of

its application to the charge to which he was pleading guilty. *State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009).

The State agrees Nyabugulu was not adequately informed of the consequences of his plea, but urges us to preserve Nyabugulu's claim for postconviction relief, since he failed to file a motion in arrest of judgment. As stated above, we find Nyabugulu's failure to file a motion in arrest of judgment does not preclude him from challenging his guilty plea, and thus, there is no need to preserve this claim for postconviction relief proceedings. As Nyabugulu was not informed of the maximum possible sentence as required under rule 2.8(2)(b)(2), we vacate his conviction and sentence, and remand the case to the district court for further proceedings.

CONVICTION AND SENTENCE VACATED; CASE REMANDED.