IN THE COURT OF APPEALS OF IOWA

No. 9-155 / 08-0882
Filed April 8, 2009

STATE OF IOWA,
Plaintiff-Appellant,

vs.

EDDY CORTEZ, a/k/a
ERMANDO CASTELENO,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Eddy Cortez appeals his convictions, following his guilty plea, for burglary in the second degree and sexual abuse in the third degree. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Non Horvat, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Potterfield, JJ.

MILLER, J.

Eddy Cortez appeals his convictions, following his guilty plea, for burglary in the second degree and sexual abuse in the third degree. He claims he "did not make a knowing and voluntary plea because the district court failed to inform the defendant (1) that the plea might affect his immigration status, or (2) that he would be subject to section 903B.1 lifetime parole." We reverse and remand.

The State charged Cortez, by trial information, with burglary in the first degree and sexual abuse in the third degree. The charges arose from an incident on October 7, 2007, when Cortez allegedly entered the residence of a Des Moines woman and sexually abused her. Cortez entered an *Alford*[1] plea as a result of a plea agreement. The agreement was that Cortez would plead guilty to the reduced charge of burglary in the second degree and to sexual abuse in the third degree, and the State would dismiss a separate charge of operating a vehicle without the owner's consent. The plea agreement specified that the district court would decide whether Cortez would serve the sentence for burglary concurrently with or consecutively to the mandatory sentence of imprisonment for the forcible felony of sexual abuse. The court found that Cortez entered the plea agreement voluntarily and understood his rights and the consequences of his guilty plea and accepted it. The court later sentenced Cortez to a term of imprisonment of no more than ten years on each count and ordered the sentences to run consecutively.

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[1] *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970). An *Alford* plea is a plea of guilty in which the defendant does not admit guilt but "acknowledges the evidence strongly negates the defendant's claim of innocence and enters [a guilty] plea to avoid a harsher sentence." *Comm. On Prof'l Ethics & Conduct v. Sturgeon*, 498 N.W.2d 338, 340 (Iowa 1992).

Cortez appeals, claiming his plea was defective because the district court did not inform him the plea might affect his immigration status, or that he would be subject to section 903B.1 lifetime parole, as required by Iowa Rule of Criminal Procedure 2.8(2)(*b*). Our review of a claim of error in a guilty plea proceeding is at law. Iowa R. App. P. 6.4; *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004).

The State first claims Cortez did not preserve error, as he did not file a motion in arrest of judgment as required by Iowa Rule of Criminal Procedure 2.24(3)(*a*). Cortez did not do so. Nevertheless, he contends his present challenge to his guilty plea is not precluded because the district court did not advise him that failure to file a motion in arrest of judgment would bar him from challenging the plea on appeal.

Generally, "[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." Iowa R. Crim. P. 2.24(3)(*a*).

> Yet, this requirement does not apply where a defendant was never advised during the plea proceedings, as required by rule 2.8(2)(*d*), that challenges to the plea must be made in a motion in arrest of judgment and that the failure to challenge the plea by filing the motion within the time provided prior to sentencing precludes a right to assert the challenge on appeal.

Meron, 675 N.W.2d at 540. Rule 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.

This rule clearly imposes two requirements. First, the court must inform the defendant of the need to file a motion in arrest of judgment, and second it must

inform the defendant of the consequences of failing to file such a motion. *Meron*, 675 N.W.2d at 541; *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980). "Failure by a judge to comply with this rule operates to reinstate the defendant's right to appeal the legality of his plea." *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

At the plea proceeding the court here told Cortez the following regarding the motion in arrest of judgment.

> It is my duty to tell you that you have a right to file what's called a "motion in arrest of judgment." That's a method by which you could attack the guilty plea that you have entered here today. You can do that at any time up until five days before the date set for sentencing or forty-five days from today, whichever comes first. And actually I think that would probably be – I believe it would be by April 17th, would be the last date you could file that. If you have any questions about that, [your attorney] can inform you further.

We conclude this colloquy was not sufficient to inform Cortez of the consequences of failing to file a motion in arrest of judgment, that if he failed to do so he could not challenge the plea proceedings on appeal. Accordingly, Cortez is not precluded from challenging his plea on appeal and we will consider the merits of his appeal.

Cortez claims the district court did not inform him of the maximum possible punishment on a conviction for sexual abuse, as required by rule 2.8(2)(*b*)(2).[2] More specifically, he claims the court failed to inform him that by pleading guilty to the offense of sexual abuse in the third degree he was subject to the additional punishment of lifetime parole under to section 903B.1. Rule 2.8(2)(*b*) "specifies

[2] This rule requires that before the court can accept a guilty it must address the defendant in open court and inform him or her of, and determine he or she understands, a number of matters including the "mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 2.8(2)(*b*)(2).

the colloquy in which a court must engage to ensure that a plea is knowingly and voluntarily made." *State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997). Noncompliance with this rule normally constitutes reversible error. *See Meron,* 675 N.W.2d at 542; *State v. Hook*, 623 N.W.2d 865, 867 (Iowa 2001), *abrogated on other grounds by State v. Barnes,* 652 N.W.2d 466, 468 (Iowa 2002). Substantial compliance is required. *Meron*, 675 N.W.2d at 542.

The record here shows the district court did not inform Cortez that in pleading guilty to sexual abuse in the third degree he would be subject to lifetime parole under section 903B.1. The State contends, however, that the court was not required to inform Cortez of this because 903B.1 lifetime parole is merely a "parole decision" and not "punishment" under rule 2.8(2)(*b*)(2). We disagree. The United States Supreme Court has noted, "parole is an established variation on imprisonment of convicted criminals" and "parolees are on the 'continuum' of state-imposed *punishments.*" *Samson v. California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 2198, 165 L. Ed. 2d 250, 258 (2006) (citations omitted) (emphasis added). "[P]arole is more akin to imprisonment than probation is to imprisonment." *Id*. Accordingly, we conclude lifetime parole pursuant to section 903B.1 is punitive in nature and is thus part of the "maximum possible punishment" of which rule 2.8(2)(*b*)(2) required the court to inform Cortez.

The record must demonstrate substantial compliance with the requirements of rule 2.8(2)(*b*). *See Meron*, 675 N.W.2d at 542. We conclude the district court in this case did not substantially comply with rule 2.8(2)(*b*) in accepting Cortez's guilty plea because it did not inform Cortez, prior to accepting

his plea, that he would be subject to the punishment of lifetime parole under section 903B.1. This record thus does not demonstrate that Cortez's guilty plea was knowing and voluntary.

We reverse the judgment and sentence of the district court and remand the case to the court for further proceedings to allow Cortez to plead anew. *See id.* at 544. Because we have done so it is unnecessary for us to address Cortez's additional claim that the court also erred by failing to inform him his guilty plea might affect his immigration status.

REVERSED AND REMANDED.