IN THE COURT OF APPEALS OF IOWA

No. 2-629 / 11-1409
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRETT J. PETERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick McCormick, Judge.

Brett Peterson appeals from the judgment and sentence entered following his guilty plea to operating while intoxicated, third or subsequent, and his admissions to prior operating while intoxicated convictions and to two prior felony convictions. **AFFIRMED**

Tod J. Deck of Deck Law, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kvein Cmelik, Assistant Attorney General, Patrick Jennings, County Attorney, and Bobbier Cranston, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

Brett Peterson appeals from his guilty plea and subsequent district court judgment and sentence for operating while intoxicated as a third or subsequent offender and as an habitual offender under Iowa Code sections 321J.2 and 902.8 (2009). He contends his guilty plea was not knowing or voluntary as the district court failed to inform him of the minimum sentence for operating while intoxicated third or subsequent offense, the suspension of his license, the requirement of participation in a remedial program, and the minimum fine. He also argues that the court erred in accepting his stipulation to prior felony convictions.

We affirm, finding Peterson was excused from the requirement of filing a motion in arrest of judgment because he was not fully advised about the consequences of failing to file the motion. We find substantial compliance with the court's notice of the applicable minimum sentence; that the remedial program and license suspension were not required to be included in the colloquy; and that the failure to disclose the minimum fine was harmless. Further, we find the court properly accepted Peterson's stipulation to prior convictions.

I. Statement of Facts

Brett Peterson was arrested for operating while intoxicated following a motorcycle accident. Peterson submitted to a blood test, which showed his blood alcohol content was .226. He was charged with operating while intoxicated, third or subsequent offense, and as an habitual offender; driving while license barred; and driving while license revoked. Pursuant to a plea agreement, Peterson pled guilty to the felony operating while intoxicated count, admitted his three prior

operating while intoxicated convictions, and admitted his two prior felony convictions.

He was sentenced to an indeterminate term not to exceed fifteen years, three of which would have to be served before eligibility for parole. In addition, Peterson was ordered to complete a remedial course; pay court costs, surcharges, and a fine of $3125; and submit to six years of driver's license revocation. He appeals, contending his guilty plea and stipulation to prior convictions were improper.

II. Guilty Plea

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

A. Error Preservation

The State claims Peterson did not preserve error on his challenges to his guilty plea because he failed to file a motion in arrest of judgment. *See id.* at 540; *see also* Iowa R. 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.").

> [T]his 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 the right to assert the challenge on appeal.

Meron, 675 N.W.2d at 540. The district court's failure to inform the defendant of the consequences of not filing a motion in arrest of judgment results in the appellate court's consideration of the challenge to the guilty plea on direct

appeal. *Id.* at 541. 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*." *Id.* (emphasis added).

Here, the district court solely mentioned the motion in arrest of judgment in the context of the fifteen-day deadline for filing the motion. The court did not mention the purpose of the motion, nor that failure to file such a motion would result in the defendant's inability to challenge his guilty plea on appeal. Therefore, the issue is preserved for our review as the district court substantially failed to comply with Iowa Rule of Criminal Procedure 2.8(2)(d).

1. Sufficiency of Plea

A plea of guilty must be made knowingly, voluntarily, and intelligently, and the court may not accept such a plea unless it has a factual basis. Iowa R. Crim. P. 2.8(2)(b) (2009), *Meron*, 675 N.W.2d at 542.

> *b*. *Pleas of guilty*. . . . 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 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).

Peterson contends his plea was not made in accordance with this rule because the court failed to advise him of the mandatory minimum penalties associated with the offense of operating while intoxicated without the habitual

offender enhancement. He also contends the district court improperly failed to inform him of the minimum fine, license suspension, and required participation in a remedial program. On review, we apply a "substantial compliance" standard as to whether the district court fulfilled the requirements of rule 2.8(2)(b). *State v*. *Myers*, 653 N.W.2d 574, 578 (Iowa 2002). "Under the substantial-compliance standard, 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." *Id.* "The record must confirm the existence of substantial compliance in listing each right." *Meron*, 675 N.W.2d at 542.

i. The Minimum Sentence

Both parties agree Peterson was not advised of the mandatory minimum sentence for the operating while intoxicated, third or subsequent offense, of thirty days without the habitual offender enhancement. However, he was informed by the court that with the habitual offender enhancement "that's fifteen years I would have to impose with the mandatory minimum of three years."

When a defendant has been misinformed about a sentence, the knowing and voluntary nature of the plea is affected only if the misstatement placed "in defendant's mind 'the flickering hope of a disposition on sentencing that was not possible.'" *State v*. *West*, 326 N.W.2d 316, 317 (Iowa 1982) (quoting *State v*. *Boone*, 298 N.W.2d 335, 338 (Iowa 1980)). Any misstatement must be material in the sense that it is part of the inducement for the defendant's decision to plead guilty, and the misstatement must go uncorrected. *Stovall v*. *State*, 340 N.W.2d 265, 267 (Iowa 1983). The court informed Peterson of the applicable mandatory

minimum, which was longer than the minimum for a third or subsequent offense operating while intoxicated without the habitual offender enhancement. Any omission in the court's colloquy does not undermine the voluntariness of Peterson's guilty plea.

ii. License Suspension and Remedial Program

Peterson also contends the court's failure to inform him of the suspension of his license and requirement to attend a remedial program constituted error. We disagree. "A court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea." *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998). The revocation of a defendant's license pursuant to the operating while intoxicated statute has been found to be an indirect and collateral consequence. *Id.* at 909.

Similarly, the court was not required to inform the defendant of the need to attend remedial classes.

> "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of defendant's punishment."

Id. (quoting *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975)). The remedial course was imposed upon the defendant in the discretion of the court. Therefore, it was not of "definite, immediate and largely automatic" effect. *See id.* Failure to inform of these consequences therefore does not affect the voluntariness of Peterson's guilty plea.

iii. The Fine

During the guilty plea colloquy, the district court asked Peterson, "Do you understand that the maximum penalty for the offense . . . is . . . up to a $7,500 fine?" It did not, as required by Iowa Rule of Criminal Procedure 2.8(2)(b), disclose the minimum fine of $3,125; it also did not report the proper maximum fine of $9,375. *See* Iowa Code § 321J.2 (2009). There is no mandatory minimum fine for the habitual offender enhancement imposed here. *See* Iowa Code §902.9 (2010). Further, a court may suspend a third-offense operating while intoxicated fine. *State v*. *Klein*, 574 N.W.2d 347 (Iowa 1998).

Because Peterson was informed that a fine could be imposed, and because there was flexibility in its imposition, we find the failure to inform Peterson of the minimum fine and misstatement of the maximum fine under section 321J.2 was not "material in the sense that it is part of the inducement for the defendant's decision to plead guilty[.]" *See Stovall*, 340 N.W.2d at 267.

B. Stipulation of Prior Offenses

Rule 2.8(2)(b), which governs guilty pleas,

> "does not expressly apply to a case in which a defendant is asked to admit or deny prior criminal convictions for habitual offender purposes . . . . Nevertheless, a defendant's admission of prior felony convictions which provide the predicate for sentencing as an habitual offender is so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas."

State v. *Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005) (quoting *State v*. *Brady*, 442 N.W.2d 57, 58 (Iowa 1989)).

As such, we will review the sufficiency of the proceedings for the sentencing enhancement as we do for guilty plea proceedings, which is for the correction of errors at law. *Meron*, 675 N.W.2d at 540.

1. Error Preservation

Peterson contends that the stipulation of prior offenses should be reviewed the same as his challenge to the guilty plea proceedings; that is, in accordance with our motion in arrest of judgment principals. The State alleges error was not preserved for this issue, as an objection was not made at the time of the stipulation, nor was a motion for new trial filed. Thus, the State alleges, Peterson "has waived all claims relating to the habitual offender process."

In *Kukowski*, our supreme court considered a challenge to a colloquy for a third offense operating while intoxicated sentencing enhancement. 704 N.W.2d at 689. In that case, the defendant both moved to withdraw his admission to a former conviction and filed a motion in arrest of judgment. *Id.* at 690. Though the court ultimately decided the case on the motion to withdraw admission grounds, it did analogize to a motion to withdraw a guilty plea. *Id.* at 691. Further, in this case, the court's questions that elicited the admissions at issue were made in conjunction with the guilty plea proceedings. Our rule regarding a motion in arrest of judgment includes "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[.]" Iowa R. Crim. P. 2.8(2)(b)(5)(d). As such, a motion in arrest of judgment would have been proper to challenge the enhancement procedure in this case. We have already found the court's notice for the requirement to file a

motion in arrest of judgment was insufficient and the issue will thus be decided on this direct appeal.

2. Sufficiency of Stipulation Procedure

Peterson contends his admission to prior convictions should not have been accepted, as he was not fully informed of the consequences of the admission. He expressed confusion when the court asked him to "plead guilty or not guilty" to the sentencing enhancement *after* he had admitted each of his previous operating while intoxicated convictions and the two prior felony convictions, and after he had been informed of the consequences of his stipulation.

In order to constitute reversible error, Peterson must show prejudice resulted from the trial court's failure to ascertain that Peterson understood the "ramifications of an habitual offender adjudication." *State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000); *State v*. *Bumpus*, 459 N.W.2d 619, 625–26 (Iowa 1990) ("[Defendant's former attorney] would have testified only as to [defendant's] identity in connection with the earlier conviction. In addition, the State introduced a judgment entry recording [Defendant]'s previous conviction. Accordingly, no prejudice resulted from the trial court's failure to advise [the defendant] of the consequences of his admission regarding the prior conviction.").

Here, Peterson's counsel informed the court that Peterson understood his prior admissions qualified for the sentencing enhancement. The deputy clerk of Woodbury County was listed in the minutes of testimony to testify to Peterson's four prior operating while intoxicated convictions and two previous felony convictions. Peterson does not specify what, if any, prejudice resulted from

confusion regarding the court's question about "pleading guilty or not guilty" to the habitual offender sentencing enhancement, and none appears on this record.[1]

3. Illegal Sentence

Peterson argues that the district court failed to properly apply the sentencing enhancement, resulting in an illegal sentence. Peterson cites no authority to support this proposition. While we would normally decline to address it here, under Iowa Rule of Appellate Procedure 6.903(2)(g)(3), we cannot allow a void sentence to stand even when a party does not properly raise the issue. *Carney*, 584 N.W.2d at 910. "When a court imposes a sentence which statutory law does not permit, the sentence is illegal, and such a sentence is void and we will vacate it." *State v*. *Hess*, 533 N.W.2d 525, 527 (Iowa 1995). Our supreme court in *State v*. *Ross* interpreted the habitual offender statute in the context of the imposition of a fine. 729 N.W.2d 806, 809 (Iowa 2007). There, the underlying felony did not provide for a fine. *Id.* Here, however, the fine imposed was the minimum required for a third or subsequent offense operating while intoxicated conviction, which was the basis for the habitual offender enhancement, and the imposition of the fine does not violate the rule set forth in *Ross*.

AFFIRMED.

[1] We note Peterson did not plead guilty to the habitual offender status, as his admissions to prior convictions do not constitute a guilty plea to the enhancement. *State v. Gordon*, 732 N.W.2d 41, 44 (Iowa 2007).