IN THE SUPREME COURT OF IOWA

No. 16–1112

Filed December 22, 2017

STATE OF IOWA,

Appellee,

vs.

JASON GENE WEITZEL,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Floyd County, Peter B. Newell, District Associate Judge.

The State requests further review of a court of appeals decision vacating defendant's guilty pleas. **DECISION OF COURT OF APPEALS AFFIRMED; DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.**

David A. Kuehner of Eggert, Erb, Mulcahy & Kuehner, P.L.L.C., Charles City, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Thomas E. Bakke, and Jean C. Pettinger (until withdrawal), Assistant Attorneys General, and Rachel Ginbey, County Attorney, for appellee.

WIGGINS, Justice.

A defendant appealed from the judgment and sentences entered on his guilty pleas to domestic abuse assault, possession of methamphetamine, carrying weapons, and operating while intoxicated. The defendant challenged the adequacy of his guilty plea colloquy, arguing the district court did not advise him about the statutory thirty-five percent criminal penalty surcharges. He claimed the district court's failure to disclose the surcharges invalidated his guilty pleas. We transferred the case to our court of appeals. The court of appeals held the district court did not substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(*b*)(2) during the guilty plea colloquy because it omitted information regarding the statutory thirty-five percent surcharges. Based on the district court's noncompliance, the court of appeals reversed.

The State applied for further review, which we granted. On further review, we hold the district court did not substantially comply with rule 2.8(2)(*b*)(2) because it failed to inform the defendant about the mandatory thirty-five percent criminal penalty surcharges. Because of the district court's noncompliance, the defendant is entitled to withdraw his pleas. Therefore, we affirm the decision of the court of appeals and remand the case to the district court for further proceedings.

I. Background Facts and Proceedings.

On March 11, 2016, the State filed a five-count trial information charging Jason Gene Weitzel with various crimes. In count I, the State charged him with domestic abuse assault impeding the normal breathing or circulation of blood resulting in bodily injury, a class "D" felony in violation of Iowa Code sections 708.2A(1) and (5) (2015). In count II, the State charged him with threat of terrorism, a class "D" felony in violation

of sections 708A.1 and .5. Count III charged him with possession of methamphetamine (second offense), an aggravated misdemeanor in violation of section 124.401(5). Count IV charged him with carrying weapons, an aggravated misdemeanor in violation of section 724.4(1). Lastly, count V charged him with operating while intoxicated (first offense), a serious misdemeanor in violation of section 321J.2. On April 12, the State amended the trial information to amend count II to intimidation with a dangerous weapon, a class "D" felony in violation of section 708.6.

Weitzel agreed to plead guilty to four of the five charges. At the plea hearing, the district court informed Weitzel of the minimum and maximum fines applicable to each offense and determined he understood the fines. However, the court neither informed Weitzel of the mandatory thirty-five percent criminal surcharge penalty applicable to each offense pursuant to Iowa Code section 911.1 nor determined whether Weitzel understood he would be subject to the section 911.1 surcharges. The court did inform Weitzel of the $100 domestic abuse surcharge it was required to assess on count I and the $125 law-enforcement-initiative surcharge it was required to assess on count III. Additionally, the court did inform Weitzel about the $10 drug abuse resistance education (DARE) surcharge on count III but omitted this information on count V.[1] Weitzel acknowledged he understood he would be subject to the disclosed surcharges. He entered guilty pleas to counts I, III, IV, and V. In exchange for his plea, the State dismissed count II.

[1]The court mentioned the DARE surcharge on count V during the sentencing hearing but not at the guilty plea hearing. On count III, according to the written order, the court ended up assessing only the law-enforcement-initiative surcharge.

In its written order following the sentencing hearing, the court imposed on count I an indeterminate term not to exceed five years and a fine of $750, plus the statutory thirty-five percent surcharge and the $100 domestic abuse surcharge. For count III, the court imposed an indeterminate term not to exceed two years and a fine of $625, plus the statutory thirty-five percent surcharge and the $125 law-enforcement-initiative surcharge. On count IV, the court imposed an indeterminate term not to exceed two years and a fine of $625, plus the statutory thirty-five percent surcharge. Lastly, on count V, the court imposed a two-day sentence in the county jail and a fine of $1250, plus the statutory thirty-five percent surcharge and the $10 DARE surcharge. The district court ordered Weitzel to serve the sentences on counts I, III, and IV consecutively and the two-day jail term on count V concurrently. The district court also fully suspended the fines for three of the four counts, specifically counts I, III, and IV.

On June 30, Weitzel appealed the judgment and sentences. He sought to vacate his convictions on the ground the plea hearing was inadequate. Weitzel argued the district court did not adequately advise him of the thirty-five percent surcharges pursuant to section 911.1. He also contended the court misinformed him that the maximum fine for count V was $1500 when it was actually $1250, failed to explain the fines could be cumulative, and failed to disclose the $100 domestic abuse surcharge on count I.[2]

We transferred the case to our court of appeals. The court of appeals focused on error preservation and the surcharge issues. It found the district court did not substantially comply with Iowa Rule of Criminal

[2]As we already noted, the district court did inform Weitzel of the domestic abuse surcharge on count I.

Procedure 2.8(2)(*d*), which requires the district court to inform a defendant of both the necessity of filing a motion in arrest of judgment to challenge any defects in the guilty plea colloquy and the consequences of failing to file the motion. Therefore, because the district court did not fully advise Weitzel about the motion in arrest of judgment, the court of appeals held Weitzel could challenge his pleas on direct appeal.

As for the surcharge issue, the court of appeals concluded the district court's failure to inform Weitzel of the thirty-five percent criminal penalty surcharges meant it did not substantially comply with rule 2.8(2)(*b*)(2). The court of appeals further held the proper remedy was to vacate Weitzel's pleas and convictions, and remand the matter for further proceedings.

The State filed an application for further review, and we granted it. The State explicitly states it does not contest the ruling of the court of appeals that Weitzel may challenge his pleas on direct appeal because of the district court's failure to inform him of the need to file a motion in arrest of judgment to challenge any defects in the plea proceeding. As for the second issue, the State argues the district court substantially complied with rule 2.8(2)(*b*)(2) because it informed Weitzel of the maximum possible terms of incarceration, the maximum possible fines, and other matters listed in rule 2.8(2)(*b*).

II. Issues.

When reviewing an application for further review, we retain discretion to review all the issues raised on appeal or in the application for further review, or only a portion thereof. *Gits Mfg. Co. v. Frank*, 855 N.W.2d 195, 197 (Iowa 2014). In exercising this discretion, we agree with the court of appeals and the State's position in its application for further review that Weitzel properly brought a direct appeal of his pleas

despite his counsel's failure to file a motion in arrest of judgment. Accordingly, we will let the court of appeals decision on this issue stand as the final decision in this case. The only issue we will address is the dispositive issue as to whether the court's failure to inform Weitzel about the statutory thirty-five percent surcharge applicable to each offense invalidates his pleas.

III. Scope of Review.

We review challenges to plea proceedings for correction of errors at law. *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004).

IV. Discussion and Analysis.

A. Difference Between an Appeal Under the Rubric of Ineffective Assistance of Counsel and a Direct Appeal of a Guilty Plea. Iowa court rules require the court to inform a defendant at the time of his or her plea that in order for the defendant to challenge the plea, the defendant must file a motion in arrest of judgment. Iowa R. Crim. P. 2.8(2)(*d*). If the defendant fails to file a motion in arrest of judgment after the court has informed the defendant of his or her obligation to do so, he or she cannot directly appeal from the guilty plea. *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006); *accord* Iowa R. Crim. P. 2.24(3)(*a*). However, if the guilty plea resulted from ineffective assistance of counsel, the defendant can challenge the plea under the rubric of ineffective assistance of counsel. *Straw*, 709 N.W.2d at 133.

When challenging a plea under the rubric of ineffective assistance of counsel, the defendant satisfies the prejudice prong if he or she can show "there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial." *Id.* at 138. This usually requires the defendant to bring a

postconviction-relief action to meet his or her burden of proving prejudice. *Id.*

On the other hand, when the court does not fully advise the defendant of his or her right to file a motion in arrest of judgment, the defendant may file a direct appeal challenging his or her guilty plea. *State v. Fisher*, 877 N.W.2d 676, 680–81 (Iowa 2016). The State acknowledges the district court did not properly inform Weitzel of his obligation to file a motion in arrest of judgment to challenge his guilty pleas. Thus, we will review the plea proceeding as a direct appeal.

B. Due Process and Rule-Based Claims Challenging Guilty Pleas on Direct Appeal. Before we address the merits of Weitzel's case, we first clarify the analysis used by the court of appeals in differentiating between a due process challenge and a rule-based claim. The line dividing these two types of claims is not always clear. In a number of cases, a defendant may bring a hybrid due process and rule-based claim, arguing that his or her guilty plea was not entered voluntarily because the district court failed to substantially comply with rule 2.8(2)(*b*).

The court of appeals erroneously reasoned *State v. Finney*, 834 N.W.2d 46 (Iowa 2013), distinguished between a due process challenge and a challenge to the adequacy of a plea proceeding. *Finney* emphasized the difference between a due-process challenge to a plea and a claim based on the lack of a factual basis. *Finney*, 834 N.W.2d at 61–62 (distinguishing between delving into the defendant's subjective state of mind for a due process voluntariness claim and examining whether there was an objective factual basis in the record). We noted that similarly in *State v. Rodriguez*, 804 N.W.2d 8444, 853 (Iowa 2011), the defendant "had not challenged the sufficiency of the plea colloquy, *which*

would have raised a due process voluntariness issue, but only the factual basis for the plea." *Finney*, 834 N.W.2d at 60 (emphasis added).

A clear bifurcation in all circumstances between due process and rule-based claims would defy our caselaw. In fact, the procedural safeguards of rule 2.8(2)(*b*) facilitate the process of more accurately evaluating the voluntariness of a defendant's plea. *See State v. Loye*, 670 N.W.2d 141, 151 (Iowa 2003) ("Rule 2.8(2)(*b*) codifies [the] due process mandate."). In *State v. Sisco*, 169 N.W. 542 (Iowa 1969), we laid out four basic requirements before the district court could enter a conviction on the basis of a plea: the defendant must (1) understand the charge, (2) be aware of the penal consequences of the plea, (3) enter the plea voluntarily, and (4) the district court must determine whether a factual basis exists for the plea. *Sisco*, 169 N.W.2d at 547–48 (Iowa 1969); *accord Finney*, 834 N.W.2d at 56.

Weitzel's rule-based claim, as the court of appeals coined it, that the colloquy was defective because the district court violated rule 2.8(2)(*b*)(2) by failing to inform him of the thirty-five percent surcharges, is another way of saying the district court failed to adequately address the penal consequences of his plea. Noncompliance with this second requirement of *Sisco* implicates the third requirement of *Sisco* involving voluntariness. *See Finney*, 834 N.W.2d at 57 ("Compliance with the remaining *Sisco* requirement, voluntariness, was only implicated to the extent it was affected by . . . noncompliance with the first two *Sisco* requirements.").

The court of appeals opined because the claims are separate and distinct, a defendant may voluntarily, knowingly, and intelligently plead guilty even though the colloquy does not substantially comply with rule 2.8(2)(*b*). The court of appeals provided, as an example, the district

court's failure to advise a defendant of the minimum and maximum prison sentences would have no effect on the voluntary nature of the guilty plea when the defendant's counsel had advised the defendant of the sentences off the record prior to the proceeding. However, a rule-based claim necessarily entails due process concerns when the district court does not meet the substantial compliance test, even if the defendant knew about the relevant matters listed in rule 2.8(2)(*b*). *See Loye*, 670 N.W.2d at 153–54.

In *Loye*, even though the defendant's attorney advised the defendant about the punishments that could be imposed, we vacated the defendant's convictions and allowed her to plead anew because the district court did not fulfill its obligation of confirming she understood the nature of the charges or the maximum possible punishments. *Id.* Thus, we presumed the defendant's plea was not voluntary because the district court did not substantially comply with the rules. *Id.* At first glance, it appears the defendant in *Loye* brought a rule-based claim, but her claim necessarily entailed due process concerns strictly based on the district court's noncompliance, even if she, in actuality, knew about the punishments prior to the plea hearing.

Conversely, the court of appeals reasoned, the district court may fully comply with rule 2.8(2)(*b*) but nevertheless fail to comport with due process. The court of appeals illustrated a scenario in which the defendant was under the influence of medications that hampered his or her ability to understand the proceedings. We agree a defendant may have a viable due process challenge without alleging violations of rule 2.8(2)(*b*). *See Stovall v. State*, 340 N.W.2d 265, 266–67 (Iowa 1983). We note rule 2.8(2)(*b*) embodies procedural safeguards that attempt to ensure the defendant enters his or her guilty plea knowingly and

intelligently—it does not guarantee perfection or foolproof protection against due process violations. *Cf. State v. Webster*, 865 N.W.2d 223, 233 (Iowa 2015) (stating a defendant is entitled to a fair—not a perfect—trial).

Based on the foregoing, we decline to strictly demarcate a clear line between rule-based and due-process claims, although we acknowledge a defendant may bring a due process claim without alleging rule violations. *Compare Loye*, 670 N.W.2d at 145, 150 (where the defendant claimed her guilty plea was not voluntary—a due process claim—because the district court did not comply with the rules—a rule-based claim), *with Stovall*, 340 N.W.2d at 267 (where the defendant brought a due process claim despite the district court's substantial compliance with the rules).

C. The Court of Appeals Rule-Remedy Distinction. The court of appeals reviewing Weitzel's case disavowed two unpublished cases by panels of their court, stating those opinions, *State v. Peterson* and *State v. Howell*, conflated the rule and the remedy. *See State v. Peterson*, No.11–1409, 2012 WL 3860730, at *3 (Iowa Ct. App. Sept. 6, 2012) (finding failure to inform defendant of minimum fine was not a material inducement to his guilty plea); *State v. Howell*, No. 07–1179, 2008 WL 783760, at *2 (Iowa Ct. App. Mar. 26, 2008) (stating in dicta the district court's provision of incorrect information regarding the range of possible fines substantially complied with rule 2.8(2)(*b*)(2) because the error was harmless).

The court of appeals reasoned substantial compliance focuses on whether the district court adequately followed rule 2.8(2)(*b*) while the remedy focuses on whether the failure to disclose the required information induced action on the part of the defendant or was otherwise harmless. The question of substantial compliance, the court of appeals

reasoned, concerns the conduct of the district court, not that of the defendant. The court of appeals used an illustrative analogy involving a home buyer bringing a misrepresentation suit against a home seller for failure to disclose a leaky basement. The court stated it would not say the seller made an adequate disclosure because the condition of the basement did not materially induce the buyer in purchasing the home. Rather, the court opined, it would say the seller failed to disclose but the buyer was probably not entitled to a remedy. We agree.

McCarthy v. United States, 394 U.S. 459, 462, 89 S. Ct. 1166, 1169 (1969), illustrates this distinction between compliance (or lack thereof) with Rule 11 of the Federal Rules of Criminal Procedure and the remedy. Rule 2.8(2)(*b*) of the Iowa Rules of Criminal Procedure is substantially equivalent to Rule 11 at the time of the *McCarthy* decision.[3]

In *McCarthy*, the defendant argued the district court violated Rule 11, and thus, the plea should be set aside. *McCarthy*, 394 U.S. at 462, 89 S. Ct. at 1169. Particularly, he claimed (1) the district court failed to address him personally and determine he made the plea voluntarily with an understanding of the nature of the charge, and (2) the court did not assess whether there was a factual basis for the plea before entering judgment. *Id.* The United States Supreme Court first examined whether the district court had complied with Rule 11. *Id.* at 464–67, 89 S. Ct. at 1170–71. The Court stated the dual purposes of Rule 11:

> First, . . . it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is

[3]We discuss later in our opinion about the addition of a harmless-error provision to Rule 11 post-*McCarthy*.

> adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Id. at 465, 89 S. Ct. at 1170 (footnotes omitted). Based on these goals of Rule 11, the Court held the district court did not comply with Rule 11 by failing to inquire whether the defendant understood the nature of the charge. *Id.* at 467, 89 S. Ct. at 1171.

The Court next determined what remedy the defendant was entitled to because of the district court's noncompliance with Rule 11. *Id.* at 468–72, 89 S. Ct. at 1172–74. The Court reasoned, "[P]rejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *Id.* at 471–72, 89 S. Ct. at 1173–74. Because the district court accepted the defendant's guilty plea without complying with Rule 11, the Court held the defendant was entitled to plead anew. *Id.* at 463–64, 472, 89 S. Ct. at 1169, 1174. The Court noted its holding would "insure that every accused is afforded [the] procedural safeguards [of Rule 11]" and "help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." *Id.* at 472, 89 S. Ct. at 1174.

In 1983, Congress amended Rule 11 by introducing subsection (h), the harmless-error provision.[4] Fed. R. Crim. P. 11(h) advisory

[4]At the time the Supreme Court decided *McCarthy*, the Federal Rules of Criminal Procedure already contained a harmless-error provision in Rule 52(a). *See* Fed. R. Crim. P. 11(h) advisory committee's note to the 1983 amendments ("Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11."). Rule 52(a) states, "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a).

committee's note to the 1983 amendments. Rule 11(h) provides, "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." *Id.* R. 11(h). The committee stated, "Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case." *Id.* R. 11(h) advisory committee's note to the 1983 amendments. Thus, Congress added subsection (h) to counter the practice of several courts following *McCarthy*, which, as noted, held the defendant was entitled to plead anew because the district court violated Rule 11. *See United States v. Cross*, 57 F.3d 588, 591 (7th Cir. 1995).

We agree with the court of appeals in regards to the rule-remedy distinction. *See McCarthy*, 394 U.S. at 467, 471–72, 89 S. Ct. at 1171, 1173–74; *Cross*, 57 F.3d at 590, 592 (holding the district court violated what is now Rule 11(b)(2) by failing to address the defendant directly to ensure that his plea was voluntary and not motivated by threats, coercion, or undisclosed promises but nevertheless concluding the district court's noncompliance with the Rule was harmless pursuant to Rule 11(h) because under the totality of the circumstances it did not affect the defendant's substantial rights and thus refusing to vacate the defendant's conviction to allow him to plead anew). Consequently, we must first determine whether the district court substantially complied with rule 2.8(2)(*b*)(2) and then evaluate the appropriate remedy, subject to our answer to the former inquiry.

D. The District Court's Substantial Compliance with Rule 2.8(2)(*b*)(2). We begin our analysis of the merits with Weitzel's contention that the district court's failure to inform him about the thirty-five percent criminal penalty surcharges rendered his pleas invalid. Iowa

Code section 911.1 states, "A criminal penalty surcharge shall be levied against law violators as provided in this section. . . . [The] additional penalty [shall be] in the form of a criminal penalty surcharge equal to thirty-five percent of the fine . . . imposed." Iowa Code § 911.1(1); *see also id.* § 911.1(2) ("In the event of multiple offenses, the surcharge shall be based upon the total amount of fines . . . imposed for all offenses.").

Following the United States Supreme Court's lead and like nearly all states, Iowa requires the district court before accepting a guilty plea for serious crimes to "engage in some kind of colloquy with the defendant in order to ensure . . . there is a factual basis for the plea and . . . the defendant has knowingly and voluntarily waived important constitutional rights." *Finney*, 834 N.W.2d at 50. Specifically, rule 2.8(2)(*b*)(2) of the Iowa Rules of Criminal Procedure provides,

> *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*)(2).

In determining whether a plea meets the requirements of rule 2.8(2)(*b*)(2), we apply the substantial compliance standard. *Fisher*, 877 N.W.2d at 681–82. 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." *Meron*, 675 N.W.2d at 544; *accord United States v. Cotal-Crespo*, 47 F.3d 1, 4 (1st Cir. 1995) ("We have distinguished between 'technical' violations of Rule 11 and violations of the rule's 'core concerns[.]' ").

State v. Smothers, 309 N.W.2d 506 (Iowa 1981), serves as an example of the district court's technical violation of what is now rule 2.8(2)(*b*)(5) in which the court nevertheless gave justice to the essence of the requirement. In *Smothers*, the defendant contended the district court erred in failing to advise him that by pleading guilty he would thereby waive a jury trial. *Id.* at 507. The district court had informed the defendant that if he pled not guilty, he would be entitled to a jury trial. *Id.* at 508. Nevertheless, we held the district court substantially complied with what is now rule 2.8(2)(*b*)(5), which requires the district court to inform the defendant and determine that the defendant understands he or she is waiving his or her right to a jury trial by pleading guilty. *Id.* We reasoned "[a]dvising [the defendant] he would be entitled to a jury trial if he pled not guilty implied the converse: that if he pled guilty he would not have a trial." *Id.* We noted the defendant conceded the court's statement was not misleading because he had gleaned the negative implication of the court's statement to him. *Id.*

For obvious reasons, strict or actual compliance increases the utility of the procedural protections of rule 2.8(2)(*b*). However, while strict compliance is preferred, substantial compliance is all that our caselaw has required. *Cf. State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990) ("Strict compliance with the rule's literal language practically assures that a plea of guilty thereafter accepted is made voluntarily, intelligently, and with a factual basis. Nevertheless, the rule does not establish a litany that must be followed without variation before a guilty plea may be accepted.").

In *Fisher*, we left unresolved the question of "whether failure to disclose the surcharges *alone* would have meant the plea did not *substantially comply* with rule 2.8(2)(*b*)(2)." *Fisher*, 877 N.W.2d at 686

n.6. We stated, "Regardless, we hold that *actual compliance* with rule 2.8(2)(*b*)(2) requires disclosure of all applicable chapter 911 surcharges." *Id.* We now address the question unresolved in *Fisher*.

The State contends the district court substantially complied with rule 2.8(2)(*b*)(2) because Weitzel had an adequate basis to decide whether to plead guilty when the court informed him of the maximum possible terms of incarceration—which, the State argues, directly implicates Weitzel's liberty interest—the maximum fine, and other matters listed in rule 2.8. The State further argues the court of appeals misapplied *Meron* in reasoning that the district court must separately address each facet of the punishment—such as term of incarceration, fines, license revocations, and surcharges—and substantially comply with each of those facets. Thus, the State contends "pars[ing] the requirements of the rule . . . to the degree the [c]ourt of [a]ppeals did [here] is to require strict rather than substantial compliance."

We agree with the State to the extent that the reference to "each requirement" means each provision of rule 2.8(2)(*b*). *See Meron*, 675 N.W.2d at 544. Rule 2.8(2)(*b*)(2) is one of five requirements under the rule.[5] This rule requires the court to inform the defendant of "[t]he

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[5]The full listing of rule 2.8(2)(*b*) is as follows:

> *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:
>
> (1) The nature of the charge to which the plea is offered.
>
> (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.
>
> (3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.
>
> (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

mandatory minimum punishment . . . 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). "These are considered direct consequences of the plea." *Fisher*, 877 N.W.2d at 685.

Admittedly, rule 2.8(2)(*b*)(2) does not specify the exact subsets of punishment. However, simply because the rule does not specify "surcharges" does not lend much to the State's analysis. *Cf. State v. White*, 587 N.W.2d 240, 246 (Iowa 1998) (rejecting the State's argument the guilty plea was valid because what is now rule 2.8(2)(*b*)(2) does not specify that the district court must inform the defendant of the possibility of consecutive sentences).

Surcharges are a form of punishment. We have stated fines themselves are a form of punishment that the district court must disclose before accepting a guilty plea. *Fisher*, 877 N.W.2d at 685; *accord* Fed. R. Crim. P. 11(b)(1)(H) (explicitly requiring the district court to disclose "any maximum possible penalty, including . . . fine" during the guilty plea colloquy); *People v. Harnett*, 945 N.E.2d 439, 441–42 (N.Y. 2011) ("The direct consequences of a plea . . . are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of post-release supervision, a fine."). We have also stated, "For rule 2.8 purposes, we see no meaningful difference between a fine and a built-in surcharge on a fine." *Fisher*, 877 N.W.2d at 686.

> 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.
>
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

Iowa R. Crim. P. 2.8(2)(*b*).

Furthermore, we have indicated, "According to the plain language of the statute, the surcharge of thirty-five percent is a mandatory 'additional penalty' " and is therefore "punitive on its face." *Id.* at 685. We reasoned "surcharges can be distinguished from other court-ordered payments, such as restitution, court costs, and reimbursement for the cost of court-appointed counsel, which we regard as nonpunitive." *Id.* at 686. Thus, surcharges fit comfortably within the definition of punishment.

We conclude the district court must inform Weitzel of all direct consequences of the plea in the oral colloquy or in any written waiver thereof. *See id.* at 682 (noting the district court must inform the defendant of all direct consequences of the plea); *see also White*, 587 N.W.2d at 242–43, 246 (noting the United States Supreme Court has held the defendant must be fully aware of the direct consequences of a guilty plea and holding the district court must therefore inform the defendant about the consecutive nature of the imposed sentences).

The district court's outright and wholesale omission regarding the criminal penalty surcharges cannot pass the substantial compliance threshold when there was not even a hint of compliance in the first instance.[6] Specifically, the court failed to inform Weitzel about the thirty-five percent surcharges. The court also failed to determine he understood what the surcharges meant. Weitzel therefore was "uninformed of the true maximum possible punishment." *White*, 587 N.W.2d at 246. The purpose of informing a defendant and determining whether he or she understands the penal consequences to pleading guilty is to ensure he or she makes the plea voluntarily and intelligently. *See Loye*, 670 N.W.2d at 151. Since the maximum possible

[6]We are not deciding if informing Weitzel of a surcharge without specifying the amount would be substantial compliance.

punishment includes the surcharges, we do not see how the State can work its way around what rule 2.8(2)(*b*)(2) clearly requires.

Rule 2.8(2)(*b*)(2) expressly specifies in plain language that the district court must discuss the mandatory minimum and maximum possible punishments, and again, surcharges constitute punishment. Accordingly, the district court did not substantially comply with rule 2.8(2)(*b*)(2).

E. The Remedy for the District Court's Failure to Comply with Rule 2.8(2)(*b*)(2). We now address the interrelated question concerning what remedy Weitzel is entitled to because of the district court's violation of rule 2.8(2)(*b*)(2). The court of appeals held the proper remedy for the district court's violation of rule 2.8(2)(*b*)(2) is mandatory, automatic reversal. We agree.

On direct appeal, the remedy for a valid challenge to a guilty plea is to vacate the plea, reverse the judgment of conviction, and allow the defendant to plead anew. *See Loye*, 670 N.W.2d at 153–54; *White*, 587 N.W.2d at 246–47; *see also Meron*, 675 N.W.2d at 542 ("Absent a written plea of guilty describing all the matters set forth in the rule, noncompliance with oral requirements of the rule normally constitutes reversible error.").

In *Loye*, the defendant claimed her guilty plea was invalid because the court did not fully inform her of the nature of the charges and the potential penalties. *Loye*, 670 N.W.2d at 145. We held the district court did not substantially comply with rule 2.8(2)(*b*)(1)–(2) because it failed to confirm the defendant knew and understood the nature of the charges and the maximum possible punishments. *Id.* at 153.

In mandating reversal, we examined the district court's conduct—failure to substantially comply with our rules of criminal procedure—and

applied a per se prejudice rule rather than focusing on whether prejudice actually inhered to the defendant. *See id.* at 153–54. In doing so, we highlighted the importance of the district court's duty to meet the substantial compliance standard. *See id.* at 153. We stated "[t]he fact that a defendant pleads guilty *does not relieve the court of its obligation* to ensure the defendant's knowledge and understanding of the nature of the charges and the potential punishments." *Id.* (emphasis added). "*Nor is the court's obligation lessened* because the defendant's attorney has discussed the same matters with the accused in preparation for the plea hearing." *Id.* (emphasis added); *see also McCarthy*, 394 U.S. at 466, 89 S. Ct. at 1170–71 ("By personally interrogating the defendant, . . . the judge [will] be better able to ascertain the plea's voluntariness, ..."). Thus, even if the defendant's attorney had talked to [the defendant] about the potential punishments, "reversal is automatic if the court taking the plea does not substantially comply with the requirements of the rule." *Straw*, 709 N.W.2d at 140 (Lavorato, C.J., dissenting); *accord Loye*, 670 N.W.2d at 153–54 (holding the district court did not substantially comply with the rules and thus "[the defendant's] plea was not made knowingly and intelligently and, therefore, was not voluntary" and "[f]or this reason, the defendant's guilty plea violated the Due Process Clause and must be set aside").

In *White*, the defendant claimed he did not make his guilty plea voluntarily and intelligently because the district court did not inform him about the consecutive nature of the sentences. *White*, 587 N.W.2d at 241. We reasoned rule "[2].8(2)(*b*) requires the judge, before accepting a plea of guilty, to determine that the plea was made voluntarily and intelligently." *Id.* at 246. Because of the district court's omission, the defendant did not know of the "true maximum possible punishment,"

leaving him "uninformed and unenlightened." *Id.* We reasoned "[t]he letter of the law and the spirit of the law requiring that the guilty plea be made voluntarily and intelligently, mandated by [rule 2.8(2)(*b*)] and the Due Process Clause of the United States Constitution have not been satisfied." *Id.* Thus, we allowed the defendant to withdraw his guilty plea and plead anew. *Id.* at 247.

We now address some of our older cases in which we have applied a material-inducement test to a guilty plea when a court makes an affirmative misstatement and the misstatement is material to the defendant's decision to plead guilty. In *Stovall*, the district court incorrectly told the defendant the plea bargain would obviate the five-year period the defendant would have to serve before he would become eligible for parole when, in actuality, the defendant had to serve twelve-and-one-half years. *Stovall*, 340 N.W.2d at 266–67. We found this to be a material misstatement relied upon by the defendant. *Id.* at 267. Thus, we found the defendant did not make his plea intelligently and voluntarily. *Id.* Consequently, we set aside the guilty plea and permitted the defendant to plead anew. *Id.*

In *State v. West*, the sentencing judge misled the defendant by stating it would order a presentence investigation and consider the statements of the county attorney and the defendant's attorney. *West*, 326 N.W.2d 316, 317–18 (Iowa 1982). The defendant argued the court gave him false hope that the judge had discretion concerning what the proper sentence would be, although, in actuality, the defendant was ineligible for a deferred judgment or probation. *Id.* The majority remanded the case to the district court for a determination as to whether the court's statement induced him to plead guilty. *Id.* at 318.

Finally, in *State v. Boone*, the district court incorrectly told the defendant that the sentencing possibilities included a deferred judgment or probation and therefore "placed in the defendant's mind the flickering hope of a disposition on sentencing that was not possible." *Boone*, 298 N.W.2d 335, 338 (Iowa 1980). As in *Stovall*, we found Boone did not make his plea intelligently and voluntarily. *Id.* at 338. We then set aside the guilty plea and permitted Boone to plead anew. *Id.*

Stovall, *West*, and *Boone* are distinguishable from the present case. In each of those cases, the district court affirmatively provided material misinformation that induced the defendant to plead guilty. If we were to require Weitzel to show he would not have pled guilty if he knew about the surcharge, we would be injecting a harmless-error standard into our rule. Our rule is different from the amended federal rule that allows a court to make a harmless-error analysis. *Compare* Fed. R. Crim. P. 11(h), *with* Iowa R. Crim. P. 2.8(2)(*b*). Moreover, since *Loye*, we have not employed a harmless-error analysis. Finally, if we were to write a harmless-error provision into our rule, there would be no distinction between our direct review of a guilty plea and a review based on ineffective assistance of counsel. *See Straw*, 709 N.W.2d at 137–38.

For practical reasons, we believe a bright-line rule is more appropriate than an inconsistent harmless-error analysis based on the totality-of-the-circumstances test that could lead to endless permutations. *Cf. West*, 326 N.W.2d at 319 (Harris, J., dissenting) (stating the defendant "was in no way harmed" by the sentencing judge's statements and "I cannot believe [the defendant] was misled by what the judge said"). Although the dissent in *West* did not challenge the application of the material-inducement standard, it expressed qualms over where to draw the line. *See id.* (expressing skepticism over where

the majority would find a "glimmering but false hope" had the sentencing judge ordered a presentence report without further comments or if the judge had ordered a presentence investigation after conveying doubt of his authority to suspend or defer the sentence).

A line-drawing game in which we play the role of a mind reader in order to delve into the defendant's subjective state of mind is inapposite, especially because a guilty plea entails relinquishing important constitutional rights. Moreover, a defendant's decision to plead guilty is a "grave and personal judgment, which a defendant should not be allowed to enter without full comprehension of possible consequences of conviction by such plea." *White*, 587 N.W.2d at 246 (quoting *State v. Irish*, 394 N.W.2d 879, 885 (Neb. 1986) (Shanahan, J., dissenting)).

Another concern is the lack of a sufficient record regarding a defendant's motivations for pleading guilty. *See McCarthy*, 394 U.S. at 465, 89 S. Ct. at 1170 (explaining "Rule [11] is intended to produce a complete record at the time the plea is entered of the factors relevant to [the] voluntariness determination" and "[t]hus, the more meticulously . . . Rule [11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas").

Additionally, we stated in *White* that "explaining the difference between consecutive and concurrent sentences . . . could take less than one minute" and "would not unduly burden our courts." *White*, 587 N.W.2d at 246. Similarly, the district court can afford to take another minute to inform the defendant and ascertain he or she understands the section 911.1 criminal penalty surcharges. We emphasize

> "[a] guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused" does not know of or is misinformed about the maximum punishment he or she faces by pleading guilty.

Straw, 709 N.W.2d at 144–45 (majority opinion) (quoting *Hawkman v. Parratt*, 661 F.2d 1161, 1170 (8th Cir. 1981)).

Finally, reversing a guilty plea on direct appeal should be rare. We will only reverse a guilty plea on direct appeal when the court fails to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(*b*) and fails to properly inform the defendant of the necessity to file a motion for arrest of judgment under rule 2.8(2)(*d*). Our decision today confirms that courts need to follow all the requirements of rule 2.8 when taking a guilty plea. Our holding will only encourage courts to adhere to the procedural safeguards of rule 2.8.

V. Disposition.

We set aside Weitzel's guilty pleas, remand the case to the district court where the State may reinstate any charges dismissed in contemplation of a valid plea bargain, and file any additional charges supported by the available evidence.

DECISION OF COURT OF APPEALS AFFIRMED; DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.

All justices concur except Mansfield and Waterman, JJ., who dissent.

MANSFIELD, Justice (dissenting).

I respectfully dissent. While the defendant should have been advised of the thirty-five percent surcharge provided by Iowa Code section 911.1 (2015), I would affirm the convictions based on substantial compliance with Iowa Rule of Criminal Procedure 2.8(2)(*b*).

Rule 2.8(2)(*b*)(2) requires the defendant to be advised of the "mandatory minimum punishment" and the "maximum possible punishment" for the offense to which the defendant is pleading guilty. Here the defendant pled guilty to a class "D" felony, two aggravated misdemeanors, and a serious misdemeanor. He was advised that potential fines on all charges could total as much as $21,635, including surcharges. He was also told there would be a minimum fine of $1250 on the serious misdemeanor charge of operating when intoxicated first offense. As it turned out, the defendant received only the $1250 OWI fine, plus $210 in surcharges and a thirty-five percent surcharge of $437.50. The defendant also received a term of imprisonment totaling nine years.

It is well settled that we do not reverse a guilty plea when there has been substantial compliance with rule 2.8(2)(*b*). *See, e.g.*, *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). "[I]nsubstantial errors should not entitle a defendant to relief." *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). Substantial compliance "means the statute or rule 'has been followed sufficiently so as to carry out the intent for which it was adopted.' " *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 488 (Iowa 2008) (quoting *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988)). It "means 'compliance in respect to essential matters necessary to assure the reasonable

objectives of the statute.' " *Robinson v. State*, 687 N.W.2d 591, 595 (Iowa 2004) (quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)).

The essential objective of rule 2.8(2)(*b*)(2) is to convey to the defendant the potential adverse consequences from pleading guilty. While I agree that a surcharge and a fine are effectively too sides of the same coin, *see State v. Fisher*, 877 N.W.2d 676, 685–86 (Iowa 2016), I believe a colloquy substantially complies with the rule when a defendant sentenced to prison receives an overall fine (including surcharges) that falls within the disclosed range. Here, that plainly occurred. Weitzel was sentenced to nine years in prison and received a combined fine and surcharge that was less than a tenth of the maximum he was told he could receive.

Notably, there is no requirement in Iowa that the defendant be advised of his obligation to pay *restitution* upon pleading guilty. *State v. Brady*, 442 N.W.2d 57, 59 (Iowa 1989). Here, for example, the Crime Victim Compensation Program filed for $3620.74 in reimbursement from the defendant. That possibility wasn't mentioned at all during the guilty plea colloquy. While this restitution is not punishment, the fact that it need not be mentioned at all during the colloquy should make us hesitant to split hairs over the disclosure of fines so long as the end result was still a fine within the disclosed range.

In the federal courts, a guilty plea will not be set aside due to a harmless error. "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." *See* Fed. R. Crim. P. 11(h). Whether a plea error affects "substantial rights" is analogous to whether there has been "substantial compliance" with the plea rule; ergo, federal precedents should be persuasive. Indeed, the Advisory

Committee Note to Federal Rule of Criminal Procedure 11(h) makes this similarity of standards clear. In effect, for an error to be harmless under the federal rule, it must be one that of necessity could not have prejudiced the defendant, thereby avoiding any need to consider the defendant's state of mind. Fed. R. Crim. P. 11(h) advisory committee's note to 1983 amendments. The Advisory Committee Note explains,

> [I]t is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. Illustrative are: . . . where the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings . . . .

Id. (citation omitted).

Accordingly, federal appellate courts have uniformly declined to set aside guilty pleas in circumstances like this. *See, e.g.*, *United States v. Molzen*, 382 F.3d 805, 807 (8th Cir. 2004) ("Although Federal Rule of Criminal Procedure 11(c) requires the district court to explain a defendant's liability for both fines and restitution, we hold that failure to do so does not impact a defendant's substantial rights where he was warned of a potential fine larger than the actual amount of restitution ordered." (quoting *United States v. Morris*, 286 F.3d 1291, 1294 (11th Cir. 2002)); *United States v. Powell*, 354 F.3d 362, 370 (5th Cir. 2003) (holding that the amount of mandatory restitution should have been disclosed to comply with Federal Rule of Criminal Procedure 11, but the error was harmless where the total of fines and restitution did not exceed the total dollar amount used by the court in notifying the defendant of the consequences of the plea); *United States v. Hodge*, 259 F.3d 549, 553 (6th Cir. 2001) ("In this case, Hodge was informed by the district court

that he could be subject to a fine of $250,000; this amount is clearly in excess of the $14,369 restitution order and $100 fine actually imposed on the defendant. Any error committed by the district court was, therefore, harmless and does not merit a vacation of Hodge's guilty plea."). In *United States v. Miell*, 711 F. Supp. 2d 967 (N.D. Iowa 2010), the United States District Court for the Northern District of Iowa thoroughly surveyed this federal caselaw before concluding,

> Because the court does not intend to, and will not, impose liability on defendant Miell for fines and restitution greater than the $5,000,000 the court informed him could be imposed as a fine, the court's failure to inform Miell about the court's authority to order restitution does not affect his substantial rights. Accordingly, it does not constitute a fair and just reason to withdraw his guilty pleas in this case.

Id. at 982.

I agree with the majority that we should not engage in a "line-drawing game," but as the majority points out, the occasions where a defendant can challenge a guilty plea or appeal based on failure to disclose surcharges should be rare. The district court basically would have to commit two errors at once—(1) fail to properly inform the defendant of the necessity of filing a motion in arrest of judgment to challenge the guilty plea and (2) fail to properly disclose the surcharges. In those uncommon situations, I prefer a common-sense approach supported by precedent.

Waterman, J., joins this dissent.