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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-439 / 93-1793

STATE OF IOWA,

Appellee,

vs.

MARK PAYNE,

Appellant.

Appeal from the Iowa District Court for Lyon County, Cameron B. Arnold, District Associate Judge.

Defendant appeals from judgment and sentence entered upon his plea of guilty to driving while barred, in violation of Iowa Code sections 321.560 and 321.561 (1993). **AFFIRMED.**

David L. Reinschmidt of Munger & Reinschmidt, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Francis A. Honrath, County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

HAYDEN, J.

On August 24, 1993, Mark Payne filed a written plea of guilty to driving while barred, a "waiver of right to appear in open court," and a "waiver of right to file motion in arrest of judgment." The trial court accepted the plea.

A sentencing hearing was held on October 27, 1993. Payne addressed the court extensively. The trial court noted Payne's prior criminal record; the seriousness of the offense; Payne's failure to stay away from trouble even after fines, probation, and previous incarcerations; and his minimization and rationalization. The trial court ordered Payne incarcerated for a term not to exceed two years.

On November 24, 1993, Payne, represented by new counsel, filed a motion in arrest of judgment. Payne alleged his plea was not knowing and voluntary: he asserted there was an understanding between himself and the State any sentence imposed would not exceed 120 days in jail. The motion was heard the same day and overruled.

Payne now appeals. Payne presents six issues on appeal: (1) whether Payne's right to contest his guilty plea was waived; (2) whether Payne's guilty plea was made voluntarily, intelligently, and with a factual basis; (3) whether the sentencing court failed to consider other viable sentencing alternatives; (4) whether the State breached an alleged plea agreement; (5) whether the trial

court failed to meet the requirement it specify reasons for its sentence; and (6) whether the sentence imposed constituted cruel and unusual punishment.

I. **Preservation of Error.**

When we consider a challenge to a guilty plea proceeding involving constitutional safeguards, we make an independent evaluation of the circumstances as shown by the entire record, which we review de novo. State v. Oldham, 515 N.W.2d 44, 46 (Iowa 1994) (citations omitted).

Initially, we must determine whether defendant's challenge of the acceptance of his guilty plea is properly before this court. Under Iowa Rule of Criminal Procedure 23(3)(a), "defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal." Payne did not timely file a motion in arrest of judgment. However, when a defendant is not advised of the necessity of filing the motion, pursuant to rule 8(2)(d), it is not a prerequisite for appeal. State v. Burden, 445 N.W.2d 395, 396 (Iowa App. 1989) (citations omitted). Iowa Rule of Criminal procedure 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 (emphasis added).

Failure by a judge to comply with this rule operates to reinstate the defendant's right to appeal the legality of

his guilty plea, despite the defendant's failure to timely file a motion in arrest of judgment. State v. Kirchoff, 452 N.W.2d 801, 803 (Iowa 1990); State v. West, 326 N.W.2d 316, 317 (Iowa 1982); State v. Hansen, 344 N.W.2d 725, 728 (Iowa App. 1983).

It is apparent from reading rule 8(2)(d) the court must inform the defendant (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. See Kirchoff, 452 N.W.2d at 803; State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980).

In determining whether the trial court has met the requirements of rule 8(2)(d) in guilty plea proceedings, we apply the standard of substantial compliance. State v. Taylor, 301 N.W.2d 692, 693 (Iowa 1981) (citing State v. Fluhr, 287 N.W.2d 857, 864 (Iowa 1980)). Under these facts, the trial court did not substantially comply with rule 8(2)(d). A contrary holding would run counter to Iowa precedents in this area.

Iowa courts have held defendants are not precluded from appellate review where the trial court fails to personally inform them of their rights to file a motion in arrest of judgment pursuant to rule 8(2)(d). See Worley, 297 N.W.2d at 370 ("where . . . the court fails to personally inform the defendant he may file a motion in arrest of judgment and the consequences of failing to do so, rule 23(3)(3)(a)

does not preclude our review"); State v. Birch, 306 N.W.2d 781, 783 (Iowa 1981) ("The trial court did not advise the defendant in the plea proceeding of his duty to file such a motion in order to preserve error. Thus he is not precluded from raising the issue for the first time here"); State v. Smith, 300 N.W.2d 90, 91 (Iowa 1981) ("our review is not precluded by rule 23(3)(a) unless the court has personally informed the defendant"); State v. Ludemann, 484 N.W.2d 611, 612 (Iowa App. 1992) ("We determine Ludemann is not precluded from appellate review because the court failed to personally inform him of his right to file a motion in arrest of judgment"). In fact, even in those cases where the trial court does personally address the defendant, substantial compliance with rule 8(2)(d) is not necessarily met. See State v. Kirchoff, 452 N.W.2d 801, 803 (Iowa 1990) (written waiver and single question-answer colloquy does not constitute substantial compliance with rule 8(2)(d)); State v. Glenn, 505 N.W.2d 818, 819 (Iowa App. 1993) (trial court asking defendant four times whether he had any further questions and receiving negative responses not substantial compliance).

In this case, the court did not personally address Payne when he pled. It thus did not personally inform him of his right to file a motion in arrest of judgment, the meaning of such motion, and the effect upon his case of not filing such a motion. Payne did file a written waiver which explained the plea procedure and the consequences of

not filing a motion in arrest of judgment. However, "[e]ven if we presume for the sake of argument that, because of discussions with his attorney, defendant was not unaware of the rights he was giving up, this does not relieve the trial court of its responsibility to determine that the defendant understands those rights." Glenn, 505 N.W.2d at 819. We find the trial court did not substantially comply with rule 8(2)(d). The trial court did not adequately inform defendant of the consequence of failing to challenge acceptance of the guilty plea. Consequently, rule 23(3)(a) does not preclude our review of Payne's plea proceeding.

II. Adequacy of Plea Proceeding.

We thus reach the merits of whether Payne's guilty plea was adequate. Payne contends his plea of guilty must be set aside because of defects in the plea proceeding. He argues the court failed to inform him of the matters enumerated in Iowa Rule of Criminal Procedure 8(2)(b), in the manner prescribed by that rule.

Iowa Rule of Criminal Procedure 8(2)(b) provides:

> b. Pleas of guilty. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.
>
> 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 of defining the offense to which the plea is offered.

> (3) 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 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.
>
> (4) 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.
>
> The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious or aggravated misdemeanor (emphasis added).

The purpose of rule 8(2)(b), as suggested by its first paragraph, is to ensure guilty pleas are made voluntarily, intelligently, and with a factual basis. Strict compliance with the rule's liberal language practically assures a plea of guilty thereafter accepted is made voluntarily, intelligently, and with a factual basis. Nevertheless, the rule does not establish a litany which must be followed without variation before a guilty plea may be accepted. Substantial compliance with the rule is all that is required. See, e.g., State v. Smothers, 309 N.W.2d 506, 508 (Iowa 1981).

At the time Payne filed his written guilty plea, Payne also filed a "waiver of right to appear in open court." As set forth above, rule 8(2)(b) specifically authorizes waiver of personal colloquy. Because Payne formally waived personal colloquy, he is in no position to argue the court did not comply with rule 8(2)(b).

Furthermore, the guilty plea itself substantially satisfies the substantive provisions of 8(2)(b). It states the nature of the charge: "did drive a vehicle while barred." It states the maximum punishment: "confinement in the penitentiary or reformatory for a period of not more than 2 years and a fine of $5,000.00." It repeats all the due process rights of subsection 8(2)(b)(3). Iowa R. Crim. P. 8(2)(b)(3). It confirms the defendant's waiver of his right to trial. As stated by our supreme court, "[defendant] will not be allowed to plead anew merely because he was informed of the matters listed in rule 8(2)(b) in writing instead of orally." State v. Kirchoff, 452 N.W.2d 801, 805 (Iowa 1990).

Payne's reliance on Kirchoff, Ludemann, and Saadiq is misplaced. See State v. Kirchoff, 452 N.W.2d 801 (Iowa 1990); Saadiq v. State, 387 N.W.2d 315 (Iowa 1986); State v. Ludemann, 484 N.W.2d 611 (Iowa App. 1992). In none of those cases did the defendant waive the colloquy.

Payne's reliance on State v. King, 500 N.W.2d 100 (Iowa App. 1993), is misplaced for a different reason. There the written guilty plea affirmatively misinformed him as to the maximum penalty for a serious misdemeanor. Id. at 101 (six months rather than one year). Thus, even though defendant King had waived the colloquy, the gross misstatement of the law in a written plea resulted in lack of substantial compliance with rule 8(2)(b). Id. at 101-02. No such misstatement occurred here.

Based on the record, there was substantial compliance with rule 8(2)(b). Payne will therefore not be allowed to withdraw his guilty plea. We affirm on this issue.

III. Viable Sentencing Alternatives.

Payne's third issue on appeal is whether the trial court failed to consider viable sentencing alternatives. We find this argument meritless.

When sentencing discretion has been accorded and exercised by the trial court, it is subject to limited appellate review. State v. Stanley, 344 N.W.2d 564, 567 (Iowa App. 1983). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor. Id. To overcome this presumption requires an affirmative showing of abuse. Id.

No abuse of discretion occurred here. It is true a trial court should weigh and consider all pertinent matters in determining a proper sentence, including the nature of the offense, attending circumstances, defendant's age, character, propensities, and chances for reform. State v. Johnson, 476 N.W.2d 330, 335 (Iowa 1991). The seriousness of the crime is clearly a permissible factor to be considered. State v. Post, 286 N.W.2d 195, 204 (Iowa 1980). The court did nothing improper by placing considerable emphasis on Payne's prior record and other information contained in the presentence investigation, where it is apparent from the record the trial court also assessed Payne's present attitude toward his current

offenses. The trial court's nonimposition of a monetary fine is further evidence it exercised rather than abused its discretion.

The trial court is affirmed on this issue.

IV. Alleged Plea Agreement.

Payne contends the State breached a plea agreement. However, this issue has not been preserved for appellate review.

Although errors regarding sentencing are generally preserved without the need of objection, this exception is based on the principle a defendant has no opportunity to object to a sentence, because he cannot know in advance what the sentence will be. State v. Freeman, 404 N.W.2d 188, 191 (Iowa App. 1987). On the other hand, where something objectionable occurs during the sentencing hearing prior to imposition of the sentence, failure to object should be deemed a waiver of error. State v. Wagner, 484 N.W.2d 212, 216-17 (Iowa App. 1992) (defendant's failure to object to allegedly inflammatory photographs admitted during sentencing proceeding waived error); State v. Stanley, 344 N.W.2d 564, 569-70 (Iowa App. 1983) (defendant's failure to object at sentencing to county attorney's failure to include insurance offset in determining restitution waived error).

"[T]he rule is well established that a party may not sit by and permit the trial court to commit inadvertent error without protest, and then complain for the first time

on appeal." State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974). Error was waived here by failure to object.

V. Specificity of Reasons for Sentence Imposed.

Payne argues the trial court failed to meet the requirement it specify reasons for the sentence imposed. We disagree.

It is true the sentencing court must state on the record its reasons for imposing a particular sentence. State v. Washington, 356 N.W.2d 192, 196 (Iowa 1984). However, a terse and succinct statement may be sufficient, so long as the brevity of the court's statement does not prevent review of the exercise of the sentencing court's discretion. State v. Johnson, 445 N.W.2d 337, 342-43 (Iowa 1989). The failure of the trial court to specifically recite its consideration of the issue of rehabilitation, for example, does not overcome the presumption of regularity. State v. Stanley, 344 N.W.2d 564, 569 (Iowa App. 1983).

Here, the trial court went well beyond the minimum in stating its reasons for the sentence imposed. Those reasons included Payne's prior record of convictions, the lack of success of prior probations and punishments, the seriousness of the offense, the fact there had been "no progression in the incarceration," Payne's statement to the parole officer he would continue to drive if necessary, and Payne's minimization and rationalization of his past convictions. Under this record, the trial court adequately stated its reasons for the sentence imposed.

VI. Cruel and Unusual Punishment.

Payne lastly contends his sentence constitutes "cruel and unusual punishment" and is thus unconstitutional. U.S. Const. amend. VIII. We disagree. Our supreme court has previously held a two-year prison sentence for an habitual traffic offender under Iowa Code section 321.561 does not violate the Eighth Amendment. See State v. Robbins, 257 N.W.2d 63, 68 (Iowa 1977) (trial court reversed on other grounds). Robbins controls here. "The penalty is indeed severe but we believe it is well within the legislative limits of discretion in its efforts to minimize highway injuries and deaths." Id. The penalty imposed here does not constitute cruel and unusual punishment.

Judgment of the trial court is affirmed.

AFFIRMED.