FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1987 304
vs.	)	
DEBRA ANN COMER,	)	7-291 86-1633
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 33016, 32824, and 33377), Thomas A. Renda, District Associate Judge.

The defendant appeals from the judgment and sentence, entered after her plea of guilty, for two counts of theft in the fourth degree and one count of failure to appear, claiming that the trial court failed to perform the colloquy required by Iowa Rule of Criminal Procedure 8(2)(b), in taking her guilty plea. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxanne M. Ryan, Assistant Attorney General; and Odell McGhee, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

SNELL, J.

On October 31, 1986, the appellant, Debra Ann Comer, stood charged by trial information with two counts of theft in the fourth degree and one count of failure to appear. On that date Comer filed a written guilty plea to all three charges, appeared in open court, and entered her plea. Judgment was entered on the plea and Comer was sentenced to one year of probation on each of the theft charges and fifteen days in jail for failure to appear. Comer brings this appeal in order to challenge the procedure by which the district court accepted her guilty plea. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

Comer maintains the district court erred in failing to engage her in the colloquy required by Iowa Rule of Criminal Procedure 8(2)(b). That rule provides as follows:

> 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 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 misdemeanor.

There is no question that the district court did not expressly make the inquiries required by subparts (1) to (4) of this rule. The State contends, however, that as Comer stood charged with two serious misdemeanors, see Iowa Code §§ 714.1(1), 714.2(4), 811.2(8) (1985), the district court properly exercised its discretion under the rule to waive these inquiries and that Comer approved of that waiver.

Initially we note our agreement with both parties that this question is properly before us on appeal. Although Comer failed to file a motion in arrest of judgment to challenge her conviction, the district court did not warn her that she must do so if she desires to be heard on appeal. See Iowa R. Crim. P. 8(2)(d). As a result of this failure to warn, her appellate attack is not barred. See State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980).

State v. Fluhr, 287 N.W.2d 857, 865 (Iowa 1980), establishes that a written plea of guilty such as that signed by Comer in the present case "cannot serve as a general substitute for [rule 8(2)(b)'s] requirement of personal address regarding the enumerated matters." Subsequent to the decision in Fluhr, the requirements of rule 8(2)(b) have been softened as concerns guilty pleas to serious misdemeanors. See 1984 Iowa Acts ch. 1321. As presently written, the rule allows a trial court "in its discretion and with the approval of the defendant" to waive that rule's personal address requirements prior to accepting a guilty plea to a serious misdemeanor. The present issue is joined at whether the record supports the State's contention that Comer gave her approval to the district court's waiver of the rule 8(2)(b) colloquy. We think it does not.

Our supreme court has stated that to "give approval is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act

or thing done by another." State v. Rhein, 149 Iowa 76, 81, 127 N.W. 1079, 1081 (1910). Nothing in the present record tends to show even Comer's knowledge of the district court's discretionary waiver, let alone her approval of that waiver. The 1984 legislative amendment of rule 8(2)(b) which provides for a discretionary waiver of the personal colloquy in cases such as this does not vest the trial courts with absolute discretion to do so. Nor does it grant trial courts the discretion to waive the colloquy "unless the defendant disapproves." It expressly conditions the exercise of discretion on the defendant's approval. We think this requires that the defendant be aware of the court's decision to waive the colloquy and that the defendant affirmatively express his or her approval thereto. Cf. State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1379 (Alaska 1981) (plat could not be considered "approved" where it apparently was never submitted to platting authority); State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972) (evidential use of "tacit admissions" held impermissible in criminal trials); Louis M. Herman Co. v. Gallagher Elec. Co., 334 Mass. 652, 656, 138 N.E.2d 120, 122 (1956) ("approval" denotes positive sanction); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 561 (S.D. 1981) ("approval" implies direct, affirmative sanction). Although the State correctly notes in brief that the rule "does not specify whether this approval must be given orally or in writing, whether it be done personally or by counsel, or whether it be done in response to one specific question or another," such an observation does not save the present plea. There is nothing in this record which would tend to demonstrate Comer employed any of these, or other, methods by which to communicate an approval of the district court's discretionary waiver. Far from approval, the record does not demonstrate even Comer's knowledge that an otherwise obligatory procedure was being waived.

We think rule of criminal procedure 8(2)(b) requires at very minimum that in order to approve of a trial court's discretionary decision to waive the colloquy mandated by that rule and Fluhr a criminal defendant must be aware that such discretion is being exercised. The present record does not demonstrate Comer's knowledge or approval of the trial court's discretionary waiver. Accordingly, Comer's judgment of conviction and sentence are set aside and she shall be permitted to plead anew.

REVERSED AND REMANDED WITH INSTRUCTIONS.