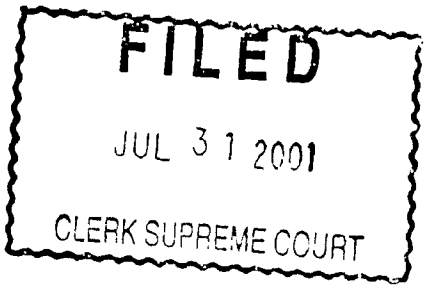
**IN THE COURT OF APPEALS OF IOWA**

No. 1-370 / 00-1511
Filed July 31, 2001




**STATE OF IOWA,**
Plaintiff-Appellee,

vs.

**JAMES FRANK SURRETT,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Defendant appeals from the judgment and sentence entered following his guilty plea to operating while intoxicated (third offense). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Considered by R. Peterson, C. Peterson and Harris, Senior Judges*.

*Senior Judges assigned by order pursuant to Iowa Code § 602.9206 (2001).

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**R. Peterson, S.J.**

Defendant James Frank Surrett appeals from the judgment and sentence entered following his guilty plea to operating while intoxicated (third offense). He contends the court erred by failing to comply with the requirements of Iowa Rule of Criminal Procedure 8(2)(b) in accepting his guilty plea to a felony, and his trial counsel was ineffective in failing to challenge the plea. We affirm.

On April 10, 2000, the trial information was filed charging Surrett with the crime of operating a motor vehicle while under the influence of an alcoholic beverage for having an alcohol concentration of .10 or more and being a third offender in violation of Iowa Code section 321J.2 (1999). This is a class "D" felony.

Defendant appeared before the court on April 19, 2000, and entered a plea of not guilty and waived his right to a speedy trial. The matter was then set for a jury trial on July 17, 2000.

On July 6, 2000, defendant appeared with his attorney before the court for the purpose of entering a guilty plea to the charges set out in the trial information. On the same day, defendant filed a document titled "Trial Rights" signed by himself and his attorney. In that document, he acknowledged he had certain trial rights that are set out in Iowa Rule of Criminal Procedure 8(2)(b)(3), (4) and by pleading guilty, he would give up those rights.

The trial court, after being advised defendant wanted to plead guilty, addressed defendant personally in open court. He asked defendant if he had signed a waiver of his trial rights and a waiver of his constitutional rights.

Defendant said, "Yes." He then asked defendant if he had gone over those with his attorney. Defendant again said, "Yes." The court then asked defendant, "And you know what your trial rights are." Defendant responded, "Yeah." The court then asked defendant if he knew what his constitutional rights are, and defendant responded, "Yes." The court then asked defendant if he waived them, and defendant responded, "Yes."

The trial court then continued a colloquy with defendant and covered the matters set out in Iowa Rule of Criminal Procedure 8(2)(b)(1)(2).

The trial court also determined there was a factual basis for the charge by questioning defendant. The trial court also determined by questioning the defendant that he had been previously convicted of this offense on April 6, 1994, and on January 18, 1996.

At the close of the proceedings, defendant was advised by the court in order for him to appeal any judgment on any grounds or defects which may have occurred during the guilty plea proceedings, he had to file a motion in arrest of judgment which must be filed within forty-five days of that date, or not later than five days prior to the time set forth for sentencing. The court also advised defendant any plea bargain he might have made with the county attorney was not binding upon the court, but the decision of what his sentence would be is to be made by the court. Defendant acknowledged he understood that also.

Defendant then appeared before the court for sentencing on August 23, 2000. The sentence imposed upon him at that time was in accordance with the

negotiated plea. He did not file a motion attacking the guilty plea prior to the sentencing.

**Standard of Review.** The application of a rule of criminal procedure is reviewed for corrections of errors at law. Iowa R. App. P. 4; *accord State v. Schuessler*, 461 N.W.2d 40, 41 (Iowa 1997). The interpretation of rule 8(2) will require reversal only where there exists legal error. *See State v. White*, 587 N.W.2d 240, 241-42 (Iowa 1998). Iowa Rule of Criminal Procedure 8(2) specifies the colloquy which a court must engage in to ensure a plea is knowlngly and voluntarily made. *State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997). Noncompliance with this rule is reversible error. *See Saadiq v State*, 387 N.W.2d 315, 324-25 (Iowa 1986).

**Discussion.** Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa Ct. App. 1987). This procedure will be departed from if the record on direct appeal is sufficient to evaluate the merits of the defendant's ineffective assistance of counsel claim. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa Ct. App. 1984). We believe the record is sufficient in this case to evaluate the merits of the defendant's claim.

Defendant has the burden of proving by a preponderance of the evidence that his attorney did not perform an essential duty and, as a result, he was prejudiced. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). The prejudice must be such so as to give rise to the reasonable probability that but for the error the result would have been different. *Id.* Defendant contends his counsel was

ineffective because the requirements of Iowa Rule of Criminal Procedure 8(2)(b) cannot be waived for a charge that is punishable as a class "D" felony.

In this situation, the court did conduct a colloquy with the defendant. However, it did not cover all of the points in that colloquy required by Iowa Rule of Criminal Procedure 8(2)(b). A portion of the requirements of that rule were covered by a written document submitted by the defendant. The correct procedure for a felony guilty plea is a full colloquy by the court. This was not done and constitutes an error of law. *State v. Hook*, 623 N.W.2d 865, 871 (Iowa 2001).

Accordingly, we find defendant's trial counsel, by allowing the type of plea that he did, did not perform an essential duty. The defendant must then establish he was prejudiced.

Defendant entered into a plea agreement in exchange for his guilty plea. The sentence he received was in accordance with this agreement. It is not reasonable to believe a difference in the method of which the plea was taken would have changed the outcome. We find defendant failed to establish he was prejudiced by his counsel's failure to object to the method in which the plea was taken. We affirm.

**AFFIRMED.**