IN THE COURT OF APPEALS OF IOWA

No. 9-172 / 98-0547
Filed June 23, 1999

STATE OF IOWA,

Appellee,

vs.

DANIEL D. PETRIE,

Appellant.

FILED
JUN 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Karen A. Romano and Matthew McEniry, Judges.

Defendant appeals from the judgment and sentence entered upon his guilty plea to operating while intoxicated (third offense). **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Christopher A. Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appelle.

Considered by Sackett, C.J., and Streit and Zimmer, JJ.

ZIMMER, J.

Daniel Petrie appeals from the judgment and sentence entered following his guilty plea to the offense of operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2.

Defendant was arrested on August 7, 1997, and charged with OWI, third offense, a class D felony. Petrie filed a written "Petition to Plead Guilty" on December 30, 1997. That same date, he personally appeared before a judge with his attorney and entered a plea of guilty. On February 24, 1998, the defendant was sentenced to a term of imprisonment not to exceed five years and fined $2500. He now appeals his conviction and sentence.

Ordinarily, a defendant is precluded from challenging the adequacy of his plea of guilty when he fails to file a motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a); *State v. Burden*, 445 N.W.2d 395, 396 (Iowa App. 1989). Although defendant did not file a motion in arrest of judgment, he is not precluded from appellate review because the trial court failed to personally inform him of his right to file a motion in arrest of judgment pursuant to Iowa Rule of Criminal Procedure 8(2)(d). *See State v. Ludemann*, 484 N.W.2d 611, 612 (Iowa App. 1992).

Petrie argues his plea should be set aside because his written petition to plead guilty indicated the minimum fine would be $750. In fact, at the time Petrie was

sentenced, the minimum fine for OWI, third offense, was $2500 under section 321J.2(2)(c).[1]

Under rule 8(2)(b), before accepting a guilty plea, one of the things a court must determine a defendant understands is:

> (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. 8(2)(b)(2).

In the case of *State v. King,* 500 N.W.2d 100 (Iowa App. 1993), a defendant was improperly advised of the potential maximum penalty for the offense charged. *Id.* at 101. Defendant signed a written plea agreement which stated the maximum sentence was six months in the county jail. *Id.* Actually, the offense was punishable by imprisonment not to exceed one year, and in fact, defendant was sentenced to one year in prison. *Id.* We found that because the written plea agreement contained a misstatement of law, the district court did not substantially comply with rule 8(2)(b) by accepting the written plea agreement. *Id.* at 102. Defendant's guilty plea was vacated. *Id.*

Under the reasoning found in *King* we determine Petrie's guilty plea should be vacated. Petrie was improperly advised the minimum possible fine was $750,

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[1] Iowa Code section 321J.2(2)(c) was amended effective July 1, 1997, to provide the penalty for OWI, third offense, would be imprisonment in the county jail for a determinate sentence of not more than one year but not less than thirty days, or commitment to the department of corrections, and a fine of not less than $2500 nor more than $7500.

when the minimum fine was actually $2500. The written plea agreement in this case contained an misstatement of law. The misstatement of law was not corrected during the guilty plea proceedings. We conclude the district court's acceptance of the written plea agreement did not substantially comply with rule 8(2)(b). For this reason, Petrie's guilty plea to the charge of OWI, third offense, should be vacated.

We vacate Petrie's guilty plea, conviction, and judgment for OWI, third offense. We remand to the district court for further proceedings. We do not retain jurisdiction. Costs of this appeal are assessed to the State.

REVERSED AND REMANDED.

No. 98-0547. [9-172] STATE v. PETRIE

Appeal from the Iowa District Court for Polk County, Karen A. Romano and Matthew McEniry, Judges. **REVERSED AND REMANDED.** Considered by Sackett, C.J., and Streit, and Zimmer, JJ. Opinion by Zimmer, J. (4 pages $1.60)

Daniel Petrie appeals the judgment and sentence entered following his guilty plea to the offense of operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2. Petrie entered a plea of guilty. He was sentenced to a term of imprisonment not to exceed five years and fined $2500. He appeals. **OPINION HOLDS:** Petrie argues his plea should be set aside because his written petition to plea guilty indicated the minimum fine would be $750. In fact, at the time Petrie was sentenced, the minimum fine for OWI, third offense, was $2500 under section 321J.2(2)(c). Under Iowa Rule of Criminal Procedure 8(2)(b)(2), before accepting a guilty plea, a court must determine a defendant understands the mandatory minimum punishment and the maximum possible punishment. We have previously vacated a guilty plea where a defendant was improperly advised of the potential maximum penalty for the offense charged. *State v. King*, 500 N.W.2d 100, 102 (Iowa App. 1993). Petrie was improperly advised of the mandatory minimum fine. The district court's acceptance of the written plea agreement in this case did not substantially comply with rule 8(2)(b). For this reason, Petrie's guilty plea to the charge of OWI, third offense, should be vacated.