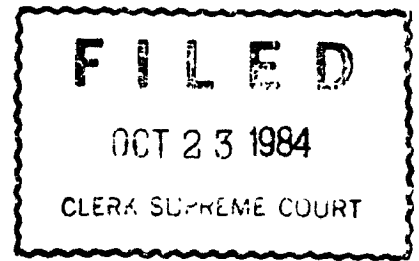


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 23, 1984

409

vs.

)

GERALD NILES,

)

4-391
84-505

Defendant-Appellant.

)

Appeal from the Iowa District Court for Jasper County - Luther T. Glanton,
Jr., Judge.

Defendant appeals from his guilty plea conviction of voluntary absence from
a facility in violation of Iowa Code section 719.4(3). REVERSED AND
REMANDED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pam Greenman, Assistant
Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

Defendant appeals from his guilty plea conviction of voluntary absence from a facility in violation of Iowa Code section 719.4(3). He asserts that his guilty plea was invalid since the court failed to inform him of his privilege against self-incrimination.

Our review of this criminal case is for correction of errors at law. Iowa R. App. P. 4; State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Preservation of Error. Defendant did not file a motion in arrest of judgment as required by Iowa Rule of Criminal Procedure 23(3)(a). He asserts that his failure is excused because the trial court did not inform him of the consequences of not filing the motion. See State v. Birch, 306 N.W.2d 781, 783 (Iowa 1981). The trial court stated:

Now Mr. Niles, you can attack the legality of this plea by way of a motion in arrest of judgment, but you must do that five days prior to the pronouncement of sentence. So if you wish to do that, you have to file that motion five days prior to December 5th; do you understand that?

The court did not explain to defendant that failure to file the motion results in loss of the right to appeal.

In State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980), the defendant was informed of the right to file a motion in arrest of judgment but was not told that failure to do so would preclude him from challenging the plea proceedings. The supreme court held: "But where, as in Worley's case, the court fails to personally inform the defendant that he may file a motion in arrest of judgment and the consequences of failing to do so, rule 23(3)(a) does not preclude our review." Id. (emphasis in original).

We conclude that the trial court's statement in the present case was insufficient to inform defendant of the consequences of his failure to file a motion in arrest of judgment. Therefore, we proceed to review the merits of defendant's argument.

II. Validity of the Guilty Plea. Iowa Rule of Criminal Procedure 8(2)(b) sets forth the procedures to be followed by a court before accepting a guilty plea. The court in this case did not inform defendant that, if he pled not guilty, at trial he would have the right not to be compelled to incriminate himself. See Iowa R. Crim. P. 8(2)(b)(3). In State v. Findley, 239 N.W.2d 852, 855 (Iowa 1976), the supreme court held that the trial court's failure to inform the accused of his privilege against self-incrimination required that the guilty plea conviction be set aside and defendant be allowed to plead anew.

The State argues, however, that subsequent to Findley, the supreme court has adopted the position that substantial and not literal compliance with rule 8(2)(b) is all that is required. The State contends that the trial court in this case substantially complied with the rule.

In State v. Fluhr, 287 N.W.2d 857, 864 (Iowa 1980), the supreme court stated in reference to this question:

This holding should not be construed to mean that every minor omission from the oral colloquy in a guilty plea proceeding should be fatal. As Sisco announced, "meaningful compliance," 169 N.W.2d at 548, or "substantial compliance," id. at 551, with procedural guidelines for taking guilty pleas is sufficient. Certainly a plea-taking error which raises no doubt as to the voluntariness or factual accuracy of the plea may be properly disregarded, provided the defendant is unable to prove prejudice. For instance, an inadvertent omission of reference to the accused's right to assistance of counsel at trial during the oral colloquy should not alone vitiate a plea in a situation where the defendant is already represented by appointed counsel, he has read and signed a form adequately explaining this right and the trial judge has determined through appropriate inquiry that the defendant possesses a clear understanding of the remainder of the form. A contrary result would serve only to exalt formalism at the expense of the societal interest in finality of judgments.

The court held that there had not been substantial compliance with the rule where the trial court did not inform defendant of any constitutional rights other than the right to a jury trial or the penal consequences of his plea. Furthermore, defendant was not shown to have adequately understood the nature of the charge. Id.

On the other hand, in State v. Smothers, 309 N.W.2d 506, 508 (Iowa 1981), the supreme court held that rule 8(2)(b)(4) had been substantially followed. The trial court inquired of defendant: "Do you understand that if you plead not guilty, you would be entitled to a speedy and public trial by jury?" Id. The supreme court concluded that the trial court's statement clearly implied that if defendant pled guilty he would have no trial. Id.

The present case is distinguishable from Smothers. Here the trial court did not mention at any time during the plea proceeding defendant's right not to incriminate himself. Furthermore, this case is not like the example of substantial compliance given in Fluhr. Unlike a situation where a defendant already represented by counsel is not informed of his right to have an attorney, there is no indication here that the omission was harmless. The record does not indicate that defendant already knew of this right or that his being informed of it would not have changed his decision to plead guilty.

Without some indication that the error is harmless, we are reluctant to let the plea stand. Therefore, defendant's guilty plea is vacated and the case is remanded to let defendant plead anew or stand trial.

REVERSED AND REMANDED.

Schlegel, J., concurs; Donielson, P.J., dissents.

I concur with the majority with respect to the preservation of error issue. However, I dissent from the court's determination that the guilty plea should be vacated. As the majority recognized, the trial court did not inform the defendant of his privilege against self-incrimination. Yet this omission should not serve to invalidate the conviction since the trial court substantially complied with the requirements of rule 8(2)(b).

The record reflects that the court questioned the defendant at length about the guilty plea to insure that there were no threats or coercion. Furthermore, the court made it clear to Niles that his plea would not be accepted if he had been threatened. In State v. Fluhr, 287 N.W.2d 857, 864 (Iowa 1980), the supreme court recognized that an error can be disregarded if it is shown that a defendant's plea was voluntary despite the error and the defendant is unable to prove he was prejudiced by the error. I believe that this is the situation before this court. There was ample evidence that Niles' guilty plea was voluntary and no indication that prejudice resulted.