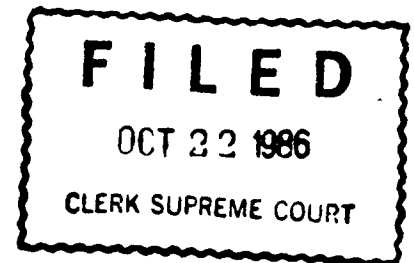


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DONALD EUGENE GUSTOFF,)

Defendant-Appellant.)

Filed October 22, 1986 443

6-291
85-1431

Appeal from Iowa District Court for Greene County (2984) - William C. Ostlund, Judicial Magistrate, and R. K. Richardson, Judge (on appeal).

Defendant appeals the district court's affirmance of a lawyer-magistrate's decision convicting defendant of two misdemeanor charges. **AFFIRMED.**

John C. Werden, Jr. of Van Dyke & Werden, P.C., Carroll, for defendant-appellant.

Thomas J. Miller, Attorney General; Thomas D. McGrane, Assistant Attorney General; and Nichola J. Martino, County Attorney, for plaintiff-appellee.

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

SCHLEGEL, J.

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Defendant appeals the district court's affirmance of a lawyer-magistrate's decision convicting defendant of two misdemeanor charges.

Defendant was charged with assault, public intoxication, and resisting arrest. After a plea agreement, the magistrate found defendant guilty of public intoxication and resisting arrest and imposed fines and costs totaling \$131. The district court upheld the misdemeanor convictions on appeal.

Defendant contends the district court erred in affirming a conviction which lacked an adequate factual basis and where there was no determination in the record that the defendant voluntarily and intelligently waived his right to trial, his privilege against compulsory self-incrimination, and his right to confront his accusers.

Rule 9 of the Iowa Rules of Criminal Procedure, provides that after an agreement between the prosecuting attorney and the attorney for defendant, and upon the entering of a plea of guilty to a lesser or related offense, the prosecuting attorney will make a charging or sentencing concession. The district court found that:

When the matter came up for trial, defendant's attorney, Mr. Snook, and the County Attorney of Greene County, Iowa, reached an agreement whereby the defendant waived his right to trial and consented to a conviction on the public intoxication charge in violation of Section 23.46 and the resisting arrest charge in violation of Section 179.1 of the Iowa Criminal Code in exchange for the County Attorney's dismissal of the assault charge. Subject to this agreement, the Magistrate found the defendant to be guilty of the two simple misdemeanor charges of public intoxication and resisting arrest, fining the defendant \$50.00 plus fifteen percent surcharge on each of the convictions and the costs of the action, making a total due and owing in the amount of \$131.00.

Defendant argues that in simple misdemeanor cases the court should not accept such guilty pleas without first determining that the plea is voluntarily

and intelligently made and has a factual basis. This type of determination is required for indictable offenses by Iowa Rule of Criminal Procedure 8(2)(b).

Rule 8(2)(b) provides:

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.

We do not think that any state or federal constitutional guarantee demands that a judicial magistrate's court must provide the entire range of procedural protections when accepting a guilty plea for a simple misdemeanor as when accepting a guilty plea for an indictable offense. See Kelsey v. Harstad, 262 N.W.2d 548, 549 (Iowa 1979) (distinguishing indictable and nonindictable misdemeanors for the purpose of according procedural protections).

Even if we were to find that 8(2)(b) did apply to simple misdemeanors via Iowa Rule of Criminal Procedure Rule 33 (applicability of indictable offense

rules to trial of simple misdemeanors), we could not agree that any error was made by the trial court. Rule 8(2)(b) provides in part: "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." The trial court found that the defendant "was represented by adequate counsel who struck a compromise with the county attorney to a plea to two charges with a dismissal of the third charge, ... and the Court believes that the defendant is bound by his agreement." If the defendant contends that he did not waive his rights to Rule 8(2)(b) guarantees, he is required to provide a sufficient record for review. State v. Ludwig, 305 N.W.2d 511, 513 (Iowa 1981). On appeal of the magistrate's decision to the district court, the defendant did not request permission to offer any additional evidence as to his failure to waive or of his counsel's abdication of duty. Defendant only argued that no record was made as to the factual basis for the finding. There is nothing in the record as to either of these issues on which we can base a review. The demands of Iowa Rule of Criminal Procedure 54(3) were not fulfilled. ("The brief shall include statements of the specific issues presented for review and the precise relief requested.")

Defendant has not shown that any of his rights under the Iowa or federal constitutions, or as protected by Iowa statutes, have been violated. We do not think that the full procedural safeguards as provided in Rule 8(2)(5) apply to guilty pleas in cases involving nonindictable misdemeanors. We do not think defendant has created the appellate record necessary for a full review of defendant's implication that his attorney inappropriately waived the defendant's fundamental rights.

AFFIRMED.