

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

v.

T. J. W.,

Defendant-Appellant.

SUPREME COURT 22-0805

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE CHRISTINE DALTON, JUDGE

APPELLANT'S AMENDED BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 28th day of June, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to T. J. W. at the address previously provided to the office.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court lacked subject matter jurisdiction and/or statutory authority to enter a restitution order for payment of the victim's pecuniary damages after the successful completion of all conditions of the deferred judgment, dismissal and expungement.

Authorities

Iowa R. App. 6.108

State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022)

Petition for Writ of Certiorari

Iowa R. App. 1.107(1)

Iowa Code § 665.11(2021)

Iowa Code § 910.7(5) (2021)

Ary v. Iowa Dist. Ct., 735 N.W.2d 621, 624 (Iowa 2007)

Christensen v. Iowa Dist. Ct., 578 N.W.2d 675, 678
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Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988)

Application for Discretionary Review

Iowa Code § 814.6(2) (2021)

Iowa Code § 814.6(2)(e) (2021)

Iowa Code § 814.1(2) (2021)

State v. Stessman, 460 N.W.2d 461, 464 (Iowa 1990)

McKeever v. Gerard, 368 N.W.2d 116 (Iowa 1985)

What is the proper form of review?

State v. Propps, 897 N.W.2d 91, 96 (Iowa 2017)

State v. Stessman, 460 N.W.2d 461, 464 (Iowa 1990)

State v. Anderson, 246 N.W.2d 277, 279 (Iowa 1976)

State v. Deng Kon Tong, 805 N.W.2d 599, 603 (Iowa 2011)

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McKeever v. Gerard, 368 N.W.2d 116 (Iowa 1985)

State v. Kluesner, 389 N.W.2d 370, 370 (Iowa 1986)

Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906)

The district court lacked subject matter jurisdiction

In re Estate of Falck, 672 N.W.2d 785, 789 (Iowa 2003)

Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989)

Wederath v. Bryant, 287 N.W.2d 591, 594 (Iowa 1980)

Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906)

Alternatively, if the district court had subject matter jurisdiction, the court lacked the authority to enter the restitution order.

Christie v. Rolscreen Co. 448 N.W.2d 447, 450 (Iowa 1989)

State v. Mandicino, 509 N.W.2d 481, 483 (Iowa 1993)

In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997)

Iowa R. Crim. P. 2.24(5)

State v. Tindell, 629 N.W.2d 357, 359 (Iowa 2001)

State v. Brown, 905 N.W.2d 846, 857 (Iowa 2018)

Iowa R. App. P. 6.907

State v. Roache, 920 N.W.2d 93, 99 (Iowa 2018)

Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993)

State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001)

State v. Kluesner, 389 N.W.2d 370, 373 (Iowa 1986)

Iowa Code § 910.3(8)-(10) (2021)

Iowa Code § 910.7(1) (2021)

The district court lacked subject matter jurisdiction to enter the restitution after the case was dismissed and expunged.

Christie v. Rolscreen Co. 448 N.W.2d 447, 450 (Iowa 1989)

Iowa Code § 907.9(4)(a) (2021)

Iowa Code § 907.9(4)(b) (2021)

Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906)

State v. Jensen, 378 N.W.2d 710, 712-13 (Iowa 1985)

State v. Bonstetter, 637 N.W.2d 161, 168 (Iowa 2001)

Lack of authority

Iowa Code § 910.7(1) (2021)

II. The victim pecuniary damages restitution order is not supported by substantial evidence.

Authorities

State v. Bonstetter, 637 N.W.2d 161, 167-68 (Iowa 2001)

State v. Roache, 920 N.W.2d 93, 99 (Iowa 2018)

State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004)

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State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)

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State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989)

State v. Tutor, 538 N.W.2d 894, 897 (Iowa Ct. App. 1995)

State v. Waigand, 953 N.W.2d 689, 694 (Iowa 2021)

State v. Shears, 920 N.W.2d 527, 541 (Iowa 2018)

State v. Watts, 587 N.W.2d 750, 751 (Iowa 1998)

Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993)

State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992)

Papenheim v. Lovell, 530 N.W.2d 668, 671 (Iowa 1995)

Long v. McAllister, 319 N.W.2d 256, 261 (Iowa 1982)

Hawkeye Motors, Inc. v. McDowell, 541 N.W.2d 914, 917
(Iowa Ct. App. 1995)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case because an issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). This case presents the questions whether (1) the district court has subject matter jurisdiction to enter a restitution order in a case in which the deferred judgment probation has been successfully completed and the case dismissed and expunged; and (2) is discretionary review or writ of certiorari the proper form of review when the offender has successfully completed a deferred judgment. Ultimately this case presents the important question for TW and others in similar procedural positions, how may such an individual seek review of a restitution judgment in a dismissed case after successfully completing the conditions of a deferred judgment? Counsel is unaware of any caselaw which answers this question.¹

¹ This case presents a slightly different question from what is presented in State v. Patterson, Supreme Court number 21-0672. (A victim pecuniary damages restitution order entered in a dismissed simple misdemeanor traffic violation case.).

STATEMENT OF THE CASE

Nature of the Case.

The Supreme Court granted TW's application for discretionary review. TW challenges the pecuniary damages restitution order entered after dismissal and expungement of a deferred judgment which is unsupported by substantial evidence.

Course of Proceeding and Disposition Below.

On April 8, 2020, the State charged TW with criminal mischief in the third degree.² (4/8/20 TI)(App. pp. 4-6). Approximately two months later, the State filed a statement of pecuniary damages. The State sought \$234.84 for the damage to car number 1. The statement mentioned car number 2 but did not specify an amount. (6/9/20 Restitution Claim)(App. pp. 7-8). The State filed additional minutes of testimony noticing an individual who did a damage estimate on a 2004

² The Trial Information cited to an incorrect alternative of criminal mischief. (4/8/20 TI)(App. pp. 4-6). *Compare* 4/8/20 Minutes pp. 6-7. (Conf. App. pp. 9-10).

Ford Escape. The State asserted that a copy of the damage estimate was provided to defense counsel. (7/19/21 Add. Minutes)(Conf. App. p. 15).

On August 19, 2021, TW pleaded guilty to criminal mischief in the fourth degree. (8/19/21 GP)(App. pp. 12-16). TW was granted a deferred judgment. She was placed on unsupervised probation for one year and ordered to pay a \$315 civil penalty. The order deferring judgment stated: “Pecuniary damages to the victim(s) are unknown at this time. A hearing will be set to determine full amount of restitution to be imposed as a condition of probation.” (8/19/21 Order Granting DJ pp. 1-3)(App. pp. 17-19). A review hearing was scheduled for February 18, 2022. (8/19/21 Order Granting DJ p. 2)(App. p. 18).

A restitution hearing was scheduled for October 28, 2021. (9/17/21 Order setting restitution hearing date)(App. pp. 21-22). The restitution hearing was continued to December 9, 2021. (10/28/21 Order continuing restitution

hearing)(App. pp. 23-24). The district court record does not show that a hearing was held on December 9, 2021, or why it was not held.

On February 15, 2022, the district court found TW had completed all terms and conditions of the deferred judgment. The court ordered: “that the charge(s) should now be **dismissed and expunged. All dismissed related charges shall now also be expunged.** Defendant is hereby advised that the case will not be expunged until all monies owing have been paid in full.” (2/15/22 Deferred judgment review order)(bold in original)(App. pp. 26-27). The order dismissing TW’s case was filed at 01:32 p.m. on February 15, 2022. (2/15/22 Deferred judgment review order)(App. pp. 26-27).

Approximately two hours after dismissing and expunging TW’s criminal case, the district court scheduled a restitution hearing for March 24, 2022.³ (2/15/22 Order setting restitution hearing)(App. pp. 28-29).

³ The order was filed at 03:36 p.m. (2/15/22 Order setting restitution hearing)(App. pp. 28-29).

The restitution hearing was held as scheduled on March 24, 2022. (Tr. p. 1L1-25). On April 8, 2022, the district court ordered TW to pay \$6,067.44 in victim pecuniary damage restitution. TW and codefendant BD⁴ are jointly and severally liable for the total restitution amount. (4/8/22 Order)(App. pp. 30-32).

TW filed a notice of appeal on May 5, 2022. (5/5/22 NOA)(App. pp. 33-34). On July 29, 2022, the Supreme Court granted TW's application for discretionary review. (7/29/22 SCt Order)(App. pp. 35-37).

Facts.

On February 19, 2020, CB reported vandalism to two vehicles. According to the police report from that date, CB reported that TW, BD, and JV arrived at her apartment. TW was or had been in a relationship with CB's son. TW was upset that CB's son had taken things that belonged to her and she wanted them back. TW was obviously upset and JV had a

⁴ Supreme Court # 22-0771.

straight pipe used to raise a tire jack. CB shut the door and locked it. (Minutes p. 6)(Conf. App. p. 9).

CB grabbed her phone and hit the record button. She went to her balcony which overlooked the parking area. She observed BD lean over the hood of her Hyundai and scratch it. BD then walked away from the car. TW removed a four-prong lug nut tool from the Hyundai's backseat and used it to hit the front driver side window two times. TW then hit the windshield with the tool two times. On the second strike, the tool flew out of TW's hand, hit the windshield, and then landed on the parking lot. (Minutes p. 6)(Conf. App. p. 9).

Next, TW obtained a tire jack from the Hyundai's backseat. She threw it at the Hyundai's sunroof. The sunroof smashed. TW retrieved another tool from the rear of the Hyundai. TW hit the windshield of the other vehicle, a Ford. TW threw the tool at the windshield and it bounced off and landed on the ground. TW then walked away and entered a

vehicle in which BD and JV were already occupying. The vehicle then left the area. (Minutes p. 6)(Conf. App. p. 9).

The officer observed the vehicles. The officer wrote:

[CB's] Hyundai had the hood scratched up, the sun roof broken out and the glass on the windshield had cracks from being struck with the tool. There was no visible damage to the front driver side window. The windshield on [CB's] Ford had cracks as well from being struck by the tool. The total damage was estimated to be \$1,400.00.

(Minutes p. 7)(Conf. App. p. 10). An evidence technician took pictures of the damage to the vehicles. (Minutes pp. 7-9)(Conf. App. pp. 10-12). On February 23, 2020, CB emailed the cell phone video to the evidence technician. (Minutes p. 4)(Conf. App. p. 7).

CB testified at the restitution hearing. CB stated that TW, BD and two other people arrived at her apartment around 8:20 a.m. on February 19, 2020. (Tr. p. 5L4-17). They were upset and yelling things about her son. (Tr. p. 5L18-23). TW was CB's son's ex-girlfriend. (Tr. p. 4L18-23).

In February 2020, CB owned two vehicles: a 2004 Ford Escape Limited and a 2004 Hyundai sedan. (Tr. p. 5L24-p. 6L5). CB recounted that BD scratched the Hyundai's hood. Meanwhile, TW had the backdoor open and threw things out of the vehicle. At this point, CB said she grabbed her phone and began recording. (Tr. p. 612-25). When BD saw CB recording, she put her hood up and walked away. (Tr. p. 7L1-3).

TW took items which CB had in the Hyundai to fix the brakes to use to damage the car. CB testified:

That shattered the windshield of the Hyundai. She was throwing big, large, metal pieces at my Hyundai making dents. And then she went over to my Escape and threw the metal crowbar at that, and that busted the Escape, and there was big dents and they were, like, throwing and kicking my Escape. Well, [TW] was.

(Tr. p. 7L12-18).

CB claimed that the Ford's windshield was "shattered" and it had multiple scratch marks. She did not know if BD caused any damage to the Ford but she saw TW throw items

at the Ford causing “big dents” and a shattered windshield.

(Tr. p. 7L20-p. 8L5).

CB stated the Hyundai also sustained damage. She testified:

Yes. She threw something at -- metal bar, broke the sunroof in the Hyundai, the windshield was shattered and busted. She tried breaking the driver's side window, she couldn't bust it, but there was marks from, like, the metal bar she was using all over the windshield -- or driver's side window. And then she -- like I said, BD took something, a razor or something, and she was drawing big, big circles around on the hood of the Hyundai, so.

(Tr. p. 8L8-21). CB asserted that the damage to both vehicles was all over and not localized. (Tr. p. 9L12-14).

CB junked the Hyundai. It would have cost more to fix it than it was worth. (Tr. p. 9L15-24). Kelley Blue Book value for a 2004 Hyundai which was “drivable and in good shape and undamaged” ranged from \$1,479 to \$3,460. (Tr. p. 10L3-12; Ex. 1)(Ex. App. pp. 3-4). CB asserted that the only previous damage to the Hyundai was a broken rear window.⁵

⁵ CB claimed TW had broken the rear window a few weeks before the February 19, 2020 incident. (Tr. p. 19L1-12).

(Tr. p. 19L1-12). CB received \$150 for the Hyundai. (Tr. p. 10L16-17). CB did not provide the prosecutor documentation that the Hyundai had been salvaged. (Tr. p. 20L13-20).

CB still had the Ford which was drivable; however, she was not driving it. (Tr. p. 11L7-13). CB claimed the Ford “incurred substantial damage.” (Tr. p. 11L14-16). CB had the windshield fixed. (Tr. p. 11L17-20). She paid \$234.84 to repair the windshield. (Tr. p. 11L20-p. 12L3; Ex. 3)(Ex. App. p. 8).

CB stated she took the Ford to a collision center for a damage estimate. She said it had been in decent shape. (Tr. p. 12L10-p. 13L3). All of the damage listed in the estimate occurred at the hands of TW and BD. (Tr. p. 13L4-6, p. 15L21-p. 16L4). CB testified she showed the collision center employee “what [she saw] was damaged [herself] with [her] eyes what they did, so [she] showed him that.” (Tr. p. 13L20-25). In response to the prosecutor’s question that she was not trying “to get a bunch of other damage or rust or anything else

fixed”, CB said “no.” (Tr. p. 14L4-9). The damage estimate for the Ford totaled \$3,512.60. (Ex. 2)(Ex. App. pp. 5-7).

CB testified that her sworn testimony was the same as what she told the officers in February 2020. (Tr. p. 20L21-p. 21L1).

Officer Jacobsen was called to testify at the restitution hearing. He reviewed his report which refreshed his memory of the event. (Tr. p. 22L11-16). When writing a report, Jacobsen strives to be as thorough and accurate as possible. (Tr. p. 23L7-9, p. 24L18-21, p. 25L13-18). Jacobsen agreed his report only listed the windshield as being damaged on the Ford. (Tr. p. 24L22-25).

The district court took judicial notice of the police reports. (Tr. p. 27L22-p. 28L19). The photographs and the video were submitted to district court for review. (Ex. 4; Ex. 5 photos)(Ex. App. pp. 9-38); (Ex. 5 video).

ARGUMENT

I. The district court lacked subject matter jurisdiction and/or statutory authority to enter a restitution order for payment of the victim’s pecuniary damages after the successful completion of all conditions of the deferred judgment, dismissal and expungement.

Proper Form of Review.

The Supreme Court ordered the parties to address whether certiorari review or discretionary review is the proper means of seeking review of a restitution order in a case dismissed after successful completion of a deferred judgment. (7/29/22 SCt order)(App. pp. 35-37).

If the incorrect document to initiate the case is filed, “the case shall not be dismissed, but shall proceed as though the proper form of review had been requested.” Iowa R. App. 6.108. Ultimately, the Court may reach the questions raised in this case because the Supreme Court granted the application for discretionary review. (7/29/22 SCt. Order) (App. pp. 35-37). Cf. State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022) (stating “[a]n appellate court either has

jurisdiction over a criminal appeal or it does not. Once a defendant crosses the good-cause threshold as to one ground for appeal, the court has jurisdiction over the appeal.”).

Petition for Writ of Certiorari

A writ of certiorari is applicable where a party claims an associate district court judge exceeded the judge’s jurisdiction or otherwise acted illegally. Iowa R. App. 1.107(1). The legislature has also established the means of seeking appellate review in categories of cases. See e.g. Iowa Code § 665.11 (2021) (“No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari.”); Iowa Code § 910.7(5) (2021) (“[a]ppellate review of a district court ruling under this section shall be by writ of certiorari.”).

In the review of a certiorari action, the Court “can only examine “the jurisdiction of the district court and the legality of its actions.”” Ary v. Iowa Dist. Ct., 735 N.W.2d 621, 624 (Iowa 2007)(quoting Christensen v. Iowa Dist. Ct., 578 N.W.2d

675, 678 (Iowa 1998)). “When the court’s findings of fact are not supported by substantial evidence, or when the court has not applied the law properly, an illegality exists.” *Id.* (citing Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988)).

Application for Discretionary Review

The legislature provided that discretionary review is available from specifically listed types of cases. Iowa Code § 814.6(2) (2021). Discretionary Review is available from an “order raising a question of law important to the judiciary and the profession.” Iowa Code § 814.6(2)(e) (2021). Additionally, the legislature provided that “[t]he supreme court may adopt additional rules to control access to discretionary review.” Iowa Code § 814.1(2) (2021).

In Stessman, this Court found that the question of how a defendant may properly seek review of a restitution order following the entry of a deferred judgment was an important question justifying the grant of discretionary review. State v. Stessman, 460 N.W.2d 461, 464 (Iowa 1990). The Supreme

Court concluded:

We believe that the proper route of possible review for a restitution order issued as part of or following a deferred judgment is an application for discretionary review. Allowing application for discretionary review of restitution orders in deferred judgment cases satisfies the need for a possible avenue of review, without upsetting the final judgment requirement imposed by statute and our prior cases.

State v. Stessman, 460 N.W.2d at 464. In Stessman, the Supreme Court reaffirmed that the entry of the deferred judgment eliminated the availability of the certiorari procedure. State v. Stessman, 460 N.W.2d at 463 (citing McKeever v. Gerard, 368 N.W.2d 116 (Iowa 1985)).

What is the proper form of review?

The procedural posture of the individual case may dictate the proper means of invoking the appellate court's jurisdiction. The first consideration is whether there is a final judgment in the criminal case. Generally, "[f]inal judgment in a criminal case means sentence." State v. Propps, 897 N.W.2d 91, 96 (Iowa 2017)(other citations omitted). In the present case, there

is not a final judgment. State v. Stessman, 460 N.W.2d at 462 (stating “[a]n order deferring judgment is interlocutory and cannot meet the final judgment requirement imposed by section 814.6.”); State v. Anderson, 246 N.W.2d 277, 279 (Iowa 1976)(stating an order to defer sentence is interlocutory and cannot meet the final judgment requirement to support an appeal.).

A second consideration is whether the deferred judgment has been successfully completed. Because TW successfully completed the terms of the deferred judgment and it was expunged, there will never be a final judgment in the present case. (2/15/22 Deferred judgment review order)(App. pp. 26-27). See Cf. State v. Deng Kon Tong, 805 N.W.2d 599, 603 (Iowa 2011) (holding “a deferred judgment constitutes a conviction for purposes of section 724.26 where the defendant (as here) has not completed his term of probation.”); Daughenbaugh v. State, 805 N.W.2d 591, 599 (Iowa 2011)

(finding that a person who successfully completed a deferred judgment is not “convicted” for the purposes of Chapter 822).

The present case is a different procedural posture than Stessman. The defendant in Stessman had not completed his deferred judgment. State v. Stessman, 460 N.W.2d at 462. Stessman sought review of a restitution order which had been entered as part of the deferred judgment. Id. at 462. TW had completed the terms of the deferred judgment and the case was dismissed and expunged. (2/15/22 Deferred judgment review order)(App. pp. 26-27). Only then after the dismissal order did the court enter an order imposing restitution. (4/8/22 Order)(App. pp. 30-32).

The Court’s decision in McKeever v. Gerard does not resolve the present question. In McKeever, the defendant who had received a deferred judgment argued the writ of certiorari was available “to correct errors that were not reviewable on direct appeal.” McKeever v. Gerard, 368 N.W.2d 116, 118 (Iowa 1985). The Court stated:

[w]hile certiorari is available regardless of the finality of a judgment, it is available only under very limited circumstances. Specifically, a writ of certiorari is granted only where, in the exercise of judicial functions, an officer exceeds the bounds of proper jurisdiction or otherwise acts illegally.

Id. (other citations omitted). The defendant in McKeever did not contend that the magistrate acted beyond the scope of his jurisdiction, only that it acted illegally in denying her motion for a new trial. Id. The McKeever Court noted that it did not find any cases “allowing certiorari review at the conclusion of the case and raising alleged errors of law ordinarily raised through an appeal.” Id. at 119. The Supreme Court stated:

On the other hand, the remedial functions of certiorari, including the avoidance of unnecessary litigation and the provision of a method of review when no other means are available, would not be advanced by recognizing that remedy here. The issuance of the writ could not avoid litigation; the trial was already completed. It is, as the district court observed, in reality an appeal under a different label. The petition came after the sentencing hearing and raised alleged errors in the trial itself. Nor is its recognition necessary to grant redress to a party who otherwise would have none; the remedy of a direct appeal was not unavailable to McKeever; she simply elected to waive it by her application for deferred judgment.

Id.

The Court concluded:

We believe the right to raise, after a trial, alleged trial court errors through a certiorari action is one of those rights, like an appeal, which is waived by an election for a deferred judgment. A defendant who elects to have the case eventually treated as if there were no conviction cannot simultaneously attack the case as if there had been one. Under these circumstances, we will not recognize the certiorari procedure.

Id.

Had the district court entered the restitution order during the period of the deferred judgment, the order would be authorized. State v. Kluesner, 389 N.W.2d 370, 370 (Iowa 1986)(stating Iowa Code section 910.2 imposes a duty to order restitution in a deferred judgment case.). A restitution order entered as in a deferred judgment case prior to dismissal and expungement is reviewable by discretionary review. State v. Stessman, 460 N.W.2d at 464. But here, the order was entered after dismissal. This procedural posture changes the method of review. The first question is whether the district

court had subject matter jurisdiction and/or the authority to enter the order. Appellant contends this first question is best reviewed by certiorari.

As early as 1906, the Iowa Supreme Court recognized the lack of jurisdiction to correct the record after discharge. In Smith v. District Court, the Supreme Court declared that “[t]here must be a time when the court’s jurisdiction over defendant’s person by way of punishment ceases. Otherwise, it may continue indefinitely.” Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906). “With the satisfaction of the record in the manner indicated by the statute the entire matter becomes a part of the irrevocable past, and beyond the power of the court to add to or detract therefrom.” Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906). The Smith Court concluded that the district court should have denied the motion, in entering judgment it exceeded its jurisdiction and certiorari was the proper remedy. Id.

However, if the Court finds differently, TW requests the Court rule on her challenge as her application for discretionary review was granted. This Court has jurisdiction to decide this issue.

Preservation of Error.

TW did not challenge the district court's subject matter jurisdiction or authority to enter the order after the successful completion of the deferred judgment, dismissal and expungement of the case.

The district court lacked subject matter jurisdiction

“Subject matter jurisdiction” refers to the power of a court to deal with a class of cases to which a particular case belongs.” In re Estate of Falck, 672 N.W.2d 785, 789 (Iowa 2003) (other citation omitted). Subject matter jurisdiction denotes the “the authority of a court to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court’s attention.” Christie v. Rolscreen Co., 448 N.W.2d 447,

450 (Iowa 1989)(quoting Wederath v. Bryant, 287 N.W.2d 591, 594 (Iowa 1980)). “A constitution or a legislative enactment confers subject matter jurisdiction on the courts.” In re Estate of Falck, 672 N.W.2d at 789. If the district court lacks subject matter jurisdiction, the judgment is void. Id. A void judgment is subject to collateral attack. Id. Unlike personal jurisdiction, a party cannot waive or vest by consent subject matter jurisdiction. Id. Nor can a party confer subject matter jurisdiction on the court by an act or procedure. Id. at 789. The district court lacked subject matter jurisdiction to enter the restitution order after discharge and expungement of the deferred judgment. Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906).

Alternatively, if the district court had subject matter jurisdiction, the court lacked the authority to enter the restitution order.

“A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case.” Christie v. Rolscreen Co. 448 N.W.2d 447, 450 (Iowa

1989). In such a situation, “the court lacks authority to hear that particular case.” Id. The court’s lack of authority “can be obviated by consent, waiver or estoppel.” State v. Mandicino, 509 N.W.2d 481, 483 (Iowa 1993). This Court interpreted the decision in Mandicino to mean that “a court’s lack of authority is not conclusively fatal to the validity of an order.” In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997).

In the context of a criminal conviction, an illegal sentence cannot be waived by failing to challenge the sentence on direct appeal. Iowa R. Crim. P. 2.24(5) (“The court may correct an illegal sentence at any time.”). See also State v. Tindell, 629 N.W.2d 357, 359 (Iowa 2001) (“The exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified bounds of allowable sentencing. In other words, the sentence is illegal because it is beyond the power of the court to impose.”). The judgment for pecuniary damages restitution is most akin to a criminal sentence which includes restitution

pursuant to Iowa Code Chapter 910. The pecuniary damages restitution judgment in a dismissed case is the equivalent of an illegal sentence. Cf. State v. Brown, 905 N.W.2d 846, 857 (Iowa 2018) (stating “[t]he State agrees with Brown that an assessment of court costs for the dismissed simple misdemeanor charge would be an illegal sentence.”). TW was not required to object to the district court’s authority.

Standard of Review.

The appellate courts “constitute courts for correction of errors at law.” Iowa R. App. P. 6.907. Additionally, the appellate court reviews “the district court’s restitution order for correction of errors at law.” State v. Roache, 920 N.W.2d 93, 99 (Iowa 2018).

Discussion.

“Restitution is purely a creature of statute in Iowa.” Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993). “A court is authorized to order criminal restitution pursuant to the statutes. In the absence of such statutes, the court has no

power to issue a restitution order.” State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001). Kluesner holds that restitution is mandatory in a deferred judgment case. State v. Kluesner, 389 N.W.2d 370, 373 (Iowa 1986). However, Kluesner involved the entry of a restitution order at the same time as the deferred judgment was entered. Id. at 370-71. Restitution may be entered at the time of entry of the deferred judgment, or subsequently when the amount becomes known subject to the time constraints in Iowa Code section 910.7. Iowa Code § 910.3(8)-(10) (2021); Iowa Code § 910.7(1) (2021).

The district court lacked subject matter jurisdiction to enter the restitution after the case was dismissed and expunged.

The general class of case involved in the present matter is a dismissed case after successful completion of TW’s deferred judgment. The district court lacked the authority “to hear and determine cases of the general class to which the proceedings in question belong.” Christie v. Rolscreen Co., 448 N.W.2d at 450. “A person who has been discharged from probation shall no longer be held to answer for the person’s offense.” Iowa

Code § 907.9(4)(a) (2021). Upon discharge from probation imposed as a condition of a deferred judgment, the case shall be expunged. Iowa Code § 907.9(4)(b) (2021).

Once the case was dismissed, the district court no longer had subject matter jurisdiction to enter the restitution order. Smith v. Dist. Ct., 109 N.W. 1085, 1087 (Iowa 1906) (stating “[t]here must be a time when the court’s jurisdiction over defendant’s person by way of punishment ceases. Otherwise, it may continue indefinitely.”). Once TW had successfully completed the terms of the deferred judgment as ordered and the case was dismissed, the entire case was “beyond the power of the court to add” to it. Id. The district court lacked subject matter jurisdiction.

In Jensen, the Supreme Court held that the district court did not lose jurisdiction of a probation revocation proceeding that had been commenced but not completed before the period expired. State v. Jensen, 378 N.W.2d 710, 712-13 (Iowa 1985). The Supreme Court further held “a revocation

proceeding is commenced with the filing in district court of an application for revocation.” Id. at 713.

TW is in a different procedural posture than the defendant in Jensen. The order entering a deferred judgment stated “[p]ecuniary damages to the victim(s) are unknown at this time. A hearing will be set to determine full amount of restitution to be imposed as a condition of probation.” (8/19/21 Order Granting DJ pp. 2-3)(App. pp. 18-19). The record shows that restitution hearings had been scheduled after entry of the deferred judgment, but the hearings were not held. (9/17/21 Order setting restitution hearing date; 10/28/21 Order continuing restitution hearing)(App. pp. 21-24). The State has the burden to prove damages. State v. Bonstetter, 637 N.W.2d 161, 168 (Iowa 2001). The State failed to seek a restitution order specifying the amount of restitution prior to the dismissal order. Unlike the prosecutor in Jensen, the State in the present case did not seek to extend the district

court's jurisdiction. The district court's subject matter jurisdiction ended once the case was dismissed.

Lack of authority

The district court lacked statutory authority to enter a restitution order for payment of the victim's pecuniary damages after the successful completion of all conditions of the deferred judgment, dismissal and expungement. Iowa Code section 910.7 only permits the modification of an offender's plan of restitution or restitution plan of payment "during the period of probation, parole, or incarceration." Iowa Code § 910.7(1) (2021). Beyond the period of probation, parole or incarceration, the legislature has not provided a mechanism to impose additional restitution or modify the terms of a plan of restitution.

TW had successfully completed the terms of her probation as ordered as a condition of the deferred judgment. (8/19/21 Order granting deferred judgment p. 2; 2/15/22 Deferred judgment review order)(App. pp. 18, 26-27). The

district court exceeded its authority by entering the pecuniary damages criminal restitution order. Subject to the statute of limitation, CB's only means of obtaining a judgment is in an independent civil action.

TW respectfully requests the Court vacate the district court's restitution order.

II. The victim pecuniary damages restitution order is not supported by substantial evidence.

Preservation of Error.

The amount of victim restitution was contested. A contested hearing occurred on March 24, 2022. (Tr. p. 1L1-p. 29L10). Following the hearing, the court entered an order for pecuniary damages restitution. (4/8/22 Order)(App. pp. 30-32). TW preserved error by challenging the pecuniary damage claim. State v. Bonstetter, 637 N.W.2d 161, 167-68 (Iowa 2001).

Standard of Review.

The appellate court reviews "the district court's restitution order for correction of errors at law." State v.

Roache, 920 N.W.2d 93, 99 (Iowa 2018). When reviewing a restitution order, the court determines whether the district court’s findings lack substantial evidentiary support, or whether the district court has not properly applied the law. State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004).

“Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion.” State v. Bonstetter, 637 N.W.2d at 165.

Discussion.

Restitution is a mandatory part of criminal sentencing under Iowa law. Iowa Code § 910.2 (2021); State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010). It is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1)(a) (2021); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). It is also mandatory when judgment is deferred as a condition of probation. State v. Kluesner, 389 N.W.2d 370, 373 (Iowa 1986).

The legislature has inserted restitution, which otherwise would normally be civil, into the criminal proceeding. State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009). The court is authorized to order criminal restitution pursuant to the restitution statutes. State v. Bonstetter, 637 N.W.2d at 166.

Restitution includes “pecuniary damages.” Iowa Code § 910.1(10) (2021). “Pecuniary damages” means all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.” Iowa Code § 910.1(6) (2021).

The Iowa Supreme Court has interpreted these provisions as requiring a restitution order to rest on “a causal connection between the established criminal act and the injuries to the victim.” State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). The State has the burden to prove the amount of damages caused by a defendant’s criminal conduct. State v. Tutor, 538

N.W.2d 894, 897 (Iowa Ct. App. 1995). TW’s “criminal conduct must have been the cause in fact of the loss and within the scope of liability.” State v. Waigand, 953 N.W.2d 689, 694 (Iowa 2021) (citing State v. Shears, 920 N.W.2d 527, 541 (Iowa 2018)). The State may recover all damages it can establish by a preponderance of the evidence. State v. Holmberg, 449 N.W.2d at 377. “Sentencing courts should not rubber-stamp victim restitution claims.” State v. Roache, 920 N.W.2d at 108.

Restitution is not limited to the parameters of the offense to which a defendant enters a guilty plea. State v. Watts, 587 N.W.2d 750, 751 (Iowa 1998); Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993). Rather, “the order can be extended to any amount which would be appropriate for tort recovery.” State v. Holmberg, 449 N.W.2d at 377. Even so, there must still be evidence tying the defendant’s admitted conduct to the amount of restitution ordered. Id. at 377-78. A restitution order “is not excessive ‘if it bears a real reasonable

relationship to the damage caused.” State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992) (quoting State v. Mayberry, 415 N.W.2d at 647).

The law in Iowa governing damages to automobiles is well settled and follows three general standards. Papenheim v. Lovell, 530 N.W.2d 668, 671 (Iowa 1995). The rules are:

- (1) When the motor vehicle is totally destroyed or the reasonable cost of repair exceeds the difference in reasonable market value before and after the injury, the measure of damages is the lost market value plus the reasonable value of the use of the vehicle for the time reasonably required to obtain a replacement.
- (2) When the injury to the motor vehicle can be repaired so that, when repaired, it will be in as good condition as it was in before the injury, and the cost of repair does not exceed the difference in market value of the vehicle before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the vehicle for the time reasonably required to complete its repair.
- (3) When the motor vehicle cannot by repair be placed in as good condition as it was in before the injury, then the measure of damages is the difference between its reasonable market value before and after the injury, plus the reasonable

value of the use of the vehicle for the time reasonably required to repair or replace it.

Papenheim v. Lovell, 530 N.W.2d at 671 (citing Long v. McAllister, 319 N.W.2d 256, 261 (Iowa 1982)).

The district court ordered TW to pay \$6,067.44 in victim pecuniary damage restitution. TW and codefendant BD are jointly and severally liable for the total restitution amount. (4/8/22 Order)(App. pp. 30-32). The district court's findings lack substantial evidentiary support. State v. Roache, 920 N.W.2d at 99 (stating "[e]vidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion."). The video in Exhibit 5 and the photographs in Exhibit 4 and 5 are the best evidence of the damage caused by TW and BD. (Ex. 4; Ex. 5)(Ex. App. pp. 9-38).

2004 Hyundai sedan

The record shows that CB's Hyundai sustained more damage than the Ford. The Hyundai had broken a windshield and sunroof. (Ex. 4 p. 1, 7, 8; Ex. 5 # 4, #6, # 7, #8)(Ex. App. pp. 9, 15-16, 20, 22-23). It also had scratches on the hood.

(Ex. 4 p. 4, 5; Ex. 5 #4, #5)(Ex. App. pp. 12-13, 20-21). The video shows BD scratching the Hyundai's hood and then leaving the area. (Ex. 5 video). The video shows TW hitting the Hyundai's driver's side window, the windshield, and the sunroof. (Ex. 5 video).

CB claimed the Hyundai was damaged beyond repair or that it would cost more to fix than it was worth. (Tr. p. 9L15-24). In determining the pecuniary damage to the Hyundai, it appears the district court applied the first standard: the measure of damages is the lost market value plus the reasonable value of the use of the vehicle for the time reasonably required to obtain a replacement. (4/8/22 Order p. 2)(App. p. 31).

The State had the burden to present sufficient evidence that the reasonable cost of repair would exceed the vehicle's market value. The State did not represent evidence regarding the cost to repair the Hyundai. The district court is required to employ the standard which compensates the victim but

does not provide a windfall. To be able to prove the Hyundai could not be repaired and be placed in as good condition as it was in before the vandalism, the State needed to present substantial evidence regarding the reasonable cost to repair the damage cause by TW and BD. The State failed to carry its burden.

Alternatively, if the Court finds the district court properly applied the first standard, the evidence is not sufficient to support the restitution award for the Hyundai. “The trial court may not disregard evidence and arbitrarily fix an amount of damage for which no basis in the evidence exists.” Hawkeye Motors, Inc. v. McDowell, 541 N.W.2d 914, 917 (Iowa Ct. App. 1995). The photographs in Exhibits 4 and 5 show that the Hyundai had significant pre-existing damage to the front area by the passenger-side headlight. (Ex. 4 p. 4; Ex. 5 #21)(Ex. App. pp. 12, 37). At the time of the incident, CB was having the Hyundai’s brakes repaired. (Tr. p. 8L8-p. 9L7). The Blue Book estimate admitted was for a 2004 Hyundai in

“good condition.” (Ex. 1)(Ex. App. p. 3). Prior to this incident, the Hyundai could not be considered to have been in “good condition.”

The appellate court “will uphold an award of damages so long as the record discloses a reasonable basis for which the award can be inferred or approximated.” Hawkeye Motors, Inc. v. McDowell, 541 N.W.2d at 918. “An award of damages within the range of the evidence will not be disturbed on appeal.” Id. The private party sale range for CB’s 2004 Hyundai was estimated between \$1,479 to \$ 3,460. Kelley Blue Book private party value was estimated at \$2470 for a car in good condition. (Ex. 1)(Ex. App. p. 3). The record shows the Hyundai was not in good condition. At most, the value of the Hyundai which needed new brakes and had significant pre-existing front-end damage was at the low end of the of the Blue Book estimate. The district court’s restitution award of \$2,470 is not supported by substantial evidence.

2004 Ford Escape Limited

The damage to the Ford caused by TW was all caught on the video. CB testified that BD was scratching the Hyundai and TW was in the Hyundai's backseat when she grabbed her phone and started recording. (Tr. p. 6L12-25). The video shows TW hitting the Ford's windshield and then throwing the item at the windshield before going back to the waiting vehicle and leaving. (Ex. 5 video). The Ford had a broken windshield. (Ex. 4 p. 2, 3; Ex. 5 #14, #15)(Ex. App. pp. 10-11, 30-31). The video does not show TW or BD doing any other damage to the Ford. (Ex. 5 video). The photographs taken by the evidence technician also do not show any damage to the Ford other than the windshield. (Ex. 5, #11, #12, #13, #16, #17)(Ex. App. pp. 27-29, 32-33).

If this Court finds that the district court had subject matter jurisdiction and/or authority to enter the pecuniary damage restitution, the record establishes TW is liable for the cost of repairing the Ford's windshield. (Ex. 3)(Ex. App. p. 8).

However, the district court's findings regarding the additional restitution of \$3,512.60 is unsupported by substantial evidence.

CB testified that TW was "throwing and kicking [her] Escape." (Tr. p. 7L12-18). The video does not support CB's claims that TW kicked her Ford. (Ex. 5 video). CB claimed that the Ford had scratches but she could not say that BD scratched the Ford. (Tr. p. 7L20-p. 8L7). The video also does not support that anyone scratched the Ford. (Ex. 5 video). The evidence does not support the need for all of the repairs listed on the estimate admitted as Exhibit 2. There is no evidence that the front bumper cover, the right front combination lamp, the right fender, right and left front and back doors including the door handles, right and left door mirrors, quarter panels, mudguards, right and left quarter glass, left and right rear combination lamp, rear bumper cover, paint, and clear coat were damaged by TW and BD.

(Ex. 2)(Ex. App. pp. 5-7). The video clearly shows this damage was not caused by TW or BD. (Ex. 5 video).

Officer Jacobsen also did not note this extensive damage to the Ford in his report. (Tr. p. 24L11-25). Jacobsen's report also does not contain any allegations that TW inflicted any damage to the Ford except breaking the windshield. The report provides:

[CB] said [TW] again opened the rear driver side door and this time pulled out a tool used with a socket wrench set. [CB] said [TW] hit the windshield of her other car, a Ford with IA plates [redacted], with it. [CB] said [TW] then threw the tool at the windshield and it bounced off and landed on the ground.

[CB] said [TW] then walked away and got into a silver Chevy with IA plates [redacted]. [CB] said [BD] and [JV] were already in the car, and it left westbound away from the parking lot.

(Jacobsen report p. 1, Minutes p. 6)⁶. (Conf. App. p. 9). Crime Scene Technician Loose took twenty-two photographs on

⁶ The district court took judicial notice of the police reports contained in the Minutes. (Tr. p. 27L22-p. 28L19).

February 19, 2020.⁷ Her report listed the damage she was documenting. The only damage she listed for the Ford was the damage to the windshield. (Loose report p. 1, Minutes p. 8) (Conf. App. p. 11).

The restitution order is not supported by substantial evidence. The district court erred in awarding CB pecuniary damages unsupported by the evidence. The restitution order must be reversed and remanded for a corrected restitution order.

CONCLUSION

TW respectfully requests this Court find that the district court lacked subject matter jurisdiction to enter the restitution after successful completion of the terms of the deferred judgment and dismissal of the case and vacate the order.

If the Court finds the district court had subject matter jurisdiction, TW requests the Court find the district court lacked statutory authority to enter a restitution after

⁷ Presumably the photographs taken by CST Loose are those in Exhibit 5 photos.

completion of the deferred judgment probation and vacate the order.

Alternatively, if the district court had subject matter jurisdiction and statutory authority, TW request this court find the district court's restitution order is not supported by substantial evidence, reverse the order and remand for an amended order.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

Counsel hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$6.46, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 6,987 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Martha J. Lucey

Dated: 6/28/23

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