

IN THE COURT OF APPEALS OF IOWA

No. 22-1401
Filed February 21, 2024

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRISHA LEE KOUNTKOFISKY,
Defendant-Appellant.

Appeal from the Iowa District Court for Winneshiek County, Laura Parrish,
Judge.

The defendant appeals the restitution order requiring her to pay victim
pecuniary damages and category “B” restitution. **SENTENCE AFFIRMED AND
REMANDED WITH DIRECTIONS.**

Gregory F. Greiner, West Des Moines, for appellant.

Brenna Bird, Attorney General, and Bridget A. Chambers, Assistant
Attorney General, for appellee.

Considered by Bower, C.J., and Greer and Chicchelly, JJ.

GREER, Judge.

In this appeal over what type of restitution and how much restitution should be paid, we start with the background.

I. Background Facts and Prior Proceedings.

In August 2022, Trisha Kountkofsky entered an *Alford* plea¹ to third-degree theft, an aggravated misdemeanor, in violation of Iowa Code sections 714.1(1) and 714.2(3) (2021). In her *Alford* plea and waiver of rights,² Kountkofsky agreed that the State could prove that she “unlawfully and willfully took possession or control of the property of another, and that property had a value in excess of \$750.00 but not exceeding \$1,500.00, with the intent to deprive the owner thereof.” Regarding victim restitution, Kountkofsky acknowledged that she would “pay victim restitution to be determined after restitution hearing.” However, she also agreed, “I waived my right to have a hearing on my reasonable ability to pay that portion of my court debt but request the Court make a determination of my reasonable ability to pay based on my financial affidavit and other information of record.” Kountkofsky did not have a financial affidavit on file, nor did she file one. The State did not file a statement of pecuniary damages.

¹ See *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (permitting a criminal defendant to enter a guilty plea without admitting guilt by acknowledging strong evidence of guilt and voluntarily, knowingly, and understandingly agreeing to allow the court to consider such strong evidence of guilt in accepting the guilty plea).

² Although Kountkofsky pled guilty, because she is challenging the sentence imposed and not the guilty plea, she has good cause for appeal. See Iowa Code § 814.6(1)(a)(3) (granting the right of appeal “where the defendant establishes good cause”); *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020) (“We hold that good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.”).

The next day, the sentencing court entered its disposition order and sentence, accepting the *Alford* plea and imposing a suspended sentence, two years of probation, and \$855 fine plus 15% surcharge and court costs totaling \$128.25. The sentencing court also suspended the fine. In addition, the sentencing court ordered that Kountkofsky

shall pay all Category “A” restitution as defined in Iowa Code § 910.1(01), and all pecuniary damages as defined in Iowa Code § 910.1(3). [Kountkofsky] is presumed to have the reasonable ability to pay all Category “B” restitution as defined in Iowa Code § 910.1(001), unless a finding is made by the Court, upon request of [Kountkofsky], to determine [she] is unable to reasonably make Category “B” payments. Any such request to the Court regarding Category “B” restitution would be subject to the requirements of Iowa Code § 910.2A. Judgment is imposed as set forth above for the amounts listed in this Order. [Kountkofsky] must pay the judgment in full or may perform community service at a rate of \$7.25 per hour in lieu of or in combination with said payment for any Category “A” or Category “B” restitution. Victim restitution is owed . . . in the amount of \$5,000.00.

(Emphasis added.)

Kountkofsky filed a notice of appeal the week after the sentence. As of that time, the State had still not filed a statement of pecuniary damages. While her appeal was pending, in September 2022, Kountkofsky filed a restitution plan of payment, agreeing to pay \$274.98 in court costs and \$5000 in victim restitution. She agreed to a plan of payment requiring her to pay \$50 per month until the amount was paid in full. The court accepted the plan two days later. On appeal, Kountkofsky argues that the restitution order contains errors in statutory sections and that the sentencing court should have held a hearing regarding victim pecuniary damages and her reasonable ability to pay category “B” restitution. The State agrees with Kountkofsky that the order cited to incorrect code sections.

II. Standard of Review.

“We review restitution orders for correction of errors at law.” *State v. Gross*, 935 N.W.2d 695, 698 (Iowa 2019). “[W]e determine whether the court’s findings lack substantial evidentiary support, or whether the court has not properly applied the law.” *State v. Albright*, 925 N.W.2d 144, 158 (Iowa 2019) (alteration in original) (citation omitted), *abrogated on other grounds by State v. Crawford*, 972 N.W.2d 189, 197 (Iowa 2022).

III. Analysis.

Kountkofsky raises challenges to the restitution order itself and the amounts she was ordered to pay for both the victim pecuniary damages and category “B” restitution.

a. Nunc Pro Tunc Issue. We start with some housekeeping. Kountkofsky’s arguments on appeal involve two types of restitution: victim pecuniary damages (section 910.1(6)) and category “B” restitution (section 910.1(2)). And as a preliminary matter, we note that the court erred in referencing the code sections for each type of restitution in its restitution order. All parties to this appeal agree. So, we conditionally affirm the sentence but remand for a nunc pro tunc order correcting the order to include the appropriate code sections.

b. Victim Pecuniary Damages. Regarding victim pecuniary damages,³ the court is required to order restitution for victim pecuniary damages regardless of the

³ Section 910.1(6) defines “pecuniary damages” in part as “all damages to the extent not paid by an insurer on an insurance claim by the victim, which a victim

offender's reasonable ability to pay. Iowa Code § 910.2(1)(a)(1); *State v. Davis*, 944 N.W.2d 641, 645 (Iowa 2020) ("The court's order for Davis to pay \$2000 in restitution to the victim of his crime falls within this first category, and the court was not required to determine his reasonable ability to pay this amount before ordering the victim restitution."), *superseded by statute on other grounds as stated in State v. Hawk*, 952 N.W.2d 314, 317–18 (Iowa 2020). Likewise, "[p]ecuniary damages shall be paid to victims in full before category 'A' and category 'B' restitution are paid." Iowa Code § 910.2(1)(a)(2)(b). Section 910.3 provides the steps to determine the amount of restitution to be paid, and those steps were not followed here by the State or Kountkofsky. The State never filed a statement of pecuniary damages, yet Kountkofsky agreed to a restitution plan of payment with the State that she would pay \$5000 for victim restitution. The court approved the plan. And that, according to the State, makes Kountkofsky's appellate challenge to the pecuniary damage award moot. See *State v. Colvin*, No. 16-1110, 2017 WL 936173, at *2 (Iowa Ct. App. Mar. 8, 2017).

At the same time, the State concedes Kountkofsky is entitled to direct review of the restitution order. See Iowa Code § 910.7(1) ("At any time during the period of probation, parole, or incarceration, the offender, the prosecuting attorney, or the office or individual who prepared the offender's restitution plan may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted."). To that end, the State contends "if Kountkofsky

could recover against the offender in a civil action arising out of the same facts or event."

believes that any amount of restitution ordered in the district court's [restitution] order is incorrect, she may seek review of the district court's restitution order pursuant to Iowa Code section 910.7." And here the restitution order was entered after sentencing. See *State v. Patterson*, 984 N.W.2d 449, 455 (Iowa 2023) (noting a restitution order entered after the time for sentencing is a "permanent restitution order" that can be challenged only under section 910.7); see also Iowa Code § 910.3(9), (10).

But Kountkofsky must file a petition to get the restitution modification before the district court, as we are not allowed to review or modify the plan of restitution unless Kountkofsky "has exhausted [her] remedies under . . . section [910.7] and obtained a ruling from the district court prior to the issue being raised in the appellate courts." Iowa Code § 910.7(5). Thus, we find the current challenge is moot and we have no authority to address the victim restitution challenge without a ruling from the district court on the issue. See *Patterson*, 984 N.W.2d at 455 n.5; see also *State v. Holmes*, 958 N.W.2d 545, 549 (Iowa 2021) (finding the defendant must exhaust the remedies in the district court before appellate determination of the restitution to be paid). However, we note that in ruling on a petition for modification, the amount of victim pecuniary damages ordered by the district court still must be supported by substantial evidence in the record. *State v. Kurka*, No. 14-0776, 2015 WL 1332018, at *5 (Iowa Ct. App. Mar. 25, 2015) (citing *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000)). And here, there is no statement of pecuniary damages on file, and Kountkofsky's *Alford* plea was to theft of an amount between \$750 and \$1500. Yet, because the issue is moot and Kountkofsky has not exhausted her remedies if she seeks a modification of her

stipulation of damages, we do not address the issue of victim pecuniary damages further.

c. Category “B” Restitution. Regarding category “B” restitution, under Iowa Code section 910.2A(1), “[a]n offender is presumed to have the reasonable ability to make restitution payments for the full amount of category ‘B’ restitution.” Category “B” restitution includes court costs. See Iowa Code § 910.1(2) (listing court costs as category “B” restitution). “[T]he statute places the burden on offenders requesting a court determination of the amount of category ‘B’ restitution they are reasonably able to make toward paying the full amount of that restitution.” *State v. McCalley*, 972 N.W.2d 672, 679 (Iowa 2022) (citing Iowa Code § 910.2A(2)). Furthermore, “[f]ailure to furnish a completed financial affidavit waives any claim regarding the offender’s reasonable ability to pay.” Iowa Code § 910.2A(2); see also *State v. McKinney*, No. 22-0842, 2023 WL 5091842, at *2 (Iowa Ct. App. Aug. 9, 2023) (holding that because the defendant did not request a reasonable-ability-to-pay determination and did not file the required affidavit by the time of sentencing, he waived his ability to challenge the determination). And “[a]n offender’s failure to request a determination pursuant to this section waives all future claims regarding the offender’s reasonable ability to pay.” Iowa Code § 910.2A(3)(b); see also *McCalley*, 972 N.W.2d at 680 (“By failing to avail herself of multiple opportunities to timely request a determination on her ability to pay before filing this appeal, McCalley waived her claims and we cannot address them on direct appeal.”).

Here, Kountkofsky was required to pay \$274.98 in court costs, which was the only category “B” restitution that the sentencing court assessed. Because she

did not file a financial affidavit, she waived her right to a reasonable-ability-to-pay hearing, so she cannot overcome the presumption that she had the ability to pay. We reject her challenge to the court's order that she has the reasonable ability to pay category "B" restitution and affirm that part of the restitution order.

Finally, as a means around the waiver issue, Kountkofsky asserts that the restitution order failed to adequately notify her of her right to challenge the category "B" restitution. This argument returns to the fact the district court included the wrong code sections in the restitution order, but as the State points out, Kountkofsky had notice of her right to a restitution hearing in her signed written guilty plea and the restitution order specifically stated that category "B" restitution is subject to the requirements of section 910.2A, which sets out the category "B" restitution hearing parameters. See Iowa Code § 910.2A(2)(a)–(d). We find no merit in this argument.

IV. Conclusion.

To recap, we affirm the sentence with directions for entry of a nunc pro tunc order correcting the code sections for victim pecuniary damages to section 910.1(6) and category "B" restitution to section 910.1(2) in the restitution order. We affirm the sentence in all other portions of the restitution orders raised here.

SENTENCE AFFIRMED AND REMANDED WITH DIRECTIONS.