IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1351

STATE OF IOWA,
Plaintiff-Appellee,

vs.
STEPHON TRAVELL CURRY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE PAUL D. MILLER AND KEVIN MCKEEVER,
JUDGES

APPELLEE'S BRIEF

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ROUTING STATEMENT

Transfer to the Court of Appeals is appropriate because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a). Curry's restitution claim is not ripe and he has not sought modification under Iowa Code section 910.7. Further the Court can and should resolve this case without overturning Iowa Supreme Court precedent.

STATEMENT OF THE CASE

Nature of the Case

The defendant Stephen Curry pled guilty to robbery in the second degree. On appeal, he argues that the Court should overrule existing case law to find that the district court must determine a defendant's reasonable ability to pay before knowing how much the restitution amount will be. He also argues the district court abused

its discretion when it imposed a seventy-percent mandatory minimum.

Course of Proceedings

The defendant was charged with one count of robbery in the first degree under Iowa Code sections 711.1(1)(b) and 711.2 and one count of theft in the fourth degree under Iowa Code sections 714.1(1) and 714.2(4). Trial Information; App. 7. In exchange for the defendant's plea, the State offered to dismiss the theft count and to reduce the robbery charge to second-degree robbery. Plea Tr. 2, lines 17-25; 3, lines 1-5. The State also agreed to the threat assessment recommendation for the mandatory minimum, whether the recommendation was fifty percent or seventy percent. Plea Tr. 2, lines 17-25; 3, lines 1-5.

The defendant pled guilty to robbery in the second degree. Judgment and Sentence; App. 14. He received a ten-year sentence with all fines and applicable surcharges suspended. Judgment and Sentence; App. 14. He also received a seventy-percent mandatory minimum. Judgment and Sentence; App. 14. The reasons for sentencing were the violent nature of the offense, the recommendation of the presentence investigation report, protection

to the community, and that the sentence offered the maximum opportunity for rehabilitation. Judgment and Sentence; App. 15.

At sentencing, the district court also imposed victim restitution and court costs. Judgment and Sentence; App. 14-15. It stated that the defendant "shall make victim restitution as set out in the Statement of Pecuniary Damages" and that the defendant "is further ordered to make restitution for court costs." Judgment and Sentence; App. 15. It then gave the State 30 days to file a Statement of Pecuniary Damages. Sentencing Tr. 9, lines 17-20. The district court also determined that the defendant was not reasonably able to pay for court-appointed counsel. Judgment and Sentence; App. 15.

The defendant appeals. At the time the defendant filed a notice of appeal, the State had not filed a statement of pecuniary damages. *See generally* Online Trial Court Docket.

Facts

The defendant ran up to the victim and punched her. Minutes of Testimony; Confid. App. 5. He then took her iPhone and fled. Minutes of Testimony; Confid. App. 5.

ARGUMENT

I. Curry's Restitution Claim is Not Ripe and Not Directly Appealable. Existing Iowa Precedent is Sound and Does Not Permit This Claim at This Time.

Preservation of Error

In limited circumstances, an appellate court may consider the defendant's challenge to restitution absent the district court's ruling on the issue. *See State v. Janz*, 358 N.W.2d 547, 547-48 (Iowa 1984); *but see State v. Tanner*, 2016 WL 4384468, at *5 (Iowa Ct. App. 2016) ("We question whether that relaxed standard should allow a defendant to fail to present facts on an issue that requires the court to consider certain facts in the exercise of its discretion, then complain on appeal the court failed to consider facts the defendant failed to present.").

Standard of Review

This Court reviews restitution orders for correction of errors at law. *State v. Jose*, 636 N.W.2d 38, 43 (Iowa 2001). When reviewing a restitution order, the Court "determine[s] whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

Merits

Curry asks this Court to find for the first time that the district court must consider a defendant's reasonable ability to pay his restitution before the district court knows the amount of restitution. This Court should find the defendant's claim is not ripe because there is no plan of restitution. This Court should also find the defendant has failed to exhaust his remedies because he has not moved under Iowa Code section 910.7 to modify a plan of restitution or plan of payment.

If this Court declines to dismiss Curry's restitution claim on those grounds, this Court should apply existing Iowa law. It is sound and logical that the district court must know the amount the defendant owes before it can determine the defendant's reasonable ability to pay this amount.

A. Curry's claim is not ripe when there is no plan of restitution.

Curry's ability-to-pay claim is not properly before this Court because it is not yet ripe. "If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it." *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 432 (Iowa 1996).

A district court is not required to consider a defendant's reasonable ability to pay until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999); *State v. Campbell*, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (stating that the sentencing court is not required to consider the defendant's ability to pay until it has issued "the order constituting the plan of restitution"). Until that obligation is triggered, a defendant's challenge on ability-to-pay grounds is premature. *See Jackson*, 601 N.W.2d at 357 (stating that it was precluded from granting the defendant the relief he sought). Further, it may be an abuse of discretion for the sentencing court to determine the reasonable ability to pay without a reasonable estimate of the restitution owed and without any evidentiary support for the finding. *See Campbell*, 2016 WL 4543763, at *4 (reversing the district court's finding of reasonable ability to pay when the district court did not have even a reasonable estimate of the restitution owed and no evidentiary support for the finding).

At the time of Curry's appeal, his plan of restitution was not complete. The district court had ordered that Curry pay court costs and attorney fees, but it did not include even a temporary amount of

costs or fees in its sentencing order. Judgment and Sentence; App. 14-15. Nor had it entered any supplemental orders setting forth the amounts of these costs and fees. Curry's claim is not yet ripe when the district court has not completed a plan of restitution. Therefore, this Court should dismiss his reasonable-ability-to-pay claim on ripeness grounds.

B. Curry's claim is not properly exhausted because he has not challenged his ability to pay under Iowa Code section 910.7.

Even if Curry's claim was ripe, his restitution claim should be dismissed because Curry has failed to file a motion under Iowa Code section 910.7. Iowa Code section 910.7 is the mechanism the legislature has provided to defendants to modify the plan of restitution or plan of payment. Iowa Code § 910.7. Until a defendant petitions the district court for modification, he is not entitled to directly appeal the district court's finding on the reasonable ability to pay. *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (declining to grant relief on a defendant's ability-to-pay challenge where the plan of restitution was not yet complete and the defendant had not yet petitioned the district court for modification under Iowa Code section 910.7); *State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017)

(reaffirming *Jackson*'s principle "that ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7").

Until Curry exhausts his remedies under Iowa Code section 910.7, his claim is not directly appealable. This Court should dismiss Curry's restitution claim.

C. The defendant's restitution claim fails on the merits under existing Iowa precedent. This precedent is sound and logical.

Curry makes two restitution arguments on appeal. First, he asks this Court to hold that sentencing courts have an "affirmative obligation to preemptively" determine a defendant's reasonable ability to pay court costs, attorney fees, and jail room and board "before issuing a plan of restitution." *See* Appellant's Brief at 10 & 14 (emphasis omitted). Because it did not follow this rule, Curry argues, the district court in this case erred. Alternatively, Curry contends that the district court's sentencing order did include a plan of restitution and a restitution plan of payment, thus triggering the court's obligation to determine whether Curry had the reasonable ability to pay court costs and attorney fees. *See* Appellant's Brief at 43-44. If this Court declines to dismiss Curry's restitution claim on ripeness or

appealability grounds, existing Iowa precedent is thorough, sound, and logical to deny Curry's claim on the merits.

1. Iowa precedent does not require a district court to determine the defendant's reasonable ability to pay before knowing how much restitution is at issue.

Restitution is mandatory in every criminal case in which the defendant is found or pleads guilty. Iowa Code § 910.2(1). The sentencing court is required to order pecuniary damages to the defendant's victims and to the clerk for fines, penalties, and surcharges. Iowa Code §§ 910.1(3) & (4), 910.2(1). To the extent the defendant is reasonably able to pay, the court must also impose other payments such as contributions to a local anticrime organization, reimbursements to the crime victim compensation program, restitution to public agencies, court costs including correctional fees, and court-appointed attorney fees. Iowa Code § 910.2(1). If the court finds that the defendant is unable to pay certain costs and fees, it may instead order that the defendant perform community service. Iowa Code § 910.2(2).

Everyone involved in the criminal case has a role in compiling the restitution figures. The county attorney is tasked with providing the court with "a statement of pecuniary damages to victims of the

defendant . . . .” Iowa code § 910.3. If the amount is not available at the time of sentencing, the county attorney has thirty days after that date to provide the statement to the court. Iowa Code §910.3. It is the clerk of court’s job to provide the court with a statement of court-appointed attorney fees and court costs including correctional fees. *Id.*

At sentencing or “at a later date to be determined by the court,” the sentencing court is required to “set out the amount of restitution . . . and the persons to whom restitution must be paid.” *Id.* (emphasis added). “If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time.” *Id.* The court must then “issue a permanent, supplemental order, setting the full amount of restitution[,]” and “further supplemental orders, if necessary.” *Id.* Together, these orders are “known as the plan of restitution.” *Id.; see State v. Harrison*, 351 N.W.2d 526, 528 (Iowa 1984) (stating that a restitution order “must include a plan of restitution setting out the amounts and kind of restitution in accordance with the priorities established in section 910.2”).

"After sentencing in which a plan of restitution is ordered, the next step is establishing a plan of payment." *Harrison*, 351 N.W.2d at 528. The plan of payment is a schedule of payments that will allow the defendant to carry out the plan of restitution. *Id.* When a defendant is incarcerated, the director of the Iowa department of corrections is required to "prepare a restitution plan of payment or modify any existing plan of payment." Iowa Code § 910.5(1)(d). Unlike when a defendant is placed on probation, however, an incarcerated defendant's "plan of payment is not initially made subject to court approval or change." *See Harrison*, 351 N.W.2d at 528-29 (comparing Iowa Code sections 910.4 and 910.5).

Nevertheless, at any time during the defendant's probation, parole, or incarceration, the defendant "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 one is warranted. Iowa Code § 910.7(1). The court may modify the plan of restitution or plan of payment, or both. *Id.* § 910.7(2).

At issue here is the sentencing court's finding—or lack thereof—of Curry's reasonable ability to pay the costs of the action, court costs including sheriff's fees, and attorney fees. The parties agree that the

sentencing court is constitutionally required to make an ability-to-pay finding. *See Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000) (stating that "[t]he 'reasonably able to pay' requirement enables section 910.2 to withstand constitutional attack"); Appellant's Brief at 26. But the parties disagree on when the court is required to make that determination.

Under Iowa case law, the sentencing court "is not required to give consideration to the defendant's ability to pay" until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *Swartz*, 601 N.W.2d at 354. In the case of a defendant serving a term of imprisonment, the court's determination of whether the defendant is reasonably able to pay costs and fees "is more appropriately based on [his] ability to pay the current installments than his ability to ultimately pay the total amount due." *State v. Van Hoff*, 415 N.W.2d 647, 649 (Iowa 1987).

If at the time of sentencing, the district court has at least a temporary amount of restitution identified up to that time, it should determine whether the defendant has the reasonable ability to pay that amount. *See* Iowa Code §§ 910.2 & 910.3. Upon the entry of each

supplemental restitution order comprising the plan of restitution, the district court should revisit its reasonable-ability-to-pay finding.

But the defendant does not have the right to be heard on the reasonable-ability-to-pay issue *before* the district court issues each supplemental restitution order. *See* Appellant's Brief at 31-37. The statute and the constitution simply do not require that. The constitution requires only that the State not place a financial obligation on the exercise of a constitutional right—such as the right to counsel—without tailoring it to whether a person can meet that obligation. *Fuller v. Oregon*, 417 U.S. 40, 54 (1974); *State v. Haines*, 360 N.W.2d 791, 797 (Iowa 1985) (relying on *Fuller* to recognize the "reasonable ability to pay" standard can survive constitutional attack). That the tailoring happen before the district court has any idea how much money is at issue is not a constitutional requirement. Nor does the statute require the district court to evaluate the defendant's reasonable ability to pay prior to knowing how much restitution is sought.

This is logical. It makes little sense for a district court to evaluate a defendant's ability to pay a nonexistent amount of money. Instead, the district court must know how much money is at issue to

decide whether the defendant's income and life circumstances will permit him to pay that amount over some period of time.

Curry proposes solutions to a nonexistent problem. He is not prevented from attacking his reasonable ability to pay under the Iowa law. He can challenge his reasonable ability to pay after the district court enters a restitution order identifying the amount. At that time, he can articulate why he is unable to reasonably pay that amount based on actual numbers. *See, e.g., State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987) (recognizing that the defendant believed restitution of $16,500 was unreasonable because it would take him 92 years to pay his restitution at his current level of income). And, depending on when he decides to attack the order, he can have counsel to help him do so. *See* Iowa Code §§ 910.3 & 910.7; *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997) (holding that, to be considered an extension of the criminal proceeding, a defendant's "petition under section 910.7 must be filed within thirty days from the entry of the challenged order"). *See State v. Jose*, 636 N.W.2d 38, 46-47 (Iowa 2001) (discussing *State v. Alspach*, 554 N.W.2d 882 (Iowa 1996) and *Blank*). In sum, a defendant seeking to challenge an ability-to-pay finding made at sentencing or through supplemental

restitution orders has adequate remedies without the solutions Curry suggests.

2. There is not a plan of restitution in place at this time.

Alternatively, Curry argues that the district court erred by not making a reasonable-ability-to-pay finding because there was a plan of restitution in place. Again, Curry's claim has no merit.

There cannot be a complete or even a temporary restitution plan without a court order setting forth the amount and type of restitution ordered. *See* Iowa Code § 910.3 (requiring that "the court shall set out the amount of restitution[,]" either at sentencing or in "a permanent, supplemental order, setting the full amount of restitution"). Although the county attorney, clerk of court, public defender, and sheriff or municipality each has a role in compiling the numbers, the statute plainly requires that the court issue restitution orders setting forth the amount of restitution. *See id*. The district court may order these amounts in its sentencing order, or at a later time in supplemental orders. *See id*. Either way, however, the amount is not enforceable against the defendant until the district court makes it part of an order. *See Campbell*, 2016 WL 4543763, at *3 n.4) (questioning "the propriety of sending an account to collections

before the court has completed the plan of restitution and determined the total amount due").

Without a supplemental restitution order imposing these costs, these costs are not a part of the plan of restitution. *See State v. Martin*, No. 11-0914, 2013 WL 4506163, at *2 & n.3 (Iowa Ct. App. Aug. 21, 2013) (stating that where the sentencing order contains no restitution amounts and there are no supplemental orders, "no restitution has been ordered" and "there is nothing for [the defendant] to challenge"). And without a plan of restitution, the district court did not yet have an obligation to determine whether Curry had the reasonable ability to pay those amounts. Indeed, a finding without at least "an estimate of the total amount of restitution" is "premature and lack[s] evidentiary support." *See Campbell*, 2016 WL 4543763, at *4.

At most, this Court should affirm with instructions for the district court to enter a final plan of restitution setting forth the restitution amounts. *See Campbell*, 2016 WL 4543763, at *4. At that point, the district court should determine whether Curry has the reasonable ability to pay the full amount or whatever installments it imposes. *See id.*; *see also Van Hoff*, 415 N.W.2d at 648. If Curry

"believes the forthcoming plan of restitution does not reflect his reasonable ability to pay, he may petition the district court for modification under Iowa Code section 910.7. *See Campbell*, 2016 WL 4543763, at *4.

II. The District Court Properly Exercised its Discretion During Sentencing.

Preservation of Error

A defendant may challenge sentencing errors on direct appeal without objecting in the district court. *See State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

When a defendant's sentence is within the statutory limits, the appellate court reviews the district court's decision for abuse of discretion. *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015). The district court has broad discretion to act within legal parameters. *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). The district court necessarily has latitude to act "according to the dictates of a judge's own conscience, uncontrolled by the judgment of others" for sentencing decisions. *Id.* The appellate court's review is limited to deciding if the district court's decision "was unreasonable or based on untenable grounds." *Id.*

Merits

Curry argues that the district court abused its discretion by failing to consider mitigating factors.The district court did not abuse its discretion because it considered the individual characteristics of this defendant and his crime.

The sentencing court has discretion to choose among statutorily authorized sentencing options. *See* Iowa Code § 901.5. In exercising its discretion, the sentencing court selects the sentence that "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5. A district court, when applying its discretion, should

> "[w]eigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual."

State v. Leckington, 713 N.W.2d 208, 216 (Iowa 2006) (quoting *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)).

Here, the district court considered the presentence report, the nature of the offense, and the fact that it was a violent crime when it imposed the seven-tenths mandatory minimum. Sentencing Tr. 8, lines 6-25. The presentence investigation report contained the mitigating circumstances that the defendant advances. It shows he graduated high school and his future educational plans. *See* PSI; Confid. App. 10. It shows that he has an infant daughter. *See* PSI; Confid. App. 12. The defendant also explained these mitigating factors in his allocution to the court. Sentencing Tr. 7, lines 23-26; 8, lines 1-5.

A sentencing court is not required "to specifically acknowledge each claim of mitigation" the defendant urges. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995). Nor does a sentencing court's failure to state a particular mitigating fact necessarily mean the sentencing court did not consider that fact. *Id.* The defendant's mitigating factors were before the district court. The district court's decision to weigh other factors more heavily is not an abuse of discretion.

The district court found that the violent nature of the offense outweighed any mitigating circumstances. Because the district court

properly exercised its discretion here, this Court should affirm Curry's sentence.

CONCLUSION

The defendant's restitution claim is not ripe and is not exhausted. The district court did not abuse its discretion when it imposed the seventy-percent mandatory minimum. This Court should affirm.

REQUEST FOR NONORAL SUBMISSION

The State believes oral argument is unnecessary to decide this case and will not "be of assistance to the Court." *See* Iowa R. App. P. 6.908.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,742** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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