IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. QUINTEN B. MCMURRY, Defendant-Appellant.	)	S.CT. NO. 16-1722

APPEAL FROM THE IOWA DISTRICT COURT
FOR WARREN COUNTY
HONORABLE KEVIN PARKER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

MARK C. SMITH
State Appellate Defender

MELINDA J. NYE
Assistant Appellate Defender
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 31st day of July, 2017, 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 Quinten McMurry, 902 South Jefferson Way, Indianola, IA 50125.

APPELLATE DEFENDER'S OFFICE

MELINDA J. NYE
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

MJN/lr/04/17
MJN/sm/7/17

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes and Court Rules:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WAS TRIAL COUNSEL INEFFECTIVE FOR ALLOWING MCMURRY TO ENTER A PLEA TO CHILD ENDANGERMENT WITHOUT A FACTUAL BASIS?

Authorities

State v. Straw, 709 N.W.2d 128, 132 (Iowa 2006)

State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999)

U.S. Const. Amend. VI

U.S. Const. Amend. XIV

Iowa Const. Art. I, Sect. 10

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

Iowa R. Crim. P. 2.8(2)(b)

Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014)

State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001)

State v. Finney, 834 N.W.2d 46, 62 (Iowa 2013)

Iowa Code § 726.6(a) (2013)

State v. Anspach, 627 N.W.2d 227, 233 (Iowa 2001)

State v. Philo, 697 N.W.2d 481, 488 (Iowa 2005)

II. WHETHER THE COURT ABUSED ITS DISCRETION BY ORDERING MCMURRY TO COMPLETE THE PROGRAM AT FORT DES MOINES RESIDENTIAL FACILITY AS A TERM OF HIS PROBATION IN BOTH CASES?

Authorities

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Valin, 724 N.W.2d 440, 444-45 (Iowa 2006)

Iowa Code § 907.6 (2015)

State v. Helmers, 753 N.W.2d 565, 567 (Iowa 2008)

III. WHETHER THE DISTRICT COURT ENTERED AN ILLEGAL SENTENCE IN TAXING TO MCCMURRY COSTS ASSOCIATED WITH THE COUNTS DISMISSED BY THE STATE?

Authorities

State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010)

State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998)

City of Cedar Rapids v. Linn County, 267 N.W.2d 673, 673 (Iowa 1978)

City of Des Moines v. State ex rel. Clerk of Court, 449 N.W.2d 363, 364 (Iowa 1989)

Woodbury County v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969)

Iowa Code § 815.13 (2013)

Iowa Code § 910.2 (2013)

State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991)

State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009)

State v. Hill, No. 03-0560, 2004 WL 433844, at *2
(Iowa Ct. App. March 10, 2004)

State v. Wheeler, No. 11–0827, 2012 WL 3026274, at *1-2
(Iowa Ct. App. July 25, 2013)

State v. Loye, 670 N.W.2d 141, 149 (Iowa 2003)

State v. Black, No. 14-0886, 2016 WL 3010497
(Iowa Ct. App. May 25, 2016)

State v. Stewart, No. 13-1113, 2014 WL 3511822, *4
(Iowa Ct. App. July 16, 2014)

IV. WHETHER THE DISTRICT COURT ERRED IN ASSESSING ATTORNEY'S FEES WITHOUT KNOWING THE AMOUNT OF ATTORNEY'S FEES?

Authorities

State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999)

State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984)

State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987)

State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009)

Iowa Code § 910.2(1) (2015)

State v. Wagner, 484 N.W.2d 212, 215–16 (Iowa Ct. App. 1992)

State v. Campbell, No. 15-1181, 2016 WL 4543763, at *4
(Iowa Ct. App. Aug. 31, 2016)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: After pleading guilty to child endangerment and false report of an incendiary device in two separate underlying cases in the Warren County District Court, Quinten McMurry appeals from his convictions, judgments and sentences.

Course of Proceedings: The State charged Quinten McMurry with child endangerment causing bodily injury, a class D felony in violation of Iowa Code sections 726.6(1), (3) & (6) (2015). (Trial Information FECR028439) (App. p. 5). McMurry entered a plea agreement with the State and pled guilty to child endangerment (not causing injury), an aggravated misdemeanor in violation of Iowa Code sections 726.6(1)(a), (3) and (7) (2015). (Waiver of Rights and Plea of Guilty FECR028439) (App. pp. 6-9). In January 2016, the

court accepted McMurry's plea, deferred judgment and placed McMurry on probation. (Sentencing Order FECR028439) (App. p. 10).

In June 2016, McMurry was charged with false reporting of an explosive or incendiary device, a class D felony in violation of Iowa Code section 712.7 (2015); threats, a class D felony in violation of Iowa Code section 712.8 (2015); and first degree harassment, an aggravated misdemeanor in violation of Iowa Code section 708.7(1) & (2) (2015). (Trial Information FECR029413) (App. pp. 16-18). The State moved to dismiss count III, harassment, in the interests of justice. (Motion to Dismiss) (App. p. 19). On the day of trial, McMurry and the State reached a plea agreement in which he would enter an Alford plea to false report of an incendiary device and the State would dismiss the threats charge. (Plea Tr. p. 5 L. 6 – 25; p. p. 13 L. 22 – p. 14 L. 9).

Largely because of the new charges, a report of probation violation was filed in the child endangerment case (FECR028439). (Probation Violation Report) (App. pp. 14-15).

After entering his Alford plea in FECR029413, McMurry stipulated that his conviction was a violation of his probation in FECR028439. (Stipulation FECR028439) (App. p. 20).

On October 3, 2016, McMurry was sentenced in both cases. In FECR029413, the State asked for a suspended sentence and probation. (Sentencing Tr. p. 6 L. 4-18). McMurry requested a deferred judgment, relying heavily on his mental health issues, noting he had been diagnosed with bipolar disorder. He attached letters from his treating psychiatrists demonstrating that his condition was effectively treated with medication and noting that he was working with Everly Ball to create a comprehensive treatment plan. (Sentencing Brief) (App. pp. 21-27). The court imposed and suspended a five year indeterminate prison term and imposed the minimum fine, surcharge, court costs, and attorney's fees. The court placed McMurry on probation and ordered him to attend the program at Fort Des Moines Residential Facility as part of his probation, noting that if it turned out that McMurry did not qualify for the program, the court would amend the

sentencing order to remove that requirement. (Sentencing Tr. p. 12 L. 18 – p. 13 L. 21; Judgment & Sentence) (App. pp. 28-32).

In FECR028439, relying on McMurry's stipulation, the court concluded he violated his probation and revoked his deferred judgment. The court imposed and suspended a two year indeterminate sentence and ordered McMurry to attend the Fort Des Moines Residential program. The court ordered the sentence to run consecutively to the sentence in FECR59413. (Sentencing Tr. p. 14 L. 19 – p. 16 L. 23; Probation Violation Order) (App. pp. 33-34).

McMurry filed a motion asking the court amend the sentencing order by removing the requirement that he reside at the Fort Des Moines Residential Facility, noting that the program required its residents to work full time and attaching a letter from McMurry's doctor opining McMurry is not able to work full time due to his mental health issues. (Motion to Reconsider; Attached Letter) (App. pp. 35-37). The court denied the motion summarily. (Order) (App. pp. 38-39).

McMurry filed a timely notice of appeal. (Notices of Appeal) (App. pp. 40-43).

Facts: FECR028439 (child endangerment): According to the minutes of testimony, on December 27, 2014, Meredith Morris called the police to report her son was with his father, Quinten McMurry, at his house. Her son texted Morris and told her that McMurry was drinking and he wanted to come home. (Minutes – Peterson Narrative) (Conf. App. pp. 14-15). Officer Peterson was dispatched and knocked on the door. He could smell alcohol when McMurry answered the door. McMurry wouldn't allow police into the house. Officer Peterson could see a child sitting on the couch inside. He asked the boy if "everything was ok." The boy shook his head then covered his face. When McMurry continued to refuse to allow officers in the house to check on the child, he was arrested. The boy was taken to a squad car where another officer saw that he had "injuries to his face." On the drive to the police station, after being told he was going to be charged with child endangerment, McMurry he said he was teaching his

son wrestling moves because he was being picked on at school. (Minutes - Peterson Narrative) (Conf. App. pp. 14-15).

FECR029413 (false report of an incendiary device): On June 14, 2016, Officer Largesse was dispatched to conduct a welfare check on McMurry in his apartment because McMurry was reportedly threatening to hurt himself. When McMurry refused to answer the door, police tried to open the door with a key from the owner of the apartment building. McMurry called the Warren County dispatch and said that he had explosives connected to the door and that he would kill himself and the officers if they came in. The building and adjacent buildings were evacuated. (Minutes - Largesse Narrative) (Conf. App. pp. 22-23).

An Iowa State Patrol tactical response team and bomb squad were called in to assist. Sergeant Dwyer negotiated with McMurry via telephone. He noted that McMurry was difficult to understand and seemed lethargic. McMurry told Sergeant Dwyer that he wanted to die and claimed that "the government" wanted to put him in Guantanamo Bay for terrorism.

Although he said he wanted to die, he didn't want to hurt anyone else, but if officers continued to try to get into his apartment he would shoot them in the legs so that they would have to kill him. His mood ranged from despondent to enraged during the several hours Dwyer talked to him. Eventually, the tactical unit entered McMurry's apartment and arrested him. Apparently no weapons or explosives were found in the apartment. Officers transported McMurry to the hospital for evaluation. In route, he threatened to kill the officers and their families, and after being dragged into the emergency room, he threatened to kill the doctors, too. He denied wanting to hurt himself and the emergency room doctor refused to treat him because of his combativeness. Officers took him to the Warren County jail. (Minutes - Largesse Narrative; Dwyer Narrative) (Conf. App. pp. 22-24).

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING MCMURRY TO ENTER A PLEA TO CHILD ENDANGERMENT WITHOUT A FACTUAL BASIS.

A. Error Preservation and Standard of Review. Normally, a defendant challenging a guilty plea must file a motion in arrest of judgment prior to being sentenced to preserve error. State v. Straw, 709 N.W.2d 128, 132 (Iowa 2006). However, a claim that the failure to file a motion in arrest of judgment was due to ineffective assistance of counsel provides exception to this general rule. Id. Claims of ineffective assistance of counsel are reviewed de novo. State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999).

B. Discussion. Criminal defendants are guaranteed the effective assistance of counsel by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, section 10 of the Iowa Constitution. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). To prevail on a claim of ineffective assistance of counsel, a defendant must establish, by a preponderance of evidence, that trial counsel

failed to perform an essential duty and that the defendant was prejudiced by counsel's failure. Id.

The district court may not accept a guilty plea without first determining that the plea has a factual basis. See Iowa R. Crim. P. 2.8(2)(b); Schminkey, 597 N.W.2d at 788. If trial counsel allows a defendant to plead guilty to a charge for which a factual basis does not exist, counsel has failed to perform an essential duty. Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014). Schminkey, 597 N.W.2d at 788; see also State v. Straw, 709 N.W.2d 128, 134 (Iowa 2006) (counsel's failure to call attention to the flaws in the plea procedure and failure to file a motion in arrest of judgment was a failure to perform an essential duty). "Prejudice in such a case is inherent." Schminkey, 597 N.W.2d at 788. See also Rhoades, 848 N.W.2d at 29. Thus, the primary inquiry on appeal is whether the record before the district court at the time of the plea established a factual basis for McMurry's plea to child endangerment. Schminkey, 597 N.W.2d at 788; Rhoades, 848

N.W.2d at 29 ("At the time of the guilty plea, the record must disclose facts to satisfy all elements of the offense.").

While "the trial court is not required to extract a confession from the defendant," the court must "be satisfied that the facts support the crime." State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001). The entire record before the district court may be reviewed to establish the factual basis for the plea. State v. Finney, 834 N.W.2d 46, 62 (Iowa 2013); Rhoades, 848 N.W.2d at 29. In this case, the record before the district court at the time of McMurry's plea included the minutes of testimony and McMurry's written guilty plea. There was no in-court plea colloquy, no written plea agreement, and no PSI.

McMurry pled guilty to child endangerment. "A person who is the parent, guardian, or person having custody or control over a child . . . commits child endangerment when the person . . . [k]nowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety." Iowa Code section 726.6(a) (2013).

McMurry's written guilty plea purported to establish a

factual basis for his plea by admitting "On 12/27/14, I had visitation and was supervising my children and I knowingly acted in a manner that created a substantial risk to my child's emotional health." (Guilty Plea & Waiver of Rights) (App. pp. 6-9). This admission establishes that he was parent of the child he was alleged to have endangered, but the rest of his "admission" is merely a recitation of the technical language from the statute, which is insufficient to establish a factual basis. Rhoades, 848 N.W.2d at 30. ("Here, as in Ryan, the district court used technical language from the statute that was insufficient to establish a factual basis.").

> Although we do not require a detailed factual basis, we do require the defendant to acknowledge facts that are consistent with the elements of the crime. On the other hand, the district court's reading of the technical terms in the information and having the defendant agree to those terms is not enough to establish a factual basis for those terms.

Rhoades, 848 N.W.2d at 30.

As well, the minutes of testimony do not establish facts sufficient to support a plea for child endangerment. The definition of "substantial risk" in child endangerment context is

"the very real possibility of danger" to a child's emotional health or safety." See State v. Anspach, 627 N.W.2d 227, 233 (Iowa 2001).

The minutes provide that McMurry had been drinking while his nine-year-old son was at his house for visitation. His son sent his mother a text message indicating his father was "drinking" and he wanted her to come get him. McMurry smelled of alcohol when he answered the door, but the minutes do not indicate how intoxicated McMurry might have been, if at all. No BAC test was administered, and the police reports do not include any other description of the level of McMurry's intoxication, such as slurred speech, inability to walk, or bloodshot eyes. The boy shook his head "no" when Officer Peterson asked him if "everything was ok." When officers finally arrested McMurry and took the boy to a squad car, they saw that he had "injury's to his face." Although photos were apparently taken of the injuries and the boy was interviewed, neither the photos nor the recording of the interview are included in the minutes. The minutes contain no other

description of the injuries or their seriousness. The minutes contain no information indicating the boy needed medical attention. Although McMurry told officers that he had been teaching his son MMA moves and wrestling with him, there was no indication of whether the wrestling was the cause of the injury to his son or when the wrestling took place. There was no indication of whether other people were in the house. The mere fact that a parent was drinking some undisclosed amount of alcohol with a child present in the house is not sufficient "to create the very real possibility of danger" to the child. As well, the fact that a son received some unidentified type of "injury" to his face while having visitation with his father does not indicate the father "created the very real possibility of danger" to the child's emotional health. (Minutes of Testimony) (Conf. App. pp. 4-15).

The remedy for a claim of ineffective assistance of counsel based on the lack of a factual basis for a guilty plea is to vacate the sentence and remand the case to allow the State an opportunity to establish a factual basis, unless the defendant

was charged with the wrong crime. Schminkey, 597 N.W.2d at 792. If the defendant was charged with the wrong crime, the plea is set aside. Id. See State v. Philo, 697 N.W.2d 481, 488 (Iowa 2005).

In this case, it is possible the State could introduce additional information to provide a factual basis that McMurry knowingly created a substantial risk to his son's emotional health. Accordingly, the case should be remanded to give the State an opportunity to establish facts that show McMurry created a substantial risk to his son's emotional health, and if it cannot do so, the district court should dismiss the plea.

II. THE COURT ABUSED ITS DISCRETION BY ORDERING MCMURRY TO COMPLETE THE PROGRAM AT FORT DES MOINES RESIDENTIAL FACILITY AS A TERM OF HIS PROBATION IN BOTH CASES.

A. Error Preservation and Standard of Review: The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). When a defendant challenges the terms of probation, the appellate court will

review the terms imposed for an abuse of discretion. State v. Valin, 724 N.W.2d 440, 444-45 (Iowa 2006).

B. Discussion: A district court may impose "any reasonable conditions that either promote rehabilitation of the defendant or protection of the community" when determining the conditions of probation. Valin, 724 N.W.2d at 445. Iowa Code § 907.6 (2015).

The district court imposed a special condition of probation in FECR029413 that McMurry complete the program at the Fort Des Moines Residential Facility.

> Further, you're to attend to program at the Fort Des Moines Correctional Facility until you attain maximum benefits. I looked in the presentence investigation. I did not see anything that say you were not qualified for that program. If you're not qualified for that program, then the Court, by an amendment to the judgment entry, will delete that provision, but you're to attend that program at the correctional center, and you're to remain in the Warren County custody until that matriculation happens.

(Sentencing Tr. p. 13 L. 11 – 20). The court also imposed the same term in the probation in FECR028439. (Sentencing Tr. p. 16 L. 5-6). Within a week of the court's sentencing order,

McMurry filed a motion asking the court to remove the requirement that he attend the Fort Des Moines program because he was unable to work full time and the program at Fort Des Moines requires its participants work full time. (Motion to Reconsider Judgment and Sentence) (App. pp. 35-36). McMurry included a letter from his psychiatrist indicating his mental health was not stable enough to allow McMurry to work full time. (Attachment) (App. p. 37). The court summarily denied the motion. (Order) (App. p. 38).

The court's requirement that McMurry attend the program at Fort Des Moines was an abuse of discretion because the program requires its participants to work full-time—at least 32 hours a week. McMurry has a significant mental health issues, including a diagnosis of bipolar disorder. (Sentencing Brief, Everly Ball letter) (App. pp. 21-26). His mental health concerns were at the root of his legal troubles in the false reporting of an incendiary device. (Everly Ball letter; Minutes – Dwyer narrative) (App. p. 26; Conf. App. p. 24). The court acknowledged that McMurry might not be appropriate for the

program. McMurry presented evidence that his care providers unanimously advise against his working, or seeking to work, full time until his mental condition is stabilized.

The court acknowledged that the Fort Des Moines program might not be suitable for McMurry and expressly offered to modify the sentencing order to remove the requirement. (Sentencing Tr. p. 13 p. 11-20). However, the court refused to do so, without explanation, when presented with the request it invited. (Order) (App. p. 38). A court has abused its discretion when it has "exercised it discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Helmers, 753 N.W.2d 565, 567 (Iowa 2008). It is the very essence of an abuse of discretion to impose a term of probation that the court knows the defendant cannot fulfill.

The purpose of a special term of probation is to promote the rehabilitation of the defendant or protect the community. Imposing a term that McMurry cannot possibly complete and may harm his ability to stabilize his mental condition is

antithetical to his rehabilitation and it does nothing to protect the community. As well, it does not protect the community.

Because the district court abused its discretion when it required McMurry to complete the program at the Fort Des Moines facility, McMurry's sentences should be vacated and his case remanded for amended judgment and sentencing orders removing that term of his probation.

III. THE DISTRICT COURT ENTERED AN ILLEGAL SENTENCE IN TAXING TO MCCMURRY COSTS ASSOCIATED WITH THE COUNTS DISMISSED BY THE STATE.

A. Preservation of Error. Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

B. Standard of Review. Challenges to the legality of a sentence are reviewed for errors at law. State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998).

C. Discussion: In FECR029413, the district court ordered courts costs on the two dismissed counts taxed to McMurry. (Plea Tr. p. 13 L. 9-10; Judgment and Sentence ¶¶

7, 11) (App. pp. 30-31). The court's order that McMurry be assessed all costs of the action rather than only the costs associated with the Count I charge to which McMurry pled guilty amounted to a statutorily unauthorized, and therefore illegal, sentence.

Court costs "are taxable only to the extent provided by statute." City of Cedar Rapids v. Linn County, 267 N.W.2d 673, 673 (Iowa 1978). See also City of Des Moines v. State ex rel. Clerk of Court, 449 N.W.2d 363, 364 (Iowa 1989). "In the absence of such statutory authorization, a court has no power to award costs against a defendant." Woodbury County v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969).

Under the Iowa Code, a court may make a defendant responsible for court costs or prosecution costs associated with a particular charge only when the defendant pleads or is found guilty on such charge. No statutory provision authorizes making a defendant responsible for court or prosecution costs associated with a charge which is ultimately dismissed by the State. See Iowa Code § 815.13 (2013) (stating prosecution

"fees and costs are recoverable by the [prosecuting] county... from the defendant unless the defendant is found not guilty or the action is dismissed"); Iowa Code § 910.2 (2013) ("In all criminal cases in which there is a plea [or] verdict of guilty . . . the sentencing court shall order that restitution be made by each offender . . . to the clerk of court for . . .court costs").

"Iowa Code section 815.13 and section 910.2 clearly require . . . that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan" and "[f]ees and costs not clearly associated with any single charge should only be assessed proportionally against the defendant." State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991) (holding restitution order should have been limited to requiring defendant to pay court costs associated with charge on which he was convicted and should not have included costs relating to charges dismissed pursuant to plea agreement that was silent on payment of fees and costs). See also State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009) ("[I]t is elementary that a winning

party does not pay court costs."); State v. Hill, No. 03-0560, 2004 WL 433844, at *2 (Iowa Ct. App. March 10, 2004) (district court erred in ordering defendant to pay total court costs from mistrial, as defendant was required to pay restitution only for court costs associated with the charge to which he ultimately pled guilty, and court costs not clearly associated with the charge to which he pled guilty should be assessed against defendant at a rate of one-half); State v. Wheeler, No. 11–0827, 2012 WL 3026274, at *1-2 (Iowa Ct. App. July 25, 2013) (Defendant should not have been taxed court costs on charge that was dismissed by the State).

While parties to a plea agreement are free to "mak[e] a provision covering the payment of costs," State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991), the plea agreement in this case did not contemplate the allocation to McMurry of the costs of the dismissed counts. (Plea Tr. p. 2 L. 10 – p. 3 L. 2). There was no written plea agreement in this case. The plea as stated on the record during McMurry's plea colloquy did not include a provision addressing the allocation of court costs.

THE COURT: All right. And what are the – what are the plea agreements here, Mr. Priebe? What's you and your client's understanding?

Mr. PRIEBE: For entering an Alford plea to Count I, Your Honor, the State will recommend probation, suspended sentence of five years, two years probation, a fine. We would be allowed to argue for a deferred judgment and probation. At sentencing there are obviously going to be other conditions that we would argue that would warrant probation and deferred judgment, specifically related to his mental health, but that's our understanding of the plea agreement. I don't think I've missed anything.

THE COURT: Mr. Eichholz?

MR. EICHHOLZ: That's a correct statement, Your Honor.

(Plea Tr. p. 13 L. 22 – p. 14 L. 12).

Because the plea agreement articulated in the record contained no reference to court costs, no agreement was made regarding that issue. See State v. Loye, 670 N.W.2d 141, 149 (Iowa 2003) ("Initially, we point out that our rules of criminal procedure require that any plea agreement be disclosed 'in open court at the time the plea is offered.' . . . Its absence from the record leads us to conclude no plea agreement existed."). In such circumstances, "only such fees and costs attributable to

the charge on which a criminal defendant is convicted should be recoverable." State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991).

Because McMurry's payment of costs associated with charges in counts II and III were not authorized by statute, the court entered an illegal sentence in assessing the costs of the entire action to McMurry. The portion of the sentencing order taxing costs to McMurry should be vacated and the case should be remanded to the district court for entry of a corrected sentencing order. See State v. Black, No. 14-0886, 2016 WL 3010497 (Iowa Ct. App. May 25, 2016); State v. Stewart, No. 13-1113, 2014 WL 3511822, *4 (Iowa Ct. App. July 16, 2014) (vacating district court's assignment of costs on dismissed count and remanding to district court for entry of a corrected sentencing order).

IV. THE DISTRICT COURT ERRED IN ASSESSING ATTORNEY'S FEES WITHOUT KNOWING THE AMOUNT OF ATTORNEY'S FEES.

A. Error Preservation: Review of sentencing is properly before this court upon direct appeal despite the

absence of objection in the trial court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999). Because the district court made a finding regarding McMurry's reasonable ability to pay attorney's fees in the sentencing order, it is considered part of the sentence and may be reviewed on direct appeal. State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984).

B. Standard of Review: Appeals of restitution orders are reviewed for an abuse of discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). Constitutional issues are reviewed de novo. State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009).

C. Discussion. The court must order restitution to the victims of a crime and to the clerk of court for fines, penalties, and surcharges. Iowa Code section 910.2(1) (2015); State v. Wagner, 484 N.W.2d 212, 215–16 (Iowa Ct. App. 1992). However, restitution for crime victim assistance reimbursement, for public agencies, for court costs including correctional fees, and for court-appointed attorney fees may only be assessed to the extent the defendant is reasonably able

to pay. Iowa Code § 910.2(1) (2015). "A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910." State v. Van Hoff, 415 N.W.2d 657, 648 (Iowa 1987). Thus, before ordering payment for court-appointed attorney fees and court costs, the court must consider the defendant's ability to pay.

During the sentencing hearing, the court addressed restitution in regards to FECR029413, ordering McMurry to pay court costs and "costs for court-appointed attorney." (Sentencing Tr. p. 13 L. 9-10). The court made no specific findings on the record during the hearing about McMurry's ability to pay. However, the written sentencing order provided:

> **Restitution.** Pursuant to Iowa Code Section 910.2, and finding that the Defendant is reasonably able to pay and judgment is imposed against the Defendant as follows: (check all that apply)
> . . .
>
> ☒ Court-appointed attorney's fees per Iowa Code Section 815.9, including the expense of a Public Defender. Pursuant to Iowa Code Section 815.9(5), the Court finds upon inquiry, review of the case file and any other information

> provided by the parties, the Defendant has the reasonable ability to pay restitution of fees and costs in the amount approved by the State Public Defender or $____ , whichever is less.

(Judgment and Sentence, ¶ 7) (App. p. 30).

In this case, the district court determined McMurry had the reasonable ability to pay court-appointed attorney fees and expenses before knowing the total amount of restitution that might be owed. Because the court did not address McMurry's reasonable ability to pay on the record during the sentencing hearing, it is unclear what information the court relied upon to make the finding. As well, the record contained no information about the expected amount of attorney's fees. Thus, the court's determination that McMurry had the reasonable ability to pay was premature and an abuse of discretion. See State v. Campbell, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (concluding a sentencing court's finding of a defendant's ability to pay an undetermined amount of restitution was unsupported by the record). "[A] sentencing court cannot determine a defendant's ability to pay restitution without, at a minimum, an estimate of the total amount of

restitution." Id. Accordingly, McMurry's sentence in FECR029413 should be vacated and his case remanded to the district court for an order striking the district court's finding of his reasonable ability to pay. See id.

CONCLUSION

Because McMurry pled guilty to child endangerment without a sufficient factual basis, his case in FECR028439 should be remanded the State an opportunity to establish the factual basis, and if it cannot do so, the district court should dismiss the plea. Because the district court abused its discretion by requiring McMurry to reside at the Fort Des Moines Residential Facility as a term of his probation, McMurry's sentences should be vacated and both cases remanded for amended judgment and sentencing orders removing that term of his probation.

As well, because the district court imposed an illegal sentence in FECR029413 by requiring McMurry to pay court costs on the dismissed counts and abused its discretion by prematurely determining McMurry had the reasonable ability to

pay attorney's fees, those portions of the sentencing order should be vacated and the case should be remanded to the district court for entry of a corrected sentencing order.

NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 3.85, and that amount has been paid in full by the Office of the Appellate Defender.

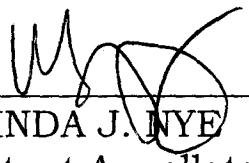
MARK C. SMITH
State Appellate Defender

MELINDA J. NYE
Assistant 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 4,905 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: 7-27-17

MELINDA J. NYE
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us