IN THE SUPREME COURT OF IOWA
Supreme Court No. 16–1722

STATE OF IOWA,
Plaintiff-Appellee,

vs.

QUINTEN BRICE MCMURRY,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@iowa.gov

DOUG EICHHOLZ
Warren County Attorney

BOBBIER A. CRANSTON
Assistant Warren County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

State Cases

State Codes

State Rule

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was There a Factual Basis for McMurry's Guilty Plea to Child Endangerment?

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
Rhoades v. State, 848 N.W.2d 22 (Iowa 2014)
State v. Anspach, 627 N.W.2d 227 (Iowa 2001)
State v. Artzer, 609 N.W.2d 526 (Iowa 2000)
State v. Finney, 834 N.W.2d 46 (Iowa 2013)
State v. Gines, 844 N.W.2d 437 (Iowa 2014)
State v. Hack, 545 N.W.2d 262 (Iowa 1996)
State v. Keene, 630 N.W.2d 579 (Iowa 2001)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
State v. Marsan, 221 N.W.2d 278 (Iowa 1974)
State v. Ortiz, 789 N.W.2d 761 (Iowa 2010)
State v. Philo, 697 N.W.2d 481 (Iowa 2005)
State v. Randall, 258 N.W.2d 359 (Iowa 1977)
State v. Schminkey, 597 N.W.2d 785 (Iowa 1999)
State v. Straw, 709 N.W.2d 128 (Iowa 2006)
State v. Velez, 829 N.W.2d 572 (Iowa 2013)
State v. Wills, 696 N.W.2d 20 (Iowa 2005)
Iowa Code § 709C.1(2)(b) (2007)

II. Did the Court Abuse Its Discretion by Ordering McMurry to Complete a Program at Fort Des Moines Residential Facility as a Term of Probation?

Authorities

Lathrop v. State, 781 N.W.2d 288 (Iowa 2010)
State v. Evans, 672 N.W.2d 328 (Iowa 2003)
State v. Formaro, 638 N.W.2d 720 (Iowa 2002)
State v. Hopkins, 860 N.W.2d 550 (Iowa 2015)
State v. Laffey, 600 N.W.2d 57 (Iowa 1999)
State v. Ogle, 430 N.W.2d 382 (Iowa 1988)

State v. Rogers, 251 N.W.2d 239 (Iowa 1977)
State v. Thomas, 547 N.W.2d 223 (Iowa 1996)
State v. Valin, 724 N.W.2d 440 (Iowa 2006)
Tindell v. Iowa Dist. Court for Scott County, 600 N.W.2d 308 (Iowa 1999)
Iowa Code § 902.4
Iowa Code § 907.6 (2005)

III. Did the Court Enter an Illegal Sentence When it Taxed Court Costs to McMurry?

Authorities

City of Cedar Rapids v. Linn County, 267 N.W.2d 673 (Iowa 1978)
State v. Basinger, 721 N.W.2d 783 (Iowa 2006)
State v. Belle, 60 N.W. 525 (Iowa 1894)
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)
State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)
State v. Dudley, 766 N.W.2d 606 (Iowa 2009)
State v. Jenkins, No. 15–0589, 2015 WL 8367810 (Iowa Ct. App. Dec. 9, 2015)
State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016)
State v. Klindt, 542 N.W.2d 553 (Iowa 1996)
State v. Lam, No. 14–1582, 2015 WL 4935707 (Iowa Ct. App. Aug. 19, 2015)
State v. McFarland, 721 N.W.2d 793 (Iowa 2006)
State v. Petrie, 478 N.W.2d 620 (Iowa 1991)
State v. Poyner, No. 06–1100, 2007 WL 4322193 (Iowa Ct. App. Dec. 12, 2007)
State v. Young, No. 16–0154, 2017 WL 935071 (Iowa Ct. App. Mar. 8, 2017)
Iowa Code § 602.8106(1)(a)
Iowa Code § 625.8(2)
Iowa Code § 815.13
Iowa Code § 910.2 (2014)
Iowa Code § 910.2(1)
Iowa R. Crim. P. 2.24(5)(a)
24 C.J.S. Criminal Law § 1776, at 432 (1999)

IV. Did the Court Err in Ordering Restitution for Attorneys' Fees and Leaving the Amount Blank?

Authorities

Goodrich v. State, 608 N.W.2d 774 (Iowa 2000)
State v. Alexander, No. 16–0669, 2017 WL 510950 (Iowa Ct. App. Feb. 8, 2017)
State v. Campbell, No. 15–1181, 2016 WL 4543763 & n.5 (Iowa Ct. App. Aug. 31, 2016)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Jose, 636 N.W.2d 38 (Iowa 2001)
State v. Lam, No. 14–1582, 2015 WL 4935707 (Iowa Ct. App. Aug. 19, 2015)
State v. Swartz, 601 N.W.2d 348 (Iowa 1999)
Iowa Code § 910.2 (2014)
Iowa Code § 910.2(1)
Iowa Code § 910.3
Iowa Code § 910.7

ROUTING STATEMENT

The issues raised here can be resolved through the application of settled legal principles. This case meets the criteria for transfer to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case:

Quentin Brice McMurry pled guilty to child endangerment, an aggravated misdemeanor, in violation of Iowa Code section 726.6(1)(a), and interference with official acts, a simple misdemeanor, in violation of Iowa Code section 719.1(1)(b) (2014). Judgment was deferred and McMurry was placed on probation.

Five months later, he committed acts which constituted a violation of his terms of probation and gave rise to additional charges. Pursuant to a plea agreement that involved dismissing other charges, McMurry stipulated to violating terms of his priobation and entered an *Alford* plea to falsely reporting an explosive or incendiary device, a class D felony, in violation of Iowa Code section 712.7 (2016).

At sentencing, McMurry was sentenced to terms of incarceration on all offenses. His credit for time served had fully satisfied his 30-day sentence for the simple misdemeanor, and the other sentences were run consecutively and suspended, pending completion of probation.

McMurry now appeals, arguing: (1) there was no factual basis for his guilty plea to child endangerment; (2) the sentencing court abused its discretion by requiring completion of a residential progam at Fort Des Moines as a term of McMurry's probation; (3) the court imposed an illegal sentence when it taxed court costs to McMurry; and (4) the court erred by finding he was reasonably able to pay restitution for attorneys' fees without determining the amount owed.

Course of Proceedings:

The State generally accepts McMurry's description of the relevant procedural history. *See* Iowa R. App. P. 6.903(3).

Facts:

McMurry stipulated that the minutes of testimony and any officers' reports could be used to establish a factual basis for his guilty plea to child endangerment. Plea of Guilty (1/15/16) at 2; App. 7.

On December 27, 2014, McMurry's nine-year-old son (Q.M.) texted his mother and told her "his dad was drinking and he wanted her to come get him." *See* Minutes Att. (1/6/15) at 2, 7; C-App. 5, 14. Officers went to investigate; McMurry answered the door and said they "couldn't be here without a warrant." *See id.* at 7; C-App. 14. Officers smelled "a strong odor of alcohol coming from [McMurry],"

and they could see Q.M. sitting on a couch inside the house. *See id.* They asked McMurry to let them "go inside and see if his son was ok"—but McMurry repeatedly refused. *See id.* An officer "asked the boy if everything was ok and he shook his head no and covered his face." *See id.* McMurry tried to physically prevent officers from entering, and the officers placed him under arrest. *See id.*

An officer who spoke with Q.M. noted injuries on his face. *Id.* Another officer also "observed the injuries to the victim" and took photographs of those injuries. *See* Minutes (1/6/15) at 1, 3; C-App. 4, 6; Minutes Att. (1/6/15) at 7; C-App. 14.

While officers were transporting him to the Warren County Jail, McMurry asked what he was being charged with. An officer told him "he was being charged with interference and [c]hild endangerment." *See* Minutes Att. (1/6/15) at 7; C-App. 14. McMurry replied by saying that "his son was being picked on at school so he was teaching him MMA [mixed martial arts] moves and wrestling with him." *See id.*

Additional facts will be discussed when relevant.

ARGUMENT

I. McMurry's Guilty Plea to Child Endangerment Was Supported by an Adequate Factual Basis.

Preservation of Error

McMurry was informed of the need to file a motion in arrest of judgment prior to sentencing in order to preserve any subsequent challenge to his guilty plea. *See* Plea of Guilty (1/15/16) at 3; App. 8. Moreover, he affirmatively waived the right to file any such motion. *See id.* at 3–4; App. 8–9. However, the argument that counsel was ineffective in allowing McMurry to enter an unsupported guilty plea without filing a motion in arrest of judgment may be raised in this direct appeal. *See State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

Although ineffective-assistance-of-counsel claims are generally preserved for postconviction relief actions, Iowa appellate courts may address them on direct appeal "when the record is sufficient to permit a ruling." *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005) (citing *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000)). The record here is sufficient to enable review because the factual basis for the guilty plea can only have been drawn from material now in the record on appeal. *See State v. Velez*, 829 N.W.2d 572, 576 (Iowa 2013) (quoting *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001)).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *See State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Here, breach and prejudice hinge upon one issue: factual basis. "Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty." *See State v. Gines*, 844 N.W.2d 437, 441 (Iowa 2014) (quoting *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999)). Moreover, Iowa courts "presume prejudice when there was no factual basis for the plea because we do not want to convict people for crimes they did not commit." *State v. Straw*, 709 N.W.2d 128, 137 n.4

(Iowa 2006) (citing *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996)). The only issue is whether there was a factual basis for this guilty plea.

"On a claim that a plea bargain is invalid because of a lack of accuracy on the factual-basis issue, the entire record before the district court may be examined." *See Finney*, 834 N.W.2d at 62. This is appropriate because "the relevant inquiry . . . does not involve an examination of [the defendant's] subjective state of mind at the time the trial court accepted the plea, but instead involves an examination of whether counsel performed poorly by allowing [him] to plead guilty to a crime for which there was no objective factual basis in the record." *Id.* Moreover, "the record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense." *See Ortiz*, 789 N.W.2d at 767–68 (citing *Keene*, 630 N.W.2d at 581).

In addition to the facts provided in the minutes of testimony, McMurry admitted to committing this offense in his written plea:

> 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.

See Plea of Guilty (1/15/16) at 2–3; App. 7–8. McMurry argues this "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." Def's Br. at 19–20 (citing *Rhoades v. State*, 848 N.W.2d 22, 30 (Iowa 2014)). But the only "technical language" he identifies is the term "substantial risk," which he notes is defined as "the very real possibility of danger." *See* Def's Br. at 20–21 (quoting *State v. Anspach*, 627 N.W.2d 227, 233 (Iowa 2001)). This is far from a definition that creates a "legal term of art"—unlike the statute from *Rhoades*, which used the phrase "intimate contact" as shorthand for "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus." *See Rhoades*, 848 N.W.2d at 30 (quoting Iowa Code § 709C.1(2)(b) (2007)). Rather, this is an example of an admission to an underlying *fact*, conveyed in terms that can be easily understood by any layperson, which also establishes an element of the offense. *See State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005) ("The defendant's admission on the record of the fact supporting an element of an offense is sufficient to provide a factual basis for that element."). Even if McMurry's admission were the only material available to establish a factual basis, it would be sufficient.

McMurry is also unable to overcome the minutes of testimony, which establish that he put Q.M. at substantial risk of physical injury (and that Q.M., in fact, was injured). *See* Minutes (1/6/15); C-App. 4; Minutes Att. (1/6/15) at 7–8; C-App. 14–15. Q.M. knew he was in danger, and he sent his mother a text message asking her to "come get him." Minutes Att. (1/6/15) at 7; C-App. 14; *see also* Minutes (1/6/15) at 2; C-App. 5. Officers specifically noted their observations that Q.M. sustained injuries to his face. *See* Minutes Att. (1/6/15) at 7; C-App. 14; Minutes (1/6/15) at 1–3; C-App. 4–6. When notified that he would be charged with child endangerment, McMurry specifically attempted to explain away those physical injuries; his explanation was that he was "teaching him MMA moves and wrestling with him." *See* Minutes Att. (1/6/15) at 7; C-App. 14. In that statement, McMurry admitted creating the substantial risk that precipitated Q.M.'s actual injuries; the timing of that statement clearly implies a causal connection. Any claim that this was insufficient would essentially be arguing that trial courts "must in every plea hearing extract from the accused a confession which factually satisfies each element of the crime charged"—which would be "incorrect." *State v. Randall*, 258 N.W.2d 359, 362 (Iowa 1977) (quoting *State v. Marsan*, 221 N.W.2d 278, 280 (Iowa 1974)).

Finally, while McMurry notes that "neither the photos nor the recording of the interview are included in the minutes," McMurry allowed the court to rely on minutes stating that they *existed*, and that they documented what the State's witnesses said they documented. *See, e.g.*, *Keene*, 630 N.W.2d at 582–83 (factual basis for guilty plea to disseminating obscene material to minors not undermined when the court did not view the video to verify it was pornographic because "it was unnecessary for the court to independently view the material claimed to be obscene prior to accepting the plea of guilty when the record otherwise contained a sufficient description of the material").

In order to accept a guilty plea, "the record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense." *See Ortiz*, 789 N.W.2d at 768 Here, McMurry admitted to facts establishing the element that he claims was missing, in language that was accessible and understandable. *See* Plea of Guilty (1/15/16) at 2–3; App. 7–8. Moreover, the minutes of testimony were clear regarding the facts that constituted the offense—including Q.M.'s text message, the officers' recorded observations of Q.M.'s injuries, and McMurry's incriminating statement. As such, this challenge cannot succeed.

II. The Court Did Not Abuse Its Discretion by Ordering McMurry to Complete a Program at Fort Des Moines Residential Facility as a Term of His Probation.

Preservation of Error

Generally applicable rules of error preservation do not apply. McMurry may challenge his sentence as defective for the first time on appeal. *See Lathrop v. State*, 781 N.W.2d 288, 292–93 (Iowa 2010).

There is one caveat. McMurry primarily challenges the court's denial of his motion to reconsider. *See* Def's Br. at 24–26. But when a sentencing court entertains a motion to reconsider the sentence that it previously imposed, "[t]he court's decision to take the action or not to take the action is not subject to appeal." *See* Iowa Code § 902.4. This language delineates a clear limit on Iowa appellate courts' jurisdiction to hear appeals from sentencing reconsiderations. *See Tindell v. Iowa Dist. Court for Scott County*, 600 N.W.2d 308, 310 (Iowa 1999) ("In providing courts with this extraordinary and useful tool, the legislature made clear that trial courts' judgment calls in these reconsiderations were not subject to our second guesses."). Such rulings are only reviewable through certiorari actions—but McMurry has not alleged that the court overstepped the bounds of its resentencing authority, and his challenge cannot be framed that way.

The State will treat McMurry's entire challenge, but it proceeds with the caveat that McMurry's argument challenging the ruling on his motion to reconsider is not properly before this Court because of the jurisdictional limitation in section 902.4 and because his claim is not susceptible to recharacterization as a petition for certiorari.

Standard of Review

"Appellate review of the district court's sentencing decision is for an abuse of discretion." *State v. Evans*, 672 N.W.2d 328, 331–32 (Iowa 2003) (citing *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999)). Moreover, "[i]t has long been a well-settled rule that trial courts have a broad discretion in probation matters which will be interfered with only upon a finding of abuse of that discretion." *See State v. Valin*, 724 N.W.2d 440, 444–45 (Iowa 2006) (quoting *State v. Rogers*, 251 N.W.2d 239, 243 (Iowa 1977)).

Merits

A sentencing court's decisions "are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). District courts are afforded broad discretion to "give the necessary latitude to the decision-making process," which means the "inherent latitude in the process properly limits [appellate] review."

State v. Formaro, 638 N.W.2d 720, 724–25 (Iowa 2002). As such, an appellate court may disagree with the sentencing decision, but that alone does not provide sufficient reason to remand for resentencing.

> The application of these goals and factors to an individual case, of course, will not always lead to the same sentence. Yet, this does not mean the choice of one particular sentencing option over another constitutes error. Instead, it explains the discretionary nature of judging and the source of the respect afforded by the appellate process.

Id.; *see also State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015) (noting that review for abuse of discretion means that "[o]n our review, we do not decide the sentence we would have imposed").

When suspending a sentence and placing a convicted defendant on probation, a sentencing court may decide to impose "any additional reasonable conditions which the court or district department may impose to promote rehabilitation of the defendant or protection of the community." *Valin*, 724 N.W.2d at 445 (quoting Iowa Code § 907.6 (2005)); *see also State v. Ogle*, 430 N.W.2d 382, 383–84 (Iowa 1988). "A condition of probation promotes the rehabilitation of the defendant or the protection of the community when it addresses some problem or need identified with the defendant, . . . or some threat posed to the community by the defendant." *See Valin*, 724 N.W.2d at 446.

At sentencing, after suspending McMurry's prison sentences and placing him on probation, the sentencing court said:

> [Y]ou're to attend the 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 says that 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.

Sent.Tr. p.12,ln.18–p.13,ln.21; *see also* Sent.Tr. p.15,ln.22–p.16,ln.6.

McMurry's motion to reconsider this condition of probation was based on his assertion that "Fort Des Moines requires participants to work on a full time basis." *See* Motion to Reconsider (10/10/16) at 1; App. 35. But McMurry provided no proof from Fort Des Moines that could have met the clear threshold set out by the sentencing court. If his inability to work full-time made him ineligible for their program, the sentencing court would amend its judgment order accordingly—but he never made that showing. *See* Motion to Reconsider (10/10/16); App. 35. Indeed, even his letter supporting his motion to reconsider noted his present inability to work may change "when he becomes stabilized," which may happen prior to placement at Fort Des Moines. *See id.* at 3; App. 37. By then, he may be eager to find full-time work.

"Probation assumes the offender can be rehabilitated without serving the suspended jail or prison sentence. But this is not to say probation is meant to be painless." *State v. Rogers*, 251 N.W.2d 239, 244 (Iowa 1977). McMurry may succeed in convincing the court that Fort Des Moines is a poor fit for him after he is placed there, or after attempting/failing to secure waiver of any "everybody works full-time" policy that Fort Des Moines may otherwise enforce. But until then, he cannot prevail by claiming the sentencing court abused its discretion, just because a policy that *may* apply to him while at Fort Des Moines *might* undermine his mental health treatment/recovery if he cannot stabilize before then and cannot obtain any waiver or negotiate any workaround to exempt him from all (or some) work requirements. *Cf.* PSI Report (10/19/16) at 3; C-App. 27 (McMurry expressing hope that, upon release from custody, he could "get a part-time job"); Sent.Tr. p.11,ln.18–p.12,ln.17. The sentencing court wielded its broad discretion to find that Fort Des Moines offers rehabilitation-related benefits that offset whatever problems would accompany McMurry's return to the workforce, and nothing in McMurry's letters from his psychiatrists enables him to demonstrate that the sentencing court abused that broad discretion in specifying these terms of probation.

III. The Court Did Not Enter an Illegal Sentence When It Taxed Court Costs to McMurry.

Preservation of Error

Generally applicable rules of error preservation do not apply. An illegal sentence may be challenged at any time. Iowa R. Crim. P. 2.24(5)(a); *State v. Bruegger*, 773 N.W.2d 862, 871–72 (Iowa 2009).

Standard of Review

Assessment of court costs falls within the broader category of restitution, and restitution orders are reviewed for correction of errors at law. *See State v. Poyner*, No. 06–1100, 2007 WL 4322193, at *1 (Iowa Ct. App. Dec. 12, 2007) (citing *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991)).

Merits

"Any damages that are causally related to the criminal activities may be included in the restitution order." *See State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001) (citing 24 C.J.S. Criminal Law § 1776, at 432 (1999)). By the same token, "[a] defendant is responsible for court costs associated with the particular charge to which he pleads or is found guilty." *State v. Lam*, No. 14–1582, 2015 WL 4935707, at *3 (Iowa Ct. App. Aug. 19, 2015) (citing Iowa Code § 910.2 (2014)).

McMurry argues that "the district court ordered court costs on the two dismissed counts taxed to McMurry." *See* Def's Br. at 27–28. But all of the court costs that were assessed were "clearly attributable" to the charge to which McMurry pled guilty, because they would have all been incurred even if the dismissed charges were never filed. *See Petrie*, 478 N.W.2d at 622. The docket report shows $220 in costs: $100 from the filing/docketing fee; $40 for the court reporter at the June 24 arraignment and bond review hearing; $40 for reporting at the August 26 plea hearing; and $40 for reporting at the October 3 sentencing hearing. *See* Combined General Docket (10/13/16) at 9; App. 52. All were assessed against McMurry, and rightly so: these costs "are to be taxed by the case, that is, one fee for each case"—so they are not clearly attributable to McMurry's *dismissed* charges. *See State v. Basinger*, 721 N.W.2d 783, 786 (Iowa 2006); *see also State v. McFarland*, 721 N.W.2d 793, 794–95 (Iowa 2006).

The opinion in *Basinger* noted that the Iowa Supreme Court "has long been committed to the rule that costs are not apportioned in criminal cases," and concluded that statutes authorizing equitable apportionment of costs among partially successful parties "do not apply to criminal prosecutions." *See Basinger*, 721 N.W.2d at 786

(citing *City of Cedar Rapids v. Linn County*, 267 N.W.2d 673, 674 (Iowa 1978)*; State v. Belle*, 60 N.W. 525, 526 (Iowa 1894)). From that, the *Basinger* court determined that because "each defendant here had a case file with a separate case number . . . for which a court reporter was used," each defendant was individually responsible for paying the full amount of the statutorily required reporting fee. *Id.*

This emphasis on cases rather than charges was also recognized as outcome-determinative in *State v. McFarland*, where one criminal defendant was convicted on eight counts that were grouped and tried in three separate cases. *See McFarland*, 721 N.W.2d at 793–94. The *McFarland* court referenced the "long-standing rule that court costs are not apportioned in criminal cases" in refusing to apportion the reporting fees between the defendant's three cases. *See id.* at 794–95 (citing *Basinger*, 721 N.W.2d at 786). At the same time, the *McFarland* court's rationale meant that the defendant could not be required to pay the reporting fee for each of the eight individual charges; the bright-line rule that each "case file with a separate case number" incurred a separate fee would also prevent the State from "trying to recover multiple times for the same costs." *Id.* at 795 (quoting *Basinger*, 721 N.W.2d at 786–87).

Treating these particular court costs as case-specific (rather than charge-specific) comports with the statutory language that bestows the authority to assess them. The Iowa Code sets filing fees at a flat $100 "for filing and docketing *a criminal case*." Iowa Code § 602.8106(1)(a) (emphasis added). That same subsection provides that "[w]hen judgment is rendered against the defendant, costs collected from the defendant shall be paid . . . to the extent necessary for reimbursement of fees paid"; this reimbursement provision contains no exception for cases where the judgment against the defendant does not entail a conviction on the most serious offense charged for every count. *See id.* Similarly, the flat fee assessed for a court reporter's services is fixed by statute: "The clerk of the district court shall tax as a court cost a fee of forty dollars per day for the services of a court reporter." *See* Iowa Code § 625.8(2). This, too, has been interpreted to set out "a court reporter fee . . . for each *case*." *McFarland*, 721 N.W.2d at 794 (emphasis added). And the restitution provisions of the Iowa Code set out that those court costs are taxed against defendants "[i]n all criminal *cases* in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered." *See* Iowa Code § 910.2(1) (emphasis added).

The Iowa Court of Appeals has accepted this logic in opinions holding that *Petrie* does not require apportionment in this situation:

> The fact that some counts were dismissed does not automatically establish that a part of the assessed court costs are attributable to the dismissed counts. Here, the record shows just the opposite. The combined general docket report prepared by the district clerk of court on December 10, 2015, two days after Johnson filed his notice of appeal, shows a total of $210 in court costs accrued as of that date. These costs would have been the same even had the State not charged Johnson with the counts later dismissed. Moreover, the record shows none of the assessed charges are clearly attributable or discrete to the dismissed counts. We therefore conclude the total court costs are clearly attributable to the counts to which Johnson pled guilty and, therefore, fully assessable to him.

See State v. Johnson, 887 N.W.2d 178, 182 (Iowa Ct. App. 2016) (footnotes omitted); *see also State v. Young*, No. 16–0154, 2017 WL 935071, at *4 (Iowa Ct. App. Mar. 8, 2017) ("The fact that count II was dismissed does not automatically establish that a part of Young's assessed court costs are clearly attributable to the dismissed count. . . . These costs would have been the same even had the State not charged Young with the later dismissed count II. Young makes no allegation to the contrary. We conclude the total assessed court costs are clearly attributable to the counts for which Young was found guilty and, therefore, fully assessable to him."); *State v. Jenkins*, No. 15–0589, 2015 WL 8367810, at *6–7 (Iowa Ct. App. Dec. 9, 2015) ("The amount

of the filing and docketing fee would have been the same even if the State had not charged Jenkins with a third count. The same is true for the court reporter fees assessed. . . . Unlike the situation in *Petrie*, the record before us shows the court costs taxed to Jenkins are clearly attributable to the charges to which Jenkins plead guilty."). *Johnson* is a published decision that provides a much-needed course correction; McMurry cites to *Hill*, No. 03–0560 and *Wheeler*, No. 11–0827, but neither of those cases retains any continuing vitality after *Johnson* correctly identified the problem with the specific type of challenge McMurry raises. *See* Def's Br. at 29–30. Indeed, *Johnson* clearly aimed to close the floodgates on this "raft" of claims, which misapply *Petrie* for marginal gain and have the unfortunate side effect of "creating much additional work for the parties' attorneys, district courts, and clerks of court." *See Johnson*, 887 N.W.2d at 180–81 & n.2.

The importance of the case/charge distinction is clearest when McMurry attempts to leverage a straightforward idea: "it is elementary that a winning party does not pay court costs." *See* Def's Br. at 29 (quoting *State v. Dudley*, 766 N.W.2d 606, 624 (Iowa 2009)). But McMurry is not the winning party; although two charges against him were dismissed, he entered an *Alford* plea to a Class D felony and was

sentenced accordingly. *Cf. Basinger*, 721 N.W.2d at 786 (quoting *Belle*, 60 N.W. at 526) ("In criminal prosecutions the party is successful as to all or as to no part of his demand, the demand upon the one hand being guilty, and upon the other, innocent."). The dismissal of those other charges did not negate McMurry's culpability, diminish the expected social utility of the State's decision to prosecute him, or obviate the clear moral obligation to punish him for his criminal act—there is no reason to construe these provisions of the Iowa Code as though McMurry somehow triumphed over the State.

This is not a situation where "the defendant was found not guilty or the action [was] dismissed," where it would be justified to require the State to bear the costs of an ill-advised prosecution. *See* Iowa Code § 815.13. This is a case "in which there is a plea of guilty . . . upon which a judgment of conviction is rendered." *See* Iowa Code § 910.2(1). Applying *Petrie* to apportion these types of costs based on dismissal of individual charges within a larger case does not comport with the statutory language in these particular provisions, and does not track the rationale behind *Basinger* and *McFarland*. A case that charged McMurry with making false reports (and nothing else) would still cost $100 to file and $40 for reporting at each proceeding. *Cf.*

State v. Klindt, 542 N.W.2d 553, 555–56 (Iowa 1996) (holding "the apportionment rule is not applicable" when "the costs in Klindt's trial . . . would have been the same regardless"). Therefore, the court costs were "clearly attributable" to the charge upon which McMurry was ultimately convicted, and the sentencing court was correct to order those costs taxed to McMurry in the absence of an agreement between the parties on that issue. As such, there is nothing illegal or defective about this sentence.

IV. The Court Did Not Err in Ordering Restitution for Attorneys' Fees and Leaving the Amount Blank.

Preservation of Error

"The amount of restitution is part of the sentencing order and may be directly appealed." *State v. Lam*, No. 14–1582, 2015 WL 4935707, at *2 (Iowa Ct. App. Aug. 19, 2015).

Standard of Review

A district court's restitution order is reviewed for errors at law. *State v. Jose*, 636 N.W.2d 38, 43 (Iowa 2001).

Merits

Generally, "a court must determine a criminal defendant's ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2." *See*

Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000). But this order did not specify the full amount of restitution—which means it was preliminary. *See* Judgment (10/3/16) at 3; App. 30. This means that *Jackson* and *Swartz* control this challenge. In each of those cases, a defendant challenged the sentencing court's admitted failure to make a determination regarding "reasonable ability to pay" before entering a temporary restitution order—and, in both cases, the challenge was dismissed because it had been brought prematurely.

> First, it does not appear in the present case that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Until this is done, the court is not required to give consideration to the defendant's ability to pay. . . . Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.

State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999) (citing *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999). The order in *Jackson* assessed restitution subtotals for court costs and attorney's fees as part of the temporary restitution order. *See id.* at 356–57. As such, the sentencing court could assess an obligation to pay $441.58 in restitution for court costs even though this sentencing order was not a

"final restitution order" under *Jackson*, *Swartz*, or section 910.3. *See* Judgment (10/3/16) at 3; App. 30.

It is important to wait for the final restitution plan before making a final determination on reasonable ability to pay. *See, e.g.*, *State v. Campbell*, No. 15–1181, 2016 WL 4543763, at *3–4 & n.5 (Iowa Ct. App. Aug. 31, 2016) (noting that "the sentencing court made an affirmative finding of Campbell's ability to pay without knowing the total amount—or even a reasonable estimate—of the restitution owed," which was "troubling" because "logically, the amount of victim restitution ordered could affect a defendant's reasonable ability to pay attorney fees and court costs"). Here, the sentencing court made a preliminary finding regarding McMurry's reasonable ability to pay, but any finding on that issue would not be ripe for review as part of the actual restitution plan because "a sentencing court cannot determine a defendant's ability to pay restitution without, at a minimum, an estimate of the total amount of restitution"—which was not available. *Id.* at *4; *see also* Judgment (10/3/16) at 3; App. 30.

This fact pattern is analogous to *State v. Alexander*:

> On February 29, 2016, the district court issued a sentencing order following Alexander's guilty plea. In the sentencing order, the court made a "finding that the defendant is reasonably able to pay." The restitution

> section stated Alexander shall pay court costs and pecuniary damages. The pecuniary damages were for an amount to be "determined at a later time." . . .
>
> [. . .]
>
> After reviewing the record, we believe the restitution order was incomplete. Here, as in *Jackson* and *Swartz*, the court expressly reserved the amounts to be included in the plan of restitution for a later determination. Although the payment plan was specified, the court is not required to determine Alexander's ability to pay until the plan of restitution is final. The order is incomplete and not directly appealable.

See State v. Alexander, No. 16–0669, 2017 WL 510950, at *2–3 (Iowa Ct. App. Feb. 8, 2017).

Similarly, in this case, the sentencing court made a preliminary finding of McMurry's reasonable ability to pay in its sentencing order. Preliminary findings on reasonable ability to pay restitution are not reviewable on direct appeal because "the court is not required to give consideration to the defendant's ability to pay" until it enters a final plan of restitution. *See Jackson*, 601 N.W.2d at 357 (citing *Swartz*, 601 N.W.2d at 354); *cf. Jose*, 636 N.W.2d at 43–47. McMurry is not without recourse to demonstrate his inability to pay; he may litigate this issue and challenge any present/subsequent determination that he is reasonably able to pay by petitioning for modification. But he cannot challenge this preliminary finding of reasonable ability to pay, because "[a] restitution order is not appealable until it is complete,"

and "the restitution order is complete when it incorporates both the total amounts of the plan of restitution and the plan of payment." *See Alexander*, 2017 WL 510950, at *2–3. Therefore, this particular claim cannot be reached or resolved on the record before this Court.

CONCLUSION

The State respectfully requests this Court affirm McMurry's convictions and sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@iowa.gov

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 **5,611** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: July 19, 2017

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@iowa.gov