ELECTRONICALLY FILED OCT 16, 2017 CLERK OF SUPREME COURT

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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED SEPTEMBER 27, 2017

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CERTIFICATE OF SERVICE

On October 16, 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.

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Iowa Court of Appeals' decision in State v. Johnson correctly interpret the Iowa Supreme Court's decision in State v. Petrie regarding the assessment of court costs incurred pursuant to a multi-count trial information when the defendant ultimately pleads guilty to only some of those charges?

II. Was there a factual basis for a guilty plea to child endangerment when the record shows the defendant was drinking and wrestled with his child causing an unspecified injury on the child's face?

III. Is it an abuse of discretion for the district court to order a defendant to complete a residential program that requires him to work full time when working would full time would be against his doctor's recommendation?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Because the court of appeals has decided an important issue of law that should be resolved by the Iowa Supreme Court, Quinten McMurry respectfully requests this court accept further review on the question of whether court costs incurred pursuant to a multi-count trial information should be prorated when the defendant ultimately pleads guilty to only some of the charged offenses and does not agree to pay all court costs. Iowa R. App. P. 6.1103(1)(b)(2) (2017).

McMurry pled guilty to one of three counts charged in a single trial information and did not agree to pay courts costs. The district court assessed all costs against him. The court of appeals affirmed McMurry's sentence concluding costs attributable both to charges to which a defendant pleads guilty and charges that are dismissed by the State are "clearly attributable" to the charges to which the defendant pled guilty and are appropriately assessed in full against the defendant.

McMurry, however, respectfully asserts a plain reading of the Iowa Supreme Court's decision in State v. Petrie, 478

N.W.2d 620 (Iowa 1991), demonstrates that costs attributable both to charges that are dismissed and charges to which a plea is entered are not "clearly attributable" to a charge to which he pled guilty. Accordingly, they should be prorated or assessed proportionately under the Petrie decision.

Further, McMurry asserts the court of appeals erred in concluding a factual basis existed for McMurry's plea to child endangerment the defendant had been drinking and wrestled with his son, causing some sort of unspecified "injury" to the child's face. As well, the court of appeals erred in concluding the district court did not abuse its discretion to order McMurry to complete a residential program that requires him to work full time when working would full time would be against his doctor's recommendation.

Accordingly, McMurry respectfully requests this court grant further review of the court of appeals' September 27, 2017, decision.

STATEMENT OF THE CASE

Nature of the Case: Quinten McMurry seeks further review after the court of appeals affirmed his convictions and sentences for child endangerment and false report of an incendiary device in two separate underlying cases in the Warren County District Court.

Course of Proceedings: Quinten McMurry 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). (App. pp. 6-9). In January 2016, the court accepted McMurry's plea, deferred judgment and placed McMurry on probation. (App. p. 10).

In June 2016, McMurry was charged with several more charges. (App. pp. 16-18). 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. (App. pp. 14-15). After entering his Alford plea in the second case, McMurry stipulated that his conviction was a violation of his probation in the first case. (App. p. 20).

On October 3, 2016, McMurry was sentenced in both cases. 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. (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) (App. pp. 28-32).

In the child endangerment case, 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 sentences in the two cases to run consecutively. (Sentencing Tr. p. 14 L. 19 – p. 16 L. 23) (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. (App. pp. 35-37). The court denied the motion summarily. (App. pp. 38-39).

McMurry filed a timely notice of appeal. (App. pp. 40-43). The court of appeals affirmed McMurry's convictions and sentences.

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. (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).

ARGUMENT

I. THE IOWA COURT OF APPEALS DECISION IN STATE V. JOHNSON INCORRECTLY INTERPRETS THE IOWA SUPREME COURT'S DECISION IN STATE V. PETRIE REGARDING THE ASSESSMENT OF COURT COSTS INCURRED PURSUANT TO A MULTI-COUNT TRIAL INFORMATION WHEN THE DEFENDANT ULTIMATELY PLEADS GUILTY TO ONLY SOME OF THOSE CHARGES.

In FECR029413, the district court ordered courts costs on the two dismissed counts taxed to McMurry. (App. pp. 30-31). McMurry argued on appeal that the court's order assessing all costs of the action rather than only the costs associated with the Count I charge to which he pled guilty amounted to a statutorily unauthorized, and therefore illegal, sentence. The court of appeals denied McMurry's claim, concluding all of the court costs that were assessed were clearly attributable to the charge to which McMurry pled guilty. (Opinion p. 8). The court concluded Petrie does not stand for the proposition that costs, such as filing fees and court reporter fees, that are

incurred pursuant to a multi-count trial information, should be prorated when the defendant ultimately pleads guilty to only some of the charges, relying on the court of appeals earlier decision in State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016). (Opinion, p. 8 n. 2).

Petrie provided:

> We hold that the provisions of Iowa Code section 815.13 and section 910.2 clearly require, where the plea agreement is silent regarding the payment of fees and costs, that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan. Consequently, the district court should have limited the restitution order in this case to requiring the defendant to pay court costs and fees attributed to his conviction of driving while barred. Expenses clearly attributed to other charges such as attorney fees connected with the suppression issues should not be assessed against the defendant. Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant. Since the defendant was only convicted on one of three counts he should be required to pay only one-third of these costs.

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

In Johnson, the court of appeals interpreted Petrie this way.

In cases such as this—where a defendant has been charged in one trial information with multiple criminal violations, pled guilty to some charges, and had others dismissed—there are three categories of costs: (1) those clearly attributable to the charges on which the defendant is convicted, (2) those clearly attributable to dismissed charges, and (3) those not clearly associated with any single charge. See State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991). A defendant may be assessed costs clearly attributable to the charges on which the defendant is convicted but may not be assessed costs clearly attributable to dismissed charges. See id. "Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant." Id.

. . .

A Petrie apportionment is not indicated in this case. See Petrie, 478 N.W.2d at 622 ("Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant. Since the defendant was only convicted on one of three counts he should be required to pay only one-third of these costs."). Petrie is distinguishable from the case at hand. In Petrie, it is clear fees and costs were incurred relative to the dismissed charges. *Id.* And apparently, although it is not clear from the opinion, there were fees and costs incurred that were not clearly associated with any particular charge, and it was those fees and costs that were to be assessed proportionally, i.e., at one-third, since Petrie pled guilty to one of three charges. Id. The Petrie court makes no suggestion that the court costs clearly attributable to the charge to which Petrie pled guilty should be automatically apportioned.

State v. Johnson, 887 N.W.2d 178, 181-82 & 182 n. 4 (Iowa Ct. App. 2016).

McMurry respectfully asserts a plain reading of Petrie demonstrates that costs incurred pursuant to *both* charges to which a defendant pleads guilty and charges which are dismissed are not "clearly attributable" to a charge to which he pled guilty. Thus, they should be prorated or assessed proportionately under the Petrie decision. Accordingly, McMurry requests this court accept further review to clarify the holding of Petrie and its effect on costs incurred on a multi-count trial information.

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

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." (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 v. State, 848 N.W.2d 22, 30 (Iowa 2014). ("Here, as in Ryan, the district court used technical language from the statute that was insufficient to establish a factual basis.").

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. (Conf. App. pp. 4-15).

Accordingly, the court of appeals erred when it concluded the record established a factual basis for McMurry's plea to child endangerment.

III. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING MCMURRY TO COMPLETE THE PROGRAM AT FORT DES MOINES RESIDENTIAL FACILITY AS A TERM OF HIS PROBATION.

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. (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. (App. p. 37). The court summarily denied the motion. 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. (App. pp. 21-26). His mental health concerns were at the root of his legal troubles in the false reporting of an incendiary device. (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. (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 court of appeals erred when it concluded the district court did not abuse its discretion by ordering 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.

CONCLUSION

Because the district court imposed an illegal sentence in by requiring McMurry to pay court costs on the dismissed counts, McMurry requests this court accept further review, vacate the court of appeals decision, vacate his sentencing order and remand his case for the entry of a corrected sentencing order. As well , because McMurry pled guilty to child endangerment without a sufficient factual basis, the court of appeals decision should be vacated, and McMurry's 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. And finally, 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, the court of appeals decision should be vacated, McMurry's sentences should be vacated and both cases

remanded for amended judgment and sentencing orders removing that term of his probation.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.46, 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 FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,235 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: 10/3/17

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ELECTRONICALLY FILED SEP 27 2017 CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 16-1722
Filed September 27, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

QUINTEN BRICE MCMURRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Kevin A. Parker, District Associate Judge.

Quinten McMurry appeals from judgments and sentences entered following his pleas of guilty to child endangerment and false report of an incendiary device. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Melinda J. Nye, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellee.

Considered by Danilson, C.J., and Tabor and McDonald, JJ.

DANILSON, Chief Judge.

Quinten McMurry appeals from judgments and sentences entered following his plea of guilty to child endangerment, and subsequent revocation of his deferred judgment and probation due to a later plea of guilty to false report of an incendiary device, which he stipulated was a violation of his probation.

I. Background Facts and Proceedings.

In January 2016, the district court accepted McMurry's written plea of guilty to child endangerment (FECR028439), deferred judgment, and placed McMurry on probation.

In June 2016, McMurry was charged with false report of an incendiary device, threats, and first-degree harassment (FECR029413). The State moved to dismiss the harassment charge in the interests of justice. 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. After entering his plea, McMurry stipulated that his conviction for false report of an incendiary device was a violation of his earlier probation.

On October 3, 2016, McMurry was sentenced in both cases. With respect to the false report of an incendiary device, the State recommended a five-year suspended prison sentence, two years supervised probation, a fine, plus surcharge and court costs, and "that counts II and III be dismissed with costs to Mr. McMurry." McMurry sought a deferred judgment and community-based probation. The court imposed and suspended a five-year indeterminate prison term and two years' probation. The court also stated:

> You're to pay the minimum fine of $750, plus the statutory surcharge and court costs. You're also ordered restitution. I don't know if there is going to be any restitution as to the incident. Further, you're to provide the DNA sample, continue with mental health and substance abuse counseling. You're to pay court costs, costs for court-appointed attorney.
>
> Further, you'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.
>
> Counts II and III are dismissed.

With respect to the child-endangerment conviction, the court revoked the deferred judgment (upon McMurry's written stipulation of a probation violation) and imposed and then suspended a two-year indeterminate sentence, and placed him back on probation under the same conditions as those imposed on the false-report-of-an-incendiary-device charge. The court ordered him to pay the minimum fine, statutory surcharge, and court costs. The sentences on these two cases run consecutively.

McMurry filed a motion to reconsider, asking the court to amend the sentencing order by removing the requirement that he reside at the Fort Des Moines Residential Facility, contending the program required a resident to work full time and attaching a letter from his psychiatrist, who opined McMurry was not presently able to work full time. The district court denied the motion.

McMurry appeals.

II. Ineffectiveness Claim.

A parent commits child endangerment when the parent "[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 § 726.6(1)(a) (2014). On appeal, McMurry asserts his plea counsel was ineffective in allowing him plead guilty to child endangerment because his plea was without a factual basis.

We review claims of ineffective assistance of counsel, which are grounded on the Sixth Amendment, de novo. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

> It is a responsibility of defense counsel to ensure that a client does not plead guilty to a charge for which there is no objective factual basis. It follows that no advice to plead guilty would be considered competent absent a showing of a factual basis to support the crimes to which the accused has elected to plead guilty. Where counsel falls short, a Sixth Amendment violation is present. The determination of whether there is a factual basis in the record to support the charge to which the defendant seeks to plead guilty is an objective inquiry that has nothing to do with the state of mind of the accused, but everything to do with the state of the record evidence.

State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2013). "The factual basis must be contained in the record, and the record, as a whole, must disclose facts to satisfy all elements of the offense." *State v. Ortiz*, 789 N.W.2d 761, at 767-68 (Iowa 2010). "[T]he 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." *Id.* at 768.

In his written plea, McMurry admitted: "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." The minutes of testimony show police went to McMurry's residence, responding to a mother's telephone call in which she stated her son was with his father—McMurry—and had texted her "dad was drinking and that he wanted her to come get him." McMurry answered

the door and said they "couldn't be here without a warrant." The officers smelled "a strong odor of alcohol coming from [McMurry]," and they could see the child sitting on a couch inside the house. An officer "asked the boy if everything was ok and he shook his head no and covered his face." McMurry would not let the officers in to check on the child and tried to physically prevent officers from entering. After placing McMurry under arrest, an officer who spoke with the child noted injuries on his face. Another officer also "observed the injuries to the victim" and took photographs of those injuries. When notified that he would be charged with child endangerment, McMurry replied by saying "his son was being picked on at school so he was teaching him MMA [mixed martial arts] moves and wrestling with him."

This record sufficiently establishes McMurry's conduct created "the very real possibility of danger" to the child's emotional health or safety. *See State v. Anspach*, 627 N.W.2d 227, 233 (Iowa 2001) (noting "the definition of 'substantial risk' in the context of child endangerment is: [t]he very real possibility of danger to a child's physical health or safety"). Not only did the child's text to his mother show there was a possibility of danger to the child's emotional health, but McMurry acknowledged in statements to the police that his conduct with his child resulted in injuries to the child's face. We have no difficulty concluding McMurry "acknowledge[d] facts that are consistent with the elements of the crime." *Rhoades v. State*, 848 N.W.2d 22, 30 (Iowa 2014). Because there is a factual basis for his guilty plea, his ineffectiveness claim fails.

III. Sentencing.

"[W]e review a defendant's sentence for the correction of errors at law." *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006).

A. Terms of probation. "When a defendant challenges the terms of probation, '[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.'" *Id.* (alteration in original). "[A]ny abuse of discretion necessarily results in a legal error." *Id.*

While acknowledging that a district court may impose "'any reasonable conditions' [of probation] that either 'promote rehabilitation of the defendant or protection of the community,'" *see id.* at 445 (citations omitted), McMurry contends the district court abused its discretion in ordering him to complete the residential facility program. He asserts the residential facility program requires participants to work full time and his mental health precludes him from doing so. We are not convinced the court abused its considerable discretion.

The district court did assure McMurry, "If you're not qualified for that [residential correctional facility] program," the court "will delete that provision." McMurry relies upon a letter from his psychiatrist, which states in its entirety: "As of this present day of 10/06/2016 Quinten McMurry is not able to maintain responsibility of a full-time position. Hopefully, this changes when he becomes stabilized so he can maintain a part-time position." We are not convinced this letter supports a conclusion that he is not qualified or able to participate in the program to which he objects. We note McMurry himself stated in allocution that if

given community probation he intended to "[s]eek out minimum part-time employment, possible full-time employment."

B. Costs. McMurry next maintains the court imposed an illegal sentence because taxing him with the "payment of costs associated with charges in counts II and III were not authorized by statute." He asserts some unspecified "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."

This court recently observed:

> "Criminal restitution is a creature of statute." *State v. Watson*, 795 N.W.2d 94, 95 (Iowa Ct. App. 2011). Iowa Code section 910.2(1) (2015) requires the sentencing court to order a defendant who pleads guilty to make restitution. Restitution includes payment of court costs. *See* Iowa Code § 910.1(4). In addition, section 815.13 allows the county or city to recover fees and costs incurred in prosecuting a criminal action "unless the defendant is found not guilty or the action is dismissed." Under these sections, a defendant should only be ordered to pay restitution on the counts on which the State obtains a conviction. *See State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991). Unless a plea agreement provides for the recovery of costs associated with dismissed charges, only those costs associated with the charges on which a conviction is obtained may be recoverable; where the plea agreement is silent on costs, no costs are recoverable for dismissed charges. *See id.*
>
> In cases such as this—where a defendant has been charged in one trial information with multiple criminal violations, pled guilty to some charges, and had others dismissed—there are three categories of costs: (1) those clearly attributable to the charges on which the defendant is convicted, (2) those clearly attributable to dismissed charges, and (3) those not clearly associated with any single charge. *See id.* A defendant may be assessed costs clearly attributable to the charges on which the defendant is convicted but may not be assessed costs clearly attributable to dismissed charges. *See id.* "Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant." *Id.*

State v. Johnson, 887 N.W.2d 178, 181-82 (Iowa Ct. App. 2016).

The State asserts all of the court costs[1] 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. We agree, and find no error in the assessment of costs here.[2]

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[1] The State notes 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.

[2] This court has previously discussed problems resulting from *Petrie*:

> *Petrie* has proved to be an administrative burden without material benefit. In many cases, it is well-nigh impossible to determine which costs are associated with any particular count. *See, e.g., Commonwealth v. Soudani*, 165 A.2d 709, 711 ("We fail to perceive how the costs of prosecution in the instant case may be divided or apportioned between the first and second counts of the indictment."). In addition, in many (perhaps most) cases, the costs are indivisible. As this court explained in [*Johnson*, 887 N.W.2d at 182]:
>
> > 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.
>
> . . . . Further, *Petrie* provides no guidance on who is to determine the attribution of costs and the method of allocation. It is an inefficient use of judicial and administrative resources to vacate the defendant's conviction and remand this matter only to have the district court enter the same sentence because the plea agreement is made of record, enter effectively the same sentence because all of the costs are deemed relevant to all of the counts and are indivisible, or enter an order based on an arbitrary allocation of costs with little relationship to the actual costs of securing a conviction.

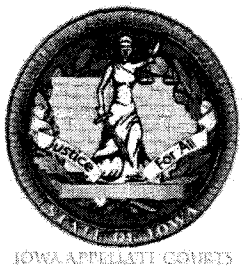
C. Attorney's fees. Finally, McMurry contends the court erred finding "the defendant has the reasonable ability to pay restitution of fees and costs in the amount approved by the State Public Defender or $___, whichever is less." Either this statement is a final ruling that McMurry is able to pay "$__," that is nothing, or it is a nonstatement and subject to a further hearing and ruling on a final plan of restitution. If we treat it as a final ruling, McMurry has nothing about which to complain. If we treat it as a preliminary ruling,[3] it is not properly before us. *See State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (stating that until a plan of restitution is completed, the court is not required to consider the defendant's ability to pay, and noting that an offender may challenge the amount of restitution by petition under Iowa Code section 910.7). In either event, it is a nonissue.

Finding no error, we affirm.

AFFIRMED.

State v. Smith, No. 15-2194, 2017 WL 108309, at *5 (Iowa Ct. App. Jan. 11, 2017), *further review denied* Mar. 2, 2017.

[3] We observe the court stated at the sentencing hearing: "I don't know if there is going to be any restitution as to the incident." That statement supports the latter alternative—that no plan of restitution is yet completed.



IOWA APPELLATE COURTS

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