IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0270

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYSON RUTH,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR GREENE COUNTY
THE HONORABLE ADRIA A.D. KESTER, JUDGE

APPELLEE'S BRIEF

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FINAL

CERTIFICATE OF SERVICE

On the 11th day of August, 2017, the State served the within Appellee's Brief and Argument on all other parties to this appeal by mailing one copy thereof to the respective pro se defendant:

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant Tyson Ruth appeals the imposition of court costs following his acceptance of a plea agreement for second-degree theft. In a pro se supplemental brief, Ruth raises claims of ineffective assistance.

Course of Proceedings

The State accepts the defendant's course of proceedings as substantially correct.

Facts

On May 16, 2016, a wildlife camera photographed defendant Tyson Ruth and his girlfriend stealing hunting equipment from a property near Jefferson. Minutes (Strautman); Conf. App. 9. The stolen property valued $1728.95. Minutes (Strautman); Conf. App. 9. A deputy sheriff identified Ruth from the photos and got a warrant to search Ruth's home. Minutes (Allen); Conf. App. 11. When officers executed the warrant, they found some of the stolen property as well

as methamphetamine and marijuana. Minutes (Allen, Property inventory); Conf. App. 11, 21–22.

ARGUMENT

I. Ruth Fails to Demonstrate that the District Court Over-Assessed Court Costs.

Preservation of Error

"Illegal sentences may be challenged at any time, notwithstanding that the illegality was not raised in the trial court or on appeal." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

When a defendant challenges the legality of a sentence, review is for correction of errors at law; however, when a particular sentence falls within statutory limits, review is for abuse of discretion. *State v. Valin*, 724 N.W.2d 440, 443–44 (Iowa 2006) (citations omitted).

Discussion

Ruth fails to demonstrate error relating to the imposition of court costs. First, the plea agreement can be interpreted as requiring the payment of all court costs. Second, Ruth fails to demonstrate that he was over-assessed any court costs associated only with the dismissed charges. Accordingly, this Court should reject his court costs challenge.

Ruth's claim originates with *State v. Petrie*, 478 N.W.2d 620 (Iowa 1991). Petrie was arrested for driving while barred, and a subsequent impound inventory of his car turned up marijuana. *Id.* at 621. He knocked out two counts of the trial information by winning his motion to suppress, and he then pled guilty to the driving charge. *Id.* Petrie raised a district-court restitution challenge arguing he should not be required to pay entire amount of attorney fees and court costs. *Id.* In a per curiam decision, a panel of the Supreme Court determined that "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." *Id.* at 622.

> 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.

Id. Recently, *Petrie* has been criticized for not tracking with the statutory language, for being internally inconsistent, and for creating

"an administrative burden without material benefit." *State v. Smith*, No. 15-2194, 2017 WL 108309, at *4–5 (Iowa Ct. App. Jan. 11, 2017).

Ruth fails to prove that his plea agreement did not encompass the payment of court costs. *See Petrie*, 478 N.W.2d at 622 ("We stress that nothing in this opinion prevents the parties to a plea agreement from making a provision covering the payment of costs and fees."). The prosecutor's rendition of the plea agreement included, "I'll be asking that he be ordered to pay court costs and attorney fees." Sent. Tr. p. 5, line 12 – p. 6, line 4. When asked to verify the plea agreement, defense counsel only sought clarification that "victim restitution as stated by the State is solely for this particular charge." Sent. Tr. p. 6, lines 7–16. The planned imposition of "court costs" did not specify that it only applied to court costs for the one count to which Ruth pled guilty. And while the defense clarified that the plea agreement only anticipated victim restitution for the single count, the defense did not seek that same limitation for court costs. Therefore, the record indicates the plea agreement contemplated Ruth would pay all "court costs."

Even assuming the plea agreement did not include payment of all court costs, Ruth's claim still requires him to demonstrate an over-

assessment of court costs. *See State v. Johnson*, 887 N.W.2d 178, 182 (Iowa Ct. App. 2016) ("In this illegal sentence claim, it is up to Johnson to establish an over-assessment of court costs."). Ruth's case is analogous to *Johnson*, which involved a claim that the defendant was ordered to pay costs associated with dismissed counts. *Id.* at 180. The Court identified three categories of court costs:

> 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. "Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant."

Id. at 181–82 (quoting *Petrie*, 478 N.W.2d at 622). But the Court explained, "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." *Id.* at 182. Instead, the *Johnson* Court examined the court costs listed in the combined general docket report and determined, "These costs would have been the same even had the State not charged Johnson with the counts later dismissed." *Id.* Thus, those costs were clearly attributable to the counts to which the defendant pled guilty and fully assessable to him. *Id. See also State v. Young*, 16-0154, 2017 WL 935071, at *3–5 (Iowa

Ct. App. Mar. 8, 2017) (rejecting the defendant's court-costs claim because he failed to demonstrate over-assessment); *State v. Kirk*, 16-1930, 2017 WL 2875965, at *2–3 (Iowa Ct. App. July 6, 2017) (Doyle, J., concurring) (stating the full court costs were clearly attributable to the defendant's conviction).

Ruth fails to demonstrate that he was assessed any court costs unattributable to his conviction. According to the combined general docket report, a total of $482.20 in court costs has been assessed. Docket Report at 13; App. 17. That amount included a $100 filing fee, various sheriff's fees[1], and court reporter fees for the guilty plea and sentencing hearings. Docket Report; App. 17. Unlike *Petrie* in which costs for the suppression hearing were clearly attributable to the dismissed drug counts, any of the costs for Ruth's suppression hearing as well as court reporting fees for his plea and sentencing hearings were directly attributable to the theft charge to which he pled guilty. Just as in *Johnson*, Ruth does not prove that any of these fees would have been different if the State had not charged him with additional theft and drug charges. Therefore, Ruth has not

[1] The sheriff's fees align with service of subpoenas and transport costs. The subpoenas are not in the record, so it is not clear whether they relate to the suppression hearing or discovery depositions.

established that he has been assessed court costs clearly attributable to the dismissed counts.

The Court should reject Ruth's request for remand. He does not identify any charges unattributable to his theft conviction and does not claim that he was over-assessed. Similarly, he has not identified any costs that must be apportioned as not clearly associated with any charge. *See Johnson*, 887 N.W.2d at 182 n.4 ("A *Petrie* apportionment is not indicated in this case. . . . The *Petrie* court makes no suggestion that the court costs clearly attributable to the charge to which Petrie pled guilty should be automatically apportioned."). If Ruth can demonstrate that some of the court costs are not attributable to his theft conviction, then he should prove that claim in a restitution hearing in the district court. *See* Iowa Code § 910.7 (2017) (permitting the defendant to challenge restitution at any time during probation, parole, or incarceration). As it stands now, the record fails to demonstrate any error in the assessment of court costs.

"A remand for a corrected sentencing order would only exalt form over substance because a corrected order will not change [Ruth's] obligation one iota." *Young*, 2017 WL 935071, at *5. Ruth

has failed to demonstrate that the plea agreement did not encompass payment of court costs. And he has not even alleged that he was over-assessed court costs. Consequently, this Court should affirm.

II. Ruth's Pro Se Ineffective Assistance Claims Are Too Undeveloped to Consider on Direct Appeal.

Preservation of Error

Ruth raises various claims of ineffective assistance, which is an exception to the normal error preservation rules. *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel's performance was deficient and that prejudice resulted. *Id.* at 687.

Under the first prong, the defendant must show counsel's representation fell below an objective standard of reasonableness. *Id.*

at 687–88. The reviewing court must be highly deferential to counsel's performance, avoid judging in hindsight, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To prove the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Defendants can raise claims of ineffective assistance on direct appeal if they have "reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2) (2017). "[I]f a defendant wishes to have an ineffective-assistance claim resolved on direct appeal, the defendant will be required to establish an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). "If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court's view of the potential viability of the claim." *Id.*

Discussion

Ruth's pro se ineffective assistance claims are too imprecise and too undeveloped to consider on direct appeal. First, he claims trial counsel should not have withdrawn the motion to suppress. Pro Se Br. at 2. But Ruth withdrew his suppression challenge so he could accept the plea agreement (Order 11/7/2016; App. 10), and the record lacks proof whether his suppression challenge held any merit. Second, he claims counsel should have pursued a chain-of-custody challenge. Pro Se Br. at 2–3. But accepting the plea agreement waived any chain-of-custody challenge Ruth could have raised at trial, and he fails to articulate any flaw in the chain of custody regarding the stolen items recovered from his home. Also, Ruth fails to present any objective evidence that he would have rejected the plea agreement for one count in favor of going to trial on eight counts (including a class B felony carrying a 25-year sentence). Finally, Ruth claims counsel "failed to defend his client against a sentencing breach" (Pro Se Br. at 4), but that allegation is too imprecise to decipher. At most, this Court should preserve Ruth's pro se claims for further development in a postconviction relief action.

CONCLUSION

The Court should affirm Tyson Ruth's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

The State agrees this case is appropriate for submission without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,008** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: August 10, 2017

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