IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1838

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN SHANE WESTON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR APPANOOSE COUNTY
THE HONORABLE RANDY S. DeGEEST, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
Katie.Krickbaum@ag.iowa.gov

SUSAN C. DANIELS
Appanoose County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

State Rules

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court substantially comply with Weston's right of allocution by giving him a chance to volunteer information relevant to his punishment?

State v. Birch, No. 99-1833, 2000 WL 1520258 (Iowa Ct. App. Oct. 13, 2000)
State v. Craig, 562 N.W.2d 633 (Iowa 1997)
State v. Duckworth, 597 N.W.2d 799 (Iowa 1999)
State v. Glen, 431 N.W.2d 193 (Iowa Ct. App. 1988)
State v. Liddell, 672 N.W.2d 805 (Iowa 2003)
State v. Lumadue, 622 N.W.2d 302 (Iowa 2001)
State v. Millsap, 547 N.W.2d 8 (Iowa Ct. App. 1996)
State v. Nosa, 738 N.W.2d 658 (Iowa Ct. App. 2007)
State v. Patterson, 161 N.W.2d 736 (Iowa 1968)
State v. Smith, No. 17-1228, 2018 WL 2084824 (Iowa Ct. App. May 2, 2018)
State v. Thomas, 520 N.W.2d 311 (Iowa Ct. App. 1994)
State v. Wilson, 294 N.W.2d 824 (Iowa 1980)
Iowa R. Crim. P. 2.23(3)(a)
Iowa R. Crim. P. 2.23(3)(d)

II. Did the district court err in ordering Weston to pay restitution in the form of court costs and attorney's fees?

State v. Jose, 636 N.W.2d 38 (Iowa 2001)
Bader v. State, 559 N.W.2d 1 (Iowa 1997)
Goodrich v. State, 608 N.W.2d 774 (Iowa 2000)
Headley v. Headley, 172 N.W.2d 104 (Iowa 1969)
Iowa Coal Min. Co., Inc. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)
State v. Bullock, No. 15-0982, 2017 WL 4049276 (Iowa Ct. App. Sept. 13, 2017)
State v. Alexander, No. 16-0669, 2017 WL 510950 (Iowa Ct. App. Feb. 8, 2017)
State v. Bonilla, No. 17-0491, 2018 WL 2084854 (Iowa Ct. App. May 2, 2018)
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)

State v. Boutchee, No. 17-1217, 2018 WL 3302010 (Iowa Ct. App. July 5, 2018)
State v. Brown, No. 16-1118, 2017 WL 2181568 (Iowa Ct. App. May 17, 2017)
State v. Campbell, No. 15-1181, 2016 WL 4543763 (Iowa Ct. App. Aug. 31, 2016)
State v. Harrison, 351 N.W.2d 526 (Iowa 1984)
State v. Hess, 533 N.W.2d 525 (Iowa 1995)
State v. Ihde, 532 N.W.2d 827 (Iowa Ct. App. 1995)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Janz, 358 N.W.2d 547 (Iowa 1984)
State v. Johnson, 744 N.W.2d 646 (Iowa 2008)
State v. Kaelin, 362 N.W.2d 526 (Iowa 1985)
State v. Kemmerling, No. 16-0221, 2016 WL 5933408 (Iowa Ct. App. Oct. 12, 2016)
State v. Love, 589 N.W.2d 49 (Iowa 1998)
State v. Martin, No. 11-0914, 2013 WL 4506163 (Iowa Ct. App. Aug. 21, 2013)
State v. Mason, No. 02-0591, 2003 WL 22087414 (Iowa Ct. App. Sept. 10, 2003)
State v. McMurry, No. 16-1722, 2017 WL 4317302 (Iowa Ct. App. Sept. 27, 2017)
State v. Plettenberg, No. 17-1312, 2018 WL 2084814 (Iowa Ct. App. May 2, 2018)
State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
State v. Storrs, 351 N.W.2d 520 (Iowa 1984)
State v. Swartz, 601 N.W.2d 348 (Iowa 1999)
*State v. Thom*as, 520 N.W.2d 311 (Iowa Ct. App. 1994)
State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987)
Iowa Code § 910.3
Iowa Code §§ 910.1(3) & (4)
Iowa Code § 910.7
Iowa Code §§ 910.4 and 910.5
Iowa Code § 910.2(1)
Iowa Code § 910.5(1)(d)
Iowa Code § 910.7(1)
Iowa Code § 910.7(2)
Iowa Code § 910.2(2)
Iowa Code § 910.2

III. Did the district court properly order Weston to pay all court costs that can be reasonably attributed to the count to which he was found guilty?

State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)
State v. Haywood, No. 17-1187, 2018 WL 3650328 (Iowa Ct. App. Aug. 1, 2018)
State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016)
State v. Martin, No. 11-0914, 2013 WL 4506163 (Iowa Ct. App. Aug. 21, 2013)
State v. Petrie, 478 N.W.2d 620 (Iowa 1991)
State v. Ruth, No. 17-0270, 2017 WL 4317329 (Sept. 27, 2017)
State v. Sisk, 577 N.W.2d 414 (Iowa 1998)
State v. Smith, No. 15-2194, 2017 WL 108309 (Iowa Ct. App. Jan. 11, 2017)

ROUTING STATEMENT

Transfer to the Court of Appeals is appropriate because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, Defendant Jonathan Shane Weston was found guilty of domestic abuse assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2A(2)(b), a serious misdemeanor. Weston appeals issues related to his sentence and restitution. The Honorable Randy S. DeGeest entered judgment and imposed sentence.

Course of Proceedings

Weston accurately outlines the course of proceedings and disposition in the district court. *See* Iowa R. App. P. 6.903(3); Appellant's Brief at 12-14.

Facts

On February 27, 2017, Weston was charged by trial information with burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3, a class B felony; domestic abuse assault impeding air blood flow, in violation of Iowa Code sections 708.1 and 708.2A(5), a class D felony; and assault while participating in a felony, in violation of Iowa Code section 708.3(2), also a class D felony. Trial Information; App. 4.

Shortly before trial, the district court granted the State's motion to dismiss Counts I and III, and the case proceeded to trial on the single count of domestic abuse assault impeding air blood flow. Motion to Dismiss; App. 10; Order Dismissing Counts I & III; App. 11. In the court's dismissal order, it stated that "the costs of [the] dismissals are assessed to the State." Order Dismissing Counts I & III; App. 11.

After deliberating, the jury found Weston guilty of the lesser-included offense of domestic abuse assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2A(2)(b), a serious misdemeanor. Verdict Form; App. 13.

During the sentencing hearing, the district court asked Weston and his attorney whether either knew of any reason why the court should not proceed to enter judgment. Sentencing Hearing Transcript, Oct. 23, 2017 ("Sent. Hr'g Tr.") 3:14-25. The State recommended a sentence of 365 days in jail, with all but 120 days suspended. Sent. Hr'g Tr. 5:9-15. The State also asked the court to impose the minimum fine, the 35 percent surcharge, "all court costs and all court-appointed attorney fees . . . ." Sent. Hr'g Tr. 5:21-25.

The district court gave Weston's counsel a chance to argue facts in mitigation. *See* Sent. Hr'g Tr. 6:15-13:6. It also engaged with Weston directly about his employment. *See* Sent. Hr'g Tr. 9:6-16; 10:21-11:17; 12:23-13:2; 13:9-14:5. At one point, when Weston sought to add more details about his employment situation, the court stated:

> You don't have the right of allocution,[1] but I was going to grant it to you to make any statement you want to say.

[1] The district court appears to have misspoken here: Although a defendant convicted of a serious misdemeanor does not have the right

> You don't have to say anything if you don't want to, and maybe you should talk to your attorney first because attorneys give really good advice before they have people-

Sent. Hr'g Tr. 11:1-7. In response, Weston said, "I feel just like telling you the truth would be best[,]" and then described the seasonal nature of his work. Sent. Hr'g Tr. 11:8-17.

After a lengthy colloquy with both Weston and his counsel, *see* Sent. Hr'g Tr. 6:15-14:5, the district court sentenced Weston to a term of incarceration not to exceed 365 days, with all but 120 days suspended, and imposed a $315 fine. Order of Disposition at 1-2; App. 15-16; Sent. Hr'g Tr. 14:6-15:18. The court also ordered that Weston serve a one-year term of probation. Order of Disposition at 2; App. 16. Finally, the court required that Weston pay court costs in an amount to be assessed by the clerk and court-appointed attorney's fees, "as approved by the Court and the State Public Defender." *Id.* at 3; App. 17; Sent. Hr'g Tr. 15:19-16:3.

After the court imposed sentence, Weston stated, "I can't say anything? You know, I?" Sent. Hr'g Tr. 16:4-10. The district court responded that it had given him "an opportunity[,]" but allowed

---

to a presentence investigation report, he does have the right of allocution. *See* Iowa Code § 901.2(2)(d).

Weston to speak again without interruption. Sent. Hr'g Tr. 16:11-18:25. The court then explained why Weston's attorney's presentation convinced it to impose a lesser sentence than it was initially inclined to impose, and thanked Weston for his statement. Sent. Hr'g Tr. 17:3-23. It stated, however, that it still believed "that the sentence [it] just entered is appropriate." Sent. Hr'g Tr. 17:25-18:1.

Weston now appeals, arguing that the district court did not substantially comply with Weston's right of allocution and challenging the court's order to pay court costs and attorney's fees. For the reasons set forth below, Weston's claims have no merit.

ARGUMENT

I. The district court substantially complied with Rule 2.23(3)(d) by giving Weston a chance to speak at his sentencing hearing.

Preservation of Error

Weston first argues that the district court failed to substantially comply with its obligation to allow Weston to speak before it entered judgment against him. *See* Appellant's Brief at 15-24. The traditional error-preservation rules do not ordinarily apply "to void, illegal or procedurally defective sentences." *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Although the appellate courts have urged parties to alert the district court to any claim of error before filing an

appeal, "[a] defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right of appeal on that ground." *State v. Birch*, No. 99-1833, 2000 WL 1520258, at *1 (Iowa Ct. App. Oct. 13, 2000) (citing *State v. Wilson*, 294 N.W.2d 824, 825-26 (Iowa 1980)); *see also Thomas*, 520 N.W.2d at 313 n.1.

Standard of Review

This Court reviews defects in sentencing procedure for errors at law. *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure . . . ." *Id.*

Merits

Iowa Rule of Criminal Procedure 2.23(3)(d) provides that before judgment is entered, "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." The district court need not use any particular language to satisfy Rule 2.23(3)(d); substantial compliance is sufficient. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). The court will be deemed to have complied with the defendant's right of allocution if it gives the

defendant an opportunity to volunteer any information helpful to his case. *Id.*; *see also State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001) (*quoting State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997)) (requiring "a record establishing that the court has 'invited, or afforded an opportunity for' the defendant to speak regarding punishment").

The district court substantially complied with Rule 2.23(3)(d) here. It gave Weston multiple opportunities to speak in relation to his punishment, even stating specifically that it was giving Weston a chance to address the court. First, the district court asked Weston whether he knew "of any real reason why the court shouldn't proceed to enter judgment and do sentencing today[.]" Sent. Hr'g Tr. 3:17-21; *see* Iowa R. Crim. P. 2.23(3)(a). Then, when the court asked whether Weston was currently employed, Weston himself answered, explaining the nature of his work. Sent. Hr'g Tr. 9:6-16. With the court expressing some confusion as to Weston's work history, Weston again addressed the court directly:

> THE DEFENDANT: Can I say –
> THE COURT: You don't have the right of allocution, but I was going to grant it to you to make any statement you want to say. You don't have to say anything if you don't want to, and maybe you should talk to your attorney first

> because attorneys give really good advice before they have people –
> THE DEFENDANT: I feel just like telling you the truth would be best.

Sent. Hr'g Tr. 10:21-11:9. Weston then proceeded to further explain his employment. Sent. Hr'g Tr. 11:9-17. Weston responded when the court directly asked him whether he had a vehicle and whether he would be able to travel to Wapello County to complete the Iowa Domestic Abuse Program. Sent. Hr'g Tr. 12:20-13:4. Finally, Weston responded at length when the court asked him when his spring work season begins and about his lack of seniority at the company. Sent. Hr'g Tr. 13:9-14:5. The district court gave Weston ample "opportunity to exercise his right of allocution and invited him to volunteer any information in mitigation of his sentence." *See State v. Smith*, No. 17-1228, 2018 WL 2084824, at *2 (Iowa Ct. App. May 2, 2018) (concluding that the district court substantially complied where the court asked the defendant whether he had anything to say, and the defendant said "no").

Weston claims that his statements to the court came in the context of resolving the "employment issue," and did not provide Weston "an opportunity to volunteer any and all" of his arguments in mitigation. *See* Appellant's Brief at 18-20. But the court based its

sentence, at least in part, on the facts that Weston had a job and a car. Sent. Hr'g Tr. 14:14-15:15; 17:3-21. The purpose of the sentencing hearing is for the court to elicit facts like these. *See State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968) (concluding that the court afforded the defendant his right of allocution).

This case is more like *State v. Glen*, 431 N.W.2d 193, 194 (Iowa Ct. App. 1988), than *State v. Millsap*, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996), and *State v. Nosa*, 738 N.W.2d 658, 659-60 (Iowa Ct. App. 2007)—two cases on which Weston relies. In *Glen*, as here, the district court asked the defendant if there was any reason why the court should not sentence him, asked the defendant if he understood the State's sentencing recommendation, and directly engaged with the defendant about his employment situation. 431 N.W.2d at 194. Even though the district court did not specifically use the language in Rule 2.23(3)(d), the court found that the "exchange between the court and the defendant provided defendant adequate opportunity to address the court." *Id.* at 194-95.

The district courts in *Millsap* and *Nosa*, on the other hand, did not engage with the defendant in any way. In *Millsap*, the court simply asked the defendant whether he was ready to be sentenced

and the defendant "made no verbal response to the question[.]" 547 N.W.2d at 10. And in *Nosa*, following defense counsel's argument, the defendant did not respond to the court's question, "Is there anything else you want to say?" 738 N.W.2d at 659. As discussed above, the district court here did a significant amount more than these two courts.

Weston also seems to argue that he was not given *enough* of an opportunity to address the court. But not only did the district court substantially comply with Weston's right of allocution before it initially entered judgment, it also gave Weston the opportunity to speak as to his punishment after announcing its sentence. After the court stated that there was a sheriff present to take Weston away, Weston balked, stating "I can't say anything? You know, I?" Sent. Hr'g Tr. 16:7-10. Noting that it had already given him the opportunity, the court nevertheless allowed Weston to speak again on his own behalf. Sent. Hr'g Tr. 16:11-18:25. After listening to Weston, the district court again explained its reasons for the sentence it entered, stating that it "appreciated [Weston's] remarks[,]" but said that the sentence it had entered was appropriate. Sent. Hr'g Tr. 17:3-18:1.

The court considered Weston's additional comments and reaffirmed that the sentence it had previously imposed was the appropriate one. Because Weston was given ample opportunity to volunteer any information in mitigation of his sentence, the district court cannot be found to have committed error. This Court should affirm Weston's sentence.

II. Weston cannot succeed on any of his challenges to the district court's restitution order.

Weston also makes several arguments related to the district court's imposition of court costs and attorney's fees. First, Weston contends that this Court should direct the district court to enter a nunc pro tunc order removing costs from the written judgment and sentence because the court did not specifically order that Weston pay costs in its oral pronouncement of sentence. *See* Appellant's Brief at 24-27. Weston also claims that the district court erred by imposing court costs and attorney fees without first determining whether Weston had the ability to pay those costs and fees. *See* Appellant's Brief at 27-30. Finally, Weston argues that even if the court costs stand, the district court erred by ordering him to pay costs that are attributable to the two dismissed charges. *See* Appellant's Brief at 31-40. None of Weston's restitution claims warrants relief.

A. The district court's written judgment aligns with its intent in sentencing Weston.

Error Preservation

Weston first contends that there is a conflict between the district court's oral and written judgement orders that can be fixed with a nunc pro tunc order "removing from the written sentencing order Weston's obligation to pay court costs." *See* Appellant's Brief at 26. As stated above, the general rule of error preservation "is not ordinarily applicable to void, illegal or procedurally defective sentences." *Thomas*, 520 N.W.2d at 313.

Standard of Review

"When a party asserts that an inconsistency exists between an oral sentence and a written judgment entry, [this Court] review[s] the matter for correction of errors at law." *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995).

Merits

A district court may correct a clerical error in the written judgment by issuing a nunc pro tunc order. *Id.* "The purpose of a nunc pro tunc order is not to correct a mistake of litigants, judicial thinking, or a mistake at law; the function is to make the record show truthfully what judgment was actually rendered." *State v. Mason*, No.

02-0591, 2003 WL 22087414, at *2 (Iowa Ct. App. Sept. 10, 2003) (citing *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969)). A nunc pro tunc order may only be used "where there is an obvious error that needs correction or where it is necessary to conform the order to the court's original intent." *State v. Johnson*, 744 N.W.2d 646, 648-49 (Iowa 2008); *see also Hess*, 533 N.W.2d at 527 ("An error is clerical in nature if it is not the product of judicial reasoning and determination.").

No nunc pro tunc order is necessary here because the written judgment reflects the district court's intent. During the sentencing hearing, the State asked the court to impose "all court costs and all court-appointed attorney fees." Sent. Hr'g Tr. 5:21-23. Weston did not object or suggest an alternative amount. When entering judgment, the court asked defense counsel whether there were court-appointed attorney fees, and counsel responded that his fees were "substantial[;] . . . in excess of probably 4 or $5,000." Sent. Hr'g Tr. 15:19-23. The court then ordered Weston to pay his attorney's fees, and stated, "going from a B to a serious misdemeanor is a very successful case, but I think you should be responsible to pay back the costs." Sent. Hr'g Tr. 15:24-16:4.

Consistent with its statement during the hearing, the district court's written judgment ordered Weston to pay an unspecified amount of court costs and court-appointed attorney's fees. Order of Disposition at 3; App. 17. There is no need for the Court to remand for a nunc pro tunc order because, in context, it is apparent that the district court's intent is reflected in the written judgment.

B. Weston's reasonable-ability-to-pay challenge is premature, not directly appealable, and must be dismissed because there is no plan of restitution in place. If the Court reaches the merits, it should find that the district court did not err because no ability-to-pay finding was yet required or, alternatively, that the district court did make such a finding and the finding was not an abuse of its discretion.

Error Preservation/Motion to Dismiss

Alternatively, Weston argues that the district court erred by imposing court costs and attorney's fees without making a reasonable-ability-to-pay determination. *See* Appellant's Brief at 27-30. Weston's claim is not properly before this Court because it is not yet ripe. Nor has Weston exhausted his remedies below, as required. For those reasons, this Court should dismiss Weston's reasonable-ability-to-pay claim. *See Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 432 (Iowa 1996) ("If a claim is not ripe for

adjudication, a court is without jurisdiction to hear the claim and must dismiss it."); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (declining to grant relief on a defendant's ability-to-pay challenge where the plan of restitution was not yet complete and the defendant had not yet petitioned the district court for modification under Iowa Code section 910.7).

A district court is not required to consider a defendant's reasonable ability to pay until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Boutchee*, No. 17-1217, 2018 WL 3302010, at *4-5 (Iowa Ct. App. July 5, 2018) (finding that "the district court was not required to determine [the defendant's] ability to pay until the plan of restitution was final"); *State v. Campbell*, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (stating that the sentencing court is not required to consider the defendant's ability to pay until it has issued "the order constituting the plan of restitution"). Until that obligation is triggered, a defendant's challenge on ability-to-pay grounds is premature. *See Jackson*, 601 N.W.2d at 357 (stating that it was precluded from granting the defendant the relief he sought).

At the time of Weston's appeal, his plan of restitution was not complete. The district court had ordered that Weston pay court costs and attorney fees, but it did not include even a temporary amount of costs or fees in its sentencing order. Order of Disposition at 3; App. 17. Nor had it entered any supplemental orders setting forth the amounts of those costs and fees. Until the district court has "at a minimum, an estimate of the total amount of restitution," it had no obligation to assess Weston's ability to pay costs and fees. *See Campbell*, 2016 WL 4543763, at *4. And Weston may not challenge the district court's failure to make an ability-to-pay determination until that obligation exists. *See*, *e.g.*, *Boutchee*, 2018 WL 3302010, at *4-5 (agreeing that the defendant's restitution claim was "not ready for review" where "the restitution order was incomplete"); *State v. Brown*, No. 16-1118, 2017 WL 2181568, at *4 (Iowa Ct. App. May 17, 2017) (concluding that the defendant's ability-to-pay challenge was premature because "the trial court had not yet entered a plan of restitution that would trigger the trial court's obligation to determine [the defendant's] reasonable ability to pay"); *State v. Alexander*, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017) (holding that the district court's restitution order was "incomplete and not

directly appealable" where the district court had "expressly reserved the amounts to be included in the plan of restitution for a later determination"); *State v. Kemmerling*, No. 16-0221, 2016 WL 5933408, at *1 (Iowa Ct. App. Oct. 12, 2016) ("Because the total amount of restitution had not yet been determined by the time the notice of appeal was filed, any challenge to the restitution order in this case is premature."); *see also State v. McMurry*, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) (stating that a preliminary restitution order with no restitution amount would not be properly before the court).

Nor is Weston entitled to directly appeal the district court's reasonable ability to pay finding—or lack thereof—until he moves under Iowa Code section 910.7 for modification of the plan of restitution or plan of payment, or both. *See State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) (reaffirming *Jackson*'s principle "that ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7"); *see also Boutchee*, 2018 WL 3302010, at *5; *State v. Plettenberg*, No. 17-1312, 2018 WL 2084814, at *2 (Iowa Ct. App. May 2, 2018).

Weston incorrectly asserts that his restitution claim is a challenge to an illegal sentence that he may bring at any time. *See* Appellant's Brief at 25. While that may be true of a defendant's challenge to the amount of restitution found in the sentencing order, *see State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984), it is not the case for a reasonable-ability-to-pay challenge. *See Plettenberg*, 2018 WL 2084814, at *2 (quoting *Richardson* and providing that "unlike direct causal-connection or amount-of-restitution challenges, 'ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7'"); *see also State v. Bullock*, No. 15-0982, 2017 WL 4049276, at *2 (Iowa Ct. App. Sept. 13, 2017) (stating that a reasonable-ability-to-pay challenge "does not automatically bring his claim within the ambit of an illegal sentence"). "The ability to pay is an issue apart from the amount of restitution and is therefore not an 'order incorporated in the sentence' and is therefore not directly appealable as such." *State v. Jose*, 636 N.W.2d 38, 45 (Iowa 2001) (alteration omitted).

Thus, until the district court completes the plan of restitution and Weston exhausts his remedies under Iowa Code section 910.7,

Weston's claim is not ripe and not directly appealable. *See Jackson*, 601 N.W.2d at 357. Because Weston's ability-to-pay claim is not properly before this Court, it must be dismissed.

Standard of Review

This Court reviews restitution orders for correction of errors at law. *Jose*, 636 N.W.2d at 43. When reviewing a restitution order, the Court "determine[s] whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). To the extent that Weston raises a constitutional claim, the Court's review is de novo. *See State v. Love*, 589 N.W.2d 49, 50 (Iowa 1998).

A defendant seeking "to upset an order for restitution" for court costs and attorney fees "'has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion.'" *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985) (quoting *State v. Storrs*, 351 N.W.2d 520, 522 (Iowa 1984)); *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa Ct. App. 1995).

Merits

1. Restitution Framework

Restitution is mandatory in every criminal case in which the defendant is found or pleads guilty. Iowa Code § 910.2(1). The

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

At sentencing or "at a later date to be determined by the court," *the sentencing court* is required to "set out the amount of restitution . . . and the persons to whom restitution must be paid." *Id.* (emphasis added). "If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time." *Id.* The court must then "issue a permanent, supplemental order, setting the full amount of restitution[,]" and "further supplemental orders, if necessary." *Id.* Together, these orders are

"known as the plan of restitution." *Id.*; *see State v. Harrison*, 351 N.W.2d 526, 528 (Iowa 1984) (stating that a restitution order "must include a plan of restitution setting out the amounts and kind of restitution in accordance with the priorities established in section 910.2").

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

Nevertheless, at any time during the defendant's probation, parole, or incarceration, the defendant "may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing" if one is warranted. Iowa Code §

910.7(1). The court may modify the plan of restitution or plan of payment, or both. *Id.* § 910.7(2).

2. Reasonable ability to pay

At issue here is the sentencing court's finding—or lack thereof—of Weston's reasonable ability to pay the costs of the action and attorney fees. The parties agree that the sentencing court is constitutionally required to make an ability-to-pay finding. *See Harrison*, 351 N.W.2d at 529 (emphasis and alterations omitted) ("We believe that section 910.2 requires the sentencing court to order restitution in the plan of restitution 'for court costs, court-appointed attorney fees or the expense of a public defender when applicable' only 'to the extent that the offender is reasonably able to make such restitution'"); *see also Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000) (stating that "[t]he 'reasonable able to pay' requirement enables section 910.2 to withstand constitutional attack"); Appellant's Brief at 27-30. But, as discussed above, the court "is not required to give consideration to the defendant's ability to pay" until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *Swartz*, 601 N.W.2d at 354. In the case of a defendant serving a term of imprisonment, the court's

determination of whether the defendant is reasonably able to pay costs and fees "is more appropriately based on [his] ability to pay the current installments than his ability to ultimately pay the total amount due." *State v. Van Hoff*, 415 N.W.2d 647, 649 (Iowa 1987).

3. The district court did not yet have the obligation to determine whether Weston had the reasonable ability to pay court costs and attorney's fees.

Because the sentencing order here did not include a plan of restitution and because the district court has not yet entered any supplemental orders imposing the amount of restitution, the court was not yet required to determine whether Weston had the reasonable ability to pay court costs or attorney fees. Thus, it did not error by not making a reasonable-ability-to-pay finding.

The costs and attorney's fees listed in the Combined General Docket or in the financial section of Iowa Courts Online are not enough to prompt a reasonable-ability-to-pay requirement. There cannot be a complete or even a temporary restitution plan without a court order setting forth the amount and type of restitution ordered. *See* Iowa Code § 910.3 (requiring that "the court shall set out the amount of restitution[,]" either at sentencing or in "a permanent, supplemental order, setting the full amount of restitution"). Although

the county attorney, clerk of court, public defender, and sheriff or municipality each has a role in compiling the numbers, the statute plainly requires that the court issue restitution orders setting forth the amount of restitution. *See id*. The district court may order these amounts in its sentencing order, or at a later time in supplemental orders. *See id*. Either way, however, the amount is not enforceable against the defendant until the district court makes it part of an order. *See Campbell*, 2016 WL 4543763, at *3 n.4 (citing *Bader v. State*, 559 N.W.2d 1, 3-4 (Iowa 1997)) (questioning "the propriety of sending an account to collections before the court has completed the plan of restitution and determined the total amount due").

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

least "an estimate of the total amount of restitution" is "premature and lack[s] evidentiary support." *See Campbell*, 2016 WL 4543763, at *4. The district court did not err by failing to assess Weston's reasonable ability to pay court costs and attorney's fees.

4. Alternatively, the record demonstrates that Weston did have the ability to pay up to $5,000 in court costs and attorney's fees.

Even if this Court finds that there was a plan of restitution in place at the time of sentencing and that the district court was required to make an ability-to-pay determination, the record supports the conclusion that Weston has the reasonable ability to pay up to $5,000 in court costs and attorney's fees. *C.f. Kaelin*, 362 N.W.2d at 528 (refusing to hold that a district court's failure to state on the record its reasons for ordering restitution for court costs and attorney fees invalidates the restitution order).

As discussed above, the State asked the district court to impose the full amount of court costs and attorney's fees. Sent. Hr'g Tr. 5:21-25. Weston did not object. *See* Sent. Hr'g Tr. 6:15-14:4. Then, after extended discussion of Weston's employment and after obtaining from Weston's counsel an estimate of the amount of his fees ("in excess of probably 4 or $5,000"), the court stated that Weston

"should be responsible to pay back the costs." Sent. Hr'g Tr. 15:19-16:3. This is enough to support the court's restitution order for both costs and fees. *See State v. Bonilla*, No. 17-0491, 2018 WL 2084854, at *4 (Iowa Ct. App. May 2, 2018) (concluding that the district court considered the defendant's reasonable ability to pay in ordering attorney's fees and court costs where "the court considered factors relevant to [the defendant's] ability to pay").

The record supports the district court's finding. Weston is employed, has a driver's license, and the district court suspended all but 120 days of his sentence. Sent. Hr'g Tr. 8:25-9:25; 10:21-11:24; 13:9-14:5; 15:6-11. Moreover, the financial page of Iowa Courts Online shows that Weston has already paid $5,000 in "costs." Iowa Courts Online, https://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm, last visited Aug. 21, 2018). The district court did not abuse its discretion in concluding that Weston has the reasonable ability to pay up to $5,000 in costs and attorney's fees.[2]

[2] The State concedes that the current record does not support a finding that Weston has the reasonable ability to pay anything beyond $5,000.

For all of those reasons, this Court should decline to reach the merits and dismiss Weston's appeal of this issue on ripeness and exhaustion grounds. At most, the Court should affirm but instruct the district court to issue "a permanent, supplemental order, setting forth the full amount of restitution[,]" as required by Iowa Code section 910.3. *See Campbell*, 2016 WL 4543763, at *4. At that point, the district court will be required to determine whether Weston is reasonably able to pay the amounts owed. *See id.* If Weston "believes the forthcoming plan of restitution does not reflect his reasonable ability to pay, he may petition the district court for modification under Iowa Code section 910.7. *See id.* at *4.

III. The district court correctly assessed the costs of the dismissed counts to the State.

Preservation of Error

Weston also argues that by assessing him court costs associated with his dismissed counts, the district court entered an illegal sentence. "An illegal sentence may be corrected at any time and is not subject to normal rules of error preservation." *State v. Smith*, No. 15-2194, 2017 WL 108309, at *4 (Iowa Ct. App. Jan. 11, 2017) (citing *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009)).

Standard of Review

The Court reviews claims of an illegal sentence for the correction of legal error. *See State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998).

Merits

As discussed in detail above, Weston's challenge to the district court's imposition of costs is premature because the district court has not yet entered a specific amount. *See Martin*, at 2013 WL 4506163, at *2 & n.3. Should the Court reach the issue, however, it should conclude that the district court's assessment of costs did not amount to an illegal sentence.

"[T]he assessment of court costs associated with dismissed counts in a multi-count trial information constitutes an illegal sentence unless the plea agreement provides" otherwise. *State v. Ruth*, No. 17-0270, 2017 WL 4317329, at *1 (Sept. 27, 2017) (citing *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991)). Here, in its dismissal order, the district court plainly assessed to the State the costs associated with the two dismissed counts. *See* Order Dismissing Counts I & III; App. 11. Thus, in its sentencing order, the court did not need to distinguish between costs associated with the dismissed

counts and those associated with the count to which Weston was found guilty; it had already done so.

Nor has Weston proven that any of the costs outlined in the Combined General Docket are "solely attributable to the dismissed counts of the trial information." *Ruth*, 2017 WL 4317329, at *1; *State v. Haywood*, No. 17-1187, 2018 WL 3650328, at *2 (Iowa Ct. App. Aug. 1, 2018); *State v. Johnson*, 887 N.W.2d 178, 182 (Iowa Ct. App. 2016). In his challenge, Weston points to filing fees, court reporter fees, and sheriff transportation fees that were accrued before the district court dismissed two of the three counts again him. *See* Appellant's Brief at 32-34. Those costs, however, can all also "be reasonably attributed to the offense to which" Weston was found guilty. *See Ruth*, 2017 WL 4317329, at *1. On this record, the Court cannot conclude that Weston's sentence was illegal.

CONCLUSION

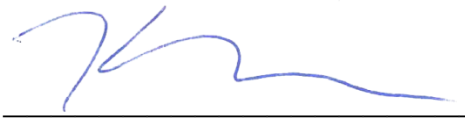
For all of the reasons set forth above, the State respectfully requests that this Court dismiss Weston's challenge to the district court's restitution order and affirm the court's sentencing order.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument. Should the Court grant oral argument, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



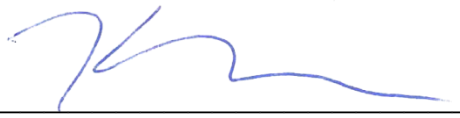
KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
katie.krickbaum@ag.iowa.gov

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 **5,844** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: September 19, 2018



KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
katie.krickbaum@ag.iowa.gov