ELECTRONICALLY FILED DEC 24, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 17-1838
	)	
JONATHAN SHANE WESTON,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR APPANOOSE COUNTY
HONORABLE RANDY S. DeGEEST, JUDGE
(JURY TRIAL & SENTENCING)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 5, 2018

MARK C. SMITH
State Appellate Defender

VIDHYA K. REDDY
Assistant Appellate Defender
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On December 24, 2018, 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 Jonathan Weston, 301 N. Main St, Numa, Iowa 52544.

STATE APPELLATE DEFENDER

/s/ Vidhya K. Reddy
VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

VKR/lr/6/18
VKR/sm/9/18
VKR/sm/12/18

QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court failed to substantially comply with Weston's right of allocution at sentencing?

II. Whether the portion of the sentencing order directing Weston to pay court costs must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence? Additionally, whether the district court erred in ordering Weston to pay court costs and attorney fees, without making any ability to pay determination?

III. Whether the district court entered an illegal sentence in taxing to Weston all court costs in the action rather than only those court costs associated with the Count 2 offense on which he was convicted?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules:

STATEMENT IN SUPPORT OF FURTHER REVIEW

1). The Court of Appeals erred in concluding Weston was afforded his right to allocution. The court mistakenly believed Weston did not have the right of allocution at sentencing. (Sent.p.11 L.2-4). Although the court stated "but I was going to grant it to you to make any statement you want to say" (Sent.p.11 L.3-4), that statement was made in the midst of Weston's request to respond to the court's inquiry on the specific issue of his employment. The court's statement, in that context, did not unambiguously provide Defendant with an opportunity to volunteer any and all arguments or information he might have supporting mitigation of his sentence – as distinct from merely speaking to the employment matter at issue in the court's then-already-pending question.

Later, after the court had already pronounced judgment and the selected sentence, Weston (upon his personal request) was permitted to speak freely to voice arguments and information in mitigation of his sentence. (Sent.p.16 L.11-p.17 L.2). Such opportunity, however, came too late to comply

with the rule, as judgment and sentence had already been pronounced by the sentencing court. Rule 2.23(3)(d) requires the allocution right be afforded "*Prior to*... rendition [of judgment]". Iowa R. Crim. P. 2.23(3)(d) (emphasis added).

The district court's subsequent statement that it still believed the sentence already rendered was appropriate (Sent.p.17 L.3-p.18 L.1), did not cure the error. The purpose of the requirement that a defendant's right of allocution be entertained *prior* to the rendition of judgment is to ensure the court properly takes into account such information prior to selecting the sentence. It is not enough that, after the court already commits to a particular sentence, it claims to disclaim that the defendant's information provided in allocution would have made any difference in the sentence. See State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) (reversing though "the district court attempted to disclaim the reference to the impermissible sentencing factor").

2). Additionally, the district court erred in ordering Weston to pay court costs and attorney fees, without making

any ability to pay determination. The Court of Appeals concluded "the challenge is 'not ripe' because there is not yet a plan of restitution." (CTA Opin. p.5). And yet, even at the time the combined general docket was generated in November 2017, Weston's court debt herein had already been deemed *delinquent* and sent to third party debt collection, with a $331.13 collection fee added on – all without any so-specific "plan of restitution" document ever being filed. See (Combined Gen. Docket, p.13: Financial Summary)(App.22) (listing 11/10/17 entry of $331.13 owed and due for "THIRD PARTY DEBT COLLECT").

Weston respectfully requests this Court to clarify the proper procedure for considering the defendant's reasonable ability to pay criminal restitution. Caselaw in this area is conflicting, and clarification is needed. Weston respectfully submits State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984) and State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985) were correct in holding that, to pass constitutional muster, the reasonable ability to pay determination must be made *at the*

time of sentencing. Any contrary portions of State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999) and State v. Jackson, 601 N.W.2d 354 (Iowa 1999) – both relied upon by the Court of Appeals herein – should be overruled.

3). Finally, the district court entered an illegal sentence in taxing to Weston all court costs in the action rather than only those court costs associated with the Count 2 offense on which he was convicted. The Court of Appeals noted "any costs arising from counts I and III were assessed to the State by a court order dismissing those counts prior to trial." (CTA Opin., p.5 n.1). However, the "Judgment/Lien Detail" of the combined general docket shows judgment entered "Against" Defendant and "For" the State of Iowa for "COSTS", without specifying costs only for the convicted counts. (Combined Gen. Docket, p.12)(App.21). Further the "Financial Summary" page of the combined general docket, shows that all of the court costs were listed as due from Defendant, and none were proportioned out as required under State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991). (Combined

Gen. Docket, p.13)(App.22). This would appear to be because the sentencing order provided Weston must pay court costs as assessed by the clerk without specifying he should be made to pay only those costs associated with the convicted count (Count 2). See (10/23/17 Sentence, p.3 ¶10)(App.17).

WHEREFORE, Defendant-Appellant Jonathan Shane Weston respectfully requests this Court grant further review of the Court of Appeals' December 5, 2018 decision.

STATEMENT OF THE CASE

Defendant-Appellant Jonathan Shane Weston seeks further review of the Court of Appeals decision affirming his sentence for Domestic Abuse Assault Causing Bodily Injury, a Serious Misdemeanor in violation of Iowa Code sections 708.1 and 708.2A(2)(b) (2015)

ARGUMENT

I. The district court failed to substantially comply with Weston's right of allocution at sentencing.

A. Preservation of Error: The general rule requiring error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

B. Standard of Review: The standard of review for sentencing procedures is an abuse of discretion. State v. Craig, 562 N.W.2d 633, 634 (Iowa 1997).

C. Discussion: Iowa Rule of Criminal Procedure 2.23(3)(d) provides that "prior to... rendition [of judgment], 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." Iowa R. Crim. P. 2.23(3)(d). Where the allocution requirement is not substantially complied with, resentencing is required. State v. Lamadue, 622 N.W.2d 302, 304 (Iowa 2001).

To comply, the court must give the defendant "an opportunity to volunteer any information helpful to the defendant's cause." State v. Duckworth, 597 N.W.2d 799, 800 (Iowa 1999). The sentencing judge "should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." State v. Craig, 562 N.W.2d 633, 636 (Iowa 1997).

In the present case, the sentencing court failed to substantially comply with the obligation to afford Weston his personal right of allocution prior to the court's rendition of judgment.

At one point, after hearing defense counsel's discussion of Defendant's employment situation, the sentencing court questioned whether Weston was presently employed, and

Weston personally responded to answer that he was employed and to provide an explanation of that employment. (Sent.p.8 L.25-p.9 L.16). Later, the court again questioned Weston's employment status. (Sent.p.110 L.21-25). Weston again personally sought to interject a response to the court's question on the employment issue, resulting in the following exchange:

> 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. Stadiums are a seasonal time thing, and the big part of them is football bleachers, which is September is when your football season starts your rush on them. Now the ones he's waiting on the concrete on are the late bleachers or the baseball, rodeo arenas, so it gets a break in there. And probably even in that time there will be a short break at Thanksgiving. He's not going to work straight through that.

(Sent.p.10 L.21-p.11 L.17). The court then redirected questioning back to defense counsel, stating:

> THE COURT: So, Monte, why shouldn't I give your client 365 days in jail, which I'm inclined to do?

(Sent.p.11 L.18-19). The court engaged in further discussion with defense counsel and the prosecuting attorney regarding the appropriate sentence, occasionally (on four occasions) directing particular questions to Weston regarding his access to a vehicle and his employment. (Sent.p.11 L.18-p.14 L.5). The court then proceeded to pronounce its judgment and sentence against Weston, imposing 365 days in jail and suspending all but 120 days. (Sent.p.14 L.6-p.15 L.16). After the court informed Weston there was a sheriff present to take him into custody on the sentence imposed, Weston personally interjected:

> THE DEFENDANT: I can't say anything? You know, I?
>
> THE COURT: I gave you an opportunity. Do you have something else you want to say?
>
> THE DEFENDANT: I just feel like I really wish to, you know, there was more -- I did everything I

> could do, and maybe I didn't know what to do on the notarized statements, but all the evidence, I did everything I could to prove everything I could prove, that her statements was a lie. And I don't know how that possibly even got to the jury trial if -- I was even offered this as a plea bargain.
>
> I didn't take it because I wasn't guilty of it, and my ex-girlfriend of 2004 that I'm still friends with, was -- is friends with me and writing a statement for the next case I'm on. And I feel like going into custody now puts me where I'm not going to be able to get the right to -- I don't know. I'm sorry. I just don't feel like I really got –

(Sent.p.16 L.9-p.17 L.2).

The district court failed to substantially comply with Weston's right of allocution at sentencing. The court mistakenly believed Weston did not have the right of allocution at sentencing. (Sent.p.11 L.2-4); Compare Iowa R. Crim. P. 2.23(3)(d) (providing for right of allocution). Although the court stated "but I was going to grant it to you to make any statement you want to say", that statement was made in the midst of Weston's request to respond to the Court's inquiry on the specific issue of his employment. The court's statement, in that context, did not unambiguously provide Defendant with an opportunity to volunteer any and all arguments or

information he might have supporting mitigation of his sentence – as distinct from merely speaking to the employment matter at issue in the court's then-already-pending question. That is, in context, the court's reference to an opportunity for allocution would be understood as an ability to personally answer the court's questions concerning employment, not to volunteer any and all information Defendant may wish to personally provide in mitigation of sentence untethered from the specific factual inquiry made by the court. See State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996) (Allocution requirement not substantially complied with where court's "question did not invite Millsap to address the court in mitigation of the sentence, nor did the surrounding circumstances reveal Millsap should have understood the court was giving him the opportunity."); State v. Nosa, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007) ("The important thing is whether the defendant is given an opportunity to volunteer any information helpful to the defendant's case.").

Moreover, the wording of the court's statement ("I was going to grant it to you to make any statement you want to say") suggested that the court would address Weston's allocution right at some later point of the sentencing hearing, not that this particular moment (when Weston was responding to the court's pending inquiry on the specific issue of his employment) was the time to raise any and all arguments or information Weston might wish to personally present in mitigation of punishment. After Weston responded to the court's specific inquiry regarding his employment, the sentencing court then redirected its questioning back to defense counsel and away from Defendant. (Sent.p.11 p.18-19) ("So, Monte, why shouldn't I give your client 365 days in jail, which I'm inclined to do?"). The court did not subsequently invite Defendant to volunteer any information or arguments he may personally wish to make in mitigation of sentence.

Subsequently, after the court had already pronounced judgment and the selected sentence in Weston's case, Weston

interjected stating: "I can't say anything? You know, I?" (Sent.p.16 L.9-10). At that point, Weston was permitted to speak freely to voice arguments and information in mitigation of his sentence. (Sent.p.16 L.11-p.17 L.2). Such opportunity, however, came too late to comply with the rule, as judgment and sentence had already been pronounced by the sentencing court. Rule 2.23(3)(d) requires that the allocution right be afforded "*Prior to*... rendition [of judgment]". Iowa R. Crim. P. 2.23(3)(d) (emphasis added). Although the court subsequently stated it still believed the sentence it already rendered to be appropriate (Sent.p.17 L.3-p.18 L.1), the purpose of the requirement that a defendant's right of allocution be entertained *prior* to the rendition of judgment is to ensure the court properly takes into account such information prior to selecting the sentence. It is not enough that, after the court already commits to a particular sentence, it claims to disclaim that the defendant's information provided in allocution would have made any difference in the sentence. See State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) (ordering resentencing,

"although the district court attempted to disclaim the reference to the impermissible sentencing factor"). A new sentencing hearing should be ordered.

D. Conclusion: Weston respectfully requests that this Court vacate his sentence and remand for a new sentencing hearing.

II. The portion of the sentencing order directing Weston to pay court costs must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence. Additionally, the district court erred in ordering Weston to pay court costs and attorney fees, without making any ability to pay determination.

A. Preservation of Error: The district court's sentence may be reviewed on appeal even where there was no objection in the district court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999).

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

C. Discussion: Weston respectfully urges that the portion of the sentencing order directing him to pay court costs must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence (which included no reference to court costs). Additionally, the portion of the sentencing order directing him to pay reimbursement for court-appointed attorney fees (and also the portion ordering payment of court costs, if not removable by way of a nunc pro tunc order) amounted to an illegal sentence and abuse of discretion as there was no finding of an ability to pay those fees and costs.

1). Nunc Pro Tunc (Court Costs):

The portion of the written sentencing order assessing court costs (10/23/17 Sentence, p.3 ¶10)(App.17) is in conflict with the court's oral pronouncement of sentence which made no reference to court costs (Sent.p.15 L.6-p.16 L.3). Where there is a discrepancy between the oral pronouncement of sentence and the written judgement, the oral pronouncement governs. State v. Hess, 533 N.W.2d 525, 527-529 (Iowa 1995).

A nunc pro tunc should accordingly be entered removing from the written sentencing order Weston's obligation to pay court costs. See (10/23/17 Sentence, p.3 ¶10)(App.17)(ordering defendant to pay "Court costs... (Clerk to assess.)").

2). Illegal Sentence and Abuse of Discretion (Court Costs and Court Appointed Attorney Fees)

The legislature specifically provided that the imposition of restitution for the cost of legal assistance and for court costs is subject to a determination of the defendant's reasonable ability to pay. See Iowa Code section 910.2(1) (2017); Iowa Court R. 26.2(10)(a).

A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Cf. Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983). "A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be

reasonably able to pay the judgment." State v. Dudley, 766 N.W.2d 606, 614-615 (Iowa 2009). See also State v. Haines, 360 N.W.2d at 793

Published Supreme Court case law is conflicting. Recently, this Court addressed a sentencing order which stated the court would assess the entirety of defendant's appellate attorney fees against him unless he filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of procedendo following his appeal. State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018). The Supreme Court stated "when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay." Id.

Coleman appears to follow the Harrison and Haines line of reasoning. Harrison provided that the "reasonable ability to pay" provision is an "express condition on the determination of the amount of restitution for court costs and attorney fees."

"The sentencing court would never get to the point of exercising this authority if it were mandated to order full restitution for court costs and attorney fees without regard to the offender's ability to pay." State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Therefore, this discretion must be exercised at the sentencing hearing. Id. The Harrison holding was followed in Haines. State v. Haines, 360 N.W.2d at 797 (Court failed to exercise discretion to determine whether Haines was reasonably able to pay all or part of attorney fees).

But in Blank, the Court focused on not on the entire amount of restitution due, but on Blank's ability to pay the current installment. State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997). The Blank Court cited State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987).

In State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999) the defendant challenged that the district court improperly ordered restitution for the amount of court costs and defendant's court-appointed lawyer fees without first making a

determination of the defendant's ability to pay. The Court concluded:

> that he may not advance that claim in this court on the present record for two reasons. First, it does not appear that the ***plan of restitution*** contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Until that remedy has been exhausted we have no basis for reviewing the issue that defendant raises.

Swartz, 601 N.W.2d at 354 (emphasis added).

The Supreme Court decided Jackson the same day as Swartz. State v. Jackson, 601 N.W.2d 354 (Iowa 1999). The Court followed its holding in Swartz. The Court again held that a "***plan of restitution*** contemplated by Iowa Code section 910.3" must be completed before the district court is required to give consideration to the defendant's ability to pay. And a person who is dissatisfied with the amount of restitution required by the plan must petition pursuant to Iowa Code section 910.7 for a modification. "Unless that remedy has been exhausted, we have no basis for reviewing

the issue in this court." Jackson, 601 N.W.2d at 357 (emphasis added).

The Court in Jose concluded that Swartz had not challenged the total amount of criminal restitution (restitution plan), but the restitution plan of payment. State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001). The Swartz opinion does not use the phrase "plan of payment." Additionally, Swartz and Jackson both refer to Iowa Code section 910.3 plan of restitution. Swartz, 601 N.W.2d at 354; Jackson, 601 N.W.2d at 357. Iowa Code section 910.3 requires the district court to determine the "amount of restitution" and such "court orders shall be known as the plan of restitution." Iowa Code § 910.3 (2017).

In addition to being contrary to the Supreme Court's pronouncement in the Harrison and Haines line of cases, the Swartz and Jackson line of cases fail to adequately take into consideration that the legislature provided the practical process of assessing court costs and attorney fees. The clerk of court is tasked with the duty of implementing the criminal

judgment order. Iowa Code § 602.8102(141) (2017). The clerk of court must collect the court reporter fees, collect filing fees, and carry out duties related to probations and restitutions. Iowa Code § 625.8, § 602.8102(99) & (135), § 602.8106(1) (2017). As a practical matter, once the district court orders a defendant to pay court costs and attorney fees, the clerk of court assesses the amount authorized by Code or the amount paid by the State Public Defender. There is no further order containing a specific amount entered by the court.

The clerk is required to send the restitution plan to the Department of Correctional Services if the defendant is placed on probation or is incarcerated. Iowa Code § 907.8, § 910.4, § 910.5(1)(a), § 602.8102(135) & (141) (2017). The restitution plan is complete after sentencing when the clerk assesses the fines, fees, surcharges and other restitution as order by the judgment order. In general, nothing more will filed unless the defendant is sentenced to custody of the Department of Corrections. The 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) (2017).

The restitution plan of payment is final at the time of sentencing. Generally, the court requires payment of fines, surcharges, attorney fees and other restitution be paid the day of sentencing. Iowa Ct. R. 26.2(1); Iowa Code § 602.807(1)(a). If court debt is not paid within 30 days, it may be sent to collections and a collection fee of up to 25% may be tacked on to the outstanding balance. See Iowa Code § 602.8107(5)(b). However, *at sentencing*, the court may establish a payment plan. Iowa Ct. R. 26.2(2)(1)-(5). Under either option provided by Iowa Court Rule 26, the restitution plan of payment is established *at the time of sentencing.*

Weston respectfully submits the Harrison and Haines Courts were correct in its holding that in order to pass constitutional muster the reasonable ability to pay determination must be made at the time of sentencing or upon supplemental request and order. If this determination was not made, the defendant can challenge it on direct appeal. Any

contrary portions of Swartz and Jackson should be overruled. Additionally, the district court has the obligation to determine the total amount of criminal restitution the defendant has the reasonability to pay, not the current installment as held in Blank. If the installment amount is the determinative factor, a defendant's right to counsel will be chilled because the debt could last a lifetime[1] and the reasonable ability to pay will be meaningless. To the extent Blank and Van Hoff hold otherwise, they should be overruled.

D. Conclusion: Weston respectfully requests that the portion of the sentencing order assessing court costs and court-appointed attorney fees should be vacated and remanded to the district court for entry of a corrected sentencing order omitting that language.

[1] Court debt is not written off until 65 years after the date of imposition. Iowa Code § 602.8107(6) (2017).

III. The district court entered an illegal sentence in taxing to Weston all court costs in the action rather than only those court costs associated with the Count 2 offense on which he was convicted.

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

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

C. Discussion: Assessment to Weston of all court costs of the action rather than only those costs associated with the convicted count (Count 2), amounted to an illegal sentence.

The State initially charged Weston with three counts, in a multi-count trial information. (2/27/17 TI)(App.4-5). However, on May 18, 2017, the State moved to dismiss Counts 1 and 3 "in the interest of justice" on grounds that the State "lack[ed] sufficient evidence" to pursue those counts to trial. (5/18/17 Mot.Dismiss)(App.10). On the same date, the court

entered an order stating those counts would be dismissed and that "the costs of said dismissals are assessed to the State." (5/18/17 Order Dismissing)(App.11-12).

Weston subsequently proceeded to trial on the remaining Count 2 offense, and was convicted and sentenced for a lesser-included offense of that count. (Trial p.1 L.1-25, p.5 L.9-20, p.177 L.6-23); (5/24/17 Verdict Form)(App.13-14); (Sent.p.15 L.6-p.16 L.3); (10/23/17 Sentence)(App.15-18). Although the court's earlier May 18, 2017 order specified that Counts 1 and 3 were to be dismissed with "the costs of said dismissals... assessed to the State" (5/18/17 Order Dismissing)(App.11-12), the court's subsequent October 23, 2017 sentencing order directed that the court costs be assessed against Weston, without limiting the costs assessed to only those costs associated with the Count 2 charge. See (10/23/17 Sentence, p.3 ¶10)(App.17)("Court costs in the amount of $ _____. (Clerk to assess.)."). The financial detail of the Combined General Docket indicates that Weston was charged the full court costs, including those incurred prior to May 18,

2018 (the date Counts 1 and 3 were dismissed) in addition to the costs incurred after that date. See (Comb. Gen. Docket, p.13: Financial Summary)(App.22). Additionally, the judgment and lien detail of the Combined General Docket indicates judgment was entered against Weston and in favor of the State for "Costs", but that no such judgment was entered against the State for the costs associated with the dismissed Counts 1 and 3. See e.g., (Combined General Docket, p.12: Judgment/Lien Detail)(App.21) (specifying judgment was entered "Against" Weston and "For" the "State of Iowa" for "FINE $315 + S/C $110.25 + COSTS + ATTY FEES").

To the extent the sentencing court ordered Weston to be assessed *all* costs rather than only the costs associated with the Count 2 charge on which he was convicted, such assessment amounted to a statutorily unauthorized, and therefore illegal, sentence.

Court costs "are taxable only to the extent provided by statute." City of Cedar Rapids v. Linn County, 267 N.W.2d 673 (Iowa 1978). "In the absence of such statutory

authorization, a court has no power to award costs against a defendant...." Woodbury County v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969) (quoting 20 Am.Jur.2d, Costs, section 100). See also Poyner, 2007 WL 4322193, at *2 (holding defendant "did not receive an illegal sentence" because taxation of costs to him was authorized by statute).

Under the Iowa Code, a court may make a defendant responsible for court costs associated with a particular charge only when the defendant pleads or is found guilty on such charge. No statutory provision authorizes making a defendant responsible for court costs associated with a charge that is ultimately dismissed by the State. See Iowa Code § 815.13 (2017) (stating prosecution "fees and costs are recoverable by the [prosecuting] county... from the defendant *unless* the defendant is found not guilty or *the action is dismissed*....") (emphasis added); Iowa Code § 910.2 (2017) ("In all criminal cases in *which there is a plea [or] verdict of guilty*..., the sentencing court shall order that restitution be made by each

offender... to the clerk of court for... court costs....") (emphasis added).

"... Iowa Code section 815.13 and section 910.2 clearly require... that only such... costs attributable to the charge on which a criminal defendant is convicted should be recoverable" *and "costs not clearly associated with any single charge should only be assessed proportionally against the defendant."* State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991) (emphasis added). See also Id. ("Since the defendant was only convicted on one of three counts he should be required to pay only one-third of these costs" that "are not clearly associated with any single charge"); State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009) ("...[I]t is elementary that a winning party does not pay court costs."); State v. Hill, No. 03-0560, 2004 WL 433844, at *2 (Iowa Ct. App. March 10, 2004) (district court erred in ordering defendant to pay total court costs from mistrial, as defendant was required to pay restitution only for court costs associated with the charge to which he ultimately pled guilty, and court costs not clearly associated with the charge to which he pled

guilty should be assessed against defendant at a rate of one-half); State v. Wheeler, No. 11-0827, 2012 WL 3026274, at *1-2 (Iowa Ct. App. July 25, 2013) (Defendant should not have been taxed court costs on charge that was dismissed by the State).

While parties to a plea agreement are free to "mak[e] a provision covering the payment of costs" even in the absence of independent statutory authorization, Petrie, 478 N.W.2d at 622, no such agreement existed in present case.

In State v. McMurry, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) and State v. Ruth, No. 17-0270, 2017 WL 4317329, at *1 (Iowa Ct. App. Sept. 27, 2017), the Iowa Court of Appeals declined to proportion costs under Petrie reasoning that costs that are associated with *both* dismissed *and* convicted counts are "clearly attributable" to the convicted count and therefore not proportionable. The Iowa Supreme Court has accepted further review in both of those cases. Defendant respectfully urges that the decisions on McMurry and Ruth are at odds with Petrie, which plainly

demonstrated that costs incurred pursuant to *both* dismissed *and* convicted counts are "not clearly associated with any *single* charge" and thus must be proportioned. Petrie, 478 N.W.2d at 622 (emphasis added). Our Supreme Court's decision in Petrie controls.

Weston was initially charged with three counts, but ultimately convicted of only one count. The two dismissed counts (Counts 1 and 3) were dismissed on May 18, 2017, at the request of the State. (5/18/17 Motion to Dismiss; 5/18/17 Order Dismissing)(App.10-12). None of the court costs incurred prior to the May 18, 2017 dismissal of Counts 1 and 3 were associated *solely* with the Count 2 offense for which Weston was ultimately convicted. See (Combined General Docket, p.13: Financial Summary)(App.22) (including in "Due Amount": 2/27/17 $100 filing and docketing fee; 2/6/17 and 5/8/17 court reporter fees of $40 a day; a number of 4/19/17 and 5/3/27 Sheriff's Fees totaling $269.47; and 4/25/17 and 5/3/17 Court Reporter invoices for $36.75 and $66.50 for deposition transcripts); See also

(4/24/17 Court Reporter Invoice for $36.75; 5/3/17 Court Reporter Invoice for $66.50)(App.8-9). Accordingly, the court costs incurred prior to the May 18, 2017 dismissal date should have been proportioned, with Weston responsible for only one-third of those costs. See Petrie, 478 N.W.2d at 622 (Stating that "costs not clearly associated with any *single* charge should only be assessed proportionally against the defendant" with the defendant "required to pay only one-third of these costs") (emphasis added).

Because Weston's payment of all costs of the action (rather than only those costs associated with the convicted Count 2 offense) was neither authorized by statute nor required under any plea agreement in the present case, the court entered an illegal sentence in directing that court costs be assessed against Weston, without limiting the costs assessed to only those costs associated with the Count 2 charge. The court's order taxing costs to Weston should be vacated, and this matter should be remanded to the district court with instructions to limit assessment of costs to Weston

to the costs associated with the Count 2 charge. See Petrie, 478 N.W.2d at 622 ("... only such... costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan" *and "costs not clearly associated with any single charge should only be assessed proportionally against the defendant."*) (emphasis added).

D. Conclusion: Weston respectfully requests that this Court vacate the district court's order taxing costs of the action to Weston, and remand this matter to the district court for entry of an order making Weston responsible only for those costs associated with the Count 2 charge on which he was convicted (contingent on the required ability to pay determination, discussed above in Division II(2)).

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 $3.92, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

VIDHYA K. REDDY
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 5,493 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Vidhya K. Reddy Dated: 12/24/18

VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

ELECTRONICALLY FILED DEC 05, 2018 CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 17-1838
Filed December 5, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN SHANE WESTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Appanoose County, Randy S. DeGeest, Judge.

Jonathan Weston appeals following conviction for domestic abuse assault causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Katie Krickbaum, Assistant Attorney General, for appellee.

Considered by Danilson, C.J., and Potterfield and Doyle, JJ.

DANILSON, Chief Judge.

Jonathan Weston appeals following conviction for domestic abuse assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2A(2)(b) (2017). His challenges are to the sentencing procedure and the sentence imposed. Because Weston was allowed his right to allocution and his restitution claim is premature, we affirm.

Weston first asserts the trial court did not substantially comply with his right of allocution. "Our review of sentencing procedures is for an abuse of discretion." *State v. Nosa*, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007). "Such abuse will be found only if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*; *see also State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997).

A sentencing court is required under Iowa Rule of Criminal Procedure 2.23(3)(a) to ask the defendant whether he or she "has any legal cause to show why judgment should not be pronounced against" him or her. Rule 2.23(3)(d) requires that prior to the court's rendition of judgment "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." Together, these requirements are referred to as a defendant's right to allocution. *See Craig*, 562 N.W.2d at 635-37.

> Sentencing courts are not required to use any particular language to satisfy rule 2.23(3)(d). *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999); *Craig*, 562 N.W.2d at 635. Substantial compliance with the rule is sufficient. *Duckworth*, 597 N.W.2d at 800. "The important thing is whether the defendant is given an opportunity to volunteer any information helpful to the defendant's case." *Craig*, 562 N.W.2d at 635. Therefore, as long

> as the district court provides the defendant with an opportunity to speak regarding his punishment, the court is in compliance with the rule.

Nosa, 738 N.W.2d at 660.

Here, the district court erroneously stated to Weston, "You don't have the right of allocution . . . ." But, in light of the unique circumstances presented here, we do not remand for resentencing. The district court initially asked Weston whether he knew "of any real reason why the court shouldn't proceed to enter judgment and do sentencing today," and Weston answered, "No." However, the court did allow Weston to address the court on a number of occasions prior to the court's imposition of judgment, and Weston did so. Weston explained his employment, and he responded to the court's questions about whether he had a vehicle and whether he would be able to travel to complete the domestic abuse program. Weston also informed the court about when his seasonal work would begin and spoke of his lack of seniority in the arena-building company. Weston's counsel argued against the maximum 365-day sentence.

The court announced it was imposing a sentence of 365 days, with all but 120 days suspended and credit for time served. Weston balked, stating, "I can't say anything?" Noting that it had already given him the opportunity, the court asked, "Do you have something else you want to say?" Weston then did address the court. The district court explained its reasoning and stated it "appreciated [Weston's] remarks," and it reaffirmed that the sentence it had announced was appropriate.

This case is not like *Nosa*, where the defendant did not respond to the court's question, "Is there anything else you want to say?" *See id.* ("After

reviewing the sentencing transcript, we agree [that Nosa was not afforded his right to allocution personally]. Although trial counsel availed himself of the opportunity to address the court on the subject of sentencing, our supreme court has held the right to allocution is personal to the defendant and will not be deemed exercised through counsel alone."). It was error for the court to state Weston did not have a right to allocution. Nevertheless, Weston's right was not denied here, and Weston exercised his right to allocute. *See State v. Millsap*, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996) ("As long as the defendant is provided an opportunity to speak about the punishment to be imposed, the right is satisfied."); *State v. Ludley*, 465 N.W.2d 912, 915 (Iowa Ct. App. 1990) ("Any comments you want to make at all regarding this offense?").

Weston next asserts the sentencing order must be corrected because it fails to conform to the oral pronouncement of sentence with respect to costs; that is, the court did not orally state costs would be imposed, but the judgment order indicated restitution would be required. Weston also asserts the court erred in directing him to pay court costs and attorney fees without making a finding that Weston had the ability to pay.

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

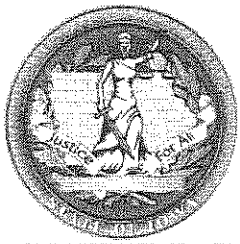
During the sentencing hearing, the State asked the court to impose "all court costs and all court-appointed attorney fees." Weston did not object or suggest an alternative amount. When entering judgment, the court asked defense counsel whether there were court-appointed attorney fees, and counsel

responded that his fees were "substantial . . . in excess of probably [$4000] or $5000." The court then ordered Weston to pay his attorney's fees and stated, "[G]oing from a B to a serious misdemeanor is a very successful case, but I think you should be responsible to pay back the costs." The district court's written judgment ordered Weston to pay an unspecified amount of court costs and court-appointed attorney's fees. We find no reason the district court must issue a nunc pro tunc.

Weston asserts, "The portions of the district court's sentence ordering Weston to pay court costs and court-appointed attorney fees without any ability-to-pay determination is statutorily and constitutionally unauthorized and illegal." The State counters that the challenge is "not ripe" because there is not yet a plan of restitution. We agree with the State. *See State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (stating until a plan of restitution is completed, "the court is not required to give consideration to the defendant's ability to pay"); *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999) (same).[1]

AFFIRMED.

[1] We note any costs arising from counts I and III were assessed to the State by a court order dismissing those counts prior to trial.



State of Iowa Courts

Case Number	Case Title
17-1838	State v. Weston

Electronically signed on 2018-12-05 09:28:46