

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 KATHY PERRY,)
)
 Defendant-Appellant.)

S.CT. NO. 18-0351

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE JOHN C. NELSON, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 13th day of September, 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 Kathy Perry, 2615 1st Street, Sioux City, IA 51106.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**WHETHER THE DISTRICT COURT ERRED BY ORDERING
THE DEFENDANT TO PAY RESTITUTION FOR JAIL AND
ATTORNEY FEES?**

Authorities

State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010)

State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016)

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State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004)

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal of a judgment of conviction following a guilty plea driving while barred in Woodbury County case number AGCR099470.

Course of Proceedings: On November 20, 2017, the defendant, Kathy Perry, was charged with driving while barred in violation of Iowa Code section 321.561 (2017), an aggravated misdemeanor. (Trial Information) (App. pp. 4-5). On January 24, 2018, Perry entered a written plea of guilty to the charge. (Written Plea of Guilty) (App. pp. 6-9). On the same day, the court sentenced Perry to 20 days in jail and ordered her to pay restitution for jail fees and attorney fees. The court suspended a \$625 fine. (Sentencing Order) (App. pp. 10-12). On February 26, 2018, Perry's attorney filed a notice of appeal. (Notice of Appeal) (App. pp. 13-14). On March 30, 2018, the

Iowa Supreme Court granted Perry's request for delayed appeal. (Iowa S. Ct. Order, 3/30/2018) (App. pp. 15-17).

Facts: The defendant, Kathy Perry, was pulled over by a Sioux City police officer after he observed her driving a car with an inoperable brake light. Perry's driver's license was barred at the time that she was driving the car. She was arrested and charged with driving while barred. (Minutes of Testimony) (Conf. App. pp. 4-12).

Further relevant facts will be discussed below.

ARGUMENT

THE DISTRICT COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION FOR JAIL AND ATTORNEY FEES.

Preservation of Error and Standard of Review: In this case, neither the plea nor the sentencing hearings were reported. There was no request for restitution filed by the prosecutor. The court simply made the restitution part of the sentencing order. (Sentencing Order) (App. pp. 10-12). Counsel did not object, and the sentencing order contained no language allowing the defendant to later request a hearing if she objected

to the restitution. However, in such cases, no objection is necessary to preserve an issue of irregularity in sentencing for appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant need no object to sentencing irregularity to preserve issue for appeal). Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). Additionally, when a plan of restitution has been made part of the sentencing order, the defendant has the right to a direct appeal. State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). Furthermore, when a court makes a finding of the defendant's ability to pay in the sentencing order, the appellate court can review that order. See, e.g. State v. Pace, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018).

The court reviews a district court's restitution order for

errors of law. State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004).

Discussion: The district court is required to order restitution in all criminal cases where there is a guilty plea or a verdict of guilt. Iowa Code § 910.2(1) (2017). Restitution is defined as “payment of pecuniary damages to a victim in an amount and in the manner provided by the offender’s plan of restitution.” Id. § 910.1(4). In general, “restitution ordered to the victim is made without regard to the defendant’s ability to pay.” State v. Wagner, 484 N.W.2d 212, 215-216 (Iowa Ct. App. 1992).

“However, restitution is ordered for crime victim assistance reimbursement, for public agencies, for court costs including correctional fees, for court-appointed attorney fees, for contribution to local anticrime organization, and for the medical assistance program only to the extent the defendant is reasonably able to pay.” Kurtz, 878 N.W.2d at 472 (citing Iowa Code § 910.2(1) (2015)). “Constitutionally, a court must determine a criminal defendant’s ability to pay before entering an order requiring such defendant to pay criminal restitution

pursuant to Iowa Code section 910.2.” Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000). The defendant has the burden to show either a failure of the court to exercise discretion or an abuse of that discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987).

The Iowa Court of Appeals has reversed restitution orders when the district court failed to make a determination of the defendant’s ability to pay and when the court found the defendant had the ability to pay despite the fact that the amount of the fees had yet to be determined. State v. Tanner, 14-1963, 2016 WL 4384468, at *5 (Iowa Ct. App. Aug. 17, 2016) (vacating the restitution portion of the sentence because the appellate court could not determine whether the court reasonably exercised its discretion when it ordered restitution for attorney’s fees and victim compensation); State v. Pace, 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018) (vacating the restitution portion of the sentencing order because the court abused its discretion when it determined the defendant was able to pay jail fees without knowing the amount

of those fees).

Regarding jail fees, the court in this case ordered as follows: “The Defendant shall make restitution to the Woodbury County Sherriff’s Office for correctional fees including medical service the defendant received pursuant to Iowa Code section 910.4 and Iowa Code section 346.7. The Woodbury County Sheriff shall file a claim for reimbursement.” (Sentencing Order) (App. pp. 10-12). With regard to the attorney’s fees, the court ordered as follows: “Upon review the court FINDS that Defendant is reasonably able to pay attorney fees.” (Sentencing Order) (App. pp. 10-12). The written plea of guilty that Perry signed advised that she understands that she “can” be ordered to make restitution to for attorney fees and that the jail “may charge up \$50.00 per day” while in custody. (Written Plea of Guilty) (App. pp. 6-9). The Woodbury County Sheriff has not filed a claim for fees. There is also no order indication in the record regarding the amount of attorney’s fees. The court abused its discretion by ordering restitution for jail and attorney’s fees without determining the amount. State v.

Pace, 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018).

Regarding the defendant's ability to pay the fees, the court made a finding that she was reasonably able to pay the attorney's fees, but made no such finding regarding the jail fees. (Sentencing Order) (App. pp. 10-12). The court abused its discretion on both counts. The court is constitutionally required to make a determination of the defendant's ability to pay the fees prior to ordering jail fees restitution. Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000). The court failed to do so regarding the jail fees. This portion of the sentencing order should therefore be vacated.

The court made a finding of the defendant's ability to pay attorney's fees, however, there is no such support for that finding in the record. The financial affidavit that Perry filed states that she had no job and no income. (Application for Court Appointed Counsel and Order) (Conf. App. p. 13). The Minutes of Testimony show that Perry had at least 11 license suspensions on her record for failure to pay fines, failing to post

security for an accident, and failure to satisfy a non-Iowa citation. (Minutes of Testimony) (Conf. App. pp. 4-12). The court abused its discretion by making a finding that the defendant was reasonably able to pay fees without any factual support. That portion of the sentencing order should be vacated.

CONCLUSION

The Appellant requests the court vacate the restitution order.

NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 1.50, and that amount has been paid in full by the Office of the Appellate Defender.

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

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) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,315 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Dated: 09/13/18

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