

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0351

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KATHY JO PERRY,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The district court properly ordered the defendant to pay restitution in accordance with its statutory directive.

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Iowa Code § 910.5(1)(d)
Iowa Code § 910.7(1)
Iowa Code § 910.7(2)
Iowa Code § 910.2(2)

ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case

Kathy Jo Perry appeals the district court's order regarding restitution. The Honorable John C. Nelson presided over the proceedings in Woodbury County. The issue on appeal is whether the court erred in ordering Perry to pay restitution for jail expenses and attorney fees.

Course of Proceedings

The State accepts Perry's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The State also accepts Perry's statement of the facts as essentially correct.

ARGUMENT

I. The district court properly ordered the defendant to pay restitution in accordance with its statutory directive.

Ripeness

Perry contends the district court erred when it ordered her to pay restitution for jail fees and attorney fees without knowing the amounts of those fees. Def. Brief at 10-12. She also argues that the court erred in finding she had the reasonable ability to pay the attorney fees without knowing the amount. *Id.* Perry, however, has failed to exhaust her remedies below as required. For that reason, this court should dismiss Perry's restitution 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. 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 Perry filed her notice of appeal, the plan of restitution was not complete. Not. of Appeal (2/26/18); App. 13. That is likely due to the fact that no amounts were included in the order. Sent. Order (1/24/18); App. 10-11. In fact, the sentencing order stated:

The Defendant shall make restitution to the Woodbury County Sheriff's Office for correctional fees*The Woodbury County Sheriff shall file a claim for reimbursement.*

Sent. Order (1/24/18); App. 10-11 (emphasis added).

The court also ordered Perry to pay her attorney fees and determined she had the reasonable ability to pay those fees. Sent. Order (1/24/18); App. 10-11. The court, however, did not enter an amount. Sent. Order (1/24/18); App. 10-11. The court also ordered Perry begin making payments of \$50 per month. Sent. Order (1/24/18); App. 10-11. Until the district court has “at a minimum, an estimate of the total amount of restitution,” it had no obligation to assess Perry’s ability to pay costs. *See Campbell*, 2016 WL 4543763, at *4. And Perry may not challenge the district court’s failure to make an ability-to-pay determination until that obligation exists. *See, e.g., 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 Perry entitled to directly appeal the district court’s reasonable ability to pay finding—or lack thereof—until she 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”).

The State notes, however, that in recent cases, the Court of Appeals remanded the case to the district court for hearing when a court determines that a defendant has the reasonable ability to pay before a plan of restitution is entered. *State v. Johnson*, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) (because the sentencing court made a

finding in its written order that Johnson was reasonably able to pay court-appointed attorney fees, it is “incorporated in the sentence” and may be directly appealable); *State v. Pace*, No. 16-1785, 2018 WL1629894, at *3 (Iowa Ct. App. 2018). The State submits that these cases are contrary to *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) and *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999), and should be overruled.

Thus, until the district court completes the plan of restitution and Perry exhausts her remedies under Iowa Code section 910.7, her claim is not ripe and not directly appealable. *See Jackson*, 601 N.W.2d at 357.

Preservation of Error

Perry incorrectly asserts that her restitution claim is a challenge to an illegal sentence that she may bring at any time. *See* Appellant’s Brief at 7-8. 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, particularly when the district court made no finding of the defendant’s ability to pay in its sentencing order. *See Campbell*, 2016 WL 4543763, at *3; *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).

Perry cannot yet bring her reasonable-ability-to-pay claim because events below have not yet triggered the district court’s obligation to make such a finding. Once the district court enters a supplemental order completing the plan of restitution, Perry will have the opportunity to challenge the district court’s finding (or lack thereof) that he has the reasonable ability to pay those amounts. After exhausting that remedy, Perry may then bring the claim back to this Court.

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).

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

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).

Everyone involved in the criminal case has a role in compiling the restitution figures. The county attorney is required to provide the court with “a statement of pecuniary damages to victims of the defendant” *Id.* § 910.3. If the amount is not available at the time of sentencing, the county attorney has thirty days after that date to provide the statement to the court. *Id.* It is the clerk of court’s job to provide the court with a statement of court-appointed attorney fees and court costs including correctional fees. *Id.*

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).

At issue here is the sentencing court’s finding that Perry had the reasonable ability to pay attorney fees without knowing the amount of the 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 91-92. The question is when the court is required to make that determination.

The State urges the Court to abide by *Swartz* and *Jackson*, and conclude that the sentencing 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).

Under the current law, if the district court sets forth the full amount of restitution and payment plan in its sentencing order, it should make a reasonable-ability-to-pay finding at that time. *See Harrison*, 351 N.W.2d at 529; *Van Hoff*, 415 N.W.2d at 649. In that case, the defendant may directly appeal the finding. *See State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). If, however, the district court postpones entry of the plan of restitution because the amount is not available, a defendant must wait until such time as the amount is available and the plan of payment is set before any action can be taken. *See Iowa Code §§ 910.2 & 910.3*. The defendant, however, may not appeal those findings until she challenges them in the district court under Iowa Code section 910.7. *See Jackson*, 601 N.W.2d at 357.

Alternatively, even if the court finds that Perry may directly appeal the district court's order, the court's reasonable ability to pay determination must be upheld. At the time the court sentenced Perry and found that she had the reasonable ability to pay attorney fees, no amounts were provided. Thus, the court made a proper determination that she had the reasonable ability to pay. That is, Perry had the reasonable ability to pay nothing if nothing was requested and nothing was ordered.

Similarly, Perry argues that the court erred in ordering her to pay jail fees without determining the amount. Def. Brief at 11. Without question, the jail fees constitute restitution. "Restitution" also includes "fines, penalties, and surcharges. . . court costs including correctional fees approved pursuant to section 356.7. . . " Iowa Code § 910.1(4). Iowa Code section 356.7 provides, in turn, that a county sheriff "may charge a prisoner who is eighteen years of age or older and who has been convicted of a criminal offense. . . for room and board provided to the prisoner while in custody of the county sheriff or municipality, and for any medical aid provided to the prisoner under section 356.6. . . . Iowa Code § 356.7. Before the correctional fees may be imposed, the statute mandates that the

district court approve the claim before it may be paid. *State v. Abrahamson*, 696 N.W.2d 589, 593 (Iowa 2005). The “ ‘sound judgment, practical sagacity, [and] wise discretion’ going into the order for reimbursement for room and board must be that of the court –not the sheriff.” *Id.*

Although the record does not establish that the district court approved the claim for jail or correctional fees, Perry suffered no harm because the sheriff did not file a claim for fees. *See* trial court docket. When and if the sheriff files the claim for fees, the court must approve the claim. *Id.* Until that occurs, Perry cannot challenge the court’s order.

The district court committed no error in ordering Perry to pay restitution because the court is required to do so by statute. Even though the court ordered her to pay jail fees and attorney fees, those amounts have not been determined and her challenge is premature. When the district court issues a supplemental order of restitution and the plan of payment is established, she may then challenge restitution.

CONCLUSION

The district court’s order must stand.

REQUEST FOR NONORAL SUBMISSION

This case involves routine challenges to restitution. Oral argument is not necessary to dispose of the claim. In the event oral argument is scheduled, the State requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,752** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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