

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) SUPREME COURT 19-0022
)
 DANIEL WESLEY DAVIS, JR.,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR TAMA COUNTY
HONORABLE MARY E. CHICHELLY, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

MARTHA J. LUCEY
Assistant Appellate Defender
mlucey@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEY FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 8th day of November, 2019, 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 Daniel Davis Jr., 4912 Walnut Dr., Pleasant Hill, Iowa 50327.

APPELLATE DEFENDER'S OFFICE

/s/ Martha J. Lucey

MARTHA J. LUCEY

Assistant Appellate Defender

Appellate Defender Office

Lucas Bldg., 4th Floor

321 E. 12th Street

Des Moines, IA 50319

(515) 281-8841

mlucey@spd.state.ia.us

appellatedefender@spd.state.ia.us

MJL/sm/7/19

MJL/sm/11/19

TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service.....	2
Table of Authorities	4
Statement of the Issue Presented for Review.....	6
Routing Statement	8
Statement of the Case	8
Argument	
The district court erred in ordering Davis to pay discretionary criminal restitution without a final order considering his reasonable ability to pay without undue hardship.	12
Conclusion.....	23
Request for Nonoral Submission	23
Attorney's Cost Certificate	23
Certificate of Compliance.....	24

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983).....	17
State v. Albright, 925 N.W.2d 144 (Iowa 2019)	12, 20, 22
State v. Alspach, 554 N.W.2d 882 (Iowa 1996)	12, 15
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001).....	15-16
State v. Covell, 925 N.W.2d 183 (Iowa 2019)	22
State v. Dudley, 766 N.W.2d 606 (Iowa 2009).....	15, 17
State v. Headley, 926 N.W.2d 545 (Iowa 2019)	22
State v. Haines, 360 N.W.2d 791 (Iowa 1985).....	17
State v. Harrison, 351 N.W.2d 526 (Iowa 1984)	17
State v. Jenkins, 788 N.W.2d 640 (Iowa 2010)	13
State v. Klawonn, 688 N.W.2d 271 (Iowa 2004)	13
State v. Mayberry, 415 N.W.2d 644 (Iowa 1987)	12, 15
State v. McMurry, 925 N.W.2d 592 (Iowa 2019).....	18
State v. Mosley, No. 17-1087, 2019 WL 1868186 (Iowa April 26, 2019)	13
State v. Petrie, 478 N.W.2d 620 (Iowa 1991).....	18

State v. Petty, 925 N.W.2d 190 (Iowa 2019) 22

State v. Rawls, No. 18-0882, 2019 WL 2145722
(Iowa Ct. App. May 15, 2019) 12

State v. Thomas, 520 N.W.2d 311 (Iowa Ct. App. 1994). 12

State v. Woody, 613 N.W.2d 215 (Iowa 2000) 12

Statutes & Court Rules:

Iowa Code § 815.9(3) (2017) 14-15

Iowa Code § 815.9(4) (2017) 15

Iowa Code § 910.2 (2017) 15

Iowa Code § 910.2(1) (2017) 12, 15-16

Iowa Code § 910.3 (2017) 20

Iowa Court R. 26.2(10)(a)..... 16

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

DID THE DISTRICT COURT ERR IN ORDERING DAVIS TO PAY DISCRETIONARY CRIMINAL RESTITUTION WITHOUT A FINAL ORDER CONSIDERING HIS REASONABLE ABILITY TO PAY WITHOUT UNDUE HARDSHIP?

Authorities

Iowa Code § 910.2(1) (2017)

State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996)

State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987)

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

State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000)

State v. Albright, 925 N.W.2d 144, 162 (Iowa 2019)

State v. Rawls, No. 18-0882, 2019 WL 2145722, at *2 (Iowa Ct. App. May 15, 2019)

State v. Mosley, No. 17-1087, 2019 WL 1868186, at *1 (Iowa April 26, 2019)

State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004)

State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010)

Iowa Code § 815.9(3) (2017)

Iowa Code § 910.2 (2017)

Iowa Code § 815.9(4) (2017)

State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)

State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001)

Iowa Court R. 26.2(10)(a)

State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985)

State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984)

Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983)

State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991)

State v. McMurry, 925 N.W.2d 592, 600-601 (Iowa 2019)

Iowa Code § 910.3 (2017)

State v. Covell, 925 N.W.2d 183, 189 (Iowa 2019)

State v. Petty, 925 N.W.2d 190, 197 (Iowa 2019)

State v. Headley, 926 N.W.2d 545, 553 (Iowa 2019)

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: Appellant Daniel Davis appeals following his guilty plea, judgment and sentence, to the charges of theft in the second degree in violation of Iowa Code sections 714.4 and 714.2(2) and possession of a controlled substance – third offense in violation of Iowa Code sections 124.401(5) (2017).

Course of Proceeding and Disposition Below: On May 9, 2018, the State charged Davis with Count I: theft in the first degree; Counts II and III: theft in the third degree; and Count IV; possession of a controlled substance (methamphetamine) – third offense, all for acts alleged on August 25, 2017. The State also noticed the habitual offender enhancement for the felony counts. (TI)(App. pp. 4-10).

On August 16, 2018, Davis appeared in court and entered Alford¹ guilty pleas pursuant to a plea agreement.

(Order Accepting Pleas & Judgment)(App. pp. 16-18). The prosecutor outlined the agreement:

[], in exchange for the Defendant's pleas of guilty to Count One, and that would be the lesser-included offense of Theft in the Second Degree, and Count Four, Possession of a Schedule II Controlled Substance, Third Offense, the State has agreed not to pursue the habitual felony enhancement. Further, the State will be dismissing Counts Two and Three. The Defendant agrees to go to prison, and there is a joint recommendation that all these sentences run concurrently with all imposed sentences that the Defendant is facing. Additionally I'd recommend the minimum fine and restitution. I have no objection to the Court suspending that fine in lieu of the restitution owed, the Defendant's costs and attorney fees. I think that should include all of the conditions of the plea. [].

(Tr. p. 2L17-p. 3L10). The plea agreement was binding on the court. (Tr. p. 3L13-17, p. 4L17-20).

Davis waived his right to a delay between his guilty pleas and sentencing. (Tr. p. 22L25-p. 24L6). Davis was sentenced to be incarcerated for a period not to exceed five years on each count to be served concurrently and

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

concurrently with previous sentences Davis was serving. The court suspended the fine on each count. The court imposed a \$125 law enforcement initiative surcharge on each count.

Davis was ordered to pay a \$10 DARE surcharge. The court also ordered Davis to pay the cost of the action and to reimburse the state for the cost of his legal assistance. The court ordered Davis to pay victim restitution pursuant to a statement of pecuniary damages to be filed by the state within thirty days. Count II and III were dismissed. (Tr. p. 26L21-p. 28L5; Order Accepting Pleas & Judgment)(App. pp. 16-18).

On August 31, 2018, the State filed the statement of pecuniary damages seeking \$2,000 in restitution. (Pecuniary Damages)(App. pp. 20-22). The court ordered Davis to pay \$2,000 in restitution. (Order for Pecuniary Damages)(App. pp. 23-24). Davis filed a Notice of Appeal on September 14, 2018. (NOA)(App. p. 25). On September 19, 2018, the Department of Corrections filed a restitution plan showing

Davis owed \$2,405.58 in restitution. (9/19/18 Restitution Plan)(App. p. 27).

Facts: At the guilty plea, the prosecutor outlined the factual basis and the evidence that would have been presented at trial:

Your Honor, the Defendant was at the Meskwaki Casino, I believe, that he collided with a vehicle that was parked there. When law enforcement began looking into the situation, it turned out the vehicle had been stolen from a car dealership in, I believe it was in Polk County, a situation where they had come sort of lock box on the side window of the car with a key in it. Anyway, the vehicle was stolen from the car dealership. And I believe a search warrant was executed; and in the execution of that search warrant, drugs were found in the car. The Defendant was ultimately charged - - he was driving the car. The Defendant was ultimately charged with theft of the vehicle as well as the controlled substance because he had a two prior felony convictions, two prior felony possession of controlled substance convictions, the drug offenses being possession of a controlled substance.

(Tr. p. 17L7-23, p. 21L5-13). See also Minutes (Conf. App. pp. 4-13).

ARGUMENT

THE DISTRICT COURT ERRED IN ORDERING DAVIS TO PAY DISCRETIONARY CRIMINAL RESTITUTION WITHOUT A FINAL ORDER CONSIDERING HIS REASONABLE ABILITY TO PAY WITHOUT UNDUE HARDSHIP.

Preservation of Error.

Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1) (2017); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). Procedurally defective, illegal, or void sentences are not subject to the usual concept of waiver or requirement of error preservation. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000).

Davis' complaint is properly raised on appeal because the court failed to follow the procedure outlined in State v. Albright, 925 N.W.2d 144, 162 (Iowa 2019). See also e.g. State v. Rawls, No. 18-0882, 2019 WL 2145722, at *2 (Iowa Ct. App. May 15, 2019) ("The State argues Rawls's claim is not

ripe for appellate review. The State made the same argument in *Albright*, but the court implicitly rejected it by ruling on the issue.”)(footnote omitted); State v. Mosley, No. 17-1087, 2019 WL 1868186, at *1 (Iowa April 26, 2019)(per curiam) (“Here, the district court did not have the benefit of the procedures outlined in *Albright* when it entered its order regarding restitution of court costs and attorney fees. Accordingly, we must vacate that part of the sentencing order regarding restitution and remand the case back to the district court.”).

Standard of Review.

The Court reviews restitution orders for correction of errors at law. State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010).

Discussion.

Davis was found to be indigent and was granted court-appointed counsel. (Order of Attorney Withdrawal & Appt. of Counsel; Financial Affidavit)(App. pp. 13-14; 15). At sentencing, the district court ordered Davis to pay restitution for court costs and attorney fees. (Order Accepting Pleas & Judgment p. 2)(App. p. 17). These costs were order as restitution, assessed by the clerk of court and are being collected by the Department of Corrections. (General Combined Docket p. 8 (Financial Summary); 9/19/18 Restitution Plan)(App. p. 26).²

When a person is granted an appointed attorney, he shall be required to reimburse the state for the total cost of legal assistance provided to the person. Iowa Code § 815.9(3) (2017). “Legal assistance” includes not only the expense of the public defender or an appointed attorney, but also transcripts, witness fees, expenses, and any other goods or

² The password protected financial summary on Iowa Courts online shows court-appointed attorney fees were also added.

services required by law to be provided to an indigent person entitled to an appointed attorney. Iowa Code § 815.9(3) (2017).

In all criminal cases where judgment is entered, the sentencing court shall order restitution be made. Restitution includes court-appointed attorney fees and court costs. Iowa Code §§ 910.2 and 815.9(4) (2017). Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1) (2017); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). The legislature has inserted restitution, which otherwise would normally be civil, into the criminal proceeding. Cf. State v. Dudley, 766 N.W.2d at 620 (“the legislature has injected this matter, which would ordinarily be civil, in a criminal action and provided for counsel throughout the criminal prosecution, ending with judgment on behalf of the State.”). The court is authorized to order criminal restitution pursuant to the restitution statutes. State v. Bonstetter, 637 N.W.2d 161,

166 (Iowa 2001).

The legislature specifically provided that the imposition of restitution for the cost of legal assistance and court costs is subject to a determination of the defendant's reasonable ability to pay. Iowa Code section 910.2(1) (2017) provides in relevant part:

In all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities, to the clerk of court for fines, penalties, surcharges, and, **to the extent that the offender is reasonably able to pay**, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b", court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, when applicable, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A.

Iowa Code § 910.2(1) (2017)(emphasis added). See also Iowa Court R. 26.2(10)(a) ("the court shall order the payment of the total costs and fees for legal assistance as restitution to the extent the person is reasonably able to pay").

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) ("The more appropriate question is whether consideration of a defendant's financial background in setting or resetting sentence is so arbitrary or unfair as to be a denial of due process."). Iowa's recoupment statute does not infringe on a defendant's right to counsel because of the "reasonable ability to pay" determination. State v. Haines, 360 N.W.2d at 793; State v. Dudley, 766 N.W.2d at 614-615. "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." Id. at 615.

The imposition of the discretionary criminal restitution was not part of the plea agreement.

A plea agreement may include provisions regarding the payment of legal assistance fees and court costs. State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991), *modified*, State v. McMurry, 925 N.W.2d 592, 600-601 (Iowa 2019). The prosecutor outlined the agreement:

[], in exchange for the Defendant's pleas of guilty to Count One, and that would be the lesser-included offense of Theft in the Second Degree, and Count Four, Possession of a Schedule II Controlled Substance, Third Offense, the State has agreed not to pursue the habitual felony enhancement. Further, the State will be dismissing Counts Two and Three. The Defendant agrees to go to prison, and there is a joint recommendation that all these sentences run concurrently with all imposed sentences that the Defendant is facing. Additionally *I'd recommend the minimum fine and restitution. I have no objection to the Court suspending that fine in lieu of the restitution owed, the Defendant's costs and attorney fees.* I think that should include all of the conditions of the plea. [].

(Tr. p. 2L17-p. 3L10)(emphasis added). The plea agreement was binding on the court. (Tr. p. 3L13-17, p. 4L17-20). The record reflects that the imposition of court costs and attorney fees were not part of the plea agreement.

The prosecutor spoke in terms of "recommend" suspension of the fines and "joint recommendation" for

concurrent sentences. Yet, the prosecutor spoke of restitution as if the court lacked discretion in the imposition of costs and attorney fees. (Tr. p. 3L2-8). Similarly, the court informed Davis that he “*will be required* to pay any court costs and court appointed attorney fees.” And *will be required* to submit a DNA sample. But yet, the court informed Davis that he “*may also be required* to make restitution to any victims of each of these offenses.” (Tr. p. 6L8-20)(emphasis added).

The plea agreement did not contain a provision regarding court costs and attorney fees. The district court was required to consider Davis’ reasonable ability to pay the discretionary restitution.

The district court did not enter a final order which considered Davis’ reasonable ability to pay.

The district court ordered Davis to pay restitution for court costs and attorney fees without a final order which would take into consideration his reasonable ability to pay. (Order Accepting Pleas & Judgment; Order for Pecuniary Damages)(App. pp. 16-18; 23-24). Recently, the Supreme

Court clarified the process the district court must follow when ordering criminal restitution. State v. Albright, 925 N.W.2d 144 (Iowa 2019). The Albright Court urged the district court to take whatever steps necessary to ensure the items of restitution are in front of the court at the time of sentencing. Id. at 160. If not all of the items of restitution are available at the time of sentencing, the Code allows the sentencing court to file a temporary order prior to the final plan of restitution. Id.; Iowa Code § 910.3 (2017).

A plan of restitution is not complete until the court issues the final restitution order. State v. Albright, 925 N.W.2d at 160. The Court stated:

Until the court issues the final restitution order, the court is not required to consider the offender's reasonable ability to pay. Restitution orders entered by the court prior to the final order are not appealable as final orders or enforceable against the offender. The reason for these orders being nonappealable or enforceable is that the final order of restitution must take into account the offender's reasonable ability to pay.

Id. at 160-161.

The district court did not have the amounts of any item for which discretionary restitution was ordered. Yet, the district court ordered Davis to pay the unknown amounts. (Order Accepting Pleas & Judgment)(App. pp. 16-18). The clerk of court has assessed the restitution against Davis. (General Combined Docket p. 8 (Financial Summery))(App. p. 26). The Department of Corrections is collecting this unenforceable judgment.³ (9/19/18 Restitution Plan)(App. p. 27). Contrary to this Court's decision in Albright, the lower court is enforcing the restitution order contained in the sentencing order prior to a final order which is required to take into consideration Davis' ability to pay without an undue hardship.

³ Twenty percent of all credits to Davis' inmate's institutional account are being taken by the Department of Corrections. The Restitution Plan also provides: "[a]ny attempt to violate the conditions of this plan will result in major disciplinary proceedings. (Restitution Plan)(App. pp. 19, 27). While victim restitution is the first priority, Iowa Code section 902.2(1), the order should be corrected to avoid seizure of funds which will cause Davis undue hardship.

As in Albright, the trial court ordered restitution for items in the “second category of restitution” without having the amount of each item of restitution before it. “This is contrary to the statutory scheme as outlined in [Albright].” State v. Albright, 925 N.W.2d at 162. This portion of the sentencing order must be vacated. When final amounts are obtained, the district court must give notice to Davis, appoint counsel and schedule a hearing where the district court will determine his reasonable ability to pay court costs and attorney fees. See State v. Covell, 925 N.W.2d 183, 189 (Iowa 2019) (“Here, the district court did not have the total amount of restitution owed when it entered its order finding Covell reasonably able to pay. Therefore, the court erred, and we reverse the part of the sentence regarding restitution and remand the case for resentencing consistent with this opinion and our opinion in Albright.); State v. Petty, 925 N.W.2d 190, 197 (Iowa 2019)(same); State v. Headley, 926 N.W.2d 545, 553 (Iowa 2019)(same).

CONCLUSION

Daniel Davis respectfully requests this Court vacate the portion of the sentencing order requiring him to pay court costs and attorney fees and remand for a restitution hearing and final order where the district court will determine his reasonable ability to pay the restitution.

NONORAL SUBMISSION

Counsel does not believe oral argument would assist the court, therefore, counsel requests the case be submitted without 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 \$1.36, and that amount has been paid in full by the Office of the Appellate Defender.

**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 2,709 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Martha J. Lucey Dated: 11-6-19
MARTHA J. LUCEY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mlucey@spd.state.ia.us
appellatedefender@spd.state.ia.us