

IN THE COURT OF APPEALS OF IOWA

No. 16-1771
Filed August 16, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL FAIR,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

Michael Fair challenges the legality of his sentence, which we treat as a
writ of certiorari. **WRIT SUSTAINED.**

Sharon D. Hallstoos of Hallstoos Law Office, Dubuque, for appellant.

Thomas J. Miller, Attorney General, and Genevieve Reinkoester, Assistant
Attorney General, for appellee.

Considered by Danilson, C.J., and Tabor and McDonald, JJ.

DANILSON, Chief Judge.

On August 24, 2007, Michael Fair pled guilty to third-degree sexual abuse. Fair was informed the offense required a lifetime special sentence of parole. Fair received a ten-year sentence and fine, both of which were suspended. He was placed on probation for a period of two years with placement at the Residential Corrections Facility. The court also imposed a special sentence required by Iowa Code section 903B.1 (2007), which committed Fair to the custody of the Iowa Department of Corrections for life, with eligibility for parole as provided by Iowa Code Chapter 906. The court dismissed a second charge but imposed the costs of that charge to Fair.

Several probation violations were reported in 2008. On April 9, 2009, following a hearing, Fair's probation was revoked and the previously suspended sentence was imposed. On November 19, 2009, the court reconsidered Fair's sentence and returned him to a period of two years of supervised probation. In 2010, Fair cut off his GPS tracking device and fled the state. He was arrested in Texas. He incurred a theft charge. A second probation violation hearing was held on May 5, 2011, Fair's probation was again revoked, and the court imposed the sentence that had previously been suspended.

More than five years later, on September 13, 2016, Fair filed a motion for correction of an illegal sentence, contending the imposition of the sentence imposed under section 903B.1 violated his constitutional rights. The district court denied the motion.

Fair appeals, contending his plea counsel was ineffective in allowing him to plead guilty without being sufficiently informed of the full ramifications of the section 903B.1 special sentence. He also contends the imposition of the costs on a dismissed charge constitutes an illegal sentence.

We do not address the ineffectiveness claim because it could have been but was not raised within the three-year limitation period for postconviction-relief actions. See *Lopez-Penaloza v. State*, 804 N.W.2d 537, 541-42 (Iowa Ct. App. 2011) (noting the three-year statute of limitations on a claim counsel misadvised the defendant on the consequences of a plea). Moreover, the district court did not rule on the claim, and therefore, it is not properly before us. See *State v. Seering*, 701 N.W.2d 655, 661-62 (Iowa 2005).

We treat Fair's notice of appeal from the motion to correct an illegal sentence as a petition for writ of certiorari. See *State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017) (“[W]e will treat Propps’s notice of appeal and accompanying briefs as a petition for writ of certiorari, as we conclude that appeals from a motion to correct an illegal sentence are most appropriately fashioned in this manner.”). “An illegal sentence is one that is not permitted by statute,” and, thus, can be corrected at any time. *State v. Gordon*, 732 N.W.2d 41, 43 (Iowa 2007) (citation omitted).

“[T]he provisions of Iowa Code section 815.13 and section 910.2 clearly require, where the plea agreement is silent regarding the payment of fees and costs, that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan.” *State v.*

Petrie, 478 N.W.2d 620, 622 (Iowa 1991). We agree with Fair that the district court erred in assessing the costs of the dismissed charge here. The State concedes the error. We sustain the writ and remand for a corrected sentencing order.

WRIT SUSTAINED.