

IN THE COURT OF APPEALS OF IOWA

No. 2-1179 / 10-1841
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ANDREW HOLDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson,
Judge.

James Andrew Hols appeals a portion of the sentence, concerning
restitution, imposed upon his conviction for domestic abuse assault. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler Buller, Assistant Attorney
General, Rose Anne Mefford, County Attorney, for appellee.

Considered by Danilson, P.J., Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

Following his conviction for third or subsequent domestic abuse assault, James Hols appeals, challenging the portion of a sentencing order concerning restitution for court-appointed attorney fees. We affirm.

Hols, charged with criminal offenses, was represented by court-appointed attorneys. A jury found Hols guilty, under Count I of a trial information, of domestic abuse assault, and under Count II, of assault causing bodily injury, a lesser included offense of a charge of willful injury. Hols had stipulated to two or more prior convictions for domestic abuse assault, enhancing the current domestic abuse assault conviction to a class “D” felony pursuant to Iowa Code section 708.2A(4) (2009), and had stipulated to two prior class “D” felony convictions, leading to enhanced sentencing as an habitual offender pursuant to Iowa Code sections 902.8 and 902.9(3). The trial court’s November 8, 2010 judgment entry sentenced Hols to a term of no more than fifteen years, with a minimum term of three years. See Iowa Code §§ 902.9(3), .8. The court ordered the verdict on Count II merged with the sentence on Count I and entered no separate sentence on Count II.¹

The court’s written judgment entry provides, in the part relevant to the issue(s) presented on appeal, the following:

The defendant is ORDERED to pay costs of prosecution in the amount of \$_____ (clerk assess), and court-appointed attorney’s fees, in an amount not to exceed \$_____, if any. If the defendant was represented by court-appointed counsel, the

¹ Although the verdict on Count II appears to include an essential element not contained in the verdict on Count I, bodily injury resulting from an assault, the State has not sought review of the court’s ruling that the two offenses merge.

defendant must pay restitution for attorney fees pursuant to Section 815.9 for any costs incurred, and judgment is ordered for the same. Any additional costs or restitution items not known at the time of this Judgment Entry may be certified by the Clerk of the District Court at the time those costs are determined. Defendant is ORDERED to make payments in a timely fashion.

Hols appeals. On appeal he asserts that (1) the district court imposed an illegal sentence when it required him to pay court-appointed attorney fees without limiting his liability for such fees to the fee cap set by the State Public Defender, and (2) the procedure used by the court in imposing attorney fees as a part of restitution is statutorily and constitutionally defective. He requests that we vacate that portion of his sentence regarding restitution for attorney fees and remand to the district court for an order establishing his obligation for attorney fees not to exceed \$1200.

As a preliminary matter, the State argues that error has not been preserved as notice of appeal was filed on November 12, 2010, some “four months before the ‘order’ to pay attorneys’ fees was entered on the online [Iowa Court Information System] docketing system on March 15, 2011,” and a notice of appeal “cannot logically preserve an alleged error that has yet to occur.” The record before us on appeal, however, contains no March 15, 2011 “order” and no indication that any such “order” was ever made by a judge. We therefore give no consideration to any such “order.” Further, and more importantly, Hols’s notice of appeal, filed four days after the district court’s written judgment entry, together with the contents of his brief, make it clear that his challenge is to that portion of the court’s November 8, 2010 sentence that concerns restitution for court-

appointed attorney fees. Sentencing defects may be raised on appeal despite the absence of objection in the trial court. See *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998) (citing cases). The rule requiring that issues be first raised in the trial court does not apply to void, illegal, or procedurally defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). We reject the State's assertion that Hols has not preserved error on the issue(s) presented.

Challenges to the legality of a sentence are reviewed for errors at law, *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996), as are challenges to restitution orders, *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010). If constitutional issues must be reached, they are reviewed de novo. *State v. Brooks*, 760 N.W.2d 197, 204 (Iowa 2009).

Iowa Code section 815.9 provides for determination of indigency and appointment of an attorney for a person found to be indigent. The trial court appointed counsel to represent Hols, presumably because Hols demonstrated indigency. Iowa Code section 910.2 provides, in relevant part, the following concerning payment of restitution for court-appointed attorney fees:

In all criminal cases in which there is a . . . verdict of guilty . . . the sentencing court shall order that restitution be made by each offender . . . to the extent that the offender is reasonably able to pay, for . . . court-appointed attorney fees ordered pursuant to section 815.9.

Iowa Code § 910.2.

The following provision then deals with procedures for the determination of the amounts of restitution to be paid for various items, and directs the sentencing court to order restitution. In relevant part it provides:

At the time set for sentencing or at a later date to be determined by the court, the court shall set out the amount of restitution . . . and the persons to whom restitution must be paid. 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. At a later date as determined by the court, the court shall issue a permanent, supplemental order, setting the full amount of restitution.

Iowa Code § 910.3.

As can be seen from these statutes, it is the duty of “the court,” “[a]t the time set for sentencing,” or “the court,” “[a]t a later date as determined by the court,” to set the amount of restitution. Iowa Code § 910.3. “‘Restitution’ . . . includes . . . court-appointed attorney fees ordered pursuant to section 815.9.” *Id.* § 910.1(4). The court is to order restitution for court-appointed attorney fees, to the extent the offender is reasonably able to pay. *Id.* § 910.2.²

The State asserts that Hols’s appeal, and the claims of error he makes, are premature and not properly presented for appellate review. It argues there was no order entered requiring him to pay restitution for any amount of court-appointed attorney fees, much less an amount in excess of any fee limitation established pursuant to section 13B.4. The State requests that we affirm the district court’s judgment entry, pointing out that if at any time the court has entered or does enter an illegal order for restitution Hols may utilize section 910.7 (2011) to correct any such error. We agree with the State on these points.

² We note Hols’s argument, conceded by the State, that at the time he was sentenced his obligation to make restitution for court-appointed attorney fees was limited to the amount established by the State public defender as a fee limitation pursuant to section 13B.4. See *State v. Dudley*, 766 N.W.2d 606, 621-22 (Iowa 2009).

An amount of court-appointed attorney fees apparently was not available at the time of sentencing and the district court's judgment entry did not set an amount to be paid for the services of court-appointed counsel, leaving blank the spot where an amount to be paid might have been inserted. The court instead ordered that "[a]ny additional . . . restitution items not known at the time of this judgment entry may be certified by the Clerk of the District Court *at the time . . . determined.*" (Emphasis added.) We assume this language means that the court, in compliance with its duty under section 910.3 (2009), was to set the amount to be paid and the clerk was thereafter to certify that amount to the Director of the Iowa Department of Corrections. See *id.* § 910.5 (2009) (requiring the court to forward to the director a copy of the offender's restitution plan when an offender is committed to the custody of the director pursuant to a sentence of confinement). We so assume because of the presumption that public officers and officials perform their duties. See, e.g., *In re Ditz's Estate*, 117 N.W.2d 825, 830 (Iowa 1962) (assuming attorney general will comply with duty to protect public interest in charitable trusts); *Joneson v. Joneson*, 102 N.W.2d 911, 913 (Iowa 1960) (noting presumption that, absent a showing to the contrary, public officers perform their duties, and assuming clerk of district court had done so); *Halverson v. Hageman*, 92 N.W.2d 569, 576 (Iowa 1958) (same).

Based on the record currently properly before us, we cannot conclude that the district court's November 8, 2010 judgment entry contains an illegal order for restitution for court-appointed attorney fees. We therefore affirm the judgment of the court. If, subsequent to Hols's notice of appeal the district court has made, or

does make, an illegal order for such restitution, Hols may of course seek relief pursuant to section 910.7 (2011).

AFFIRMED.