

IN THE COURT OF APPEALS OF IOWA

No. 2-225 / 11-0827
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS DEAN WHEELER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas Staskal,
Judge.

A defendant appeals a district court order denying his motion to tax costs and fees to the State following the State's dismissal of a charge of non-felonious misconduct in office. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Angela L. Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines,
for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas Henry Miller, Deputy Assistant Attorney General, and John P. Sarcone, County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Tabor and Mullins, JJ., take no part.

VAITHESWARAN, P.J.

Thomas Wheeler appeals a district court order denying his motion to tax costs and fees to the State following the State's dismissal of a charge of non-felonious misconduct in office.

I. Background Facts and Proceedings

Thomas Wheeler was manager of the Iowa Film Office within the Iowa Department of Economic Development. The State filed a preliminary complaint and, later, a trial information, charging Wheeler with non-felonious misconduct in office, a serious misdemeanor. Iowa Code § 721.2(6) (2007). The filings were based on Wheeler's claimed failure to verify an applicant's eligibility for film tax credits.

Eventually, the State moved to dismiss the misdemeanor charge on the ground that it had substituted that charge with felony charges arising from the same conduct. The district court granted the motion.

Wheeler subsequently moved to have costs and attorney fees incurred in the misdemeanor prosecution taxed against the State or, at the very least, not taxed against him. The State resisted the motion on the grounds that the statutory cost provisions cited by Wheeler applied to civil rather than criminal actions and, as a practical matter, the costs Wheeler incurred in defending the serious misdemeanor charge could be applied to a defense against the felony charges.

The district court denied Wheeler's motion "for the reasons stated in the State's resistance." Wheeler filed a notice of appeal.¹

II. Analysis

Wheeler contends the district court erred in (A) assessing court costs against him, (B) not taxing the costs of depositions and transcripts to the State, and (C) not taxing his attorney fees to the State. As statutory construction is involved, our review is on error. *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009).

A. Taxation of Costs

The record reflects that Wheeler posted a \$1000 bond. Following the district court's dismissal of the misdemeanor charge, the clerk of court notified Wheeler of "monies due." The notice stated that the bond amount was "being held" because Wheeler owed \$80 in court costs "as a result of judgment(s) against you, due and payable to this office." The \$80 sum reflects court reporter charges for two reported hearings. See Iowa Code § 625.8(2) (2011) ("The clerk of the district court shall tax as a court cost a fee of forty dollars per day for the services of a court reporter.").

Wheeler asserts he should not have been taxed with court costs because the district court dismissed the serious misdemeanor charge. We agree.

¹ The State argues that this appeal is not properly before the court. The State apparently relies on a statutory provision requiring a "final judgment of sentence." Iowa Code § 814.6(1)(a). But, as Wheeler points out, the Iowa Supreme Court considered just such a post-acquittal cost-taxation order in *State v. Dudley*, 766 N.W.2d 606, 624 (Iowa 2009), and did so on a direct appeal and application for further review. In any event, even if a direct appeal was not the correct vehicle for seeking review, we may treat a notice of appeal as an application for discretionary review. See Iowa R. App. P. 6.108. We will do so here.

In *Dudley*, 766 N.W.2d at 624, a defendant who was found not guilty of a criminal charge was similarly taxed with court reporter fees. He asserted his trial attorney was ineffective in failing to object to these costs. *Id.* The court agreed, stating, “[T]he . . . court reporter fee is always taxed as a court cost, and it is elementary that a winning party does not pay court costs.” *Id.* This language is dispositive.

We recognize that the charge here was dismissed prior to trial while the charge in *Dudley* was adjudicated in Dudley’s favor following trial. However, the practical effect was the same: no judgment and sentence was entered against either defendant. For that reason, the court reporter fees should not have been taxed as costs to Wheeler. See, e.g., Iowa Code §§ 602.8106(1)(a) (referring to costs collected from the defendant “[w]hen judgment is rendered against the defendant”); 815.13 (noting witness and mileage fees paid by counties or cities in prosecutions under county or city ordinances are recoverable from the defendant “unless the defendant is found not guilty *or the action is dismissed*” (emphasis added)); *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) (“[O]nly such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan.”).

We reverse the order denying Wheeler’s motion as it relates to taxation of court costs and we remand for entry of an order rescinding the clerk of court’s “notice of monies due” and releasing the \$1000 bond, if it has yet to be released.

B. Taxation of Deposition and Transcript Costs

Wheeler next contends the district court should have taxed the deposition and transcript costs to the State. He asserts, “Whether the county, the State, the

court, or some other fund must bear those costs is of real no [sic] import to Wheeler—simply the fact that he, as a criminal defendant who was not convicted of the charges against him, must not be forced to bear the costs.”

The record contains no evidence that deposition and transcript costs were taxed to Wheeler, but, as an initial matter, Wheeler bore the costs of the depositions he chose to take. In support of his argument that those costs should have been shifted to the State, he cites a civil statute, Iowa Code section 625.14.

That provision states:

The clerk shall tax in favor of the party recovering costs the allowance of the party’s witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow.

Iowa Code § 625.14. Assuming without deciding that this civil provision applies here,² the Iowa Rules of Civil Procedure do not allow the taxation of deposition costs to anyone unless the depositions are introduced into evidence at trial. See Iowa R. Civ. P. 1.716 (“Costs of taking and proceeding to procure a deposition shall be paid by the party taking it who cannot use it in evidence until such costs are paid. The judgment shall award against the losing party *only such portion of these costs as were necessarily incurred for testimony offered and admitted upon*

² We find it unnecessary to wade into the morass of precedent on the subject of whether chapter 625 applies to criminal actions. See *City of Cedar Rapids v. Linn County*, 267 N.W.2d 673, 674 (Iowa 1978) (concluding Iowa Code section 625.1, authorizing taxation of costs to the losing party “provides authority for taxing costs in civil cases only”); *Woodbury County v. Anderson*, 164 N.W.2d 129, 133 (Iowa 1969) (finding “no provision” for taxation of investigation and printing costs in a criminal action and finding these costs “would not be properly taxable under the provisions of either section 625.1 or 625.14”). *But see State v. Basinger*, 721 N.W.2d 783, 785–86 (Iowa 2006) (in criminal appeal, citing Iowa Code section 625.8 regarding taxation of jury fees to defendants); *State v. McFarland*, 721 N.W.2d 793, 794–95 (Iowa 2006) (same).

the trial” (emphasis added)).³ There was no trial on the misdemeanor charge. For that reason, we conclude the district court appropriately denied Wheeler’s motion for taxation of these costs.

C. Taxation of Attorney Fees

Finally, Wheeler argues that the State should have been required to reimburse him for the attorney fees he expended in his defense of the serious misdemeanor charge. He relies primarily on two statutory provisions, one of which obligates the attorney general to “[p]rosecute and defend all actions and proceedings brought by or against any state officer in the officer’s official capacity.” Iowa Code § 13.2(1)(c).

The Iowa Supreme Court addressed a similar argument in *Richter v. Shelby County*, 745 N.W.2d 505 (Iowa 2008). There, the specific issue was “whether a county is statutorily obligated to provide a legal defense for a sheriff’s deputy charged with voluntary manslaughter in connection with a shooting that occurred while the deputy was on duty” and subsequently found not guilty of the charge. *Richter*, 745 N.W.2d at 505–06. The deputy cited Iowa Code section 331.756(6), which states the county attorney shall “[c]ommence, prosecute, and defend all actions and proceedings in which a county officer, in the officer’s official capacity, or the county is interested or a party.” *Id.* at 507 (quoting Iowa Code § 331.756(6)). The court denied the indemnification request, concluding

³ With respect to depositions taken on behalf of the prosecution, Iowa Code section 815.13 provides that these costs shall be borne by the county prosecuting the charge and may not be recouped from the defendant if the defendant is found not guilty of the charge.

that the deputy “was not defending in the underlying criminal action or proceeding in his official capacity.” *Id.* at 508.

This case is not materially different from *Richter*. Although Wheeler relies on a separate code provision, Iowa Code section 13.2(c), the language of that provision is virtually identical to section 331.756(6). For that reason, *Richter* controls the outcome.

Wheeler also cites section 669.21, a provision of the state tort claims chapter of the Iowa Code. That section provides:

Except as otherwise provided in subsection 2, the state shall defend any employee, and shall indemnify and hold harmless any employee against any claim as defined in section 669.2, subsection 3, paragraph “b”, including claims arising under the Constitution, statutes, or rules of the United States or of any state.

Id. § 669.21(1). The term “claim” is defined as follows:

Any claim against an employee of the state *for money only*, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee’s office or employment.

Id. § 669.2(3)(b) (emphasis added). Weaver’s attorney fee claim is premised on the dismissed criminal action and the criminal action was not a claim “for money only.” This provision, therefore, is inapplicable.

III. Disposition

We affirm the district court’s denial of Weaver’s motion for taxation of costs and attorney fees as it relates to the taxation of deposition and transcript costs and attorney fees. We reverse the district court’s denial of Weaver’s motion as it relates to the \$80 in court reporter fees. We remand for entry of an

order rescinding the clerk of court's "notice of monies due" and releasing the \$1000 bond, assuming it has yet to be released.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.