

**IN THE COURT OF APPEALS OF IOWA**

No. 2-832 / 11-1679  
Filed October 17, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**TERRY JOHN HOUSTON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Clinton County, Thomas G. Reidel,  
Judge.

Terry Houston appeals from judgment imposed upon his conviction for  
operating a motor vehicle while under the influence. **AFFIRMED IN PART,  
SENTENCE VACATED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Phillip F. Van Liew, Student Intern, Michael L. Wolf, County Attorney,  
and Robin Strausser, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

**POTTERFIELD, J.**

Terry Houston was charged with an aggravated misdemeanor—operating a motor vehicle while under the influence of an alcoholic beverage or other drug, second offense, in violation of Iowa Code sections 321J.2(1)(a) and (2)(b) (2011). At trial, the officer who conducted a traffic stop because Houston was going forty-nine miles per hour in a thirty-five-mile-per-hour zone testified Houston’s breath smelled of alcohol and that Houston subsequently failed several field sobriety tests. Houston testified that he drank one cup of coffee with cherry brandy over several hours while working with Berryman’s Carburetor Cleaner in an enclosed space. Houston testified he “found this out later . . . [Berryman’s] do[es]n’t use chlorinated solvents anymore, because of the chemical reactions that people have.” The defense had retained an expert witness, who was flown in from Maryland to testify. The record does not indicate why the expert was not called to testify. Defense counsel argued Houston was not intoxicated. The jury returned a guilty verdict.

Houston explained to the court at sentencing and in his presentencing investigation statement that he has studied chemistry and learned that the main ingredient in Berryman’s Carburetor Cleaner is dichloromethane, which metabolizes to carbon monoxide in the human body. Houston believed he had carbon monoxide poisoning, which acted as a depressant and would explain the symptoms the arresting officer observed.

On appeal, Houston contends his trial counsel was ineffective for failing to file a notice of an involuntary-intoxication defense, request a jury instruction on involuntary intoxication, and call an expert witness to testify in support of that

defense. He also contends the sentence imposed included an order to pay restitution for attorney fees in excess of the statutory fee limitation.

*Ineffectiveness claim.* The State argues that Houston cannot prevail upon his claim of ineffective assistance of counsel because counsel exercised his judgment in electing not to use the expert witness and not to raise an involuntary intoxication defense. See *State v. Fountain*, 786 N.W.2d 260, 266-67 (Iowa 2010) (discussing ineffective-assistance-of-counsel claims and trial strategy). We cannot reach the conclusion urged by the State because there is no explanation in this record as to why the expert witness was not called to testify. We find the record insufficient to address Houston's ineffectiveness claim and preserve it for possible postconviction proceedings. See *id.* at 267.

*Restitution amount was erroneous.* The court appointed counsel to represent Houston. As a part of the sentence imposed upon his conviction, the court ordered Houston to pay restitution for attorney fees in excess of the statutory fee limitation. The State concedes this was not proper. See Iowa Code § 815.9 ("If a person is granted an appointed attorney, the person shall be required to reimburse the state for the total cost of legal assistance provided to the person pursuant to this section."); *id.* § 815.14 (noting that in determining the amount of restitution the expense of the public defender or court appointed counsel "shall not exceed the fee limitations established in section 13B.4");<sup>1</sup> *State v. Dudley*, 766 N.W.2d 606, 622-23 (Iowa 2009). The fee limitation applicable here is \$1200. We therefore strike that portion of the sentence

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<sup>1</sup> This provision has been amended and now reads, "The expense of the public defender may exceed the fee limitations established in section 13B.4." 2012 Iowa Acts ch. 1063, § 12.

ordering Houston to pay attorney fee restitution and remand for entry of an order consistent with the fee limitation.

**AFFIRMED IN PART, SENTENCE VACATED IN PART, AND  
REMANDED.**