ELECTRONICALLY FILED AUG 09, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CHARLES R. ALBRIGHT, Defendant-Appellant.	)))))))))	SUPREME COURT 17-1286

APPEAL FROM THE IOWA DISTRICT COURT
FOR FRANKLIN COUNTY
HONORABLE GREGG R. ROSENBLADT, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 9th day of August 2018, 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 Charles Albright, #1065220, Anamosa State Prison, 406 North High Street, Anamosa, IA 52205.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DID THE STATE PRESENT SUFFICIENT EVIDENCE TO PROVE ALBRIGHT COMMITTED KIDNAPPING IN THE FIRST DEGREE?

Authorities

Iowa Code § 710.1 (2015)

Iowa Code § 710.2 (2015)

Iowa Code § 710.1(3) (2015)

State v. Siemer, 454 N.W.2d 857, 864-865 (Iowa 1990)

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II. DID THE DISTRICT COURT ERR IN SUBMITTING KIDNAPPING IN THE SECOND DEGREE (DANGEROUS WEAPON) AS A LESSER-INCLUDED OFFENSE OF KIDNAPPING IN THE FIRST DEGREE (TORTURE)?

(not addressed in reply brief)

III. DID TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO AND INTRODUCING EVIDENCE OF ALBRIGHT'S OTHER CRIMES, WRONGS OR OTHER ACTS?

(not addressed in reply brief)

IV. DID THE DISTRICT COURT ERR IN ORDERING ALBRIGHT TO REIMBURSE THE STATE FOR THE COST OF HIS LEGAL ASSISTANCE WITHOUT FIRST CONSIDERING HIS REASONABLE ABILITY TO PAY SUCH RESTITUTION?

Authorities

State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999)

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Iowa Code § 602.8106(1) (2017)

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Iowa Code § 910.4 (2017)

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the plaintiff-appellee's brief.

ARGUMENT

I. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE ALBRIGHT COMMITTED KIDNAPPING IN THE FIRST DEGREE.

Iowa Code section 710.1 defines kidnapping:

A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:

1. The intent to hold such person for ransom.

2. The intent to use such person as a shield or hostage.

3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.

4. The intent to secretly confine such person.

5. The intent to interfere with the performance of any government function.

Iowa Code § 710.1 (2015). "Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse." Iowa Code § 710.2 (2015). Specifically, in this case, the State had the burden to prove Albright kidnapped Hartman with the intent to inflict serious injury upon her. Then, to prove kidnapping in the first degree, the State was required to prove Albright kidnapped Hartman, and as a consequence of the kidnapping, Hartman was intentionally subjected to torture. (TI; Amended TI; Ins. 23)(App. pp. 13-14, 35-36, 40). See Iowa Code §§ 710.1(3) and 710.2 (2015).

The "incidental rule" applies to kidnapping cases which allege the "subject to torture" element to elevate the offense to a Class A kidnapping in the first degree. The Supreme Court has applied the incidental rule in kidnapping cases where torture was charged. State v. Siemer, 454 N.W.2d 857, 864-865 (Iowa 1990)("substantial evidence in this record to

support a finding of confinement which exceeds that normally incidental to the underlying crime of child abuse."); State v. Simmons, 454 N.W.2d 866, 867 (Iowa 1990)(aiding and abetting Siemer).

The Supreme Court has not limited the incidental rule to situations involving a sexual assault. The Robinson Court discussed the holding in Rich:

> After canvassing the cases, we came down firmly on the side of the cases adopting the incidental rule. We recognized every assault, rape, and robbery involves some act of intentional confinement or movement. *Cf. id.* (discussing sexual assault). We reasoned notwithstanding the unqualified language in Iowa Code section 710.1(3), the legislature did not intend to give the prosecution a choice of two penalties of such a disparate nature for sexual abuse. We noted under Iowa law a conviction of first-degree kidnapping was punishable by life in prison, while third-degree sexual abuse was punishable by no more than ten years in prison. Further, we doubted the legislature intended the possibility of life in prison to apply to the "usual" case of sexual abuse, in which some movement or confinement occurs. We declared such a literal interpretation of the statute "would not be sensible or just." The heart of *Rich* was the three-pronged test used for determining whether confinement or removal exceeded that normally incident to the commission of sexual abuse. Whether any element of this three-pronged test was satisfied would depend upon the totality of the facts.

State v. Robinson, 859 N.W.2d 464, 475 (Iowa 2015)(other citations omitted).

"Torture" means the intentional infliction of severe physical or mental pain. (Ins. 28)(App. p. 45). See also State v. White, 668 N.W.2d 850, 857 (Iowa 2003)(We conclude "torture" as it is used in Iowa Code section 710.2 includes mental anguish unaccompanied by physical or sexual assault. In other words, "torture" is either physical and/or mental anguish.). While being "subjected to torture" does not necessarily require an assault resulting in physical contact, it does require some type of assault. Iowa Code section 708.1 provides in relevant part:

2. A person commits an assault when, without justification, the person does any of the following:

a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

c. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1(2) (2015).

Calling a person demeaning names, no matter how much it might hurt her feelings or be offensive, does not rise to the level of "torture." Iowa cases finding sufficient evidence of "torture" all involved some type of assault. See e.g. State v. White, 668 N.W.2d at 857-58 (name calling, threats to kill, pointing a gun at her); State v. Cross, 308 N.W.2d 25, 27 (Iowa 1981)(victim abducted by stranger at truck stop, defendant ripped off the victim's clothes; hit her several times, one blow producing a large wound on her head; bit her breasts, chained her hands, and carried her in the car trunk for miles, nude and unconscious; defendant constantly threatened to kill the victim and to inflict oral and anal sexual abuses; he exposed himself to her, fondled her breasts, and penetrated her vagina with his finger); State v. Gailey, No. 08-0628, 2009 WL 778772, at *3 (Iowa Ct. App. March 26, 2009)(screamed and

ranted, threatening to kill, pointed the gun repeatedly, drove at dangerously high speeds in his attempt to elude the police; confronted victims repeatedly with a real possibility of their death or serious injury numerous times, in addition to his threats to kill himself, law enforcement officers, and other members of his family.); State v. Kirchner, 600 N.W.2d 330, 334 (Iowa Ct. App. 1999)(repeatedly threatened to kill victim while brandishing the tire iron or hitting the tire iron against the wall; hit victim causing a black eye, pushed her down the basement steps causing a hip injury; broke a ceramic doll and threatened to cut victim's face with pieces of glass; tied victim's hands and feet during which time he continued to threaten her with the tire iron); State v. Schertz, 328 N.W.2d 320, 321 (Iowa 1982)("Under the law as applied to this case, 'torture' is defined as: to intentionally inflict intense pain to body for purposes of punishment, or to abstract a confession or information, or for sadistic pleasure."). The incidental rule applies to Albright's case.

IV. THE DISTRICT COURT ERRED IN ORDERING ALBRIGHT TO REIMBURSE THE STATE FOR THE COST OF HIS LEGAL ASSISTANCE WITHOUT FIRST CONSIDERING HIS REASONABLE ABILITY TO PAY SUCH RESTITUTION.

Albright's challenge to the imposition of restitution for the costs of his legal assistance is "ripe." The cases which hold otherwise must be overruled.

The statutory language in Iowa Code section 910.2(1) dictates the sentencing court shall: (1) order restitution to the victim; (2) to the clerk of court for fines, penalties and surcharges; and (3) to the extent that the offender is reasonably able to pay for court-appointed attorney fees. The statute does not provide the sentencing court should wait for a final restitution plan and a restitution plan of payment.

In Swartz, the defendant challenged that the district court improperly ordered restitution for court costs and defendant's court-appointed lawyer fees without first deciding the defendant's ability to pay. State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999). The Court concluded:

that he may not advance that claim in this court on the present record for two reasons. First, it does not appear that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Until that remedy has been exhausted we have no basis for reviewing the issue that defendant raises.

State v. Swartz, 601 N.W.2d at 354.

The Supreme Court decided Jackson the same day as Swartz. State v. Jackson, 601 N.W.2d 354 (Iowa 1999). The Court followed its holding in Swartz. The Court again held that a "plan of restitution contemplated by Iowa Code section 910.3" must be completed before the district court is required to consider the defendant's ability to pay. And a person who is dissatisfied with the amount of restitution required by the plan must petition pursuant to Iowa Code section 910.7 for a modification. "Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court." State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999).

The Court in Jose concluded that Swartz had not challenged the total amount of criminal restitution (restitution plan), but the restitution plan of payment. State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001). The Court stated:

> The amount of restitution is part of the sentencing order and is therefore directly appealable, as are all orders incorporated in the sentence. *Janz*, 358 N.W.2d at 549. The ability to pay is an issue apart from the amount of restitution and is therefore not an "order[ ] incorporated in the sentence" and is therefore not directly appealable as such.
>
> The facts in this case differ from those in *Janz* in only one respect. Here, unlike in *Janz*, the amount of restitution had not been determined at the time notice of appeal was filed.
>
> Likewise, the facts in this case differ from those in *Swartz* and *Jackson* in only one respect. Here, Jose challenges the amount of restitution, whereas in *Swartz* and *Jackson* the defendants only challenged the district court's failure to determine their *ability to pay*. The defendants in *Swartz* and *Jackson* were therefore challenging the "restitution plan of payment," rather than the actual "plan of restitution." Iowa Code § 910.7. At issue here is the plan of restitution, rather than the plan of payment.

State v. Jose, 636 N.W.2d at 45.[1] The Swartz opinion does not use the phrase "plan of payment." Additionally, Swartz and Jackson both refer to Iowa Code section 910.3 plan of

restitution. State v. Swartz, 601 N.W.2d at 354; State v. Jackson, 601 N.W.2d at 357. Iowa Code section 910.3 requires the district court to determine the "amount of restitution" and such "court orders shall be known as the plan of restitution." Iowa Code § 910.3 (2017).

The Court of Appeals' opinions generally follow Swartz and Jackson that the "reasonable ability to pay determination" is not "ripe" for appeal unless the plan of restitution and the restitution plan of payment are final. See e.g. State v. Kurtz, 878 N.W.2d 469, 471-72 (Iowa Ct. App. 2016)("We conclude Kurtz is able to appeal the restitution order, including the court's failure to consider his ability to pay, because the plan of restitution and the restitution plan of payment were part of the sentencing order from which Kurtz had a right of appeal."); State v. Johnson, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) ("We conclude [Johnson] is able to appeal the restitution order, including the court's failure to consider his ability to pay,

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1 State v. Janz, 358 N.W.2d 547 (Iowa 1984).

because the plan of restitution and the restitution plan of payment were part of the sentencing order from which [Johnson] had a right of appeal."); State v. Tanner, No. 14-1963, 2016 WL 4384468, at * 5 (Iowa Ct. App. Aug 17, 2016)("It was proper for Tanner to raise the issue on direct appeal because, when the plan of restitution and restitution plan of payment are part of a sentencing order, a defendant has the right to direct appeal."); State v. Poland, No. 17-0189, 2018 WL 3302201, at *6 (Iowa Ct. App. July 5, 2018)("The facts here are similar to the facts of *State v. Johnson*"); State v. Boutchee, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018)(The checked boxes requiring repayment of court costs was not a "final restitution order" under Swartz and Jackson.); State v. Pearl, No. 13-0796, 2014 WL 1714490, at *5 (Iowa Ct. App. April 30, 2014)("Because the plan of restitution was not complete in the case by the time the notice of appeal was filed, we are unable to consider this issue at this time."); State v. Hols, No. 10-1841, 2013 WL 750307, at *2

(Iowa Ct. App. Feb. 27, 2013)(Judgment entry did not set an amount of attorney fees; defendant may seek relief pursuant to section 910.7); State v. Wilson, Nos. 1-104, 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. April 27, 2001)("We cannot address this issue at this time because no plan of restitution was completed at the time Wilson filed his notice of appeal and the record before us on appeal contains no court order dictating a plan for payment of restitution."). The Court of Appeals summed up the rule in Alexander:

> Our rule regarding the ability to appeal a restitution order can be summarized as follows: A restitution order is not appealable until it is complete; the restitution order is complete when it incorporates both the total amounts of the plan of restitution and the plan of payment. A defendant must also petition the court for a modification before they challenge the amount of restitution. If the above requirements are met, our Constitution requires the court to make a finding of the defendant's reasonable ability to pay.

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017).

In addition to being contrary to the Supreme Court's pronouncements in State v. Harrison, 351 N.W.2d 526, 529

(Iowa 1984) and State v. Haines, 360 N.W.2d 797 (Iowa 1985), the Swartz and Jackson line of cases fail to adequately take into consideration that the legislature provided the practical process of assessing court costs and attorney fees. The clerk of court is tasked with the duty of implementing the criminal judgment order. Iowa Code § 602.8102(141) (2017)("Carry out duties relating to the entry of judgment as provided in rule of criminal procedure 2.23, Iowa court rules."). The clerk of court must collect the court reporter fees. Iowa Code §§ 625.8 and 602.8102(99) (2017). The clerk is also to carry out duties related to probations and restitutions. Iowa Code § 602.8102(135) (2017) ("Carry out duties relating to deferred judgments, probations, and restitution as provided in sections 907.4 and 907.8, and chapter 910."). The clerk of court also is to collect filing fees in criminal cases where judgment is rendered. Iowa Code § 602.8106(1) (2017). As a practical matter, once the district court orders a defendant to pay court costs and attorney fees, the clerk of court assesses the amount

authorized by Code and/or the amount paid by the State Public Defender. The court does not enter a further order containing a specific amount of restitution.

The clerk is required to send the restitution plan to the Department of Correctional Services if the defendant is placed on probation. Iowa Code §§ 907.8 and 910.4 (2017). The court is required to send the restitution plan to the Department of Correction if the defendant is incarcerated. Iowa Code § 910.5(1)(a) (2017). The clerk of court carries out this duty for the court. Iowa Code § 602.8102(135), (141) (2017). The restitution plan is complete after sentencing when the clerk assesses the fines, fees, surcharges and other restitution as order by the judgment order. In general, nothing more will filed unless the defendant is sentenced to custody of the Department of Corrections. The Department of Corrections is required to "prepare a restitution plan of payment or modify any existing plan of payment." Iowa Code § 910.5(1)(d) (2017).

The restitution plan of payment is final at the time of sentencing. Generally, the court requires payment of fines, surcharges, attorney fees and other restitution be paid the day of sentencing. Iowa Ct. R. 26.2(1)("A person shall be instructed to pay the court debt with the office of the clerk of court on the date of imposition of the court debt."); Iowa Code § 602.807(1)(a)(" "Court debt" means all fines, penalties, court costs, fees, forfeited bail, surcharges under chapter 911, victim restitution, court-appointed attorney fees or expenses of a public defender ordered pursuant to section 815.9, or fees charged pursuant to section 356.7 or 904.108."). See (Judgment, p. 2)(App. p. 53)("Financial obligations shall be paid to the Clerk of Court"). However, at sentencing, the court may establish a payment plan. Iowa Ct. R. 26.2(2)(1)-(5). The sentencing court did not establish a payment plan. (Judgment)(App. pp. 52-54). Under either option provided by Iowa Court Rule 26, the restitution plan of payment is established at the time of sentencing.

CONCLUSION

Charles Albright respectfully requests this Court reverse his conviction for first degree kidnapping and remand to the district court for an appropriate order either dismissing the charge or entry of a judgment on a proper lesser-included offense. Alternatively, Albright respectfully requests this Court reverse his conviction for first degree kidnapping and remand for a new trial. Lastly, Albright respectfully requests this Court vacate the order for restitution for the cost of his legal assistance and remand for an appropriate order after consideration of his reasonable ability to pay this portion of criminal restitution.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.87, and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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 2,897 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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