

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0678

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER RYAN COVEL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DICKINSON COUNTY
THE HONORABLE DAVID A. LESTER, JUDGE

APPELLEE'S BRIEF

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FINAL

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court Did Not Abuse Its Discretion When It Revoked Defendant's Deferred Judgment and Imposed a Prison Sentence.

Authorities

State v. Barry, 2004 WL 1252706 (Iowa Ct. App. June 9, 2004)

State v. Formaro, 638 N.W.2d 720 (Iowa 2002)

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II. Defendant's Restitution Challenge is Premature, Not Directly Appealable, and Must Be Dismissed Because There is No Plan of Restitution in Place.

Authorities

Iowa Coal Min. Co., Inc. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

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ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Defendant Christopher Ryan Covell (“Defendant”) appeals the revocation of his deferred judgment and the imposition of a prison sentence. On appeal, Defendant argues that the district court erred when it revoked his deferred judgment, imposed a prison sentence, and imposed court costs because Defendant does not have a reasonable ability to pay.

Course of Proceedings

The State accepts Defendant’s course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Underlying Conviction

The facts of Defendant’s underlying crime are deeply disturbing, and a detailed recitation is not necessary for the resolution of this case. However, because Defendant challenges the revocation of his deferred judgment, it is necessary for the Court to

understand the circumstances surrounding the district court's decision. On or about August 24, 2012, Defendant anally sodomized his year-and-half old sister, which resulted in her death. 03-22-2013 Minutes of Testimony; Conf. App. 3–21. During his sex offender treatment, Defendant admitted that he also sexually abused another sister several times, “including a couple of times after the death” of his baby sister. 01-09-2018 Hearing Tr. 38:10–39:1.

On March 25, 2013, Defendant pleaded guilty to one count of sexual abuse in the second degree. 03-25-2013 Order for Judgment; App. 24–26. Because Defendant was a youthful offender at the time of his conviction, his sentence was deferred, and his supervision was “transferred back to the Juvenile Court for disposition in accordance with Section 232.52 of the Code of Iowa, and the plea agreement, and he shall be supervised in accordance with the provisions of Section 232.54(1)(h) of the Code of Iowa.” *Id.*

After Defendant turned 18, in accordance with the youthful offender provisions of the Iowa Code, Defendant appeared in the district court to be sentenced. 10-01-2015 Order of Disposition; App. 27–32. The district court granted Defendant a deferred judgment and placed him on probation for five years. *Id.* ¶¶ 1–2; App. 27. Defendant

was placed at a residential treatment facility (“RTF”) and was required to continue with sex offender and mental health treatment.

Id.

Probation Violations and Revocation

On February 20, 2016, Defendant entered the Sex Offender Treatment Program (“SOTP”) at the RTF in Sioux City. 01-23-2018 PSI at 9; Conf. App. 30. On June 12, 2017, after “one minor violation, [] two medium violations, and [] 17 major violations” of the rules of the SOTP and RTF, Defendant was terminated from the program. 01-23-2018 PSI at 2, 9, PSI Attachment (Letter to Kris Johnson, Parole/Probation Officer); Conf. App. 23, 30, 34–37.

While most of Defendant’s violations related to the general rules of the RTF, in “June he was found in possession of pornographic magazines and movies, which ultimately tipped the scale and lead to the termination from the program. Please note that the sexual component of the pornography is concerning because he was heavily into pornography when this crime occurred, ultimately killing his sister sexually. It is also noted that [Defendant] lack[ed] progress in his therapy throughout his stay at the RTF.” 01-23-2018 PSI at 9; Conf. App. 30. When Defendant’s room was searched, “21 magazines

ranging from hard core pornography to erotica were located...[Defendant] admitted to collecting the magazines and at times selling them to other sex offender residents...[and] also admitted to personal use of the pornography...Magazines located included but were not limited to Hustler, Live Young Girls, Adam and Eve, and Just 18.” 01-23-2018 PSI Attachment (Letter to Kris Johnson, Parole/Probation Officer); Conf. App. 34–37. Defendant’s counselor and the manager of the RTF wrote that “[t]he level of secrecy and criminal thinking involved in [Defendant’s] most recent treatment violation is concerning. It indicates severe deficits in his internalization of and motivation to use SOTP skills to work towards avoiding further deviant cycles which could in turn result or progress to further victimization[.]” *Id.*

The updated pre-sentence investigation report (“PSI”) recommended that Defendant’s deferred judgment be revoked and a prison sentence imposed for “several reasons[.]”

[T]he original crime resulted in the death of the offender’s sister. At that time he was very heavy into pornography. He has been through sex offender treatment at Four Oaks which he did not finish because he turned 18, he was placed in the RTF and failed to follow the rules, along with possessing pornography. While at the RTF he failed to successfully

complete sex offender treatment. Prior to entering the RTF he was in the community for approximately 4 months and sought no treatment; he did not have stable living, and was not able to manage himself within the community.

01-23-2018 PSI at 11; Conf. App. 32.

The district court held two probation revocation hearings, three months apart. At the first hearing, Defendant's probation officer, Kris Johnson, testified regarding Defendant's multiple probation violations. 01-09-2018 Hearing Tr. 5:6–24, 7:3–8:4. Johnson also testified that the person "who runs the program at the RTF" advised that Defendant should not return to the facility. *Id.* at 8:5–9:13. Johnson noted that Defendant had not completed the SOTP at the RTF. *Id.* at 9:20–10:8.

Johnson advised against placing Defendant on probation with a requirement for outpatient SOTP. Johnson stated that

[Defendant] wouldn't follow the rules at the residential treatment facility regarding sex pornography, DVDs, all those sorts of things. All of those things are prohibited while you're in treatment. So the fact that he was in a 24-hour supervised facility in sex offender treatment and still getting those things and still utilizing those things indicates to me that the need is great for sex offender treatment and that the community's safety could

possibly be in jeopardy regarding his sex offenses in the past.

Id. at 10:23–12:7.

Defendant also testified at the first probation revocation hearing. *Id.* at 17:1–3. Defendant described his treatment, education, job and termination history, and plans for the future. Defendant admitted to the probation violations. *Id.* at 2:19–4:18. Defendant asked to be placed back into the RTF and stated he would do better because “now I have more concrete plan to put in.” *Id.* at 25:2–7. When asked about this plan, Defendant stated it was “to just get settled and talk to [my counselor] about just things I could do differently.” *Id.* at 25:8–19.

At the end of the first probation revocation hearing, the district court took judicial notice of two of Defendant’s juvenile court files, JVJV003039, “which shows much of the history of his behaviors and treatment over the course of when he was being supervised as a juvenile offender,” and JVJV003032, which was a child in need of assistance case concerning Defendant. *Id.* at 37:23–38:9, 45:13–22. The district court also ordered an updated PSI and took the matter under advisement. *Id.* at 45:13–46:14.

Defendant's second probation violation hearing took place three months after the first hearing. With the exception of the updated PSI, the parties did not present any new evidence. The State continued to argue for the revocation of Defendant's deferred judgment and the imposition of a prison sentence, and Defendant again asked to be re-placed at the RTF. 04-09-2018 Hearing Tr. 4:1–7:2. Prior to imposing the sentence, the district court stated:

Yours is an interesting case, sir. And part of the reason it's taken me so long is I wanted to take the time to review the juvenile information contained in the lower court files. What we always do in these cases is look at, of course, the number of factors and how those factors apply to three really overarching principles governing sentencing. Those have been touched on here.

First of all, as the retribution or punishment aspect of it. Second, and these are in no particular order, is the rehabilitation aspect of it. What can we do for you to try to change your behavior that led you into court here? And thirdly, the restitution aspect, payment, compensation to the victims. From what I've seen in the juvenile file and of course in the contents of the file that is currently before me...a lot of effort has been expended toward trying to rehabilitate you. Efforts were made as a juvenile, efforts were made again as an adult. Yet, although [trial counsel] points out correctly you didn't reoffend, nonetheless, you continued to show an interest in and possess the type of materials that obviously

have to give rise to concerns by this court that the past efforts at rehabilitation have not been effective.

I struggle with this and I partly agree with [trial counsel], you are a young man, you didn't commit another crime, give you another chance, but unfortunately, from what I've seen in the court files, those efforts have not been successful. And what I'm deeply concerned about is the possibility of reoffending. As [trial counsel] points out, the testing that's been done would suggest that you won't, but also staring me in the face is your decision to possess the materials that you did, violate the terms of your probation, all after having been so closely supervised and had so many efforts to rehabilitate you expended on you for the last several years.

I don't like the number of years that are required to be imposed for a term like this. As counsel as said, because your offense was committed as a juvenile, the mandatory minimums do not apply. There is now a long line of cases making that clear. But nonetheless, I'm required to sentence you to at least an indeterminate term, the number of years I don't like, but be that as it may, that's what the legislature has decided, that we can't control the number of years you'd actually be required to serve.

I've also obviously taken into consideration the nature of the harm...to the victim here and the family. Nobody can disagree that that wasn't significant. Granted, you were a juvenile, you had all of the issues with the mental development, impulse control, things like that that go along with the juvenile mind. However, you're now an adult

and you're still showing propensities toward that type of behavior even though you're in one of the most structured settings that we have short of prison. Because of that, I, after thinking long and hard about this, have come to the conclusion that the appropriate disposition in your case is a prison term. The thing I feel good about is the parole board, if you get down there, can decide hey, this kid has done enough time, he can get out, we'll put him on parole. You'll be subject to the lifetime supervision – and your behavior, you don't exhibit this type of behavior and that they can keep track of you. Again, though, it's with some hesitation that I find that this is the appropriate disposition. By doing this, I'll acknowledge I am moving beyond the rehabilitative aspect of it. Certainly that will be part of your time in prison, but I think it's time for you that the emphasis switches more to the retribution side of it, and I think that's why this needs to occur this way.

Id. at 7:21–10:24. The district court then revoked Defendant's deferred judgment and sentenced him to an indeterminate term of 25 years in prison. 04-09-2018 Order of Disposition; App. 104–110. The district court did not impose a fine or surcharge but required Defendant "to make restitution for court costs and correctional fees. You shall be required to repay court-appoint[ed] attorney fees in the amount approved by the Office of the State Public Defender, the court finding that you have a reasonable ability to pay based on your past employment as demonstrated while you were at the RTF and as set

forth in the presentence investigation report.” 04-09-2018 Hearing Tr. 11:25–12:11, 04-09-2018 Order of Disposition ¶ 10; App. 107. The district court did not determine an amount of restitution or put a restitution plan in place.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Revoked Defendant’s Deferred Judgment and Imposed a Prison Sentence.

Preservation of Error

Defendant “is not required to raise an alleged sentencing defect in the trial court in order to preserve claimed error on that ground.” *State v. Barry*, 2004 WL 1252706, at *1 (Iowa Ct. App. June 9, 2004) (citing *State v. Wilson*, 294 N.W.2d 824, 825–26 (Iowa 1980)). As such, the State does not contest error preservation.

Standard of Review

Where a challenged sentence falls within the statutory parameters, this Court “presume[s] it is valid and only overturn[s] for an abuse of discretion or reliance on inappropriate factors.” *State v. Hopkins*, 860 N.W.2d 550, 554 (Iowa 2015) (citing *State v. Washington*, 832 N.W.2d 650, 660 (Iowa 2013)). Abuse of discretion is found only when the grounds for the district court’s decision are clearly untenable or unreasonable. *State v. Kirby*, 622 N.W.2d 506,

511 (Iowa 2001) (quoting *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996)); see also *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) (“[O]ur task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds.”). There is a strong presumption in favor of the district court’s sentencing decision. *Formaro*, 638 N.W.2d at 724.

Merits

At the district court, Defendant “readily admitted his violations of the rules at the RTF[.]” App. Br. at 13. Even though Defendant admitted to the multiple violations, he argues that the district court abused its discretion when it revoked his deferred judgment and imposed a prison sentence because it failed to recognize his capacity for reform. *Id.* This claim is soundly belied by the record.

The district court held not one but two revocation hearings in which testimony, evidence, and argument were introduced. At the conclusion of the first revocation hearing, the district court ordered an updated PSI. The district court then took three months to carefully review Defendant’s entire record, including his juvenile record which outlined all of the efforts taken to rehabilitate him.

At the second hearing, the district court engaged in a lengthy monologue in which it acknowledged it struggled over its decision, but stated it ultimately decided to revoke Defendant's deferred judgment and impose a prison sentence. The district court stated that Defendant's record showed repeated attempts at rehabilitation, and although Defendant did not reoffend, he "continued to show an interest in and possess the type of materials that obviously have to give rise to concerns by this court that the past efforts at rehabilitation have not been effective." 04-09-2018 Hearing Tr. The district court also said that Defendant was "now an adult and [] still showing propensities toward that type of behavior even though you're in one of the most structured settings that we have short of prison." *Id.* at 10:3–7.

The hearing transcripts show the district court was thoughtful, considered all appropriate sentencing factors, carefully reviewed Defendant's past attempts at rehabilitation, and determined that Defendant's current behavior was troubling because he exhibited behavior that demonstrated that the multiple efforts at his rehabilitation were not successful. Only after considering all of this

information did the district court revoke Defendant's deferred judgment and impose a prison sentence.

And this decision is supported by the record. Defendant attempts to downplay his probation violations by stating they were "only violations of the facility's rules[.]" App. Br. at 13. This argument fails to grapple with the severity of Defendant's underlying offense, and the fact that Defendant underwent six years of rehabilitative efforts, and yet, he still decided to accumulate large amounts of pornography in direct violation of SOTP requirements. The insidious nature of these materials in Defendant's case is made clear by the PSI, which stated that Defendant's previous considerable appetite for pornographic material may have played a role in the sexual assault and death of his sister. Defendant has failed to show the district court abused its discretion, and his claim fails.

II. Defendant's Restitution Challenge is Premature, Not Directly Appealable, and Must Be Dismissed Because There is No Plan of Restitution in Place.

Motion to Dismiss

Defendant's ability-to-pay claim is not properly before this Court because it is not yet ripe. Nor has Defendant exhausted his remedies below, as required. For those reasons, this Court should

dismiss Defendant's restitution claim. *See Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 432 (Iowa 1996) ("If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it."); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (declining to grant relief on a defendant's ability-to-pay challenge where the plan of restitution was not yet complete and the defendant had not yet petitioned the district court for modification under Iowa Code section 910.7).

A district court is not required to consider a defendant's reasonable ability to pay until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete" *Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Campbell*, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (stating that the sentencing court is not required to consider the defendant's ability to pay until it has issued "the order constituting the plan of restitution"). Until that obligation is triggered, a defendant's challenge on ability-to-pay grounds is premature. *See Jackson*, 601 N.W.2d at 357 (stating that it was precluded from granting the defendant the relief he sought).

At the time of Defendant’s appeal, his plan of restitution was not complete. The district court had ordered that Defendant pay court costs and attorney fees, but it did not include even a temporary amount of costs or fees in its sentencing order. 04-09-2018 Order of Disposition; App. 104–110. Nor had it entered any supplemental orders setting forth the amounts of those costs and fees. Until the district court has “at a minimum, an estimate of the total amount of restitution,” Defendant cannot challenge a determination regarding his ability to pay costs and fees. *See Campbell*, 2016 WL 4543763, at *4; *see also, State v. Brown*, No. 16-1118, 2017 WL 2181568, at *4 (Iowa Ct. App. May 17, 2017) (concluding that the defendant’s ability-to-pay challenge was premature because “the trial court had not yet entered a plan of restitution that would trigger the trial court’s obligation to determine [the defendant’s] reasonable ability to pay”); *State v. Alexander*, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017) (holding that the district court’s restitution order was “incomplete and not directly appealable” where the district court had “expressly reserved the amounts to be included in the plan of restitution for a later determination”); *State v. Kemmerling*, No. 16-0221, 2016 WL 5933408, at *1 (Iowa Ct. App. Oct. 12, 2016)

“Because the total amount of restitution had not yet been determined by the time the notice of appeal was filed, any challenge to the restitution order in this case is premature.”); *see also State v. McMurry*, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) (stating that a preliminary restitution order with no restitution amount would not be properly before the court).

Nor is Defendant entitled to directly appeal the district court’s reasonable ability to pay finding until he moves under Iowa Code section 910.7 for modification of the plan of restitution or plan of payment, or both. *See State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) (reaffirming *Jackson’s* principle “that ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7”).

Thus, until the district court completes the plan of restitution and Defendant exhausts his remedies under Iowa Code section 910.7, Defendant’s claim is not ripe and not directly appealable. *See Jackson*, 601 N.W.2d at 357. Because Defendant’s restitution claim is not properly before this Court, it must be dismissed. To the extent the district court made a premature decision regarding Defendant’s

ability to pay, it should be disregarded. *See Campbell*, 2016 WL 4543763, at *4.

CONCLUSION

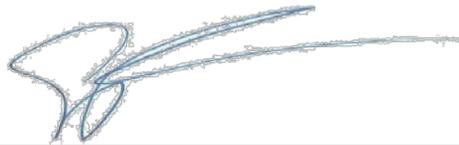
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,431** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 12, 2018



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