IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JONATHAN SHANE WESTON, Defendant-Appellant.	)	S.CT. NO. 17-1838

APPEAL FROM THE IOWA DISTRICT COURT
FOR APPANOOSE COUNTY
HONORABLE RANDY S. DeGEEST, JUDGE
(JURY TRIAL & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT

MARK C. SMITH
State Appellate Defender

VIDHYA K. REDDY
Assistant Appellate Defender
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

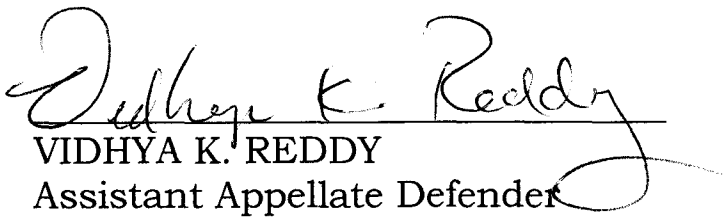
STATE APPELLATE DEFENDER
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On September 25, 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 Jonathan Weston, 301 N. Main St, Numa, Iowa 52544.

STATE APPELLATE DEFENDER



VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

VKR/lr/6/18
VKR/sm/9/18

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Jonathan Shane Weston from his jury trial conviction for Domestic Abuse Assault Causing Bodily Injury, a Serious Misdemeanor in violation of Iowa Code sections 708.1 and 708.2A(2)(b) (2015).

Course of Proceedings: On February 27, 2017, the State charged Weston with: Burglary in the First Degree, a Class B Felony in violation of Iowa Code sections 713.1 and 713.3 (2015) (Count 1); Domestic Abuse Assault by Impeding Air or Blood Flow Causing Bodily Injury, a Class D Felony in violation of Iowa Code sections 708.1 and 708.2A(5) (2015) (Count 2); and Assault While Participating in a Felony, a Class D Felony in violation of Iowa Code section 708.3(2) (2015) (Count 3). (2/27/17 Trial Information) (App. pp. 4-5). Weston

pled not guilty and demanded his right to a speedy trial within 90 days of the trial information. (3/19/17 Written Arraignment) (App. pp. 6-7).

On May 18, 2017, the State moved to dismiss Counts 1 and 3 "in the interest of justice" on grounds that the State "lack[ed] sufficient evidence" to pursue those counts to trial. (5/18/17 Motion to Dismiss) (App. p. 10). The court dismissed those counts with costs assessed to the state. (5/18/17 Order Dismissing) (App. pp. 11-12).

A jury trial on the remaining Count 2 charge (Domestic Abuse Assault by Impeding Air or Blood Flow Causing Bodily Injury) commenced on May 23, 2017. (Trial Tr. p.1 L.1-25, p.5 L.9-20). On May 24, 2017, the jury returned a verdict finding Weston guilty of the lesser-included offense of Domestic Abuse Assault Causing Bodily Injury. (Trial Tr. p.177 L.6-23); (5/24/17 Verdict Form) (App. pp. 13-14).

A sentencing hearing was held on October 23, 2017. At that time, the court imposed judgment against Weston for Domestic Abuse Assault Causing Bodily Injury (a lesser-

included-offense of the Count 2 charge), a Serious Misdemeanor in violation of Iowa Code sections 708.1 and 708.2A(2)(b) (2015). The court imposed 365 days of incarceration, suspended all but 120 days, and placed Weston on probation for one year. The court also imposed a $315 fine and 35% surcharge. Additionally, the court ordered Weston to pay court costs as assessed by the clerk of court, and pay reimbursement of court-appointed attorney fees. Finally, the court ordered Weston to submit a DNA sample for profiling, ordered him to complete a batterer's education program, and imposed a five-year no-contact-order. (Sent. Tr. p.15 L.6-p.16 L.3); (10/23/17 Sentence) (App. pp. 15-18).

Weston filed a pro se Notice of Appeal on November 14, 2017. (11/14/17 Certified NOA) (App. pp. 19-20).

Facts: Any facts pertinent to the issues raised will be discussed below.

ARGUMENT

I. The district court failed to substantially comply with Weston's right of allocution at sentencing.

A. Preservation of Error: The general rule requiring error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Thus, a defendant is not required to raise an alleged sentencing defect in the district court in order to preserve a right of direct appeal on that ground. State v. Wilson, 294 N.W.2d 824, 825-826 (Iowa 1980); State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010).

B. Standard of Review: The standard of review for sentencing procedures is an abuse of discretion. State v. Craig, 562 N.W.2d 633, 634 (Iowa 1997). An abuse of discretion will be found if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Duckworth, 597 N.W.2d 799, 800 (Iowa 1999).

C. Discussion: Iowa Rule of Criminal Procedure 2.23(3)(d) provides that "prior to... rendition [of judgment], counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." Iowa R. Crim. P. 2.23(3)(d). The rule is mandatory, State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996), and substantial compliance is required, Craig, 562 N.W.2d at 635. Any waiver of the allocution right must be unambiguous, knowing, and intentional. State v. Lamadue, 622 N.W.2d 302, 304 (Iowa 2001). Where the allocution requirement is not substantially complied with, a remand for resentencing is required. Id.

Rule 2.23(3)(d) requires that *both* "counsel for the defendant, *and the defendant personally*" be allowed to address the court in mitigation of punishment "prior to... rendition [of judgment]". Iowa R. Crim. P. 2.23(3)(d) (emphasis added). A sentencing judge is not required to use any particular language in offering the allocution right to the defendant, but the court must give the defendant "an

opportunity to volunteer any information helpful to the defendant's cause." Duckworth, 597 N.W.2d at 800; Craig, 562 N.W.2d at 635. The sentencing judge "should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." Craig, 562 N.W.2d at 636 (quoting Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 355, 5 L.Ed.2d 670, 673 (1961)).

In the present case, the sentencing court failed to substantially comply with the obligation to afford Weston his personal right of allocution prior to the court's rendition of judgment.

At one point, after hearing defense counsel's discussion of Defendant's employment situation, the sentencing court questioned whether Weston was presently employed, and Weston personally responded to answer that he was employed and to provide an explanation of that employment. (Sent. Tr. p.8 L.25-p.9 L.16). Later, the court again questioned Weston's employment status, stating:

> I'm confused about the work. I remember this was set for sentencing, and Mr. McCoy [Defense

> Counsel], you filed an application to continue so your client could go build stadiums, and now he's saying he didn't go build stadiums.

(Sent. Tr. p.110 L.21-25). Weston again personally sought to interject a response to the court's question on the employment issue, resulting in the following exchange:

> THE DEFENDANT: Can I say –
>
> THE COURT: ***You don't have the right of allocution, but I was going to grant it to you to make any statement you want to say.*** You don't have to say anything if you don't want to, and maybe you should talk to your attorney first because attorneys give really good advice before they have people –
>
> THE DEFENDANT: I feel just like telling you the truth would be best. Stadiums are a seasonal time thing, and the big part of them is football bleachers, which is September is when your football season starts your rush on them. Now the ones he's waiting on the concrete on are the late bleachers or the baseball, rodeo arenas, so it gets a break in there. And probably even in that time there will be a short break at Thanksgiving. He's not going to work straight through that.

(Sent. Tr. p.10 L.21-p.11 L.17). The court then redirected questioning back to defense counsel, stating:

> THE COURT: So, Monte, why shouldn't I give your client 365 days in jail, which I'm inclined to do?

(Sent. Tr. p.11 p.18-19). The court engaged in further discussion with defense counsel and the prosecuting attorney regarding the appropriate sentence, occasionally (on four occasions) directing particular questions to Weston regarding his access to a vehicle and his employment. (Sent. Tr. p.11 L.18-p.14 L.5). The court then proceeded to pronounce its judgment and sentence against Weston, imposing 365 days in jail and suspending all but 120 days. (Sent. Tr. p.14 L.6-p.15 L.16). After the court informed Weston there was a sheriff present to take him into custody on the sentence imposed, Weston personally interjected:

> THE DEFENDANT: I can't say anything? You know, I?
>
> THE COURT: I gave you an opportunity. Do you have something else you want to say?
>
> THE DEFENDANT: I just feel like I really wish to, you know, there was more -- I did everything I could do, and maybe I didn't know what to do on the notarized statements, but all the evidence, I did everything I could to prove everything I could prove, that her statements was a lie. And I don't know how that possibly even got to the jury trial if -- I was even offered this as a plea bargain.
>
> I didn't take it because I wasn't guilty of it, and my ex-girlfriend of 2004 that I'm still friends with,

> was -- is friends with me and writing a statement for the next case I'm on. And I feel like going into custody now puts me where I'm not going to be able to get the right to -- I don't know. I'm sorry. I just don't feel like I really got –

(Sent. Tr. p.16 L.9-p.17 L.2).

The district court failed to substantially comply with Weston's right of allocution at sentencing. The court mistakenly believed Weston did not have the right of allocution at sentencing. (Sent. Tr. p.11 L.2-4); Compare Iowa R. Crim. P. 2.23(3)(d) (providing for right of allocution). Although the court stated "but I was going to grant it to you to make any statement you want to say", that statement was made in the midst of Weston's request to respond to the Court's inquiry on the specific issue of his employment. The court's statement, in that context, did not unambiguously provide Defendant with an opportunity to volunteer any and all arguments or information he might have supporting mitigation of his sentence – as distinct from merely speaking to the employment matter at issue in the court's then-already-pending question. See State v. Nosa, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007)

(resentencing required where "The district court did not unambiguously provide Nosa with the opportunity to exercise his right to allocution."). That is, in context, the court's reference to an opportunity for allocution would be understood as an ability to personally answer the court's questions concerning employment, not to volunteer any and all information Defendant may wish to personally provide in mitigation of sentence untethered from the specific factual inquiry made by the court. See State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996) (Allocution requirement not substantially complied with where court's "question did not invite Millsap to address the court in mitigation of the sentence, nor did the surrounding circumstances reveal Millsap should have understood the court was giving him the opportunity."); Nosa, 738 N.W.2d at 660 ("The important thing is whether the defendant is given an opportunity to volunteer any information helpful to the defendant's case.") (quoting Craig, 562 N.W.2d at 635).

Moreover, the wording of the court's statement ("I was going to grant it to you to make any statement you want to say") suggested that the court would address Weston's allocution right at some later point of the sentencing hearing, not that this particular moment (when Weston was responding to the court's pending inquiry on the specific issue of his employment) was the time to raise any and all arguments or information Weston might wish to personally present in mitigation of punishment. After Weston responded to the court's specific inquiry regarding his employment, the sentencing court then redirected its questioning back to defense counsel and away from Defendant. (Sent. Tr. p.11 p.18-19) ("So, Monte, why shouldn't I give your client 365 days in jail, which I'm inclined to do?"). The court did not subsequently invite Defendant to volunteer any information or arguments he may personally wish to make in mitigation of sentence.

Subsequently, after the court had already pronounced judgment and the selected sentence in Weston's case, Weston

interjected stating: "I can't say anything? You know, I?" (Sent. Tr. p.16 L.9-10). At that point, Weston was permitted to speak freely to voice arguments and information in mitigation of his sentence. (Sent. Tr. p.16 L.11-p.17 L.2). Such opportunity, however, came too late to comply with the rule, as judgment and sentence had already been pronounced by the sentencing court. Rule 2.23(3)(d) requires that the allocution right be afforded "*Prior to*... rendition [of judgment]". Iowa R. Crim. P. 2.23(3)(d) (emphasis added). Although the court subsequently stated it still believed the sentence it already rendered to be appropriate (Sent. Tr. p.17 L.3-p.18 L.1), the purpose of the requirement that a defendant's right of allocution be entertained *prior* to the rendition of judgment is to ensure the court properly takes into account such information prior to selecting the sentence. It is not enough that, after the court already commits to a particular sentence, it claims to disclaim that the defendant's information provided in allocution would have made any difference in the sentence. See State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) ("...[A]lthough the district

court attempted to disclaim the reference to the impermissible sentencing factor, 'we cannot speculate about the weight the sentencing court gave to [the referenced factor]. Since we cannot evaluate their influence, we must strike down the sentence.'") (quoting State v. Black, 324 N.W.2d 313, 316 (Iowa 1982)). A new sentencing hearing should be ordered.

D. Conclusion: Defendant-Appellant Jonathan Shane Weston respectfully requests that this Court vacate his sentence and remand for a new sentencing hearing.

II. The portion of the sentencing order directing Weston to pay court costs must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence. Additionally, the district court erred in ordering Weston to pay court costs and attorney fees, without making any ability to pay determination.

A. Preservation of Error: The district court's sentence may be reviewed on appeal even where there was no objection in the district court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999). Because the challenged language ordering Weston to pay court costs and court-appointed attorney fees is contained within the district court's sentencing order, it is

considered part of the sentence and may be addressed on direct appeal. State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984); State v. Campbell, No. 15-1181, 2016 WL 4543763, at *2 (Iowa Ct. App. Aug. 31, 2016); State v. Pace, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018).

B. Standard of Review: Appeals of restitution orders are reviewed for an abuse of discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). Constitutional issues are reviewed de novo. State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009).

C. Discussion: Weston respectfully urges that the portion of the sentencing order directing him to pay court costs must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence (which included no reference to court costs). Additionally, the portion of the sentencing order directing him to pay reimbursement for court-appointed attorney fees (and also the portion ordering payment of court costs, if not removable by way of a nunc pro tunc order) amounted to an illegal sentence and abuse of

discretion as there was no finding of an ability to pay those fees and costs.

1). Nunc Pro Tunc (Court Costs):

The court's written sentencing order directs Weston to pay court costs as assessed by the clerk of court. See (10/23/17 Sentence, p.3 ¶10) (App. p. 17). However, the court's oral pronouncement of sentence made no reference to court costs. See (Sent. Tr. p.15 L.6-p.16 L.3).

The portion of the written sentencing order assessing court costs is thus in conflict with the court's oral pronouncement of sentence. Where there is a discrepancy between the oral pronouncement of sentence and the written judgement, the oral pronouncement governs. State v. Hess, 533 N.W.2d 525, 527-529 (Iowa 1995). The proper remedy is to remand for entry of a nunc pro tunc order. Id. at 529.

A nunc pro tunc should accordingly be entered removing from the written sentencing order Weston's obligation to pay court costs. See (10/23/17 Sentence, p.3 ¶10) (App. p. 17)

(ordering defendant to pay "Court costs... (Clerk to assess.) (Additional costs may be later certified by the clerk.)").

Alternatively, to the extent this Court determines the portion of the written sentencing order directing Weston to pay court costs is not appropriately removable by way of a nunc pro tunc order, this Court should hold that the assessment of court costs without any ability to pay determination amounted to an abuse of discretion and an illegal sentence, as discussed next in subsection 2 of this division.

2). Illegal Sentence and Abuse of Discretion (Court Costs and Court Appointed Attorney Fees)

A sentencing court must order restitution to the victims of a crime and to the clerk of court for fines, penalties, and surcharges, regardless of a defendant's ability to pay. Iowa Code section 910.2(1) (2015); State v. Wagner, 484 N.W.2d 212, 215–16 (Iowa Ct. App. 1992). However, restitution for crime victim assistance reimbursement, for public agencies, for court costs, and for court-appointed attorney fees may only be assessed to the extent the defendant is reasonably able to

pay. Iowa Code § 910.2(1) (2015). See also Iowa Code § 815.14 (2015); Campbell, 2016 WL 4543763, at *3. "A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910." Van Hoff, 415 N.W.2d at 648. Thus, before ordering payment for court costs or court-appointed attorney fees, the court must consider the defendant's ability to pay. Indeed, the imposition of a reimbursement obligation for court-appointed-attorney fees "without any consideration of... ability to pay infringes on [the defendant's] right to counsel." Dudley, 766 N.W.2d at 626.

In the present case, the sentencing court ordered that Weston pay court costs and court-appointed attorney fees. See (Sent. Tr. p.15 L.19-p.16 L.3) (ordering reimbursement of court-appointed attorney fees); (10/23/17 Sentence, p.3 ¶10) (App. p. 17) (ordering reimbursement of court-appointed attorney fees, and court costs as assessed by the clerk). However, no determination of Weston's ability to pay such costs and fees was made by the sentencing court.

The portions of the district court's sentence ordering Weston to pay court costs and court-appointed attorney fees without any ability-to-pay determination is statutorily and constitutionally unauthorized and illegal. See State v. Bruegger, 773 N.W.2d 862, 871 (an illegal sentence is one that "is outside the statutory bounds" or "itself...unconstitutional"); Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001) (an illegal sentence is "one not authorized by statute"). Such aspects of the sentence also amount to a "failure of the court to exercise discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. Statutorily and constitutionally, the court must consider the defendant's ability to pay before ordering payment for court costs and court-appointed attorney fees. Id. See also State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018). It was error for the court to order Weston to pay court costs and attorney fees without affirmatively making any ability to pay determination. See Dudley, 766 N.W.2d at 615 (reimbursement obligation "may not be constitutionally imposed on a defendant unless a determination is *first* made

that the defendant is or will be reasonably able to pay the judgment.") (emphasis added); Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000) ("Constitutionally, a court must determine a criminal defendant's ability to pay *before* entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.") (emphasis added). The portion of the sentencing order assessing court costs and court-appointed attorney fees should be vacated and remanded to the district court for entry of a corrected sentencing order omitting that language.

D. Conclusion: Defendant-Appellant Jonathan Shane Weston respectfully requests that the portion of the sentencing order assessing court costs and court-appointed attorney fees should be vacated and remanded to the district court for entry of a corrected sentencing order omitting that language. See (10/23/17 Sentence, p.3 ¶10) (App. p. 17).

III. The district court entered an illegal sentence in taxing to Weston all court costs in the action rather than only those court costs associated with the Count 2 offense on which he was convicted.

A. Preservation of Error: Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010). An illegal sentence is "one not authorized by statute." Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001). See also State v. Poyner, No. 06-1100, 2007 WL 4322193, at *2 (Iowa Ct. App., Dec. 12, 2007) (holding that, where taxation of costs to defendant was authorized by statute, defendant "did not receive an illegal sentence"). Such illegal sentence may be corrected at any time. See Iowa R. Crim. P. 2.24(5)(a).

B. Standard of Review: Challenges to the legality of a sentence are reviewed for errors at law. State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998).

C. Discussion: To the extent the order to pay court costs is not vacated as requested above in Division II, this

Court should hold that assessment to Weston of all court costs of the action rather than only those costs associated with the convicted count (Count 2), amounted to an illegal sentence.

The State initially charged Weston with three counts, in a multi-count trial information. (2/27/17 TI) (App. pp. 4-5). However, on May 18, 2017, the State moved to dismiss Counts 1 and 3 "in the interest of justice" on grounds that the State "lack[ed] sufficient evidence" to pursue those counts to trial. (5/18/17 Motion to Dismiss) (App. p. 10). On the same date, the court entered an order stating those counts would be dismissed and that "the costs of said dismissals are assessed to the State." (5/18/17 Order Dismissing) (App. pp. 11-12).

Weston subsequently proceeded to trial on the remaining Count 2 offense, and was ultimately convicted and sentenced for a lesser-included offense of that count. (Trial Tr. p.1 L.1-25, p.5 L.9-20, p.177 L.6-23); (5/24/17 Verdict Form) (App. pp. 13-14); (Sent. Tr. p.15 L.6-p.16 L.3); (10/23/17 Sentence) (App. pp. 15-18). Although the court's earlier May 18, 2017 order specified that Counts 1 and 3 were to be dismissed with

"the costs of said dismissals... assessed to the State" (5/18/17 Order Dismissing) (App. pp. 11-12), the court's subsequent October 23, 2017 sentencing order directed that the court costs be assessed against Weston, without limiting the costs assessed to only those costs associated with the Count 2 charge. See (10/23/17 Sentence, p.3 ¶10) (App. p. 17) ("Court costs in the amount of $ _____. (Clerk to assess.). (Additional costs may be later certified by the clerk.)."). An examination of the financial detail of the Combined General Docket indicates that Weston was charged the full court costs, including those incurred prior to May 18, 2018 (the date Counts 1 and 3 were dismissed) in addition to the costs incurred after that date. See (Combined General Docket, p.13: Financial Summary) (App. p. 22). Additionally, the judgment and lien detail of the Combined General Docket indicates that judgment was entered against Weston and in favor of the State for "Costs", but that no such judgment was entered against the State for the costs associated with the dismissed Counts 1 and 3. See e.g., (Combined General Docket, p.12:

Judgment/Lien Detail) (App. p. 21) (specifying judgment was entered "Against" Weston and "For" the "State of Iowa" for "FINE $315 + S/C $110.25 + COSTS + ATTY FEES").

To the extent the sentencing court ordered Weston to be assessed *all* costs rather than only the costs associated with the Count 2 charge on which he was convicted, such assessment amounted to a statutorily unauthorized, and therefore illegal, sentence.

Court costs "are taxable only to the extent provided by statute." City of Cedar Rapids v. Linn County, 267 N.W.2d 673 (Iowa 1978). See also City of Des Moines v. State ex rel. Clerk of Court, 449 N.W.2d 363, 364 (Iowa 1989) (similarly stating). "In the absence of such statutory authorization, a court has no power to award costs against a defendant...." Woodbury County v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969) (quoting 20 Am.Jur.2d, Costs, section 100). See also Poyner, 2007 WL 4322193, at *2 (holding defendant "did not receive an illegal sentence" because taxation of costs to him was authorized by statute).

Under the Iowa Code, a court may make a defendant responsible for court costs associated with a particular charge only when the defendant pleads or is found guilty on such charge. No statutory provision authorizes making a defendant responsible for court costs associated with a charge that is ultimately dismissed by the State. See Iowa Code § 815.13 (2011) (stating prosecution "fees and costs are recoverable by the [prosecuting] county... from the defendant *unless* the defendant is found not guilty or *the action is dismissed....*") (emphasis added); Iowa Code § 910.2 (2011) ("In all criminal cases in *which there is a plea [or] verdict of guilty...*, the sentencing court shall order that restitution be made by each offender... to the clerk of court for... court costs....") (emphasis added).

"... Iowa Code section 815.13 and section 910.2 clearly require... that only such... costs attributable to the charge on which a criminal defendant is convicted should be recoverable" *and "costs not clearly associated with any single charge should only be assessed proportionally against the defendant."* State

v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991) (emphasis added). See also Id. ("Since the defendant was only convicted on one of three counts he should be required to pay only one-third of these costs" that "are not clearly associated with any single charge"); State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009) ("...[I]t is elementary that a winning party does not pay court costs."); State v. Hill, No. 03-0560, 2004 WL 433844, at *2 (Iowa Ct. App. March 10, 2004) (district court erred in ordering defendant to pay total court costs from mistrial, as defendant was required to pay restitution only for court costs associated with the charge to which he ultimately pled guilty, and court costs not clearly associated with the charge to which he pled guilty should be assessed against defendant at a rate of one-half); State v. Wheeler, No. 11–0827, 2012 WL 3026274, at *1-2 (Iowa Ct. App. July 25, 2013) (Defendant should not have been taxed court costs on charge that was dismissed by the State).

While parties to a plea agreement are free to "mak[e] a provision covering the payment of costs" even in the absence

of independent statutory authorization, Petrie, 478 N.W.2d at 622, no such agreement existed in present case.

In State v. McMurry, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) and State v. Ruth, No. 17-0270, 2017 WL 4317329, at *1 (Iowa Ct. App. Sept. 27, 2017), the Iowa Court of Appeals declined to proportion costs under Petrie reasoning that costs that are associated with *both* dismissed *and* convicted counts are "clearly attributable" to the convicted count and therefore not proportionable. The Iowa Supreme Court has accepted further review in both of those cases. Defendant respectfully urges that the decisions on McMurry and Ruth are at odds with Petrie, which plainly demonstrated that costs incurred pursuant to *both* dismissed *and* convicted counts are "not clearly associated with any *single* charge" and thus must be proportioned. Petrie, 478 N.W.2d at 622 (emphasis added). Our Supreme Court's decision in Petrie controls.

Weston was initially charged with three counts, but ultimately convicted of only one count. The two dismissed

counts (Counts 1 and 3) were dismissed on May 18, 2017, at the request of the State. (5/18/17 Motion to Dismiss; 5/18/17 Order Dismissing) (App. pp. 10-12). None of the court costs incurred prior to the May 18, 2017 dismissal of Counts 1 and 3 were associated *solely* with the Count 2 offense for which Weston was ultimately convicted. See (Combined General Docket, p.13: Financial Summary) (App. p. 22) (including in "Due Amount": 2/27/17 $100 filing and docketing fee; 2/6/17 and 5/8/17 court reporter fees of $40 a day; a number of 4/19/17 and 5/3/27 Sheriff's Fees totaling $269.47; and 4/25/17 and 5/3/17 Court Reporter invoices for $36.75 and $66.50 for deposition transcripts); See also (4/24/17 Court Reporter Invoice for $36.75; 5/3/17 Court Reporter Invoice for $66.50) (App. pp. 8-9). Accordingly, the court costs incurred prior to the May 18, 2017 dismissal date should have been proportioned, with Weston responsible for only one-third of those costs. See Petrie, 478 N.W.2d at 622 (Stating that "costs not clearly associated with any *single* charge should only be assessed proportionally against the

defendant" with the defendant "required to pay only one-third of these costs") (emphasis added).

Because Weston's payment of all costs of the action (rather than only those costs associated with the convicted Count 2 offense) was neither authorized by statute nor required under any plea agreement in the present case, the court entered an illegal sentence in directing that court costs be assessed against Weston, without limiting the costs assessed to only those costs associated with the Count 2 charge. The court's order taxing costs to Weston should be vacated, and this matter should be remanded to the district court with instructions to limit assessment of costs to Weston to the costs associated with the Count 2 charge. See Petrie, 478 N.W.2d at 622 ("... only such... costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan" *and "costs not clearly associated with any single charge should only be assessed proportionally against the defendant."*) (emphasis added).

D. Conclusion: Defendant-Appellant Jonathan Shane Weston respectfully requests that this Court vacate the district court's order taxing costs of the action to Weston, and remand this matter to the district court for entry of an order making Weston responsible only for those costs associated with the Count 2 charge on which he was convicted (contingent on the required ability to pay determination, discussed above in Division II(2)).

NONORAL SUBMISSION

Oral submission is not requested unless this Court believes it may be of assistance to the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.15, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

VIDHYA K. REDDY
Assistant Appellate Defender

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Vidhya K. Reddy Dated: 9/25/18

VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us