

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 18-0351
)
 KATHY PERRY,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE JOHN C. NELSON, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED JANUARY 23, 2019

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CERTIFICATE OF SERVICE

On February 6, 2019, 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 Kathy Perry, 2615 1st Street, Sioux City, IA 51106.

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QUESTION PRESENTED FOR REVIEW

**WHETHER THE DISTRICT COURT ERRED BY ORDERING
THE DEFENDANT TO PAY RESTITUTION FOR JAIL AND
ATTORNEY FEES?**

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW the Defendant-Appellant and, pursuant to Iowa Rule of Appellate Procedure 6.1103 (2014), hereby makes application for further review of the January 23, 2019, decision of the Iowa Court of Appeals in State of Iowa v. Kathy Jo Perry, Supreme Court number 18-0351. In support thereof, Appellant states:

1. The Iowa Court of Appeals erred by holding that the restitution plan was not complete because the district court failed to make a determination of the defendant's ability to pay jail fees. (Opinion). The Court of Appeals erred to the extent that it held that the defendant may only challenge the restitution by filing for a hearing under Iowa Code section 910.7 (2017).
2. The court is required to determine an amount of restitution and the defendant's ability to pay at the time of sentencing. In this case the court failed to determine the amount or an estimate of the amount owed for attorney's fees and jail fees but

nonetheless ordered the defendant to pay \$50 a month toward those fees.

3. 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 costs including correctional fees and court-appointed attorney fees.* Iowa Code § 910.2(1) (2017).

The statute does not provide the sentencing court should wait for a final restitution plan and a restitution plan of payment.

Id.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal of a judgment of conviction following a guilty plea driving while barred in Woodbury County case number AGCR099470.

Course of Proceedings: On November 20, 2017, the defendant, Kathy Perry, was charged with driving while barred in violation of Iowa Code section 321.561 (2017), an aggravated misdemeanor. (Trial Information) (App. pp. 4-5). On January 24, 2018, Perry entered a written plea of guilty to the charge. (Written Plea of Guilty) (App. pp. 6-9). On the same day, the court sentenced Perry to 20 days in jail and ordered her to pay restitution for jail fees and attorney fees. The court suspended a \$625 fine. (Sentencing Order) (App. pp. 10-12). On February 26, 2018, Perry's attorney filed a notice of appeal. (Notice of Appeal) (App. pp. 13-14). On March 30, 2018, the Iowa Supreme Court granted Perry's request for delayed appeal. (Iowa S. Ct. Order, 3/30/2018) (App. pp. 15-17). The Iowa Court of Appeals confirmed the conviction but partially vacated the sentence. (Opinion).

Facts: The defendant, Kathy Perry, was pulled over by a Sioux City police officer after he observed her driving a car with an inoperable brake light. Perry's driver's license was barred at the time that she was driving the car. She was arrested and charged with driving while barred. (Minutes of Testimony) (Conf. App. pp. 4-12).

Further relevant facts will be discussed below.

ARGUMENT

THE DISTRICT COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION FOR JAIL AND ATTORNEY FEES.

Preservation of Error and Standard of Review: In this case, neither the plea nor the sentencing hearings were reported. There was no request for restitution filed by the prosecutor. The court simply made the restitution part of the sentencing order. (Sentencing Order) (App. pp. 10-12). Counsel did not object, and the sentencing order contained no language allowing the defendant to later request a hearing if she objected to the restitution. However, in such cases, no objection is necessary to preserve an issue of irregularity in sentencing for

appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant need no object to sentencing irregularity to preserve issue for appeal). Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). Additionally, when a plan of restitution has been made part of the sentencing order, the defendant has the right to a direct appeal. State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). Furthermore, when a court makes a finding of the defendant's ability to pay in the sentencing order, the appellate court can review that order. See, e.g. State v. Pace, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018).

The court reviews a district court's restitution order for errors of law. State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004).

Discussion: The court in this case ordered as follows: “The Defendant shall make restitution to the Woodbury County Sherriff’s Office for correctional fees including medical service the defendant received pursuant to Iowa Code section 910.4 and Iowa Code section 346.7. The Woodbury County Sheriff shall file a claim for reimbursement.” (Sentencing Order) (App. pp. 10-12). With regard to the attorney’s fees, the court ordered as follows: “Upon review the court FINDS that Defendant is reasonably able to pay attorney fees.” (Sentencing Order) (App. pp. 10-12). The court ordered Perry to pay \$50 per month toward her financial obligation despite the fact that no amounts were included in the order. The Woodbury County Sheriff has not filed a claim for fees. There is also no order indication in the record regarding the amount of attorney’s fees.

The Court of Appeals found that the “restitution plan” was complete regarding the attorney’s fees and the therefore was “appealable.” The court vacated the restitution order for attorney’s fees and remanded for the court to determine the

amount of the fees and the defendant's ability to pay. The court then stated that if Perry was dissatisfied with that order she could challenge that order under Iowa Code section 910.7. (Opinion). The court then determined that the order for the jail fees was not appealable because the restitution plan was not complete because the court made no finding that Perry had the ability to pay those fees. The court further advised that when the plan is complete, then she may challenge the order under Iowa Code 910.7. (Opinion).

The district court is required to order restitution in all criminal cases where there is a guilty plea or a verdict of guilt. Iowa Code § 910.2(1) (2017). Restitution is defined as "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." *Id.* § 910.1(4). The ultimate question is *when* a court must make the determination of a defendant's reasonable ability to pay attorney fees and court costs including correctional fees.

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 costs including correctional fees and court-appointed attorney fees.* Iowa Code § 910.2(1) (2017).

The statute does not provide the sentencing court should wait for a final restitution plan and a restitution plan of payment.

Id.

Iowa Code section 910.2(1) (2017) provides in relevant part:

In all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities, to the clerk of court for fines, penalties, surcharges, and, **to the extent that the offender is reasonably able to pay**, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b", court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, when applicable, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A.

Iowa Code § 910.2(1) (2017)(emphasis added). See also Iowa Court R. 26.2(10)(a) (2018)("the court shall order the payment of the total costs and fees for legal assistance as restitution to the extent the person is reasonably able to pay").

A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Cf. Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983)("The more appropriate question is whether

consideration of a defendant's financial background in setting or resetting sentence is so arbitrary or unfair as to be a denial of due process.”). Iowa's recoupment statute does not infringe on a defendant's right to counsel because of the “reasonable ability to pay” determination. State v. Haines, 360 N.W.2d at 793; State v. Dudley, 766 N.W.2d 606, 614-615 (Iowa 2009). “A cost judgment 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.” State v. Dudley, 766 N.W.2d at 615.

Published Supreme Court case law is conflicting.

Recently, this Court addressed a sentencing order which stated the court would assess the entirety of defendant's appellate attorney fees against him unless he filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of procedendo following his appeal. State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018). The Supreme Court stated “when the district court assesses any future attorney fees on Coleman's case, it must follow the law and

determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay." Id. Coleman appears to follow the Harrison and Haines line of reasoning. Harrison provided that the "reasonable ability to pay" provision is an "express condition on the determination of the amount of restitution for court costs and attorney fees." "The sentencing court would never get to the point of exercising this authority if it were mandated to order full restitution for court costs and attorney fees without regard to the offender's ability to pay." State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Therefore, this discretion must be exercised at the sentencing hearing. Id. The Harrison holding was followed in Haines. State v. Haines, 360 N.W.2d at 797 (Court failed to exercise discretion to determine whether Haines was reasonably able to pay all or part of attorney fees).

But in Blank, the Court focused on not on the entire amount of restitution due, but on Blank's ability to pay the current installment. State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997). The Blank Court cited Van Hoff, but did not

include the entire holding from the case. Id. The Court in

Van Hoff held:

We do not believe Van Hoff's "reasonable" ability to pay the restitution is necessarily determined by his ability to pay it in full during the period of his incarceration, as held by the court of appeals, although that might be one of the factors to be considered. A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the inmate's ability to pay the current installments than his ability to ultimately pay the total amount due. Van Hoff does not claim that he is paying child support, alimony, or any similar expenses. His living expenses, obviously, are paid by the state. He does not claim that he is unable to pay twenty percent of his prison wages toward the restitution order.

State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987).

In Swartz, the Supreme Court held that until Swartz exhausted the remedy provided in Iowa Code section 910.7 the Court had no basis for reviewing his "reasonable ability to pay" court costs and attorney fees. State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999). See also State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999)(same). 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 Swartz opinion does not use the phrase “plan of payment.”

The statute does not provide the sentencing court should wait for a final restitution plan and a restitution plan of payment.

Id.

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. Id. at 357.

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); State v. Johnson, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016); State v. Tanner, No. 14-1963, 2016 WL 4384468, at * 5 (Iowa Ct. App. Aug 17, 2016); State v. Poland, No. 17-0189, 2018 WL 3302201, at *6 (Iowa Ct. App. July 5, 2018); State v. Boutchee, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018);

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

State v. Pearl, No. 13-0796, 2014 WL 1714490, at *5 (Iowa Ct. App. April 30, 2014); State v. Hols, No. 10-1841, 2013 WL 750307, at *2 (Iowa Ct. App. Feb. 27, 2013); State v. Wilson, Nos. 01-0104, 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. April 27, 2001).

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 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). The clerk of court must collect the court reporter fees. Id. §§ 625.8 and 602.8102(99). The clerk is also to carry out duties related to probations and restitutions. Id. § 602.8102(135). The clerk of court also is to collect filing fees in criminal cases where judgment is rendered. Id. § 602.8106(1). 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. Id. §§ 907.8 and 910.4. The court is required to send the restitution plan to the Department of Correction if the defendant is incarcerated. Id. § 910.5(1)(a). The clerk of court carries out this duty for the court. Id. § 602.8102(135), (141).

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.” Id. § 910.5(1)(d).

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 made the day of sentencing. Iowa Ct. R. 26.2(1) (2017) (“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) (2017) (“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.”). However, at sentencing, the court may establish a payment plan. Iowa Ct.

R. 26.2(2)(1)-(5) (2017). Under either option provided by Iowa Court Rule 26, the restitution plan of payment is established at the time of sentencing. The district court had the obligation to determine the total amount of criminal restitution Perry has the reasonable ability to pay at the time the restitution was ordered. The law regarding the defendant's reasonable ability to pay is conflicting and confusing. This Court should take this opportunity to clarify the law to aid the bench and bar.

CONCLUSION

The Appellant requests the court vacate the restitution order.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$ 3,460, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

MARIA RUHTENBERG
Assistant Appellate Defender

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR
FURTHER REVIEWS**

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,345 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



Dated:

1/31/19

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IN THE COURT OF APPEALS OF IOWA

No. 18-0351
Filed January 23, 2019

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KATHY JO PERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John C. Nelson,
District Associate Judge.

Kathy Jo Perry appeals the restitution provisions of her sentence for driving
while her license was barred. **CONVICTION AFFIRMED; SENTENCE
PARTIALLY VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Maria Ruhtenberg, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Martha E. Trout, Assistant Attorney
General, for appellee.

Considered by Tabor, P.J., and Mullins and Bower, JJ.

TABOR, Presiding Judge.

Kathy Jo Perry appeals the sentencing order following her guilty plea to driving while her license was barred. She contends the district court erred by ordering her to pay restitution for attorney fees and correctional costs without determining the amounts of those obligations. *The sentencing order declared Perry was reasonably able to pay attorney fees but was silent about her ability to pay other court costs.* We agree with Perry that the district court abused its discretion in finding her able to pay attorney fees without knowing the full amount owed. Accordingly, we remand for a corrected sentencing order.

I. Facts and Prior Proceedings

In November 2017, Sioux City police arrested Perry for driving while her license was barred. She pleaded guilty to an aggravated misdemeanor, and the court sentenced her to twenty days in jail, suspending a \$625 fine. The court also ordered her to pay court costs and attorney fees. For court costs, specifically for correctional fees, the court directed the Woodbury County Sheriff to file a claim for reimbursement. The court further ordered, "The Defendant shall pay not less than \$50 monthly and the first payment shall be due within 30 days from the date of this order, until the fine, surcharges, restitution (if ordered) and court costs are paid in full." In the final line of the sentencing order, the court found, "Upon review the court FINDS that Defendant is reasonably able to pay attorney fees." Perry appeals the restitution aspects of the sentencing order.

II. Discussion

Perry asserts the district court abused its discretion in ordering her to pay restitution for correctional costs and attorney fees without determining the amount

of those obligations. We review her restitution challenge for correction of errors at law. See *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

The district court must impose restitution in all cases of criminal conviction. See Iowa Code § 910.2 (2017). The court orders victim restitution, fines, penalties, and surcharges without considering the defendant's ability to pay. *Id.* § 910.2(1). But the court may impose other restitution costs, including correctional fees under section 356.7 and court-appointed attorney fees, only to the extent it determines the offender is reasonably able to pay. *Id.*

At the time of sentencing or at a later date to be determined by the court, the court shall set out the amount of restitution . . . and the persons to whom restitution must be paid. If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time. At a later date as determined by the court, the court shall issue a permanent, supplemental order, setting the full amount of restitution. The court shall enter further supplemental orders, if necessary. These court orders shall be known as the plan of restitution.

Id. § 910.3.

An offender dissatisfied with the amount of restitution required by the plan of restitution may petition the district court for a modification under section 910.7. *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999).

The determination of whether the offender is reasonably able to pay is a constitutional safeguard. *Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000). On appeal, the defendant bears the burden to show either a failure to exercise discretion or an abuse of discretion in relation to that determination. *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987). "A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the

inmate's ability to pay the current installments than his ability to ultimately pay the total amount due." *Id.* at 649.

In its sentencing order, the court directed Perry to pay correctional costs and attorney fees without information concerning the amounts owed.¹ The court declared Perry was reasonably able to pay attorney fees, but did not address her ability to pay jail costs. Perry claims the court abused its discretion by making that ability-to-pay finding without factual support.

The State insists Perry's contention is not ripe because, at sentencing, the plan of restitution was not complete—no amounts were included in the order. The State argues, "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,'" thus the appeal is premature. *See State v. Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999) (finding challenge to sentencing court's failure to determine ability to pay premature because (1) the plan of restitution was not complete when notice of appeal was filed and (2) no basis for review existed until the offender petitioned the district court for modification under section 910.7). Taking the response a bit further, the State also asserts Perry cannot "directly appeal the court's reasonable-ability-to-pay determination—or lack thereof—until she moves" for a modification under Iowa Code section 910.7. *See Swartz*, 601 N.W.2d at 354.

¹ Our record does not include a fee claim from the sheriff's office or an attorney fee claim from the clerk of court. Neither does it include any supplemental court orders setting the total amount of restitution.

We start with the justiciability question. In *State v. Jose*, our supreme court found the restitution amount is part of a sentencing order and therefore directly appealable, “as are all orders incorporated in the sentence.” 636 N.W.2d 38, 45 (Iowa 2001) (citing *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984)). Interpreting *Jose* and *Janz*, our court concluded a defendant may appeal a restitution order—“including the court’s failure to consider his [or her] ability to pay”—when the plan of restitution and the restitution plan of payment were part of the sentencing order. *State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016).

But neither the *Janz/Jose/Kurtz* trilogy nor the *Jackson/Swartz* line of cases directly addresses the problem with the sentencing order identified by Perry. Here, the district court decided Perry had the reasonable ability to pay restitution for attorney fees before it entered an order constituting the final plan of restitution. Under similar facts, we have decided the sentencing court abused its discretion by issuing an affirmative finding of a defendant’s ability to pay without knowing the total amount—or even a reasonable estimate—of the restitution owed.² See *State v. Campbell*, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (remanding for correction of sentencing order); see also *State v. Pace*, No. 16-

² We acknowledge our cases have been inconsistent on this point. In some instances, we have declined to hear a challenge to a restitution order as premature. See, e.g., *State v. McMurry*, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) (concluding where sentencing court found McMurry able to pay “\$___”, the ruling was either a final determination McMurry was able to pay \$0.00 or a nonfinal “nonstatement” requiring further hearing and ruling on a “final plan of restitution” and either way was a “nonissue” for the court); *State v. Brown*, No. 16-1118, 2017 WL 2181568, at *2, *5–6, (Iowa Ct. App. May 17, 2017) (finding no basis to address issue where district court found Brown reasonably able to pay and ordered unknown amounts for pecuniary damages and court costs). To address this inconsistency, our supreme court has retained several cases involving the reviewability of restitution orders. See *State v. Albright* (No. 17-1286); *State v. Smith* (No. 18-0184); *State v. Covel*, (No. 18-0678).

1785, 2018 WL 1442713, at *3 (Iowa Ct. App. Mar. 21, 2018) (finding district court abused its discretion by determining Pace was able to pay jail fees without knowing the amount). While the district court was not required to determine Perry's ability to pay attorney fees until it issued the plan of restitution, it nonetheless did so. As in *Campbell and Pace*, such a premature determination, lacking in evidentiary support, should be stricken from the sentencing order.³

We vacate the aforementioned portion of the sentencing order and remand to the district court for further proceedings to determine the amount of attorney fees owed and Perry's reasonable ability to pay. If Perry believes the forthcoming plan of restitution does not reflect her ability to pay, she may petition the district court for modification under Iowa Code section 910.7. See Iowa Code § 910.7; see also *Swartz*, 601 N.W.2d at 354.

The court also ordered Perry to pay jail fees. See Iowa Code § 356.7. It did not determine the amount of those fees, nor did it find Perry was reasonably able to pay them. Failure to make an ability-to-pay determination without finalizing the plan of restitution is not an appealable error. See *Jackson*, 601 N.W.2d at 357; *Swartz*, 601 N.W.2d at 354. Accordingly, Perry's contention the court abused its discretion by ordering her to pay jail fees is not ripe for our review. Once the district court finalizes a plan of restitution and determines what amount she is reasonably able to pay, she may raise a challenge under section 910.7.

CONVICTION AFFIRMED; SENTENCE PARTIALLY VACATED AND REMANDED.

³ The sentencing order also arguably contains a premature plan of payment as it requires Perry to pay \$50 per month and gives a starting date of thirty days.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
18-0351

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