

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 19-0363  
 )  
 DALLAS LYON, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR STORY COUNTY  
HONORABLE STEVEN VAN MAREL, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT

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## **CERTIFICATE OF SERVICE**

On November 1, 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 to Dallas D. Lyon, No. 1157276, Iowa Medical & Classification Facility, 2700 Coral Ridge Avenue, Coralville, IA 52241.

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A District Court shall not enter a final order of restitution until all items of restitution are before it and it has assessed the offender’s reasonable ability to pay certain items of restitution. In this case, the district court ordered Lyon to pay court costs and attorney fees but that amounts were not known at time of the sentencing hearing. Did the District Court err in ordering Lyon to pay court costs and attorney fees.....	
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## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**A DISTRICT COURT SHALL NOT ENTER A FINAL ORDER OF RESTITUTION UNTIL ALL ITEMS OF RESTITUTION ARE BEFORE IT AND IT HAS ASSESSED THE OFFENDER'S REASONABLE ABILITY TO PAY CERTAIN ITEMS OF RESTITUTION. IN THIS CASE, THE DISTRICT COURT ORDERED LYON TO PAY COURT COSTS AND ATTORNEY FEES BUT THAT AMOUNTS WERE NOT KNOWN AT TIME OF THE SENTENCING HEARING. DID THE DISTRICT COURT ERR IN ORDERING LYON TO PAY COURT COSTS AND ATTORNEY FEES?**

### Authorities

State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984)

State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001)

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State v. McMurry, 925 N.W.2d 592, 601 (Iowa 2019)

## **ROUTING STATEMENT**

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

## **STATEMENT OF THE CASE**

***Nature of the Case:*** Appellant Dallas Lyon appeals following his guilty plea, judgment, and sentence for: one count of Theft in the Second Degree, in violation of Iowa Code sections 714.1(1) and/or 714.1(4), and 714.2(2), a Class D felony (Count I); and one count of Burglary in the Third Degree, in violation of Iowa Code sections 713.1 and 713.6A, a Class D felony (Count II).

***Course of Proceedings:*** On July 10, 2018, the State charged Lyon with one count of Theft in the Second Degree, in violation of Iowa Code sections 714.1(1) and/or 714.1(4), and 714.2(2), a Class D felony (count I); and one count of Burglary in the Third Degree, in violation of Iowa Code sections 713.1 and 713.6A, a Class D felony (Count II). (Trial Information)(App. pp. 4-6).



On December 17, 2018, Lyon filed a notice of intent to plead guilty. (Notice of Intent to Plead Guilty)(App. p. 7). On January 17, 2019, Lyon pleaded guilty as charged pursuant to an agreement with the State. (Plea Tr. p. 2 L15-22). The agreement with the State required Lyon to plea guilty as charged, in exchange the parties would jointly recommend that he be sentenced to five years confinement on each charge- to be suspended, that he receive street probation for a term not to exceed three years, and pay the minimum mandatory fine on each count plus the 35 percent surcharge, court costs, attorney fees, and pecuniary damages. Additionally, if Lyon were to violate his probation, he would be sentenced to 10 years in confinement. The State also agreed that any misdemeanors and companion cases would be dismissed with charges assessed to Lyon, including a case involving an ATV, which the parties agreed Lyon would pay for pecuniary damages. (Plea Tr. p. 7 L23-p. 9 L16).

On February 28, 2019, a sentencing hearing was held. At the hearing the State recommended a sentence in accordance

with the plea agreement—that Lyon be sentenced to two five year terms of confinement to be suspended, that he be placed on probation for three years, assessed a fine of \$750, court costs, and surcharges per charge, and restitution per the State’s filed pecuniary damages, with the remaining charges dismissed and the costs assessed to Lyon. (Sent. Tr. p. 3 L9-22; Amended Statement of Pecuniary Damages)(App. pp. 8-9).

The Court sentenced Lyon to an indeterminate term of confinement not to exceed five years for each charge, served concurrently, a \$750 fine, 35% surcharge, \$125 LEI surcharge, and court costs, with the fines and surcharges waived, \$2,075 in victim restitution, and attorney fees. (Sent. Tr. p. 5 L17-p. 6 L23; Order of Disposition)(App. pp. 10-12).

On March 6, 2019, Lyon filed a notice of appeal. (Notice of Appeal)(App. p. 13).

**Facts:** During the guilty plea proceeding, the following exchange occurred regarding the factual basis:

THE COURT: So, Mr. Lyon, on April 29, 2018, in Story County, Iowa, did you take property belonging

to another person, or did you receive that property from somebody else?

THE DEFENDANT: Yes.

THE COURT: Which one was it? Did you receive it from somebody else or did you take it yourself?

THE DEFENDANT: I took it myself.

THE COURT: Okay. And that was property belonging to William Keller, is that correct?

THE DEFENDANT: I believe so, yes.

THE COURT: You didn't know who you took it from?

THE DEFENDANT: No, Your Honor.

THE COURT: You didn't know the owner?

THE DEFENDANT: No, sir.

THE COURT: Did you take the property intending to deprive the owner of the property?

THE DEFENDANT: Yes.

THE COURT: You took it to sell it or dispose of it in some fashion?

THE DEFENDANT: Yeah.

THE COURT: You took it and pawned it, is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You didn't have any intention of returning it to the owner?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Did the owner tell you you could have the property?

THE DEFENDANT: No, Your Honor.

THE COURT: Would you agree that the property you took had a value of greater than \$1,000?

THE DEFENDANT: No.

THE COURT: It looks like you took some chain saws, is that right?

THE DEFENDANT: Yes.

THE COURT: Did you take some other items too?

THE DEFENDANT: Yes.

THE COURT: Do you think the value of everything that you took exceeded \$1,000?

THE DEFENDANT: Yes.

THE COURT: Okay. You're a little hesitant.

THE DEFENDANT: I'm not sure.

THE COURT: If the owner of the property said what you took was worth over \$1,000, do you have any disagreement with what the owner said it was worth?

THE DEFENDANT: No.

THE COURT: Okay. Then on the charge of burglary in the third degree, there the elements of the offense is that on or about April 29, 2018, you entered an occupied structure. The second element of the offense is that you did so with the intent to commit a theft. And that last element of the offense is that you didn't have any right or permission to enter an occupied structure. So on April 29, 2018, looks like about 2:45 p.m. did you enter a building at 326 Lincoln Way in Ames?

THE DEFENDANT: Yes.

THE COURT: All right. That's the pawn shop?

THE DEFENDANT: Yes.

THE COURT: All right. Did you enter Mr. Keller's property before that at – looks like he must have lived out in the county in Story County, Iowa. Did you enter a building owned by Mr. Keller?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That was his shop?

THE DEFENDANT: Yeah, there's a barn by itself.

THE COURT: It was a building out on an acreage in Story County?

THE DEFENDANT: Yes.

THE COURT: Did you have any permission to enter that building?

THE DEFENDANT: No, Your Honor.

THE COURT: Did you enter it with the intent to commit a theft once you were inside?

THE DEFENDANT: Yes.

THE COURT: Then when you were in there you took some chain saws, and some other items that – of Mr. Keller’s, is that correct?

THE DEFENDANT: Yeah.

THE COURT: Did you have any right or permission to take that property?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Mr. Lyon, then for the last time did you still wish to enter these pleas of guilty.

THE DEFENDANT: Yes.

Other relevant facts will be discussed below.

### **ARGUMENT**

**A DISTRICT COURT SHALL NOT ENTER A FINAL ORDER OF RESTITUTION UNTIL ALL ITEMS OF RESTITUTION ARE BEFORE IT AND IT HAS ASSESSED THE OFFENDER’S REASONABLE ABILITY TO PAY CERTAIN ITEMS OF RESTITUTION. IN THIS CASE, THE DISTRICT COURT ORDERED LYON TO PAY COURT COSTS AND ATTORNEY FEES BUT THAT AMOUNTS WERE NOT KNOWN AT TIME OF THE SENTENCING HEARING. DID THE DISTRICT COURT ERR IN ORDERING LYON TO PAY COURT COSTS AND ATTORNEY FEES?**

***Preservation of Error:*** An improper award of criminal restitution is an illegal sentence. See State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984) (Noting that the practice in Iowa for many years had been to allow either the district court or the appellate court to correct an illegal sentence.); State v. Jose, 636

N.W.2d 38, 44 (Iowa 2001) (“[The court noted that where the time for appeal has expired, a defendant must petition the district court under Iowa Rule of Criminal Procedure [2.24(5)(a)] to correct an illegal sentence.]”). A challenge to an illegal sentence includes a claim that that the sentence itself is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a).

**Standard of Review:** This Court reviews restitution orders for correction of errors at law. State v. Albright, 925 N.W.2d 144, 158 (Iowa 2019). “[W]e determine whether the court’s findings lack substantial evidentiary support, or whether the court has not properly applied the law.” Id. (quoting State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004)).

**Discussion:** Lyon argues the District Court erred in ordering him to pay restitution in the form of court costs and attorney fees without first determining his reasonable ability to pay those items. In Albright, this Court set forth the procedure to follow when determining the restitution obligation of a

defendant. Albright, 925 N.W.2d at 160–62. The Court recognized that Iowa Code instructs how the District Court should order restitution and it creates two categories of restitution. Id. at 159. The Court noted that the District Court must order “restitution ‘to victims ‘to the victims of the offender’s criminal activities [and] to the clerk of court for fines, penalties, [and] surcharges” regardless of the defendant’s reasonable ability to pay. Id. (quoting Iowa Code § 910.2(1) (2019)).

The Court in Albright then recognized the second category of restitution which is the following:

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.

Id. (quoting Iowa Code § 910.2(1) (2019)). The Court held that these certain items of restitution are subject to a reasonable-

ability-to-pay determination. Id. Specifically, this Court held that “[i]f the court finds an offender is not reasonably able to pay all or a part of the items in the second category, the court may order community service in lieu of restitution under the terms and conditions set forth in the Code.” Id. (quoting Iowa Code § 910.2(2) (2019)). Factors of a reasonable ability to pay may include the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his or her dependents, and other factors as the court deems appropriate. Id. at 161-62. The court must have all items of restitution before it when determining the reasonable ability to pay. Id.

The Court also clarified that a plan of restitution is not complete until the sentencing court issues the final restitution order. Id. at 160. Finally, the Court emphasized that a final restitution order must take into account the offender's reasonable ability to pay those items for the second category of restitution. Id. at 160-61. The Court recognized that “[r]estitution orders entered by the court prior to the final order



are not appealable as final orders or enforceable against the offender.” Id. at 161. The Court stressed that the reason for these orders being nonappealable or enforceable is that the final order of restitution must take into account the offender’s reasonable ability to pay. Id.

In this case, the Court waived the fines and 35% surcharge; however, the Court ordered Lyon to pay attorney fees, the court costs for the two charges Lyon pled guilty to, as well as the dismissed charges, and the LEI surcharges. (Order of Disposition)(App. pp. 10-12). The amounts for these fees were not known at the time of the sentencing hearing. (Order of Disposition)(App. pp. 10-12). The Court held that “[t]hese amounts are due immediately and shall be considered delinquent if not paid in 30 days.” (Order of Disposition)(App. pp. 10-12).

After a careful review of this record, this Court should conclude that the District Court erred when it ordered Lyon to pay restitution for court costs without having the amount before it. This is contrary to the statutory scheme as outlined in

Albright. See Albright, 925 N.W.2d at 162. Lyon acknowledges that the District Court did not have the benefit of the procedures outlined in Albright when it entered its order regarding restitution. Accordingly, this Court should vacate that part of the sentencing order regarding restitution for court costs and remand the case back to the District Court to impose restitution for court costs consistent with this Supreme Court's decision in Albright. See State v. Crawford, No. 17-1640, 2019 WL 1868195, at \*1 (Iowa Apr. 26, 2019); State v. Dieckmann, No. 17-1806, 2019 WL 1868208, at \*1 (Iowa Apr. 26, 2019); State v. Mosley, No. 17-1087, 2019 WL 1868186, at \*2 (Iowa Apr. 26, 2019); State v. Perry, No. 18-0351, 2019 WL 1868225, at \*1 (Iowa Apr. 26, 2019); State v. Steenhoek, No. 17-1727, 2019 WL 1868202, at \*1 (Iowa Apr. 26, 2019); State v. Tournier, No. 17-1697, 2019 WL 1868199, at \*1 (Iowa Apr. 26, 2019); State v. Weston, No. 17-1838, 2019 WL 1868212, at \*1 (Iowa Apr. 26, 2019); State v. Headley, 926 N.W.2d 545, 553 (Iowa 2019); State v. Singleton, No. 18-0397, 2019 WL 1494641, at \*3 (Iowa Ct.

App. Apr. 3, 2019); State v. McMurry, 925 N.W.2d 592, 601 (Iowa 2019).

### **CONCLUSION**

For the reasons expressed above, Defendant-Appellant Dallas Lyon respectfully requests this Court vacate that part of the sentencing order regarding restitution for court costs and remand the case back to the District Court to impose restitution consistent with the Iowa Supreme Court's decision in Albright.

### **NONORAL SUBMISSION**

Oral submission is not requested.

### **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$1.14, and that amount has been paid in full by the Office of the Appellate Defender.

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

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 2,188 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



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