IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0451

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE STAAKE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY
THE HONORABLE RICHARD D. STOCHL, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case presents a single issue: whether the district court erred in imposing court costs at Defendant David Lee Staake's ("Defendant") sentencing hearing. The State requests retention by the Iowa Supreme Court under Iowa Rules of Appellate Procedure 6.1101(2)(b) and (d). The State asks the Supreme Court to retain this case to address the tension between the holding of *State v. Albright*, 925 N.W.2d 144 (Iowa 2019), and the remedy which the Court provided. *Albright* did not announce new rules or procedures regarding the imposition of restitution and abided by existing precedent that has long found that "[r]estitution orders entered by the [district] court prior to the final order are not appealable as final orders or enforceable against the offender." *Id.* at 161. However, in direct opposition to this holding, the Court vacated the restitution imposed in *Albright* and remanded the case to the district court. *Id.* at 162–63. The remedy provided in *Albright* has swallowed the holding, leading the Court of Appeals to vacate all restitution contemplated by the district court at sentencing and remand cases to the district court without further guidance. As it currently stands, nearly every sentencing order will be subject to the same treatment

because restitution is routinely contemplated by the district court at sentencing. In addition, *Albright* failed to discuss the long-standing statutory requirement that, if a defendant would like to challenge restitution on appeal, that defendant must first exhaust his or her remedies at the district court. As such, the State requests retention to clarify these issues.

STATEMENT OF THE CASE

Nature of the Case

Defendant appeals his sentence after he pleaded guilty to one count of Sexual Abuse in the Third Degree, in violation of Iowa Code section 709.4(1)(b)(3)(d), a class C felony. On appeal, Defendant argues that the district court erred when it imposed court costs at sentencing.

Course of Proceedings and Facts

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3). Due to the limited nature of Defendant's appeal, any facts necessary to the resolution of his claim will be discussed below.

ARGUMENT

I. Defendant's Claim is Unripe and Unexhausted.

Preservation of Error and Merits

Defendant argues that the district court erred because it "prematurely ordered [Defendant] to pay court costs and any costs and fees submitted to the clerk of court when it did not have those costs before it." App. Br. at 14.[1] The order of disposition required Defendant to pay court costs in the amount of $204.84. 03-04-2019 Order of Disposition ¶ 2; App. 8. The order also stated that the clerk will assess any additional fees, and Defendant "is hereby put on notice that court costs are often submitted and assessed after sentencing and the Defendant is responsible for payment of these costs as set forth below." *Id.*; App. 9. This claim is unripe because the district court has not filed a final restitution order in Defendant's case, so Defendant has not yet been ordered to pay restitution. This claim is also unexhausted, and thus, premature, and should be dismissed.

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[1] The bulk of Defendant's brief addresses the application of S.F. 589 to his appeal. He asserts that S.F. 589 should not apply to his appeal because it was filed prior to the law's effective date. In the recently decided *State v. Macke*, ____ N.W.2d ____, No. 18-0839, 2019 WL 4382985 (Iowa Sept. 13, 2019), the Supreme Court agreed with this position. Because the Supreme Court has already decided that S.F. 589 does not apply to Defendant's current appeal, it is not necessary to consider those claims here.

First, the claim is unripe. An appellate court will not review a challenge to the reasonable ability to pay a restitution order unless the district court has ordered a plan of restitution. *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999). "A plan of restitution is not complete until the court issues the final restitution order." *State v. Albright*, 925 N.W.2d 144, 160 (Iowa 2019) (citing *Jackson*, 601 N.W.2d at 357). A court need not "consider the offender's reasonable ability to pay" until it issues "the final restitution order." *Id.* at 160–61. "Restitution orders entered by the court prior to the final order are not appealable as final orders or enforceable against the offender." *Id.* at 161. Here, there is no amount of restitution and no final restitution order. Therefore, Defendant's claim attacking court costs is not ripe. *But see State v. Moore*, No. 17-1822, 2019 WL 4228986 (Iowa Sept. 6, 2019).

Second, the claim is unexhausted. Once the district court orders a plan of restitution, Defendant can petition the district court for a modification under Iowa Code section 910.7. *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357. "Until that remedy has been exhausted, [this Court] ha[s] no basis for reviewing the issue." *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357.

In addition, Defendant has suffered no harm from the order he disputes. Restitution orders "entered by the court prior to the final order are not…enforceable against the offender." *Albright*, 925 N.W.2d at 161. Here, the district court has not entered a final restitution order. The court costs in the district court's sentencing order are, therefore, unenforceable. Because Defendant need not pay court costs yet, he has suffered no harm from that part of the sentencing order.

The Court of Appeals has disagreed with this position. *See State v. Garvin*, No. 18-1258, 2019 WL 2871423, at *1–2, fn. 4 (Iowa Ct. App. July 3, 2019). While one recent panel initially agreed with this argument, it decided to reverse course. *See State v. Levy*, No. 18-1089, 2019 WL 3317334, at *2 (Iowa Ct. App. July 24, 2019), *superseded by State v. Levy*, No 18-1089, 2019 WL 4566916 (Iowa Ct. App. Aug. 7, 2019). In a number of cases, the Court of Appeals has implicitly found the defendants' restitution challenges are ripe because, in *Albright*, the Supreme Court vacated the defendant's sentencing order and remanded the case to the district court "to order restitution in a manner consistent with this opinion." 925 N.W.2d at 162–63.

However, in *Albright*, this Court explicitly said 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. While the State agrees it was incongruous for the Court to vacate the defendant's sentencing order and remand the case after stating that his claim was not appealable or enforceable, this does not change the explicit holding of *Albright*.[2] In *Albright*, this Court stated that restitution orders that are not final are neither enforceable or appealable. Although the Court remanded the case to the district court, the State asserts this should not be considered an implicit undoing of the explicit holding, reasoning, and statements in the opinion.

In addition, *Albright* did not change the long-standing requirement that a defendant is required to exhaust his remedies under Iowa Code section 910.7 before he is permitted to file an appeal. Defendant makes no argument as to why he should be permitted to file an appeal before he exhausts his remedies at the district court. Until he does so, this Court cannot review the issue.

[2] In light of the holding of *Albright*, the State maintains the remedy was dismissal.

Jackson, 601 N.W.2d at 357. Post-*Albright* cases from the Court of Appeals have failed to consider whether a defendant has exhausted his or her remedies before allowing his or her appeal to proceed, and instead, skips this step and considers the defendant's substantive claim. But *Albright* did not disturb this statutory requirement, so it is unclear why defendants are no longer being required to exhaust their remedies before an appeal is taken. In fairness, *Albright* also did not take required exhaustion into consideration before it remanded the case to the district court, and this failure may be causing additional confusion.

Finally, many post-*Albright* cases have remanded sentencing orders to the district court because the district court "did not have the benefit of the procedures outlined in *Albright* when it entered its order regarding restitution[,]" and ordered the district court to "impose restitution consistent with…*Albright*." *Moore*, No. 17-1822, 2019 WL 4228986 at *1; *State v. Perry*, 925 N.W.2d 190, 197 (Iowa 2019). But *Albright* did not announce new rules for the district court to follow when imposing restitution. Instead, it reiterated the old ones. By simply remanding cases to the district court without providing further instruction on how they should properly impose

restitution, the Court leaves both district courts and the Court of Appeals in a quandary. At the very least, if the Court remands this case to the district court to order restitution consistent with *Albright*, the Court should clearly state what, exactly, that means.

CONCLUSION

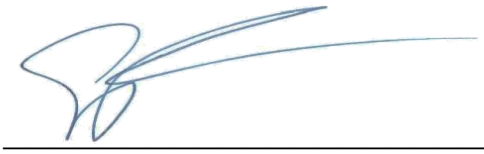
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

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

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



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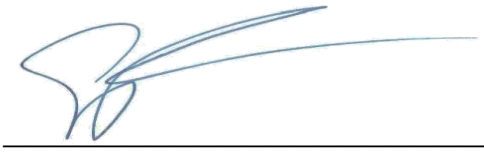
CERTIFICATE OF COMPLIANCE

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 **1,516** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 23, 2019



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