

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0363

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALLAS DEAN EDWIN LYON,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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FINAL

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Can this Court reach the merits of Lyon’s ability-to-pay challenge where there is no final, appealable order and where Lyon has not exhausted his statutory remedies?**

Authorities

State v. Albright, 925 N.W.2d 144 (Iowa 2019)
Iowa Coal Min. Co., Inc. v. Monroe County, 555 N.W.2d 418
(Iowa 1996)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Garvin, No. 18-1258, 2019 WL 2871423
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State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
Swartz, 601 N.W.2d
Iowa Code § 910.7
Iowa Code § 910.3

- II. Alternatively, is an ability-to-pay finding unnecessary here where Lyon agreed to pay court costs and attorney’s fees and, accordingly, agreed that he had the reasonable ability to pay those costs and fees?**

Authorities

State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)
State v. Bullock, No. 15-0982, 2017 WL 4049276
(Iowa Ct. App. Sept. 13, 2017)
State v. Cason, 532 N.W.2d 755 (Iowa 1995)
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State v. Snyder, 336 N.W.2d 728 (Iowa 1983)
State v. Thacker, 862 N.W.2d 402 (Iowa 2015)
Iowa Code § 907.10

ROUTING STATEMENT

The Iowa Supreme Court should retain this case to resolve the conflict between its holding in *State v. Albright*, 925 N.W.2d 144 (Iowa 2019), and the action it took in that case. In *Albright*, the Court reaffirmed that restitution orders entered by the district court before the final order “are not appealable as final orders or enforceable against the offender.” *Id.* at 160-61; *see also id.* at 162 (concluding that “any temporary, permanent, or supplemental order regarding restitution is not appealable or enforceable until the court files its final order of restitution”). It went on, however, to vacate the district court’s restitution order in that case, despite the fact that the order was neither enforceable nor appealable. *See id.* at 162-63.

The State requests retention under Iowa Rules of Appellate Procedure 6.1101(2)(b) and (d) in this case—as it has in several other cases—so the Supreme Court can clarify whether it meant what it said in *Albright*. *See, e.g., State v. Moore*, No. 18-1877, 2019 WL 4297255, at *5 (Iowa Ct. App. Sept. 11, 2019) (rejecting the State’s argument that the defendant’s ability-to-pay challenge was premature because, “[w]hile the supreme court has stated ‘[r]estitution orders entered by the court prior to the final order are not appealable as final orders,’

Albright, 925 N.W.2d at 161, both of Iowa’s appellate courts have frequently vacated restitution-related orders absent a final restitution order”).

The State also seeks guidance on whether the exhaustion requirement—set forth in *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) and *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999), but left out of the Court’s decision in *Albright*—continues to limit appellate courts’ ability to review a defendant’s ability-to-pay challenge. For those reasons, the State asks the Iowa Supreme Court to take this case.

STATEMENT OF THE CASE

Nature of the Case

Defendant Dallas Dean Edwin Lyon pleaded guilty to theft in the second degree, a class D felony, in violation of Iowa Code sections 714.1(1) and 714.1(4); and burglary in the third degree, a class D felony, in violation of Iowa Code sections 713.1 and 713.6A. Lyon appeals the resulting sentence and order of restitution. The Honorable Steven P. Van Marel entered judgment and imposed sentence.

Facts and Course of Proceedings

On April 29, 2018, Lyon stole several items from another person's shop, and sold them at a pawn shop. Minutes of Testimony; Plea Hearing Transcript, Jan. 17, 2019 9:23-14:9. The stolen items, which included two chainsaws, an air compressor, a battery jumpstarter, and a generator, amounted to a loss of \$680 to the victims. Minutes of Testimony; Amended Statement of Pecuniary Damages, Jan. 25, 2019; App. 8.

The State charged Lyon with 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; and burglary in the third degree, in violation of Iowa Code sections 713.1 and 713.6A, also a class D felony. Trial Information; App. 4. Separately, the State began investigating Lyon's theft of an ATV, with a loss to the victim of \$1,395.00. Plea Hr'g Tr. 8:25-9:11; Amended Statement of Pecuniary Damages, Jan. 25, 2019; App. 8.

On January 17, 2019, Lyon pleaded guilty as charged in the trial information. Order to Accept Plea. In exchange for his plea of guilty, the State agreed not to file charges in the ATV-theft case, and to recommend a suspended sentence. Plea Hr'g Tr. 7:23-9:16. As part of

the agreement, Lyon agreed to pay the fines and surcharges, “and the court costs of the action and any court-appointed attorney fees.” Plea Hr’g Tr. 8:6-11. Lyon further agreed to pay restitution to the victims in the charged case, as well as restitution to the victim in the uncharged ATV-theft case. Plea Hr’g Tr. 8:25-9:11; *see also* Sentencing Hearing Transcript, Feb. 28, 2019 3:9-4:4.

On February 28, 2019, the district court sentenced Lyon to two concurrent five-year terms of imprisonment. Order of Disposition at 1; App. 10; Sent. Hr’g Tr. 6:9-17. The court also ordered, but then “waived” a \$750 fine and surcharge, and ordered that Lyon pay the \$125 LEI surcharge, “and the costs of this action to include any court-appointed attorney fees.” Order of Disposition at 1; App. 10; Sent. Hr’g Tr. 6:18-23. Finally, the court imposed \$2,075 in victim restitution. Order of Disposition at 1; App. 10; Sent. Hr’g Tr. 6:21-23. The court stated that “[t]hese amounts are due immediately and shall be considered delinquent if not paid in 30 days.” Order of Disposition at 1; App. 10.

Neither the written order nor the transcript of the sentencing hearing suggests that the district court ordered a specific amount of court costs or attorney’s fees, or that the court determined whether

Lyon had the reasonable ability to pay those amounts. Order of Disposition; App. 10; *see generally*, Sent. Hr'g Tr.

Lyon now appeals, asking this Court to vacate the restitution portion of the sentencing order. For the reasons set forth below, Lyon's appeal is premature and should be dismissed. Alternatively, Lyon cannot challenge the district court's failure to make a reasonable-ability-to-pay finding because Lyon agreed to pay the assessed court costs and attorney's fees, and thus agreed that he had the reasonable ability to pay them. Lyon's appeal has no merit.

ARGUMENT

I. **This Court must dismiss Lyon's appeal because it is not properly before this Court.**

Motion to Dismiss

Lyon's ability-to-pay claim is not properly before this Court because it is not yet ripe. Nor has Lyon exhausted his remedies below, as required. For those reasons, this Court should dismiss Lyon's restitution claim. *See Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 432 (Iowa 1996) ("If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it."); *Jackson*, 601 N.W.2d at 357 (declining to grant relief on a defendant's ability-to-pay challenge where the plan of restitution was

not yet complete and the defendant had not yet petitioned the district court for modification under Iowa Code section 910.7).

As Lyon acknowledges in his brief, and this Court outlined in *Albright*, 925 N.W.2d at 160-61 & 62, a plan of restitution is not complete until the district court has issued the final restitution order. See Appellant’s Brief at 16. Until that time, “the court is not required to consider the offender’s reasonable ability to pay.” *Albright*, 925 N.W.2d 160-61; see also Iowa Code § 910.3; *Swartz*, 601 N.W.2d at 354; *State v. Haines*, 360 N.W.2d 791, 793–94 (Iowa 1985). Temporary or placeholder restitution orders entered before the final order are not appealable as final orders and are not enforceable against the offender. *Albright*, 925 N.W.2d at 160-61 & 62; *Jackson*, 601 N.W.2d at 357.

At sentencing here, the district court ordered that Lyon pay restitution to his victims. Sent. Hr’g Tr. 6:21-22. The court also imposed other forms of restitution, including court costs and attorney’s fees. Sent. Hr’g Tr. 6:18-21. It did not, however, have before it an amount of those costs and fees; accordingly, the court did not (and could not, under the dictates of *Albright*) determine whether Lyon had the reasonable ability to pay them. Sent. Hr’g Tr. 6:9-7:18;

see Order of Disposition at 1-2; *Albright*, 925 N.W.2d at 161. Because the district court has not yet issued the final plan of restitution in Lyon’s case, the challenge he brings is not properly before this Court. *See Albright*, 925 N.W.2d at 161; *State v. Hass*, 930 N.W.2d 699, 704 (Iowa 2019) (reaffirming that because there was no restitution plan in place when the defendant filed her appeal, the district court was not yet required to determine her reasonable ability to pay); *Jackson*, 601 N.W.2d at 357. *But see State v. Garvin*, No. 18-1258, 2019 WL 2871423, at *1-2 (Iowa Ct. App. July 3, 2019) (collecting cases).

Nor is Lyon entitled to directly appeal the district court’s reasonable-ability-to-pay finding—or lack thereof—until he moves under Iowa Code section 910.7 for modification of the plan of restitution or plan of payment, or both. *See State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) (reaffirming *Jackson*’s principle “that ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7”). Nothing in *Albright* changed that; indeed, the Court in *Albright* specifically upheld the decision in *Jackson*, which sets as prerequisites to an ability-to-pay appeal both that 1) the plan of restitution is complete, and 2) the defendant has exhausted his

remedies under Iowa Code section 910.7. *Albright*, 925 N.W.2d at 160-61; *Jackson*, 601 N.W.2d at 357. Here, Lyon has an incomplete plan of restitution and he has not attempted to resolve the issue with the district court. His appeal is neither ripe nor exhausted. For those reasons, this Court should dismiss Lyon’s restitution claim.

II. Alternatively, the district court was not required to make a reasonable-ability-to-pay finding here because Lyon agreed to pay the assessed court costs and attorney’s fees and, by doing so, agreed that he had the reasonable ability to pay them.

Preservation of Error

As discussed above, this Court should not reach the merits of Lyon’s claim because it is not properly before the Court. Lyon incorrectly asserts that his restitution claim is a challenge to an illegal sentence that he may bring at any time. *See* Appellant’s Brief at 13-14. While that may be true of a defendant’s challenge to the *amount* of restitution found in the sentencing order, *see State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984), it is not the case for a reasonable-ability-to-pay challenge. *See State v. Bullock*, No. 15-0982, 2017 WL 4049276, at *2 (Iowa Ct. App. Sept. 13, 2017) (stating that a reasonable-ability-to-pay challenge “does not automatically bring his claim within the ambit of an illegal sentence”). “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.” *State v. Jose*, 636 N.W.2d 38, 45 (Iowa 2001) (alteration omitted).

Standard of Review

This Court reviews restitution orders for correction of errors at law. *Id.* at 43. When reviewing a restitution order, the Court “determine[s] whether the court’s findings lack substantial evidentiary support, or whether the court has not properly applied the law.” *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

Merits

Again, this Court should not reach the merits of Lyon’s appeal because it is not yet ripe for review, nor has Lyon exhausted his remedies under Iowa Code section 907.10. If the Court decides to hear Lyon’s case, however, it should conclude that the district court did not err. The district court was not required to make a reasonable-ability-to-pay finding here because, by agreeing to pay court costs and attorney’s fees, he affirmatively asserted that he had the ability to pay the assessed amounts.

Restitution was a large part of Lyon’s guilty plea. Lyon agreed to plead guilty as charged in this case both to potentially benefit from the State’s recommendation of a suspended sentence and to avoid charges in an ongoing theft investigation. Plea Hr’g Tr. 7:23-9:16. The State agreed to this result, at least in part, because Lyon agreed to pay restitution to the victim of the second, uncharged theft. Sent. Hr’g Tr. 3:9-4:4.

The parties’ plea agreement also specifically required that Lyon pay any assessed court costs and attorney fees. *See* Plea Hr’g Tr. 8:6-11. With an agreement like this, particularly in a case where restitution played an important role in the outcome of the case, the district court is not required to make a reasonable-ability-to-pay finding. By pleading guilty under this arrangement, Lyon agreed to pay the costs and fees the district court imposed, and he agreed that he had the reasonable ability to pay them. *C.f. State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) (stating that “nothing in this opinion prevents the parties to a plea agreement from making a provision covering the payment of costs and fees”); *State v. Thacker*, 862 N.W.2d 402, 408-09 (Iowa 2015) (quoting *State v. Cason*, 532 N.W.2d 755, 756-57 (Iowa 1995)) (holding that “a sentencing court

does not abuse its discretion for failing to state sufficient reasons for imposing a sentence if it ‘was merely giving effect to the parties’ agreement”); *State v. Snyder*, 336 N.W.2d 728, 729 (Iowa 1983) (providing that, where the defendant enters into a plea bargain with the State and there is no claim that the district court departed from the term of the bargain, a statement of reasons is not required because “[t]he sentence of imprisonment was . . . not the product of the exercise of trial court discretion but of the process of giving effect to the parties’ agreement.”

In light of the parties’ agreement here, the district court was not required to make a reasonable-ability-to-pay finding before ordering restitution in the form of court costs and attorney’s fees. For that reason, this Court should affirm Lyon’s sentence, including the restitution order.

CONCLUSION

For all the reasons discussed above, the State respectfully asks this Court to dismiss Lyon’s appeal because it is not properly before this Court. Should the Court reach the merits, the State asserts that Lyon cannot challenge a result to which he agreed as part of his plea

agreement. The Court should affirm the district court’s judgment and sentence, including its restitution order.

At most, this Court should affirm Lyon’s conviction and sentence, but “vacate the portion of the sentencing order assessing” costs and fees “pending completion of a final restitution order and assessment of [Lyon’s] reasonable ability to pay.” *See State v. Levy*, No. 18-1089, 2019 WL 4566916, at *2 (Iowa Ct. App. Aug. 7, 2019).

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument. Should the Court grant oral argument, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,314** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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