IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1504

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAD RICHARD CHAPMAN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

Chapman disagrees, asserting that the Supreme Court should retain the case to "address[] Iowa Code section 692A.126," and decide his reasonable-ability-to-pay argument. Chapman Br. at 19–20. Neither issue justifies retention.

Chapman is mistaken that his section 692A.126 claim presents an issue the Supreme Court has never addressed. His claim asks what parts of and for what purposes the district court can use the minutes of testimony to enhance his sentence. Chapman Br. at 33–40. The Supreme Court has already explained how to use the minutes in such situations. *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (per curiam). A sentencing court can "consider those facts contained in the minutes that are admitted to or otherwise established as true," but "[w]here portions of the minutes are not necessary to establish a factual basis for a plea, they are deemed denied by the defendant and are otherwise unproved and a sentencing court cannot consider or rely on them." *Id.* (citing *State v. Black*, 324 N.W.2d 313, 316 (Iowa

1982)); *see also*, *e.g*. *State v. Rigel*, No. 16–0576, 2017 WL 936135, at *3 (Iowa Ct. App. Mar. 8, 2017). And a district court can consider the minutes to establish the factual basis needed to accept an *Alford*[1] plea. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (en banc).

As for Chapman's reasonable-ability-to-pay claim, the Iowa Supreme Court has taken several cases dealing with this issue. *See* Chapman Br. at 21 (citation omitted). Once those cases are decided, the Court of Appeals can apply the law to resolve this case. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant Chad Richard Chapman appeals following his *Alford* plea to child endangerment in violation of Iowa Code sections 726.6(1)(a) and 726.6(7). He attacks his sentence in four ways: (1) the State failed to prove his offense was sexually motivated, (2) the Court unlawfully imposed a special sentence under Iowa Code section 903B.2 and the law-enforcement-initiative surcharge, (3) the district court ordered him to pay court costs without determining his

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

reasonable ability to pay, and (4) a discrepancy exists between the oral and written sentences about attorney's fees. Only his second claim prevails.

Course of Proceedings and Facts

Chapman entered an *Alford* plea to child endangerment. Sentencing Order (8/28/2018) at 1; App.22; Am. Trial Info. (7/9/2018); App.13. He acknowledged the district court would consider the minutes in accepting his plea but asserted it could not consider them for sentencing. Plea Hr'g Tr., 45:19 to 46:2; Sentencing Hr'g Tr., 12:4–8, 15:5–14. The minutes explained that when he babysat CB, a six-year-old girl, he "d[id] S-E-X to" her; "put his wiener between her legs," meaning he "put his penis on her private"; and "licked her 'pee-pee.'" Mins. of Test. (10/5/2017) at 1–2; C.App.4–5.

In sentencing Chapman, the district court "placed him on the sex offender registry for … ten years" after finding beyond a reasonable doubt that his offense was sexually motivated. Sentencing Tr., 12:9–13. It also imposed a special sentence under Iowa Code section 903B.2, the law-enforcement-initiative surcharge, applicable fines, and court costs. *Id.* at 12:14–16, 15:1–3; Sentencing Order

(8/28/2018) at 3, 4, 5; App.24, 25, 26. It ordered Chapman to "make restitution in the amount of $TBD." *Id.* at 3; App.24. The Department of Correctional Services entered a plan of payment making Chapman's restitution "due immediately." Plan of Payment (8/28/2018); App.28. At the time Chapman appealed, no order had been entered setting the amount of restitution, though the combine general docket report filed five days later included amounts for some items Chapman owed. Notice of Appeal (8/30/2018); App.29; General Docket Report (9/4/2018) at 11; App.31.

ARGUMENT

I. The district court could consider the minutes of testimony to find Chapman's crime sexually motivated.

Preservation of Error

Chapman preserved error by objected to the district court considering the minutes in finding his crime sexually motivated. Sentencing Hr'g Tr., 15:5–14.

Standard of Review

This Court reviews sentencing decisions for correction of errors at law. *State v. Letscher*, 888 N.W.2d 880, 883 (Iowa 2016) (citation omitted). It "will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure."

Id. (quoting *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002)). A sentencing decision "enjoys a strong presumption in its favor." *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001) (citing *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994)).

Merits

Because Chapman pleaded guilty to child endangerment under Iowa Code section 726.6(1)(a), the district court could order him to register as a sex offender for ten years if it found "beyond a reasonable doubt" that his offense was "sexually motivated." Iowa Code § 692A.102(1)(a)(9), .103(1), .126(1)(v). Chapman argues that the district court erred by so finding. Chapman Br. at 27. The crux of his argument is that the district court could rely on the minutes of testimony to support his plea only, not to enhance punishment. *Id.* at 38–39. He is wrong.

As Chapman acknowledges, the district court could rely on the minutes to establish his guilt. Plea Hr'g Tr., 45:19 to 46:2; *see*, *e.g.* *Schminkey*, 597 N.W.2d at 788. But contrary to his argument, it could also consider the minutes that proved his guilt to find his offense was sexually motivated beyond a reasonable doubt. *See Gonzalez*, 582 N.W.2d at 517. In *Rigel* and *State v. Mesenbrink*, both of which

Chapman relies on, the Court of Appeals acknowledged that a district court could consider the minutes of testimony establishing the defendant's guilt on his *Alford* plea to enhance punishment so long as the defendant did not deny the minutes relied on. 2017 WL 936135, at *5; No. 15–0054, 2015 WL 7075826, at *5 (Iowa Ct. App. Nov. 12, 2015). Here, Chapman did not deny any of the minutes, so the district court could consider the minutes that proved his guilt when considering sexual motivation. *See Gonzalez*, 582 N.W.2d at 517.

The minutes proving Chapman's guilt established that his crime was sexually motivated beyond a reasonable doubt. *See* Iowa Code § 692A.126(1). To prove he committed child endangerment, the State had to show, among other things, that Chapman acted with knowledge he was creating a substantial risk to CB's physical, mental, or emotional health or safety. Iowa Model Jury Instr. 2610.1 (2018); Iowa Code § 726.6(1)(a). The facts in the minutes proving that element were that: CB said Chapman "does S-E-X to me," meaning "humping"; Chapman "licked [CB's] 'pee'"; and "put his wiener between [CB's] private and her butt and started humping," though he did not penetrate CB. Mins. of Test. (10/5/2017) 1, 2; C.App.4, 5. Nothing else in the minutes could have proven that Chapman

knowingly created a risk to CB's health or safety. *See generally id.*; C.App.4–5; Addl. Mins. of Test. (3/20/2018); C.App.9–10. Thus, Chapman's conduct proving that he knowingly created a risk to CB's health or safety—licking her vagina and putting his penis on her vagina and buttock and humping—also showed his sexual motivation. And there is no conceivable non-sexual explanation for his licking CB's vagina or putting his penis on her vagina and buttock and humping her; indeed, Chapman does not advance one.

If this Court disagrees, the correct remedy is a remand to allow the State to make the requisite showing. The Court of Appeals has twice reached that conclusion. *Rigel*, 2017 WL 936135, at *5 (citing *State v. Royer*, 632 N.W.2d 905, 909–10 (Iowa 2001)); *Mesenbrink*, 2015 WL 7075826, at *5. That conclusion is correct here because the record contains sufficient evidence, if presented at sentencing on remand, to prove beyond a reasonable doubt that Chapman's conduct was sexually motivated. *See* Mins. of Test. (10/5/2017) at 1–2; C.App.4–5.

In the end, this Court should reject Chapman's pick-and-choose approach to the minutes of testimony: consider them to establish guilt, but not to enhance punishment. Chapman Br. at 33. Beyond

self-interest, no principle supports his approach. This Court should reject his proposal and affirm the district court's finding that Chapman was sexually motivated when he rubbed his penis on CB's vagina and buttock and licked her vagina.

II. Chapman is right: the district court erred by imposing a special sentence under Iowa Code section 903B.2 and the law-enforcement-initiative surcharge.

Preservation of Error

"A defendant may challenge an illegal sentence at any time." *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009) (citing *State v. Parker*, 747 N.W.2d 196, 212 (Iowa 2008)).

Standard of Review

This Court reviews a claim "that a sentence is illegal for correction of errors at law." *State v. Lopez*, 907 N.W.2d 112, 116 (Iowa 2018).

Merits

When sentencing Chapman, the district court imposed a special sentence under Iowa Code section 903B.2 and the law-enforcement-initiative surcharge. Sentencing Hr'g Tr., 12:14–16, 15:1–3; Sentencing Order (8/28/2018) at 3; App.24. But neither punishment is authorized on a child-endangerment conviction under Iowa Code

sections 726.6(1)(a) and 726.6(7). Iowa Code §§ 903B.2, 911.3. This Court should therefore vacate those parts of Chapman's sentence.

III. Chapman's challenge attacking his reasonable ability to pay court costs must be dismissed as unripe and unexhausted.

Motion to Dismiss

Chapman's ability-to-pay claim is not properly before this Court because it is not yet ripe. Nor is it exhausted. For those reasons, this Court should dismiss his claim. *See Iowa Coal Mining Co. v. Monroe Cnty.*, 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."); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (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).

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 …." *Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Campbell*, No. 15–1181, 2016 WL 4543763, at *4 (Iowa Ct.

App. Aug. 31, 2016) (stating that the sentencing court is not required to consider the defendant's ability to pay until it has issued "the order constituting the plan of restitution"). Until that obligation is triggered, a defendant's challenge on ability-to-pay grounds is premature. *E.g.*, *Jackson*, 601 N.W.2d at 357.

At the time of Chapman's appeal, his plan of restitution was not complete. The district court had ordered that Chapman pay court costs, but it did not include even a temporary amount of those costs in its sentencing order. Sentencing Order (8/28/2018) at 2, 3, 4; App.23, 24, 25. Indeed, it listed the amount of restitution as "$TBD." *Id.* at 3; App.24. Nor has it entered any supplemental orders setting forth the amounts of those costs, though the general docket report, entered after Chapman appealed, fixed some costs. Combine General Docket Report (9/4/2018) at 11; App.31. Until the district court has "at a minimum, an estimate of the total amount of restitution," Chapman cannot challenge a determination regarding his ability to pay those costs and fees. *See Campbell*, 2016 WL 4543763, at *4; *see also, e.g.*, *State v. Alexander*, No. 16–0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017) (holding that the district court's restitution order was "incomplete and not directly appealable" where

the district court had "expressly reserved the amounts to be included in the plan of restitution for a later determination").

Nor is Chapman entitled to directly appeal the district court's reasonable ability to pay finding 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"). He has not moved for modification.

Thus, until the district court completes the plan of restitution and Chapman exhausts his remedies under Iowa Code section 910.7, Chapman's claim is not ripe and not directly appealable. *Jackson*, 601 N.W.2d at 357. Because Chapman's restitution claim is not properly before this Court, it must be dismissed. To the extent the district court made a premature decision regarding Chapman's ability to pay, it should be disregarded. *See Campbell*, 2016 WL 4543763, at *3–4.

IV. There is no discrepancy between the oral pronouncement and written sentence regarding attorney's fees.

Preservation of Error

"Errors in sentencing … 'may be challenged on direct appeal even in the absence of an objection in the district court.'" *State v. Thacker*, 862 N.W.2d 402, 405 (Iowa 2015) (quoting *State v. Lathrop*, 781 N.W.2d 288, 292–93 (Iowa 2010)).

Standard of Review

This Court reviews sentencing decisions for correction of errors at law. *Letscher*, 888 N.W.2d at 883 (citation omitted). It "will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure." *Id.* (quoting *Formaro*, 638 N.W.2d at 724). A sentencing decision "enjoys a strong presumption in its favor." *Jose*, 636 N.W.2d at 41 (Iowa 2001) (citing *Peters*, 525 N.W.2d at 859).

Merits

Chapman says that "a discrepancy exists between the oral sentencing pronouncement and the subsequent written judgment entry regarding reimbursement of legal assistance fees." Chapman Br. at 68 (bolding and capitalization removed). He specifically targets

attorney's fees. *Id.* at 69, 71. Because there is no conflict, his claim fails.

When a written judgment differs from the oral pronouncement of sentence, "the oral pronouncement … controls," but here there was no conflict. *See State v. Hess*, 533 N.W.2d 525, 528 (Iowa 1995) (citation omitted). After inquiring about attorney's fees at the sentencing hearing, the district court set "the amount at zero." Sentencing Hr'g Tr., 15:21 to 16:15. In the sentencing order, the district court found that Chapman "has the reasonable ability to pay restitution of fees and costs" related to "court appointed legal assistance." Sentencing Order (8/28/2018) at 5; App.26. As it relates to attorney's fees, the court's statement was correct: Chapman could pay nothing, the amount of attorney's fees the court had imposed. Sentencing Hr'g Tr., 16:14–15; Sentencing Order (8/28/2018) at 5; App.26. No order has set an amount of attorney's fees Chapman must pay. *See* Combine General Docket Report (9/4/2018); App.31; Iowa Code § 815.9(4), (5). Because the statements create no conflict, this Court should reject his claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court vacate Chapman's 903B.2 special sentence and the law-enforcement-initiative surcharge but affirm the sentence in all other respects.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

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 **2,510** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: March 13, 2019

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