

IN THE SUPREME COURT OF IOWA

STATE OF IOWA)	
PLAINTIFF-APPELLEE)	APPELLANT'S FINAL
)	BRIEF
VS.)	
)	NO. 19-1433
ASHLEY DAWN THOMPSON)	
DEFENDANT-APPELLANT)	

APPEAL FROM THE DISTRICT COURT, POWESHIEK COUNTY, THE
HONORABLE ROSEANNE MEFFORED, DISTRICT ASSOCIATE
COURT JUDGE

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Statement of the Issues Presented

1. Whether the district court violated Thompson’s due process rights under the U.S. and Iowa Constitutions and the notice provision of Iowa Code 903.7(1)(b) when it revoked Thompson’s deferred judgment.

United States Supreme Court Cases

Gagnon v. Scarpelli, 411 U.S. 778 (1973)

Morrissey v. Brewer, 408 U.S. 421 (1972)

Iowa Court of Appeals Cases

State v. Brown, no.17-0921, 2018 WL 2727728 (Iowa Ct. App. June 6, 2018) (unpublished opinion)

State v. Moreno, no.14-0985, 2015 WL 576380 (Iowa Ct. App. February 11, 2015) (unpublished opinion)

State v. Van Wie, no.13-0133, 2014 WL 69517 (Iowa Ct. App. January 9, 2014) (unpublished opinion)

2. Whether the district court erred in its 8-22-2018 order by finding Thompson was reasonably able to pay correctional fees and court-appointed attorney fees when the specific amount of those two fees was unknown as of 8-22-2018.

Iowa Supreme Court Cases

State v. Albright, 925 N.W.2d 144 (Iowa 2019)

State v. Covel, 925 N.W.2d 183 (Iowa 2019)

Iowa Court of Appeals Cases

State v. Thomas, 520 N.W.2d 311 (Iowa Ct. App. 1994)

Routing Statement

Pursuant to Iowa R. App. P. 6.1101(3)(a), the Supreme Court should transfer this appeal to the Court of Appeals because it presents the application of existing legal principles.

Statement of the Case

The defendant-appellant (hereinafter referred to as “Thompson”) appeals from the district court’s order revoking her deferred judgment for the aggravated misdemeanor crime of Child Endangerment, Iowa Code 726.6(7), and imposing a sentence of two years in prison, with all two years suspended, two years of “informal probation to the Court”, a \$625 fine plus applicable surcharges and court costs, and up to \$150 of court-appointed attorney fees. (App. at pp.25-26).

Statement of Facts

On 12-29-2017, the state filed a trial information accusing Thompson of Child Endangerment Causing Serious Injury, a class C felony, in violation of Iowa Code 726.6(5). (App. at pp.3-4). On 1-1-2018, Thompson filed a written arraignment and plea of not guilty. (App. at pp.5-7). On 6-27-2018, Thompson filed a written guilty plea to the lesser-included offense of Child Endangerment, Iowa Code 726.6(7), an aggravated misdemeanor. (App. at pp.8-11). The district court accepted the guilty plea (App. at pp.12-13) and granted Thompson a deferred judgment (App. at pp.14-16). The order required Thompson to pay “Sheriff Correctional fees” and court-appointed attorney fees of \$1,800 or the amount actually submitted for payment to the State Public Defender. (App. at p.14). The order stated that Thompson was reasonably able to pay such fees. (App. at p.14). The order also set a “status hearing” for 8-1-2019 “to determine the defendant’s compliance with the terms of his/her deferred judgment.” (App. at p.15).

On 7-8-2019, the state filed an application to revoke Thompson’s deferred judgment on the sole ground that she had paid only \$200 of her \$2,167.40 financial obligations in the case. (App. at p.18). At the time, attorney Ryan Mitchell was Thompson’s court-appointed attorney of record. (Order Appointing Counsel, 3-11-2019). On 7-9-2019, the district court set a

hearing on the state's application for 7-18-2019. (App. at pp.20-21). The order setting the hearing stated: "Clerk to Notify: Defendant/Defendant's Attorney." (App. at p.20). Nothing in the record shows that Thompson was ever served a copy of the state's application to revoke her deferred judgment or the order setting a hearing on the state's application, but the combined general docket states "COPY MAILED TO DEFT" regarding the order setting hearing on the state's application for 7-18-2019. (App. at p.39). On 7-11-2019, Attorney Mitchell filed a motion to withdraw as Thompson's attorney. (App. at p.22). On that same date the court allowed Attorney Mitchell to withdraw and appointed Attorney Michael Fisher to represent Thompson. (App. at pp.23-24). On 7-18-2019, Thompson did not appear for the hearing, but Attorney Michael Fisher did. The court held an unreported hearing, revoked Thompson's deferred judgment, entered a judgment of conviction, and imposed a sentence. (App. at pp.25-29). The only mention in the district court's order regarding the revocation of the deferred judgment was as follows: "The Court FINDS by a preponderance of the evidence that the Defendant has violated the terms of his/her probation under the terms of the Deferred Judgment. The Defendant is hereby withdrawn from the Deferred Judgment Program, and the Deferred Judgment granted to the Defendant on August 16, 2018, is hereby REVOKED." (App. at p.25).

Nothing in the record indicates that the district court held a “status hearing” on 8-1-2019 as its deferred judgment order filed on 8-16-2018 said it would. Thompson filed a timely notice of appeal on 8-19-2019.¹ (App. at p.30).

Additional facts will be discussed below as needed.

Argument

1. The district court violated Thompson’s due process rights under the U.S. and Iowa constitutions and the provisions of Iowa Code 907.3(1)(b) when it revoked her deferred judgment.

Preservation of Error:

Due process rights must be satisfied in a proceeding to revoke a deferred judgment. State v. Moreno, no.14-0985, 2015 WL 576380 at *2 (Iowa Ct. App. Feb. 11, 2015) (citing Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)). The state has the burden of showing that the district court satisfied Thompson’s due process rights and provided a sufficient factual basis when it revoked her deferred judgment. Id. (citing State v. Lillibridge, 519 N.W.2d 82, 83 (Iowa 1994) and State v. Hughes, 200 N.W.2d 559, 562 (Iowa 1972)). Therefore, even though the hearing at which the court revoked

¹ Thompson filed her notice of appeal thirty-two calendar days after the district court entered its order revoking her deferred judgment. However, the thirtieth day to file her notice of appeal fell on 8-17-2019, a Saturday. A defendant must file a notice of appeal within thirty days of the entry of a final judgment in her case. Iowa R. App. P. 6.101(1)(b). But, when the thirtieth day falls on a Saturday, the defendant has until the next day in which the clerk of court’s office is open to receive the notice of appeal to file the notice of appeal. Iowa Code 4.1(34). Therefore, because the thirtieth day for Thompson to file her notice of appeal fell on 8-17-2019, a Saturday, she had until 8-19-2019, the next day the clerk of court was open, to file her notice of appeal.

Thompson's deferred judgment was not reported and there is no record of Thompson objecting to the violation of her due process rights or the notice provision of Iowa Code 903.7(1)(b) at the hearing on the state's application to revoke her deferred judgment, Thompson can raise this claim on direct appeal. Id.; State v. Van Wie, no.13-0133, 2014 WL 69517 at *2 (Iowa Ct. App. January 9, 2014); State v. Brown, no.17-0921, 2018 WL 2727728 at *2 (Iowa Ct. App. June 6, 2018).² Additionally, a defendant can directly appeal the revocation of her deferred judgment. State v. Farmer, 234 N.W.2d 89, 90-91 (Iowa 1975).

Standard of Review:

Generally, appellate courts "review cases involving the revocation of probation and deferred judgment for the correction of errors at law." Brown, 2018 WL 2727728 at *2 (citing Iowa R. App. P. 6.907). "However, when considering a constitutional challenge" the standard of review is de novo. Id. (citing State v. Love, 589 N.W.2d 49, 50 (Iowa 1998)).

Argument:

² In Moreno, the Court of Appeals rejected the state's argument that "because [the appellant] failed to request the proceedings be recorded or establish a record pursuant to Iowa Rule of Appellate Procedure 6.806, she waived the argument she now asserts on appeal." Moreno, no.14-0985, 2015 WL 576380 at *2. The Court of Appeals did so because "it is the State's the burden to show [the defendant's] due process rights were satisfied and that the proper factual basis was established when the court revoked her deferred judgment." Id. Similarly, in State v. Van Wie, the Court of Appeals "decline[d] to shift to the defendant the burden of creating a record of the probation violation hearing that due process requires the court to make." 2014 WL 69517 at *2. In Van Wie, the state argued that the appellant had to create a record of the unreported probation violation hearing pursuant to Iowa Rule of Appellate Procedure 6.806. Id.

Upon a plea of guilty, the district court, with defendant's consent, "may defer judgment and may place the defendant on probation upon conditions it may require." Iowa Code 907.3(1)(a). "Upon a showing that the defendant is not cooperating with the program of probation or is not responding to it, the court may withdraw the defendant from the program, pronounce judgment, and impose any sentence authorized by law. *Before taking such action, the court shall give the defendant an opportunity to be heard on any matter relevant to the proposed action.*" Iowa Code 907.3(1)(b) (emphasis added).

Because "probation revocation involves a serious loss of liberty... due process must be afforded" to the defendant in proceedings pursuant to Iowa Code 907.3(1)(b). State v. Lillibridge, 519 N.W.2d 82, 83 (Iowa 1994). To comply with the due process requirements of the U.S. and Iowa constitutions, a proceeding to revoke a defendant's deferred judgment must (1) provide the defendant with written notice of the alleged probation violation, (2) disclose to the defendant the evidence against her, (3) provide the defendant with an opportunity to present witnesses and other evidence, (4) provide the defendant with an opportunity to confront and cross-examine adverse witnesses, (5) be presided over by a neutral and detached "hearing body", and (6) if the deferred judgment is revoked, provide a written

statement from the factfinder as to the evidence relied on the reasons for revoking the deferred judgment. See Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) (discussing due process requirements in parole revocation proceedings); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (discussing due process requirements in probation revocation proceedings).

In the present case, the hearing to revoke Thompson's deferred judgment violated the due process requirements of the U.S. and Iowa constitutions and the notice provision of Iowa Code 907.3(1)(b) for the following reasons: (1) Thompson was not provided written notice of the alleged probation violations or the order setting the hearing, (2) Thompson did not have an opportunity to present witnesses and other evidence or confront the witnesses against her, and (3) the district court's order revoking her deferred judgment did not specify the evidence relied on in revoking the deferred judgment or the reasons for doing so. This brief will address these three deficiencies in turn.

a. Thompson was not provided written notice of the alleged probation violations or the order setting the hearing on the state's application to revoke her deferred judgment.

The state filed its application to revoke Thompson's deferred judgment on 7-8-2019. (App. at p.18). Nothing in the record indicates that Thompson ever received a copy of the state's application or that the state, or

any other entity, made an effort to provide her a copy of the state's application. The district court entered an order on 7-9-2019 setting the state's application for hearing on 7-18-2019. (App. at p.20-21). Regarding this order, the combined general docket states: "COPY MAILED TO DEFT". (App. at p.39). However, the combined general docket does not indicate what address the copy of the order was mailed to or whether Thompson received the order. Furthermore, it is reasonable to assume that Thompson did not receive notice of the hearing date and time because she did not appear for the hearing on 7-18-2019.

Because nothing in the record indicates that Thompson received a copy of the state's application to revoke her deferred judgment, the district court violated due process by revoking Thompson's deferred judgment when Thompson had not received written notice of the alleged probation violation. Gagnon, 411 U.S. at 787-88. Additionally, because there is nothing in the record to indicate Thompson received the order setting hearing for 7-18-2019 or was otherwise made aware of the hearing on 7-18-2019, the district court violated due process and the notice provision of Iowa Code 907.3(1)(b) by revoking Thompson's deferred judgment when she did not have notice of the hearing at which the court revoked the deferred judgment. Id.

b. Thompson did not have an opportunity to present witnesses or other evidence and did not have an opportunity to confront the witnesses against her

Because Thompson did not receive notice of the hearing on 7-18-2019 where the district court considered the state's application to revoke her deferred judgment, she did not have an opportunity to present evidence or confront the witnesses against her. Therefore, the district court's order revoking her deferred judgment violated her due process rights under the U.S. and Iowa constitutions. Gagnon, 411 U.S. at 787-88.

c. The district court's order revoking Thompson's deferred judgment failed to specify the evidence relied on to revoke the deferred judgment or the reasons for revoking the deferred judgment

When ruling on the question of whether to revoke a defendant's deferred judgment, "the trial court does not have to file an opinion or make conclusions of law, but due process requires written findings by the court showing the factual basis for the revocation." Lillibridge, 519 N.W.2d at 83.

In Lillibridge, the state filed an application to revoke the defendant's deferred judgment. Id. The court did not hold a reported hearing on the state's application, but entered an order revoking the defendant's deferred judgment that stated as follows: "The court finds the defendant has violated probation. Probation terminated. Defendant sentenced to 30 days in the county jail and fined \$500 plus 30% surcharge plus court costs." Id. The

Iowa Supreme Court held that the district court failed to meet the due process requirement of stating the evidence relied on and the reasons for revoking the deferred judgment and therefore reversed the district court's order revoking the deferred judgment. Id. The Iowa Supreme Court so held because the district court's language did not "indicate what evidence the court relied on in revoking probation", "indicate what [the defendant's] probation violations were or how these violations influenced the court to select the sentence it did." Id.

In the present case, the hearing on the state's application to revoke Thompson's deferred judgment was not reported. The following language is all that appears in the district court's order regarding the evidence and reasons for revoking the deferred judgment (App. at p.25):

REVOCAION OF DEFERRED JUDGMENT

The Court FINDS by a preponderance of the evidence that the Defendant has violated the terms of his/her probation under the terms of the Deferred Judgment. The Defendant is hereby withdrawn from the Deferred Judgment Program, and the Deferred Judgment granted to the Defendant on August 16, 2018, is hereby **REVOKED.**

This language is the same in all relevant aspects, and has nothing additional, as the district court's insufficient language in Lillibridge. The language in the present case, like that in Lillibridge, failed to state what evidence the district court relied on to find that Thompson had violated the terms of the Deferred Judgment, failed to state what terms of the Deferred

Judgment Thompson failed to comply with, and failed to explain how Thompson's supposed violation justified revoking her deferred judgment rather than an alternative disposition. Because the language failed to do these things, the district court did not comply with Thompson's due process rights under the U.S. and Iowa constitutions when it revoked her deferred judgment. Id.

Conclusion and Requested Relief for Issue One:

For the reasons stated above, the district court violated Thompson's due process rights under the U.S. and Iowa constitutions and the notice provision of Iowa Code 907.3(1)(b) when it revoked her deferred judgment. Therefore, the court must vacate Thompson's conviction, reverse the district court's order revoking the deferred judgment, and remand the case to the district court for a new hearing on the state's application to revoke Thompson's deferred judgment. Id.

- 2. The district court erred in its 8-16-2018 order by ordering Thompson to pay her court-appointed attorney fees and sheriff fees without knowing the amount of such restitution at the time it entered its restitution order**

Preservation of Error:

Error preservation rules do not apply to challenges to illegal, void, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313

(Iowa Ct. App. 1994). Thompson’s sentence in the present case is illegal because the district court found she had the reasonable ability to pay, and ordered her to pay, restitution for her court-appointed attorney fees and sheriff fees without knowing the amount of such restitution at the time it entered the order. State v. Albright, 925 N.W.2d 144, 158-61 (Iowa 2019). Therefore, Thompon did not have to take any action in the district court to pursue this issue on direct appeal.

Standard of Review:

The appellate courts review restitution orders for correction of errors at law. Id. at 158. In doing so, the appellate court determines whether the district court’s findings lack substantial evidentiary support or whether the district court improperly applied the law. Id.

Argument:

The court can only order a defendant to pay restitution for items listed in Iowa Code 910.2(2) to the extent that the defendant has the reasonable ability to pay such restitution. Id. at 159. Court-appointed attorney fees and correctional fees are items of restitution in Iowa Code 910.2(2). The district court “must wait to enter a final order of restitution until all items of restitution are before the court. Once the court has all the items of restitution before it, then and only then shall the court make an assessment as to the

offender's reasonable ability to pay." Id. at 162. If the district court makes a determination on a defendant's reasonable ability to pay restitution under Iowa Code 910.2(2) without having the final amounts of such restitution before it, the appellate court must vacate the restitution order and remand the case to the district court for a determination on the defendant's reasonable ability to pay. Id.; State v. Covell, 925 N.W.2d 183, 189 (Iowa 2019).

In the present case, the district court's order issued on 8-16-2018 that granted Thompson a deferred judgment also required her to pay "Sheriff correctional fees pursuant to Iowa Code Section 365.7" and court-appointed attorney fees in the amount of \$1,800 plus attorney expenses or the amount actually submitted to the Public Defender, whichever was less. (App. at p.14). Nothing in the district court's 8-16-2018 order or the rest of the record indicates that the district court knew of the amounts of sheriff correctional fees and court-appointed attorney fees at the time it found Thompson to have the reasonable ability to pay such fees. Because the district court did not know these amounts at the time it found Thompson to have the reasonable ability to pay them, its finding that Thompson did have the reasonable ability to pay is in violation of Albright's procedure.

Conclusion and Request for Relief for Issue Two:

The district court's finding that Thompson had the reasonable ability to pay her court-appointed attorney fees as of 8-16-2018 violated Albright. Therefore, this court must vacate the district court's restitution order filed on 8-16-2018 and remand the case to the district court for a hearing on Thompson's reasonable ability to pay her court-appointed attorney fees and correctional fees.

Request for Submission With Oral Argument

Thompson requests to be heard at oral argument.

Statement of Costs

Thompson's attorney incurred no costs in printing or duplicating necessary copies of this brief

Certificate of Service

I certify that on 3-17-2020 I will email a copy of this brief to Ashley Dawn Thompson. /s/ *Peter Stiefel*

Certificate of Compliance with Type-Volume Limitations, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4,564 words.
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f)

because this brief has been prepared in a proportionally spaced type face using Microsoft Word in 14 point Times New Roman text.