

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

v.

T. J. W.,

Defendant-Appellant.

SUPREME COURT 22-0805

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE CHRISTINE DALTON, JUDGE

APPELLANT'S AMENDED REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 28th day of June, 2023, 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 T. J. W. at the address previously provided to the office.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court lacked subject matter jurisdiction and/or statutory authority to enter a restitution order for payment of the victim's pecuniary damages after the successful completion of all conditions of the deferred judgment, dismissal and expungement.

Authorities

Iowa Code § 907.1(3) (2022)

Iowa Code § 907.3(1)(b) (2022)

State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989)

Iowa Code § 910.3 (2022)

Iowa Code § 910.7(1) (2022)

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State v. Van Wie, No. 13-0133, 2014 WL 69517, at *2 (Iowa Ct. App. Jan. 9, 2014)

In re Estate of Falck, 672 N.W.2d 785, 798 (Iowa 2003)

State v. Pals, 805 N.W.2d 767, 777 (Iowa 2011)

II. The victim pecuniary damages restitution order is not supported by substantial evidence.

Authorities

State v. Stessman, 460 N.W.2d 461, 463 (Iowa 1990)

Iowa Code § 910.3

2020 Iowa Acts, ch 1074, § 74, 83

2021 Iowa Acts, ch 80, § 377

2020 Iowa Acts, ch 1074, § 79, 80, 83

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State v. Patterson, 984 N.W.2d 449 (Iowa 2023)

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State v. Ripperger, No. 14-2108, 2016 WL 146525, at *2 (Iowa Ct. App. Jan. 13, 2016)

State v. Wilkerson, No. 11-1522, 2012 WL 2819369, at *2-3 (Iowa Ct. App. July 11, 2012)

<https://www.kbb.com/car-advice/it-may-cost-more-than-you-think-to-replace-windshield/>

III. Once the case was dismissed, TW had a legitimate expectation of finality. Statutory and double jeopardy principles prevent the resurrection of the dismissed case.

Authorities

Iowa R. Crim. P. 2.24(5)(a)

Iowa Code § 907.9(4)(a) (2022)

Iowa Code § 907.9(4)(b) (2022)

U.S. Const. amend. V

Simmons v. State Public Defender, 791 N.W.2d 69, 73 (Iowa 2010)

Iowa R. App. P. 6.907

Iowa Code § 910.3 (2022)

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State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989)

State v. Allen, 601 N.W.2d 689, 690 (Iowa 1999)

State v. Houston, No. 09-1623, 2010 WL 5050564, at *2 (Iowa Ct. App. Dec. 8, 2010)

Smith v. Dist. Ct, 109 N.W. 1085, 1087 (Iowa 1906)

Lanier v. State, 270 So.3d 304, 309-10 (Ala. Crim. App. 2018)

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the plaintiff-appellee's brief.

ARGUMENT

I. The district court lacked subject matter jurisdiction and/or statutory authority to enter a restitution order for payment of the victim's pecuniary damages after the successful completion of all conditions of the deferred judgment, dismissal and expungement.

Discussion.

The district court lacked subject matter jurisdiction

The order granting TW a deferred judgment required her “to pay all monies owed as ordered.” She was ordered to pay \$100 toward Category B restitution and a civil penalty of \$315. (8/19/21 Order granting deferred judgment p. 2)(App. p. 18). The order dismissing the charge stated the “[d]efendant has completed all terms and conditions of the Deferred Judgment.” (2/15/22 Deferred judgment review order)(App. p. 26).

The court had not entered an order requiring TW to pay pecuniary damages prior to April 8, 2022. (4/8/22 Order)(App. pp. 30-32). The February 15, 2022 order which advised that all monies owed must be paid in full prior to expungement cannot be referring to monies which had not yet been ordered. (2/15/22 Deferred judgment review order)(App. p. 26).

The legislature enacted two separate Chapters which address expungement. Iowa Code chs. 907 and 901C. Iowa Code sections 907.1 and 907.3 apply to deferred judgments. Iowa Code section 907.1(3) provides “expunged” “means the court’s criminal record with reference to a deferred judgment or any other criminal record that has been segregated in a secure area or database which is exempted from public access.” Iowa Code § 907.1(3) (2022). Iowa Code section 907.3(1)(b) provides “[u]pon fulfillment of the conditions of probation and the payment of fees imposed and not waived by the judicial district department of correctional services under

section 905.14, the defendant shall be discharged without entry of judgment.” Iowa Code § 907.3(1)(b) (2022). This is what happened in the present case. TW fulfilled the conditions of the deferred judgment and the case was dismissed and then was to be expunged.

Assuming arguendo, TW had not paid all of the financial obligations, the case was still dismissed.¹ The order states:

It is hereby ordered that the charge(s) should now be **dismissed and expunged. All dismissed related charges shall now also be expunged.** Defendant is hereby advised that the case will not be expunged until all monies owing have been paid in full.

(2/15/22 Deferred judgment review order)(bold in original)

(App. p. 26). The order only limits expungement until all monies are paid in full. The order dismissed the case without a limitation for payment in full.

1. TW cannot conclusively point to the financial section of the case on Iowa Courts online to show that the financial obligations were or were not satisfied at the time of the district court’s dismissal of the case. When the district court entered the restitution order on April 8, 2022 it ordered that any money the defendants had already paid shall be moved to the victim restitution column and paid to CB. (4/8/22 Order p. 2) (App. p. 31).

TW's request for the determination of her ability to pay is filed² on the EDMS docket after the order deferring judgment. (8/19/21 RAP Affidavit)(Conf. App. pp. 16-17). The written guilty plea is also filed³ after the order deferring judgment. (8/19/21 GP)(App. pp. 12-16). The court had the request for determining the ability to pay affidavit because the court determined TW only had the ability to pay \$100 Category B restitution. (8/19/21 Order Granting DJ p. 2⁴) (App. p. 18). TW did not request the court to determine the amount of Category B restitution after sentencing because this was already ordered on August 19, 2021.

The district court only has the duty to order victim restitution to the extent the prosecution proves the pecuniary damages by a preponderance of the evidence. State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). The order

2. The request for reasonable ability to pay determination for Category B restitution was filed at 10:47 a.m.

3. The guilty plea is filed at 10:47 a.m.

4. The order granting a deferred judgment was filed at 10:38 a.m.

deferring judgment states “Pecuniary damages to the victim(s) are unknown at this time.” (8/19/21 Order Granting DJ p. 2) (App. p. 18). If the pecuniary damages are not known at the time of sentencing, the State must prepare a statement of pecuniary damages. Iowa Code § 910.3 (2022). The prosecuting attorney may petition the court on any matter related to the plan of restitution. Iowa Code § 910.7(1) (2022). Iowa Code section 910.7(1) does not place this obligation on the district court. In fact, section 910.7 does not authorize the court to modify the plan of restitution on its own motion. Iowa Code § 910.7(1) (2022). It was the State’s obligation to seek a hearing to add pecuniary damages to the terms of TW’s deferred judgment prior to dismissal.

The record is silent regarding the intention of the court or the parties to enter an order for victim restitution after the dismissal of the case. TW was not present at the time the court reviewed the case and dismissed it. (2/15/22 Deferred judgment review order) (App. p. 26). Judge Traum entered the

order dismissing the case. (2/15/22 Deferred judgment review order) (App. pp. 26-27). Approximately, two hours later Judge Tabor entered the order scheduling the restitution hearing. (2/15/22 Order setting restitution hearing)(App. pp. 28-29). The involvement of two judges does not support an inference of an agreement.

The appellant has the duty to produce the record for appeal. State v. Ludwig, 305 N.W.2d 511, 513 (Iowa 1981) (stating “[i]t is defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon.”). However, there is no basis to believe there was an agreement that can be produced. The order dismissing the case does not mention an agreement regarding victim restitution. Cf. State v. Loye, 670 N.W.2d 141, 149 (Iowa 2003) (The absence of an agreement to waive the right to appeal from the record led the Court to conclude no plea agreement existed.); State v. Manning, No. 19-0464, 2020 WL 569335, at *3 (Iowa Ct. App. Feb. 28, 2020) (stating “[n]othing in the record here shows

that Manning agreed to pay restitution to victims of the dismissed charges.” And concluding the Court “cannot nullify the error by assuming the plea agreement explicitly requires something it does not.”); State v. Ross, No. 13-0686, 2014 WL 3928878, at *2 (Iowa Ct. App. Aug. 13, 2014)(stating the Court “refused to shift the burden to the defendant to create the evidence of what did not occur.”); State v. Van Wie, No. 13-0133, 2014 WL 69517, at *2 (Iowa Ct. App. Jan. 9, 2014) (stating the Court declined “to shift the burden of creating a record of the probation violation hearing that due process requires the court to make.”). Most importantly, even assuming an agreement, a party cannot confer subject matter jurisdiction on the court by an act or procedure. In re Estate of Falck, 672 N.W.2d 785, 798 (Iowa 2003).

Alternatively, if the district court had subject matter jurisdiction, the court lacked authority to enter the restitution order.

Preservation of Error.

This Court should not find “consent” to enter a pecuniary damages restitution order based on the defendant’s appearance at the hearing. TW would be faulted, and possibly arrested, if she had not appeared. Cf. State v. Pals, 805 N.W.2d 767, 777 (Iowa 2011)(stating “the standard for determining the validity of a consent to search is whether the consent was voluntarily given and not a result of duress or coercion, expressed or implied.”).

II. The victim pecuniary damages restitution order is not supported by substantial evidence.

Proper Form of Review.

The Supreme Court held in Stessman that the entry of the deferred judgment eliminated the availability of the certiorari procedure. State v. Stessman, 460 N.W.2d 461, 463 (Iowa 1990). Therefore, the proper form of review was by discretionary review. Id. at 464. However, the legislature amended Chapter 910 during the 2020 and 2021 legislative sessions. Iowa Code § 910.3; 2020 Iowa Acts, ch 1074, § 74,

83; 2021 Iowa Acts, ch 80, § 377; 2021 Iowa Acts, ch 145, § 8; Iowa Code § 910.7; 2020 Iowa Acts, ch 1074, § 79, 80, 83.

The Supreme Court recently addressed the proper form of review of a restitution order entered after sentencing. State v. Patterson, 984 N.W.2d 449 (Iowa 2023). Because the legislature amended Chapter 910 to limit appellate review of restitution orders entered after sentencing, the Supreme Court determined that there was no longer an appeal of right. The proper form of review of restitution orders entered after sentencing is by writ of certiorari. Patterson, 984 N.W.2d at 954-55. In Patterson, the Supreme Court had no need to address its prior holding in Stessman because the district court entered judgment for Patterson's criminal offense. Id. at 451-52.

The Supreme Court granted TW's application for discretionary review. (7/29/22 SCt Order) (App. pp. 35-37). If the Court must reach the second question presented, whether the restitution order is supported by substantial evidence, TW

requests the Court determine the proper form of review of a restitution order entered as part of a deferred judgment prior to completion. This question of how a defendant may properly seek review of a restitution order accompanying or following a deferred judgment order will arise again and guidance is needed to avoid the expense of litigation and unnecessary waste of judicial resources.

Discussion:

The video evidence and the photographs taken immediately after the incident contradicts CB's testimony. (Ex. 4; Ex. 5 photos; Ex. 5 video)(Ex. App. pp. 9-38). While it is accurate that there are portions of the video where the view is obstructed, the district court also had photographs taken by the evidence technician. (Ex. 5, #11, #12, #13, #16, # 17)(Ex. App. pp. 27-29, 32-33). The photographs do not depict the damage to the Ford Escape, other than the windshield, as CB claimed. It was the duty of the district court to weigh the evidence as a whole taking into consideration the credibility of

CB and the video and photographic evidence. Cf. Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 849 (Iowa 2011) (stating “[w]e acknowledge the video does tend to impeach the credibility of Pease ... It was the duty of the commissioner, however, to weigh the evidence as a whole ...”); State v. Mohr, No. 19-0070, 2020 WL 564907, at *2 (Iowa Ct. App. Feb. 5, 2020)(stating video evidence is one factor to evaluate; finding this is “not a case in which the video evidence contradicts the officer’s testimony.”); State v. Ripperger, No. 14-2108, 2016 WL 146525, at *2 (Iowa Ct. App. Jan. 13, 2016) (stating “the video from the officer’s patrol car does not corroborate his testimony.”); State v. Wilkerson, No. 11-1522, 2012 WL 2819369, at *2-3 (Iowa Ct. App. July 11, 2012)(stating the deputy “acknowledged the recording does not confirm his description of Wilkerson’s driving”; finding an “objective review of the totality of the circumstances requires [the Court] to find the evidence is insufficient to raise

reasonable suspicion ...”). Viewing the evidence as a whole, the district court’s finding lacks substantial evidence.

The State cites no authority to support its assertion that the damaged windshield somehow impacted other parts of the vehicle. St. PP Brief p. 35. CB had the windshield replaced. (Ex. 3)(Ex. App. p. 8). Based on the \$234.84 invoice, CB’s 2004 Ford Escape did not have technology add-ons such as rain-sensing wipers or advanced driver assistance systems. See e.g. <https://www.kbb.com/car-advice/it-may-cost-more-than-you-think-to-replace-windshield/> (discussing the increased cost for replacing windshields for newer cars with technology add-ons). Damage to the Ford’s windshield does not impact the front bumper cover, the right front combination lamp, the right fender, right and left front and back doors including the door handles, right and left door mirrors, quarter panels, mudguards, right and left quarter glass, left and right rear combination lamp, rear bumper cover, paint, and clear coat. (Ex. 2)(Ex. App. pp. 5-7).

III. Once the case was dismissed, TW had a legitimate expectation of finality. Statutory and double jeopardy principles prevent the resurrection of the dismissed case.

Preservation of Error.

The State's alternate argument that the failure to include victim restitution results is an illegal sentence was not raised in the district court. Iowa Rule of Criminal Procedure 2.24(5)(a) permits the court to correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a). However, there are statutory and constitutional limits to correcting a completed sentence. Iowa Code §§ 907.9(4)(a) and 907.9(4)(b) (2022); U.S. Const. amend. V.

Standard of Review.

To the extent the issue involves a constitutional issue, reviewed is de novo. Simmons v. State Public Defender, 791 N.W.2d 69, 73 (Iowa 2010). Interpretation of a statute is reviewed for corrections of errors at law. Iowa R. App. P. 6.907.

Discussion.

The order dismissing the case was not illegal. As discussed in Division I, the prosecutor must submit a pecuniary damages statement and request the court enter an order for payment of victim restitution. Iowa Code §§ 910.3 and 910.7(1) (2022). The district court only has the duty to order victim restitution to the extent the prosecution proves the pecuniary damages by a preponderance of the evidence. State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). It was the State's obligation to seek a hearing to add pecuniary damages to the terms of TW's deferred judgment prior to dismissal.

Assuming arguendo, the order dismissing the case was illegal, the order may not be vacated. TW had a legitimate expectation of finality in the case and resurrection of the dismissed case violates statutory authority and double jeopardy principles.

Iowa Code section 907.9(4)(a) provides that a person discharged from probation “shall no longer be held to answer for the person’s offense.” This is true even if portions of court debt remain unpaid. Iowa Code § 907.9(4)(a) (2022). Further, if the person received a deferred judgment, the criminal record shall be expunged. Iowa Code § 907.9(4)(b) (2022).

The district court found TW had completed all conditions of the deferred judgment and dismissed TW’s case. (2/15/22 Deferred Judgment review order)(App. pp. 26-27). TW can no longer be held to answer for the offense. Iowa Code §907.9(4)(a)(2022).

The double jeopardy clause “in part protects against multiple punishments for the same offense.” State v. Allen, 601 N.W.2d 689, 690 (Iowa 1999). See also U.S. Const. amend. V (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”).

It appears that the Iowa Supreme Court has not addressed whether a sentence can be corrected after the

defendant has completed the sentence based on double jeopardy principles. State v. Houston, No. 09-1623, 2010 WL 5050564, at *2 (Iowa Ct. App. Dec. 8, 2010). But see Smith v. Dist. Ct, 109 N.W. 1085, 1087 (Iowa 1906) (stating “[t]here must be a time when the court’s jurisdiction over defendant’s person by way of punishment ceases.”).

In Houston, the Iowa Court of Appeals addressed the situation where the district court resentenced Houston to an additional period of parole as required by Iowa Code section 903B after he had been discharged from probation. State v. Houston, No. 09-1623, 2010 WL 5050564, at *1 (Iowa Ct. App. Dec. 8, 2010). The Court of Appeals concluded:

As noted above, Iowa courts have the authority to correct illegal sentences at any time. Iowa R. Crim. P. 2.24(5)(a). However, there must be some temporal limitation imposed by due process and notions of fundamental fairness on a court’s ability to resentence a defendant. In accord with double jeopardy principles, we conclude that a legitimate expectation of finality arises upon a defendant’s completion of the original sentence. It follows that a proper limit on a court’s ability to resentence a defendant to correct an illegal sentence should be prior to completion of the original sentence. Once

the original sentence is fully served, the attachment of jeopardy and Iowa Code section 907.9(4) preclude the court from resentencing.

Houston, 2010 WL 5050564, at *4.

Most jurisdictions that have examined this issue have found resentencing after completion of a sentence violates double jeopardy principles. Houston, 2010 WL 5050564, at *3 (citing cases); Lanier v. State, 270 So.3d 304, 309-10 (Ala. Crim. App. 2018)(citing cases). The Iowa Supreme Court also should find that reversing or vacating the order dismissing the case violates double jeopardy.

CONCLUSION

TW respectfully requests this Court find that the district court lacked subject matter jurisdiction to enter the restitution after successful completion of the terms of the deferred judgment and dismissal of the case and vacate the order.

If the Court finds the district court had subject matter jurisdiction, TW requests the Court find the district court lacked statutory authority to enter a restitution after

completion of the deferred judgment probation and vacate the order.

Alternatively, if the district court had subject matter jurisdiction and statutory authority, TW request this court find the district court's restitution order is not supported by substantial evidence, reverse the order and remand for an amended order.

Lastly, TW requests the Court decline the State's invitation to violate double jeopardy principles and reverse the order dismissing the case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$3.36, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-
STYLE REQUIREMENTS**

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 2,876 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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