

IN THE COURT OF APPEALS OF IOWA

No. 3-887 / 12-0736
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NADIA DEANNA YVONNE JONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Bradley McCall (trial and sentencing) and Karen A. Romano (restitution hearing), Judge.

The defendant appeals from the district court's order confirming restitution following her conviction for simple misdemeanor animal neglect. **APPEAL DISMISSED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, John Sarcone, County Attorney, and Celene Gogerty, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

VAITHESWARAN, P.J.

We must decide whether this appeal of a restitution order should be dismissed.

I. Background Proceedings

Nadia Jones picked up a dog belonging to someone else. The dog became ill in her care and a veterinarian ultimately euthanized it, with the owner's permission.

The State charged Nadia Jones with the serious misdemeanor version of animal neglect, an indictable misdemeanor. A jury found Nadia Jones guilty of the lesser included simple misdemeanor version of animal neglect. The district court adjudged her guilty, deferred sentence, and placed Jones on probation for twelve months. The court also ordered restitution in an amount "to be determined." Jones did not seek discretionary review of the conviction. See Iowa R. Crim. P. 2.73(1) (authorizing appeal to district court from simple misdemeanor conviction); *Tyrrell v. Iowa Dist. Ct.* 413 N.W.2d 674, 675 (Iowa 1987) (holding defendant charged with indictable misdemeanor but found guilty of simple misdemeanor had no right of appeal to the district court but could seek discretionary review of the conviction by the Iowa Supreme Court).

Three-and-one-half months later, the State moved to amend the sentence to include restitution. See Iowa Code § 910.3 (2009) ("At the time of sentencing *or at a later date to be determined by the court*, the court shall set out the amount of restitution including the amount of public service to be performed as restitution and the persons to whom restitution must be paid." (emphasis added)); see also *State v. Blakely*, 534 N.W.2d 645, 648-49 (Iowa 1995) (concluding the statutory

thirty-day deadline for filing a statement of pecuniary damages was directory rather than mandatory). The district court issued a supplemental restitution order in the amount of \$3000.

Two days after the order was filed, Jones asked for a restitution hearing pursuant to Iowa Code section 910.7. Following a hearing, the district court confirmed restitution in the amount of \$3000.

Jones filed a notice of appeal from the order confirming restitution. The State responded by moving to dismiss the appeal on the ground that, under Iowa Code section 814.6(1)(a), Jones “does not enjoy an appeal as a matter of right” from a simple misdemeanor. Jones resisted the motion. She asked the court “to conclude that she enjoys an appeal as of right . . . independent of the underlying simple misdemeanor conviction,” and alternatively, that discretionary review should be accepted in this case. The Iowa Supreme Court ordered the jurisdictional issue to be addressed and considered by this court.

II. Jurisdictional Issue

Iowa Code chapter 814 governs appeals from the district court. Section 814.6(1)(a) provides a criminal defendant a “[r]ight of appeal” from “[a] final judgment of sentence, except in case of simple misdemeanor.” By its terms, this statute forecloses a direct appeal to the Iowa Supreme Court from a judgment in a simple misdemeanor case.¹ The question here is whether this provision also forecloses a direct appeal from a district court order confirming a supplemental restitution order, where the underlying crime was a simple misdemeanor.

¹ As explained, in some cases, but not this case, a defendant may file a direct appeal of a simple misdemeanor conviction to the district court. Iowa R. Crim. P. 2.73(1).

As noted, Jones requested a hearing on the supplemental restitution order pursuant to Iowa Code section 910.7, which states:

At any time during the period of probation, parole, or incarceration, the offender or the office or individual who prepared the offender's restitution plan may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.

Jones points out that “[a]n order requiring an offender to pay restitution constitutes a judgment and lien against all property.” Iowa Code § 910.7A. In her view, therefore, a restitution order issued pursuant to section 910.7, is an independent enforceable judgment that is directly appealable, even if the underlying crime is a simple misdemeanor. In resolving her argument, we find guidance in several opinions.

In *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984), the court stated that a defendant had two means of challenging the amount of a criminal restitution order: through a direct appeal of the sentencing order, or by requesting a section 910.7 restitution hearing. *Accord State v. Jenkins*, 788 N.W.2d 640, 644 (Iowa 2010). The court noted that if the time for a direct appeal from the sentence had expired, the defendant would have to use section 910.7 to obtain a modification of restitution before seeking modification on appeal. *Janz*, 358 N.W.2d at 549. *Janz* supports the State's assertion that the order confirming the restitution amount was part of the underlying criminal sentence.

In *State v. Alspach*, 554 N.W.2d 882, 884 (Iowa 1996), the court appeared to confirm that view, holding that a restitution hearing was a “critical stage of the sentencing proceedings” that required assistance of counsel. However, the court

limited its holding to “challenges to restitution imposed as part of the original sentencing order, or supplemental orders, *under Iowa Code section 910.3*” and stated “when, pursuant to *Iowa Code section 910.7*, a later action is initiated to modify the plan or extend its completion date, the suit is civil in nature and not part of the criminal proceedings.” *Id.* (emphasis added). This language lends support to Jones’s assertion that the order confirming restitution under section 910.7 was a civil judgment rather than an extension of the criminal sentence.

Subsequent opinions, however, clarified that not all section 910.7 restitution hearings are civil in nature.

In *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997), the court stated that “[t]o be considered *an extension of the criminal proceedings* . . . the defendant’s *petition under section 910.7* must be filed within thirty days from the entry of the challenged order.” (Emphasis added). While the focus of this opinion was on the time for challenging a restitution order, the emphasized language amounted to a reaffirmation of *Janz’s* statement that a defendant could challenge the amount of a criminal restitution order by way of a request for hearing under section 910.7.

The court further clarified the interplay between a direct appeal of a criminal sentence and a section 910.7 restitution hearing in *State v. Jose*, 636 N.W.2d 38 (Iowa 2001). *Jose* appealed a sentencing order that imposed restitution but did not specify an amount. *Jose*, 636 N.W.2d at 40. After the expiration of a deadline for filing a direct appeal, the district court entered three supplemental restitution orders specifying the total amount of restitution. *Id.* at 43. *Jose* attempted to challenge those restitution amounts in the appeal he had already filed. *Id.* Citing *Janz* and the previously emphasized language in *Blank*,

the court stated that “[t]he amount of restitution is part of the sentencing order and is therefore directly appealable, as are all orders incorporated in the sentence.” *Id.* at 45-47. The court distinguished a challenge to the amount of restitution from a challenge based on a defendant’s ability to pay restitution. *Id.* The court characterized the latter as “an issue apart from the amount of restitution” and not an order “incorporated in the sentence.” *Id.* at 45. The court noted that “Jose could have filed a 910.7 petition to modify the supplemental orders while his case was pending on appeal and thereby preserve his right to a restitution hearing and court-appointed counsel.” *Id.* at 47; *accord Janz*, 358 N.W.2d at 549.

At first blush, these opinions might appear far afield from the issue at hand. While the ultimate issues were not the same, the opinions establish that an order filed in response to a timely section 910.7 request for a restitution hearing on the amount of restitution is an order in a criminal proceeding. Based on these opinions, we conclude the district court’s order confirming Jones’s restitution obligation of \$3000 was an extension of the criminal sentencing order rather than an independent, enforceable judgment. For that reason, section 814.6(1)(a) controls whether a direct appeal is available. As discussed, that provision plainly forecloses a direct appeal of a simple misdemeanor sentence. Accordingly, Jones had no right of direct appeal.

Our analysis cannot end here because the State concedes we could elect to treat Jones’s notice of appeal as an application for discretionary review. See Iowa R. App. P. 6.108 (“If any case is initiated by a notice of appeal . . . and the appellate court determines another form of review was the proper one, the case

shall not be dismissed, but shall proceed as though the proper form of review had been requested.”); see also Iowa Code § 814.6(2)(d) (permitting discretionary review in cases involving simple misdemeanor convictions); *Tyrrell*, 413 N.W.2d at 675 (observing that although a defendant convicted of a simple misdemeanor has no appeal as a matter of right, the defendant “would, of course, have the right to apply for a discretionary review under section 814.6(2)(d)”²).

Jones contends the court should grant discretionary review because “the Appellate Court’s guidance is necessary on the appropriate determination of victim restitution recoverable from the death of a pet.” She states “[i]n particular, appellate guidance is necessary on the questions of causation, valuation, and whether cremation-related costs are recoverable as victim restitution in cases involving the death of a pet.” The State responds that, “Although Jones tries to make this case seem unique based upon its facts, this case is no different than any other restitution challenge in which a defendant seeks to attack the district court’s findings as to the value of property lost or destroyed as a result of the offender’s criminal acts.”

In deciding whether to grant discretionary review, we are less persuaded by the facts than by the district court’s role in setting the amount of restitution.

² The State cites *State v. Stessman*, 460 N.W.2d 461, 464 (Iowa 1990) for the proposition that discretionary review is available. In that case, discretionary review was granted under section 814.6(2)(e), for “[a]n order raising a question of law important to the judiciary and the profession.” *Stessman*, 460 N.W.2d at 464. The important question of law was “how a defendant may properly seek review of a restitution order accompanying or following a deferred judgment order.” *Id.* We need not consider or apply that exacting standard because section 814.6(2)(d) specifically applies to simple misdemeanors. Additionally, *Stessman* involved a deferred judgment rather than deferred sentence and did not involve a simple misdemeanor. See Iowa Code § 907.3(2).

That court is vested with discretion to determine the amount. *State v. Tutor*, 538 N.W.2d 894, 896 (Iowa Ct. App. 1995). Once set, the amount will not be overturned unless there is an abuse of discretion. *Id.* Given this discretion, and the fact that Jones does not argue anything more than that the court abused its discretion in setting restitution at \$3000,³ we are persuaded that discretionary review is not warranted.

APPEAL DISMISSED.

³ Jones suggests that cremation costs were unauthorized. While she states that there is no authority allowing these costs, she cites no authority prohibiting them either. We believe the district court had discretion to include costs relating to the dog's death, including cremation costs. Absent a statutory provision prohibiting the inclusion of these costs, we conclude those costs do not implicate an illegal sentence. See *State v. Lang*, No. 10-0577, 2010 WL 5050568, at *3 (Iowa Ct. App. Dec. 8, 2010) (stating amount of restitution does not implicate illegal sentence).