IN THE COURT OF APPEALS OF IOWA

No. 3-046 / 11-1994
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS DEAN WHEELER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas Staskal, Judge.

A defendant appeals from a district court order denying his motion to tax costs. **REVERSED AND REMANDED.**

Gary Dickey Jr. and Angela Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

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

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Thomas Wheeler appeals from a district court order denying his motion to tax costs after he was acquitted by a jury of eight felony counts and found guilty of one count. He asserts the district court erred in taxing all court costs to him, including the costs of depositions and transcripts. The State argues Wheeler has waived error on his claims because he has failed to provide an adequate record on appeal. In the alternative, the State claims he should bear all costs because he was not a "winning party." We find the court costs should be taxed to both parties, and therefore, we reverse and remand.

I. Background Facts and Proceedings

Wheeler was charged in a nine-count trial information arising from his conduct with the Iowa Department of Economic Development and the tax credits for the film industry found in Iowa Code section 15.393 (2009). These nine counts consisted of four counts of felonious misconduct in office, four counts of fraudulent practice in the first degree, and one count of conspiracy to commit theft and fraudulent practices. After a lengthy jury trial, Wheeler was found guilty on one count of felonious misconduct in office, in violation of Iowa Code sections 721.1(2) and (3) (2011), a class "D" felony, and acquitted of the remaining eight counts. Judgment was deferred and Wheeler was placed on probation for two years. A civil penalty of $750 was imposed, and he was ordered to pay restitution in an amount to be determined in a supplemental order, which would include court costs, fees, and surcharges. Wheeler submitted a restitution repayment plan detailing his obligation to pay the $750 civil penalty and

$7935.86 in court costs by making monthly payments of $394.82.[1] On November 18, Wheeler filed a motion to amend the court order seeking to "proportionally tax the costs to the [State] by a ratio of 1/9 [sic] of the costs to Wheeler and 8/9 [sic] of the costs to the State." He also requested the costs of court reporters, transcripts, and depositions be taxed proportionately to the State.

The district court denied Wheeler's requests, citing Iowa Code section 910.2, which requires assessment of court costs against a defendant in any criminal case "in which there is a . . . verdict of guilty." The district court reasoned "even in a multi-count civil case, a defendant found liable on only one of the counts would be regarded as the 'losing' party and would be responsible for costs." Wheeler appealed. The State moved to dismiss the appeal because Wheeler was given a deferred judgment, which is not a "final judgment of sentence" under Iowa Code section 814.6(1)(a) and therefore carries no statutory right to appeal. Our Supreme Court denied the State's motion, and the notice of appeal was treated as an application for discretionary review. *See State v. Stessman*, 460 N.W2d 461, 464 (Iowa 1990) (providing in order to appeal from a restitution order after entry of a deferred judgment, the proper route for review is an application for discretionary review, allowing for review without upsetting the final judgment requirement).

[1] The plan included an order which reads: "Now, on this 7 day of Nov., 2011, the Court/Supervisor, having reviewed the above Plan, finds that it is satisfactory. It is therefore Hereby Ordered that the offender comply with the terms of said plan and that the same is made a condition of the offender's supervision." Under the signature line appear the words, "Judge/Supervisor." The signature is illegible.

II. Standard of Review and Issue Preservation

As statutory construction is involved, our review is on error. *State v*. *Dudley*, 766 N.W.2d 606, 612 (Iowa 2009). Moreover, our review of a restitution order is for correction of errors at law. *Teggatz v*. *Ringleb*, 610 N.W.2d 527, 529 (Iowa 2000).

The State claims because "there is nothing to substantiate the amount of court costs and what sources they are derived from," Wheeler has failed to provide us a record affirmatively disclosing the error relied upon, and the error is therefore waived. As we are engaging in statutory interpretation, the exact amount of costs is not critical to our decision.

III. Apportionment

Wheeler first argues the district court erred in taxing all of the court costs to him. Iowa Code section 910.2 mandates in part, "In all criminal cases in which there is a . . . verdict of guilty . . . the sentencing court shall order that restitution be made . . . to the clerk of court for fines, penalties, surcharges . . . [and] court costs." This court has held the rationale behind section 910.2 is similar to the rationale of tort under civil law; a wrong has been done, and the victim deserves to be fully compensated for the injury by the actor who caused it. *State v*. *Ihde*, 532 N.W.2d 827, 829 (Iowa Ct. App. 1995). Our supreme court has held "the obvious purpose of Iowa Code chapter 910 is to compensate the victim and serve the functions of deterrence and rehabilitation of the offender." *State v*. *Bonstetter*, 637 N.W.2d 161, 166 (Iowa 2001). In addition, section 815.13 provides in pertinent part "fees and costs are recoverable by the county or city

from the defendant unless the defendant is found not guilty or the action is dismissed."

Wheeler relies on *State v*. *Petrie*, 478 N.W.2d 620, 621-22 (Iowa 1991), in which our supreme court, after noting it would not "search for a different meaning when the statutory language is clear" determined:

> The provisions of Iowa Code section 815.13 and section 910.2 clearly require, where the plea agreement is silent regarding the payment of fees and costs, that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan. Consequently, the district court should have limited the restitution order in this case to requiring the defendant to pay court costs and fees attributed to his conviction of driving while barred. Expenses clearly attributed to other charges such as attorney fees connected with the suppression issues should not be assessed against the defendant. Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant. Since the defendant was only convicted on one of three counts he should be required to pay only one-third of these costs.

This logic follows a more general rule that "restitution depends on the existence of a crime for which the offender was convicted*."* *Bonstetter*, 637 N.W.2d at 165 (citing 24 C.J.S. *Criminal Law* § 1774, at 431 (1999)). Moreover, as Wheeler argues, "[I]t is elementary that a winning party does not pay court costs." *Dudley*, 766 N.W.2d at 624.

Wheeler was the "winning party" as to eight of the nine counts on which he was charged and tried. The State attempts to distinguish *Petrie* because there was a guilty plea in *Petrie* and here the charges were fully tried to a jury. The State asserts, "[I]t does not follow that when a case goes to trial on all counts that the costs must be apportioned, based upon the conviction/acquittal ratio." We find this distinction is interesting but not controlling as section 910.2 does not

distinguish between a plea of guilty and a verdict of guilty in mandating restitution. As noted in *Bonstetter*, the function of chapter 910 is to deter and rehabilitate the offender, "as restitution forces the offender to answer directly for the consequences of his or her actions." 637 N.W.2d at 165-66. There is no need to deter and rehabilitate Wheeler for charged offenses beyond the one conviction.

IV. Specific Costs: Taxing Depositions and Transcripts

Wheeler claims the district court erred in not taxing the costs of transcripts and depositions to the State. He argues under Iowa Code section 625.9, transcripts "shall be taxed as costs," and under section 625.14, "[T]he clerk shall tax in favor of the party recovering costs the allowance of the party's witnesses . . . the necessary expenses of taking depositions . . . and any further sum for any other matter which the court may have awarded as costs."

Applying his reading of *Dudley*—that such costs cannot be taxed to an acquitted defendant—Wheeler asserts the costs of transcripts and depositions must be taxed to the State. Wheeler adds, "Whether the county, the State, the court, or some other fund must bear those costs is of real no [sic] import to Wheeler—simply the fact that he, as a criminal defendant who was not convicted of the charges against him, must not be forced to bear the costs." The State failed to respond to Wheeler's assertion sections 625.9 and 625.14 are applicable to criminal as well as civil cases. Rather it continues its reliance on *Dudley*, asserting Wheeler is not a "winning party" because he was convicted of one of the offenses charged. Though raised before it, the district court did not

address Wheeler's argument that chapter 625 is applicable. Rather, the district court based its ruling on the notion Wheeler was not a "winning party."

Because we have determined Wheeler was a "winning party" as to eight of the nine counts, we must address whether sections 625.9 and 625.14 allow for taxation of transcripts and deposition costs to the State.[2]

Recently, sections of chapter 625 have been found to be applicable to criminal actions, and there is no distinguishing language between these sections and sections 625.9 and 625.14. *See*, *e.g.*, *Dudley*, 766 N.W.2d at 624 (applying Iowa Code § 625.8(2) to a criminal case); *State v. Basinger*, 721 N.W.2d 783, 785-86 (Iowa 2006) (finding Iowa Code section 625.8 regarding jury and court reporter fees applicable to criminal defendants); *State v. McFarland*, 721 N.W.2d 793, 794-95 (same); *but see City of Cedar Rapids v. Linn County*, 267 N.W.2d 673, 674 (Iowa 1978) (concluding Iowa Code section 625.1, authorizing taxation of costs to the losing party "provides authority for taxing costs in civil cases only").[3]

However, in applying section 625.14 in civil cases, deposition costs are not automatically assessed in full. Iowa Rules of Civil Procedure do not allow the taxation of deposition costs to anyone unless the depositions are introduced into evidence at trial. *See* Iowa R. Civ. P. 1.716 ("Costs of taking and proceeding to procure a deposition shall be paid by the party taking it who cannot use it in

---

[2] This is not Wheeler's first time posing this argument to us. *See State v. Wheeler*, No. 11-0827, 2012 WL 3026274, at *2 (Iowa Ct. App. July 25, 2012).

[3] *City of Cedar Rapids* was a civil action between a city and a county over who bore the costs of prosecution after a defendant was acquitted of an ordinance violation. 267 N.W.2d at 673. It did not address whether the acquitted defendant bore the cost. *Id.* It is therefore not inconsistent with our holding in this case that a defendant acquitted of certain charges should not be ordered to pay the costs associated with those charges. The State provides us no authority to the contrary.

evidence until such costs are paid. The judgment shall award against the losing party *only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial*." (emphasis added)). In applying this section of chapter 625 to a criminal case we need to also apply associated rules of civil procedure. *See* Iowa R. Civ. P. 1.101 ("The rules in this chapter shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise or statutes not affected hereby provide different procedure in particular courts or cases."). Therefore, in order to assess deposition costs under section 625.14, Wheeler must prove the portion of these costs that were necessarily incurred for the testimony offered and admitted at trial.

As the record of the "court costs" in this case appear to have been sealed, we remand to the district court to determine the amount of court costs to assess against Wheeler and against the State, consistent with this opinion and the principles set forth in *Petrie*. *See Petrie*, 478 N.W.2d at 621 (holding expenses clearly attributable to charges the defendant was found not guilty of should not be assessed against the defendant pursuant to a restitution plan, and fees and costs not clearly associated with any single charge should only be assessed proportionally against the defendant). Included in that determination will be how much, if any, deposition costs can properly be taxed against the State under Iowa Code section 625.14, as well as the proper amount to be taxed pursuant to the rules for transcripts under Iowa Code section 625.9.

V. Conclusion

Because we find no distinction in Iowa Code section 910.2 between guilty pleas and guilty verdicts, we reverse and remand to the district court for a proper

apportionment of court costs consistent with *Petrie*. Moreover, because we find Iowa Code sections 625.9 and 625.14 are applicable to cases such as this, the district court on remand must also determine if any of the transcript and deposition costs are properly taxable to the State by applying the rules of civil procedure.

REVERSED AND REMANDED.