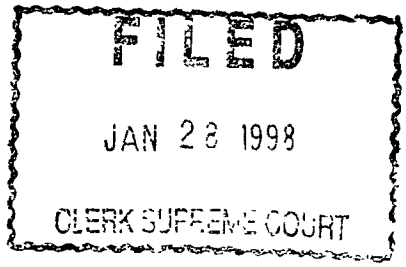
IN THE COURT OF APPEALS OF IOWA

No. 7-396 / 95-2102
Filed January 28, 1998

000431



STATE OF IOWA,
Appellee,

vs.

VINCENT ANTONE JOHNSON,
Appellant.

Appeal from the Iowa District Court for Jones County, Thomas Horan and Lynne E. Brady, Judges.

Defendant appeals from judgment and sentences entered for interference with official acts, in violation of Iowa Code section 719.1(2) and interference with official acts while displaying a dangerous weapon, in violation of Iowa Code sections 719.1(2) and 702.7 (1993). **JUDGMENT OF THE DISTRICT COURT AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

John Stitely, Cedar Rapids, until withdrawal, and then Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Connie S. Ricklefs, County Attorney, and Craig Elliott, Assistant County Attorney, for appellee.

Heard by Cady, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Defendant Vincent Johnson appeals his convictions for interference with official acts, in violation of Iowa Code section 719.1(2), and interference with official acts while displaying a dangerous weapon, in violation of Iowa Code sections 719.1(2) and 702.7 (1993).

I. Background Facts and Proceedings.

Johnson was charged with these offenses following an altercation between inmates and correctional officers at the Iowa Men's Reformatory in Anamosa on February 18, 1994. This incident involved officers Cynthia Kester and Steve Faber. Johnson was accused of approaching Kester with a knife as she was attempting to subdue another inmate. When Faber came to Kester's aid, Johnson allegedly pointed the knife at Faber.

Johnson was charged by trial information filed on April 15, 1994 with misdemeanor interference with official acts based on his altercation with Faber. He was subsequently convicted of this offense on September 19, 1994. The trial information concerning Johnson's actions toward Kester was not filed until October 4, 1994. In Kester's case, Johnson was charged with the more serious offense of interference with official acts while displaying a dangerous weapon. Johnson's motion to dismiss the case on double jeopardy grounds was denied.

In an unrelated incident occurring on March 15, 1994, Johnson allegedly struck officer James Slach with a mop. As a result, the State filed a criminal complaint

charging Johnson with simple misdemeanor assault. This complaint was filed April 20, 1994, and amended by the State on September 26, 1994, to increase the charge against Johnson to aggravated misdemeanor interference with official acts. The State's trial information including the amended charge was filed on October 14, 1994. Johnson's motion to dismiss the Slach case based on denial of his right to court-appointed counsel and speedy trial was denied.

The charges concerning Kester and Slach were consolidated for trial. Following an October 13, 1995, bench trial Johnson was convicted of interference with official acts while displaying a dangerous weapon in Kester's case and interference with official acts in Slach's case. On December 1, 1995, Johnson was sentenced to indeterminate terms of five and two years respectively. The court made these sentences concurrent to each other but consecutive to "all other sentences [Johnson] was currently serving." Johnson was also ordered to pay restitution for the cost of his court-appointed attorney fees.

Johnson was serving a robbery sentence at the time of the events resulting in the convictions which are the subject of this appeal. Subsequent to the date he was charged, but before sentencing in this case, Johnson was sentenced to additional terms of confinement for the Faber offense and an unrelated offense he committed on May 2, 1994.

In this appeal Johnson raises multiple challenges to his convictions and resulting sentence. He cites the States's failure to comply with the speedy indictment requirements of Iowa Rule of Criminal Procedure 27 in both cases. Johnson also argues double jeopardy principles preclude serial prosecutions based on the February 18 altercations with Faber and Kester. Insufficiency of the evidence supporting his conviction in the Kester case is cited as another error requiring reversal. Additionally, Johnson argues the court erred in ordering the concurrent sentences imposed on December 1, 1995, be served consecutive to any sentence he was serving at the time judgment and sentence were pronounced. Lastly, Johnson argues the court erred in ordering him to make restitution for court-appointed attorney fees without a determination of his ability to pay these fees.

II. Speedy Indictment.

Our rules concerning error preservation are well settled. We cannot review an issue unless it was raised in the trial court. *State v. Holbrook*, 262 N.W.2d 480, 482 (Iowa 1978)(citations omitted). Careful review of Johnson's motions to dismiss and supporting arguments of counsel fails to disclose any reference to speedy indictment issues implicated by the timeliness with which the trial informations were filed in this case.

As a fall back position, Johnson attributes the failure to preserve error on this issue to ineffective assistance of trial counsel. We find the record insufficient to

assess Johnson's ineffective assistance claims and they are preserved for postconviction proceedings.

III. Double Jeopardy.

Johnson argues his conviction in the case involving Faber precludes the State from prosecuting him on the charge in the case involving Kester, because the two charges are essentially the same. This claim involves a constitutional safeguard. We therefore review de novo. *State v. Clarke*, 475 N.W.2d 193, 194 (Iowa 1991) (citations omitted).

Johnson's prosecution for the Kester incident was not barred by double jeopardy. The incident involving Faber and Johnson is related to the incident involving Kester and Johnson; however, the two did not occur simultaneously and involved different victims. As the district court noted in its ruling on Johnson's motion to dismiss, the supreme court rejects the episodic immunity doctrine which "requires the prosecution to join all charges against a defendant arising out of a single criminal incident in one trial." *State v. Jackson*, 422 N.W.2d 475, 477 (Iowa 1988).

We agree with the district court's finding the charge against Johnson involving Faber "did not deal at all with the [d]efendant's actions as they related to Officer Kester, and any interference he may have caused with regard to Officer Kester or any display of a dangerous weapon he made with regard to Officer Kester." Double jeopardy protects persons from multiple punishments for the same offense. *State v.*

Krebs, 562 N.W.2d 423, 425 (Iowa 1997). Johnson's double jeopardy protections were not implicated under this circumstance, and we affirm on this issue.

IV. Sufficiency of the Evidence Supporting the Kester Conviction.

Johnson argues the evidence in the case involving Kester does not support his conviction, and even if all the evidence presented is taken as true, his actions did not constitute interference with official acts. We disagree.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the state. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

Iowa Code section 719.2 (1993) provides:

> A person under the custody, control, or supervision of the department of corrections who knowingly resists, obstructs, or interferes with a correctional officer . . . in the performance of the person's official duties, commits a serious misdemeanor. If a person violates this subsection and in so doing commits an assault, . . . the person commits an aggravated misdemeanor. If a person violates this subsection and in so doing inflicts or attempts to inflict bodily injury other than serious injury to another, displays a dangerous weapon, . . . the person commits a class "D" felony . . . .

Iowa Code § 719.2 (1993).

Kester testified she was working as a correctional officer at the Iowa Men's Reformatory on February 18, 1994. She also testified she was involved in a inmate disturbance during which she saw Johnson approximately ten to fifteen feet from her with a shank or a knife in his hand. She stated that Johnson was moving toward her. Her version is corroborated by Faber's testimony that he saw Johnson approach Kester with a knife. These facts support the jury's finding that Johnson knowingly resisted, obstructed, or interfered with Kester's official acts and in so doing displayed a dangerous weapon. We affirm on this issue.

V. Sentencing.

Johnson argues the court erred in making the sentences imposed in this case consecutive to those imposed for offenses subsequently committed because he had not been sentenced for the subsequent offenses at the time he committed the acts underlying his convictions in this case. He agrees the sentences in the cases involving Kester and Slach must run consecutive to the twenty-five year sentence he is serving for robbery.

Our review of the district court's sentencing decision is limited to corrections of legal errors. Iowa. R. App. P. 4. When a court imposes a sentence that statutory law does not permit, the sentence is illegal and it will be vacated. *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982).

Iowa Code section 901.8 provides, in part, "[i]f a person is sentenced . . . for a crime committed while confined in a detention facility or penal institution, the

sentencing judge shall order the sentence to begin at the expiration of any existing sentence." Iowa Code § 901.8 (1995). The supreme court has determined "by 'existing sentence,' the legislature meant any sentence the inmate was under at the time he committed [the new offense]. . . ." *State v. Smith*, 300 N.W.2d 90, 93 (Iowa 1981)(citing *State v. Jones*, 299 N.W.2d 679 (Iowa 1980)).

Johnson committed the acts underlying the cases involving Kester and Slach in February and April 1994. He was sentenced on October 28, 1994, for interference with Faber and an unrelated conviction. Therefore, these sentences were not existing sentences to which the consecutive sentencing provisions of section 901.8 applied. Because the district court relied on the foregoing provisions of section 901.8, we deem it necessary to vacate the sentences of incarceration imposed in this case and remand to the district court for resentencing.

VI. Restitution.

The district court ordered Johnson to pay restitution for pecuniary damages, if any, court costs, and his court-appointed attorney fees, subject to court approval of a payment plan prepared by the department of corrections or other supervising agency or institution. Johnson argues the court erred in not making an individualized assessment of his ability to pay restitution of court costs and attorney fees. We disagree.

Restitution is authorized by statute. *State v. Wagner*, 484 N.W.2d 212, 215 (Iowa App. 1992). Restitution may include court costs and court-appointed attorney

fees. *See* Iowa Code § 910.1(3). The trial court has discretion to determine the amount of restitution a defendant must pay. *State v. Tutor*, 538 N.W.2d 894, 896 (Iowa App. 1995). However, the court may order restitution for court costs and attorney fees only to the extent the defendant is reasonably able to pay the amount ordered. *State v. Kaelin*, 362 N.W.2d 526, 528. "A defendant who seeks to overturn or modify a restitution order must show a failure by the trial court to exercise its discretion or an abuse of discretion." *Tutor,* 538 N.W.2d at 896 (citation omitted). Challenges to a restitution order may be made on direct appeal or in a chapter 910 proceeding. *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993); *State v. Janz,* 358 N.W.2d 547, 549 (Iowa 1984); *see* Iowa Code § 910.7.

The following exchange took place at the sentencing proceedings:

> THE COURT: Defendant shall make restitution for court costs and the expenses of a court-appointed attorney fees pursuant to the contract with the state public defender as filed in this case. Mr. Hanrahan [sic], that's the way you get paid, isn't it?
>
> MR. O'FLAHERTY: That's right, Your Honor.
>
> THE COURT: The Department of Corrections or other supervising agency or institution shall prepare a plan or payment for the above restitution order and submit restitution, court costs, and attorney fees -- and submit same to the [c]ourt for approval and signature.

As the State correctly notes, the amount of Johnson's restitution is contingent upon the court's approval of a plan of restitution to be submitted by the Department of Corrections. The court has not yet determined the amount of restitution or

Johnson's ability to pay. Until this determination is made, we find nothing to review.

VII. Summary.

Johnson's convictions are affirmed. We vacate the sentence of incarceration imposed by the district court and remand for resentencing.

JUDGMENT OF THE DISTRICT COURT AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.