

IN THE COURT OF APPEALS OF IOWA

No. 0-750 / 10-0577
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARIUS DARNELL LANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Lang appeals the court's order increasing the amount of restitution after
he had discharged his sentence. **REVERSED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, and Thomas J. Ferguson, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Potterfield, J., and Tabor, J., take no part.

EISENHAUER, J.

Darius Lang appeals the court's order increasing the amount of restitution after he had discharged his sentence. We reverse.

I. Background Facts and Proceedings.

The State filed a trial information charging Lang with burglary and sexual assault for acts committed on April 23, 1992. The court appointed an attorney to defend Lang. After Lang pled guilty in March 1993, he was sentenced to consecutive, indeterminate terms of incarceration, each term not to exceed ten years. The sentencing order also stated: "Judgment is rendered against the defendant . . . for the costs of prosecution taxed at \$125.81, est[imated] with execution to issue accordingly."

On May 18, 1993, counsel previously appointed to represent witness Littleton during discovery/contempt filed a claim requesting the State pay \$180.15 in attorney fees. The court granted counsel's request on June 3, 1993.

On May 26, 1993, Lang's defense counsel filed a claim requesting the State pay \$5570.36 in attorney fees. On June 21, 1993, the district court ordered the State to pay \$3000, noting "statutory limit."

On July 18, 1993, the court entered a supplemental order for restitution, stating "all amounts were not included in original order." The court ordered Lang to pay: \$125.31 estimated court costs, \$1142.35 additional court costs, and \$180.15 attorney fees (\$1447.81 total). The \$3000 court-appointed counsel attorney fee was not included in the supplemental restitution order.

On August 23, 1993, the warden filed a restitution plan with the clerk of court in which Lang would pay \$1447.81 by paying twenty percent of “all credits” to his institutional account. No action was taken to modify Lang’s restitution plan to include the \$3000 attorney fee under Iowa Code section 910.3 (Supp. 1991), which provides:

Determination of amount of restitution If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order At a later date as determined by the court, the court shall issue a permanent supplemental order, setting the full amount of restitution. The court shall enter further supplemental orders, if necessary. These court orders shall be known as the plan of restitution.

Alternatively, the State did not file a motion seeking to modify Lang’s restitution plan to include the \$3000 attorney fee under Iowa Code section 910.7 (1993), which provides:

At any time during the period of . . . incarceration, the . . . office or individual who prepared the offender’s restitution plan may petition the court on any matter related to the plan of restitution The court, at any time prior to the expiration of the offender’s sentence, may modify the plan of restitution.

On July 29, 1993, Lang’s defense counsel filed a motion for reconsideration of the court’s order requiring the State to only pay \$3000 of its \$5570.36 attorney fee claim. After hearing, on September 23, 1993, the court ordered the State to pay “the additional sum of \$2570.36.” The record does not contain a modified restitution plan requiring Lang to pay an additional \$5570.36 in restitution. Lang discharged his sentence and was released from incarceration on March 19, 2002.

On October 14, 2009, the court filed a rule to show cause for contempt on nonpayment of restitution stating: (1) the county attorney requests a hearing due to \$6603.58 in unpaid fine and court costs “for this case which was completed in 1993”; and (2) “no payments have been made since 1999.”

A contempt hearing was held on March 10, 2010. The hearing was not reported. On March 11, 2010, the court ruled Lang could not be held in contempt “until his sentencing order is amended and supplemental restitution orders are entered.” Next, the court amended Lang’s sentencing order to include “restitution for costs accrued since [the July 19, 1993 supplemental restitution order] and for attorney fees and expenses of \$5,570.36 approved June 21, 1993, and September 23, 1993.” The court stated:

The defendant was sentenced on March 17, 1993, and judgment was entered for costs but the sentencing court failed to comply with Iowa Code § 910.2 which, after a 1992 amendment, required the sentencing court to order restitution for court costs and, to the extent the offender is reasonably able to pay, attorney fees. A supplemental order for restitution was filed July 19, 1993 . . . [but it] did not include attorney fees of \$3,000 approved by the court on June 21, 1993, or expenses of \$2570.36 approved by the court on September 23.

. . . .

Because of the sentencing court’s failure to order restitution as required by Iowa Code § 910.2 [as amended], the sentence is illegal to the extent that it does not require restitution and an illegal sentence may be corrected at any time. [Citation omitted.] Further, Defendant will not be prejudiced if a supplemental restitution order is entered as to amounts remaining unpaid which were not available at the time of sentencing or at the time of the supplemental order.

Lang appeals the district court’s order requiring payment of \$5570.36 in additional restitution after his sentence has been discharged.

II. Scope and Standard of Review.

Our review of a restitution order is for correction of errors of law. *State v. Paxton*, 674 N.W.2d 106, 108 (Iowa 2004). “We are bound by the district court’s findings of fact so long as they are supported by substantial evidence.” *Id.* Lang “has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion.” *State v. Blank*, 570 N.W.2d 924, 927 (Iowa 1997).

III. Merits.

“Restitution is authorized only by statute.” *State v. Tutor*, 538 N.W.2d 894, 896 (Iowa Ct. App. 1995). The purpose of restitution is to “instill responsibility in offenders” for the damages caused by criminal conduct. *Paxton*, 674 N.W.2d at 110. Under section 910.2, the sentencing court orders restitution for court costs and attorney fees “to the extent the offender is reasonably able to pay.” Iowa Code § 910.2 (1993). “Courts are permitted under section 910.3 to delay entry of judgment for restitution when, for good cause, restitutionary sums are not ascertainable at the time of sentencing.” *Blank*, 570 N.W.2d at 926; Iowa Code § 910.3 (Supp. 1991).

First, Lang argues the court abused its discretion in ruling his sentence is illegal. We agree. The district court stated: “Because of the sentencing court’s failure to order restitution as required by Iowa Code [section] 910.2, the sentence is illegal to the extent that it does not require restitution.” The record indicates the sentencing court did order restitution, including some attorney fees; therefore, the court’s conclusion is an abuse of discretion. The district court’s real problem is *the amount* of restitution ordered in 1993. We note, however, “[a]lthough a

restitution order is mandatory; the trial court has discretion to determine the amount.” *Tutor*, 538 N.W.2d at 896. Consequently, the sentencing court’s discretionary determination of the amount of restitution does not constitute an illegal sentence.

Second, Lang argues the district court has no authority to change the sentencing court’s *plan of restitution* after his sentence has been discharged. Lang is not asserting the original restitution order or July 1993 supplemental order may not be enforced. Rather, he “contends only that the district court’s authority to amend those orders has elapsed with the discharge of his sentence.”

It is undisputed Lang discharged his sentence and was released from incarceration on March 19, 2002. “[R]estitution is a phase of sentencing.” *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996). We conclude, under the circumstances of this case, the court’s authority under section 910.3 to increase the amount ordered in the plan of restitution by issuing a supplemental sentencing order ended on the day Lang’s sentence was discharged. See *Speer v. Blumer*, 483 N.W.2d 599, 601 (Iowa 1992); *State v. Chase*, 451 N.W.2d 493, 495 (Iowa 1990). Accordingly, the district court had no authority on March 11, 2010, to modify the plan of restitution and increase Lang’s restitution obligation by \$5570.36.

Finally, we address the State’s claim the court’s order, filed in 2010, is authorized as a nunc pro tunc order correcting the July 1993 supplemental order of restitution. However, the recent order does not “qualify under the test for nunc pro tunc orders: to show Now what was done Then.” *State v. Steffens*, 282

N.W.2d 120, 122 (Iowa 1979). Rather, the court's recent order attempts to *change* what was previously done in 1993. This is not allowed under nunc pro tunc doctrine:

The general rule is that an amendment of the record of a judgment, and a nunc pro tunc entry thereof, may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission or an affirmative action which should have been, but was not, taken by the court, or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide. The power of the court in this regard is to make the journal entry speak the truth by correcting clerical errors and omissions, and it does not extend beyond such function.

Id. at 122. The district court's 2010 order went beyond "correcting clerical errors and omissions," as demonstrated by the fact \$2570.36 in attorney fees was not authorized for payment by the State until *after* the entry of the July 1993 order the State contends was modified under the nunc pro tunc doctrine.

Due to our resolution of the issues, we need not address Lang's due process challenge to the court's order. The judgment of the trial court is reversed.

REVERSED.