IN THE COURT OF APPEALS OF IOWA

No. 2-203 / 11-1009
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARTHUR WILLIAM WOLCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Christopher Foy, Judge.

Defendant seeks review of a restitution order and requests a remand for a hearing on the issue with appointed counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, and Carlyle D. Dalen, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Defendant seeks review of a restitution order and requests a remand for a hearing on the issue with appointed counsel. Because defendant directly appealed his sentence before the supplemental restitution order was entered and the time for a 910.3 hearing has passed, we affirm.

On May 28, 2010, Arthur Wolcott hit Jeff Lutcavish in the head with a hammer. Wolcott was charged with willful injury. At trial, Lutcavish testified that as a result of being hit with the hammer he suffered a fractured skull. He was transported to Mayo hospital and had surgery during which a titanium plate was put in his head. The jury found Wolcott guilty of assault causing bodily injury.

At the June 27, 2010 sentencing hearing,[1] the State asked that the court order $25,000 in restitution:

> I'm not trying to make that into more than what the jury decided as a serious misdemeanor but it is still a violent act and it's an act in which a gentleman has a plate in his head because of it and that's why Crime Victims has ended up paying their max, maximum, in this case, which is $25,000. Some of his insurance paid the rest. But we're asking for $25,000 for the Crime Victims in that case.

The defense argued, "the jury found my client guilty of only a bodily injury and it's hard to come up with $25,000 worth of restitution for bodily injury." The court imposed a one-year term of incarceration, imposed a fine, and asked the State to file a formal statement of restitution. Addressing the defendant, the court stated "if you disagree with the amount the State is seeking, you can request a hearing."

[1] The defendant was sentenced on two separate cases during the hearing. This appeal is in relation only to the assault resulting in injury charge—not a felony case in which the court ordered he pay $1953 in restitution.

The written order of judgment and sentence filed on June 28 stated: "The State shall have 30 days to request and provide documentation on restitution."

At 10:54 a.m. on June 28, 2010, the defendant filed a notice of appeal "from Judgment and Sentence imposed . . . June 27, 2011."

At 11:36 a.m. on June 28, 2010, the State filed a statement of pecuniary damages, stating the Crime Victim Compensation Program had made payments of $25,000 as a result of Wolcott's criminal activities. Attached to the statement, was a payment summary from the Justice Department's Crime Victim Assistance Division regarding Lutcavish's medical expenses.

The district court entered an order, also file-stamped 11:36 a.m. on June 28, 2010, amending Wolcott's sentence and requiring Wolcott to pay restitution in the amount of $25,000 to the Crime Victim Compensation Program.

On appeal, Wolcott asks that we remand to the district court "for the express purpose of examining the propriety of a restitution challenge (i.e., the $25,000 ordered 6/28/11) to be filed within 30 days following remand." Citing *State v. Jose*, 636 N.W.2d 38, 47 (Iowa 2001), Wolcott states: "Even though Wolcott challenged this restitution order on appeal, he should now be allowed to do so in district court represented by counsel."

The State does not object to the remand, but characterizes the defendant's right to challenge the restitution as falling under Iowa Code section 910.7(1) (2009), which is civil in nature and does not carry a right to an attorney, because "the filing of the notice of appeal did not pre-date the entry of the restitution order." *See State v. Alspach,* 554 N.W.2d 882, 884 (Iowa 1996).

While we note the State is wrong in its premise that the notice of appeal did not predate the restitution order,[2] we do not find *Jose* warrants remand here.

Our supreme court recently summarized the history and statutory framework of criminal restitution in Iowa. *See State v. Jenkins*, 788 N.W.2d 640, 643-44 (Iowa 2010). There, the court wrote:

> Iowa Code chapter 910 generally provides the framework for imposition of the criminal sanction of restitution. Iowa Code section 910.1(4) defines the term "restitution." Restitution means the "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Iowa Code § 910.1(4). "Restitution" also means "the payment of crime victim compensation program reimbursements" and other governmental expenses. *Id.*
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> Regardless of whether the restitution is made to the victim or to the government, imposition of restitution is mandatory under Iowa law. Iowa Code section 910.2 states, in relevant part, "In *all criminal cases* in which there is a . . . verdict of guilty, . . . the sentencing court *shall order* that restitution be made by each offender . . . ." Iowa Code § 910.2 (emphasis added). Thus, like the federal [Mandatory Victims Protection Act] MVPA, judges have no discretion in Iowa to decline to impose restitution. Where the offender is not reasonably able to pay all or part of a CVCP reimbursement, however, the district court may allow the offender to perform community service. *Id.*
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> An offender is provided with notice of a potential restitution claim under the statute. Iowa Code section 910.3 requires the county attorney to "prepare a statement of pecuniary damages to victims of the defendant and, if applicable, any award by the Crime Victim Compensation Program," and provide it to the presentence investigator or submit it to the court at the time of sentencing. *Id.* § 910.3. The court is then to enter an order setting "out the amount of restitution" and the persons to whom restitution is to be paid. *Id.*
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> In connection with restitution orders, a criminal defendant may challenge restitution at the time of sentencing and may file a timely appeal in the criminal case of any restitution order. *State v. Blank,* 570 N.W.2d 924, 925-26 (Iowa 1997). In addition, "[a]t any time during the period of probation, parole, or incarceration, the

[2] The notice of appeal and supplemental restitution order were filed on the same date, but it is clear from the file-stamps the notice of appeal (from judgment and sentence of June 27) was filed before either the statement of pecuniary damages or the order of restitution.

> offender . . . may petition the court on any matter related to the plan of restitution or restitution plan of payment." Iowa Code § 910.7(1). A petitioner seeking to challenge a restitution award outside of a criminal appeal, however, is not automatically entitled to a hearing, but is granted a hearing only if the district court determines, based on the petition, that a hearing is warranted. *Blank,* 570 N.W.2d at 927; *State v. Alspach,* 554 N.W.2d 882, 883-84 (Iowa 1996). If the district court determines that a hearing should be held, the court has authority to modify the plan of restitution, the plan of payment, or both. Iowa Code § 910.7(2).

Id.

In *Alspach*, 554 N.W.2d at 882, the supreme court held "that a defendant is entitled to court-appointed counsel when challenging restitution as a part of the original sentencing order, or supplemental orders, issued under Iowa Code section 910.3." Because, however, a challenge to the restitution plan brought under section 910.7 is outside of the criminal appeal process and is civil in nature, *see Blank*, 570 N.W.2d at 926, the petitioner is not entitled to court-appointed counsel. The right to court-appointed counsel and the timing of a defendant's challenge has spawned a great deal of litigation. *See Jose*, 636 N.W.2d at 43-46 and cases cited therein.

In *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984), the court rejected the State's contention that an order involving restitution may never be appealed, stating: "[D]efendant's appeal from the final judgment was also a permissible appeal from all orders incorporated in that sentence, including the order of restitution here challenged."

In *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999), the defendant challenged on appeal the sentencing court's order of restitution for the court costs and defendant's court-appointed attorney fees. The basis of the

defendant's challenge, though, was that the district court had failed to determine his ability to pay. *Id.* The supreme court held the defendant could not make that challenge on direct appeal because the plan of restitution was not complete at the time the notice of appeal was filed. *Id.*

In *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999), the court explained its *Swartz* ruling as one in which the defendant was not challenging the amount of restitution, but the plan of restitution.

> The amount of restitution is part of the sentencing order and is therefore directly appealable, as are all orders incorporated in the sentence. *Janz,* 358 N.W.2d at 549. The ability to pay is an issue apart from the amount of restitution and is therefore not an "order[ ] incorporated in the sentence" and is therefore not directly appealable as such.

Jose, 636 N.W.2d at 45.

Here, as in *Jose*, the amount of restitution was not determined at the time the notice of appeal was filed. The *Jose* court wrote:

> Where the *plan* of restitution is not complete at the time of appeal, what is the safe course for a defendant to follow? *Janz*, *Swartz*, and *Jackson* provide no ready answer to this question. In this connection, Jose raises two concerns with requiring him to file a section 910.7 petition for modification before appealing his restitution order. First, he questions the district court's jurisdiction to hear a section 910.7 petition while a sentencing issue is pending on appeal in the same case. Second, he questions whether he would be entitled to court-appointed counsel were he to file such an action.

Id. at 45-46. In answer to the first question, the court explained that while "[g]enerally, an appeal divests the district court of jurisdiction," *id*. at 46, a section 910.7 petition to modify a restitution order is "collateral to an appeal from a sentence of conviction" of which the district court retains jurisdiction. *Id.*

In answer to the second question—whether the defendant would be entitled to court-appointed counsel were he to file a timely section 910.7 action in district court—the court noted prior case law indicated:

> When timeliness is factored into the analysis, it becomes clear—and we now hold—that the criminal due process requirements outlined in *Alspach* can be claimed only if protected by a timely challenge. Fairness dictates that a defendant who delays challenging a restitution order should not be treated the same as one who files a timely appeal. 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. A defendant, however, is granted no such statutory reprieve.
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> *Janz* instructs that a defendant challenging a restitution order entered as part of the original sentence has two options: to file a petition in district court under section 910.7, or to file a direct appeal. *To be considered an extension of the criminal proceedings, however, the defendant's petition under section 910.7 must be filed within thirty days from the entry of the challenged order.* Failing that, or a timely appeal [under *Janz*], a *later* action under section 910.7 would still provide an avenue for relief. But the action would be civil, not criminal, in nature.

Jose, 636 N.W.2d at 47 (quoting *Blank*, 570 N.W.2d at 926 (emphasis added)). The court allowed a remand for a restitution hearing with court-appointed counsel, "given the unsettled law" and "fundamental fairness." *Id.*

Wolcott's counsel attempts to analogize Wolcott's situation to *Jose*, but ignores that at the time *Jose* was decided, the law was "unsettled." With the *Jose* ruling in 2001, the law was no longer "unsettled." As noted in *State v. Dudley*, 766 N.W.2d 606, 619 n.5 (Iowa 2009):

> This court clarified its *Alspach* decision in *Blank.* We held that, while the timing of the court's supplemental order would not affect a defendant's right to counsel, the timing of the defendant's challenge of that order would. *Blank*, 570 N.W.2d at 926. We stated a defendant could challenge a supplemental order by a timely appeal or by filing a petition pursuant to section 910.7. *Id.* If the petition under section 910.7 is filed within thirty days of the

> supplemental order, it would be considered an extension of the criminal proceedings, and the defendant's right to counsel would be preserved. *Id.* If the defendant filed a section 910.7 proceeding more than thirty days after the supplemental order, "the action would be civil, not criminal, in nature," and the defendant would forfeit his right to counsel. *Id.*

In Wolcott's case, he filed his notice of appeal prior to the supplemental order establishing the amount of restitution. He could have filed a petition under section 910.7 in the district court within thirty days of the supplemental order, and it would have been considered an extension of his criminal proceedings. *Dudley*, 766 N.W.2d at 619 n.5; *Jose*, 636 N.W.2d at 47; *Blank*, 570 N.W.2d at 926. He did not do so. Under these circumstances, we do not believe a remand is mandated.[3] We affirm.

AFFIRMED.

[3] Section 910.7 remains an available avenue for relief "[a]t any time during the period of probation, parole, or incarceration."