

IN THE COURT OF APPEALS OF IOWA

No. 3-394 / 11-0360
Filed September 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK NEILL MORENO,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil,
District Associate Judge.

Defendant appeals the restitution order entered following his conviction for
fourth-degree criminal mischief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant
Appellate Defender, for appellant.

Patrick Moreno, Cedar Falls, pro se.

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

Considered by Danilson, P.J., Mullins, J., and Mahan, S.J.* Bower, J.
takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.**I. Background Facts & Proceedings.**

On October 15, 2010, Patrick Moreno entered a written guilty plea to certain misdemeanor offenses.¹ The district court accepted his guilty plea, and he was sentenced on the same day. Moreno's prison sentences were suspended, and he was placed on probation. The sentencing order required restitution for fines, surcharges, court costs, and court-appointed attorney fees. See Iowa Code § 910.2 (2009). He did not appeal.

On December 3, 2010, the county attorney filed a restitution notice stating the victim had suffered damages of \$527.08. No court action was taken after the filing of this notice. On January 26, 2011, more than thirty days after the filing of the restitution notice, Moreno filed a pro se application for a restitution hearing. A hearing was held on February 18, 2011.² The district court entered an order indicating Moreno appeared pro se at the hearing. The court determined Moreno should pay restitution in the amount of \$412.17 for damages caused as the result of the charge of fourth-degree criminal mischief. Moreno filed a notice of appeal. He did not challenge the amount of restitution ordered at the hearing. Instead, he argued he had the right to counsel at the restitution hearing, and the district court did not adequately determine whether he waived his right to counsel.

¹ There is no copy of the written guilty plea in the district court record. Nor is there a transcript of the plea proceedings. See Iowa R. Crim. P. 2.8(2)(b) (noting that for serious and aggravated misdemeanors a defendant may waive a plea colloquy and file a written guilty plea).

² There is no transcript in the record of the restitution hearing and no indication that a court reporter was present during the hearing.

II. Standard of Review.

We review constitutional issues de novo. See *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009).

III. Merits.

From the record presented on appeal, the first time the issue of the right to counsel at the restitution hearing was raised was in a pro se document titled, “Notice of Appeal and Request for Rehearing,” filed on March 2, 2011.

The State contends Moreno has not preserved error on his claims since he failed to provide a record of the proceedings. Moreno filed his application for hearing on restitution pro se.³ There is no indication in the application that he was requesting the assistance of counsel. The supplemental restitution order noted only that Moreno appeared in person pro se. There is nothing in the district court’s order to show Moreno raised the issue of whether he was entitled to court-appointed counsel for the restitution hearing, and if the issue was raised, whether he waived the right to counsel.

We conclude it is unnecessary to decide this case on the State’s argument. In other words, we do not have to decide if Moreno preserved error. This case can be decided instead on the basis of Iowa Code section 910.7 and the established case law.

Iowa Code section 910.7(1) reads as follows:

³ Moreno had filed an application for a court-appointed attorney during the criminal proceedings and received the assistance of counsel. In the sentencing order Moreno was required to pay court-appointed attorney fees in an amount to be later determined. His attorney filed a statement on November 15, 2010, certifying fees and expenses.

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.

Moreno was sentenced October 15, 2010, and did not appeal the sentence. The restitution notice was filed December 3, 2010, and Moreno filed his request for a restitution hearing fifty-four days later, on January 26, 2011. No supplemental sentencing order was issued by the court during this fifty-four day period. Moreno's request for a hearing was a pro se request, and he did not request court-appointed counsel. The supreme court stated in *State v. Alspach*, 554 N.W.2d 882, 884 (Iowa 1996), as follows:

We do not mean to suggest by this opinion that a defendant is entitled under all circumstances to court-appointed counsel when challenging restitution orders. Our ruling is limited to challenges to restitution imposed as part of the original sentencing order, or supplemental orders, under Iowa Code section 910.3. 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. The offender would ordinarily have no right to appointed counsel under such circumstances.

In *State v. Blank*, 570 N.W.2d 924, 925-26 (Iowa 1997), the supreme court further elaborated, as follows:

Before proceeding to the merits of Blank's appeal, we address a matter implicated by a decision postdating these proceedings, *State v. Alspach*, 554 N.W.2d 882 (Iowa 1996). In *Alspach* this court held that a defendant has the right to court-appointed counsel when challenging restitution as part of the original sentencing order, or supplemental order, issued under Iowa Code section 910.3. The controversy arose because, as was the case here, the court's supplemental judgment for restitution came months after the original sentencing proceeding in which defendant had the benefit of counsel. We reasoned that the right to counsel guaranteed at all critical stages of the criminal proceeding should

not rest on the “mere fortuity of whether restitution figures were available at sentencing.” *Alspach*, 554 N.W.2d at 884. Our decision was strictly limited, however, to challenges aimed at the *original* sentence, and supplements thereto; later *modifications* to the restitution plan, sought by offenders or corrections officials, are governed by the civil remedies afforded under section 910.7. *Id.*

.....
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. [*State v.*] *Janz*, 358 N.W.2d [547,] 549 [(Iowa 1984)]. Considerations of judicial economy may favor giving the sentencing court the opportunity to consider the challenge in the first instance. *Id.* 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, a *later* action under section 910.7 would still provide an avenue for relief. *Janz*, 358 N.W.2d at 549. But the action would be civil, not criminal, in nature. *Alspach*, 554 N.W.2d at 884.

(Emphasis in original, some citations omitted.)

We are not dealing here with the original sentencing order. That order was not appealed. In addition, we are not dealing here with a supplemental judgment for restitution. There was no supplemental judgment for restitution filed prior to Moreno’s request for a hearing. In addition, Moreno’s request was filed fifty-four days after the filing of the restitution notice. Moreno did not seek the appointment of counsel in his request. Based upon the record of this case, we conclude the restitution hearing under Iowa Code section 910.7 was a request for civil remedies and, as such, was civil in nature and not criminal. Moreno was not entitled to court-appointed counsel. The decision of the district court is affirmed.

AFFIRMED.