

IN THE COURT OF APPEALS OF IOWA

No. 6-349 / 05-1183
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHILIP ACNIL DAU,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, John D. Lloyd,
Judge.

Philip Acnil Dau appeals from a restitution order entered against him.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and David Adams, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Boesen, Assistant Attorney
General, Wayne Reisetter, County Attorney, and Stacy Ritchie, Assistant County
Attorney, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Philip Dau appeals from a restitution order entered against him. He argues the district court failed to subtract from his restitution obligation the amount of money the victim received from insurance. We affirm.

I. Background Facts and Proceedings

Philip Dau drove his car into the side of a Kum & Go convenience store on November 14, 2004. He pleaded guilty to driving under revocation in violation of Iowa Code section 321J.21 (2003) on February 25, 2005. The case proceeded to immediate sentencing, and the court fined him \$1000, with restitution to be determined later. On April 7, 2005, the court approved the State's application for pecuniary damages totaling \$11,922. Dau filed an application for a restitution hearing on May 25, 2005. After the hearing on June 20, 2005, the court determined its initial restitution order was appropriate. Dau appeals.

II. Standard of Review

We review a restitution order for correction of errors at law. *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004). We are bound by the district court's factual findings as long as they are supported by substantial evidence. *State v. Paxton*, 674 N.W.2d 106, 108 (Iowa 2004).

III. Merits

Dau argues the district court erred in failing to reduce his restitution obligation by the amount of money the victim received from insurance. There is, however, no evidence in the record that the victim received any insurance money. On direct examination, the vice-president of facilities management at Kum & Go testified as follows:

Q. So the total amount comes to approximately \$11, 922; is that correct? A. Yes.

Q. Has your company paid this balance already? A. Yes, we have.

Q. And were you compensated by insurance in any way for any of this amount? A. No, we have not been.

Q. So that \$11, 922 is all the money that your organization has already had to pay out to repair the building? A. Yes.

On cross examination, he testified:

Q. Mr. Lakers, is your company insured for these types of events? A. We have insurance, with a \$10,000 deductible.

However, although the State and the defendant both elicited testimony concerning evidence of insurance, it is clear the State did not submit an insurance offset statement. It is equally clear it is the State's responsibility to ascertain the proper amount of offset for insurance. *State v. Wagner*, 484 N.W.2d 212, 217 (Iowa Ct. App. 1992). However, failure to do so does not necessarily require reversal. *Id.* *Wagner* makes it clear that Dau had the responsibility to object to the State's failure to submit an insurance offset. He did not do so. We therefore conclude Dau's claim concerning the insurance offset was not preserved.

Dau requests that, in the alternative, we review his claim under ineffective assistance of counsel. Because Dau filed his request for a restitution hearing more than thirty days after the order was entered, we cannot consider the hearing as an extension of his criminal trial. *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997). When requests for restitution hearings under section 910.7 are filed more than thirty days after the filing of the restitution order, they are considered civil matters. *Id.*; *State v. Alspach*, 554 N.W.2d 882, 883-84 (Iowa 1996). Therefore, Dau had no statutory or constitutional right to counsel. *Alspach*, 554

N.W.2d at 884. Although we recognize he did have representation, the hearing held on June 20, 2005, was civil in nature and not an extension of the criminal sentencing. As such, Dau has no right to have the matter reviewed in an ineffective assistance of counsel context. Therefore, his claim for ineffective assistance of counsel must fail.

The district court's restitution order for \$11,922 is affirmed.

AFFIRMED.