

IN THE COURT OF APPEALS OF IOWA

No. 6-676 / 05-1395
Filed October 11, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID MAX SMOTHERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, R. David Fahey, Jr., Judge.

Defendant appeals from the district court's denial of his request for a restitution hearing. **AFFIRMED.**

Patrick T. Parry of Forker and Parry, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa K. Taylor, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

David Smothers appeals from the district court's denial of his request for a restitution hearing. He asserts the court erred because the face of his request indicated a hearing was warranted, and because he was assessed attorney fees in contravention of Iowa Code section 815.1 (2003).¹ We review this claim for the correction of errors at law. *State v. Bradley*, 637 N.W.2d 206, 210 (Iowa Ct. App. 2001). The district court's decision to deny Smothers's hearing request will be reversed only upon a demonstrated abuse of discretion. *Id.*²

Smothers was charged with burglary in the third degree, as a habitual offender, in violation of sections 713.1, 713.6A, and 902.8. The matter proceeded to trial in June 2004. However, a hung jury resulted in a mistrial. The case was retried in July 2004, and Smothers was found guilty. At his August 2004 sentencing hearing, Smothers received an indeterminate fifteen-year term of incarceration and was ordered to reimburse the State for court-appointed attorney fees, from both trials, in the amount of \$5250. His conviction and sentence were affirmed by this court on appeal. *See State v. Smothers*, No. 04-1423 (Iowa Ct. App. Aug. 17, 2005).

On June 15, 2005, Smothers filed a request for a restitution hearing. The request, which was resisted by the State, raised two claims. First, he asserted the court had not complied with section 815.1 because it ordered him to pay fees

¹ This section was repealed on May 4, 2005, and the repeal was made retroactive to November 10, 2004. 2005 Iowa Acts ch. 107, §§ 13-14.

² Smothers also asserts section 910.2, which governs court-ordered restitution for court-appointed attorney fees, is unconstitutional. However, as Smothers concedes, this claim was not raised in his request for a restitution hearing. Accordingly, we do not consider it on appeal. *Id.* at 210-11 (limiting our inquiry "to the contents of the petition, and not to any argument raised for the first time on appeal").

associated with the mistrial, and because he was “not reasonably able to pay restitution because he was and is disabled and unable to obtain gainful employment.” Second, he asserted the restitution amount “was not properly computed” and that “the amounts due and owing are inaccurate and not justified” The court set the matter for submission on July 18, 2005, based on the parties’ written filings. On the date set for submission, the court denied the request for a hearing.

Section 910.7 required the court to set a hearing “if on the face of the petition it appears that a hearing is warranted.” Smothers contends this standard was met, pointing to the section 815.1 claim and the allegation that amounts were improperly computed. There are several problems with this contention, not the least of which is the inapplicability of section 815.1.

That section provides, in relevant part,

All costs and fees incurred . . . in a criminal case brought against an inmate of a state institution for a crime committed while confined in the institution, or for a crime committed by the inmate while placed outside the wall or confines of the institution under the control and direction of a warden, supervisors, officers, or employee of the institution, or for a crime committed by the inmate during an escape or other unauthorized departure from the institution or from the control of a warden, supervisor, officer or employee of the institution *or from wherever the inmate may have been placed by authorized personnel of the institution*, are waived if the prosecution fails, or if the person liable to pay the costs and fees cannot pay the costs and fees.

Iowa Code § 815.1 (emphasis added).

Smothers focuses on the emphasized language and contends it makes the section applicable to an individual who, like himself, was on parole when the crime was committed. However, a review of the plain language of the provision

quickly reveals that its applicability is limited to those criminal cases that are brought against an “inmate of a state institution,” and that the language regarding placement by authorized personnel refers back to a crime committed “during an escape or other unauthorized departure” by an inmate. The provision cannot logically be construed to apply in criminal actions brought against a parolee for a crime committed while on parole.

In addition, we note Smothers’s claim of an erroneous computation in the amount of fees is no more than a bare allegation unsupported by any facts. Because Smothers bore the burden of proof when challenging the restitution order, his “mere allegation . . . , without any elaboration, was insufficient to mandate a section 910.7 hearing.” *State v. Blank*, 570 N.W.2d 924, 927 (Iowa 1997).

We have considered all of Smothers’s properly preserved contentions, whether or not specifically discussed. We find no abuse of discretion in the decision to deny his request for a restitution hearing.

AFFIRMED.