

IN THE COURT OF APPEALS OF IOWA

No. 7-129 / 06-0049
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY GENE DUDLEY, SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Wayne County, David L. Christensen, Judge.

Acquitted indigent defendant appeals from a district court order requiring him to reimburse the State of Iowa for the total cost of legal assistance provided to him. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Alan M. Wilson, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Larry Gene Dudley Sr. appeals from a district court order requiring him to reimburse the State of Iowa for the total cost of legal assistance provided to him pursuant to Iowa Code section 815.9 (2005). We affirm the ruling of the district court.

I. Background Facts and Proceedings.

Dudley was charged with lascivious acts with a child on October 29, 2004. The court appointed an attorney to represent him.¹ Dudley was found not guilty on November 8, 2005, after a jury trial. Following his acquittal, the district court entered an order requiring Dudley to reimburse the State for the total cost of his legal assistance pursuant to Iowa Code sections 815.9(3) and (4). The court further ordered that it would enter a judgment pursuant to section 815.9(9) if payment was not timely made.

Dudley filed a motion challenging the constitutionality of section 815.9 and, in the alternative, requesting a payment plan. The district court stayed enforcement of the reimbursement order and scheduled a hearing on Dudley's motion. At the hearing Dudley testified that he was a sixty-four-year-old retired truck driver. He decided to retire two years early due to the criminal charges. He earned between \$35,000 and \$40,000 per year as a truck driver. Dudley testified he did not have any medical condition that prevented him from working. His sole income following retirement was \$1113 per month in Social Security benefits. Dudley's estimated expenses totaled approximately \$807.46 per month.

¹ Although the record does not contain a financial affidavit requesting appointment of counsel, the parties do not dispute that Dudley qualified for court-appointed counsel.

After the hearing, the district court overruled the constitutional challenges to the statute and ordered Dudley to reimburse the State for the total cost of his legal assistance pursuant to section 815.9. The district court granted Dudley's request for alternative relief and entered a payment plan order. Based on the record made at the hearing, the district court ordered Dudley to pay \$200 per month towards his obligation. The order provided that Dudley could be held in contempt of court if he failed to make the scheduled payments.

Dudley appeals. He claims section 815.9 is unconstitutional because it violates his rights to equal protection, due process, counsel, and freedom from imprisonment for a debt. He further claims his counsel was ineffective for failing to object to various aspects of the district court's payment plan order.

II. Scope and Standards of Review.

Generally, we review matters regarding restitution for an abuse of discretion. *State v. Love*, 589 N.W.2d 49, 50 (Iowa 1998). However, our review of constitutional challenges is de novo. *Id.* In reviewing constitutional challenges to statutes, we recognize that "statutes are cloaked with a presumption of constitutionality," and the challenger bears the heavy burden of proving unconstitutionality beyond a reasonable doubt. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005). Constitutional questions should be avoided when an appeal can be decided on other grounds. *State v. Kukowski*, 704 N.W.2d 687, 690 (Iowa 2005). Claims involving the interpretation of a statute are reviewed for errors at law. *Id.* at 690-91.

III. Statutory Framework.

Every defendant who is an indigent person as defined in section 815.9 is entitled to have counsel appointed at state expense. Iowa R. Crim. P. 2.28(1). Section 815.9 requires a person granted an appointed attorney to “reimburse the state for the total cost of legal assistance provided to the person” whether the prosecution results in a conviction, dismissal, or acquittal. Iowa Code § 815.9(3), (4).

If the prosecution results in a conviction, the repayment of the total cost of legal assistance is ordered by the sentencing court as restitution pursuant to section 910.2. *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). In ordering restitution, the sentencing court must consider the offender’s reasonable ability to pay. Iowa Code § 910.2; *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987). “When the offender is not reasonably able to pay . . . court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, the court may require the offender . . . to perform” community service in lieu of payment. Iowa Code § 910.2.

If the prosecution results in an acquittal, the defendant is ordered to reimburse the State for the total cost of legal assistance pursuant to sections 815.9(3) and (4). Unlike section 910.2, the court is not required to consider the person’s reasonable ability to pay when ordering reimbursement under section 815.9. Section 815.9 also does not provide that a person may perform community service in lieu of payment. However, an acquitted defendant does not have to reimburse the State for certain prosecution costs. Iowa Code §

815.13. If a person is found not guilty in a criminal case, the costs and fees incurred for legal assistance become due within thirty days of the acquittal. Iowa Code § 815.9(4). If reimbursement is not timely made, the “court shall order payment of the costs and fees in reasonable installments” and a “judgment shall be entered against the person for any unpaid amounts.” Iowa Code § 815.9(7), (9).

IV. Equal Protection.

The Fourteenth Amendment to the Federal Constitution prohibits states from denying persons equal protection of the laws. U.S. Const. amend. XIV, § 1.² Equal protection requires that those who are situated similarly be treated similarly under the law. *State v. Biddle*, 652 N.W.2d 191, 202 (Iowa 2002). Any governmental classification of persons must meet the applicable constitutional standard imposed under the Equal Protection Clause. *Id.* In this case, the parties agree the applicable standard is rational basis. *See State v. Haines*, 360 N.W.2d 791, 795 (Iowa 1985) (employing rational basis review where defendant claimed Iowa Code chapter 910 denied equal protection to indigents required to make restitution for court-appointed counsel). “Rational basis review requires only that the law ‘be rationally related to a legitimate state interest.’” *State v. Simmons*, 714 N.W.2d 264, 277 (Iowa 2006) (quoting *Sanchez v. State*, 692 N.W.2d 812, 817-18 (Iowa 2005)). When economic legislation is at issue, the Equal Protection Clause allows the states wide latitude. *Id.* (citations omitted).

Dudley initially argues that he was treated more harshly than an indigent defendant who was appointed a public defender because section 815.14 limits

² Dudley’s equal protection claim is raised solely as a federal constitutional claim.

the amount of restitution for such an indigent to the maximum fee established pursuant to section 13B.4. Dudley contends no such cap is placed on the reimbursement ordered for an acquitted indigent defendant who was represented by a contract attorney.³

Section 815.14 provides: “When determining the amount of restitution for each case under section 910.3, the expense of the public defender . . . shall not exceed the fee limitations established in section 13B.4.” While Dudley is correct that a contract attorney can exceed the fee limitations set forth in section 13B.4, he is incorrect that a cap is not placed on the reimbursement ordered for an indigent defendant with a contract attorney. Section 815.10A places the following limitations on a contract attorney exceeding the fee limitations: (1) the attorney must obtain court approval before exceeding the fee limitations, (2) the attorney may exceed the fee limitations only if good cause is shown, and (3) the public defender’s office independently reviews contract attorney fee claims, approving only those expenditures that are “reasonable and necessary . . . as provided for in the administrative rules and the law.” Iowa Code § 815.10A(3), (4). The alleged differential treatment between indigent defendants with public defenders and indigent defendants with contract attorneys is accordingly minimal. The equal protection guarantee does not require uniformity. *Knowles v. Iowa Dep’t of Transp.*, 394 N.W.2d 342, 344 (Iowa 1986). A classification “does not deny equal protection simply because in practice it results in some inequality;

³ A public defender shall be appointed to represent indigents if the county is served by a public defender office. Iowa Code § 13B.4(2). If the county does not have a public defender office, a contract attorney is appointed to represent the indigent. *Id.* § 13B.4(2), (3). Wayne County is not served by a public defender office.

practical problems of government permit rough accommodations” *Biddle*, 652 N.W.2d at 203 (quoting *State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999)).

We consequently reject this assignment of error.

Dudley next argues he was denied equal protection because, unlike section 910.2, section 815.9 does not require the court to inquire as to a person’s reasonable ability to pay prior to entering a reimbursement order. He asserts such an inquiry is a necessary feature of a constitutional recoupment statute. We disagree.

The classification between acquitted and convicted defendants for the purpose of court-appointed attorney fee reimbursement has been recognized by the United States Supreme Court to be “wholly noninvidious.” *Fuller v. Oregon*, 417 U.S. 40, 49, 94 S. Ct. 2116, 2123, 40 L. Ed. 2d 642, 652 (1974). The Supreme Court in *Fuller* upheld an Oregon recoupment statute because it was “wholly free of the kind of discrimination that was held in” *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), to violate the equal protection clause. *Fuller*, 417 U.S. at 48, 94 S. Ct. at 2122, 40 L. Ed. 2d at 651. The offending aspect of the Kansas recoupment statute in *James* was the statute’s provision eliminating the exemptions available to civil judgment debtors. *Id.* at 47, 94 S. Ct. at 2121, 40 L. Ed. 2d at 650-51. “The elimination of the exemptions normally available to judgment debtors ‘embodie[d] elements of punitiveness and discrimination which violates the rights of citizens to equal treatment under the law.’” *Id.* (quoting *James*, 407 U.S. at 142, 92 S. Ct. at 2035, 32 L. Ed. 2d at 611). The statute in *Fuller* survived an equal protection attack because it did not

eliminate the exemptions available to other civil judgment debtors. *Id.* The statute also provided certain safeguards for the debtors that the Supreme Court approved but did not constitutionally mandate.⁴

Like the statute in *Fuller*, section 815.9 does not eliminate any of the exemptions available to civil debtors. Moreover, section 815.9 provides that a “court shall order payment of the costs and fees in reasonable installments” if reimbursement is not timely made. Iowa Code § 815.9. The requirement that the court order payment in “reasonable installments” necessitates a consideration of the defendant’s ability to pay. The district court in this case considered Dudley’s reasonable ability to pay in setting the installment amount. In addition, an acquitted indigent defendant is not required to reimburse the State for costs that are assessed to a convicted indigent defendant. See Iowa Code § 815.13. Thus, section 815.9 provides additional protections that are not afforded to other judgment debtors or to convicted indigent defendants. We therefore find section 815.9 is “wholly free of the kind of discrimination that was held in” *James* to violate the Equal Protection Clause. *Fuller*, 417 U.S. at 48, 94 S. Ct. at 2122, 40 L. Ed. 2d at 651.

V. Due Process.

Procedural due process requires notice and the opportunity to be heard prior to depriving one of life, liberty, or property. *State v. Izzolena*, 609 N.W.2d

⁴ The Oregon statute provided the following safeguards: (1) repayment may be imposed only on convicted defendants, (2) the sentencing court must take into account the financial resources of the defendant and the burden that payment of costs would impose, (3) a convicted person may petition the court for remission of the payment of costs, and (4) a convicted person cannot be held in contempt for failure to repay if he shows his default was not willful. *Fuller*, 417 U.S. at 45-46, 94 S. Ct. at 2120-21, 40 L. Ed. 2d at 649-50.

541, 552 (Iowa 2000). Dudley argues section 815.9 violates his right to procedural due process as guaranteed by the federal and state constitutions because the statute does not provide for an opportunity for hearing prior to the imposition of the recoupment order, and he was not given notice that reimbursement would be required. We find Dudley was afforded both a hearing and notice prior to any deprivation of life, liberty or property.

We first note that although section 815.9 does not provide for a hearing prior to the entry of a reimbursement order, Dudley requested and received a hearing. Enforcement of the district court's reimbursement order was stayed pending the hearing. Therefore, he does not have standing to raise the issue that the statute does not provide for an opportunity to be heard. See *Citizens for Responsible Choices v. Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004) ("Whether litigants have standing does not depend on the legal merits of their claims, but rather whether, if the wrong alleged produces a legally cognizable injury, they are among those who have sustained it."); *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 567 (Iowa 1976) (a litigant lacks standing to raise the rights of third parties).

We also find Dudley was provided with adequate notice that he would be required to reimburse the State for the cost of his court-appointed attorney. Our supreme court considered a similar procedural due process argument in *Haines* where, as a condition of probation, a convicted defendant was ordered to reimburse the county pursuant to Iowa Code chapter 910 for court-appointed attorney fees. *Haines*, 360 N.W.2d at 792. Like Dudley, the defendant in *Haines*

complained his due process rights were violated because he was “never given notice that he might be expected to pay for the attorney. . . .” *Id.* at 796. *Haines* found that the procedural due process requirement of notice was satisfied because “[c]ounsel was appointed to advise him of his legal position and his rights.” *Id.* Furthermore, the requirement that a person must reimburse the State for the cost of legal assistance is a matter of public record. *See, e.g., Fuller*, 417 U.S. at 50 n.11, 94 S. Ct. at 2123, 40 L. Ed. 2d at 653 (noting “that the recoupment statutes . . . were published at the time of the petitioner’s plea” in commenting on procedural due process claims). We therefore conclude Dudley’s procedural due process rights were not violated because he was afforded both notice and a hearing.

VI. Right to Counsel.

The accused in a criminal proceeding is guaranteed the right to assistance of counsel. U.S. Const. amend. VI; Iowa Const. art. 1, § 10. Dudley argues section 815.9 violates his right to assistance of counsel because the statute chills his exercise of that right. He contends the “knowledge that a defendant may remain under an obligation to repay the expenses incurred in proper representation might impel him to decline the services of an appointed attorney.”

“The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel.” *Fuller*, 417 U.S. at 52-53, 94 S. Ct. at 2124, 40 L. Ed. 2d at 654. In *Haines*, 360 N.W.2d at 794, our supreme court likewise acknowledged that a “statute allowing recoupment of

court costs and court-appointed attorney's fees . . . does not violate per se the right to counsel guaranteed in the Iowa Constitution." "We cannot say that the Constitution requires that those only slightly poorer" than a defendant who is just above the line separating the indigent from the nonindigent "must remain forever immune from any obligation to shoulder the expenses of their legal defense. . . ." *Id.* (quoting *Fuller*, 417 U.S. at 53-54, 94 S. Ct. at 2124-25, 40 L. Ed. 2d at 654-55).

Like the Oregon recoupment statute and Iowa Code chapter 910, chapter 815 provides sufficient safeguards for the exercise of the right to counsel. Section 815.9(7) requires a court to order payment of attorney fees in "reasonable installments." In setting the amount of the installment payments, the district court in this case considered Dudley's ability to pay. As previously discussed, section 815.10A sets limits on the amount a defendant may incur for court-appointed representation. Furthermore, an acquitted defendant is not liable for certain prosecution costs pursuant to section 815.13. Therefore, we conclude chapter 815 includes adequate protection of the right to counsel necessary to overcome a Sixth Amendment challenge.⁵

VII. Right to be Free from Imprisonment for Debt.

The payment plan order entered by the district court provided that Dudley could be held in contempt of court if he failed to make the scheduled payments.

⁵ We also note that Dudley's exercise of his right to assistance of counsel was not chilled because he requested and accepted the appointment of an attorney. See *Citizens for Responsible Choices*, 686 N.W.2d at 475 (a litigant lacks standing when he is not among those who have sustained a legally cognizable injury); *State v. Backes*, 601 N.W.2d 374, 375 (Iowa Ct. App. 1999) (an issue is not ripe for determination when the claim is based on speculative facts).

Dudley argues this provision violates art. I, § 19 of the Iowa Constitution, which provides: “No person shall be imprisoned for debt in any civil action . . . unless in case of fraud.”

We observe that Dudley has not been imprisoned for failure to reimburse the State for his attorney fees. On the present record, it is merely speculative or hypothetical whether he would be imprisoned for failure to make payments according to the order entered by the district court. Therefore, this issue is not ripe for our consideration. *Backes*, 601 N.W.2d at 375.

VIII. Ineffective Assistance of Counsel.

Dudley claims he was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article One, Section Ten of the Iowa Constitution due to his counsel's failure to object to various aspects of the district court's payment plan order. The State argues this claim is without merit because an acquitted indigent defendant does not have a constitutional right to the effective assistance of counsel in a proceeding challenging a reimbursement order entered pursuant to sections 815.9(3) and (4). We agree.

The Sixth Amendment entitles criminal defendants to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). Where the proceedings are civil, not criminal in nature, no Sixth Amendment constitutional protections are implicated unless counsel was appointed pursuant to a statutory directive.⁶ *In re J.P.B.*,

⁶ We have assumed that due process requires counsel appointed pursuant to a statutory directive provide effective assistance. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986).

419 N.W.2d 387, 390 (Iowa 1988). Thus, before we can reach Dudley's claims of ineffective assistance of counsel, we must determine whether he was constitutionally entitled to court-appointed counsel to represent him in a proceeding challenging a reimbursement order entered pursuant to sections 815.9(3) and (4).

In *State v. Alspach*, 554 N.W.2d 882, 884 (Iowa 1996), our supreme court held that a defendant is entitled to court-appointed counsel when challenging restitution ordered pursuant to section 910.3 because restitution is a phase of sentencing, which is a "critical stage of the criminal proceeding." See also *State v. Jose*, 636 N.W.2d 38, 46 (Iowa 2001). However, where a defendant's request for a hearing pursuant to section 910.7 is made more than thirty days from the entry of the challenged order, the offender has no right to appointed counsel because the suit becomes civil in nature. *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997); *Alspach*, 554 N.W.2d at 884. The holding of *Alspach* is specifically limited to restitution orders imposed as part of sentencing pursuant to section 910.3. *Id.*; *Jose*, 636 N.W.2d at 46.

The district court's order in this matter was entered pursuant to sections 815.9(3) and (4) after Dudley was acquitted. Thus, unlike restitution orders entered as a part of the defendant's sentence pursuant to section 910.3, the district court's reimbursement order was not an extension of the criminal proceedings. We accordingly conclude Dudley was not constitutionally entitled to

Dudley does not claim the counsel representing him at the reimbursement proceedings was appointed pursuant to a statutory directive such as that contained in Iowa Code section 232.89. Moreover, section 815.9 does not authorize the appointment of counsel to represent an acquitted indigent defendant challenging reimbursement orders.

court-appointed counsel to represent him at the section 815.9 proceedings. Because Dudley was not constitutionally or statutorily entitled to counsel, he cannot claim his counsel was ineffective pursuant to the federal and state constitutions. Therefore, his ineffective assistance of counsel claims fail.

IX. Conclusion.

In conclusion, we find section 815.9 does not violate the Equal Protection Clause of the United States Constitution because our statute is free of the kind of discrimination that was held to violate equal protection principles in *James*, 407 U.S. at 142, 92 S. Ct. at 2035, 32 L. Ed. 2d at 611. We further find section 815.9 survives a procedural due process attack because Dudley was afforded a hearing and he was provided with adequate notice that he would be required to reimburse the State for his court-appointed attorney fees. We conclude Dudley's right to counsel was not chilled by section 815.9 given that he exercised his right to counsel and section 815.9 provides adequate safeguards for the exercise of that right. We also conclude Dudley's right to be free from imprisonment for debt claim is not ripe for our consideration. Finally, we find Dudley's claims of ineffective assistance of counsel are without merit because an acquitted indigent defendant is not constitutionally or statutorily entitled to court-appointed counsel in section 815.9 proceedings. We accordingly affirm the judgment of the district court.

AFFIRMED.