

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 18-0690
)
 LARRY GROSS,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SCOTT ROSENBERG, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED APRIL 17, 2019

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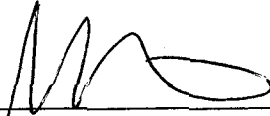
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CERTIFICATE OF SERVICE

On the 7th day of May, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Larry Gross, No. 0207647, Mt. Pleasant Correctional Facility, 1200 East Washington St., Mt. Pleasant, IA 52641.

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QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY ROOM AND BOARD FOR TIME SPENT IN JAIL WITHOUT FINDING THAT HE HAD THE REASONABLE ABILITY TO PAY?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW the Defendant-Appellant and, pursuant to Iowa Rule of Appellate Procedure 6.1103 (2014), hereby makes application for further review of the April 3, 2019, decision of the Iowa Court of Appeals in State of Iowa v. Larry Gross, Supreme Court number 18-0690. In support thereof, Appellant states:

1. The Court of Appeals erred by holding that the sheriff was seeking reimbursement of jail fees as a civil judgment rather than as restitution when the claim was filed in the criminal case rather than in a separate civil action. (Opinion).
2. The sheriff filed an application for reimbursement of jail fees in this case citing Iowa Code section 356.7, which authorizes the sheriff to be reimbursed for jail fees. (Sheriff's Application for Reimbursement) (App. p. 16). The sheriff did not specifically state that the fees were restitution, so the Court of Appeals found that they were not intended to be included in restitution as authorized in Iowa Code section 356.7(2)(i) (2017). The fact that the application was filed in the criminal

case shows the sheriff's intent. Additionally, the fees are being collected pursuant to a "Restitution Plan" filed under Iowa Code section 910. (Restitution Plan, 1/24/2019). Had the sheriff wished to collect the fees under Iowa Code section 626 (addressing procedure for executing civil judgments), the sheriff should have been required to proceed as other civil cases that are subject to collection under that statute.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal of an order of restitution in Polk County case number FECR307016.

Course of Proceedings: On August 9, 2017, the defendant, Larry Gross, was charged with arson in the first degree in violation of Iowa Code sections 712.1, 712.2 (2017), a class B felony. (Trial Information) (App. pp. 4-5). On October 19, 2017, Gross entered a guilty plea to the lesser included charge of arson in the second degree in violation of Iowa Code sections 712.1, 712.3 (2017), a class C felony. (Plea Hrg. tr. p. 1, L. 1-25, p. 14, L. 11-14). On January 5, 2018, the court sentenced Gross to 10 years in prison. (Sentencing Order) (App. pp. 9-12). Gross filed a notice of appeal on January 8, 2018. (Notice of Appeal) (App. p. 14). The conviction was affirmed on November 21, 2018. State v. Gross, 18-0048, 2018 WL 6120052 (Iowa Ct. App., Nov. 21, 2018).

On April 6, 2018, the Polk County Sheriff filed an application for reimbursement for room and board pursuant to Iowa Code section 356.7 (2017) in the amount of \$11,415.00.

(Sheriff's Application for Reimbursement) (App. pp. 15-16). On April 9, 2018, the district court approved that claim. (Order, 4/9/2018) (App. pp. 17-18). The defendant filed a notice of appeal from that order on April 18, 2018. (Notice of Appeal) (App. pp. 32-33). The Iowa Court of Appeals affirmed the district court's order on April 17, 2019. (Opinion).

Facts: According to the minutes of testimony, police officers were dispatched to a house in Des Moines on a report of a house fire. The house in question belonged to the defendant, Larry Gross. At the scene, police officers interviewed Geoff Hansen and Megan Gross, the defendant's wife, who both lived in the house. Hansen stated that Gross was agitated and upset that day. He had locked himself in his room, and eventually came out and told Hansen that if he had any personal belongings in the house, he should get them and leave because Gross had just set the house on fire. Hansen called 911. Megan Gross told officers she and Larry had argued about \$50 that was missing from their room. She also told officers that Larry had locked himself in the room and later came out stating that he

had set it on fire. Officers found some damage to the bedroom wall and door. Larry was arrested and charged with arson in the first degree. (Trial Information and Minutes of Testimony) (App. p. 4-5) (Conf. App. pp. 4-12).

Further relevant facts will be discussed below.

ARGUMENT

THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY ROOM AND BOARD FOR TIME SPENT IN JAIL WITHOUT FINDING THAT HE HAD THE REASONABLE ABILITY TO PAY.

Preservation of Error and Standard of Review: The defendant did not have the opportunity to object to the order of restitution as the order was issued without notice or opportunity to be heard. The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The sentence in the instant matter is illegal by virtue of the fact that Gross was ordered to pay room and board without any showing that he had the reasonable ability to repay those obligations. (Order, 4/9/2018) (App. pp. 17-18).

No objection is necessary to preserve an issue of irregularity in sentencing for appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant needs to object to sentencing irregularity to preserve issue for appeal). Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010).

The Court reviews a district court's restitution order for errors of law. State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004). When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Discussion: During the sentencing hearing, the court ordered

restitution, and the prosecutor stated that there was no restitution at that time and did not know what the restitution would be. The court found that the defendant was not able to pay his attorney's fees. The court also suspended the fine. (Sentencing Hrg. tr. p. 10, L. 18 – p. 11, L. 8). Three months later, the Polk County Sheriff filed a request for reimbursement for room and board in the amount of \$11,415. (Sheriff's Application for Reimbursement) (App. pp. 15-16). Three days later, the court approved the application without a hearing and without making a finding regarding the defendant's ability to pay. (Order, 4/9/2018) (App. pp. 17-18). The order informed the defendant that if he disputed the amount owed, he should contact the Polk County Jail. Further, it stated that the defendant may file an application for the court to re-examine the decision by filing an application within 15 days of the filing of the order. (Order, 4/9/2018) (App. pp. 17-18). The order was sent to a residence in Des Moines despite the fact that the court had, three months earlier, sent the defendant to prison for up to 10 years. No appeal bond had been posted. The

defendant did not request a hearing, but did file a timely notice of appeal.¹ The clerk of court filed a docket report on April 18, 2018, which included the amount owed for reimbursement for room and board as \$11,415. (Combined General Docket Rpt., Financial Summary) (App. p. 30).

The Court of Appeals found that that the sheriff intended for the jail fees to be collected under Iowa Code chapter 626 as a civil judgment rather than under chapter 910 as restitution. According the Court of Appeals, because neither the sheriff nor the court mentioned the word “restitution” the claim was automatically not collected as restitution, but instead collected under Iowa Code chapter 626. Therefore, the court held that the district court was not required to consider the defendant’s reasonable ability to pay the jail fees. (Opinion).

¹ “ ‘A defendant can and probably should ordinarily’ file a petition with the sentencing court pursuant to section 910.7 before appealing a restitution order, ‘but the defendant is not required to do so.’” State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001) (quoting State v. Janz, 358 N.W.2d 547, 548 (Iowa 1984)). That code section is permissive and not mandatory and “a defendant may appeal an illegal sentence without first filing a motion with the district court.” Id.

Chapter 626 deals with execution of judgments obtained in civil proceedings. There was no civil proceeding in this case. There was no original notice filed, nor was there an opportunity to be heard that would be required pursuant to Iowa Rules of Civil Procedure 1.302(1), 1.302, 1.305, 1.901. The sheriff did not follow procedures to execute the judgment through levy, garnishment, or lien as is described in chapter 626.

(Restitution Plan, 1/24/2019). In State v. Iowa District Court for Polk County, No. 17-0616, 2018 WL 739323. *4 (Iowa Ct. App. Feb. 7, 2018), the court stated:

On a theoretical basis, the State presents a persuasive argument that when a sheriff opts to enforce its room-and-board judgment under chapter 626, the restitution provisions in chapter 910 do not apply. But on a practical basis, it does not appear the Polk County sheriff actually chose to execute its room-and-board judgment using chapter 626. Cf. *State v. Letscher*, 888 N.W.2d 880, 887 (Iowa 2016) (noting in bail forfeiture case that sentencing court “followed none of the ordinary procedures for attachment and execution”). Instead, the assistant Polk County Attorney presented an exhibit showing the room-and-board fees stood as a financial obligation owed by [the defendant] in his criminal case, not as a separate civil judgment.

Similarly in this case, the order was filed in the criminal case and is currently being executed as restitution under Iowa Code chapter 910. Therefore, the jail fees are restitution and are subject to the requirements of the restitution statute. If the sheriff wished to collect the fees under chapter 626, the sheriff should be required to file a separate civil action that complies with the Iowa Rules of Civil Procedure to ensure the defendant receives notice and an opportunity to be heard prior to entry of judgment and execution thereon.

Restitution is defined as “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) (2017). In general, “restitution ordered to the victim is made without regard to the defendant’s ability to pay.” State v. Wagner, 484 N.W.2d 212, 215-216 (Iowa Ct. App. 1992). “However, restitution is ordered for crime victim assistance reimbursement, for public agencies, for court costs including correctional fees, for court-appointed attorney fees, for contribution to local anticrime organization, and for the medical

assistance program only to the extent the defendant is reasonably able to pay.” State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016) (citing Iowa Code § 910.2(1) (2015)).

“Constitutionally, a court must determine a criminal defendant’s ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.” Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000).

Once the final restitution order is complete, the court must consider the defendant’s reasonable ability to pay. This would include consideration of the defendant’s financial situation, his assets, his financial obligations, and the amount he needs for food, shelter, and clothing.² State v. Albright, ___ N.W.2d. ___, 17-1286, 2019 WL 1302384, *13-*14 (Iowa,

² Even prison inmates have living expenses. Inmates must pay for certain hygiene and health products such as shampoo, soap, haircare items, shaving items, toothpaste and toothbrush, deodorant, eye care items, first aid, lotion, skin care, and pain relief. Additionally, inmates must purchase socks, underwear, footwear, pants, jackets, shirts, and shoes. See IPI Canteen Catalog, August 2018, pp. 107-148; 189-226, <https://www.iaprissonind.com/Shared/catalogs/IPICanteenCatalog.pdf>.

March 22, 2019). “Restitution payments that would deprive the defendant or his or her dependents of minimum basic human needs would cause substantial financial hardship.”

Id. at *14 (quoting Commonwealth v. Henry, 475 Mass. 117, 55 N.W.2d 943, 953 (2016)).

The jail fees in this case fall under the restitution statute, and the court did not consider the defendant’s ability to pay the room and board as is required by the statute. The court did determine that the defendant did not have the ability to pay his attorney fees at the January 5, 2018, sentencing hearing. (Sentencing Hrg. tr. p. 11, L. 4-8). The defendant had been continually incarcerated between that time and the order requiring him to pay \$11, 415 for room and board. There is no reason to believe he had the ability to pay that amount when he did not have the ability to pay attorney’s fees.

CONCLUSION

For the foregoing reasons the Appellant requests the Court reverse the restitution order and remand for a hearing on the

defendant's reasonable ability to pay the entire amount of the room and board reimbursement.


ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$ 2.48, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR
FURTHER REVIEWS**

This application complies with the typeface and
type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a
proportionally spaced typeface using Bookman Old
Style, font 14 point and contains 2,182 words,
excluding the parts of the application exempted by
Iowa R. App. P. 6.1103(4)(a).



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Dated: 5/2/19

IN THE COURT OF APPEALS OF IOWA

No. 18-0690
Filed April 17, 2019

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY GROSS Jr.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Defendant appeals the district court decision requiring him to pay a room
and board reimbursement fee for time he spent in jail. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, (until withdrawal) and Maria
Ruhtenberg, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Thomas J. Ogden, Assistant
Attorney General, for appellee.

Considered by Potterfield, P.J., and Tabor and Bower, JJ.

BOWER, Judge.

Larry Gross appeals the district court decision requiring him to pay a room and board reimbursement fee for time spent in jail. We conclude the district court did not err in approving the Polk County Sheriff's application for reimbursement without making a finding Gross had a reasonable ability to pay. We affirm the decision of the district court.

Gross was charged with first-degree arson after he started a fire in his home. He entered into a plea agreement and pled guilty to second-degree arson, in violation of Iowa Code section 712.3 (2017).¹ Gross was sentenced to a term of imprisonment not to exceed ten years. The sentencing order, filed on January 5, 2018, provided Gross was to pay restitution in an amount to be determined.

On January 16, the Polk County Sheriff's Office filed a statement showing Gross was confined in the Polk County jail for 197 days. On April 6, the Polk County Sheriff's Office filed a claim for reimbursement, seeking \$11,415.00 for room and board during the time Gross was in jail. The claim stated, "This Claim is made pursuant to Iowa Code Section 356.7 for the reimbursement of Administrative Costs, Room and Board, and Medical Aid Costs."

On April 9, 2018, the district court entered an order stating, the "Sheriff's Claim for Reimbursement is approved by the Court pursuant to Iowa Code [section] 356.7 in an amount of \$11,415.00." The order advised Gross, "Any defendant aggrieved by the above order may file an application with the court to have the court reexamine this decision. The application must be filed within 15

¹ Gross's conviction was affirmed on direct appeal. *State v. Gross*, No. 18-0048, 2018 WL 6120052, at *4 (Iowa Ct. App. Nov. 21, 2018).

days after the filing of the court's order (See Iowa Rule of Civil Procedure 1.1007)." Gross did not file an application with the district court to challenge the court's order, but filed a notice of appeal on April 18, 2018, within the fifteen-day period.

Gross claims the district court improperly required him to pay restitution of \$11,415.00, without making a finding as to his reasonable ability to pay, contrary to constitutional requirements. See *State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016) ("A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910."). The State responds by claiming the Polk County Sheriff was seeking to enforce the claim as a civil judgment under chapter 626, rather than through a restitution order.

"Under section 356.7(3), a court-approved claim for room and board may be enforced in two ways: as a judgment in the traditional sense, under Iowa Code chapter 626, or as part of a restitution plan under chapter 910." *State v. Abrahamson*, 696 N.W.2d 589, 591 (Iowa 2005). In the original claim, "[i]f the sheriff or municipality wishes to have the amount of the claim for charges owed included within the amount of restitution determined to be owed by the person, a request that the amount owed be included within the order for payment of restitution by the person" must be included in the reimbursement claim filed with the clerk of district court. Iowa Code § 356.7(2)(i).

Neither the claim by the sheriff nor the ruling by the district court mentions restitution. Based on section 356.7(2)(i), we find the sheriff was seeking to enforce

its claim for reimbursement under chapter 626.² Where a sheriff proceeds under chapter 626, the court has “inherent discretionary authority to review any order . . . for substantive, as well as procedural, irregularity, and to set the matter for hearing where necessary.” *Abrahamson*, 696 N.W.2d at 592. The court should “resolve the merits of the claim.” *Id.* at 593.

On appeal, Gross asks us to reverse the district court’s order and remand for a hearing on his reasonable ability to pay. As noted, this case involves a civil judgment under chapter 626, not a restitution order under chapter 910. For a civil judgment, Gross is “afforded the same protections as other civil judgment debtors.” See *State v. Dudley*, 766 N.W.2d 606, 623 (Iowa 2009). This does not include a determination the defendant is reasonably able to pay the amount due, as in restitution proceedings. See Iowa Code § 910.2; *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (noting until a restitution plan is filed “the court is not required to give consideration to the defendant’s ability to pay”). On the other hand, a restitution proceeding “does not trigger the protections of our statutes governing execution on judgments.” *Dudley*, 766 N.W.2d at 623.

We conclude the district court did not err in approving the reimbursement application without making a finding Gross had a reasonable ability to pay. We affirm the decision of the district court.

AFFIRMED.

² We note in *State v. Iowa District Court*, No. 17-0616, 2018 WL 739323, at *4 (Iowa Ct. App. Feb. 7, 2018), we stated “it does not appear the Polk County sheriff actually chose to execute its room-and-board judgment using chapter 626.” The holding in this case is based on whether the judgment for room and board was a “court debt,” which could be satisfied by community service. *Iowa Dist. Ct.*, 2018 WL 739323, at *5.