

IN THE COURT OF APPEALS OF IOWA

No. 2-553 / 92-412

FILED

NOV 30 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KIM M. MARK,

Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Kim Mark appeals a judgment of the district court denying his request for a hearing on his plan of restitution. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Richard Crowl, County Attorney, and James Comer, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

PER CURIAM

In September 1981 Kim Mark was convicted of sexual abuse in the second degree and sentenced to a term of imprisonment not to exceed twenty-five years. The sentencing court assessed costs to Mark. A formal plan of restitution, however, was not ordered by the court. On March 6, 1985, the State began garnishing \$1.50 from Mark's monthly wage of \$7.50. Mark filed a pro se application for relief maintaining the State was garnishing his wages without a court order and without providing him with an opportunity to have an evidentiary hearing on the plan of restitution. On February 21, 1992, the district court held a hearing on Mark's application and denied his request for an evidentiary hearing. The court reasoned Iowa Code section 910.7 (1991) did not apply retroactively to a person sentenced prior to the enactment of the section. Mark has appealed.

Mark argues a modification of his restitution plan was needed because a plan of restitution was never specified by the court. Mark claims the district court never determined whether the amount imposed was correct or whether he had the ability to pay. Mark claims Iowa Code section 910.7 (1991) provides him with the right to a hearing any time prior to the expiration of his sentence.

On appeal we address whether the trial court erred in denying Mark an evidentiary hearing regarding the plan of restitution.

Section 910.7 provides:

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. The court, at any time prior to the expiration of the offender's sentence, may modify the plan of restitution or the restitution plan of payment, or both, and may extend the period of time for the completion of restitution.

Iowa Code § 910.7 (1991) (emphasis added).

The section provides an incarcerated person may petition the court at any time during such incarceration with regard to any matter related to the plan of restitution. Id. In this case Mark petitioned the court with regard to the plan of restitution while he was incarcerated. On its face the statute does not preclude application to this case. The statute only requires the person petition during the period of incarceration, probation, or parole. Id. We determine the trial court erred in denying an evidentiary hearing on the basis Mark was ineligible. We hold Mark is eligible for a hearing on his application.

The decision of whether an evidentiary hearing is warranted should be resolved by the trial court. We reverse and remand.

REVERSED AND REMANDED.