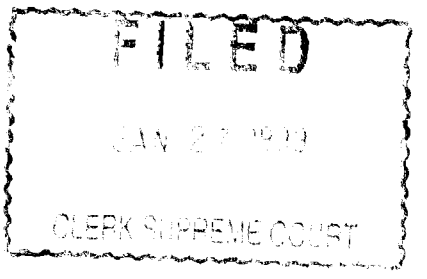
IN THE COURT OF APPEALS OF IOWA

No. 8-646 / 98-0122
Filed January 27, 1999



STATE OF IOWA,
Appellee,

vs.

JACK LOSEE,
Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Jack Losee appeals from the State's restitution plan. **AFFIRMED.**

Jane E. Rosien, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Layne M. Lindebak, Assistant Attorney General, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

STREIT, J.

Jack Losee appeals the district court's order he pay restitution for attorney fees. Because we find the district court did not abuse its discretion in ordering restitution, Losee's constitutional rights were not violated and neither the doctrines of laches or estoppel by acquiescence has been proved, we affirm.

I. Background and Facts.

Jack Losee was convicted on charges of first-degree robbery, attempt to commit murder, and going armed with intent in 1982 and two counts of first-degree murder in 1983. His sentencing orders provided, to the extent he was reasonably able to do so, he pay Polk County for the court-appointed attorney fees incurred in his cases.

In April 1994, the State adopted a restitution plan ordering Losee to pay $3167.67 in court costs and $8176.70 in attorney fees. The plan required twenty percent of Losee's institutional account credits be applied toward the restitution obligation. Losee refused to sign the plan. On March 4, 1996, Losee received a notice of intent to deduct money from his inmate account in accordance with the restitution plan.

On December 5, 1996, Losee filed an application for a hearing pursuant to Iowa Code section 910.7 (1995). He subsequently filed a request for the appointment of counsel to represent him. Losee again requested counsel at the October 1997

hearing. The judge never ruled upon the request, but indicated she would be holding an informal hearing.

The court issued a ruling on December 11, 1997, holding Losee had the reasonable ability to pay the current installments established by the restitution plan and had not been prejudiced by the State's delay in collecting the restitution. The court concluded the doctrines of laches and estoppel by acquiescence were not applicable to Losee's claims. Losee appeals.

II. The Merits.

Losee argues the court denied him his right to court-appointed counsel at the restitution hearing. Under our supreme court's holding in *State v. Alspach*, 554 N.W.2d 882 (Iowa 1996), a hearing requested to challenge restitution imposed by the original sentencing order or supplemental order is a critical stage of a criminal proceeding at which the defendant is entitled to assistance of counsel. However, the criminal due process requirements outlined in *Alspach* can be claimed only if protected by a timely challenge. *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997).

A defendant challenging a restitution order entered as part of the original sentence can challenge the order by filing a direct appeal or by filing a petition in district court under section 910.7. *Id.* To be considered an extension of the criminal proceedings, however, a petition under section 910.7 must be filed within *thirty days* from the entry of the challenged order. *Id.* (emphasis added). Failing that, or a timely

appeal, a later action under section 910.7 is a civil, not a criminal action, and the defendant does not have the right to court-appointed counsel. *See id.*

Losee was sentenced in December 1982 and in April 1983 for his crimes. Both sentencing orders provided Losee pay Polk County the court-appointed attorney fees incurred in defending his charges. Losee did not file a direct appeal or a petition pursuant to section 910.7. In April 1994 the State adopted a plan of restitution and in March 1996 began taking money from his accounts. Losee did not seek review of the plan pursuant to section 910.7. Because Losee did not directly appeal his sentence and did not file a petition pursuant to 910.7 within thirty days from entry of the challenged order, the petition he did file under 910.7 was civil rather than criminal and he was not entitled to court-appointed counsel. The trial court did not err.

Losee claims the district court erred in finding he was reasonably able to pay restitution. We review a trial court's exercise of discretion under Iowa Code section 910.7 (1995) for abuse of discretion. *State v. Blank*, 570 N.W.2d 924, 925 (Iowa 1997). In determining an inmate's ability to pay restitution, the focus is whether the defendant has the ability to pay the current installment, not whether he can pay the entire restitutionary amounts. *State v. Wagner*, 484 N.W.2d 212, 219 (Iowa App. 1992). Even a defendant with meager earnings has the ability to pay a percentage of his income to a debt of restitution. *See id.* (appellate court upheld trial court's approval of restitution plan when Wagner earned $7.20 per month and was ordered to pay twenty-five percent of his monthly earnings toward restitution). Here, Losee

earns approximately $7.70 per month and is ordered to pay twenty percent of his monthly payments in restitution. He has raised no reason why he cannot pay this allotted amount. The monthly installments are not excessive and fall well within constitutional safeguards. *See id.* The trial court did not abuse its discretion in determining Losee has the ability to pay.

Losee argues the trial court erred in determining the State had the authority to collect restitution from his wages in light of the fact the State did not enter a restitution plan for more than ten years. He argues the State is estopped by the doctrines of laches and estoppel by acquiescence. Laches will bar an action when there has been an unreasonable delay in asserting a right that causes prejudice to another. *State v. Seager*, 571 N.W.2d 204, 209 (Iowa 1997). Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. *In re Marriage of Fields*, 508 N.W.2d 730, 731 (Iowa 1993).

Losee has not proven prejudice necessary to invoke the doctrine of laches. Losee is serving a life sentence. The State's delay did not prevent him from challenging the restitution plan once it became implemented, did not hamper his defense, or cause him additional monetary loss. As for the doctrine of estoppel by acquiescence, the doctrine does not apply where one of the parties is a governmental entity and the public has a vested interest in the subject matter. *See Heckler v.*

Community Health Services, 467 U.S. 50, 51 (1984). For these reasons, Losee's challenge based on the State's delay in implementing the restitution plan fails.

We have reviewed Losee's claim the informal nature of his trial violated his due process rights and find it without merit. The district court's ruling is affirmed in all respects.

AFFIRMED.