IN THE COURT OF APPEALS OF IOWA

No 5-545 / 94-1494

FILED
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CLERK SUPREME COURT
001209

STATE OF IOWA,

Appellee,

vs.

ROBERT WILLIAM SIROVY,

Appellant

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge

Robert Sirovy appeals an order denying his request to enjoin or amend collection of restitution from his institutional account **REVERSED AND REMANDED.**

T Rae Hammans, until her withdrawal, and Matthew M. Boles, both of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and R Andrew Humphrey, Assistant Attorney General, for appellee.

Considered by Hayden, P.J., and Sackett and Huitink, JJ

HUITINK, J.

Robert Sirovy was previously convicted of the crime of sexual abuse in the second degree On March 12, 1982, he was sentenced to a term of imprisonment not to exceed twenty-five years The sentencing order also provided, "Costs are taxed to the Defendant " Sirovy's conviction and sentence were affirmed on appeal *State v. Sirovy*, No 3-74 (Iowa App June 28, 1983) (Unpublished)

On December 17, 1984, Sirovy signed a "Department of Corrections Restitution Plan" to repay court costs of $755.52 Under the plan, Sirovy was to pay twenty percent of his institutional allowances In 1992 the department instituted a new plan in which inmates would be required to pay twenty percent of all credits to their institutional accounts, which would include amounts received from friends or relatives On April 21, 1994, Sirovy received a new restitution plan which stated restitution payments would consist of twenty percent of all credits received in his institutional account

Sirovy filed a request for an order enjoining collection of his wages, or in the alternative, a hearing pursuant to Iowa Code chapter 910. The district court held a hearing on Sirovy's requests on July 21, 1994 The court determined chapter 910 did not apply in this case because that chapter applied only to crimes committed after July 1, 1982, and Sirovy was convicted prior to that date. The court also found Sirovy

was not subject to the restitution provisions of chapter 907 because he had been sentenced to a term of imprisonment

The court determined that at the time Sirovy was sentenced, a judgment for court costs against a criminal defendant was a civil liability under chapter 625, and was enforceable under chapter 626 The court concluded there was no limitation in chapter 626 on the amount the department could collect from an inmate's account The court denied Sirovy's request for relief Sirovy's motion pursuant to Iowa Rule of Civil Procedure 179(b) was denied Sirovy has appealed

I. Sirovy claims he has a property right in his institutional account and the confiscation of those funds without due process violates the Fifth and Fourteenth Amendments of the United States Constitution

The State concedes Sirovy has a property interest in his institutional account. In the recent case of *Walters v. Grossheim*, 525 N W 2d 830, 831 (Iowa 1994), the supreme court found an inmate's money in prison accounts is protected property under the Constitution. Given this protected property interest, an inmate cannot be deprived of these funds without due process. *Id.* at 832

An inmate is entitled to a predeprivation hearing, which need not be more than an informal, nonadversarial review of his or her written objections to the proposed withdrawal of funds. *Id.* at 833 To comport with due process, prison officials must merely (1) notify prisoners of the proposed amendment to their restitution plans

including assessments against outside sources. (2) permit time for objection to the proposed amendment. and (3) consider the objections for formulating an individualized plan for the future *Id.*

Due process requires that Sirovy be given such a hearing before the department may require him to pay restitution from his institutional account

II. Sirovy also raises a claim that there is no statutory authority for him to pay any restitution He agrees with the district court's determination chapter 910 does not apply Section 910 1(1) provides the chapter applies to criminal activities committed after July 1, 1982, and Sirovy was convicted prior to that date. However, Sirovy claims the district court erred in finding chapters 625 and 626 applied in this case He does not state why he believes these chapters do not apply Sirovy goes on to argue that if chapters 625 and 626 do apply, due process still requires a predeprivation hearing.

The assessment of costs in a criminal prosecution was unknown at common law, the recovery of costs in a criminal case depends wholly upon statutory provisions *Woodbury County v. Anderson,* 164 N W 2d 129, 133 (Iowa 1969) We find the assessment of costs against Sirovy was permitted by section 625 1, which provides for the assessment of costs by the successful party against the losing party

Prior to the enactment of chapter 910, a judgment for costs against a criminal defendant created a civil, not a criminal, liability *See LaRue v. Burns,* 268 N W 2d 629, 641 (Iowa 1978). An exception existed if a statute made court costs part of the

fine to be imposed as penalty for an offense *Id* Sirovy was convicted under sections 709 1 and 709 3(1) of the 1981, and court costs were not imposed as a fine under these sections Absent such statutory exception, a judgment for costs could be enforced by execution under section 626 1 *Id.* Thus, the department must proceed by the requirements of chapter 626 in order to execute on its judgment against Sirovy for court costs

We reverse the decision of the district court and remand for further proceedings We conclude Sirovy is entitled to notice and a hearing as required by due process and chapter 626 The State claims Sirovy was given such a hearing after the district court entered its decision We cannot consider this evidence because it is outside the record. We therefore determine the case must be remanded to the district court with directions to either give Sirovy a hearing as required by *Walters* and chapter 626, or in the alternative, to review the process he has already received to determine if the hearing met these requirements.

REVERSED AND REMANDED.