IN THE COURT OF APPEALS OF IOWA

No. 5-599 / 95-0095

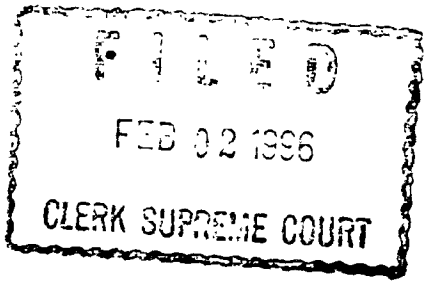
TERRY HARRINGTON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



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

Terry Harrington appeals a district court order approving his prison restitution plan. **REVERSED AND REMANDED.**

Terry Harrington, Fort Madison, pro se appellant.

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

Considered by Sackett, P.J., and Habhab and Cady, JJ.

HABHAB, J.

Terry Harrington was formerly convicted of the crime of murder in the first degree. On September 29, 1978, he was sentenced to life imprisonment. The sentencing order also provided costs of the action would be taxed to Harrington. He appealed, and the supreme court affirmed his conviction and sentence. *State v. Harrington*, 284 N.W.2d 244 (Iowa 1979).

On May 25, 1984, the Iowa Department of Corrections initiated a restitution plan for Harrington. His court costs were $1,224.60, and under the restitution plan he was to pay twenty percent of his institutional allowances. Harrington refused to sign the restitution plan. 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. In 1994, Harrington received a new restitution plan which stated payments would consist of twenty percent of all credits received in his institutional account.

Harrington filed a request for an order enjoining the collection of his wages, or in the alternative, a hearing pursuant to Iowa Code chapter 910. The request was set for a hearing on December 6, 1994. Harrington asked the court to issue an order to the penitentiary to have him available for a telephone hearing on that date and gave a telephone number for the court to call. Apparently, Harrington gave the court the wrong telephone number and the court was unable to reach him. The court then considered the matter solely on the pleadings.

The court denied Harrington's request for relief and confirmed the restitution plan. The court determined court costs could be assessed against a losing party under section 625.1 (1977). Furthermore, under section 218.43, court costs could be withheld from an inmate's wages. The court concluded the assessment of twenty percent of Harrington's institutional allowances in the present case was reasonable under the circumstances. Harrington appealed.

I. Harrington first questions the validity of a supplemental sentencing order. The original sentencing order assessed court costs to Harrington, but did not set forth the amount. He claims when the department was planning to implement a restitution plan in 1984, it requested a supplemental sentencing order from the Pottawattamie County Clerk of Court. He states the clerk issued a supplemental order stating his court costs were $1,224.60.

Harrington claims the clerk of court did not have authority to issue such an order. We determine Harrington has not preserved error on this issue. The district court did not address this claim, and Harrington did not file a motion for enlargement of the court's decision.

Even if the claim was preserved, however, we find Harrington was properly required to pay court costs. The sentencing order assessed court costs to him. Although there is no supplemental order in the record, any such order would only set forth the amount owing and no further court authorization is necessary. Section

602.8107(2) authorizes the clerk of the district court to collect court costs in criminal cases.

Harrington also claims he was entitled to a hearing before the amount of his court costs was determined. He believes he was entitled to an opportunity to be heard on the issue of the amount of the costs. Costs are assessed pursuant to chapter 625. There is no provision in this chapter for a hearing prior to the assessment of costs. Under section 625.16, a party aggrieved by the taxation of costs may apply to the court to have the costs retaxed. In the present case, Harrington did not attempt to take advantage of this procedure, but instead waited ten years before attempting to object to the amount of costs taxed in his case. We find he is not now entitled to a hearing on the amount of the costs which were assessed.

II. Harrington contends the department's implementation of a restitution plan in his case violates the statute of limitations in section 614.3. He states he was sentenced in 1978, but the department's institution plan for him was not filed until 1989. In addition, Harrington raises a claim based on the equitable doctrine of laches.

Section 614.3 provides:

> No action shall be brought upon any judgment against a defendant therein, rendered in any court of record in this state, within nine years after the rendition thereof, without leave of the court for good cause shown, and, if the adverse party is a resident of this state, upon reasonable notice of the application therefor to the adverse party; nor on a judgment of a justice of the peace in the state within nine years after the same is rendered, unless the docket of the justice or record of

> such judgment is lost or destroyed; but the time during which an action on a judgment is prohibited by this section shall not be excluded in computing the statutory period of limitation for an action thereon.

Here, Harrington was sentenced in 1978. Although procedendo had been filed on November 13, 1979, the supreme court retained the trial court file until April 26, 1990. The restitution plan was signed by a prison official on May 25, 1984, and filed with the Pottawattamie County Clerk of Court on May 31, 1984. However, because the trial court file was being held by the supreme court, the restitution plan was subsequently file-stamped by the clerk of the supreme court on January 30, 1989.

We find the restitution plan was effective as of the date is was filed with the district court. Procedendo had issued, and the case was therefore not pending before the supreme court. The restitution plan was properly filed in the district court. The 1989 date shows only when the restitution plan was placed in the trial court file by the supreme court clerk, and does not change the effective date of the restitution plan. We conclude the restitution plan is not barred by the statute of limitations found in section 614.3. We also conclude the department was not barred by the doctrine of laches from instituting a restitution plan in this case.

III. Harrington claims the department improperly applied the provisions of chapter 910 to him because he was sentenced prior to the effective date of this chapter. Section 910.1(1) provides the chapter applies to criminal activities committed after July 1, 1982, and Harrington was convicted prior to that date.

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 Harrington 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 a penalty for an offense. *Id.* Harrington was convicted under section 690.1 of the 1977 Code, and court costs were not imposed as a fine under this section. 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 Harrington for court costs.

The supreme court recently held an inmate's money in prison accounts is protected property under the United States Constitution. *Walters v. Grossheim*, 525 N.W.2d 830, 831 (Iowa 1994). 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 objections to the proposed amendment, and (3) consider the objections for formulating an individualized plan for the future. *Id.*

Due process requires that Harrington be given a hearing in compliance with *Walters* before the department may require him to pay restitution from his institutional account. We therefore reverse the decision of the district court and remand for further proceedings. Harrington has raised an additional claim based on the fact he was unable to participate in the district court hearing on his request for an order to enjoin the collection of restitution. Because we are remanding the case for a new hearing, we need not address this issue.

REVERSED AND REMANDED.