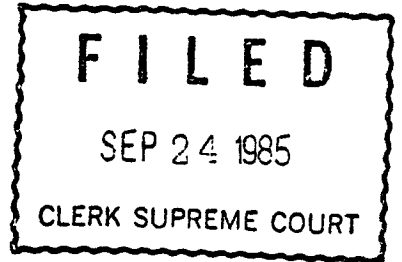


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RODDNEY DONALD PALMER,)

Defendant-Appellant.)

Filed September 24, 1985

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5-216
84-1133

Appeal from the Iowa District Court for Lee County - William S. Cahill,
Judge.

Defendant appeals the restitution provisions of the sentence imposed upon
his conviction of four counts of second-degree kidnapping and one count of
insurrection. RESTITUTION ORDER VACATED.

Paul Rosenberg of Rosenberg, Rosenberg & Reade, Des Moines, Iowa, for
defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen,
Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Defendant, Roddney Palmer, appeals the restitution provisions of the sentence imposed upon his conviction of four counts of second-degree kidnapping and one count of insurrection. He argues: (1) that the recipient of the restitution—in this case the State—was not a victim of his crimes, and thus is not entitled to receive restitution payments; (2) that the trial court abused its discretion in sentencing him to pay \$25,000 restitution; and (3) that the Victim Restitution Act, Iowa Code Chapter 910 (1983), is unconstitutional. We vacate the restitution order.

The events underlying this case occurred September 2, 1981. Palmer, an inmate at the Ft. Madison penitentiary, and three other inmates armed themselves and took four prison administrative staff members hostage. A general prison riot occurred that same day, and another hostage situation developed. The State contends that the taking of hostages by the Palmer group precipitated the prison riot. The State also argues the warden was unable to quell the riot promptly because Palmer's group threatened to kill their hostages if the warden took action.

The hostages of the Palmer group were released later the same day. The riot caused \$1.3 million of property damage to the prison. The record does not show that Palmer personally caused any substantial property damage.

Palmer was charged with several crimes. He eventually pled guilty to four counts of kidnapping in the second degree, in violation of Iowa Code section 710.3 (1981), and one count of insurrection in violation of Iowa Code section 718.1 (1981). He was sentenced to a term of incarceration for a term of not more than 35 years. Pursuant to Iowa Code sections 910.2-.3 (1983), Palmer was ordered to pay restitution to the State in the amount of \$25,000.

Palmer filed a motion to reconsider the sentence, asking that the restitution order be altered. The motion was refused. On appeal, Palmer challenges only the restitution provision of the sentence.

I. The "Victim" of the Crimes. The State is not entitled to receive restitution unless it was a victim of Palmer's crimes. Iowa Code § 910.2 (1983). Palmer argues that the definition of "victim," found in subsection 910.1(1), should be construed narrowly. He asserts that because there is no evidence that he personally damaged any property, the State was not a victim of his crime. He cites the case and holding of State v. West, 320 N.W.2d 570, 574-75 (Iowa 1982), as providing an analogy in support of his position.

The State argues that "victim" should be construed liberally to include those who were harmed indirectly by the defendant's criminal acts, as long as the defendant's acts were the proximate cause of the harm. In support of its argument, the State cites subsection 910.1(2), which states that a victim's recoverable damages include "all damages . . . which a victim could recover against the offender in a civil action arising out of the same facts or events" In a civil action, of course, a plaintiff can recover for damages that occur indirectly if the defendant's acts were the cause of the harm.

While we rule that the State is a victim, we cannot accept the State's argument in the broad form in which it was presented. To be a victim within the meaning of the statute, a two-part test must be met: a person must (1) suffer "pecuniary damages," (2) as a result of the offender's "criminal activities." Iowa Code § 910.1(1). The problem with the State's argument is that it relies on the definition of "pecuniary damages," but ignores the definition of "criminal activities."

"Criminal activities," within the meaning of the statute, is defined in subsection 910.1(3), and explained in State v. West, 320 N.W.2d at 574. The court stated:

Criminal activities are separated into two classes: (1) crimes for which a judgment [has been] entered, and (2) crimes the defendant admits committing or does not contest.

Id. The purpose of this definition, we believe, is to ensure that a factual basis for designating a person as a victim has been established. The factual basis is established either by a conviction, or by defendant's admissions. Those who have been harmed by alleged actions are not "victims" within the meaning of the statute unless the factual basis has been established in the required manner. See id. at 575 ("Although appellants may have been victims of criminal activity by West," they were not "victims" within the meaning of the statute because "the State did not include that activity in the charge" against West, nor did West admit committing the crime.).

Because Palmer has not admitted any noncharged criminal activity, we must focus upon the actual convictions: four counts of kidnapping and one count of insurrection. The four convictions for kidnapping do not provide a sufficient factual basis for concluding that the State was a "victim." The people harmed by those four crimes were the people kidnapped. However, it is indisputable that the State was the person harmed by the crime of insurrection, if harm did in fact occur. Section 718.1 of the Iowa Code provides in part:

An insurrection is three or more persons acting in concert and using physical violence against persons or property, with the purpose of interfering with, disrupting, or destroying the government of the state or any subdivision thereof, or to prevent any executive, legislative, or judicial officer or body from performing its lawful function.

(Emphasis added.) The conviction of insurrection provides a sufficient factual basis for concluding the State was a victim within the meaning of subsection 910.1(1).

II. Abuse of Discretion in Setting the Amount of Restitution. Palmer argues the trial court abused its discretion in setting the amount of restitution. Although ordering restitution to the victim is not a matter of discretion, Palmer has sufficiently raised the question whether the trial court violated the statute when it set the amount of restitution.

Iowa Code section 910.2 provides for two different restitution orders: restitution to the victim, and restitution for court costs and court-appointed attorney fees. State v. Harrison, 351 N.W.2d 526, 527-28 (Iowa 1984). Ordering restitution for court costs and court-appointed attorney fees is a matter within the discretion of the trial court. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985). However, the trial court has no such discretion in ordering restitution to the victim. "The literal language of section 910.2 requires the court to first order restitution to the victim in full." Id. (emphasis added). See also Harrison, 351 N.W.2d at 528 ("This section thus unconditionally requires the sentencing court to order offenders to make restitution to their victims . . .").

The trial court in this case obeyed the statute in ordering Palmer to pay restitution to the victim—the State. The question we face is whether the court properly determined the amount of restitution Palmer must pay.

The procedure for determining the amount of restitution to be paid is governed by section 910.3. That section provides in part:

The court shall require the county attorney to promptly prepare a statement of pecuniary damages to victims of the defendant and shall require the clerk of court to prepare a statement of court-appointed attorney's fees, the expense of a public defender and court costs which shall be promptly provided to the presentence investigator. These statements shall become a part of the presentence report. If a defendant believes no person suffered pecuniary damages, the defendant shall so state.

The statement of the county attorney and the statement of the defendant provide the trial court with some factual basis for determining the amount of harm suffered by the victim. Such facts, stated the court in Haines, are necessary "to determine the appropriate plan of restitution." 360 N.W.2d at 796-97. As a corollary to that statement, the plan of restitution must specify an amount that has a basis in fact. Ordering restitution of a purely arbitrary amount violates the statute.

The record in this case shows that restitution of \$25,000 ordered by the court was selected arbitrarily. There are no facts in the record which would support an amount of \$25,000 instead of some other amount. The restitution order therefore violates section 910.3 and must be vacated. Ordinarily, we would remand to the trial court for a proper determination of the amount of restitution to be ordered. Remand is not necessary in this instance, however, because we hold that the record is insufficient to support any restitution for the damage claimed by the State.

The State argues it is entitled to restitution for damages that were caused indirectly by Palmer because such damages are recoverable in civil actions. The State cites as authority Iowa Code subsection 910.1(2), which, under the scheme of the statute, provides that damages recoverable through a restitution order include damages "which a victim could recover against the offender in a civil action arising out of the same facts or event." We cannot, under the facts of this case, accept the State's argument.

If the State were to bring a civil action against Palmer to recover on a negligence theory, it would have to prove, inter alia, that Palmer's acts were a cause in fact of the State's damages and that his acts were also the proximate or "legal" cause of the damages. See State v. Marti, 290 N.W.2d 570, 585 (Iowa 1980) (discussing causation in both civil and criminal contexts). In addition, because other inmates did the actual property destruction, there is an issue whether their acts were a superseding cause relieving Palmer of liability for his antecedent negligence. See Haumersen v. Ford Motor Co., 257 N.W.2d 7, 15 (Iowa 1977). Additional issues of joint-and-several liability and contribution could also arise.

If the State's hypothetical civil action were based on a theory of intentional tort, the State would still have to prove that Palmer's act was the cause in fact of the State's damages. Restatement (Second) of Torts § 870 (1979). Cf. Harsha v. State Savings Bank, 346 N.W.2d 791, 801 (Iowa 1984) (tort of intentional infliction

of emotional distress requires showing of actual causation). The State would also be required to prove that Palmer intended to produce the harm that ensued, or that he knew or believed that the property destruction was a certain, or substantially certain, consequence of his actions. Restatement (Second) of Torts § 870, comment b (1979). Cf. Harsha, 346 N.W.2d at 801 (element of intent to cause emotional distress must be proved to prevail).

In either situation, the State would have the burden of coming forward with facts that would prove matters such as causation or intent. However, by seeking recovery through the restitution statute, the State is asking to be compensated on the basis of a record that is devoid of facts sufficient to establish causation or intent. The facts admitted by Palmer during the plea colloquy do not establish causation of the prison riot or intent to cause destruction of prison property; they are limited to the taking of hostages, which constituted kidnapping and insurrection.

As we have already stated in this opinion, a restitution order must have a basis in fact. See also State v. Haines, 360 N.W.2d at 796-97. Because Palmer's guilty plea does not provide a sufficient factual basis for determining that his actions caused the damage to the prison, no restitution can be ordered.

It could be argued that since the State is a victim of the crime of insurrection, the statute should be construed broadly to allow the State a hearing to establish a factual basis for receiving restitution. The hearing could arguably occur at the same time as the hearing regarding the amount of damages suffered by the victim.

We reject that argument. The result of accepting the argument in this case would be to allow the State to try an entire tort claim in a summary proceeding. That result has no basis in the statute, would be unduly burdensome to the court, and would possibly present due process problems.

The restitution statute was not intended to be a complete substitute for civil litigation. An order of restitution does not constitute a judgment giving rise to a judicial lien. Haines, 360 N.W.2d at 791. Some awards available in civil actions—such as awards of punitive damages, or awards to compensate for pain, suffering, mental anguish, and loss of consortium—are not recoverable under the statute. Iowa Code § 910.1(2).

Further, the factual determinations to be made by the trial court in ordering restitution are limited by the statute. Section 910.3 only allows the trial court to determine the amount of damages suffered by the victim, and, when restitution of attorney fees and court costs is ordered, to determine whether the offender is capable of performing community service. See Iowa Code § 910.3. In addition, the authority to determine the amount of damages suffered by the victim is limited to the determination of pecuniary damages, Iowa Code §§ 910.3, 910.1(4), which do not include pain, suffering, mental anguish, or loss of consortium. Iowa Code § 910.1(2). No language in section 910.3 can be found that would indicate the trial court is allowed to determine fact issues of causation or intent. See Iowa Code § 910.3.

Allowing the State to prove its damage claim in a summary proceeding would be an imposition on the court. The issues of causation in fact, legal cause, and superseding cause that would be presented in this case appear to be difficult and time-consuming. The case load of our courts is heavy enough that they should not be required to devote substantial time to hearings that are not mandated by statute and which, in most instances, will be unlikely to result in any substantial recovery for the victim. In short, it would not be a wise policy decision to construe the statute expansively so that courts are assigned additional duties.

Our holding does not prohibit an award of restitution in all cases in which the damage to the victim was caused indirectly by the criminal acts of the defendant. If a defendant pleads guilty to, or is convicted of, joint criminal

conduct or aiding and abetting, the record will most likely contain a sufficient factual showing of causation and intent to allow imposition of restitution.¹ However, no sufficient factual basis for restitution appears in the record of this case. The restitution order imposed upon Palmer must be vacated, and no restitution order can be reimposed.

III. Constitutionality of Chapter 910. Palmer attacks the constitutionality of Iowa Code chapter 910 (1983). He challenges the statute on both due process and equal protection grounds. His argument, however, is without merit.

A. Due Process. In State v. Haines, 360 N.W.2d at 795-96, the supreme court held that the restitution statute did not violate due process. That decision is not dispositive of Palmer's due process claim because the Haines case dealt with a claim of fundamental unfairness. Id. In contrast, Palmer claims that the statute violates procedural due process.

Notice and opportunity for hearing are essential to procedural due process. State v. Grimme, 274 N.W.2d 331, 336 (Iowa 1979). Division II of this opinion holds that restitution cannot be imposed unless the facts established by the conviction or guilty plea provide a basis for ordering restitution. That holding insures that restitution will not be imposed without adequate notice and hearing. Further, a defendant may challenge a restitution order either in district court under section 910.7 or on appeal. State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984). Chapter 910 does not violate procedural due process.

B. Equal Protection. To prevail on his equal protection claim, Palmer must show that the statute permits people who are in similar circumstances to be arbitrarily treated differently. See State v. Haines, 360 N.W.2d at 795. Palmer

¹ In such a situation, the sentencing court would be faced with the question of how, or whether to, apportion damages amount the multiple defendants. Chapter 910 is silent on that issue.

argues that section 910.3 gives the sentencing court unlimited discretion to treat similarly situated defendants differently when ordering restitution to a victim. In support of the argument, he points out that he was ordered to pay \$25,000 restitution while an accomplice hostage-taker was not ordered to pay any restitution. His argument fails because, as we stated in division II of this opinion, under section 910.2 the trial court has no discretion when ordering restitution to the victim. See also Haines, 360 N.W.2d at 797; State v. Harrison, 351 N.W. at 528. Because all defendants must be treated alike when restitution to the victim is ordered, § 910.2, the statute does not violate the guaranty of equal protection. See also Haines, 360 N.W.2d at 794-95 (provisions for restitution of attorney fees and court costs do not violate equal protection).

RESTITUTION ORDER VACATED.