IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed June 24, 1987
ROGER GENE VAN HOFF,	)	7-138
Defendant-Appellant.	)	86-1185

Appeal from the Iowa District Court for Pocahontas County (No. 13-1182) - Dale E. Ruigh, Judge.

Defendant appeals from the district court's order of restitution. **REVERSED AND REMANDED.**

Roger Gene Van Hoff, pro se, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and H. Dale Huffman, Pocahontas County Attorney, for plaintiff-appellee.

Considered en banc.

SACKETT, J.

We must determine whether the trial court abused its discretion in ordering Defendant Roger Gene Van Hoff to pay what Van Hoff contends is an unreasonable amount of restitution for court costs and attorney fees incurred in his first-degree murder trial. We determine the trial court abused its discretion in ordering an amount of restitution in excess of defendant's reasonable ability to repay. We modify the trial court's order.

Van Hoff was convicted twice of first-degree murder. He was sentenced to two concurrent terms of life imprisonment. The state sought restitution for court costs and the costs of Van Hoff's court appointed attorney under Iowa Code §910.2 (1985), which provides in relevant part:

> In all cases except simple misdemeanors under chapter 321, in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities and, if the court so orders and to the extent that the offender is reasonably able to do so, for court costs, court-appointed attorney's fees or the expense of a public defender. . . (emphasis added).

The trial court ordered Van Hoff to pay the county restitution for court costs and attorney fees. The clerk taxed these costs at $44,247.66. The Department of Corrections formulated a repayment plan requiring Van Hoff to pay 20 percent of his penitentiary wages toward the amount owed. Van Hoff sought a request for hearing to have the restitution amount reduced to a sum he could reasonably be calculated to pay. His request for hearing was filed pursuant to Iowa Code §910.7 (1985), which 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.

After hearing the trial court reduced the amount owed for court costs and attorney fees to $16,500. Van Hoff contends the trial court abused its discretion in failing to order an amount he could reasonably be calculated to pay.

The right of the state to obtain restitution from a prisoner is clearly established by Iowa Code §246.702 (1985)[1] which provides:

> If allowances are paid pursuant to section 246.701, the director may deduct an amount established by the inmate's restitution plan of payment or an amount sufficient to pay all or part of the court costs taxed as a result of the inmate's commitment. The amount deducted shall be forwarded to the clerk of the district court or proper official. The director may pay all or any part of remaining allowances paid pursuant to section 246.701 directly to a dependent of the inmate, or may deposit the allowance to the account of the inmate, or may deposit a portion and allow the inmate a portion for the inmate's personal use.

See Hrbek v. Farrier, 787 F.2d 414, 417 (8th Cir. 1986) (Court upheld constitutionality of this statute).

An order of restitution is a constructive tool in criminal justice jurisprudence and should be encouraged. See Commonwealth of Pennsylvania v. Fuqua, 267 Pa. Super. 504, 508-09, 407 A.2d 24, 25-26 (1979).

However, a sentencing court must not order restitution for court costs and attorney fees in amounts greater than the defendant is reasonably able to pay. State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Restitution to the county is limited to the extent the offender is reasonably able to do so. See State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985). The "reasonably able to pay" standard allows §910.2 to withstand constitutional attack. Fuller v. Oregon, 417 U.S. 40, 54, 94 S. Ct. 2116, 2125, 40 L.Ed.2d 642, 655 (1974).

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[1] Originally Iowa Code 217A.41. Transferred by Code Editor to Iowa Code §246.702.

Van Hoff does not object to a certain period of hardship to reimburse the state a reasonable sum based on all the circumstances in this case. Van Hoff contends the sum ordered is unreasonable and is in an amount greater than he can reasonably pay. Van Hoff has the burden to show the trial court failed to exercise its discretion or abused its discretion. Storrs, 351 N.W.2d at 522. Van Hoff has a monthly income of $69.12 and has a current prison account balance of $31.20.[2] He has no other cash and no other source of income. He has no real estate, stocks, bonds, notes or automobiles. He has debts in addition to the restitution amount of about $32,000. The debts have been reduced to judgment. He is 31 years of age. His life expectancy is 43.21 years. He is in good health and is able to work in the institution. He has no expected resources. There is no reasonable likelihood he will be released during his lifetime. It is anticipated his earnings will remain close to the current level. There is no evidence Van Hoff's financial condition will improve. He has no additional funds to apply to restitution.

He is provided food, clothing and shelter. From his earnings he purchases toothpaste, toiletries, envelopes, stationary, tobacco and postage stamps. He argues the amount set at the current amount of payment would take nearly 93 years for him to pay, or nearly twice his projected lifetime of 42.31 years.

The evidence clearly supports Van Hoff's contention the amount of restitution ordered by the trial court is an amount he is unable to pay during his lifetime. A restitution order patently beyond an offender's capacity for compliance serves no purpose, reparative or otherwise. State v. Murray, 621 P.2d 334, 343 (Haw. 1980); People v. Kay, 36 Cal. App.3d 759, 763, 111 Cal. Rptr. 894, 896 (Cal. 1973). In imposing restitution the court must make sure the amount awarded

[2] He was sentenced September 23, 1983. On August 28, 1984, he had an account balance of $48.38. Restitution commenced March 6, 1985. Monies recovered from him and held as evidence in the amount of approximately $200 were garnished and have been applied to costs.

does not exceed defendant's ability to pay. See Fuqua, 267 Pa. 504, 508-09, 407 A.2d 24, 26 (1979). Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. However, restitution requirements which are beyond the defendant's control undermine the defendant's sense of responsibility. We therefore determine the amount Van Hoff has been ordered to pay is unreasonable, and an abuse of the trial court's discretion. See Haines, 360 N.W.2d at 797. It is important a trial court determine a defendant's ability to pay in imposing restitution. See Huggett v. State, 83 Wisc.2d 790, 266 N.W.2d 403, 407 (1978). The Iowa appellate courts have not addressed the amount of reasonable restitution for attorney fees and court costs from prison wages nor do we find much guidance from other jurisdictions. In State v. Dragon, 521 A.2d 704 (Me. 1987), the Maine Supreme Court addressed the prisoner's claim of illegality of a restitution order to the victim because it failed to consider his ability to pay. However, the court determined the order was in accordance with agreement made by defendant and that defendant had consented to the amount ordered. Id at 706. Therefore the court found it was not necessary to make further inquiry to determine whether the amount ordered was excessive.

Reasonable is defined as suitable under the circumstances, nor immoderate or excessive synonymous with equitable. Black's Law Dictionary. A reasonable amount should be satisfied over a reasonable term.

Van Hoff argues the amount he earns is no more than that calculated to meet his reasonable needs. Iowa Code §246.701 (1985) provides:

> Inmates of the institutions may be required to perform any proper and reasonable service suited to their strength and attainments, for the benefit of the institutions or the welfare of the inmates, either in the institutions proper or in the industries established in connection with them. When an inmate of an institution is working outside the institution proper, the inmate shall be deemed at all times to be in the actual custody of the superintendent of the institution.

> The director may when practicable pay the inmate an allowance as the director deems proper in view of the circumstances, and in view of the cost attending the maintenance of the inmate. The allowance is a gratuitous payment and is not a wage arising out of an employment relationship. The payment shall not exceed the amount paid to free labor for a like or equivalent service. (emphasis added).

The state does not argue Van Hoff can pay more than 20 percent of his wage toward restitution. A defendant should be able to pay the award without undue hardship. Harrison, 351 N.W.2d at 529. Van Hoff does not object to a certain period of hardship to reimburse a reasonable sum. We determine a reasonable sum must be payable over a reasonable term.

We reverse and remand to the trial court to determine a reasonable amount that can be paid over a reasonable term given defendant's very limited ability to pay and considering his life expectancy.

Costs on appeal are taxed to the State of Iowa.

REVERSED AND REMANDED.

All judges concur except Donielson and Hayden, JJ., who dissent.

DONIELSON, J. (dissenting)

While I am fully in accord with Judge Hayden's dissent, I find it a bit mild and would therefore like to fully address more vigorously the majority's opinion.

The present case involves a man who was convicted twice of first-degree murder. The legislature quite justifiably decreed that individuals such as the defendant should pay a reasonable amount of costs incurred in their trial. The trial costs in the present case were $44,247.66. The trial court, after a hearing, reduced the amount that should be paid to $16,500.00, a 63% reduction. This amount was to be satisfied by the defendant paying 20% of his monthly salary of $69.12. I would place great emphasis on the 20% as the reasonable aspect and less emphasis on total income.

The majority cites to the fact that the defendant has incurred other debts amounting to $32,000.00 in support of their holding. The majority, however, appears to care little about the societal costs of this double murder. The costs to society are easily as important as his other debts. The fact that the defendant may not get his debts paid off in his lifetime is realistically unimportant to me since a great number of debts incurred by law-abiding members of this society may never be paid off in their lifetimes. This includes home mortgages, educational debts, and myriad other financial responsibilities. Why then does the majority feel that this societal debt must be paid in the defendant's lifetime?

As Judge Hayden so aptly points out, the test in the present case is whether the trial court abused its discretion. I find not an ounce of an abuse of discretion. The only abuse of discretion I find is perhaps the majority's holding that the trial court erred in not reducing the societal debt more than the 63% that it did. I find the majority's holding the actual abuse of discretion in this case. No one has a guarantee that his just debts must be paid within his expected

lifetime, and I most certainly would not provide this privilege to a person convicted of first-degree murder twice.

I respectfully dissent.

The trial court upon due consideration reduced defendant's restitution to $16,500 from the original amount of $44,247.66 which was the cost of prosecution taxed by the clerk of court. Defendant does not complain that the allocation of twenty percent of his penitentiary wages per month be applied toward payment of his restitution is unreasonable or an abuse of discretion by the trial court.

Defendant contends the district court erred in only reducing the total restitution owed to $16,500. He maintains this amount is unreasonable because: (1) it cannot be paid in full within his lifetime given his current monthly wages; (2) it requires the defendant to make payments for the rest of his life; and (3) it is unrealistic given defendant's ability to pay.

The Supreme Court in State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985), set forth the following:

> We have held that section 910.2 authorizes a sentencing court to order restitution for court costs and attorney fees only to the extent of the defendant's reasonable ability to pay the amount ordered. See State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). We have also held that a defendant who seeks to upset an order for restitution for those items "has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion." State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984). In an extreme case this burden may be met on appeal through a record showing a defendant's indigency and disability from earning income. See State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985).

I determine defendant has failed to demonstrate the trial court failed to exercise discretion or committed an abuse of discretion in reconsidering and redetermining defendant's restitution. Defendant is not indigent and he is not disabled from earning income. The only question is, how much of the costs of prosecution should defendant be required to pay under the reasonable-

ness standard. The trial court reduced the amount by almost two-thirds from the original sum.

I find twenty percent of defendant's wages applied toward a total restitution of $16,500.00 is reasonable. Defendant is able to make the monthly payment without undue hardship. This is not an extreme case as alluded to in Haines. I would hold defendant has failed to demonstrate a failure of the trial court to exercise discretion or that it committed an abuse of discretion. I would affirm the trial court.

Donielson, J., joins this dissent.