

IN THE COURT OF APPEALS OF IOWA

No. 3-246 / 92-1049

FILED

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CLERK SUPREME CT

STATE OF IOWA,

Appellee,

vs.

JACK D. JOHNSON,

Appellant.

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Appeal from the Iowa District Court for Story County,
Fredrick E. Breen, District Associate Judge.

Jack Johnson, who had been in an auto accident and later convicted of several traffic offenses, appeals a district court's decision ordering him to make restitution to the driver of the car he hit pursuant to chapter 910 of the Iowa Code. **REVERSED.**

Blake Parker of Parker & Fors, Fort Dodge, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, Mary E. Richards, County Attorney, and Molly Frazer, Assistant County Attorney, for appellee.

Considered en banc.

HAYDEN, J. 000830

Defendant Jack Johnson appeals a district court decision ordering him to pay restitution pursuant to Iowa Code chapter 910.

The restitution order arose from a 1989 automobile accident. Johnson was driving an automobile which hit another automobile occupied by Larry Eddy and his daughter, Alyssa. A jury found Johnson guilty of several offenses including operating while intoxicated (second offense), failure to stop, and two counts of driving while suspended. The district court ordered Johnson to pay \$75,000 in restitution to Eddys. This court affirmed the convictions. State v. Johnson, 473 N.W.2d 236 (Iowa App. 1991). With regard to restitution damages, however, this court vacated the district court's judgment. Id. at 238. We determined the district court erred in assessing \$75,000 of restitution damages without first establishing a causal connection, and in determining whether insurance has been paid. Id. The case was remanded for a restitution hearing. Id.

On June 3, 1992, the district court filed its order addressing the restitution damages. The court ordered Johnson to pay restitution to Eddys in the amount of \$29,082.50. Johnson appeals from this restitution order, raising several issues.

On April 28, 1993, Johnson filed a motion to dismiss or in the alternative to amend the issues. Johnson argues he

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is no longer obligated to pay restitution because he was released from parole on February 5, 1993. He contends the district court's restitution order is moot and this appeal is not necessary. Johnson cites State v. Chase, 451 N.W.2d 493 (Iowa 1990), as supporting authority for his argument.

The issue we address on appeal is whether Johnson's appeal is rendered moot based on his discharge from parole. We will not consider moot questions on appeal. St. Joseph Hosp. v. Peterson, 196 N.W.2d 418, 419 (Iowa 1972); Klein v. Klein, 239 Iowa 40, 55, 29 N.W.2d 163, 171 (1947).

In Chase, the Iowa Supreme Court addressed whether the discharge of a criminal defendant from probation left intact a victim restitution plan. Chase, 451 N.W.2d at 493. The court held "the legislature intended for restitution, as a criminal sanction, to occur only during authorized maximum probation. After that the obligations between the criminal and the victim are left for resolution by the civil courts." Id. at 495. The supreme court concluded the district court lacked authority to impose restitution on the criminal defendant because he had been released from probation. Id. Johnson maintains this exempting principle should also apply to a defendant discharged from parole.

After the Iowa Supreme Court's decision in Chase, the Iowa legislature enacted a new section related to this issue. Iowa Code section 910.7A (1993) provides:

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1. An order requiring an offender to pay restitution constitutes a judgment and lien against all property of a liable defendant for the amount the defendant is obligated to pay under the order and may be recorded in any office for the filing of liens against real or personal property.

2. A judgment of restitution may be enforced by the state, a victim entitled under the order to receive restitution, a deceased victim's estate, or any other beneficiary of the judgment in the same manner as a civil judgment.

Iowa Code § 910.7A (1993). This new code section, however, does not apply to the instant case because it was not in effect at the time the district court ruled on Johnson's restitution. See Iowa Code § 4.5 (1993) (statute is presumed to operate prospectively unless expressly made retrospective). In the absence of this statute, we cannot adopt the district court's statement in its order:

3. The amounts ordered to be paid above shall be paid in accordance with a plan of payment to be established by the Iowa Department of Corrections for payment during the period of defendant's incarceration and any parole thereafter. Any amounts remaining unpaid at the end of such period shall be made a civil judgment against the defendant.

The Iowa Supreme Court filed its opinion in Chase on February 21, 1990. The district court filed its restitution order in the instant case on June 3, 1992. Section 910.7A was passed by the seventy-fourth general assembly during the 1992 regular session. 1992 Iowa Acts 709. Iowa Code section 3.7(1) provides:

All Acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the first day of July following their passage, unless some other specified time is provided in an Act or resolution.

Iowa Code § 3.7(1) (1993). Pursuant to Iowa Code section 3.7(1), section 910.7A took effect on July 1, 1992. The instant case falls in the interim between Chase and the effective date of section 910.7A.

Therefore, Chase is controlling in the instant case. We determine, pursuant to Chase and chapter 910, Johnson's obligation to pay restitution terminated upon his discharge from parole. See Chase, 451 N.W.2d at 495. Johnson's discharge from parole during the pendency of this appeal renders his appeal moot. We grant Johnson's motion to dismiss on the grounds this appeal is moot. We reverse the decision of the district court and dismiss this appeal.

REVERSED.

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

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm. This is the second time this case has appeared before this court. The original action arose from a 1989 automobile accident. Defendant Jack Johnson was driving an automobile which hit another automobile occupied by Larry Eddy and his daughter, Alyssa.

In March 1990 a jury found Jack Johnson guilty of several offenses including operating while intoxicated (second offense), failure to stop, and two counts of driving while suspended. Johnson appealed. State v. Johnson, 473 N.W.2d 236 (Iowa App. 1991).

In the initial appeal Johnson raised three issues. First, he challenged the sufficiency of the evidence to establish he, rather than his companion, had been driving the automobile involved in the accident. Id. at 237. Second, Johnson contended the district court erred in admitting statements made by his physician. Id. Finally, he asserted the sentencing court abused its discretion in requiring him to pay \$75,000 in restitution. Id. This court affirmed the district court on the first and second issues. Id. at 237-38. With regard to restitution, this court vacated the district court's judgment. Id. at 238. We determined the court erred in assessing \$75,000 of restitution damages without first establishing a causal connection and in determining whether insurance had been

paid. Id. The case was remanded for a restitution hearing pursuant to Iowa Code chapter 910. Id.

The district court held a hearing on the matter of victim restitution. The parties stipulated to certain damages. Johnson resisted claims for: (1) Alyssa's postaccident psychiatric care; (2) mileage and meal costs associated with Cheryl, Larry's wife, and Alyssa's trips to the hospital; and (3) Larry's loss of wages and income from a hog operation.

On June 3, 1992, the district court filed a decision ordering Johnson to pay restitution to the Eddys. The district court concluded a causal connection existed between the damages claimed by the State on behalf of the Eddys and Johnson's criminal activity.

The district court determined both Alyssa and Cheryl were victims of Johnson's offense within the meaning of chapter 910 and therefore were entitled to restitution. Cheryl testified Alyssa had been receiving treatment for problems caused by the accident. Alyssa was also receiving treatment for the difficulties she experienced as a result of Larry's personality changes. The district court concluded Alyssa was entitled to recover the cost of psychiatric treatment. The court reasoned Alyssa was like a witness-spectator and was entitled to such damages.

The court also found the cost of Cheryl's trips to visit Larry in the hospital and the cost of meals above normal meals were proper claims for restitution.

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Finally, the court concluded Larry was entitled to restitution on his claims for loss of earnings and loss of income from a hog operation. Larry testified he was unable to return to any work for six months and thereafter worked on a limited basis. Prior to the accident, Larry worked a second job caring for other individuals' hogs. After the accident, the hog owners did not hire Larry. He estimated his loss of income over the two-year period was from \$18,000 to \$22,000 due to the loss of the hog operation.

Based upon these findings and the stipulations, the district court ordered Johnson to pay restitution in the amount of \$29,082.50 to Eddys.

The district court rejected Johnson's argument the Eddys were barred from bringing a claim for restitution because they had elected to bring a civil action. The district court found the legislature clearly intended Iowa Code section 910.8 to enable a victim to seek redress under both chapter 910 and by means of a civil action.

Johnson appeals from the restitution order.

We review the district court's restitution order for errors of law. State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991); State v. Sharkey, 437 N.W.2d 572, 574 (Iowa 1989) (citation omitted).

I. Motion to Dismiss. On April 28, 1993, Johnson filed a motion to dismiss or in the alternative to amend the issues. Johnson argues because he was released from parole on February 5, 1993, he is no longer obligated to

pay restitution. He cites State v. Chase, 451 N.W.2d 493, 493 (Iowa 1990), as supporting authority for his argument. In Chase, the Iowa Supreme Court addressed whether the discharge of a criminal defendant from probation left intact a victim restitution plan. Id. The court held "the legislature intended for restitution, as a criminal sanction, to occur only during authorized maximum probation. After that the obligations between the criminal and the victim are left for resolution by the civil courts." Id. at 495; see also Speer v. Blumer, 483 N.W.2d 599, 601 (Iowa 1992) (court stating offender no longer obligated to pay restitution upon discharge from probation). Johnson maintains this exempting principle should also apply to a defendant discharged from parole. The State argues, inter alia, Chase is not the controlling case and the restitution order should remain intact.

I conclude Chase is not controlling in the instant case where Johnson has been discharged from parole during the pendency of this appeal. The legislature's intent behind chapter 910 is to make the offender's victims whole. 24 C.J.S. Criminal Law § 1772 (1989); see Iowa Code § 910.2 (1991). Section 910.8 provides the chapter does not limit a victim's rights to file a civil action to recover damages from his or her offender. Iowa Code § 910.8 (1991). The mandatory restitution statute serves to protect the public by compensating victims of criminal activities. State v. Kluesner, 389 N.W.2d 370, 372 (Iowa 1986); see also

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Holmberg, 449 N.W.2d at 377 n.1. They also serve the purpose of rehabilitating defendant. Kluesner, 389 N.W.2d at 372. Under the circumstances of this case Johnson should not be relieved of his obligation to pay restitution to his victims.

I would overrule Johnson's motion to dismiss.

I therefore examine briefly the other issues Johnson raises on appeal.

II. Victim under Restitution Statute. Restitution for the commission of criminal offenses is mandatory in Iowa. Iowa Code section 910.2 provides:

In all criminal cases except simple misdemeanors under chapter 321, in which there is a plea 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

Iowa Code § 910.2 (1991) (emphasis added).

One of the issues Johnson raises on appeal is whether Cheryl and Alyssa are "victims" within the meaning of Iowa Code section 910.1(1). This section defines a "victim" as "a person who has suffered pecuniary damages as a result of the offender's criminal activities." Iowa Code § 910.1 (1991). "Pecuniary damages" are defined as "all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium." Iowa Code § 910.1(2) (1991). The Iowa

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Supreme Court has analyzed these definitions:

The definitions of "victim" and "pecuniary damages" are straightforward and unambiguous. The words "as a result of" in the definition of "victim" clearly connote causation. And, the words "all damages . . . which a victim could recover against the offender in a civil action arising out of the same facts or event" clearly connote a requirement that the victim prove a prima facie case of liability premised on some civil theory such as fault or intentional tort."

Sharkey, 437 N.W.2d at 574.

Johnson maintains he is not responsible for some of the damages because the recipients are not victims pursuant to chapter 910. He contests his obligation of restitution to Cheryl Eddy for mileage and meal costs she incurred during trips to visit Larry in the hospital. Johnson contends Cheryl is not a victim of the criminal offense because she was not involved in the automobile accident.

Cheryl, however, suffered pecuniary damages as a result of the accident. Chapter 910 provides for "all damages" that defendant's victims could properly recover in a civil action arising out of the criminal offense. See State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). I believe the district court properly determined Cheryl was a victim under chapter 910.

In addition, Johnson argues he should not be held responsible to pay toward the cost of Alyssa's psychiatric treatment. He maintains although Alyssa was involved in the automobile accident, she is not a victim for purposes of psychiatric treatment. I disagree. Alyssa was a

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passenger in the vehicle hit by Johnson. She is a victim under section 910.1(1). Therefore Johnson is responsible for restitution including the costs of Alyssa's psychiatric treatment. I would hold the district court was correct in finding Cheryl and Alyssa were victims as defined by Iowa Code section 910.1(1) and affirm the district court on this issue.

III. Election of Remedies. Johnson also contends the principle of election of remedies applies in this case. He argues Eddys are precluded from seeking restitution because they are suing him for civil damages. I find no merit in Johnson's argument.

The doctrine of election of remedies does not apply to this case. Iowa Code section 910.8 provides, in pertinent part: "This chapter and proceedings under this chapter do not limit or impair the rights of victims to sue and recover damages from the offender in a civil action." The section also prevents double recovery by a victim because any civil judgment must be offset by any restitution payment made by the offender to the victim. Iowa Code § 910.8 (1991). The clear legislative intent of section 910.8 is to enable a victim to seek redress under chapter 910 and by means of a civil lawsuit. I do not believe the legislature intended to put the victim of a crime to any election of remedies. I would also affirm the district court on this issue.

IV. Amount of Damages. Another issue Johnson raises on appeal is whether the amount of restitution requested by the State is unreasonably high.

Once a causal connection is established by a preponderance of the evidence, chapter 910 allows recovery of "all damages" the State can show by a preponderance of the evidence. State v. Wagner, 484 N.W.2d 212, 216 (Iowa 1992) (citing Holmberg, 449 N.W.2d at 377); Iowa Code § 910.1(2) (1991). A restitution order is not excessive "if it bears a real reasonable relationship to the damage caused." Id. (citing State v. Mayberry, 415 N.W.2d 644, 647 (Iowa 1987)). The order can be extended to any amount which would be appropriate for tort recovery. Holmberg, 449 N.W.2d at 377. The mileage and meal costs associated with the family's trips to the hospital resulted from the accident. I would hold the district court properly included these amounts in the award of damages. I do not believe the district court abused its discretion in setting the damages.

V. Res Judicata. Johnson further argues he should not be required to pay any restitution because he was not the driver of the automobile which struck the Eddys' automobile. This issue was finally adjudicated in State v. Johnson, 473 N.W.2d 236, 237 (Iowa App. 1991).

Issue preclusion prevents parties from relitigating issues which have been raised and decided. Clark v. Glanton, 370 N.W.2d 606, 608 (Iowa App. 1985) (citing

Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981)). This issue should not be relitigated in this appeal.

VI. Limitation on Damages. Finally, Johnson argues Iowa Code section 321J.2(8) limits an award of restitution arising out of drunk driving incidents to \$2000. The record shows Johnson failed to raise this issue in the district court. Therefore the issue is not preserved for appeal, and need not be addressed.

I would affirm the decision of the district court in all respects.

Danielson, J., joins this dissent.