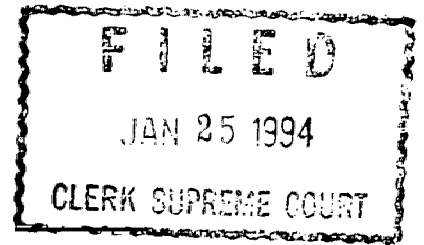


IN THE COURT OF APPEALS OF IOWA

No. 3-473 / 92-1823



STATE OF IOWA,

Appellee,

vs.

JOHN LEE HRBEK,

Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

The defendant appeals the district court's order dismissing his petition to enjoin the collection of restitution. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, and R. Andrew Humphrey, Assistant Attorney General, for appellee.

Heard by Schlegel, P.J., Sackett, J., and Keefe, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

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SCHLEGEL, P.J.

The defendant, John Lee Hrbek, appeals the district court's order dismissing his petition to enjoin the collection of restitution. He contends the district court erred in applying Iowa Code chapter 625 (1981) to his criminal case.

Hrbek was sentenced to serve two consecutive life sentences on January 26, 1982. The order required court costs to be taxed against Hrbek. In 1984 the Iowa Department of Corrections presented Hrbek with a contract under which he was to pay twenty percent of his institutional salary toward court costs and interest.

In 1992 Hrbek filed a petition to enjoin the collection of restitution and requested a hearing. Hrbek claimed that restitution was taken pursuant to Iowa Code chapter 910, Victim Restitution. This chapter was not effective until July 1, 1982, after he was convicted and sentenced. Hrbek therefore argued that application of chapter 910 violated the Ex Post Facto Clause of the United States Constitution and the Iowa Constitution. See U.S. Const. art. I, § 9; Iowa Const. art I, § 21. The district court dismissed Hrbek's petition, specifying that his obligation to pay was not controlled by chapter 910 but by section 907.12(2) of the 1981 Code of Iowa.

Hrbek then filed a rule 179(b) motion. He submitted a memorandum arguing that section 907.12 dealt with deferred judgment, deferred and suspended sentences and probation

only. The district court reconsidered its previous order but again dismissed Hrbek's petition. This time the court found that Hrbek was subject to an assessment for court costs pursuant to Iowa Code sections 625.1 and 625.14 (1981). The court agreed that section 910 was not effective on the date of Hrbek's sentencing and did not apply.

Hrbek appeals. He argues that Iowa Code sections 625.1 and 625.14 are inapplicable in criminal cases. The State does not specifically respond to Hrbek's argument. The State presents two arguments: (1) the district court did not err in denying Hrbek's petition; and (2) ex post facto law is inappropriate because restitution statutes are not penal ones describing a prohibited criminal act. We affirm the district court's order dismissing Hrbek's petition to enjoin the collection of restitution.

Our scope of review of a district court's restitutional order is for errors of law. Iowa R. App. P. 4; State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991). Under State v. McCowen, 297 N.W.2d 226 (Iowa 1980), the appellate court will uphold a ruling of the district court on any ground appearing in the record, whether urged below or not. Id. at 227. We need not adopt the trial court's premise in order to sustain the trial court's conclusion. Id. "We are obligated to affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not

one upon which the court based its holding." Citizens First Nat'l Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

In State v. Belle, 92 Iowa 258, 60 N.W. 525 (1894), the court reviewed the predecessor to chapter 625 and stated, "It seems to us clear from the language of these sections that they do not apply to criminal prosecutions." Id. at 260, 60 N.W. at 526. The court confirmed this position in City of Cedar Rapids v. Linn County, 267 N.W.2d 673 (1978), stating:

In the only case before today in which the issue was raised the court held the statute did not apply in criminal prosecutions. In State v. Belle, 92 Iowa 258, 60 N.W. 525 (1894), the State appealed a judgment ordering apportionment of costs in a criminal case in which a defendant charged with murder had been convicted of a lesser offense. . . . The question was whether these sections authorized apportionment of costs in a criminal case. In holding they did not, the court said, "It seems to us clear from the language of these sections that they do not apply to criminal prosecutions." . . .

Therefore, the legislative history and the only prior case in which the issue was presented support the position of plaintiffs that § 625.1 provides authority for taxing costs in civil cases only.

Id. at 674 (citation omitted).

In addition, the court in Fryer v. State, 325 N.W.2d 400 (Iowa 1982), stated, "A postconviction proceeding is a civil suit; thus section 625.1 ('Costs shall be recovered by the successful party against the losing party') is applicable." Id. at 415 (emphasis added). From the above-cited case law it is clear that the district court erred in applying sections 625.1 and 625.14 to Hrbek's

case. The predecessor code provisions to these sections were enacted as part of the code of procedure governing civil trials. Linn County, 267 N.W.2d at 674.

This provision [Iowa Code section 1811] was enacted in 1851 with other statutes governing procedure in civil trials. In the Revision of 1860 it was reenacted as part of the code of civil practice. See § 3449, Revision of 1860. Nothing in its subsequent history has extended its applicability to criminal cases.

Id. (emphasis added).

Similarly, as the district court recognized in its ruling on the defendant's 179(b) motion, Iowa Code section 910 was not effective on the date of Hrbek's sentencing and, therefore, does not apply. During the presentation of oral arguments in the present case, the State advanced the position that Hrbek's sole avenue of relief in challenging the restitution order was through former Iowa Code section 663A (postconviction relief).¹ However, in Earnest v. State, No. 92-1806, slip op. at 10 (Iowa Nov. 24, 1993), the court stated:

We hold that [Iowa Code section 663A.2(7)] unambiguously excludes claims relating to restitution in postconviction proceedings. Any alleged errors relating to restitution must be resolved on direct appeal or in a chapter 910 proceeding. See Iowa Code § 910.7.

Id. Accordingly, the State's argument in this regard is without merit.

1. The Iowa Code Editors have transferred chapter 663A to chapter 822 in the 1993 Code of Iowa.

However, Iowa Code section 606.15(27) (1981) provides, in relevant part:

Fees. Except in probate matters, the clerk of the district court shall charge and collect the following fees . . . :

27. In criminal cases, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant.

Iowa Code § 606.15(27) (1981) (emphasis added). In Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223, 227 (Iowa 1991), the court held that "fees" include court costs. Id. (citing LaRue v. Burns, 268 N.W.2d 639, 641 (Iowa 1978) (stating that costs includes sums ordinarily taxable as expenses incurred in an action as provided by statute); State v. Rodgers, 251 N.W.2d 239, 242 (Iowa 1977) (referring to fees as costs); Woodbury County v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969) (stating that court-approved fees and expenses under statute shall be taxed as part of costs)). Section 606.15(27) (1981) was repealed in 1981 and corresponds to Iowa Code section 602.8105(1)(k) (1993). See 1981 Iowa Acts, ch. 117, § 1244.

More importantly, Iowa Code sections 218.42 and 218.43 (1981) authorize payments of wages to inmates and a deduction therefrom for court costs. Section 218.43 provides:

Deduction to pay court costs. If such wage be paid [as authorized in section 218.42], the director in control of such institution may deduct therefrom an amount sufficient to pay all or a

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part of the costs taxed to such inmate by reason
of his commitment to said institution. . . .

Iowa Code § 218.43 (1981).

Therefore, although the authority relied upon by the district court is inapplicable to the present case, other authority exists upon which we must affirm the district court's judgment. "We are obligated to affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the court based its holding." Hoyt, 297 N.W.2d at 332.

AFFIRMED.