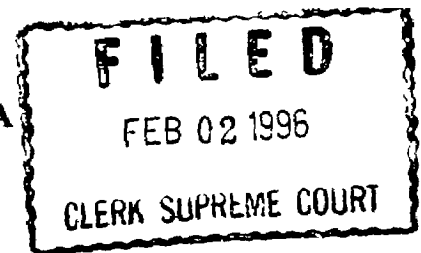


IN THE COURT OF APPEALS OF IOWA

No 5-607 / 95-0186



STATE OF IOWA,

Appellee,

001021

vs.

JAMES R. LOVE, JR.,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch,
Judge.

James Love, Jr. appeals an order denying his request to enjoin the collection of
twenty percent of his institutional wages for the payment of restitution. **AFFIRMED.**

James R. Love, Jr., Fort Madison, pro se.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, and Fred H. McCaw, County Attorney, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

PER CURIAM

In 1989 Robert Love, Jr. pled guilty to the crime of robbery in the first degree. On March 13, 1989, he was sentenced to a term of imprisonment not to exceed twenty-five years. The sentencing order stated the amounts of victim's damages, court-appointed attorney fees, and court costs were not reported. Love did not appeal his conviction or sentence.

The Iowa Department of Corrections sent a letter to the Dubuque County Clerk of Court seeking a supplemental order to determine the amount of restitution Love should be required to pay. Love's trial attorney had filed a claim for \$1,336.91 in attorney fees. On April 27, 1989, the district court issued a supplemental order requiring Love to make restitution of \$123.60 in court costs and \$1,336.91 for attorney fees. The department then instituted a restitution plan which required Love to pay twenty percent of his institutional allowances.

On August 20, 1993, Love filed a request for an order enjoining collection of his wages, or in the alternative, a hearing on his restitution plan. The district court found Love was not entitled to a hearing and dismissed his request. Love then appealed. In an unpublished decision, the supreme court vacated the decision of the district court and remanded the case. *State v. Love*, No. 93-1414 (Iowa Aug. 8, 1994). The court determined Love was entitled to a hearing on the question of whether he was reasonably able to pay the amounts required under his restitution plan. *Id.*

On remand, the district court held a telephone hearing with Love on December 22, 1994. The court found Love received eighty-eight dollars per month as wages, and twenty percent of this amount was taken as restitution. Love testified if the money was not taken as restitution he would place it in savings or use it for schooling. The court determined Love was reasonably able to have twenty percent of his earnings deducted for restitution. Love has now appealed the district court's decision.

I. Love contends chapter 910 violates his right to assistance of counsel by requiring him to reimburse the State for his attorney fees and court costs. He claims the fact he is now required to reimburse the State for his court-appointed counsel could act to chill others from claiming their constitutional right to counsel.

We first note Love failed to preserve error on this issue. The district court did not rule on this claim, and Love failed to request a ruling. Therefore, there is nothing for us to review. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). However, even if Love had preserved error on this issue, we find he is not entitled to relief based on the merits of his claim.

The supreme court has determined chapter 910 does not violate per se the right to counsel guaranteed by the Iowa and United States Constitutions. *State v. Haines*, 360 N.W.2d 791, 794 (Iowa 1985). This is because the statute only authorizes the court to order an offender to make restitution of court costs and court-appointed attorney fees

to the extent the offender is reasonably able to do so *Id.* We conclude chapter 910 does not violate Love's right to assistance of counsel

II. Love claims the district court violated section 910.3 by sentencing him based on a presentence investigation which did not contain the amounts of restitution. In pertinent part, section 910.3 provides

The clerk of court shall prepare a statement of court-appointed attorney's fees, the expense of a public defender, and court costs, which shall be provided to the presentence investigator or submitted to the court at the time of sentencing

Love believes this portion of the statute is mandatory, and claims the court should not have ordered him to pay restitution because the clerk of court had not prepared such a statement at the time of his sentencing.

We reject Love's claim this portion of section 910.3 is mandatory. Section 910.3 also recognizes pecuniary damage reports might not be available at the time of sentencing and allows a county attorney to provide a statement of such damages within thirty days. The supreme court has determined this thirty-day requirement is directory and not mandatory. *State v. Blakley*, 534 N.W.2d 645, 648 (Iowa 1995).

Section 910.3 permits a court, at a later date, to issue a permanent, supplemental order, setting the full amount of restitution. *Id.* As the court noted in *Haines*, the district court must have the facts in order to determine the appropriate amount of restitution. *Haines*, 360 N.W.2d at 797. We find no violation of section 910.3 under the facts of this case.

III. Love contends the district court was misled by the department's request for a supplemental restitution order. The department sent a letter to the court which stated restitution had been ordered in the sentencing judgment. In fact, the sentencing judgment stated the amounts had not yet been reported and did not specifically state restitution had been ordered. We find, however, the court's order anticipated ordering restitution once it received a report of the amounts involved. As discussed above, section 910.3 permits a court, after sentencing, to issue a supplemental order setting forth the amount of restitution. We do not find the department misled the court.

IV. Love claims the imposition of restitution in this case violated his right against double jeopardy. He argues restitution is a type of punishment and states he should not be required to pay restitution and serve a sentence for his crime.

The first purpose of restitution is to protect the public by compensating victims of criminal activities. *State v. Wagner*, 484 N.W.2d 212, 215 (Iowa App. 1992). The second purpose is rehabilitation. *Id.* Because the purpose of restitution is not punishment, we conclude it is not a criminal penalty. Thus, restitution is not a second punishment which violates a defendant's right against double jeopardy. *See State v. Lange*, 531 N.W.2d 108, 117 (Iowa 1995) (Because the Iowa drug stamp tax is not a criminal penalty, it does not constitute a second punishment violative of a defendant's right against double jeopardy.). We conclude Love has not been subjected to double jeopardy due to the requirement he pay restitution.

V. Love contends the district court abused its discretion by not ordering restitution at the time he was sentenced, and then ordering restitution at a later time. He believes the original sentencing order specifically did not order him to pay restitution, and he believes the court abused its discretion by changing its mind and later entering the supplemental order which did require the payment of restitution. He states the court did not take into consideration his reasonable ability to pay restitution.

A trial court has discretion to determine whether an offender is reasonably able to pay all or a part of the court costs, court-appointed attorney fees, or the expense of a public defender. *Haines*, 360 N.W.2d at 797. In order to overturn or modify a district court restitution order, the defendant must show a failure of the trial court to exercise discretion or an abuse of discretion. *Wagner*, 484 N.W.2d at 216.

As previously discussed, the original sentencing order stated the amounts necessary to determine restitution had not yet been reported. Love incorrectly states the sentencing order did not require him to pay restitution. Furthermore, after Love's case was remanded, the district court did consider his reasonable ability to pay restitution. Love testified if he did not have to pay restitution this money would be placed in savings or used for schooling. We find no abuse of discretion in the district court's determination Love was reasonably able to pay twenty percent of his institutional allowances for restitution.

VI. Finally, Love claims there is a conflict between section 910 2 and 910 3. He states section 910 2 requires restitution to be ordered at the time of sentencing while 910 3 permits restitution to be set forth in a later supplemental order. We do not find any conflict between these two sections. Section 910 2 provides restitution should be ordered, and section 910 3 provides when it may be ordered.

After considering all issues raised in this appeal, we affirm the decision of the district court finding Love is reasonably able to pay restitution. Costs of this appeal are assessed to Love.

AFFIRMED.