

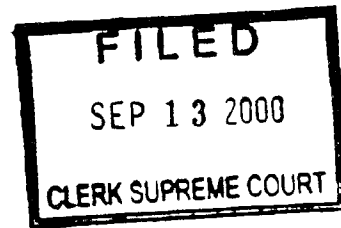
IN THE COURT OF APPEALS OF IOWA

No. 0-502 / 99-1831
Filed September 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ALLEN ZIMMERMAN, JR.,
Defendant-Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Defendant appeals from the judgment and sentences entered upon his convictions for delivery of a controlled substance and delivery of a simulated controlled substance. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Paul L. Martin, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

James Zimmerman appeals from the judgment and sentences entered upon his convictions for delivery of a controlled substance and delivery of a simulated controlled substance. He argues the State failed to present sufficient evidence to corroborate accomplice testimony and the trial court erred by ordering restitution for the full amount of court-appointed attorney fees without first considering his ability to pay. We affirm.

The case against Zimmerman began with the 1998 arrest of an individual named John Pippins for possession of cocaine. Authorities agreed not to press charges against Pippins in exchange for his cooperation as an informant against a certain drug dealer. When the targeted dealer was arrested for murder before Pippins could inform against him, Pippins's deal was in danger of falling through. Seeking to fulfill his end of the bargain, Pippins asked his brother, Henry Payne, to arrange a 'buy' of methamphetamine. Payne had no involvement with police and, according to Pippins, knew nothing of his brother's role as an informant. Payne said he knew of a dealer who lived across the street and he would arrange a purchase.

The first controlled buy took place on March 6, 1999. Police gave Pippins money and a tape recorder. Pippins drove to Payne's home under police surveillance and met with his brother. Together the brothers walked across the street to another house. Pippins and Payne testified, and the tape recording revealed, the two entered the house and Pippins purchased a quantity of methamphetamine from a man named 'Jim.' The brothers left the house and separated. Pippins drove to a designated location to rendezvous with police. He

was searched and no longer had the cash but did have a quantity of methamphetamine.

Subsequently, police investigated the identity of the 'Jim' who might be living in the particular house. The house belonged to a Pamela Rafferty, James Zimmerman's girlfriend, with whom he had been living for some time. Another buy was arranged for March 12, 1999, and it proceeded in much the same manner as the first, except on this occasion the substance, which was represented as methamphetamine, was only a simulation. On both March 6 and 12, police surveilled Pippins and Payne but were unable to observe their actual entry into the house or the buy itself.

On May 5, 1999, the State charged Zimmerman with: delivery of a controlled substance in violation of Iowa Code sections 124.401(1) and 124.401(1)(b)(7) (1997) (count I); failure to affix drug tax stamps in violation of sections 453B.1(3)(a) and 453B.12 (counts II and IV); and delivery of a simulated controlled substance in violation of sections 124.401(1) and 124.401(1)(b)(7) (count III). Additional charges were brought against him for another occurrence but are not involved in this appeal. Trial commenced on August 24, 1999. At the close of the State's evidence, Zimmerman moved for judgment of acquittal on all counts. The court directed a verdict only on the drug tax stamp charges. On August 27, the jury returned guilty verdicts on the remaining two counts. Zimmerman filed a motion for new trial and in arrest of judgment which the district court denied. On November 12, 1999, Zimmerman was sentenced to two concurrent terms of imprisonment not to exceed twenty-five years and ordered to pay restitution of \$7,844.05 in court-appointed attorney fees.

Zimmerman appeals. He contends the district court erred by: (1) denying his motion for directed verdict regarding counts I and III based upon the State's failure to present sufficient evidence to corroborate accomplice testimony; and (2) failing to consider his reasonable ability to pay before assessing him the full amount of court costs and court-appointed attorney fees at sentencing.

I. Scope of Review. Challenges to the sufficiency of evidence to corroborate an accomplice's testimony are reviewed for errors at law. *State v. Taylor*, 557 N.W.2d 523, 525 (Iowa 1996) (citations omitted). We also review restitution orders involving court-appointed attorney fees for errors of law. *State v. Brewer*, 547 N.W.2d 15, 16 (Iowa App. 1996).

II. Corroboration of Accomplice Testimony. Payne and Pippins were the only two witnesses who actually took part in or observed the drug transaction and identified Zimmerman as the dealer. Zimmerman maintains insufficient evidence existed to corroborate the testimony of Payne and Pippins and connect him to the drug deal: police officers did not actually observe the transaction itself, no attempt was made to identify the voices on the tape recordings, and none of Zimmerman's fingerprints were retrieved from the narcotics containers. Therefore, he contends, the trial court should have granted his motion for judgment of acquittal.

Iowa Rule of Criminal Procedure 20(3) provides:

A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is a person who willfully unites in or is in some way concerned in

the commission of a crime. *State v. Doss*, 355 N.W.2d 874, 879 (Iowa 1984). Corroborative evidence need not be strong or confirm every detail of the accomplice's testimony. *Taylor*, 557 N.W.2d at 528 (citation omitted). However, it must furnish some material fact tending to connect the defendant to the crime, lending support to the accomplice's credibility. *Id.*

Zimmerman's argument rests on the faulty premise that Payne and Pippins were accomplices. Pippins was an informant acting at the direction of the police, not an individual who participated in the crime with Zimmerman and later decided to testify against him. An informant acting under police direction is not an accomplice for purposes of rule 20(3) and his or her testimony need not be corroborated. *State v. Johnson*, 219 N.W.2d 690, 694 (Iowa 1974) (holding under similar fact pattern that informant who purchased drugs from defendant during a buy controlled by police was not an 'accomplice'); *see State v. Williams*, 315 N.W.2d 45, 58 (Iowa 1982) (concluding police informant in pimping sting was not accomplice). Pippins was also not a solicited person. The term "solicited person" in rule 20(3) applies only when the accused is charged with the offense of solicitation under Iowa Code section 705.1. *Williams*, 315 N.W.2d at 58. Here, Zimmerman was not charged with solicitation. Pippins's testimony required no corroboration and, therefore, supports the convictions.

On the other hand, Payne did not act at the direction of the police and did not know his brother was a police informant. Payne arranged the buys and could possibly have been charged with conspiracy to distribute methamphetamine. See Iowa Code § 124.401(1). However, regardless of whether Payne could be considered an accomplice, his testimony identifying Zimmerman as the individual

who sold the methamphetamine and the simulated substance was sufficiently corroborated by Pippins's testimony. Police provided additional corroboration. Officers had Pippins under surveillance from the time they gave him a tape recorder and the cash to make the purchase until he and Payne entered the house where Zimmerman lived with his girlfriend. Similar evidence has been considered sufficiently corroborative. See *Johnson*, 219 N.W.2d at 694 (finding informant's testimony sufficiently corroborated by police testimony that officers followed informant to bar where drug transaction allegedly took place and observed defendant's vehicle near bar, despite the fact police did not enter bar and observe actual transaction). The trial court committed no error by denying Zimmerman's motions for judgment of acquittal on this ground.

III. Restitution of Court-Appointed Attorney Fees. Zimmerman claims because he is indigent and will remain so in prison, paying restitution of \$7,844.05 in attorney fees represents an onerous burden for him. He argues the trial court erred by failing to consider his ability to pay before it ordered a large amount of restitution, in violation of due process principles and Iowa Code section 910.2.

Section 910.2 authorizes a sentencing court to order restitution for court-appointed attorney fees only to the extent of a defendant's reasonable ability to pay the amount ordered. See Iowa Code § 910.2; *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985). A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910. *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987) (citations omitted). However, a defendant who seeks to upset a restitution order has the

burden to demonstrate either the failure of the court to exercise discretion or an abuse of that discretion. *Id.* 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 *Kaelin*, 362 N.W.2d at 528.

Zimmerman fails to meet that burden. The mere allegation of indigency is not enough. Cf. *State v. Blank*, 570 N.W.2d 924, 927 (Iowa 1997) (finding mere allegation of inability to pay insufficient to require hearing on defendant's petition to modify restitution amount under Iowa Code section 910.7). A defendant has at least two opportunities to make an appropriate record on the issue. *Kaelin*, 362 N.W.2d at 528. One is at sentencing and the other is through section 910.7 which permits a defendant to petition to modify a restitution order. *Id.* We have no such record. A defendant may directly appeal a sentence requiring restitution, *id.*, but where there is no record on the issue, we have little to review.

Furthermore, Zimmerman's argument focuses on his long-term ability to pay the allegedly burdensome total due to his incarceration. However, a determination of reasonable ability to pay, especially in a case of long-term incarceration, is more appropriately based on an inmate's ability to pay current installments established by a restitution plan, rather than on his or her ability to ultimately pay the total amount due. *Van Hoff*, 415 N.W.2d at 649. Prisoners are certainly able to earn income, however, nothing in the record indicates how much income Zimmerman could earn and what his expected installment payments will be. While direct appeal is a possible means of challenging a restitution order, without a record, it is perhaps not the best means.

In addition, the Iowa Supreme Court has recently rejected an argument

similar to Zimmerman's. In *State v. Swartz*, a defendant urged on appeal that the district court improperly ordered restitution for the amount of court-appointed attorney fees without first determining his ability to pay. *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999). The supreme court concluded the defendant could not advance that claim on the record made for two reasons: (1) no plan of restitution, contemplated by Iowa Code section 910.3, was complete at the time the notice of appeal was filed, and (2) Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for modification. *Id.* Until the latter remedy had been exhausted, the court concluded it had no basis for reviewing the issue. *Id.* In Zimmerman's case, the district court stated in the judgment and sentencing order that "[p]ayment of the fines, surcharges, attorney fees and court costs shall be paid in a restitution plan during stay in prison" This statement indicates there had been no plan entered at the time of sentencing. Zimmerman also did not petition for modification of the amount. Therefore, we have no basis for reviewing the issue and affirm the district court's restitution order.

AFFIRMED.