

IN THE COURT OF APPEALS OF IOWA

No. 1999-124 (9-340) / 98-1223

Filed June 23, 1999

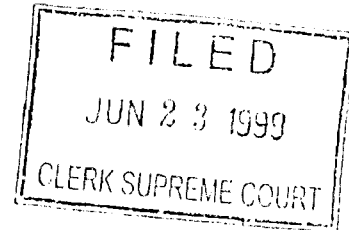
STATE OF IOWA,

Appellee,

vs.

VINCENT ANTONE JOHNSON,

Appellant.



Appeal from the Iowa District Court for Jones County, Thomas Horan, Judge.

Vincent Johnson appeals a district court sentencing order assessing him restitution for attorney fees and costs. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Connie S. Ricklefs, County Attorney, and Craig Elliott, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

Vincent Johnson appeals a district court sentencing order assessing him restitution for attorney fees and costs. As we find the court did not abuse its discretion in ordering restitution, we affirm.

Background facts. In 1995, Johnson was convicted of two counts of interference with official acts while incarcerated at the Iowa Men's Reformatory at Anamosa, now known as the Anamosa State Penitentiary. This court affirmed his convictions on direct appeal but remanded the case for resentencing because the district court had not appropriately exercised discretion with regard to the question of consecutive sentences. *See State v. Johnson*, No. 7-396 (Iowa App. Jan. 28, 1998). At that time, neither the amount of restitution nor Johnson's ability to pay had been determined by the court. On remand, the district court resentenced Johnson and ordered him to pay approximately \$5,200 for attorney fees and court costs as restitution. Johnson now appeals.

Ability to pay full amount of restitution. Johnson asserts that the district court abused its discretion in ordering him to pay the full amount of attorney fees due and in finding that he had a reasonable ability to pay.¹

The sentencing court has the authority to order a defendant to pay restitution for crime victim assistance reimbursement, court costs, and court appointed attorney costs or the expense of a public defender when applicable. *See Iowa Code* § 910.2

¹ He does not contest the reasonableness of the fees nor the calculation of the amount due.

(1997). The defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order. *See Id.*; *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987); *State v. Haines*, 360 N.W.2d 791, 797 (Iowa 1985). 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. *See State v. Taylor*, 506 N.W.2d 767, 768 (Iowa 1993); *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985).

The State contends that this issue is not ripe for our review because no plan of payment has been submitted by the Department of Corrections. *See Iowa Code* § 910.5 (1997). However, there is no statutory nor common law requirement which demands that a plan of payment be implemented before the defendant can challenge the amount of restitution ordered or ability to pay.

On the contrary, our supreme court has found that defendants have the option to challenge a restitution order either on direct appeal or by filing a petition under Iowa Code section 910.7. *See State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997); *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984). In fact, the court has noted that it may be in the defendant's best interests to appeal directly rather than wait to file a section 910.7 petition. *See Blank*, 570 N.W.2d at 926 (recognizing that a 910.7 action would be civil in nature); *see also State v. Alspach*, 554 N.W.2d 882, 884 (Iowa 1996). It is true that previous cases have stated that the focus should be on a defendant's ability to pay the installments of a plan rather than on a defendant's ability to pay the entire amount of restitution. *See Blank*, 570 N.W.2d at 927; *Van Hoff*, 415 N.W.2d at 649. However, Johnson was not required to wait for a payment

plan to be prepared and then file under section 910.7. *See Janz*, 358 N.W.2d at 549. Should Johnson care to challenge the plan of payment ultimately entered by the Department of Corrections, he may file a 910.7 petition. However, this does not preclude him from seeking review of the court's original order of restitution before such a plan is entered.

Johnson argues that based on his current incarceration, pay and mandatory expenses, the court abused its discretion in finding he had a reasonable ability to pay over \$5,000 for attorney fees. We disagree. Johnson currently earns only \$7 per month in idle pay while in segregation, but may earn more when he is released from segregation. Furthermore, he is not serving a life sentence and therefore may be able to make a living after his release. Greater amounts of restitution have been upheld, even when the offender is serving a life sentence and would never realistically be able to pay the total amount of restitution. *See State v. Wagner*, 484 N.W.2d 212, 218 (Iowa App. 1992) (upholding a restitution order of \$109,000 where inmate was serving a life sentence earned \$7.20 per month). The district court took into consideration Johnson's current earnings and expenses and concluded that Johnson had the reasonable ability to pay the restitution. After reviewing the record, we find no abuse of discretion.

Having found the court did not abuse its discretion in ordering the restitution, we hereby affirm the court's order.

AFFIRMED.

No. 98-1223. [1999-124 (9-340)] STATE v. JOHNSON

Appeal from the Iowa District Court for Jones County, Thomas Horan, Judge.
AFFIRMED. Considered by Huitink, P.J., and Streit and Vogel, JJ. Opinion by Vogel, J.
(4 pages \$1.60)

Vincent Johnson appeals a district court sentencing order assessing him restitution for attorney fees and costs. **OPINION HOLDS: *Ability to pay full amount of restitution.*** Johnson asserts that the district court abused its discretion in ordering him to pay the full amount of attorney fees due and in finding that he had a reasonable ability to pay. The State contends that this issue is not ripe for our review because no plan of payment has been submitted by the Department of Corrections. However, there is no statutory nor common law requirement which demands that a plan of payment be implemented before the defendant can challenge the amount of restitution ordered or ability to pay. Johnson argues that based on his current incarceration, pay and mandatory expenses, the court abused its discretion in finding he had a reasonable ability to pay over \$5,000 for attorney fees. We disagree. Johnson currently earns only \$7 per month in idle pay while in segregation, but may earn more when he is released from segregation. Furthermore, he is not serving a life sentence and therefore may be able to make a living after his release. Greater amounts of restitution have been upheld, even when the offender is serving a life sentence and would never realistically be able to pay the total amount of restitution. The district court took into consideration Johnson's current earnings and expenses and concluded that Johnson had the reasonable ability to pay the restitution. After reviewing the record, we find no abuse of discretion.