IN THE COURT OF APPEALS OF IOWA

No. 0-666 / 00-385
Filed November 20, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL ALLEN NAUJOKS,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Jane F. Spande, and Nancy Baumgartner, District Associate Judges.

Michael Naujoks appeals from the imposition of restitution following his guilty plea to assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Denver D. Dillard, County Attorney, and Brian Claney, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Michael Naujoks pled guilty to assault causing bodily injury, in violation of Iowa Code sections 708.1 (1997) and 708.2(2), after striking a fellow cellmate at the Linn County jail. The district court sentenced him to eight days of jail time previously served and imposed a fine, surcharge and court costs, to be paid with other restitution.

Approximately eighteen months later, the State sought restitution in the amount of $2068.93 to reimburse the crime victim assistance program for medical and emergency response costs incurred by the program. Over Naujoks's objection, the district court granted the State's request. On appeal, Naujoks maintains defense counsel rendered ineffective assistance by failing to tell him about his restitution obligation before he pled guilty. We disagree and affirm.

I. Counsel's Failure To Advise Defendant As To Restitution

Naujoks contends we should impose on defense counsel a duty to advise a defendant about restitution because restitution is mandatory in all criminal cases in which a defendant pleads guilty. The State responds that Iowa Rule of Criminal Procedure 8 listing required disclosures during plea proceedings does not mandate a defendant receive advice about restitution. The State's position echoes the district court's conclusion. The court stated:

> There is no such requirement that a Defendant be advised of the requirement to make restitution prior to a plea of guilty in Chapter 910 or in Rule 8 of the Iowa Rules of Criminal Procedure. By analogy, the Court concludes that if a guilty plea cannot be set aside for failure to inform a Defendant of the requirement to make

> restitution, said failure to advise does not pose a bar to the Court ordering victim restitution.

We feel compelled to agree with this conclusion.

A. Standard of Review. We review ineffective assistance of counsel claims de novo. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). A postconviction relief applicant must prove by a preponderance of the evidence that (1) trial counsel breached an essential duty and (2) prejudice resulted. *State v. Arne*, 579 N.W.2d 326, 330 (Iowa 1998). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). The second element, prejudice, is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). In the guilty plea context, prejudice means the applicant would have insisted on going to trial rather than choosing to plead guilty. *Irving*, 533 N.W.2d at 541.

B. Breach of Essential Duty. When a defendant asserts counsel failed to provide advice concerning the consequences of a guilty plea, we will find a breach of an essential duty only if the consequences flow "directly" from the plea. *State v. Carney,* 584 N.W.2d 907, 910 (Iowa 1998); *Mott v. State*, 407 N.W.2d 581, 582 (Iowa 1987). A direct consequence is one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975) (*quoting Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1365-66 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005, 94 S.Ct. 362, 38 L. Ed. 2d 241 (1973)).

1. Direct Consequences Generally. Certain direct consequences have been codified in Iowa Rule of Criminal Procedure 8(2)(b). This rule requires the district court to inform a defendant about particular rights the defendant will waive by pleading guilty, including "the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 8(2)(b).

Our highest court has refined this rule, identifying specific consequences that must be disclosed to a defendant as well as those that need not. *See State v. White*, 587 N.W.2d 240, 242-43 (Iowa 1998) (duty to disclose possibility of having to serve consecutive sentences); *State v. Carney*, 584 N.W.2d at 909 (no duty to advise defendant license will be revoked as a result of pleading guilty to OWI); *Kinnersley v. State*, 494 N.W.2d 698, 700 (Iowa 1993) (no duty to inform defendant concerning timing of eligibility for parole); *Mott v. State*, 407 N.W.2d at 583 (no duty to inform defendant of possibility of deportation); *Saadiq v. State*, 387 N.W.2d 315, 325-26 (Iowa 1986) (no duty to inform defendant sentence prohibits possession of firearm). *See also State v. Woolsey*, 240 N.W.2d 651, 653 (Iowa 1976) (pre-rule 8 case holding no duty to inform defendant about ineligibility for deferred judgment or suspended sentence and probation); *State v. Warner*, 229 N.W.2d 776, 781-82 (Iowa 1975) (pre-rule 8 case holding no duty to inform defendant about consequences of plea on a companion charge).

2. Restitution: Is it a Direct Consequence? "Restitution" is defined as "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Iowa Code § 910.1(4). The term includes fines, penalties, surcharges, contributions to local anti-crime

organizations, payments to public agencies, court costs, court-appointed attorney fees and public defender expenses, and "crime victim compensation program reimbursements." *Id.*

The Iowa Supreme Court has not explicitly addressed whether restitution is a direct consequence of a plea. However, in *State v. Brady*, 442 N.W.2d 57, 59 (Iowa 1989), the court confronted a closely related issue: whether the district court must inform a defendant about court costs as part of the defendant's sentencing as a habitual offender under Rule 18(9). To answer this question, the court turned to Rule 8 jurisprudence for guidance. *Id.* The court preliminarily noted court costs were a component of restitution. *Id.* The court then concluded court costs were not punishment and, accordingly, the district court had no obligation to discuss this component of restitution during the habitual offender phase of his burglary trial. *Id.* However, the court implied its holding might have been different were it a challenge to disclosure of victim restitution as opposed to court costs. *Id.*

Having resolved the appeal on the punishment issue, the court in *Brady* found it unnecessary to reach the question of whether restitution was a direct consequence of the plea. The court nevertheless encouraged district courts to advise defendants about restitution, stating:

> We note Brady's attack on this sentence is quite narrow; he contends only that the "guilty plea" is defective on the ground the court costs were punishment under rule 8(2)(b). He does not argue that payment of costs is a "direct consequence" which, under our cases, must be discussed by the court in a guilty plea colloquy. (citations omitted). We express no view on the latter question but suggest that, in future cases, courts in guilty plea proceedings fully inform defendants of the impact of the restitution provisions of Iowa Code chapter 910.

Brady, 442 N.W.2d at 59. Here, we must squarely confront the issue left open in *Brady*. Specifically, we must decide whether crime victim assistance reimbursements represent a direct consequence of a plea that must be disclosed to a defendant before or during the guilty plea colloquy. [1] As noted, the answer to this question turns on whether these payments represent "a definite, immediate, and largely automatic effect on the range of defendant's punishment." *Warner*, 229 N.W.2d at 782.

Restitution is a mandatory part of sentencing. Iowa Code § 910.2.[2] *See also State v. Watts*, 587 N.W.2d 750, 751 (Iowa 1998). Because it is mandatory, we conclude restitution has a "definite" effect on the range of punishment. *Cf. United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir. 1997) (stating consequence is collateral rather than direct where district court has discretion to

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[1] The parties have not addressed the question of whether these restitution payments are punishment in the first instance. *See* Iowa R. Crim. P. 8(2)(b)(2); *Brady*, 442 N.W.2d at 59. For purposes of this appeal, therefore, we will assume without deciding that these payments are punishment. *See State v. Izzolena*, 609 N.W.2d 541, 548 (Iowa 2000) (noting restitution serves to "protect the public by compensating victims for criminal activities" and "rehabilitate the defendant" but pointing to punitive components in certain portions of the statute); *State v. Carney*, 584 N.W.2d 907, 909 (Iowa 1998) (noting license revocation "may carry the sting of punishment", but nevertheless concluding revocation did not have an effect on range of punishment). *Cf. United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998) (stating restitution under federal Mandatory Victims Restitution Act is punishment for Eighth Amendment purposes); *State v. War Bonnet*, 428 N.W.2d 508, 509 (Neb. 1988) (reiterating restitution order is criminal penalty imposed as punishment for crime); *Keller v. Wyoming*, 723 P.2d 1244, 1246-47 (Wyo. 1986)(stating payment of restitution is punishment authorized by law).

[2] The statute states in pertinent part:

> In all criminal cases in which there is a plea of guilty, verdict 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, to the clerk of court for fines, penalties, surcharges, and, to the extent that the offender is reasonably able to pay, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 9, paragraph "b", court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney's fees, or the expense of a public defender when applicable, or contribution to a local anticrime organization.

impose); 21 Am. Jur. 2d *Criminal Law* § 668 (1998)(noting court is not required to inform defendant of consequence where imposition lies within discretion of court and where imposition is controlled by a government agency operating beyond the direct authority of the judge).

However, the victim assistance reimbursement component of Iowa's restitutionary scheme need not have an "immediate" effect on the range of punishment, particularly where a victim's damages are not "readily ascertainable." *See State v. Blakley*, 555 N.W.2d 221, 222 (Iowa 1996). In this case, for example, the State did not file a statement of pecuniary damages until almost eighteen months after sentencing.

Further, the payment is not "automatic," as Iowa Code section 910.3 affords a defendant an opportunity to contest the amount of the payment and section 910.2 requires a court to determine a defendant's reasonable ability to pay. *Cf. State v. Haines*, 360 N.W.2d 791, 797 (Iowa 1985) (noting reasonable ability to pay standard allows statute to withstand constitutional attack). Additionally, section 910.2 allows a court to order community service instead of restitution, again suggesting restitution is not automatic. Finally, a defendant may challenge a restitution plan at any time during probation, parole or incarceration, and a court may modify it, further indication restitution is not automatic. *See* Iowa Code § 910.7.

Because payments to the crime victim assistance reimbursement program do not have an "immediate and largely automatic effect on the range of the defendant's punishment," we conclude these payments are not a direct consequence of the plea and the court had no obligation to advise Naujoks of the

consequence during the plea colloquy. As the court did not have a duty to advise Naujoks of the possibility of reimbursement to the crime victim assistance program, neither did his attorney. *See State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). Accordingly, we find no breach of an essential duty.[3]

We recognize other jurisdictions have reached a contrary conclusion. *See, e.g.,* Fed. R. Crim. P. 11 (c)(1); *State v. War Bonnet*, 428 N.W.2d 508, 509 (Neb. 1998) *Keller v. Wyoming*, 723 P.2d 1244, 1246-47 (Wyo. 1986); *but see State v. Sanders*, 490 N.W.2d 211, 214-15 (Neb. 1992) (noting fact defendant was not apprised of restitution did not render guilty plea involuntary because restitution was condition of probation rather than criminal penalty). We note, however, that the federal rule, unlike our Rule 8, explicitly requires the court to advise defendants they may face mandatory restitution, although failure to do so is deemed harmless error if it does not affect a defendant's substantial rights. Fed. R. Crim. P. 11(h).[4] Additionally, *War Bonnet* and *Keller* dealt with the payment of restitution to the actual victim as opposed to a victim reimbursement program, a component of restitution that our highest court suggests is "more substantial" than court costs. *Brady,* 442 N.W.2d at 59. Naujoks challenges a payment to the victim compensation program, which, under our statutory scheme

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[3] The State also argues Naujoks's attorney did not breach an essential duty because she acted in conformity with Naujoks's wishes. We need not address this contention. *Cf. United States v. Peden*, 872 F.2d 1303, 1307 (7th Cir. 1989) (holding failure of court to inform defendant about restitution harmless error where record revealed defendant understood charges and possibility restitution could be imposed).

[4] *See United States v. Crawford*, 169 F.3d 590, 592-93 (9th Cir. 1999) (concluding failure to inform of restitution harmless where court advised defendant he was subject to a fine which was larger than his ultimate restitution obligation); *United States v. Gabriele*, 24 F.3d 68, 70 (10th Cir. 1994) (same); *United States v. Pogue*, 865 F.2d 226, 229 (10th Cir. 1989) (failure to give defendant opportunity to withdraw plea after restitution was ordered required remand); *United States v. Corn*, 836 F.2d 889, 894 (5th Cir. 1988) (remanding to district court where court failed to inform restitution was integral part of sentence).

has a higher priority than court costs but a lower priority than direct victim restitution. *See* Iowa Code § 910.2. For these reasons, we do not find those authorities persuasive.

C. Prejudice. In light of our conclusion that Naujoks's attorney did not breach an essential duty, we need not address the prejudice prong of Naujoks's ineffective assistance of counsel claim.

II. Summary

We conclude Naujoks's attorney did not render ineffective assistance in failing to advise him about the likelihood he would be held responsible for reimbursing the crime victim assistance program.

AFFIRMED.