

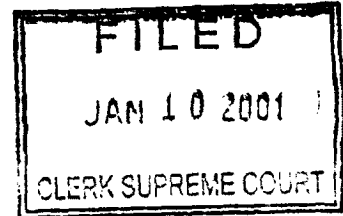
IN THE COURT OF APPEALS OF IOWA

No. 0-692 / 99-0233
Filed January 10, 2001

DAVID K. CRADY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Jasper County, Darrell Goodhue,
Judge.

On appeal from the denial of his application for postconviction relief, David Crady contends (1) his criminal trial counsel was ineffective for failing to object to the restitution order and (2) the criminal trial court abused its discretion by failing to properly determine the appropriate amount of restitution. **AFFIRMED.**

Michael M. Lindeman of Lindeman Law, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Steve Johnson, County Attorney, and Michael Jacobsen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan and Habhab, S.J.

Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

SACKETT, C.J.

This is an appeal from the denial of Applicant-Appellant David K. Crady's petition for post conviction relief. Crady contends his trial counsel was ineffective in not objecting to a restitution order and the district court abused its discretion in fixing restitution. The relief Crady seeks is not available in a petition for post conviction relief proceedings. We affirm the dismissal of his petition.

Crady was found guilty of first degree theft on February 7, 1996, and sentenced to ten years in prison. Prior to Crady's trial the district court granted his motion for a psychiatric evaluation. Following Crady's conviction the State sought to tax the costs of the evaluation against Crady. The district court did so, and on May 20, 1996 assessed \$2056.61 against Crady, and on August 12, 1996 assessed an additional charge of \$6991 to him. Crady filed a direct appeal challenging a jury instruction and his conviction was affirmed on appeal. *State v. Crady*, No. 96-689 (Iowa App. May 19, 1997).

Crady filed this application for post conviction on October 14, 1997, more than a year after the restitution orders were entered. The district court addressed the issue as a claim of ineffective assistance of counsel with Crady claiming that his trial counsel should not have asked for a psychiatric evaluation. The district court denied this claim finding Crady had not preserved the issue by raising it on direct appeal and had showed no prejudice.

Crady's two challenges on appeal are directed to the restitution orders. The State contends that post conviction proceedings are not the place to challenge a restitution order. We are inclined to agree.

Iowa Code section 822.2 sets forth those instances where the law of post conviction procedure is applicable. Section 822.2(7) after delineating certain instances where the procedure is applicable provides in relevant part, "except alleged error relating to restitution, court costs or fees under section 904.702 or chapter 815 and 910." Applying this section we hold a post conviction proceeding is not available to challenge the amount of a restitution order.

Nor is Crady's petition challenging the restitution timely enough to be considered a part of the criminal proceedings. In *State v. Alspach*, 554 N.W.2d 882 (Iowa 1996) the court held that a defendant has the right to court-appointed counsel when challenging restitution as part of the original sentencing order, or supplemental order, issued under Iowa Code section 910.3. *Alspach*, 554 N.W. 2d 833. However, the criminal due process requirements outlined in *Alspach* can be claimed only if protected by a timely challenge. *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997). Fairness dictates that a defendant who delays challenging a restitution order should not be treated the same as one who files a timely appeal. *Id.* Courts are permitted under section 910.3 to delay entry of judgment for restitution when, for good cause, restitutionary sums are not ascertainable at the time of sentencing. *State v. Blakley*, 555 N.W.2d 221, 222 (Iowa 1996). A defendant, however, is granted no such statutory reprieve. *Blank*, 570 N.W. 2d at 926.

The court in *State v. Janz*, 358 N.W.2d 547 (Iowa 1984) instructs that a defendant challenging a restitution order entered as part of the original sentence has two options: to file a petition in district court under section 910.7, or to file a direct appeal. *Janz*, 358 N.W.2d at 549. Furthermore, to be considered an

extension of the criminal proceedings the defendant's petition under section 910.7 must be filed within thirty days from the entry of the challenged order. Crady filed the petition more than a year after the restitution orders were entered. Thus this petition was not filed within the time necessary to consider it a criminal proceedings. However, Crady is not without his form for relief.

Section 910.7¹ provides in relevant part:

At any time during the period of . . . incarceration, the offender . . . may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.

Failing the requirements necessary to be considered an extension of the criminal proceedings a later action under section 910.7 would still provide an avenue for relief. *Earnest*, 508 N.W.2d at 633; *Janz*, 358 N.W.2d at 549. But that action is civil, not criminal in nature. See *Alspach*, 554 N.W.2d at 884.

Crady has failed to show his claims are properly raised as a part of a post conviction proceedings. We dismiss without prejudice.

AFFIRMED.

¹ As originally enacted, section 910.7 required that a district court grant a hearing whenever a defendant sought to challenge a restitution order. Iowa Code § 910.7 (1983). In 1986 section 910.7 was amended to add the present language granting the district court the discretion to determine whether or not a hearing should be held. 1986 Iowa Acts ch. 1075, § 6. The legislative history indicates the 1986 amendment was intended to limit a defendant's remedies in restitution matters and to allow the courts discretion in granting restitution hearings. See S.F. 2143, 71st G.A., 1st Session (Iowa 1986).