

IN THE COURT OF APPEALS OF IOWA

No. 4-526 / 94-189

STATE OF IOWA,

Appellee,

vs.

NEAL SAUNDERS NELSON,

Appellant.

Appeal from the Iowa District Court for Fremont County, J. C. Irvin, Judge.

Neal Nelson appeals the denial of his petition to modify a restitution order. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and Vicki R. Danley, County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ., but decided en banc.

HUITINK, J.

Neal Nelson appeals the denial of his petition to modify a restitution order. We affirm.

Nelson was convicted of willful injury in violation of Iowa Code section 708.4 (1991). He was acquitted of first-degree burglary and attempted murder. Nelson was sentenced to a term not to exceed ten years and ordered to pay victim restitution, court-appointed attorney fees and court costs.

A supplemental order was filed ordering Nelson to pay $1311.35 in court costs and $3078.48 in attorney fees. Nelson's petition to modify the restitution order was denied. Nelson appeals.

We review the district court's restitution order for errors at law. Iowa R. App. P. 4.

Nelson first contends that the court erred in ordering him to pay fees and costs regarding the counts for which he was not convicted. Nelson relies on State v. Petrie, 478 N.W.2d 620 (Iowa 1991), to support his claim that restitution is limited to crimes for which he was convicted.

In Petrie the defendant was charged with possession of a controlled substance with intent to deliver, being an habitual offender, and driving while barred. After evidence seized in an unlawful inventory search of defendant's car was suppressed, the State agreed to drop the first two charges in exchange for the defendant

pleading guilty to the charge of driving while barred. The defendant was then ordered to pay for all court costs and fees, including those associated with two dismissed charges. Our supreme court stated:

> Expenses clearly attributed to other charges such as attorney fees connected with the suppression issues should not be assessed against the defendant. Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant.

Petrie, 478 N.W.2d 620, 622 (Iowa 1991). Because there were attorney fees clearly attributed to the suppression issues, they could not be assessed against the defendant. Id.

Here, unlike Petrie, Nelson was actually tried on all three counts. Nelson's attorney conceded that he did not and could not accurately apportion his fees to the separate counts. The indivisible nature of the fees and costs coupled with the fact that all three charges were submitted leads us to conclude Petrie is not controlling in this case.

We, like the district court, find all fees and costs are attributable and clearly associated with the willful injury charge. Accordingly, we conclude the district court did not err in ordering full restitution.

Nelson also argues the district court failed to assess his reasonable ability to pay the costs and fees. He claims the district court ignored his poor health, inability to work, and indigency.

A sentencing court may order restitution for court costs and attorney fees but only to the extent of the defendant's reasonable ability to pay. Iowa Code § 910.2 (1991); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). 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. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987) (citation omitted).

The district court had before it ample evidence from which it could determine Nelson's reasonable ability to pay. The record shows Nelson receives Social Security benefits of $656 per month and earns prison wages of fifty cents per day. The restitution plan consists of twenty percent of his institutional wages and other income.

A determination of reasonableness is based on an inmate's ability to pay the current installments rather than on his ability to ultimately pay the total amount due. Id. at 649. Ordering an inmate who earned eighty dollars per month in prison to pay restitution of $16,500 was not an abuse of discretion. Id. In this case the record shows Nelson has the reasonable ability to pay the current installments.

The district court exercised its discretion in assessing Nelson's ability to pay restitution. We find no abuse of that discretion. Accordingly, we affirm.

We have considered all of Nelson's claims and determine them to be without merit. The decision of the district court is affirmed in its entirety. Costs of this appeal are assessed to Nelson.

AFFIRMED.

All judges concur except Hayden and Sackett, JJ., who dissent.

HAYDEN, J. (dissenting)

I respectfully dissent.

My reading of State v. Petrie, 478 N.W.2d 620, 621 (Iowa 1991), is as follows:

> We hold that the provisions of Iowa Code section 815.13 and section 910.2 clearly require, where the plea agreement is silent regarding the payment of fees and costs, that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan. . . . Expenses clearly attributed to other charges . . . should not be assessed proportionally against the defendant. Fees and costs not clearly associated with any single charge should be assessed proportionally against the defendant. Since the defendant was only convicted on one of three counts he should be required to pay only one-third of these costs. (Emphasis added.)

Although defendant here stood trial on all three counts the jury convicted him of only one. Petrie is no less applicable because he elected to be tried rather than enter a plea. I determine the fees and costs not clearly associated with any single charge should be assessed proportionately against Nelson. Since he was convicted on one of three counts he should be required to pay only one-third of these costs.

I disagree with the majority agreeing with the trial court. All fees and costs are not attributable solely to and clearly associated with the charge of which he was convicted. I would reverse the trial court. I would remand to assess the fees and costs not clearly identified or attributable to the willful injury charge proportionately (one-third) against Nelson.

Sackett, J., joins this dissent.