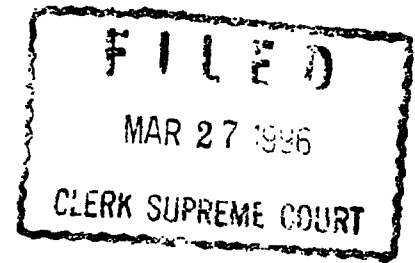


IN THE COURT OF APPEALS OF IOWA

No. 6-029 / 95-0519



000263

STATE OF IOWA,

Appellee.

vs.

KENNETH E. JOHNS,

Appellant.

Appeal from the Iowa District Court for Wayne County, Michael J. Streit, Judge.

Kenneth Johns appeals the district court's dismissal of his petition requesting a restitution hearing. **REVERSED AND REMANDED.**

Monty W. Franklin, Humeston, for appellant.

Thomas J. Miller, Attorney General, and R. Andrew Humphrey, Assistant Attorney General, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ. Streit, J., takes no part.

HUITINK, J. 000264

At issue in this case is whether Kenneth Johns is entitled to a hearing regarding his objections to a restitution plan implemented by the Iowa Department of Corrections. The district court denied Johns request for a hearing. We reverse and remand.

In 1988 Johns was convicted of the crimes of burglary in the second degree and failure to appear. He was ordered to pay a total amount of \$2186.06 in court costs and attorney fees for these two crimes. In 1993 Johns was convicted of escape and determined to be a habitual offender. He was ordered to pay an additional amount of \$1321 in court costs and attorney fees.

Johns signed a plan of restitution in 1989 which permitted the department to withhold twenty percent of his institutional allowance for the payment of restitution. The department later instituted a new plan in which inmates would be required to pay twenty percent of all credits to their institutional accounts, which would include amounts received from friends or relatives.

On December 9, 1993, Johns filed a petition for an Iowa Code chapter 910 hearing on his restitution plan. He claimed the department violated his right to due process by taking additional funds from his prison account without a hearing. Johns filed a motion for summary judgment on his claims. The State resisted the motion and filed its own motion for summary judgment.

The case was continued pending resolution of a similar case by the Iowa Supreme Court. A decision in that case, *Walters v. Grossheim*, 525 N.W.2d 830 (Iowa 1994), was filed on December 21, 1994. In *Walters*, the court held “a departmental or institutional policy that purports to take an inmate’s private resources cannot be implemented without first granting the inmate an opportunity to protect his or her interest from unreasonable deprivation.” *Id.* at 832.

In January 1995 the district court sustained the State’s motion for summary judgment and dismissed the case. A subsequent order provided the chapter 910 matters were dismissed, but the case was not. Johns filed a motion to reconsider the court’s ruling. In ruling on this motion, the district court denied Johns’ motion for summary judgment, entered judgment against Johns on the chapter 910 proceedings, and dismissed the proceedings.

Johns appeals. He claims the district court erred by denying his motion for summary judgment and in entering summary judgment for the State. He claims he is entitled to a hearing before the department may withhold twenty percent of all funds received into his institutional account.

Our scope of review is not that of an appellate review of a postconviction proceeding because section 822.2(7) specifically excludes actions involving “alleged error relating to restitution” from postconviction actions. Our supreme court previously held any alleged errors relating to restitution must be resolved on direct appeal or in a

chapter 910 proceeding, not through postconviction proceedings. *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993). We review restitution orders for errors of law. *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991).

In the recent case of *Walters v. Grossheim*, 525 N.W.2d 830, 831 (Iowa 1994), the supreme court found an inmate's money in prison accounts is protected property under the Constitution. Given this protected property interest, an inmate cannot be deprived of these funds without due process. *Id.* at 832.

An inmate is entitled to a predeprivation hearing, which need not be more than an informal, nonadversarial review of his or her written objections to the proposed withdrawal of funds. *Id.* at 833. To comport with due process, prison officials must merely (1) notify prisoners of the proposed amendment to their restitution plans including assessments against outside sources, (2) permit time for objection to the proposed amendment, and (3) consider the objections for formulating an individualized plan for the future. *Id.*

We note an inmate's funds from outside sources are subject to deductions for restitution purposes. *State v. Van Hoff*, 528 N.W.2d 99, 100 (Iowa 1995). Due process requires, **however**, that Johns be given a hearing before the department may require him to pay restitution from funds he receives from outside sources.

The State claims Johns was given an opportunity to object to the new restitution plan after the district court decision in this case. This evidence is outside the record and we may not consider it.

In his reply brief, Johns raises a claim that the department's application of certain code sections and administrative rules violates the ex post facto law. We find Johns failed to preserve error on this issue because he raises it for the first time on appeal. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995).

We reverse the decision of the district court and remand for further proceedings. We conclude Johns is entitled to a hearing as required by *Walters*.

REVERSED AND REMANDED.