

IN THE COURT OF APPEALS OF IOWA

No. 8-650 / 07-0300
Filed September 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN ALLEN GOYETTE,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Jane F. Spande,
Judge.

Defendant appeals a restitution order entered after his guilty plea.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Harold L. Denton, County Attorney, and Heidi Carmer, Assistant County
Attorney, for appellee.

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

EISENHAUER, J.

On September 22, 2006, Benjamin Goyette filed a written plea of guilty (Alford) to assault causing bodily injury. On January 4, 2007, the court accepted Goyette's plea, ordered deferred judgment with probation, and set a restitution hearing for February 8, 2007. At the February hearing Goyette challenged the reasonableness of the restitution payment by the Crime Victim Assistance Program (CVAP) and sought a separate hearing to determine the restitution amount. Goyette also argued his due process rights were violated. The court rejected Goyette's claims and ordered him to reimburse the CVAP the full amount it had paid the victim. Goyette now appeals.

"Decisions regarding sentencing and restitution issues are . . . reviewed for errors at law . . . and are reversed only for a demonstrated abuse of discretion." *State v. Bradley*, 637 N.W.2d 206, 210 (Iowa Ct. App. 2001). See Iowa R. App. P. 6.4. We review constitutional challenges de novo. *Bradley*, 637 N.W.2d at 210.

Goyette first argues the district court erred in citing to an unpublished court of appeals opinion in violation of Iowa Rule of Appellate Procedure 6.14(5)(b), which states unpublished opinions may be cited in briefs to the court but "unpublished opinions shall not constitute controlling legal authority." We find no error. While unpublished cases are not controlling, such cases may be cited in briefs and used as persuasive authority. Additionally, the unpublished case referenced by the district court quotes a published opinion with precedential

value, *Bradley*, 637 N.W.2d 206. As discussed below, the *Bradley* decision guides our conclusion the district court did not error in rejecting Goyette's claims.

Goyette next argues he has been deprived of due process because he was not allowed to challenge the amount of restitution paid to the victim by the CVAP. Restitution is a statutory requirement applicable in criminal cases where guilt is established. *State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989). "It is a mandatory part of sentencing in Iowa." *State v. Mai*, 572 N.W.2d 168, 171 (Iowa Ct. App. 1997). Iowa Code section 910.2 (2005) provides:

In all criminal cases in which there is a plea of guilty . . . the sentencing court *shall* order that restitution be made by each offender to the victims . . . and, to the extent that the offender is reasonably able to pay, for crime victim assistance reimbursement.

(Emphasis added.) The district court does have the power to determine the "defendant's ability to make payment for crime victim assistance disbursements," however, the court does not have "authority to arbitrarily waive imposition" of this statutory expense. *Bradley*, 637 N.W.2d at 213. Rather, "[t]he district court is not only authorized but mandated to order restitution for [crime victim assistance payments], subject only to the offender's reasonable ability to pay." *Id.* at 215.

We decline Goyette's request to overturn *Bradley*, which discussed the fact the offender has the ability to challenge inappropriate CVAP awards. The *Bradley* court stated:

This is not to say an offender is without power to question the validity of an award made by the crime victim compensation program. Although the decision to award compensation lies with the Iowa Department of Justice . . . that decision must be made in compliance with the prevailing law. Thus, a defendant could successfully challenge an order for payment made by the program if such payment was unauthorized by rule or statute.

Id. We find no deprivation of due process when the restitution order mandated as a part of sentencing does not prevent Goyette from seeking administrative or civil relief in separate proceedings. See Iowa Code chapter 910; Iowa Admin. Code r. 61-9.1(912)-9.36(915). See also *State v. Jose*, 636 N.W.2d 38 (Iowa 2001); *State v. Blank*, 570 N.W.2d 924 (Iowa 1997).

Finally, Goyette summarily claims ineffective assistance of counsel. He raises this as an alternative to his appeal issues “should this Court deem any of the issues raised on appeal to be inadequately preserved.” He “incorporates all arguments and authorities cited above and asserts that counsel had a duty to raise, litigate and preserve those issues for appeal and that any failure to do so has resulted in prejudice.” To establish a claim of ineffective assistance of counsel, a defendant must show: (1) the attorney failed to perform an essential duty; and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). The only issue not addressed above appears to involve Goyette’s appellate argument that he is entitled to have a jury determination of the amount of restitution. However, restitution is a phase of sentencing. *State v. Alspach*, 554 N.W.2d 882, 882 (Iowa 1996). Sentencing hearings are not required to conform to the requirements of a criminal trial. *State v. Ashley*, 462 N.W.2d 279, 281 (Iowa 1990). Goyette’s claim of entitlement to a jury is without merit; therefore, Goyette’s counsel did not fail to perform an essential duty and was not ineffective. See *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

We have considered all arguments raised by Goyette and those not specifically addressed are deemed to be without merit.

AFFIRMED.