

IN THE COURT OF APPEALS OF IOWA

No. 3-125 / 10-2042
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH RAY GILLELAND,
Defendant-Appellant.

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY ALAN DOTY
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Gary D. McKenrick and Mark D. Cleve, Judges.

Defendants appeal the district court's decisions that it would not consider their requests for restitution hearings. **REVERSED AND REMANDED.**

Kent A. Simmons, Davenport, for appellants.

Thomas J. Miller, Attorney General, Kevin Cmelik and Martha E. Trout, Assistant Attorneys General, and Alan Ostergren, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Tabor, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.**I. Background Facts & Proceedings.**

Keith Gilleland and Larry Doty were each convicted of criminal offenses and ordered to pay restitution. The defendants filed petitions for a hearing on restitution, pursuant to Iowa Code section 910.7 (2009), more than thirty days after the entry of judgment in their respective criminal cases.¹ They are challenging their restitution plans.

The district court issued similar orders in response to the requests for a restitution hearing, as follows:

Under Section 910.7, Iowa Code (2009), a petition filed concerning an Order for Restitution or a supplemental Order for restitution must be filed within 30 days after entry of the challenged order. When it is initiated after 30 days, the suit is a civil suit in nature. Because the defendant's request here for a restitution hearing was filed more than 30 days after the entry of the supplemental restitution order, his request constitutes the commencement of a collateral civil action to which Chapter 610A, Iowa Code (2009), is applicable. Therefore, no further action can be taken on the defendant's application until he has complied with the requirements of Chapter 610A, Iowa Code (2009).

IT IS THEREFORE ORDERED that the defendant's Request for Restitution Hearing filed [], shall remain unsubmitted pending compliance by the defendant with the requirements of Chapter 610A, Iowa Code (2009).

IT IS FURTHER ORDERED that this matter shall be submitted in a civil action case file with a new case number assigned by the clerk of this Court.

(Citations omitted.) The order also provided that the clerk would provide defendants with a copy of a supervisory order that had been issued by the

¹ Gilleland filed a request for a restitution hearing on November 23, 2010. Doty filed a motion for a restitution clarification and correction hearing on March 22, 2011. Gilleland filed a second request for a restitution hearing on July 6, 2011. In response to Gilleland's second request, the district court referred back to a previous ruling and determined the request for restitution would remain unsubmitted pending compliance with the requirements of Iowa Code chapter 610A.

Seventh Judicial District on November 30, 2006. The order concerned civil litigation by prisoners and was sent to the defendants.²

The defendants appealed the district court decisions, and those appeals were consolidated for our review. On appeal, the Iowa Supreme Court, on its own motion, directed the State to file a statement explaining why the district court's order should not be summarily reversed. The State submitted a statement outlining its appellate arguments. The supreme court then determined the case was not appropriate for summary disposition, noting the legal issues involved in the appeal were complex. The court also appointed legal counsel for the defendants. The case was then transferred to the Iowa Court of Appeals for disposition.

II. Standard of Review.

In restitution matters, our review is for the correction of errors at law. *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004). We determine whether there is substantial evidence to support the court's factual findings, and whether the court has properly applied the law. *Id.*

III. Merits.

A. "Criminal restitution is a creature of statute." *State v. Watson*, 795 N.W.2d 94, 95 (Iowa Ct. App. 2011). At the time of sentencing, or a later time,

² The supervisory order provided:

Pursuant to Iowa Code Chapter 610A, inmates of an institution or facility under the control of the Iowa Department of Corrections or prisoners of a county jail or detention facility, who bring a civil action or appeal shall pay a minimum of 20 percent of the required filing fee before the Court will take any further action on the inmate's or prisoner's action or appeal. The inmate/prisoner shall then make monthly payments of 10 percent of all outstanding fees and costs associated with the inmate's or prisoner's action or appeal.

This supervisory order follows the provisions of section 610A.1(1)(a).

“the court shall set out the amount of restitution including the amount of public service to be performed as restitution and the persons to whom restitution must be paid.” Iowa Code § 910.3. The restitution orders are known as the plan of restitution. *Id.* A restitution plan of payment is also prepared, which takes into consideration the offender’s income, physical and mental health, age, education, employment and family circumstances. *Id.* §§ 910.4(2), 910.5(1)(d)(1).

Section 910.7(1) provides:

At any time during the period of probation, parole, or incarceration, the offender or the office or individual who prepared the offender’s restitution plan 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.

After a petition for hearing has been filed, and before a defendant’s sentence has expired, a court “may modify the plan of restitution or the restitution plan of payment, or both, and may extend the period of time for the completion of restitution.” Iowa Code § 910.7(2).

A defendant may challenge a restitution order by means of a timely appeal or through a petition pursuant to section 910.7. *State v. Jenkins*, 788 N.W.2d 640, 644 (Iowa 2010). A defendant seeking to modify restitution has the option of filing a petition pursuant to section 910.7 or by filing a direct appeal. *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984). If the time for appeal has expired, however, then section 910.7 still provides a defendant with an avenue to challenge a restitution order. *Ernest v. State*, 508 N.W.2d 630, 633 (Iowa 1993). A petition filed pursuant to section 910.7 may be filed at any time during a

defendant's period of probation, parole, or incarceration. *Jenkins*, 788 N.W.2d at 644.

Restitution is part of the criminal sentencing process. *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000). In *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996), the Iowa Supreme Court considered whether a person who had requested a restitution hearing pursuant to section 910.7 was entitled to representation by court-appointed counsel. If a defendant challenges restitution imposed as part of the original sentencing order, or a supplemental order, then the defendant is entitled to court-appointed counsel. *Alspach*, 554 N.W.2d at 884. However, “[w]hen pursuant to Iowa Code section 910.7, a later action is initiated to modify the plan or extend its completion date, the suit is civil in nature and not part of the criminal proceedings. The offender would ordinarily have no right to appointed counsel under such circumstances.” *Id.*

The ruling in *Alspach* was further considered in *State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997), where the court stated, “Our decision [in *Alspach*] was strictly limited, however, to challenges aimed at the *original* sentence, and supplements thereto; later *modifications* to the restitution plan, sought by offenders or corrections officials, are governed by the civil remedies afforded under section 910.7.” The court determined in order to be considered an extension of the criminal proceedings, a petition under section 910.7 would need to be filed within thirty days of the challenged order. *Blank*, 570 N.W.2d at 926; see also *State v. Jose*, 636 N.W.2d 38, 47 (Iowa 2001). Actions filed after that thirty-day period are considered civil, not criminal, in nature. *Id.*; see also *State v. Dudley*, 766 N.W.2d 606, 619 n.5 (Iowa 2009) (noting that after the thirty-day

period, a defendant may still file a challenge under section 910.7, but the case is considered to be civil in nature and a defendant is not entitled to court-appointed counsel); *State v. Lessner*, 626 N.W.2d 869, 871 (Iowa Ct. App. 2001) (noting that when a later petition under section 910.7 is filed it should not be considered part of the criminal proceedings, but is civil in nature).

Case law thus makes clear that proceedings based on a petition filed pursuant to section 910.7 more than thirty days after a challenged restitution order are civil in nature. Under the district court's decision a request for a modification of a restitution plan filed more than thirty days after judgment was entered in a criminal case would need to be filed as a separate civil action under Iowa Code chapter 610A and follow the statutory procedures found in that chapter.

B. We first discuss whether there is any prior legal precedent for the district court's decision.³ In *Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000), the Iowa Supreme Court differentiated between restitution proceedings and proceedings pursuant to chapter 610A. The court stated:

The problem with Goodrich's contention is that the challenged order was not a criminal restitution order. Rather, it was merely an assessment of court costs and attorney's fees under Iowa Code section 610A.1. Iowa Code chapter 610A applies to postconviction relief proceedings because such proceedings are civil actions.

³ We note there is a prior unpublished decision on this issue, *State v. Mockmore*, No. 03-1411, 2004 WL 1898760 (Iowa Ct. App. Aug. 26, 2004). However, "[u]npublished opinions or decisions shall not constitute controlling legal authority." Iowa R. App. P. 6.904(2)(c). Therefore, this unpublished decision cannot be considered as a controlling legal precedent.

Goodrich, 608 N.W.2d at 776; see also *Dudley*, 766 N.W.2d at 614 (citing *Goodrich* for the proposition that the provisions of chapter 910 apply only to criminal restitution orders). While some proceedings pursuant to section 910.7 are civil in nature, we conclude there is no direct legal precedent in Iowa to support the district court's determination that chapter 610A applies to a petition for a restitution hearing filed more than thirty days after a challenged restitution order.

C. We turn next then to a consideration of section 910.7 and chapter 610A in an attempt to determine legislative intent. "The polestar of statutory interpretation is the intent of the legislature." *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000). Legislative intent may be derived from the language of a statute, the statute's subject matter, the object sought to be accomplished, the purpose of the statute, underlying policies, remedies provided, and the consequences from various interpretations of a statute. *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 49 (Iowa 2012).

Often, the intent of the legislature may be gleaned from the language of a statute. *State v. Adams*, 810 N.W.2d 365, 377 (Iowa 2012). "To ascertain the meaning of the statutory language, we consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole." *State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003). The purpose of the restitution statute is two-fold—to protect the public by compensating victims for criminal activities and to rehabilitate the criminal defendant. *Izzolena*, 609 N.W.2d at 548.

D. Chapter 610A, “Civil Litigation by Inmates and Prisoners,” applies to civil litigation brought by “an inmate of an institution or facility under the control of the department of corrections or a prisoner of a county or municipal jail or detention facility.” Iowa Code § 610A.1(1). Section 910.7, however, applies to an offender “during the period of probation, parole, or incarceration.” *Id.* § 910.7(1). A question arises as to whether section 910.7 and chapter 610A are directed to entirely the same category of persons, or in other words, are persons on probation or parole considered to be inmates or prisoners for purposes of chapter 610A.

In *Anderson v. State*, 801 N.W.2d 1, 4 (Iowa 2011), the Iowa Supreme Court determined a person on probation, who lived at his home with an electronic monitoring device, was not an inmate of a county jail or other correctional or mental facility within the meaning of section 903A.5(1). Chapter 610A does not expansively apply to all those under the supervision of the Iowa Department of Corrections, but instead specifically applies to inmates of an institution or facility and prisoners of a jail or detention facility. Iowa Code § 610A.1(1).

We do not find anything in chapter 610A which would lead us to believe it was intended to apply to anyone other than inmates and prisoners. *See Maghee v. Iowa Dist. Ct.*, 712 N.W.2d 687, 694 (Iowa 2006) (noting “[a] hearing to determine penalties under Iowa Code section 610A.3 is more akin to a disciplinary hearing involving loss of earned time credits than to a parole or probation revocation hearing,” and thereby distinguishing actions under chapter 610A from proceedings involving parole or probation).

Furthermore, the office or individual who prepared the offender's restitution plan may petition the court for a restitution hearing. Iowa Code § 910.7(1). It is clear the filing of a petition by such an office or individual is not a filing by an inmate or prisoner, such that chapter 610A would apply. Therefore, out of the universe of those who may file a petition for a restitution hearing under section 910.7, chapter 610A, if it applied at all, would apply only in limited instances. We do not believe the legislature intended different rules to apply to a person who files a petition for hearing on restitution and is an inmate or prisoner from those who may file such a petition who are not an inmate or a prisoner.

E. The State raises an argument based on the fact section 910.7 is captioned, "Petition for hearing." The State asserts the use of the word "petition" means the legislature intended a filing requesting a restitution hearing to create a new civil action. The term "petition" may designate a filing initiating a new civil action. See Iowa R. Civ. P. 1.301(1) ("For all purposes, a civil action is commenced by filing a petition with the court."). However, we focus on the legislative intent of the statute, rather than the label attached to the type of filing. See *Dudley*, 766 N.W.2d at 620 ("We think it proper to focus on the legislative intent evidenced by these statutes, rather than on the label attached to the final judgment.").

As noted above, a person may file a petition for a restitution hearing under section 910.7 "[a]t any time during the period of probation, parole, or incarceration." Under section 910.7, a person may file a petition for a restitution hearing before the time for a direct appeal has expired. See *Blank*, 570 N.W.2d at 926. If the petition under section 910.7 is filed within thirty days of a

challenged restitution order, it is considered an extension of the criminal proceedings. *Dudley*, 766 N.W.2d at 619 n.5. Only a petition filed more than thirty days after a challenge order is considered to be civil in nature. *Id.*

Thus, under the statutory language of section 910.7 all filings are designated a “petition,” but only some of the proceedings are considered to be civil. It is apparent a petition filed pursuant to section 910.7 within thirty days of a challenged restitution order does not create a new civil proceeding, but rather those proceedings are a continuation of the criminal action. We conclude the use of the word “petition” does not provide any clarification concerning the legislature’s intent as to whether chapter 610A should apply to proceedings filed pursuant to section 910.7 more than thirty days after a challenged restitution order.

F. Finally, we consider the operation of the two statutes. “[C]hapter 610A is the legislature’s attempt to deter inmates and prisoners from filing frivolous lawsuits.” *Maghee*, 712 N.W.2d at 692. A district court may dismiss civil litigation brought by an inmate or prisoner when the action is frivolous or malicious in whole or in part. Iowa Code § 610A.2(1)(b); *Maghee*, 712 N.W.2d at 691. Additionally, an inmate must pay a minimum of twenty percent of the required filing fee and make monthly payments of ten percent of all outstanding fees and costs associated with the action. Iowa Code § 610A.1(1)(a); *Goodrich*, 608 N.W.2d at 777.

On the other hand, section 910.7(1) provides, “[T]he court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.” “A petitioner seeking to challenge a restitution award outside of a criminal appeal,

however, is not automatically entitled to a hearing, but is granted a hearing only if the district court determines, based on the petition, that a hearing is warranted.” *Jenkins*, 788 N.W.2d at 644. The district court serves as a gatekeeper and has the discretion to grant a hearing if “it appears from the face of the petition that a request for a section 910.7 hearing is not frivolous.” *Blank*, 570 N.W.2d at 927.

We conclude section 910.7(1) contains a provision allowing the district court to winnow out frivolous requests for a restitution hearing. The provisions of chapter 610A are not necessary to execute this function. The main purpose of chapter 610A, attempting to deter inmates and prisoners from filing frivolous lawsuits, is already fulfilled by the language of section 910.7.⁴

IV. Conclusion.

In summary, we have found no prior legal precedent in case law to support a finding that chapter 610A applies to a petition filed pursuant to section 910.7 more than thirty days after a challenged restitution order, although such proceedings are civil in nature. In attempting to ascertain the intent of the legislature, we noted that chapter 610A applied to only a subgroup of those who may file a petition pursuant to section 910.7. We determined the use of the word “petition” in section 910.7 did not lead to a conclusion the legislature intended the use of that word to signal a petition for a restitution hearing would create a new civil action. Finally, we noted section 910.7 contained a provision that permits a

⁴ We do note that chapter 610A contains a requirement that an inmate or prisoner must pay a minimum of twenty percent of a required filing fee, which section 910.7 does not require. We do not believe this difference is sufficient, in light of other factors, to conclude that the legislature intended for chapter 610A to apply to civil proceedings brought pursuant to section 910.7.

district court to dismiss a frivolous petition and the application of chapter 610A was not necessary to conduct this function.

Taking all of these factors into consideration, we conclude chapter 610A does not apply to a petition for a restitution hearing filed more than thirty days after a challenged restitution order. We reverse the decisions of the district court and remand for further proceedings.

REVERSED AND REMANDED.