

IN THE COURT OF APPEALS OF IOWA

No. 8-698 / 07-0492
Filed October 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS MICHAEL BERTCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, District Associate Judge.

Defendant appeals the district court decision amending his sentence to include restitution to the Crime Victim Assistance Program. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobsen, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

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

Curtis Bertch pled guilty to three counts of assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2(2) (2003). The State alleged Bertch got into a fight at a party in Waterloo, Iowa, and injured John Dunbar, Christopher Belz, and Damon Sivertsen. On September 10, 2004, Bertch was given a one-year sentence on each count, to run concurrently, with all but ten days suspended, and placed on probation for a period of two years.¹ Bertch was ordered to pay victim restitution without specifying the amount.

Belz received medical treatment costing \$15,000, which was charged to the Crime Victim Assistance Program (CVAP). While Bertch was still on probation, on April 25, 2006, the State filed a motion to amend the sentence to include restitution to the CVAP. On April 27, 2006, a default judgment in the amount of \$85,718.71 was entered against Bertch and Steven Quail in favor of Belz in a civil action.² Bertch was expected to be discharged from a residential facility on June 28, 2006.

Bertch filed a motion to dismiss the State's restitution application due to the civil litigation involving the same issues, and he challenged the timeliness of the request to amend the sentence. The district associate court found it had jurisdiction to address the restitution issue. The court found the statement of pecuniary damages was not untimely under Iowa Code section 910.3. It also

¹ Bertch was on probation at the time of the offense, and was sent to the Violator's Program.

² Quail was also allegedly involved in the fight at the party in Waterloo on April 10, 2004.

found Bertch could not re-litigate the issue of his liability up to \$15,000, and was not entitled to a new hearing on the amount of damages. The court granted the motion to amend Bertch's sentence to include restitution to the CVAP.³ Bertch appeals the decision of the court.

II. Standard of Review

We review restitution orders for the correction of errors at law. *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004); *State v. Knudsen*, 746 N.W.2d 608, 609 (Iowa Ct. App. 2008). We are bound by the court's findings of fact if they are supported by substantial evidence. *State v. Paxton*, 674 N.W.2d 106, 108 (Iowa 2004). To the extent Bertch is raising constitutional issues, these are reviewed de novo. *State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006).

III. Jurisdiction

Bertch claims the district associate court did not have jurisdiction to order him to pay restitution in an amount greater than \$10,000. District associate courts have jurisdiction in civil actions where the amount in controversy does not exceed \$10,000. Iowa Code § 602.6306(2); *State v. Erdman*, 727 N.W.2d 123, 125 (Iowa 2007). District associate courts also have jurisdiction of indictable misdemeanors and class "D" felony violations. Iowa Code § 602.6306(2). Indictable offenses are those other than simple misdemeanors. Iowa R. Crim. P. 2.4(2).

³ The court ordered that CVAP is not entitled to recover any amounts under the restitution order that have already been recovered in the civil action. The restitution order does not affect the applicability of joint and several liability for Bertch and Quail in the civil case. Furthermore, any payment made to CVAP under the restitution order is to be offset against the judgment in the civil action.

Bertch was charged with, and pled guilty to, serious misdemeanors. See Iowa Code § 708.2(2) (providing assault causing bodily injury is a serious misdemeanor). The district associate court had jurisdiction over the criminal proceedings against Bertch because it involved an indictable misdemeanor.

The restitution proceedings in this case arose based on the State's motion to amend Bertch's sentence in the criminal proceeding. Bertch filed a timely challenge to the request, and therefore, the restitution proceedings may be considered a continuation of the criminal proceedings. See *State v. Jose*, 636 N.W.2d 38, 47 (Iowa 2001) (noting that to be considered a part of the criminal proceedings a defendant's challenge must be filed within thirty days of a restitution order); *State v. Lessner*, 626 N.W.2d 869, 871 (Iowa Ct. App. 2001) (same). The \$10,000 limitation applies only to civil cases before a district associate court. *Erdman*, 727 N.W.2d at 125. We conclude the district associate court had jurisdiction to consider the restitution matter in this case.

IV. Timeliness

Section 910.3 provides, in relevant part:

If pecuniary damages amounts are not available at the time of sentencing, the county attorney shall provide a statement of pecuniary damages incurred up to that time to the clerk of court. The statement shall be provided no later than thirty days after sentencing. . . . At the time of sentencing or at a later date to be determined by the court, the court shall set out the amount of restitution . . . and the persons to whom restitution must be paid. If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time. At a later date as determined by the court, the court shall issue a permanent, supplemental order, setting the full amount of restitution. The court shall enter further supplemental orders, if necessary.

The thirty-day limit in section 910.3 is directory, not mandatory. *State v. Blakley*, 534 N.W.2d 645, 648-49 (Iowa 1995) (*Blakley I*). The State's motion to amend a sentence to include restitution may be granted, even if the State has not abided by the thirty-day limit, if there is good cause for the departure. *State v. Blakley*, 555 N.W.2d 221, 222 (Iowa 1996) (*Blakley II*). Furthermore, restitution may be ordered despite an untimely statement of pecuniary damages if the defendant has not been prejudiced by the delay. *State v. Bradley*, 637 N.W.2d 206, 213 (Iowa Ct. App. 2001).

The court found Bertch was not prejudiced by the untimely statement of pecuniary damages. The court noted that the sentencing order of September 10, 2004, ordered Bertch to pay victim restitution, but the amount was left blank. Judgment in the civil suit involving Bertch and Belz was not entered until April 27, 2006. Furthermore, Bertch was not discharged from a residential facility until June 28, 2006. We determine the court's findings of fact are supported by substantial evidence, and affirm the court's conclusion that Bertch was not prejudiced by the State's request on April 25, 2006, to amend his sentence. We conclude restitution to the CVAP is not barred on the ground of untimeliness.

V. Causation

Bertch claims the State did not present sufficient evidence to show that the amount of the restitution order was causally connected to his criminal conduct. Generally, in order to calculate a restitution order, the district court must find a causal connection between the established criminal act and the injuries to the victim. *State v. Bonstetter*, 637 N.W.2d 161, 168 (Iowa 2001).

When the payment is ordered to a crime victim assistance program, however, “[t]he district court is not only authorized but mandated to order restitution for these amounts, subject only to the offender’s reasonable ability to pay.” *Bradley*, 637 N.W.2d at 215 (citing Iowa Code § 910.2). Payments to the CVAP are separate and distinct from restitution to be made to a victim. *Id.* There is no requirement of a showing of a causal connection when the order for restitution is based on payments made by the CVAP. *See id.*

A defendant may challenge the validity of an award made to the CVAP only by questioning whether the payment was authorized by rule or statute. *Id.* Bertch raises no such claim in this case. We conclude the district court properly ordered Bertch to reimburse the CVAP for payments the program made to a victim of his crimes.

VI. Constitutional Issues

Bertch raises several constitutional claims. The district associate court disposed of these claims in a summary fashion, stating “Exercise of jurisdiction by the Court in this matter would not constitute an ex post facto law, would not subject defendant to double jeopardy, and would not violate the defendant’s due process rights.” On appeal, defendant also raises a claim of collateral estoppel. It is clear this issue was not raised at the time of the restitution hearing, and we conclude this issue has not been preserved for our review. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997) (noting the appellate courts do not consider an issue raised for the first time on appeal).

A. Bertch claims he was subjected to double jeopardy, in violation of the Fifth Amendment, because he was acquitted of his restitution obligations when the State failed to timely file them. Defendant does not cite any authority to support a claim that an untimely statement of pecuniary damages is considered an “acquittal” for restitution proceedings, raising double jeopardy concerns. In addition, we have already addressed the untimeliness argument and found the statement of pecuniary damages was permitted by section 910.3 in this case.

B. Bertch claims he was denied due process because he was not granted the opportunity to re-litigate the amount of damages. As noted above, in *Bradley*, 637 N.W.2d at 215, we determined that under section 910.2 the district court is not charged with finding causation when restitution is based on payments to the CVAP. The defendant may only challenge whether the payment by the CVAP to the victim was unauthorized by rule or statute. *Bradley*, 637 N.W.2d at 215. We conclude the district court properly found Bertch was not denied due process.

C. Bertch asserts the restitution order violated the ex post facto provisions of the Iowa and federal constitutions because he had completed his sentence when the State filed its motion to amend his sentence. The record shows that on September 10, 2004, Bertch was placed on probation for a period of two years. The State filed its motion to amend on April 25, 2006. The court received a letter from the First Judicial District Department of Correctional Services dated June 28, 2006, stating Bertch was expected to be discharged from a residential facility on that date.

The record shows Bertch had not completed his sentence at the time the State filed the motion to amend the sentence. We conclude Bertch has not shown an ex post facto violation.

VII. Ineffective Assistance

Finally, Bertch contends that if he failed to preserve error on any issues, this was due to ineffective assistance of counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). 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 where we have found a lack of error preservation is the claim of collateral estoppel. In his brief, Bertch cites to the sentencing order and states, “The record in the instant case shows unequivocally that defendant’s restitution was litigated and decided prior to the filing of any restitution claim.” In the sentencing order, however, the amount of victim restitution was left blank because the amount of restitution was not known at the time. Clearly, the amount of victim restitution was not litigated and decided prior to the filing of the State’s motion to amend. We determine counsel did not breach an essential duty by failing to raise this issue at the time of the restitution hearing, and Bertch has failed to show he received ineffective assistance of counsel.

We affirm the decision of the district court.

AFFIRMED.