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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0142**

Abdulkadir Ali Mohamud, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 26, 2013
Reversed and remanded
Kirk, Judge**

Olmsted County District Court
File Nos. 55-CR-09-4247, 55-CR-09-5673

David W. Merchant, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County
Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge;
and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the district court's denial of his petition for postconviction relief and its failure to appoint counsel to represent appellant at a restitution hearing. We conclude that the district court erred when it denied appellant's request for counsel at his restitution hearing. We reverse and remand this matter for appointment of counsel and a rehearing on appellant's restitution challenge.

FACTS

On October 12, 2009, appellant Abdulkadir Ali Mohamud pleaded guilty to second-degree, aggravated assault and second-degree murder. On January 27, 2010, the district court sentenced appellant to 204 months in prison. The district court also ordered appellant to pay \$6,010.80 in restitution to the family of one of his victims, and \$269.50 to the Minnesota Crime Victims Reparations Board (MCVRB).

On March 15, 2010, the MCVRB requested that the district court order an additional \$3,086.16 in restitution to cover funeral expenses, \$1,536.36 of which was submitted on behalf of the victim's father and \$1,549.80 submitted on behalf of the victim's mother. The additional request for \$3,086.16 submitted by the MCVRB on March 15, reflected funeral expenses that it had reimbursed to the parents of the victim. The state requested that the district court modify its restitution order to reflect the actual amount owed to each parent, reduced by the amount each parent had already been reimbursed by the MCVRB. The state asserted that the total cost of the funeral was \$7,343.90. On May 11, the district court ordered that appellant's restitution obligation be

increased to \$7,963.15. It appears that the district court arrived at this total by using the original amount of funeral expenses claimed by the victim's mother and adding the cost of the counseling sessions reimbursed by the MCVRB.¹ Appellant made no objection to this modification to his restitution obligation.

On August 11, the MCVRB sent the district court a request for an additional \$5,277.35 in restitution. Of that amount, \$2,591.10 covered reimbursements to the victim's father for funeral expenses, and \$2,686.25 covered reimbursements to the victim's mother for funeral expenses. In response to a request by the district court for more information, the state explained that the new claim reflects: (1) the MCVRB's increase in the amount of funeral expenses it reimburses from 50% to 75% of the costs; (2) that the claimants had not sought restitution for the costs of the wake as of the time of the prior amendment to the restitution amount; and (3) a new claim for priest's fees not reflected in the earlier claims. On September 8, the district court issued a second amended restitution order increasing appellant's restitution obligation to \$7,971.15.

On September 16, appellant sent a letter to the district court in which he questioned the increase in his restitution obligations. The district court responded with a letter to appellant, construing appellant's letter as a challenge to the September 8 amendment to the restitution figure. The district court advised appellant of the

¹ Appellant's pro se brief notes that the restitution orders of the district court contain errors, including double and triple reimbursements for some of the counseling sessions. It is likely that the first amended restitution order did contain double and triple charges for therapy sessions for the victim's family. It is also likely that this was an inadvertent mathematical error by the district court, which the district court may elect to address on remand.

procedures to challenge restitution under Minn. Stat. § 611A.045, subd. 3(b) (2010), and scheduled a restitution hearing.

On October 14, appellant again sent a letter to the district court indicating that his attorney refused to represent him in his restitution matter because appellant could not pay for his services. The district court sent a letter to the Third Judicial District Chief Public Defender asking whether appellant was entitled to a public defender. The chief public defender indicated that appellant was not eligible for a public defender. The district court then sent appellant a letter on November 2, advising him that the district court would not appoint a public defender and suggesting that appellant's former counsel may be under a continuing duty to provide representation.

On November 5, the district court held a restitution hearing. Appellant, who appeared telephonically, asked at the start of the hearing whether an attorney was representing him and, when he confirmed he was not represented, again stated that he needed an attorney to represent him at the hearing. The district court ruled that appellant was not entitled to a public defender and proceeded with the hearing.

On November 16, the district court again modified the restitution order, setting appellant's restitution obligation amount at \$7,271.62. On January 26, 2012, appellant petitioned the district court for postconviction relief, challenging its modification to appellant's restitution and claiming ineffective assistance of counsel because appellant was unrepresented at the hearing on his challenge to restitution. The district court denied appellant's petition for postconviction relief. This appeal follows.

DECISION

I. The district court erred when it did not appoint counsel to represent appellant during the hearing challenging the modification of his restitution.

Appellant argues that the district court erred when it denied his petition for postconviction relief because: (1) the district court lacked legal authority under Minn. Stat. § 611A.04, subd. 1(b) (2010), to modify the restitution; and (2) even if permissible under statute, the modification violated appellant's constitutional due process rights. Appellant also argues that his constitutional guarantee of the assistance of counsel was violated by the district court. Because the question of whether appellant should have received representation at the restitution hearing is dispositive, we address it first.

The state concedes that, in light of this court's recent decision in *State v. Maddox*, 825 N.W.2d 140 (Minn. App. 2013), appellant is entitled to representation in the restitution proceedings. The United States and Minnesota Constitutions guarantee a criminal defendant the right to assistance of counsel. U.S. Const. amends VI, XIV, § 1; Minn. Const. art. I, § 6. The right to counsel applies to critical stages of the criminal proceedings. *State v. Krause*, 817 N.W.2d 136, 144 n.6 (Minn. 2012). Sentencing is a critical stage of a criminal proceeding. *Maddox*, 825 N.W.2d at 144. “[A] restitution hearing under Minn. Stat. § 611A.045, subd. 3(b), is a critical stage of the state's prosecution of a criminal defendant to which an accused's right to counsel applies under Minnesota Constitution article I, section six . . . and the obligation to pay restitution is a part of a criminal sentence.” *Id.* at 146 (citation omitted).

There is no dispute between the parties that appellant did not waive his right to representation at the restitution hearing. And this court “indulge[s] in every reasonable presumption against waiver.” *State v. Kivimaki*, 345 N.W.2d 759, 763 (Minn. 1984). Appellant wrote the district court prior to the restitution hearing requesting counsel, and, at the hearing, he made oral requests for representation. Appellant was denied counsel at a proceeding in which he had a constitutional right to representation, and he did not waive his right to counsel. Thus, because *Maddox* clarified the law, the district court erred when it did not appoint a public defender to represent appellant at the restitution hearing.

Because appellant was entitled to representation at the restitution hearing, we decline to address the remaining challenges he raises. We reverse the district court’s decision on appellant’s petition for postconviction relief and remand this matter for appointment of counsel for appellant and for a rehearing on appellant’s challenge to restitution under Minn. Stat. § 611A.045, subd. 3(b).

Reversed and remanded.