

FILED  
8-27-15  
Court of Appeals  
Division I  
State of Washington

NO. 72828-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

YOUNG KEUN LEE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	5
1. THE STATE CONCEDES THAT THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON RESTITUTION .....	5
2. THE DUE PROCESS CLAUSE DOES NOT CONFER A RIGHT TO CONFRONTATION AT A RESTITUTION HEARING.....	6
3. NEITHER THE SIXTH AMENDMENT NOR ARTICLE I, SECTION 21, ENTITLES LEE TO A JURY DETERMINATION OF RESTITUTION.....	9
D. <u>CONCLUSION</u> .....	13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Alleyne v. United States, \_\_\_ U.S. \_\_\_,  
133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)..... 11

Morrissey v. Brewer, 408 U.S. 471,  
92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)..... 7, 8

Southern Union Co. v. United States, \_\_\_ U.S. \_\_\_,  
132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012)..... 10, 11

United States v. Bengis, 783 F.3d 407 (2d Cir. 2015)..... 11

United States v. Bussell, 414 F.3d 1048 (9th Cir. 2005) ..... 10

United States v. Day, 700 F.3d 713 (4th Cir. 2012)..... 10, 11

United States v. Garza, 429 F.3d 165 (5th Cir. 2005) ..... 10

United States v. George, 403 F.3d 470 (7th Cir. 2005) ..... 10

United States v. Green, 722 F.3d 1146 (9th Cir. 2013) ..... 11

United States v. Leahy, 438 F.3d 328 (3d Cir. 2006) ..... 10

United States v. Milkiewicz, 470 F.3d 390 (1st Cir. 2006) ..... 10

United States v. Miller, 419 F.3d 791 (8th Cir. 2005) ..... 10

United States v. Reifler, 446 F.3d 65 (2d Cir. 2006)..... 10

United States v. Rosbottom, 763 F.3d 408 (5th Cir. 2014),  
cert. denied, 135 S. Ct. 985 (2015) ..... 11

United States v. Sosebee, 419 F.3d 451 (6th Cir. 2005)..... 10

United States v. Williams, 445 F.3d 1302 (11th Cir. 2006)..... 10

United States v. Wolfe, 701 F.3d 1206 (7th Cir. 2012)..... 11

<u>United States v. Wooten</u> , 377 F.3d 1134 (10th Cir. 2004).....	10
<u>Williams v. New York</u> , 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).....	6
 <u>Washington State:</u>	
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	12
<u>State v. Dang</u> , 178 Wn.2d 868, 312 P.3d 30 (2013).....	8
<u>State v. Fambrough</u> , 66 Wn. App. 223, 831 P.2d 789 (1992).....	7, 8
<u>State v. Kinneman</u> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	3, 4, 5, 6, 10, 11, 12
<u>State v. Kisor</u> , 68 Wn. App. 610, 844 P.2d 1038 (1993).....	7
<u>State v. Pollard</u> , 66 Wn. App. 779, 834 P.2d 51 (1992).....	7
<u>State v. S.S.</u> , 67 Wn. App. 800, 840 P.2d 891 (1992).....	7
<u>State v. Smith</u> , 33 Wn. App. 791, 658 P.2d 1250 (1983).....	8
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	12
<u>State v. Strauss</u> , 119 Wn.2d 401, 832 P.2d 78 (1992).....	6, 7

**A. ISSUES PRESENTED**

1. Should this case be remanded for an evidentiary hearing on restitution, where the parties agree that that is the appropriate remedy in light of the trial court's explicit statement that it would not grant the defendant's request for an evidentiary hearing?

2. Does a defendant have a due process right to confrontation at a restitution hearing?

3. Does a defendant's right to trial by jury under the Sixth Amendment and article I, section 21, entitle him to a jury determination of restitution?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

The State initially charged the defendant, Young Keun Lee, with assault in the third degree. CP 1. Pursuant to a plea agreement, Lee pled guilty to amended charges of assault in the fourth degree and attempted bail jumping. CP 6-8, 23. Lee received a suspended sentence, and restitution was to be determined at a later date. CP 25-26. The trial court later entered

a timely order of restitution in the amount of \$51,995.01. CP 28.

Lee timely appealed. CP 30-31.

## 2. SUBSTANTIVE FACTS.

Approximately four months after sentencing, a restitution hearing was held in the trial court. RP<sup>1</sup> 17. The State requested that the court order \$144.69 of restitution to the assault victim, Jose Lesaca, and \$51,850.32 to King County Risk Management to reimburse them for worker's compensation benefits paid to Lesaca for medical care and time off from work as a result of the assault by Lee. RP 18-20, 26; CP 28. Lee, who had waived his presence but was represented by counsel, indicated that he did not believe the restitution requested was causally related to the assault and requested a continuance for an evidentiary hearing, citing to indications in medical records the State had presented that Lesaca's injury may have been related to a pre-existing condition. RP 19-22. The State argued that the documents did establish a causal relationship between Lesaca's physical problems and the assault. RP 22-23, 27.

---

<sup>1</sup> The report of proceedings in this case comprises a single volume covering proceedings on July 2, 2014, November 4, 2014, and November 18, 2014. It will be referred to as "RP."

After hearing from both sides, the trial court announced that it wanted to continue the hearing so that everyone had time to read through the “voluminous” documentation the State had provided.<sup>2</sup> RP 17, 27. The court stated, “I’m not setting it over for an evidentiary hearing. I’m setting it over just to continue the matter so we can all read through the documents a little more closely.” RP 27. The court set a new date a few weeks away, saying, “We can determine at that time whether I’m comfortable to rule, or whether we need an evidentiary hearing.” RP 28.

Two weeks later, the parties reconvened and again addressed whether the documents provided by the State sufficiently proved that the victim’s back problems were caused by the assault. RP 29-51. Lee repeatedly asked the court to schedule an evidentiary hearing, citing State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005). RP 33, 42, 45, 54. Lee’s arguments suggested that he believed an evidentiary hearing would necessarily involve live testimony and cross-examination. RP 42, 52. The State acknowledged that Kinneman required an evidentiary hearing under the circumstances, but argued that the

---

<sup>2</sup> Unfortunately, it appears that these documents were neither marked as an exhibit nor formally filed, except for a few pages of billing records that were filed later. CP 32-41. As a result, the vast majority of the documents reviewed by the trial court are not in the record on appeal.

current hearing was the required evidentiary hearing, pointing out that it had presented the court with sufficient documentary evidence, and that live testimony was not required. RP 46. Lee responded that the court had specifically stated that the current hearing would not be an evidentiary hearing, and that he had thus had no notice that he should be prepared to present his own evidence. RP 51-52.

In the end, the trial court deferred its ruling, stating, "I'm going to read Kinneman and maybe some other cases and see if legally I'm required to hold any further hearing." RP 55. The court asked the parties to identify any particular documents within the records provided by the State that each party believed supported its position on causation, and stated it would look at everything

and determine, without more oral argument, whether I think there's a sufficient basis here for a preponderance of evidence to support the State's position. If I do, I will sign [the State's proposed restitution order]. If I think that more of a factual evidentiary hearing is necessary, I'll send out an Order to that effect and a proposed date. Is that reasonable?

RP 57. The parties indicated their agreement. RP 57. Later that day, the trial court signed the State's proposed Order Setting Restitution. CP 28.

**C. ARGUMENT**

1. THE STATE CONCEDES THAT THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON RESTITUTION.

Lee contends that this case should be remanded to the trial court for an evidentiary hearing because the trial court erred when it failed to hold an evidentiary hearing to resolve the parties' dispute as to whether the restitution requested was a result of Lee's crime. The State agrees that Lee did not have a fair opportunity to refute the State's evidence regarding restitution because he detrimentally relied on the judge's statement that the second hearing would not be an evidentiary hearing. This Court should therefore remand the case for an evidentiary hearing.

When a defendant disputes facts relevant to determining restitution, the trial court must hold an evidentiary hearing, at which the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Here, it appears from the record that neither the parties nor the trial court understood the first restitution hearing to be an evidentiary hearing, and the trial court explicitly stated that the second hearing would not be an evidentiary hearing. RP 22, 23, 27. Because no evidentiary hearing of which Lee had proper notice

occurred in this case, this Court should remand the case for an evidentiary hearing on restitution. See Kinneman, 155 Wn.2d at 286.

2. THE DUE PROCESS CLAUSE DOES NOT CONFER A RIGHT TO CONFRONTATION AT A RESTITUTION HEARING.

Lee contends that he has a constitutional right under the due process clause to confront the witnesses against him at an evidentiary restitution hearing, unless the trial court finds good cause for not allowing confrontation. This claim should be rejected. It is well-settled law that there is no due process right to cross-examination in a restitution hearing.

The Due Process Clause does not require that sentencing courts consider only evidence given in open court by witnesses subject to cross-examination. Williams v. New York, 337 U.S. 241, 250, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); State v. Strauss, 119 Wn.2d 401, 414, 832 P.2d 78 (1992). "Due process is satisfied so long as a defendant has an opportunity to rebut evidence presented at the time of sentencing, and so long as there is some factual basis in the record to corroborate information supplied by persons

who are not subject to cross examination.” State v. S.S., 67 Wn. App. 800, 807-08, 840 P.2d 891 (1992).

As the imposition of restitution is a part of sentencing, due process similarly does not prevent the consideration of hearsay or unfronted testimony at a restitution hearing. See State v. Pollard, 66 Wn. App. 779, 784, 834 P.2d 51 (1992) (rules of evidence do not apply at sentencing, and therefore do not apply at restitution hearings); State v. Fambrough, 66 Wn. App. 223, 224-27, 831 P.2d 789 (1992) (because “due process is substantially relaxed at a restitution hearing,” opportunity for confrontation is not required). Due process requires only that the evidence presented at a restitution hearing be reliable and that the defendant have an opportunity to refute it. Id. at 784-85 (citing Strauss, 119 Wn.2d 401); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993).

Lee’s claim that due process entitles him to confrontation is based on his analogy to Morrissey v. Brewer, in which the United States Supreme Court held that due process requires that the defendant be allowed to cross-examine adverse witnesses at a parole revocation hearing unless good cause is shown not to allow confrontation. 408 U.S. 471, 92 S. Ct. 2593, 2600-02, 33 L. Ed. 2d 484 (1972). Washington courts have applied Morrissey to require

confrontation in contexts such as a sentence modification, revocation of a suspended sentence, revocation of a conditional release following acquittal by reason of insanity, and revocation of a Special Sex Offender Sentencing Alternative. See Brief of Appellant at 11.

However, the holding of Morrissey, and of all the Washington cases cited by Lee, turned on the fact that the hearings in question involved the potential termination of the defendant's liberty. E.g., Morrissey v. Brewer, 408 U.S. at 482; State v. Dang, 178 Wn.2d 868, 883, 312 P.3d 30 (2013) (finding a limited right to cross-examination because, "[l]ike parole, sentencing modification, and SSOSA revocation, the trial court's revocation of an insanity acquittee's conditional release implicates a conditional liberty dependent on the observance of special terms and conditions."). The imposition of restitution, in contrast, does not involve a loss of liberty. Fambrough, 66 Wn. App. at 226-27; State v. Smith, 33 Wn. App. 791, 799, 658 P.2d 1250 (1983). Morrissey's limited due process right to confrontation therefore does not apply in a restitution hearing.

Because there is no due process right to confrontation at a restitution hearing, this Court should hold that the State has no obligation to present live testimony rather than documentary evidence at the evidentiary hearing upon remand.

3. NEITHER THE SIXTH AMENDMENT NOR ARTICLE I, SECTION 21, ENTITLES LEE TO A JURY DETERMINATION OF RESTITUTION.

Lee contends that the right to trial by jury in the Sixth Amendment and article I, section 21, of the Washington Constitution entitle him to a jury determination of restitution. This claim should be rejected. The Washington Supreme Court and all circuits of the federal court of appeals have determined that the Sixth Amendment does not grant a right to a jury determination of restitution, and the Washington Supreme Court has determined that article I, section 21, grants no broader protection than the Sixth Amendment when it comes to sentencing.

Although the United States Supreme Court has never directly addressed whether the Sixth Amendment grants defendants the right to a jury determination of the facts on which

restitution is based, the Washington Supreme Court and all circuits of the federal court of appeals have concluded that it does not. Kinneman, 155 Wn.2d at 282; United States v. Milkiewicz, 470 F.3d 390, 403 (1st Cir. 2006) (rejecting argument that “maximum” amount of restitution based solely on fact of conviction is zero dollars); United States v. Reifler, 446 F.3d 65, 118-20 (2d Cir. 2006); United States v. Leahy, 438 F.3d 328, 337-38 (3d Cir. 2006); United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005); United States v. Sosebee, 419 F.3d 451, 454, 461 (6th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); United States v. Miller, 419 F.3d 791, 792-93 (8th Cir. 2005); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); United States v. Wooten, 377 F.3d 1134, 1144-45 (10th Cir. 2004); United States v. Williams, 445 F.3d 1302, 1310-11 (11th Cir. 2006).

Lee contends that a jury determination of restitution is required under Southern Union Co. v. United States, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), which held that Apprendi applies to the imposition of criminal fines. However, not

only is this Court bound by Kinneman's holding that Apprendi does not apply to restitution until the Washington State or United States Supreme Court says otherwise, but the argument Lee raises has already been rejected by the Ninth Circuit and all other circuits that have considered the issue in light of Southern Union. United States v. Green, 722 F.3d 1146, 1149-50 (9th Cir. 2013) (holding Southern Union's extension of Apprendi does not require abandonment of prior circuit precedent that Apprendi does not apply to restitution); United States v. Bengis, 783 F.3d 407, 412-13 (2d Cir. 2015); United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985 (2015); Day, 700 F.3d at 732; United States v. Wolfe, 701 F.3d 1206, 1216-18 (7th Cir. 2012).<sup>3</sup>

Lee's contention that article I, section 21, independently provides a right to a jury determination of restitution is similarly ill-founded, as the Washington Supreme Court has held that article I, section 21, does not provide any broader protection than the Sixth

---

<sup>3</sup> Lee also briefly cites Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), in support of his argument for a jury determination of restitution. Brief of Appellant at 17-18. Like Southern Union, Alleyne was based on Apprendi. 133 S. Ct. at 2155. Lee offers no argument, and the State is aware of none, explaining why Alleyne would compel the extension of Apprendi to restitution when Southern Union does not.

Amendment in the context of sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). Lee relies on Sofie v. Fibreboard Corp.<sup>4</sup> and its conclusion that article I, section 21, provides for the jury determination of damages in a civil suit, yet that holding turned on the supreme court's determination that the measure of damages in a civil suit was traditionally within the jury's province at the time the Washington State Constitution was enacted. Sofie, 112 Wn.2d at 645-46.

However, criminal sentencing was not within the jury's province at the time the state constitution was enacted. Smith, 150 Wn.2d at 154, 156. Therefore, neither Sofie nor any other source provides justification for finding a constitutional right under article I, section 21, to a jury determination of restitution.

Because this Court is bound by Kinneman's holding that there is no Sixth Amendment right to a jury determination of restitution, and because article I, section 21, does not provide any broader protection in the context of sentencing, this Court should hold that the State has no obligation upon remand to prove the amount and causal nexus of the requested restitution to a jury.

---

<sup>4</sup> Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989).

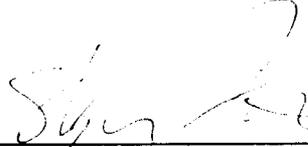
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to remand this case for an evidentiary hearing on restitution, and to clarify that Lee has no constitutional right to confrontation or a jury determination at the evidentiary hearing.

DATED this 27<sup>th</sup> day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
STEPHANIE FINN GUTHRIE, WSBA #43033  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Gregory C. Link, the attorneys for the appellant, at greg@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Young Keun Lee, Cause No. 72828-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of August, 2015.

W Brame

Name:

Done in Seattle, Washington