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Court of Appeals
Division I
State of Washington
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Supreme Court No. 96490-4
COA No. 76618-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Shacon Fontane Barbee requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Barbee, No. 76618-0-I, filed October 8, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The restitution statute unambiguously requires the trial court to determine the amount of restitution "at the sentencing hearing or within one hundred eighty days." RCW 9.94A.753(1). Here, the trial court entered a new restitution order, adding a new victim, more than three years after Barbee's "sentencing hearing." Despite the plain language of the statute, the Court of Appeals upheld the new order because it was entered within 180 days of Barbee's "resentencing hearing." Did the court misinterpret and misapply the statute, warranting review by this Court? RAP 13.4(b)(1), (2), (4).

2. The trial court entered a restitution order without holding a hearing at which Barbee could be present. The record explicitly states that Barbee did not waive his right to be present at a restitution hearing. Nonetheless, the Court of Appeals held that no due process violation occurred because *defense counsel* did not request a hearing or object to

the restitution order. Does this case present significant constitutional questions regarding an offender's constitutional right to be present at a restitution hearing and counsel's ability to waive that right on behalf of the client, warranting review by this Court? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

1. The trial court entered a timely restitution order awarding \$15,078 in restitution to the victim of counts VII and VIII.

Shacon Barbee was charged with several crimes related to his alleged participation in a prostitution enterprise. CP 45-49. The charges included three counts of theft: two counts of first degree theft from the United States Social Security Administration (counts VII and VIII) and one count of second degree theft from the Department of Social and Health Services (DSHS) (count IX). CP 48. The State alleged Barbee received regular payments from the Supplemental Security Income Program and DSHS, based on claimed disabilities and poverty, but did not report his prostitution-related income to these agencies. CP 85.

Following a jury trial, Barbee was convicted of all three theft counts as charged, as well as most of the other charges. CP 50. His sentencing hearing was held on November 15, 2013. He received an

exceptional sentence on count I—promoting the commercial sexual abuse of a minor—based on two aggravating factors. CP 52.

A restitution hearing was held on May 7, 2014. The State requested \$15,078 in restitution payable to the Social Security Administration, the victim of counts VII and VIII. CP 48, 71, 73-76. The court entered an order awarding \$15,078 in restitution to the Social Security Administration, in accordance with the State’s request. CP 66.

2. The sentence for count I was reversed on appeal and remanded to the trial court for the limited purpose of resentencing Barbee on that count.

Barbee appealed his judgment and sentence, raising several issues. He did not challenge the restitution order.

In an unpublished opinion, Division One affirmed the convictions and exceptional sentence but remanded to the trial court with instructions to amend the judgment and sentence to correct the seriousness level and standard sentence range for count I, and to strike one of the aggravators underlying the exceptional sentence for count I. CP 128-50. The court left the remaining portions of the sentence intact and did not address the restitution order in its opinion. *Id.*

Barbee filed a petition for review in this Court, raising several issues, but he did not challenge the restitution order. This Court granted

review of two issues: (1) whether Barbee's two convictions for promoting prostitution violated the Double Jeopardy Clause; and (2) whether the Court of Appeals erred in affirming the exceptional sentence for count I despite its holding that the standard sentence range had been miscalculated. CP 152.

After this Court granted review, the parties discovered that Barbee's exceptional sentence for count I exceeded the statutory maximum of 120 months. CP 154-55. In light of this discovery, the Court remanded to the trial court for "resentencing on that count." CP 79, 155. The Court rejected the double jeopardy argument and affirmed the two convictions for promoting prostitution. CP 154-77. The Court mandated the case to the superior court "for further proceedings in accordance" with its opinion. CP 77.

A resentencing hearing was held on March 22, 2017. Barbee was present with counsel. 3/22/17RP 8. Consistent with the Court's mandate, the trial court resentenced Barbee on count I only. 3/22/17RP 15; CP 216.

Neither the parties nor the court mentioned restitution at any point during the resentencing hearing. See 3/22/17RP 8-20. On the new judgment and sentence, the box next to the phrase, "Defendant waives

right to be present at future restitution hearing(s),” is not checked. CP 215. Likewise, the minutes of the hearing state, “Defendant does not waive right to be present at restitution hearing.” CP 254-56.

3. The trial court entered a second restitution order, awarding an additional \$4,150.09 in restitution to the victim of count IX, long after the statutory 180-day deadline had passed and without holding a hearing at which Barbee could be present.

Despite this Court’s limited mandate only to resentence Barbee on count I, the State filed additional restitution documents and requested a new restitution order. CP 259-73. The State requested the court order Barbee to pay an additional \$4,150.09 in restitution to a second victim—DSHS. Id. The State’s documentation included a copy of a letter sent from DSHS to Barbee several years earlier in July 2011, long before his sentencing hearing, which notified him of the alleged overpayment of medical and food assistance benefits. Id.

No restitution hearing was held. The court entered a second restitution order on June 14, 2017, in accordance with the State’s request. CP 257-58. In addition to the original amount of \$15,078 awarded to the Social Security Administration, the court awarded an additional amount of \$4,150.09 to DSHS. Id.

Barbee appealed the new restitution order, arguing it was untimely because it was entered more than 180 days after his sentencing hearing, and his due process rights were violated because he did not waive his right to be present at a restitution hearing. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The Court of Appeals violated the plain language of the restitution statute by holding the 180-day time clock began to run following Barbee’s “resentencing” hearing rather than his “sentencing” hearing.**

Contrary to the Court of Appeals’ opinion, the trial court exceeded its statutory authority by entering a new restitution order, adding a second victim, long after the statutory 180-day deadline had passed. The Court of Appeals’ misinterpretation and misapplication of the restitution statute warrants review by this Court. RAP 13.4(b)(1), (2), (4).

- a. The plain language of the statute requires the trial court to enter a restitution award within 180 days of the “sentencing hearing,” not the “resentencing hearing.”

The trial court entered the new restitution order on June 14, 2017, more than three and a half years after Barbee’s sentencing hearing, which was held in November 2013. CP 257-58. This was well

beyond the statutory 180-day deadline. See RCW 9.94A.753(1). The new order is not a permissible “modification” of the original order because it awards restitution to a second victim who was not covered by the original order. The trial court exceeded its authority by failing to comply with the statutory deadline.

A court’s authority to order restitution is derived wholly from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). “A restitution order is void if statutory provisions are not followed.” State v. Johnson, 96 Wn. App. 813, 815, 981 P.2d 25 (1999).

The proper application of the restitution statute depends upon its plain meaning. State v. Gray, 174 Wn.2d 920, 926-27, 280 P.3d 1110 (2012). Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Id. If the statute is unambiguous after a review of the plain meaning, the Court’s inquiry is at an end. Id.

The interpretation and application of the restitution statute is reviewed *de novo*. Gonzalez, 168 Wn.2d at 263.

The plain language of the restitution statute unambiguously requires the trial court to determine the amount of restitution within 180

days of the “sentencing hearing.” The statute provides, “When restitution is ordered, the court shall determine the amount of restitution due *at the sentencing hearing or within one hundred eighty days . . .*” RCW 9.94A.753(1) (emphasis added).

The statutory 180-day time limit is mandatory unless extended by the court for good cause. Gray, 174 Wn.2d at 925-26; State v. Moen, 129 Wn.2d 535, 542-43, 919 P.2d 69 (1996); State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994). The State bears the burden to ensure that restitution is accurately determined within the 180-day deadline. Moen, 129 Wn.2d at 542.

If the State cannot meet the deadline, it must move to continue the hearing for good cause. Johnson, 96 Wn. App. at 816-17. The motion must be made before the 180-day deadline has passed. Id. The court must make an express finding of good cause in order to extend the 180-day deadline. State v. Grantham, 174 Wn. App. 399, 406, 299 P.3d 21, review denied, 178 Wn.2d 1006 (2013).

Once a timely restitution order is entered, the court has “broad power” to modify it “as to amount, terms, and conditions during any period of time the offender remains under the court’s jurisdiction.” RCW 9.94A.753(4); Gray, 174 Wn.2d at 925.

But the statute does not authorize the court to “modify” a restitution order beyond the statutory time deadline by adding a new victim that was not covered by the original order. State v. Chipman, 176 Wn. App. 615, 309 P.3d 669 (2013). That is because there is no restitution to modify if it is not “determined” in the first place. Gray, 174 Wn.2d at 932 (quoting RCW 9.94A.753(1)). A restitution award that is not timely “determined” may not be modified. Gray, 174 Wn.2d at 926, 932.

Restitution must be “determined” as to each victim before the expiration of the 180-day deadline. Chipman, 176 Wn. App. at 622. In Chipman, the trial court timely ordered restitution to the victim in count II. Id. at 617. After the deadline passed, the court ordered additional restitution to the victim of count I. Id. 619. The Court of Appeals held this was not a timely modification because the original restitution order had not “determined” the amount of restitution for the victim of count I. Id. 619-21. The second restitution order was not merely a modification of the original order but was “an independent restitution order that was the product of a separate restitution hearing relating to a different victim with different injuries named in a different count.” Id. at 622. As such, it was independently subject to the 180-day deadline. Because the

order was entered after the deadline had passed, it was untimely. Id.; see also State v. Burns, 159 Wn. App. 74, 79-80, 244 P.3d 988 (2010) (restitution order may not be modified beyond the statutory deadline to add restitution for uncharged crimes).

Here, the trial court held a hearing and awarded restitution to the Social Security Administration—the victim of counts VII and VIII—within 180 days of the sentencing hearing. CP 66. This order was timely. RCW 9.94A.753(1). More than three years later, the court entered a second restitution award adding an additional victim—DSHS, the victim of Count IX. CP 257-58.

That portion of the new order awarding restitution to DSHS was not a permissible “modification” of the original timely award because the original order had not covered DSHS. Chipman, 176 Wn. App. at 622. Instead, the new award was an independent restitution order relating to a different victim with different injuries named in a different count. Id. Because it was entered more than 180 days after the sentencing hearing, it was untimely and in excess of the court’s statutory authority. Id.; Burns, 159 Wn. App. at 79-80; RCW 9.94A.753(1).

The Court of Appeals attempted to circumvent the plain language of the statute by holding the 180-day time clock did not begin to run until after Barbee's "resentencing hearing," rather than his "sentencing hearing." Slip op. at 4. By doing so, the court misapplied the statute. The statute unambiguously requires the trial court to determine the amount of restitution within 180 days of the "sentencing hearing," not the "resentencing hearing." RCW 9.94A.753(1).

The State had all of the information it needed to request restitution for DSHS, the victim of count IX, well before Barbee's sentencing hearing in November 2013. CP 259-73. Allowing the State to wait until after Barbee's *resentencing* hearing in March 2017 to request restitution for DSHS unfairly penalizes Barbee for prevailing in his appeal and successfully obtaining a resentencing hearing. This inequitable result is an additional reason why this Court should grant review and reverse the Court of Appeals.

- b. This Court's opinion remanding for resentencing on count I did not restart the statutory time clock because the original restitution order remained valid and final.

This Court's opinion reversing the sentence on count I and remanding for "resentencing on that count," see CP 79, 155, did not restart the time clock for restitution. Neither Barbee nor the State challenged the restitution order on appeal and this Court did not address it. The Court reversed only a portion of the sentence—the prison term for count I. That portion of the sentence was erroneous because it exceeded the statutory maximum. But the remaining portions of the sentence remained valid and final. The trial court did not need to revisit the restitution award in order to correct the portion of the sentence that was erroneous. The trial court's decision to enter a new restitution award on remand exceeded the scope of this Court's mandate.

It is well established that "the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed." In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (quoting State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980)).

This Court has consistently held that “[c]orrecting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.” In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). In other words, when only a portion of the sentence is reversed on appeal, “the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced’ is unaffected.” State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (quoting In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)).

When a portion of a sentence is reversed on appeal, the trial court’s discretion to resentence on remand is limited by the scope of the appellate court’s mandate. State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992). The trial court has discretion to decide those issues that are necessary to resolve the case on remand. State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), aff’d, 163 Wn.2d 664, 185 P.3d 1151 (2008).

Here, this Court held that only the sentence for count I was erroneous because it exceeded the statutory maximum. CP 154-55. The Court reversed only that portion of the sentence and remanded to the

trial court only for “resentencing on that count.” CP 79, 155. The Court left the remaining portions of the sentence untouched.

The Court’s opinion did not affect the finality of those portions of Barbee’s judgment and sentence that were correct and valid when imposed. Goodwin, 146 Wn.2d at 877. The restitution order was not challenged or reviewed on appeal. It remained valid and final. Id.

The trial court did not need to readdress restitution in order to correct the portion of the sentence that was erroneous. By revisiting restitution, and entering a new restitution order, the court exceeded the scope of this Court’s mandate. Schwab, 134 Wn. App. at 645.

Because the restitution order was still final and valid on remand, the trial court did not have authority to change the terms of restitution.

2. Barbee’s right to due process was violated because the court entered a restitution award without holding a hearing at which Barbee could be present.

The trial court entered the new restitution award on remand without providing Barbee a hearing at which he could be present. As a result, Barbee’s right to due process was violated. This Court should grant review because this case presents significant constitutional questions—whether a defendant has a constitutional right to be present

at a restitution hearing, and whether that right can be waived by defense counsel. RAP 13.4(b)(3), (4).

A court may not enter a restitution order unless the defendant receives advance notice and an opportunity to object. State v. Saunders, 132 Wn. App. 592, 608, 132 P.3d 743 (2006); State v. Burmaster, 96 Wn. App. 36, 56, 979 P.2d 442 (1999).

The defendant must be given advance notice so that he has an opportunity to object and request a hearing. “[R]estitution is not ‘determined’ within the meaning of the statute until an objecting defendant receives a restitution hearing.” State v. Ryan, 78 Wn. App. 758, 762, 899 P.2d 825 (1995).

If a restitution hearing is held, the defendant has a right to be present. This right derives from the state and federal constitutions and court rule. State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997); Const. art. 1, § 22 (“In criminal prosecutions the accused shall have the right to appear and defend in person”); U.S. Const. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law”); CrR 3.4(a) (“The defendant shall be present at . . . the imposition of sentence.”).

The due process right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights might be affected, and evidence should not be taken in his absence." State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975); see also Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (defendant must "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge").

This due process right to be present extends to any sentencing proceeding where the act to be done by the court involves the exercise of discretion or judgment and is more than merely ministerial. State v. Davenport, 140 Wn. App. 925, 932-33, 167 P.3d 1221 (2007). It also extends to any proceeding where the court increases the quantum of punishment imposed. See State v. Hotrum, 120 Wn. App. 681, 684, 87 P.3d 766 (2004).

Thus, the constitutional right to be present extends to a restitution hearing because imposing restitution involves the exercise of judicial discretion and judgment, and increases the quantum of punishment. See State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005) ("RCW 9.94A.753 allows the judge considerable discretion in

determining restitution”); id. at 281 (“restitution is punishment”); State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999) (when authorized by statute, imposition of restitution is generally within the discretion of the trial court).

Where a defendant has a constitutional right to be present, the presence of counsel is insufficient to satisfy the constitutional mandate. Walker, 13 Wn. App. at 557.

Here, the trial court entered a new restitution order, awarding an additional \$4,150.09 in restitution to a new victim, without holding a hearing at which Barbee could be present. Barbee did not waive his right to be present. To the contrary, the judgment and sentence, and minutes of the resentencing hearing, explicitly state he did *not* waive his right to be present at a future restitution hearing. CP 215, 254-56.

Contrary to the Court of Appeals’ holding, Slip op. at 5-6, counsel’s failure to request a hearing and his signature on the restitution order are not sufficient to waive *Barbee*’s constitutional right to be present at a restitution hearing. Walker, 13 Wn. App. at 557.

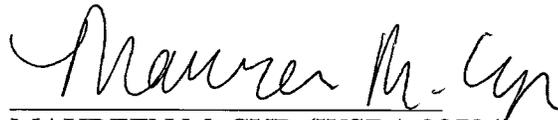
The trial court’s decision to enter a restitution order without holding a hearing at which Barbee could be present, in the absence of any waiver by Barbee of his right to be present, violated his due

process rights. Saunders, 132 Wn. App. at 608; Burmaster, 96 Wn. App. at 56; Walker, 13 Wn. App. at 557; Snyder, 291 U.S. at 105-06. This Court should grant review and reverse the Court of Appeals.

E. CONCLUSION

This Court should grant review because the Court of Appeals misapplied the restitution statute, and because the case presents a significant constitutional question regarding an offender's right to request and be present at a restitution hearing.

Respectfully submitted this 6th day of November, 2018.


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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 76618-0-1
)	
Respondent,)	
)	DIVISION ONE
v.)	
)	
SHACON FONTANE BARBEE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: October 8, 2018

MANN, A.C.J. — Shacon Barbee appeals the trial court's restitution order and argues that, in issuing the order, the trial court exceeded its statutory authority. RCW 9.94A.753(1) provides the court the authority to order a defendant to pay restitution within 180 days of the sentencing hearing. Barbee asserts that the trial court exceeded its statutory authority by issuing a restitution order more than 180 days from the initial sentencing hearing.

Further, Barbee asserts that the trial court's restitution order violated his due process rights by failing to provide sufficient notice and an opportunity to object and by denying his right to be present at a restitution hearing. The record, however, establishes that Barbee was afforded sufficient notice of the restitution order and an

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opportunity to object. Further, the record shows that Barbee's counsel agreed to the restitution order and did not request a hearing.

We affirm.

FACTS

On June 18, 2013, a jury convicted Barbee of two counts of promoting commercial sex abuse of a minor, two counts of promoting prostitution in the second degree, three counts of first degree theft, and one count of leading organized crime. On November 15, 2013, the trial court sentenced Barbee to an exceptional sentence of 420 months. On May 7, 2014, the court ordered Barbee to pay restitution of \$15,078 to the Social Security Administration. On appeal, the Supreme Court affirmed Barbee's convictions but remanded the case back to the trial court to fix a sentencing error on the first count of promoting commercial sex abuse of a minor. See State v. Barbee, 187 Wn.2d 375, 386 P.3d 729 (2017).

On March 22, 2017, the trial court resentenced Barbee to an exceptional sentence of 120 months to run concurrently with his other convictions. 84 days later, on June 14, 2017, the trial court signed a second restitution order retaining the initial \$15,078.00 owed to the Social Security Administration and adding an additional \$4,150.09 to the Health Care Authority.

ANALYSIS

RCW 9.94A.753

Barbee's contention that the trial court exceeded its statutory authority is a question of statutory interpretation. "The authority to impose restitution is not an inherent power of the court, but is derived from statutes." State v. Davison, 116 Wn.2d

917, 919, 809 P.2d 1374 (1991). This court reviews questions of statutory interpretation de novo. State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).

The primary objective of the reviewing court is to “ascertain and carry out the legislature’s intent.” Dep’t of Ecology v. Campbell & Gwinn, LLC., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The first step in determining the legislature’s intent is to review the plain meaning of the statute. “Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” State v. Gray, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012) (citing State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If, after reviewing the plain meaning of the statute, the statute is unambiguous, then the “court’s inquiry is at an end.” State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

RCW 9.94A.753 provides that “[w]hen restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days.” Barbee argues that the language of the restitution statute indicates that the trial court exceeded its statutory authority by issuing the 2017 restitution order. Barbee contends that the 180 day limit began to run on November 15, 2013, the initial sentencing, and therefore the 2017 restitution order far exceeded the 180 day limit. RCW 9.94A.753 is not so limited.

Barbee asks this court to rewrite the statute by inserting the word “initial” before the term “sentencing hearing,” so that the 180 day deadline would run after the 2013 sentencing hearing but not after the 2017 sentencing hearing. The plain language of

RCW 9.94A.753(1), however, provides that the triggering event for the 180 day limit is “the sentencing hearing,” not “the initial sentencing hearing” as Barbee desires.

Barbee also argues that because the Supreme Court remanded his case for resentencing on only one count, the trial court exceeded its authority by revisiting the restitution issue. Citing State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992), Barbee asserts that the trial court’s discretion to resentence on remand is limited by the scope of the appellate court’s mandate. Collicott, a collateral estoppel case, does not stand for that proposition. But even if we were to assume that the trial court was unable to resentence Barbee on any other count that does not mean that the court was unable to issue a second restitution order. The trial court’s authority to enter a restitution order emanates from the restitution statute, not from the reviewing court. Gray, 174 Wn.2d at 924 (emphasis added) (“A court’s authority to order restitution is derived solely from statute.”). Therefore, it is RCW 9.94A.753 that defines the extent of the trial court’s authority and not the Supreme Court’s opinion in Barbee. Barbee 187 Wn.2d at 375.

The plain language of RCW 9.94A.753(1) provides that the trial court has the authority to issue a restitution order up to 180 days after the sentencing hearing. The statute does not limit the trial court’s authority to only 180 days after the initial sentencing hearing. RCW 9.94A.753(1) applies just as much to a sentencing hearing on remand as it does to the initial sentencing hearing after trial. Here, the trial court issued a restitution order 84 days after the sentencing hearing. As such, the trial court acted within its statutory authorization.

Due Process

Next, Barbee argues that the trial court violated his due process rights by ordering restitution without providing him advanced notice and an opportunity to object. Barbee also asserts that the trial court's failure to allow him to be present at the restitution hearing further violated his due process rights. We disagree.

It is undisputed that the trial court must provide the defendant with notice of a pending restitution order and the right to object, and that if a restitution hearing is held, the defendant has a right to be present at that hearing. See State v. Saunders, 132 Wn. App. 592, 132 P.3d 743 (2006); State v. Burmaster, 96 Wn. App. 36, 979 P.2d 442 (1999). Barbee asks this court to go a step further and presume that he was not afforded sufficient advanced notice of the State's intent to seek a new restitution order because he asserts that the record is unclear. But, as the Supreme Court counseled, a reviewing court "will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent." State v. Jasper, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012) (citing Barker v. Weeks, 182 Wn.2d 384, 391, 47 P.2d 1 (1935)).

The record here is not silent. The trial court provided Barbee with sufficient notice of the pending restitution order and was given the opportunity to object. First, on June 1, 2017, Restitution Investigator Christie Cano of the King County Prosecutor's Office Victim Assistance Unit mailed a restitution packet to defense counsel. Included in the cover letter of the restitution packet was the statement "Please review, sign, and return the Order Setting Restitution to me by June 19, 2017. If I do not hear from you by that date, I will automatically set a restitution hearing." Second, in its 2017 resentencing

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order, the trial court checked the box indicating that "Defendant shall pay restitution in an amount to be determined." Finally, the order setting restitution is signed by defense counsel under the notation "copy received; Notice Presentation waived."

Accordingly, the record sufficiently establishes that Barbee was given advanced notice of the proposed second restitution order and ample opportunity to object. In fact, if Barbee simply ignored the restitution packet, investigator Cano would have scheduled a restitution hearing. Instead, Barbee's attorney signed and returned the restitution order to the court.

Finally, we reject Barbee's argument that the trial court denied him the right to due process by failing to allow him to be present at the restitution hearing when no such hearing was held. Barbee did not object to the proposed restitution order and did not request a hearing. Accordingly, the trial court did not violate his due process rights. Barbee did not have a right to be present at a hearing that did not take place.

We affirm.

Mann, ACT.

WE CONCUR:

Andrus, J.

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76618-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

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