

FILED
Jul 01, 2015
Court of Appeals
Division I
State of Washington

NO. 73221-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TREVOR UTLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

At a contested restitution hearing following Trevor Utley's assault conviction, the prosecution provided a medical bill for services rendered to the victim several months after the incident. The State did not show that this bill was due to medical needs caused by the assault; consequently, as several cases from this Court have held, the State did not meet its burden of proving the medical bill was statutory authorized restitution. Alternatively, this restitution order increases Mr. Utley's punishment based on factual determinations never presented at the time of conviction and Mr. Utley is entitled to a jury determination of the factual basis for the restitution order.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously ordered restitution for medical services without adequate evidence that the services were causally connected to the incident as required by statute.

2. The court relied on unduly speculative inferences to impose restitution, contrary to the requirements of due process under the Fourteenth Amendment and article I, section 3.

3. Mr. Utley had a right to a jury determination of disputed restitution under the Sixth Amendment and article I, section 21.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Restitution is a part of the punishment ordered for a conviction. A court lacks authority to impose restitution premised on unduly speculative claims, including a bill for medical costs without evidence showing the treatment was needed due to the offense of conviction. Mr. Utley objected to the prosecution's request that he pay for medical expenses incurred months after the incident without proof the services rendered were caused by the incident. When the State did not meet its burden of proving the charges on the medical bill resulted from the assault, did the court lack authority to order Mr. Utley pay restitution for this bill?

2. Do the Sixth Amendment right to a jury determination of facts essential to punishment and the Washington Constitution's "inviolate right" to a jury trial on damages require contested restitution be determined by a jury?

D. STATEMENT OF THE CASE.

Based on an incident that occurred on June 13, 2014, Trevor Utley pled guilty to one count of assault in the second degree. CP 1, 9. As part of his plea, he agreed to pay restitution in an amount to be determined by the court. CP 13, 23.

The court held a restitution hearing on February 10, 2015, shortly before the 180-day time line for restitution expired. CP 34; RP 2, 5.¹

The supporting documents offered by the State at the restitution hearing were: (1) an undated letter from the victim of the assault, Corey Soles; (2) a bus ticket receipt; and (3) an itemized list of medical services rendered to Mr. Soles on August 5, 2014, by CentraCare Health for \$3,753.27. CP 44-49. The prosecution did not present any witness testimony or any sworn statements. RP 2, 7.

Most of Mr. Soles' letter discusses restitution requests other than medical expenses, including reimbursement for \$199 to replace clothes that were lost or damaged and \$269 for a bus ticket Mr. Soles paid for so that he could return home to Minnesota after the incident. CP 46. Mr. Utley did not contest these expenses. RP 3.

Mr. Utley objected to the medical expenses requested based on the CentraCare Health bill. RP 5-6. He argued that it was not causally connected to the incident. *Id.* The bill was an itemized list of services rendered several months after the incident and there was no explanation that these services were for injuries caused by the assault. CP 48-49. In

¹ "RP" refers to the restitution hearing on February 10, 2015.

Mr. Soles' letter, he mentioned going "to the ER," but he had not received a bill, did not say what services he received, and did not mention what ER facility he went to for treatment. CP 46.

Despite calling the evidence "a bit thin," the court imposed the full amount of restitution requested by the State, \$4,221.27. RP 8; CP 42. The court reasoned that Mr. Soles was obviously injured in the assault and it would assume these medical expenses were needed as a result of the incident. RP 8. Mr. Utley appeals.

E. ARGUMENT.

1. The court impermissibly imposed restitution without evidence of a causal connection between the claimed amount and the offense of conviction

a. Restitution is authorized only for loss incurred by a victim as a result of the offense of conviction.

Restitution is a criminal sanction that it "strongly punitive" in its purpose. *State v. Kinneman*, 155 Wn.2d 272, 280, 119 P.3d 350 (2005).

It is part of the sentence that may not be imposed absent affording the accused the fundamental right to due process of law. *State v. Hotrum*, 125 Wn.App. 681, 683, 87 P.3d 766 (2004); *State v. Dedonado*, 99 Wn.App. 251, 254, 991 P.2d 1216 (2000).

Determining the accurate sentence to impose, including restitution, may not be based on mere assertions or unproved allegations. *See State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Restitution is part of the “quantum of punishment” and the same due process rights attach as to other contested parts of punishment, including being proven to the degree required by law. *State v. Schultz*, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999); *State v. Serio*, 97 Wn.App. 586, 987 P.2d 133 (1999).

The restitution statute provides, in pertinent part, that restitution:

shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages due to mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling related to the offense.

RCW 9.94A.753(3).

The statute’s ascertainable-damages requirement precludes restitution for speculative and intangible losses. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Instead, the State must offer evidence that “affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *abrogated on other*

grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Restitution is permitted only as actual compensation for loss caused by the offense of conviction. *State v. Ewing*, 102 Wn.App. 349, 353-54, 7 P.3d 835 (2000); *State v. Johnson*, 69 Wn.App. 189, 191, 847 P.2d 960 (1993). A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679–80, 974 P.2d 828 (1999). It acts beyond its sentencing authority when it imposes restitution that is not statutorily authorized or adequately proved based on reliable evidence. *See Griffith*, 164 Wn.2d at 965, 967; *State v Moen*, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996).

b. The court's determination of damages was based upon conjecture and speculation.

At the restitution hearing, the State bears the burden of proving “a victim’s injuries were causally connected to a defendant's crime before ordering a defendant to pay restitution for the expenses which resulted.” *Enstone*, 137 Wn.2d at 682. “A causal connection is not established simply because a victim or insurer submits proof of

expenditures.” *State v. Dennis*, 101 Wn.App. 223, 227, 6 P.3d 1173 (2000) (quoting *Dedonado*, 99 Wn.App. at 257).

A bill for medical costs is inadequate to prove the mandatory causal connection when it is “not possible to determine from such documentation whether all the costs incurred were related to the offender's crime.” *Id.* “Likewise, a summary of medical treatment that ‘does not indicate why medical services were provided fails to establish the required causal connection between the victim’s medical expenses and the crime committed.’” *Id.*, citing *State v. Bunner*, 86 Wn.App. 158, 160, 936 P.2d 419 (1997).

In *Dennis*, the defendant pled guilty to assaulting several police officers and the State sought restitution for medical expenses relating to two officers, Dornay and Libby. 101 Wn.App. at 225. The supporting evidence the State presented was: (1) a letter from the prosecutor’s Victim Assistance Unit saying both officers were treated at Northwest Hospital for their injuries and that Seattle Workers Compensation paid specific amounts for both officers’ claims; (2) a letter from the workers’ compensation office showing it paid Northwest Hospital the bill for Officer Dornay, noting the date of injury. *Id.* at 226.

The *Dennis* Court faulted the documents produced by the prosecution because they “do not indicate why medical services were provided to Officers Dornay and Libby.” *Id.* at 227-28. The court found sufficient evidence for restitution for Dornay, because the letter from the Victim Assistance Unit and probable cause certification said the officers were treated at Northwest Hospital “for their injuries,” and the workers compensation letter said Dornay’s injury occurred on July 30, 1997, which was the date of the incident. *Id.*

But “the only evidence the State presented regarding Officer Libby indicated that Officer Libby was treated at Northwest Hospital for injuries on an unknown date, incurring \$180.94 in expenses. This evidence is not sufficient to establish a causal connection between Officer Libby’s injuries and Dennis’s assault.” *Id.*

Similarly, in *Bunnar* the State offered an itemized list of medical treatment and counseling expenses the Department of Social and Health Services paid on behalf of the victim of a sexual offense. 86 Wn.App. at 159. The sentencing court inferred that DSHS “would not have paid the medical bills if they were not related to Bunner’s crimes,” and ordered the restitution. *Id.* at 160.

But this Court reversed because the bill summary “does not indicate why medical services were provided.” *Id.* Therefore, it “fails to establish the required causal connection between the victim’s medical expenses and the crime committed.” *Id.*

Dennis and *Bunnar* dictate the result here. The State sought medical expenses based solely on an undated letter signed by Mr. Soles mentioning a visit to “the ER” and a bill for a list of services provided almost two months after the incident. CP 45-49.

In his undated letter, Mr. Soles noted medical treatment in passing. CP 46. The letter says he “recently had to go to the ER again” and “was told” by an unnamed person that it was due to “the stress of healing.” *Id.* Whoever told him that his medical treatment was caused by “the stress of healing” was not alleged to be a doctor or health care provider. *Id.* He had not received a bill at the time he wrote the letter. *Id.* He did not say when he went to the ER or what hospital he used. *Id.*

The only other documentation related to the requested restitution for medical expenses was a bill from CentraCare Health for services provided to Mr. Soles on August 5, 2014, almost two months after the June 13, 2014 incident. CP 48-49. This bill does “not indicate why

medical services were provided to” Mr. Soles, which was a critical flaw in *Dennis*, 101 Wn.App. at 227-28, and *Bunner*. 86 Wn.App. at 159.

Mr. Utley objected to the insufficient proof that the medical expenses were incurred due to the offense of conviction. RP 5-6. The court agreed that the evidence “is a bit thin,” but found it was sufficient and ordered Mr. Utley to pay the full amount the State requested. RP 6-7.

The court’s speculation overlooked the substantial gaps in proof and diluted the State’s burden. As held in *Dennis*, “a summary of medical treatment that does not indicate why medical services were provided fails to establish the required causal connection between the victim’s medical expenses and the crime committed.” 101 Wn.App. at 227.

First, the court surmised that Mr. Soles’s letter connected the injuries from the incident to the ER visit, but the letter says Mr. Soles had not yet received a bill. RP 7-8; CP 46. It does not verify that the bill the State gave the court is the bill for the ER visit Mr. Soles mentioned in his letter. And it does not give the court background information from which the court could make this connection, because the undated letter does not say when or where Mr. Soles went to the ER.

Second, the medical bill submitted by the State was for services delivered almost two months after the incident. CP 48-49. Had it occurred immediately after the incident, it might be reasonable to infer the medical needs related to the assault. Due to the significant time gap, it is unduly speculative to surmise that all expenses were incurred due to the offense. *Dennis*. 101 Wn.App. at 227-28.

Third, the medical bill is merely an itemized list of expenses, which this Court held was inadequate in *Bunner*. The document has no explanation about why the services were needed. CP 48-49. The State did not provide any doctor's notes about the treatment given. The prosecutor argued that "in our position," the medical services were essentially a follow-up from the first ER visit on the day of the incident, for which the State did not have a bill and was not seeking restitution. RP 4. She contended that when a person does not have health insurance, he will go to the ER, and argued Mr. Soles likely went to the ER for this reason, although she had no evidence about it. *Id.* The prosecutor's argument about the reason Mr. Soles received medical services is not evidence on which the court may rely when restitution is disputed. *Hughes*, 154 Wn.2d at 154.

Without evidence that the medical bill was for services caused by the offense, the prosecution did not meet its burden of proof. The medical expenses must be stricken from the restitution order.

c. The unproven expenses must be stricken from the restitution order.

When the State “fails to establish a causal connection between defendant’s actions and the damages, this court must vacate the restitution order.” *Dennis*, 101 Wn.App. at 229. The State is not permitted any further opportunity to meet its burden of proof “after it fails to do so following a specific objection.” *Id.* At the restitution hearing, Mr. Utley objected to the sufficiency of evidence establishing the medical expenses for which restitution was sought were causally connected to the offense of conviction. RP 5-6, 8. The portion of the order for medical expenses must be vacated. *Dennis*, 101 Wn.App. at 230.

2. The Sixth Amendment bars the court from imposing restitution based on loss that was not found by a jury.

The Sixth Amendment’s right to a jury guarantees the right to have a jury find every fact essential to punishment beyond a reasonable doubt. U.S. Const. amend. VI; *Apprendi v. New Jersey*, 530 U.S. 466,

476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (internal citations omitted). This rule preserves the “historic jury function” of “determining whether the prosecution has proved each element of an offense beyond a reasonable doubt.” *Oregon v. Ice*, 555 U.S. 160, 163, 129 S. Ct. 711, 172 L. Ed. 2d 51 (2009). Concluding the historical function of the jury included determining the value of a financial penalty or fine, the Supreme Court has recently made clear the criminal fines are subject to the rule of *Apprendi*. *Southern Union Co. v. United States*, __ U.S. __, 132 S. Ct. 2344, 2354, 183 L. Ed. 2d 318 (2012).

Restitution is punishment imposed for a conviction. *Kinneman*, 155 Wn.2d at 280; *see also Pasquantino v. United States*, 544 U.S. 349, 365, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) (“The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct”); *State v.*

Edelman, 97 Wn.App. 161, 166, 984 P.2d 421 (1999) (“ . . . restitution is part of an offender’s sentence and is primarily punitive in nature”).

In *Southern Union*, the defendant corporation was subject to a \$50,000 fine for each day it was in violation of the Resource Conservation and Recovery Act. 132 S. Ct. at 2349. The defendant argued that imposition of anything more than \$50,000, one day’s fine, required a jury finding of the duration of the violation. *Id.* The Supreme Court agreed. *Id.* at 2357. In doing so, the Court rejected any effort to distinguish between the punishment of incarceration and financial punishments. *Id.* at 2352-53. The Court noted the “core concern” of *Apprendi* is the reservation to the jury of “the determination of facts that warrant punishment.” *Id.* at 2350 (citing *Ice*, 555 U.S. at 170). “That concern applies whether the sentence is a criminal fine, or imprisonment or death.” *Southern Union*, 132 S. Ct. at 2350. The Court specifically recognized *Apprendi* applies where the punishment is based upon “the amount of the defendant’s gain or the victim’s loss.” *Southern Union*, 132 S. Ct. at 2350-51. That is precisely how restitution is determined under RCW 9.94A.753.

Kinneman held that restitution did not trigger the Sixth Amendment’s protections. 155 Wn.2d at 282. It reasoned that because

the statute does not set a maximum amount, even though restitution is a mandatory part of punishment under RCW 9.94A.753, the court does not exceed the statutory maximum when it imposes restitution. *Id.* It found RCW 9.94.753 was “more like the advisory Federal Sentencing Guidelines after *Booker* [*v. United States*, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)].” *Id.* at 281.

Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151, 2160, 186 L. Ed.2d 314 (2013) undermines *Kinneman*’s reasoning. “A fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense” that must be proved beyond a reasonable doubt. *Id.* *Alleyne* overturned prior cases that had limited the reasoning of *Apprendi* to factual questions that increase the statutory maximum and not those that simply raise the minimum. *Id.* at 2158. The *Kinneman* Court focused on the notion that no jury finding would be required unless restitution exceeded the maximum allowed by statute, without regard to the increase in minimum punishment triggered by restitution. *Alleyne* holds that “[a] fact that increases a sentencing floor, thus, forms an essential ingredient of the offense” that must be proven as an element of the offense. *Id.* at 2161.

Kinneman also reasoned that a judge has discretion in determining the amount of restitution in treating restitution as advisory, but the judge has no discretion to omit restitution. 155 Wn.2d at 282. Nothing in the statute would permit a judge to impose anything less than the actual damages proved in a nonextraordinary case.

A judge's discretion to decline to impose restitution in "extraordinary circumstances" is irrelevant to the inquiry. There is no published case explaining what "extraordinary circumstance" might mean. The SRA affords judges the ability to impose a sentence below the standard range based upon mitigating circumstances without a jury finding. But the discretion to depart downward does not change the mandatory requirement of a jury finding when additional facts are alleged as a basis for an upward departure, as made plain by *Blakely*. The discretion to impose a lesser sentence does not determine whether the Sixth Amendment applies to facts which increase the sentence.

In addition, when *Booker* concluded the federal guidelines were advisory, it did not mean a court had discretion in limited cases to deviate from an otherwise required sentence, or that certain provisions afforded courts discretion within the guidelines. Instead, what the Court meant by advisory was that the sentencing court was not bound by the

statute in any manner. *Booker*, 543 U.S. at 245. That is not the case with RCW 9.94A.753.

RCW 9.94A.753 requires restitution be imposed in all but the undefined extraordinary circumstances. Indeed, in any case in which the victim receives benefits from the crime victims' compensation fund the trial court has no discretion at all and must impose restitution. RCW 9.94A.753(7). The SRA's mandate of restitution is not "advisory" but rather mandatory, and creates a mandatory minimum amount based on factual findings made by a judge and explicitly tied to the particular factual findings the judge is required to make. *See Southern Union*, 132 S.Ct. at 2349.

Kinneman erroneously concluded that the absence of a maximum in RCW 9.94A.753 avoids any Sixth Amendment implications. Restitution is permissible only if the State proves "easily ascertainable damages for injury to or loss of property" by a preponderance of the evidence. *Hughes*, 154 Wn.2d at 154. To use the lexicon of *Apprendi*, the "maximum" permitted by RCW 9.94A.753 is \$0 unless there is a determination of "easily ascertainable damages." Moreover, the statute sets an additional cap when it provides "restitution shall not exceed double the amount of the offender's gain or

the victim's loss from the commission of the crime.” RCW

9.94A.753(3).

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring* [*v. Arizona*, 536 U.S. 584 (2002)]), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Blakely, 542 U.S. at 305. The fact that the State bears the burden of proving the amount of restitution illustrates that a court may not impose any amount absent an additional factual determination. Because that factual determination results in an increase in punishment it must be made by the jury.

Before a court may impose any amount of restitution, the Sixth and Fourteenth Amendments require the State prove damages resulting from the loss or injury to a jury beyond a reasonable doubt. *Southern Union*, 132 S. Ct. at 2350-51.

A jury finding is not necessary where a defendant pleads guilty and stipulates to the relevant facts. *Blakely*, 542 U.S. at 310; *State v. Suleiman*, 158 Wn.2d 280, 289, 143 P.3d 795 (2006). Such a stipulation must include the factual basis for the additional punishment and stipulate that record supports such a determination. *Suleiman*, 158

Wn.2d at 292. Here, Mr. Utley pleaded guilty to second degree assault. CP 9. He reserved the right to contest any restitution request. His plea does not include any mention of the value of the victim's loss. He agreed to pay the reimbursement to clothes and a bus ticket but did not stipulate to any other loss incurred or waive his right to a jury trial under *Blakely. Suleiman*, 158 Wn.2d at 289. Mr. Utley did not waive his right to a jury determination of damages.

3. The Washington Constitution guarantees a jury determination of damages.

Article I, section 21 of the Washington Constitution provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Supreme Court held the assurance that the right “shall remain inviolate” requires a jury determination of damages.

Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function receives constitutional protection from article 1, section 21.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, *amended*, 780 P.2d 260 (1989). “The constitution deals with substance,

not shadows. Its inhibition was leveled at the thing, not the name.”
State v. Strasburg, 60 Wash. 106, 116, 110 P. 1020 (1910) (quoting
Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325, 18 L. Ed. 356
(1866)). “In other words, a constitutional protection cannot be
bypassed by allowing it to exist in form but letting it have no effect in
function.” *Sofie*, 112 Wn.2d at 660. Thus, the Court reasoned the jury’s
function as fact finder could not be divorced from the ultimate remedy
provided. “The jury's province includes determining damages, this
determination must affect the remedy. Otherwise, the constitutional
protection is all shadow and no substance.” *Id.* at 661.

In *Sofie* the Court held the legislature could not remove that
traditional function from the jury by means of a statute that capped
noneconomic damages. Similarly, nothing permits the legislative effort
to remove this damage-finding function from the jury simply by
terming such damages restitution. Restitution is limited to damages
causally connected to the offense. RCW 9.94A.753. The damages at
issue are no different than the damages at issue in *Sofie*, the value of the
loss suffered as a result of the acts of another. To preserve “inviolable”
the right to a jury trial, Article I, section 21 must afford a right to a jury
determination such damages.

If Mr. Utley's restitution order is not vacated due to insufficient evidence, he is entitled to a new hearing at which he has the right to a jury trial and the State must prove the restitution requested beyond a reasonable doubt.

F. CONCLUSION.

The restitution order should be vacated and reduced to the uncontested reimbursement of bus fare and replacement clothes, subtracting the medical expenses requested, \$3,753.27. Alternatively, Mr. Utley is entitled to a jury trial on the alleged medical expenses.

DATED this 1st day of July 2015.

Respectfully submitted,

s/ Nancy P. Collins
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73221-8-I
)	
TREVOR UTLEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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