

FILED
December 31, 2015
Court of Appeals
Division I
State of Washington

NO. 73341-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LISA D. HERNANDEZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

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

2. The trial court erred in imposing restitution in the amount of \$26,021.51 in the absence of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

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

2. The State bears the burden of proving the amount of restitution. Here the State provided a list of apparent medical expenses, which included a single entry for \$22,006.27, attributed simply to Harborview Medical Center. Is Ms. Hernandez entitled to have the appellate court reverse and vacate this portion of the restitution award because the State failed to carry its burden of proof and the court's award was, therefore, based on speculation?

C. STATEMENT OF THE CASE.

1. Procedural facts.

Ms. Hernandez was charged by information filed in King County Superior Court on June 13, 2014, with assault in the second degree, contrary to RCW 9A.36.021(1)(a), (c). CP 1. The State further alleged that Ms. Hernandez was armed with a deadly weapon, i.e., a knife for purposes of the sentence enhancement provisions of RCW 9.94A.825 and RCW 9.94A.533(4). CP 1 (Information).

After the case was continued several times, the parties came to an agreement by which the prosecutor amended the charge down to assault in the third degree, dismissed the sentencing enhancement allegation, and Ms. Hernandez entered a guilty plea. CP 6 (Amended Information); CP 7-27 (Statement of Defendant on Plea of Guilty).

At sentencing, Ms. Hernandez received a standard range sentence of 60 days confinement with credit for 30 days already served and the remaining 30 days converted to 240 hours of community restitution. CP 28-31.

Notice of appeal was timely filed on March 10, 2015. CP 36-37.

On July 16, 2015, a hearing was held regarding Ms. Hernandez's objection to the restitution request. 7/16/15RP 4-12. The

State sought restitution for medical expenses and clothing. CP 45-59.

The Honorable Leroy McCullough denied a request for restitution for a pair of cowboy boots valued at \$747, but thereafter ordered \$194.16 to the purported victim and \$25,827.43 to the Health Care Authority, for a total of \$26,021.51 in restitution. CP 60.

2. Substantive facts.

In conjunction with her plea of guilty, Ms. Hernandez acknowledged that on May 24, 2014, with criminal negligence, she caused bodily harm to Mr. Levi Whidden, by stabbing him with a knife. CP 19.

According to the affidavit of probable cause, Ms. Hernandez called 9-1-1 on May 24th at approximately 1:50 a.m. to report that she had been sexually assaulted. CP 3. She explained she had fallen asleep on the bus and missed her stop, ending up at the Renton Transit Center. Id. She obtained a ride from a driver that was in the area, but when they stopped at an intersection along the way, the man tried to sexually assault her by grabbing her crotch. CP 3-4. She immediately exited the vehicle and called 9-1-1 a few minutes later. CP 4.

The driver, Levi Whidden, alleged that after Ms. Hernandez sat in the car she reached for some cash and marijuana in the center

console. CP 4. He further asserted that when he grabbed her to prevent the supposed theft, she exited the vehicle. He then got out of the car too, walked around the back of the vehicle and when he confronted her, she stabbed him. Id.

According to surveillance video from the Transit Center, Ms. Hernandez entered the car at 1:42 a.m. CP 4. The 9-1-1 dispatcher then received Mr. Whidden's call at 1:46 a.m., and Ms. Hernandez's call at 1:50 a.m. Id.

D. ARGUMENT.

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

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. State v. Kinneman, 155 Wn.2d 272, 280, 119 P.3d 350 (2005); *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 non-extraordinary 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, Ms. Hernandez pleaded guilty to third degree assault. CP 9. She reserved the right to contest any restitution request. Her plea does not include any mention of the value of the victim's loss.

Ms. Hernandez did not waive her right to a jury determination of damages.

Due process requires that a defendant's guilty plea be made knowingly, voluntarily, and intelligently. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). In addition to these constitutional requirements, CrR 4.2 precludes a trial court from accepting a guilty plea without first determining that the defendant is entering the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. CrR 4.2(d); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). CrR 4.2(d) dictates that:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

In this case, Ms. Hernandez completed a Statement of Defendant on Plea of Guilty which outlined the charge against her, various elements the prosecution would be required to prove at trial, the many of the rights she waived in entering a guilty plea, and the consequences of that plea. CP 28-33. It did not include any statement regarding the

right to a jury determination of the amount of restitution or the requirements of strict causation and unanimity. As such, Ms. Hernandez did not waive her right to jury determination of the amount of restitution.

2. 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.

Ms. Hernandez 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.

3. The State failed to prove the medical expenses with sufficient specificity to support the award

a. The prosecution bears the burden of providing the amount of restitution.

A sentencing court's authority to impose restitution is derived solely from statute. State v. Martinez, 78 Wn.App. 870, 881, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017 (1996). RCW 9.94A.753(5) provides that "[r]estitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property."

"If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence." State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While certainty of damages need not be proved with specific accuracy, the evidence must be sufficient to provide a reasonable basis for estimating loss. State v. Pollard, 66 Wn.App. 779, 785, 834 P.2d 51 (1992). Evidence that subjects the trier of fact to speculation or conjecture is insufficient. Pollard, 66 Wn.App. at 881.

"[C]ompensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims." Martinez, 78 Wn.App. at 881.

b. The amount of restitution may not be based on conjecture or speculation.

Restitution must be based upon easily ascertainable damages, in other words, the court finds there is a causal connection between the crime proved and the injuries suffered. RCW 9.94A.753(3); State v. Fleming, 75 Wn.App. 270, 274, 877 P.2d 243 (1994); State v. Johnson, 69 Wn.App. 189, 190, 847 P.2d 960 (1993) (per curium). “While damages need not be proved with certainty, the evidence of damages must be sufficient to afford a reasonable basis for estimating the loss and must not subject the trier of fact to mere speculation or conjecture.” State v. Awawdeh, 72 Wn.App. 373, 379, 864 P.2d 965 (1993), *review denied*, 124 Wn.2d 1004, *cert. denied*, 513 U.S. 970 (1994). A causal connection exists if “but for” the offense, the loss or damages to the victim would not have occurred. State v. Tobin, 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007). The State must prove this causal connection between the expenses and the offense by a preponderance of the evidence. State v. Kinneman, 122 Wn.App. 850, 860, 95 P.3d 1277 (2004), *aff’d*, 155 Wn.2d 272, 119 P.3d 350 (2005).

A causal connection is not established simply because a victim or insurer submits proof of expenditures. State v. Dennis, 101 Wn.App.

223, 226, 6 P.3d 1173 (2000). “This is because it is often not possible to determine from such documentation whether all the costs incurred were related to the offender’s crime.” Id.

In Ms. Hernandez’s case, the documentation details approximately \$3,000 worth of expenses, but then only provides a lump sum reference to Harborview Medical Center for the bulk of the remaining \$22,000 of restitution sought. A summary of medical treatment that does not indicate why the services were provided, however, “fails to establish the required causal connection between the victim’s medical expenses and the crime committed.” State v. Bunner, 86 Wn.App. 158, 160, 936 P.2d 419 (1997).

Thus, the amount awarded to the Health Care Authority was by nature, speculative, and not based upon sufficient proof in the record. In the absence of sufficient proof in the record, the court’s award of restitution was erroneous.

c. Where the State failed to prove the amount of restitution, the remedy is to strike that amount of the award.

The remedy for the failure to carry its burden of providing the amount of restitution where the defendant objects is to strike the restitution in question. Dennis, 101 Wn.App. at 229-30. *Cf.*

Kinneman, 122 Wn.App. at 861-62 (usual remedy for the State’s failure to prove amount of restitution is vacation of the award of restitution).

At the restitution hearing, defense counsel acknowledged that,

...with respect to medical costs, the \$25,827.43, I reviewed the information, the itemized list provided as part of the restitution packet. It appears to be directly related to the injury that was sustained during the incident, so I don’t think the defense can object to that, because I think that the State has shown a nexus for that.

7/16/15RP 6-7. On the other hand, defense counsel specifically noted the absence of a “sworn affidavit” for other portions of the restitution request. 7/16/15RP 9. Similarly, the medical expenses contain neither the appropriate detail, nor the sworn affidavit at the core of the other restitution objections. In light of the enormous cost involved, the general nature of the objections and the importance of avoiding speculation in restitution orders, Ms. Hernandez requests the court strike the order for \$22,006.27 restitution.

4. The Court should not impose costs against Ms. Hernandez on appeal.

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5; GR 34. The imposition of costs on an indigent defendant is contrary to the relevant statutes and

constitutional provisions. RCW 9.94A.010; RCW 10.01.160(3); U.S. Const. amend. XIV; Const. art. I, sec. 3. Furthermore, this Court should exercise its discretion not to impose appellate costs against Ms. Hernandez. RAP 1.2(a), (c); RAP 2.5; State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

E. CONCLUSION.

The restitution order should be vacated because Ms. Hernandez is entitled to a jury determination regarding restitution and specificity in the alleged medical expenses.

DATED this 31st December, 2015.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73341-9-I
)	
LISA HERNANDEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 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:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] LISA HERNANDEZ 7429 RAINIER AVE S #203 SEATTLE, WA 98118	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2015.

X _____ 

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