IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STANLEY OMAR CHARLESTON, Appellant.	)	DIVISION ONE No. 79610-1-I UNPUBLISHED OPINION

PER CURIAM — Stanley Charleston appeals the restitution ordered as part of his sentence for two counts of second degree assault and one count of unlawful imprisonment. He contends that he was constitutionally entitled to have a jury find the facts supporting restitution. We affirm.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court defined the "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis omitted.)

In State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005), the Washington Supreme Court expressly rejected Kinneman's argument that Apprendi and Blakely require a jury to determine restitution. Although restitution

is mandatory under RCW 9.94A.753, our Supreme Court concluded that there is no established statutory minimum or maximum because the trial court has broad discretion in determining the amount:

> While the restitution statute directs that restitution "shall" be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution. [RCW 9.94A.753(5).] Instead, RCW 9.94A.753 allows the judge considerable discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss.
>
> Given the broad discretion accorded the trial judge by the statute, the lack of any set maximum, and the deferential abuse of discretion review standard, the restitution statute provides a scheme that is more like indeterminate sentencing not subject to Sixth Amendment jury determinations than the SRA's[1] determinate sentencing scheme at issue in Blakely.

Kinneman, 155 Wn.2d at 282 (citations omitted) The court held that "[t]here is no right to a jury trial to determine facts on which restitution is based under RCW 9.94A.753." Kinneman, 155 Wn.2d at 282.

Charleston cites to a recent United States Supreme Court case, Southern Union Co. v. United States, 567 U.S. 343, 132 S. Ct. 2344, 183 L.Ed. 2d 318 (2012), to argue the order setting restitution violated his constitutional right to a jury trial under Apprendi. But Southern Union does not implicate the imposition of restitution.

In Southern Union, a jury found a natural gas distributor guilty of violating federal environmental laws by storing liquid mercury without a permit for approximately 762 days. 567 U.S. at 346-47. The crime was punishable by a

[1] Sentencing Reform Act of 1981, chapter 9.94A RCW.

maximum fine of $50,000 a day. Southern Union, 567 U.S. at 347. After trial, the probation officer imposed a fine of $38.1 million. The company objected to imposition of the fine because the jury did not decide the number of days for the violation. Southern Union, 567 U.S. at 347. The Court held that because the statute imposed a maximum fine of $50,000 a day, under Apprendi, the jury must determine the facts to "set a fine's maximum amount." Southern Union, 567 U.S. at 356.

In United States v. Green, 722 F.3d 1146 (9th Cir. 2013), the Ninth Circuit held that Southern Union does not implicate Apprendi and the imposition of restitution:

> Southern Union concerned a determinate punishment scheme with statutory maximums: "[O]ur decisions broadly prohibit judicial factfinding that increases *maximum* criminal 'sentence[s],' 'penalties,' or 'punishment[s].' " [Southern Union, 567 U.S. at 350] (emphasis added). Restitution carries with it no statutory maximum; it's pegged to the amount of the victim's loss. A judge can't exceed the non-existent statutory maximum for restitution no matter what facts he finds, so Apprendi's not implicated.

Green, 722 F.3d at 1150 (some alterations in original); see also United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012) (after noting Southern Union does not discuss restitution, the Fourth Circuit concluded that because there is "no prescribed statutory maximum in the restitution context . . . , the rule of Apprendi is simply not implicated to begin with by a trial court's entry of restitution" (emphasis omitted)).

We also reject Charleston's argument that Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), undermines the reasoning of Kinneman. In Alleyne, the Court clarified that the principle announced in

Apprendi applies with equal force to facts increasing the mandatory minimum. Alleyne, 133 S. Ct. at 2160. Nothing in Alleyne undermines Kinneman.

Finally, we reject Charleston's attempt to characterize restitution as "damages" entitling him to a jury determination under Sofie v. Fibreboard Corp., 112 Wn.2d. 636, 771 P.2d 711, 780 P.2d 260 (1989). No authority supports Charleston's argument that the analysis in Sofie applies to the determination of restitution in a criminal case.

We adhere to the Washington Supreme Court's holding in Kinneman that there is no constitutional right to a jury determination of the facts establishing the amount of restitution.

Affirmed.

FOR THE COURT: