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No. 69823-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SITTON,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF CASE 3

E. ARGUMENT..... 4

**1. The State did not offer sufficient evidence to prove
 the value of Mr. Rodman’s claimed losses 4**

*a. Restitution is authorized only for loss incurred by
 victims as a result of the offense 4*

*b. The court’s determination of damages was based
 upon conjecture and specula 6*

**2. The Sixth Amendment bars the court from imposing
 restitution based on loss that was not found by a
 jury 7**

**3. The Washington Constitution guarantees a jury
 determination of damages 14**

F. CONCLUSION..... 16

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. I, § 21 1, 2, 14, 15

United States Constitution

U.S. Cosnt. amend. VI..... 1, 2, 8

Washington Supreme Court

Sofie v. Fibreboard Corp., 112 Wn.2d 636, , 771 P.2d 711,
amended, 780 P.2d 260 (1989)..... 14, 15
State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) 5, 7, 12
State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012) 5
State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005) passim
State v. Schultz, 138 Wn.2d 638, 980 P.2d 1265 (1999) 5
State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910)..... 14
State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006)..... 13

Washington Court of Appeals

State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000) 4
State v. Edelman, 97 Wn. App. 161, 984 P.2d 421 (1999) 9
State v. Hotrum, 125 Wn. App. 681, 87 P.3d 766 (2004) 4
State v. Serio, 97 Wn. App. 586, 987 P.2d 133 (1999) 5

United States Supreme Court

Allyene v. United States, _ U.S. _, 133 S. Ct. 215, 186 L. Ed.2d
314 (2013)..... 13
Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.
Ed. 2d 435 (2000) 8, 9, 12
Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.
Ed. 2d 403 (2004) 8, 11, 12, 13
Booker v. United States, 543 U.S. 220, 125 S. Ct. 738, 160 L.
Ed. 2d 621 (2005) 10, 11
Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 18 L. Ed. 356
(1866)..... 14
Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 51
(2009)..... 8

Pasquantino v. United States, 544 U.S. 349, 125 S. Ct. 1766,
161 L. Ed. 2d 619 (2005)..... 8
Southern Union Co. v. United States, __ U.S. __, 132 S. Ct. 2344,
183 L. Ed. 2d 318 (2012)..... 8, 9, 13

Statutes

RCW 9.94A.753 passim

A. SUMMARY OF ARGUMENT

Daniel Sitton appeals the trial court's order that he pay more than \$11,000 in restitution as a part of his sentence for second degree burglary. Mr. Sitton pleaded guilty and agreed to pay slightly more than \$3,000 in restitution to Richard Rodman. Six months later, the State sought additional restitution based upon Mr. Rodman's new claims of damages. After a hearing, the trial court awarded an additional amount of restitution, slightly more than \$8,000. The state did not prove such damages and the additional award must be reversed.

Additionally, because it represents an increase in punishment, the Sixth Amendment requires a jury determine of damages for restitution beyond a reasonable doubt. Moreover, Article I, section 21 has always guaranteed a jury determination of damages. The judicial determination of damages in this case violates both the state and federal constitutions.

B. ASSIGNMENTS OF ERROR

1. In the absence of sufficient proof to establish the actual loss by the victim, the trial court erred in entering the restitution order in this case.

2. The court improperly calculated the restitution loss based on facts not found by the jury nor proved beyond a reasonable doubt.

3. In the absence of substantial evidence to support it, the trial court erred in entering Finding of Fact 3.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Restitution must be based on loss incurred by the charged crime and the value of property is predicated on its fair market value. The court's valuation of the claimed lost property was wholly speculative. Did the court exceed its authority and improperly calculate the loss incurred?

2. The Sixth Amendment guarantees a jury determination of any fact which increases the punishment for an offense. Restitution is punishment. A court may only impose restitution where it finds easily ascertainable damages causally connected to the offense. Because restitution may only be imposed where that additional finding is made, must a jury determine such damages?

3. Article I, section 21 guarantees the "right to a jury shall remain inviolate." The Supreme Court has held that guarantee requires a jury determination of damages. Does Article I, section 21 require a jury determination of the damages for purposes of restitution?

D. STATEMENT OF CASE

Daniel Sitton pleaded guilty to one count of second degree burglary. CP 6-15. According to the affidavit of probable cause, to which Mr. Sitton stipulated as a basis for his plea, Richard Rodman returned to his home and found a truck vault in his bedroom had been opened and jewelry and watches worth several thousands of dollars were missing. CP 3. While the vault was damaged beyond repair, a large amount of jewelry and watches was returned to Mr. Rodman shortly after the incident. CP 4.

Mr. Sitton agreed to pay restitution of \$3,015 for the damage caused to the truck vault and any missing items. CP 28-30.

Several months later the State filed a new motion for restitution. Mr. Rodman offered nebulous testimony of a variety of watches, jewelry and coins that he claimed were missing. Mr. Rodman provided three wildly different estimations of the value of the items: \$12,346; \$14,750, or \$17,835. 12/19/12 RP 6. The State never explained why the valuations were so varied.

The trial court found Mr. Rodman had lost property as a result of the burglary. 12/19/12 RP 13. The court was “somewhat concerned”

that Mr. Rodman was unable to provide “details as to exactly what” or to explain how he reached three different valuations. *Id.*

Mr. Sitton objected to any additional restitution. Mr. Sitton also offered evidence that while the initial \$3,015 in the agreed order was intended to cover the cost of damage to the truck vault, he had obtained receipts that indicated Mr. Rodman had paid only \$299 for the vault. The trial court responded saying it specifically deleted any claim for the truck vault, as well as numerous other items. 12/19/12 P 6-7. The court ruled “the total amount of restitution I would find is \$8,830.” *Id.* at 13-14.

E. ARGUMENT

1. The State did not offer sufficient evidence to prove the value of Mr. Rodman’s claimed losses.

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

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 correct sentence to impose, including restitution, requires more than 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).

RCW 9.94A.753 provides, in pertinent part:

(3) . . . 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. . . .

(5) Restitution 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. . . .

The statute’s ascertainable-damages requirement precludes restitution for speculative and intangible losses. *Kinneman*, 155 Wn.2d at 285. 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).

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

Here, Mr. Rodman in various documents claimed the total value of the missing items was \$12,346; \$14,750, or \$17,835. The court did not find any of those claims to be credible. Instead, the court accepted Mr. Rodman's claim that particular items were taken, but then arbitrarily assigned a value of \$8,830.

It strains reason to accept as true Mr. Rodman's claim as to what property was taken all the while discounting his credibility as to the value of those items. But even accepting the trial court's mixed credibility determination, no one offered any evidence that the sum value of the items was \$8,830. The only way to arrive at that figure is to disbelieve the State's evidence of damages and then to speculate that the real value is some other number.

The judge explained:

I cut a lot of the other claims in half or deleted them altogether based upon his testimony that he couldn't recall any of the brand names of the watches or where they came from, can't remember the brand name for the four gold chains or anything about them.

12/19/12 RP 6-7. For example, while Mr. Rodman claimed the four gold chains had a total value of \$5,000, the court discounted it to \$2,000. CP 37-38; 12/19/12 RP 7. If there is no evidence to support the

claimed value because an item is unidentifiable, there is no evidence to support the conclusion that the proper value of the unidentified item is 40% of the claimed value. That is pure conjecture. If the item is unidentifiable the value is not easily ascertainable. Such evidence is insufficient to support an award of restitution. *Hughes*, 154 Wn.2d at 154. Finding of Fact 3 is wholly unsupported by the evidence.

Even assuming the state proved the value of these items, having found the proper “total amount” was \$8,830 the court did not explain nor address the effect of the prior order of \$3,015. Seemingly, having heard Mr. Rodman’s claims, and discounting many of them, what the court intended was a total of \$8,830. But at the end of the day, both orders remained in place and combine for an award of \$11,845. Even assuming the State proved \$8,830 in total damages, it certainly did not prove \$11,845. There was no justification for the addition of \$3,015 and it is simply a windfall.

The State did not prove the amount of damages resulting from Mr. Sitton’s offense. The court’s restitution order must be reversed.

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 reasoned restitution did not trigger the Sixth Amendment's protections because while RCW 9.94A.753 requires a court to impose restitution it permits a court to forego restitution in extraordinary circumstances and the statute does not set a maximum amount. 155 Wn.2d at 282. Thus the Court reasoned 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)]." *Kinneman*, 155 Wn.2d at 281.

The fact that a judge has discretion in determining the amount of restitution is not the same as saying a judge need not impose restitution at all. Nothing in the statute would permit a judge to impose anything less than the actual damages proved in a nonextraordinary case.

Further, 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. More importantly, a judge's ability to deviate below the required sentence does not change the elemental nature of facts relied upon to increase the sentence. For example, the SRA has always afforded judges the ability to impose a sentence below the standard range based upon mitigating circumstances and to do so without a jury finding. But

the existence of that discretion does not alter the elemental nature of any fact which increases the potential sentence. If that were the case, the SRA would not trigger the Sixth Amendment. *Blakely* held otherwise. It is clear that the existence of discretion to impose a lesser sentence is not determinative of 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" in any way much less in the way the federal sentencing guidelines are advisory.

Kinneman's conclusion that the absence of a maximum in RCW 9.94A.753 avoids any Sixth Amendment implications misses too much. 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.

Finally, even if the restitution determination merely fixed a minimum punishment the Sixth Amendment is still implicated. *Allyene v. United States*, _ U.S. _, 133 S. Ct. 2151, 2160, 186 L. Ed.2d 314 (2013) (“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).

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. Sitton pleaded guilty to second degree burglary. CP 6-15. That plea does not include any mention of the value of the victim’s loss or Mr. Sitton’s gain. Mr. Sitton agreed to restitution in the amount of \$3,015. CP 28-30. That agreed order does not include a stipulation to a factual basis or a stipulation that the record factually supports the determination. Thus, that

order does not constitute a waiver under *Blakely. Suleiman*, 158 Wn.2d at 289. But even if the agreed order constituted a waiver under *Blakely*, the subsequent order imposing more than \$8,000 in additional restitution was not based upon any agreement. Mr. Sitton 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.” *Sofie*, 112 Wn.2d 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.

F. CONCLUSION

For the reasons above this Court must reverse the restitution order entered in this case.

Respectfully submitted this 4th day of November 2013.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK – 25228
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69823-1-I
v.)	
)	
DANIEL SITTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF NOVEMBER, 2013, 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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