

No. 96490-4      No. 76618-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

The trial court exceeded its statutory authority when it entered a new restitution order, which added an additional victim, long after the statutory 180-day deadline had passed. Although Shacon Barbee’s exceptional sentence on one count was reversed on appeal, the remaining portions of his sentence—including the original restitution order—remained final and valid. The trial court exceeded the scope of the appellate court’s mandate by entering an entirely new restitution order on remand. The new order is not a permissible “modification” of the original order because it adds a new victim. Compounding the error, the new order was entered without providing Barbee an opportunity to request or be present at a hearing. The new restitution order is void and must be vacated.

## B. ASSIGNMENTS OF ERROR

1. The trial court acted without statutory authority in entering a new restitution order beyond the statutory 180-day deadline.
2. Barbee’s constitutional due process right to notice and to be present at a restitution hearing was violated.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The restitution statute requires the trial court to enter a restitution order within 180 days of the sentencing hearing. Once a restitution order is entered, the court may not “modify” the order to add an additional victim after the 180-day deadline has passed. Here, the trial court entered a new restitution order, adding an additional victim, more than 180 days after the sentencing hearing. Did the court exceed its statutory authority?

2. Constitutional due process requires that a defendant receive notice before a restitution order is entered so that he may object and request a hearing. If a hearing is held, the defendant has a right to be present. Here, a restitution order was entered but Barbee was not given an opportunity to request or be present at a hearing. Were Barbee’s due process rights violated?

### D. 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.<sup>1</sup> CP 45-49. Among

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<sup>1</sup> Barbee was charged with: promoting the commercial sexual abuse of a minor, S.E. (counts I and II); promoting the commercial sexual

the charges were three counts of theft. Barbee was charged with 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.<sup>2</sup> CP 50.

A sentencing hearing was held on November 15, 2013. The trial court imposed an exceptional sentence of 420 months for counts I and II (promoting the commercial sexual abuse of a minor, S.E.), and 300

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abuse of a minor, A.M. (count III); promoting prostitution in the first degree of B.K. (count IV); promoting prostitution in the first degree of C.W. (count V); leading organized crime (count VI); theft in the first degree, of currency belonging to the United States Social Security Administration (counts VII and VIII); theft in the second degree, of currency belonging to the Department of Social and Health Services (count IX); and tampering with a witness (count X). CP 45-49.

<sup>2</sup> Two of the charges, involving A.M. (counts III and X), were dismissed. CP 85. For count IV, the jury found Barbee guilty of the lesser degree charge of promoting prostitution in the second degree. The jury found him guilty of the remaining counts as charged. CP 50.

months on count VI (leading organized crime).<sup>3</sup> CP 59. The court imposed standard-range sentences for the remaining counts. CP 55. All of the sentences were ordered to be served concurrently. CP 56.

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 (the two first degree theft counts). 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, this Court affirmed the convictions and exceptional sentence but remanded to the trial court with instructions to amend the judgment and sentence to correct the

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<sup>3</sup> The exceptional sentence for count I was based in part on the jury's finding that the crime involved an ongoing pattern of sexual abuse of the same minor involving multiple incidents over a prolonged period of time. CP 59. The exceptional sentences for counts I, II, and VI were based on the court's finding that due to the multiple current convictions and Barbee's high offender score, some of the current offenses would go unpunished if an exceptional sentence were not imposed. CP 59.

seriousness level and standard sentence range for count I, and to strike the “pattern of sexual abuse” aggravator underlying the exceptional sentence for count I.<sup>4</sup> 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 the Washington Supreme Court, raising several issues. He did not challenge the restitution order. The supreme court granted review of two issues: (1) whether the two convictions for promoting prostitution violated the Double Jeopardy Clause because they constituted only a single unit of prosecution and (2) whether this Court erred in affirming the exceptional sentence for count I in light of the trial court’s miscalculation of the standard sentence range. CP 152.

After the supreme 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 supreme court remanded to the trial court for “resentencing on that

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<sup>4</sup> The Court held the trial court had miscalculated the seriousness level and standard sentence range for count I. CP 128-50. It also held the “pattern of sexual abuse” aggravator jury instruction was erroneous in light of the Washington Supreme Court’s decision in State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015). CP 128-29.

count.” CP 79, 155. Rejecting the double jeopardy argument, the court affirmed the two convictions for promoting prostitution. CP 154-77.

A resentencing hearing was held on March 22, 2017. Barbee was present with counsel. 3/22/17RP 8. Consistent with the supreme court’s mandate, the trial court resentenced Barbee only on count I. 3/22/17RP 15. The court imposed the statutory maximum of 120 months, to run concurrent with the sentences on the other counts. Id.; 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.” Sub #201.

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.*

Despite the supreme court’s mandate to resentence Barbee only on count I, the State filed additional restitution documents and requested a new restitution order. Sub #213. 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, notifying 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, according to the State’s request. Sub #212. 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.

E. ARGUMENT

**The trial court acted without statutory authority, exceeded the scope of the supreme court’s mandate, and violated Barbee’s constitutional right to due process, by ordering restitution for count IX long after the statutory deadline had passed.**

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 compounded the error and violated Barbee’s constitutional right to due process by entering the order without providing him an opportunity to object or request a hearing at which he could be present.

Barbee may challenge the erroneous restitution order for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

1. *The trial court exceeded its statutory authority by entering a new restitution order, which added a second victim, more than 180 days after the sentencing hearing.*

The trial court entered the new restitution order on June 14, 2017, more than three and a half years after the sentencing hearing, which was held in November 2013. Sub #212. This was well beyond the 180-day statutory deadline. See RCW 9.94A.753(1). The new order cannot be considered a permissible “modification” of the original order because it awards restitution to a second victim who was not covered by the original order. The 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 interpretation and application of the restitution statute is reviewed *de novo*. Gonzalez, 168 Wn.2d at 263.

The restitution statute unambiguously requires the trial court to determine the amount of restitution within 180 days of the sentencing hearing. RCW 9.94A.753(1) (“When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days . . .”).

The statutory 180-day time limit is mandatory unless extended by the court for good cause. State v. Gray, 174 Wn.2d 920, 925-26, 280 P.3d 1110 (2012); 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. Gray, 174 Wn.2d at 925. The restitution statute expressly authorizes the court to modify the restitution order “as to

amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction." RCW 9.94A.753(4).

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 held this was not a permissible timely modification because the original restitution order did not "determine" the amount of restitution for the victim of count I, even though the charges arose from the same general incident and were part of the same criminal prosecution. Id. 619-21. The second restitution order was not merely a modification of the original

order. Instead, it 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. Sub #212. That portion of the new order awarding restitution to DSHS was not a permissible “modification” of the original timely award because the original order did not cover 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).

2. *The supreme 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.*

The Washington Supreme 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 the restitution award. Neither Barbee nor the State challenged the restitution order on appeal and the supreme court did not address it. The supreme 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 the supreme 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)).

The Washington Supreme 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 the 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, the supreme 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 supreme 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 the restitution order 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 the supreme court’s mandate. Schwab, 134 Wn. App. at 645.

Because the original restitution order was still final and valid on remand, the statutory time clock did not begin to run anew. The trial court did not have authority to enter a new restitution order because the 180-day deadline had already passed.

3. *Barbee's constitutional right to due process was violated because he was not given an opportunity to object to the new award or request a hearing at which he could be present.*

The trial court entered the new restitution award on remand without providing Barbee an opportunity to object and request a hearing at which he could be present. As a result, Barbee's constitutional right to due process was violated.

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). Any order entered without advance notice to the defendant is invalid. Saunders, 132 Wn. App. at 608; Burmaster, 96 Wn. App. at 56.

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 constitutional 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. There is no indication in the record that Barbee received advance notice of the State’s intent to seek a new restitution award. In fact, the documents the State submitted in support of its new restitution

request were filed two weeks *after* the new order was entered. Sub #212, 213.

The record does not establish that Barbee waived his right to request or be present at a hearing. To the contrary, the judgment and sentence, and minutes of the resentencing hearing, show he did *not* waive his right to be present at a future restitution hearing. CP 215; Sub #201.

The court's decision to enter a restitution order without providing Barbee advance notice and an opportunity to be present at a hearing violated his constitutional 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.

4. *The second restitution order must be vacated.*

If mandatory statutory procedures are not followed, the restitution order must be vacated. Moen, 129 Wn.2d at 548. The defendant need not establish prejudice. Id.

Moreover, if the defendant did not receive advance notice of the restitution hearing, any order entered is invalid. Saunders, 132 Wn. App. at 608; Burmaster, 96 Wn. App. at 56. If a proper hearing is not held within 180 days of sentencing, “remand [is] of no practical value

because further proceedings would occur outside the statutory time limit.” Ryan, 78 Wn. App. at 763-64. Instead, the restitution order must be vacated. Id.; Saunders, 132 Wn. App. at 608.

Thus, the second restitution order must be vacated because the court did not comply with the mandatory statutory 180-day deadline. Moen, 129 Wn.2d at 548. It must be vacated for the additional reason that Barbee did not receive advance notice or an opportunity to request and be present at a hearing. Ryan, 78 Wn. App. at 763-64; Saunders, 132 Wn. App. at 608.

#### F. CONCLUSION

The trial court exceeded its statutory authority and violated Barbee’s constitutional right to due process by entering a new restitution order long after the statutory 180-day deadline had passed. The new restitution order must be vacated.

Respectfully submitted this 9th day of October, 2017.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 76618-0-I
v.	)	
	)	
SHACON BARBEE,	)	
	)	
Appellant.	)	

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