

FILED  
5-28-15  
Court of Appeals  
Division I  
State of Washington

No. 72828-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

YOUNG KEUN LEE,

Appellant.

---

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

The Honorable Regina Cahan

---

BRIEF OF APPELLANT

---

Susan F. Wilk  
Gregory C. Link  
Attorneys for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT ..... 7

    1. **Because Mr. Lee disputed the facts underlying the State’s restitution demand, the Fourteenth Amendment guarantee of due process entitled him to an evidentiary hearing** ..... 7

        a. Restitution is part of sentencing, to which due process protections apply..... 7

        b. Where Mr. Lee disputed facts material to the restitution demand, the court’s refusal to hold an evidentiary hearing denied Mr. Lee due process, and requires reversal ..... 8

    2. **On remand, Mr. Lee must be afforded the opportunity to confront the State’s evidence and call witnesses** ..... 9

    3. **On remand, the State must prove the amount of restitution sought and the requisite causal nexus to a jury** ..... 13

        a. Restitution is authorized only for loss incurred by victims as a result of the offense..... 13

        b. Because restitution is punishment, the Sixth Amendment requires a jury determination of the facts necessary to set a restitution amount..... 13

        c. The Washington Constitution guarantees a jury determination of damages..... 19

F. CONCLUSION..... 21

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>City of Redmond v. Moore</u> , 151 Wn.2d 664, 91 P.3d 375 (2004) .....	9
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711, <u>as amended</u> , 780 P.2d 260 (1989).....	19, 20
<u>State v. Abd-Rahmaan</u> , 154 Wn.2d 280, 111 P.3d 1157 (2005).....	11
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999) .....	11, 12
<u>State v. Dang</u> , 178 Wn.2d 868, 312 P.3d 30 (2013) .....	11
<u>State v. Hunley</u> , 175 Wn.2d 901, 287 P.3d 584 (2012) .....	7, 13
<u>State v. Kinneman</u> , 155 Wn.2d 272, 119 P.3d 350 (2005) ....	5, 6, 8, 13, 14, 15, 17
<u>State v. Nelson</u> , 103 Wn.2d 760, 697 P.2d 579 (1985).....	11
<u>State v. Schultz</u> , 138 Wn.2d 638, 980 P.2d 1265 (1999).....	13
<u>State v. Strasburg</u> , 60 Wash. 106, 110 P. 1020 (1910) .....	19
<u>State v. Suleiman</u> , 158 Wn.2d 280, 143 P.3d 795 (2006).....	18

### **Court of Appeals Decisions**

<u>State v. Dedonado</u> , 99 Wn. App. 251, 991 P.2d 1216 (2000).....	13
<u>State v. Edelman</u> , 97 Wn. App. 161, 984 P.2d 421 (1999).....	15
<u>State v. Hotrum</u> , 125 Wn. App. 681, 87 P.3d 766 (2004).....	13
<u>State v. Kisor</u> , 68 Wn. App. 610, 844 P.3d 1038 (1993) .....	7
<u>State v. Mark</u> , 36 Wn. App. 428, 675 P.2d 1250 (1984) .....	8
<u>State v. Marks</u> , 95 Wn. App. 537, 977 P.2d 606 (1999).....	7, 20
<u>State v. Pollard</u> , 66 Wn. App. 779, 834 P.2d 51 (1992) .....	7, 8, 9
<u>State v. Serio</u> , 97 Wn. App. 586, 987 P.2d 133 (1999).....	13
<u>State v. Woods</u> , 90 Wn. App. 904, 953 P.2d 984 (1998).....	8

### **Washington Constitutional Provisions**

Const. art. I, § 21.....	19, 20
--------------------------	--------

### **United States Supreme Court Decisions**

<u>Alleyne v. United States</u> , __U.S. __, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013).....	18
--	----

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	14, 15, 17
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	14, 17, 18
<u>Booker v. United States</u> , 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).....	16, 17
<u>Cummings v. Missouri</u> , 71 U.S. (4 Wall.) 277, 18 L. Ed. 356 (1866).....	19
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) .....	10
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) .	9
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) .....	10, 11
<u>Oregon v. Ice</u> , 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 51 (2009) ...	14, 15
<u>Pasquantino v. United States</u> , 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005).....	14
<u>Southern Union Co. v. United States</u> , __ U.S. __, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012) .....	14, 15, 18
<u>Wolff v. McDonnell</u> , 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) .....	11

### **United States Constitutional Provisions**

U.S. Const. amend. VI .....	2, 13, 15, 17, 18
U.S. Const. amend. XIV .....	1, 2, 7

### **Statutes**

RCW 9.92.060 .....	7
RCW 9.94A.753.....	15, 17
RCW 9.95.210 .....	7

### **Rules**

ER 1101 .....	8
---------------	---

## A. INTRODUCTION

At the hearing where the State demanded more than \$50,000 in restitution related to Young Keun Lee's crime of assault in the fourth degree, Mr. Lee disputed material facts and demanded an evidentiary hearing. The court did not conduct an evidentiary hearing, did not give Mr. Lee an opportunity to refute the State's claim, and the State did not present "evidence." Instead the State handed forward a sheaf of documents that were not authenticated, identified, or admitted into evidence. Mr. Lee strenuously objected.

The core of the Fourteenth Amendment's due process guarantee is a meaningful opportunity to be heard. The court's failure to conduct an evidentiary hearing denied Mr. Lee due process and requires reversal. On remand, Mr. Lee must be afforded the right to confrontation, and to a jury determination of the restitution amount.

## B. ASSIGNMENTS OF ERROR

1. The trial court's failure to hold an evidentiary hearing regarding restitution where material facts were disputed violated Mr. Lee's Fourteenth Amendment right to due process of law.

2. Mr. Lee had the due process right to confront witnesses at the restitution hearing and call witnesses on his own behalf.

3. Where the restitution amount was disputed, Mr. Lee had the right to a jury determination of the amount.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Restitution is part of sentencing and an offender being ordered to pay restitution is entitled to due process of law. Where an offender disputes material facts relating to a restitution claim, the court must hold an evidentiary hearing. Even if the rules of evidence do not apply at a restitution hearing, the hearing must satisfy due process demands, such as affording an offender the opportunity to refute the evidence and being reasonably reliable. Although Mr. Lee disputed the facts underlying the State's restitution demand, the court did not conduct an evidentiary hearing, and awarded more than \$50,000 in restitution without giving Mr. Lee an opportunity to refute or confront the State's evidence. Must the restitution order be vacated, and this matter remanded so an evidentiary hearing can be conducted?

2. At the evidentiary hearing, does the Fourteenth Amendment's guarantee of due process entitle Mr. Lee to confront the State's witnesses and call witnesses on his own behalf?

3. 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 restitution be determined by a jury?

D. STATEMENT OF THE CASE

In July 2012, appellant Young Keun Lee was homeless and living in his van in Marymoor Park. CP 3. On the morning of July 10, 2012, park employee Jose Lesaca noticed Mr. Lee sleeping in his van and confronted Mr. Lee and told him that he would have to leave. Id. Mr. Lee became agitated but eventually left the park. Id.

Later that morning, Mr. Lee walked up to Mr. Lesaca and hit him in the left shoulder with a bat. Id. According to the affidavit for determination of probable cause, Mr. Lesaca was not injured by the bat strike. Id. He got into his vehicle to report the incident, but Mr. Lee followed him in his van. Id. Mr. Lee said, “I told you you were going to pay” and threw a can containing an unknown liquid at Mr. Lesaca. Id. The can struck Mr. Lesaca’s vehicle and arm.

Mr. Lee again grabbed his bat and approached Mr. Lesaca, who got out of his vehicle. Id. The two men struggled. According to Mr. Lesaca, Mr. Lee tried to strangle him with the bat, and he had to push hard to prevent the bat from touching his neck. Id. Then Mr. Lesaca’s coworkers arrived and pulled Mr. Lee off of Mr. Lesaca. Id. The sworn certification for determination of probable cause states, “The bat did not

make contact with Lesaca's neck and he said that he wasn't injured from being hit by the bat." Id.

Mr. Lee pleaded guilty to an amended information charging assault in the fourth degree and attempted bail jumping, both gross misdemeanors. CP 6-7, 8-24. Pursuant to the plea agreement, Mr. Lee agreed to "pay restitution TBD." CP 23. The court imposed a suspended sentence with credit for all time Mr. Lee served in custody. CP 25-27.

A restitution hearing was held on November 4, 2014 before the Honorable Regina Cahan. The State sought restitution in excess of \$50,000, the bulk of it allegedly for workers' compensation. Defense counsel challenged the truth of the claim. She noted that there was "zero injury in this case" and that the "bat never even touched" Mr. Lesaca. RP 20. She noted that Mr. Lesaca's only medical bill from the time of the incident was for \$144.69, apparently for medication. RP 22. "This is insurance fraud," she stated. RP 20. She argued that the court should deny the restitution request outright, and if it were inclined award any amount, then it should hold an evidentiary hearing given Mr. Lee's dispute of the facts. RP 20.

The court noted that "voluminous materials" had been presented by the State and that it wanted to "read through this a little more carefully." Supp. CP \_\_ (Sub No. 86); RP 25. The court continued the

hearing, but ruled that it was “not setting it over for an evidentiary hearing. I’m setting it over just to continue the matter so we can all read through the documents a little more closely.” RP 27.

A second hearing was held on November, 18, 2015. At the hearing, the State argued extensively about “documents that were submitted” but did not identify the documents, offer any materials into evidence, or present any exhibits. RP 30-32. The State argued that its materials gave the court a “significant basis to estimate the amount of loss.” RP 32.

Defense counsel again emphatically disputed “the facts relevant to determining restitution.” *Id.* She cited to State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005), and argued, “the State ... is required to have an evidentiary hearing to prove the causal connection between the crime and the claimed damages.” RP 33. She specifically challenged the notion that Mr. Lee had caused the damages claimed. *Id.*

She emphasized that Mr. Lesaca said he was not injured during the incident, and argued that to the extent that he had claimed workers’ compensation for lumbar problems, the medical records indicated he suffered from a degenerative condition. RP 34, 36-39. She noted that Mr. Lesaca had health issues, such as obesity and a history of smoking, that made him a risk for lumbar spinal stenosis, and that other documents

suggested the condition existed before the charged offense. RP 39. She contended Mr. Lesaca had made a fraudulent workers' compensation claim. Id. She reiterated that the State was required to have an evidentiary hearing under Kinneman given the factual dispute. RP 42, 44.

In response, the prosecutor contended that the November 18, 2014 hearing itself was an evidentiary hearing. RP 46. However he did not offer or present any "evidence," even though he made argument based on the unidentified, unauthenticated documents he had given to the court. RP 47-51. Defense counsel objected, and noted that the court had expressly declined to set the case over for an evidentiary hearing. RP 51. She indicated that if the matter had been scheduled for an evidentiary hearing, the defense would have subpoenaed witnesses. Id. at 52. She asked for "an actual evidentiary hearing ... where the defense is allowed to actually speak to some of these people, get some of ... the answers I'm looking for." Id. at 54.

The court reserved ruling and ultimately issued a written decision awarding restitution to Mr. Lesaca in the amount of \$144.69, and to King County Risk Management, for the workers' compensation, in the amount of \$51,850.32. CP 28.

E. ARGUMENT

1. **Because Mr. Lee disputed the facts underlying the State’s restitution demand, the Fourteenth Amendment guarantee of due process entitled him to an evidentiary hearing.**

a. Restitution is part of sentencing, to which due process protections apply.

The setting of restitution is an integral part of sentencing. State v. Kisor, 68 Wn. App. 610, 620, 844 P.3d 1038 (1993). In misdemeanor sentencing, the imposition of restitution is governed by RCW 9.92.060 and RCW 9.95.210, which allow the court to order the defendant to make restitution “to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question.” State v. Marks, 95 Wn. App. 537, 540, 977 P.2d 606 (1999).

Because it is part of sentencing, a defendant is entitled to due process of law. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. Due process of law requires that (1) a defendant be afforded an opportunity to refute a restitution demand; and (2) the evidence presented in support of restitution be reliable. State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992). Claimed damages must be supported by “substantial credible evidence” that “affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” State v. Mark,

36 Wn. App. 428, 434, 675 P.2d 1250 (1984). The State must prove a causal link between the defendant's act and the loss alleged. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 984 (1998).

b. Where Mr. Lee disputed facts material to the restitution demand, the court's refusal to hold an evidentiary hearing denied Mr. Lee due process, and requires reversal.

If the defendant disputes facts relevant to determining restitution, the court must hold an evidentiary hearing, at which the State will be obligated to prove damages by a preponderance of the evidence. Kinneman, 155 Wn.2d at 285. Here, despite defense counsel's unequivocal demand for an evidentiary hearing and dispute regarding the material facts supporting the State's restitution claim, the trial court inexplicably did not hold the required hearing.

The prosecutor asserted that the November 18, 2014, hearing was an "evidentiary hearing", RP 46, but this assertion is not well taken. First, the State did not identify, offer, or present any "evidence." Although the rules of evidence do not apply at sentencing, ER 1101, evidence presented in support of restitution must nevertheless be reliable. Cf., Pollard, 66 Wn. App. at 786 (documents containing double hearsay supplied an insufficient basis on which to order restitution). The State apparently submitted "voluminous materials" to the court, but defense counsel

challenged the reliability of the claims asserted therein, and objected to their consideration.

Second, when the court continued the hearing from November 4, 2014, it specifically stated that it was not continuing the matter for an evidentiary hearing. For the State to later claim that such a hearing was being conducted without Mr. Lee's knowledge amounts to trial by ambush, which surely violates due process.

At the core of the due process guarantee is the right to a meaningful opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); City of Redmond v. Moore, 151 Wn.2d 664, 680, 91 P.3d 375 (2004). As noted, in the context of a restitution hearing, this includes affording the defendant the opportunity to *refute* the State's restitution demand. Pollard, 66 Wn. App. at 784-85. Here, Mr. Lee was given no such chance. The court's failure to conduct an evidentiary hearing denied him due process of law. The restitution order must be vacated and this case remanded for the required evidentiary hearing.

**2. On remand, Mr. Lee must be afforded the opportunity to confront the State's evidence and call witnesses.**

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v.

Eldridge, 424 U.S. at 333 (citation omitted). Beyond that, the process which is due in a given setting depends on the individual right at stake and the government’s interest in restricting that right. See Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Applying this balancing test to a parole revocation hearing, Morrissey required the hearing must provide minimal due process protections which include

- (a) written notice of the claimed violations or parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body . . . ; and (f) a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole.

408 U.S. at 482-84; U.S. Const. Amend XIV. These minimum requirements serve to “assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” Id. at 484. The Court extended these minimal requirements to probation hearings as well. See e.g., Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

The Washington Supreme Court has required these same minimal protections be afforded at a variety of post-sentencing hearings. State v.

Dang, 178 Wn.2d 868, 883, 312 P.3d 30 (2013) (applying Morrissey requirements to hearing to revoke conditional release of insanity acquittee); State v. Abd-Rahmaan, 154 Wn.2d 280, 291, 111 P.3d 1157 (2005) (concluding Morrissey requirements must apply at sentence modification hearing); State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) (applying Morrissey to revocation of Special Sex Offender Sentencing Alternative); State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985) (applying Morrissey to revocation of suspended sentence).

In each of these cases, the courts began with the notion that the hearings involved were not a part of a criminal prosecution and thus did not demand “the ‘full panoply of rights’ due in that setting.” Abd-Rahmaan, 154 Wn.2d at 285 (citing Morrissey, 408 U.S. at 480). However, in each case, despite the lessened protections, the courts recognized that confrontation remained an integral part of the process due.<sup>1</sup>

Thus, in Dang, the Court reiterated that even under the limited due process analysis applicable to such proceedings, “‘hearsay evidence should be considered only if there is good cause to forgo live testimony.’”

---

<sup>1</sup> Even in the context of prison disciplinary hearings the Court has noted that confrontation of adverse witnesses may be proper in the certain circumstances within the sound judgment of corrections officials. Wolff v. McDonnell, 418 U.S. 539, 568-69, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

Dang, 178 Wn.2d at 884 (quoting Dahl, 138 Wn.2d at 686). ““Good cause is defined in terms of difficulty and expense of procuring witnesses in combination with demonstrably reliable or clearly reliable evidence.”” Id. In Dang, the Supreme Court held that the State failed to establish good cause not to produce live witnesses where the hearsay statements in question were those of local county-designated medical providers. Id.

Because of the liberty interests at stake, the due process requirements of a sentencing hearing must be greater than the due process protections of a sentence modification hearing. Stated differently, the process at the hearing determining the *conditions* of a sentence must be more exacting than at the hearing addressing an alleged *violation* of those conditions, and certainly cannot be less. From this statement, it must follow that a defendant at least has the due process right to confront witnesses at a restitution hearing absent a specific finding of good cause. On remand, Mr. Lee must be afforded the right to confront the State’s witnesses as well as a meaningful opportunity to refute the State’s evidence with his own witnesses.

**3. On remand, the State must prove the amount of restitution sought and the requisite causal nexus to a jury.**

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

Restitution is a criminal sanction that is “strongly punitive” in its purpose. Kinneman, 155 Wn.2d at 280. As established, when restitution is determined, the accused is entitled to 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 Hunley, 175 Wn.2d at 910. 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).

- b. Because restitution is punishment, the Sixth Amendment requires a jury determination of the facts necessary to set a restitution amount.

The Sixth Amendment’s jury-trial right 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). Because the historical function of the jury included determining the value of a financial penalty or fine, the Supreme Court has recently made clear that 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).

In Kinneman, the Court acknowledged that restitution is part of the punishment imposed following 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 reiterated that 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.” Id. at 2350-51. That is precisely how restitution is determined in Washington.

Kinneman reasoned that 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 concluded that 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.

But the fact that a judge has discretion in determining the amount of restitution fundamentally differs from 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.<sup>2</sup> 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

---

<sup>2</sup> Indeed, Mr. Lee has been unable to find any case in which a court invoked the “extraordinary circumstances” exception to refuse a claim for restitution that was submitted and proven by the State.

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 the statutes that govern the imposition of restitution in felony and misdemeanor cases.

Kinneman’s conclusion that the absence of a maximum in RCW 9.94A.753 avoids any Sixth Amendment implications misses too much. To use the lexicon of Apprendi, the “maximum” permitted under the restitution statutes is \$0 unless the State presents evidence of damages. 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. Alleyne 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). But 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. Mr. Lee’s guilty plea to fourth-degree assault does not include any mention of the value of the victim’s loss or Mr. Lee’s gain. His agreement allowing the court to consider the facts contained in the certification for determination of probable cause also does not include any agreement to a specific restitution amount. Mr. Lee did not waive his right to a jury determination of damages.

c. 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 has 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, as 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. Marks, 95 Wn. App. at 540. The damages at issue are no different than the damages at issue in Sofie, i.e., they are the value of 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 of such damages.

F. CONCLUSION

The trial court denied Mr. Lee due process of law by denying him a meaningful opportunity to be heard and an evidentiary hearing on restitution sought by the State. On remand, Mr. Lee is entitled to confront the State's witnesses, to call witnesses on his own behalf, and a jury trial before restitution may be imposed.

DATED this 28<sup>th</sup> day of May, 2015.

Respectfully submitted:

/s/ Susan F. Wilk  
SUSAN F. WILK (WSBA 28250)  
GREGORY C. LINK (WSBA 25228)

Washington Appellate Project (91052)  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72828-8-I
v.	)	
	)	
YOUNG KEUN LEE,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF MAY, 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	( )	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	( )	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] YOUNG KEUN LEE	( )	U.S. MAIL
(NO VALID ADDRESS)	( )	HAND DELIVERY
C/O COUNSEL FOR APPELLANT	(X)	RETAINED FOR
WASHINGTON APPELLATE PROJECT		MAILING ONCE
		ADDRESS OBTAINED

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF MAY, 2015.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710