

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,) No. CR-19-0366-PR
)
Appellant,) Court of Appeals No.
) 1 CA-CR 18-0774
v.)
) Maricopa County Superior Court No.
VIVEK A. PATEL,) LC2018-000192
)
Appellee.) Phoenix Municipal Court No.
) 14483182

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF APPELLEE**

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INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the wrongful assessment of restitution against criminal defendants. AACJ requests the Court accept review to keep criminal restitution within constitutional limits. Affording victims "prompt" restitution under the Arizona Constitution does not preclude the legislature from capping the amount of restitution to victims, because "prompt" refers to timeliness, not to amount. AACJ joins the arguments provided in the Petition for Review and in the *amicus curiae* brief filed by the Maricopa County Office of the Public Advocate, because the court of appeals failed both to make this distinction and to conduct a severability analysis.

AACJ submits that the entirety of A.R.S. §28-672 is unconstitutional, because

the statute was clearly designed to deprive drivers who cause car accidents from having any of the protections of a civil defendant as to damages. AACJ is concerned that Arizona's case law, which continues to adhere to the belief that the restitution system is "rehabilitative" despite clear evidence proving it is punitive, has gradually devolved into an "anything goes" system where defendants' due process rights are ignored or cast aside. Here, the Legislature converted commission of simple moving violations from civil traffic offenses into class 3 misdemeanors without requiring proof of a culpable mental state. *Phoenix City Prosecutor's Office v. Nyquist*, 243 Ariz. 227 (App. 2017). This case is the latest in an increasingly egregious abuse of the restitution system, which denies criminal defendants all the constitutional and procedural protections that civil defendants would have in the situation but for the misdemeanor offense.

ARGUMENT

Arizona's restitution scheme is punitive, not rehabilitative, and thus criminal defendants are entitled to basic constitutional protections.

Restitution is defined as "compensation for loss; esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation." Black's Law Dictionary (10th ed. 2014). Criminal restitution was originally devised as a mechanism to divest an offender of any economic benefit gained from a crime. *State v. Wilkinson*, 202 Ariz. 27, ¶9 (2002); Cortney E. Loller, *What is Criminal*

Restitution?, 100 Iowa L. Rev. 93, 97 (2014). Because this “unjust enrichment” model of restitution returned both parties to their original positions, it was far more restorative than punitive in nature.

Arizona expanded criminal restitution to include losses to the victim that did not translate into gains for the offender. A.R.S. §13-603(C) (mandating restitution “in the full amount of the economic loss as determined by the court”). Unlike a pure unjust enrichment model, this form of criminal restitution emphasizes punishing the accused, deterring crime, and reducing recidivism. *Wilkinson*, 202 Ariz. 27, ¶9. Arizona cases have failed to recognize that the law of restitution has greatly evolved from “rehabilitative” to punitive while also reducing constitutional protections for defendants designed to test the accuracy of restitution requests.

A. Restitution impacts the constitutional rights to jury trial and due process.

Financial reparation to victims implicates the procedural protections of the Sixth and Seventh Amendments to the United States Constitution and article 2, §§23-24 of the Arizona Constitution.¹ The state constitutional guarantee of a jury trial in civil damages cases exists because it existed in Arizona prior to statehood.

¹ “[T]he Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States,” *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973). *But see Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 486 n.5 (1986) (“analysis is the same” under Seventh Amendment and article 2, §24); *Fisher v. Edgerton*, 236 Ariz. 71, ¶33 (App. 2014) (citing *Dombey* but comparing article 2, §23 to Seventh Amendment).

Derendal v. Griffith, 209 Ariz. 416, ¶8 (2005). Tort claims for negligence were triable to a jury under territorial law. *Tanner Companies v. Superior Court*, 123 Ariz. 599, 601 (1979). Furthermore, article 18, §5 of the Arizona Constitution states: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.” *Id.*; see also *Schwab v. Matley*, 164 Ariz. 421 (1990) (statute limiting dramshop liability violates state constitutional guarantee of jury trial in contributory negligence claims).

The right to a jury trial in criminal cases is “fundamental to our system of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968). The jury is “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,” and is meant to act as “further protection against arbitrary action.” *Id.* at 156. Any fact “that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Subsequent cases require jury findings in order to increase the maximum sentence, see *Blakely v. Washington*, 542 U.S. 296, 303, 308 (2004), or the minimum sentence, see *Alleyne v. United States*, 570 U.S. 99, 103 (2013). Furthermore, there is no “principled basis” for distinguishing criminal fines from punishments such as imprisonment or death. *Southern Union Company v. United States*, 567 U.S. 343, 349 (2012).

In *Southern Union*, the Court noted that “we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal ‘sentence[s],’ ‘penalties,’ or ‘punishment[s]’—terms that each undeniably embrace fines.” *Id.* at 350. Fines imposed under other statutes, much like restitution, are calculated by reference to “the amount of . . . the victim’s loss.” *Id.* at 349. It made clear that “in all such cases,” the facts required to determine the amount of the penalty must be found by a jury in order “to implement *Apprendi*’s ‘animating principle.’” *Id.* at 350. Thus, after *Southern Union*, there should be no question that the right to jury trial extends to monetary forms of punishment, whether they are called “fines” or “restitution.”

Finally, criminal defendants have a due process right to be sentenced based on correct and reliable information. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *State v. Grier*, 146 Ariz. 511, 516 (1985). This includes restitution, which is ordinarily part of sentencing. *State v. Steffy*, 173 Ariz. 90, 93 (App. 1992) (citing *State v. Fancher*, 169 Ariz. 266, 267 (App. 1991)). Many courts have held that Sixth Amendment rights do not apply in a restitution hearing but that due process requires defendants be permitted to challenge the evidence through cross-examination. *See United States v. Sunrhodes*, 831 F.2d 1537, 1543 (10th Cir. 1987) (despite inapplicability of Confrontation Clause to restitution hearings, defendants are nevertheless entitled to a sentence, including a

restitution determination, based on accurate information); *Franco v. State*, 918 A.2d 1158, 1162 (Del. 2007) (due process violated when trial court refuses cross-examination relevant to determine proper amount of restitution).

B. The role of restitution in criminal sentencing.

In Arizona, the first appearance of criminal restitution was called “reparation,” and it was limited in its application to probationers, as a condition of probation under the general statute authorizing courts to place offenders on probation. *See Redewill v. Superior Court*, 43 Ariz. 68 (1934) (defendant convicted of failure to provide for his minor child was required as a condition of probation to make monthly payments “for the use and benefit of [his] son.”); *Varela v. Merrill*, 51 Ariz. 64, 75-76 (1937) (“the conditions imposed by the trial court upon a [probationer]...must be such that it can reasonably be said that they have some bearing upon the protection of society against future crimes...or upon reparation by the defendant for the injury he has caused by the particular offense already committed); *see also Shenah v. Henderson*, 106 Ariz. 399, 400-01 (1970); *State v. Smith*, 118 Ariz. 345, 347 (App. 1978); *State v. Cummings*, 120 Ariz. 69, 70–71 (App. 1978). In 1977, the Legislature added A.R.S. §13-603(C) to require imposition of restitution. *See State v. Moore*, 156 Ariz. 566, 567 (1988) (“Recent statutory enactments have made the imposition of restitution mandatory.”). In contrast to Arizona’s history of conditioning probation with reparation, §13-603(C) makes no

distinction between probationers and convicted persons sentenced to imprisonment. Furthermore, §13-603(C) specifies that restitution “is a criminal penalty for the purposes of a federal bankruptcy involving the person convicted of an offense.” Thus, restitution is now part of the punishment.

Yet, in spite of this history, Arizona case law has altogether failed to recognize how its view of restitution as “rehabilitative” and not “punitive” is based in pre-MPC cases holding that the source of authority to order restitution derives from the general probation statute. Arizona case law has failed to recognize its violation of the right to a jury trial on restitution. There is no constitutional infirmity with §13-603(C) because the Legislature is authorized to set punishments. *State v. Holle*, 240 Ariz. 300, ¶9 (2016). The court—along with the state and federal constitutions—provides the procedure for assessing restitution.

In *Wilkinson*, this Court determined that the Legislature struck a balance between assessing defendants in the restitution process for the direct damages while preserving the right to jury trial for consequential damages. 202 Ariz. 27, ¶11. Because there are distinct limitations on the parties in the sentencing phase, this Court acknowledged that “[t]he sentencing phase of a criminal case is not the ideal forum for the disposition of a [civil] case. Both parties are deprived of a jury; the defendant may be limited in showing causation or developing a defense of contributory negligence or assumption of risk.” *Id.* ¶12 (quoting *State v. Garner*,

115 Ariz. 579, 581 (App. 1977)). “Requiring [a defendant] to pay restitution for damages that resulted directly from the criminal conduct serves to rehabilitate The penalty thus fits squarely within the goals of criminal punishment and does not deprive him of a civil trial to which he might otherwise be entitled.” *Id.* ¶13.

While dutifully explaining why assessment for consequential damages has no place in a criminal sentencing, *Wilkinson* altogether fails to conduct any analysis as to whether a defendant’s rights are adequately protected as to direct damages. In fact, the “crime” at issue in *Wilkinson*, contracting without a license, is a non-jury-triable offense under *Derendal*. Imposing nearly \$50,000 was upheld even though the offense bore no relation whatsoever to causation of actual damages. In fact, *Wilkinson* contradicts an earlier case that held that a conviction for a statute that does not require a finding of fault for a victim’s injuries cannot be used as the basis for ordering restitution. *State v. Skiles*, 146 Ariz. 153, 154 (App. 1985).

C. Recent Arizona cases have all but abandoned fundamental fairness in the process of determining restitution.

The requirement to pay “full restitution” now includes “investigation costs” for victimless crimes, *see State v. Guilliams*, 208 Ariz. 48 (App. 2004), acquitted offenses, *see State v. Lewis*, 222 Ariz. 321, ¶¶10, 14 (App. 2009) (noting the difference in the burden of proof to establish restitution versus establishing guilt, the court imposed restitution as to the victim of a count the jury found not proven), and even amounts of restitution exceeding a jury determination of the amount of theft,

see State v. Leon, 240 Ariz. 492, ¶¶1, 12 (App. 2016) (where jury fixed the victim’s loss between \$25,000 and \$100,000, but victim claimed loss in excess of \$200,000, the COA upheld restitution order in the amount requested by victim in spite of *Apprendi*, *Blakely*, and *Southern Union*). In another recent case, the COA abandoned any pretense of prohibiting consequential damages from the definition of “economic loss.” *State v. Quijada*, 246 Ariz. 356, ¶¶40-47 (App. 2019).

Furthermore, the COA has held that restitution, although technically part of sentencing, may be imposed at any time after sentencing: “Although [restitution] has been recognized as ‘part of the sentencing process’ in some contexts, ‘restitution is not a penalty or a disability.’” *State v. Grijalva*, 242 Ariz. 72 ¶10 (quoting *State v. Zaputil*, 220 Ariz. 425, ¶11 (App. 2008)). In *Zaputil*, the rationale for allowing an untimely imposition of restitution focused on the fact that the defendant was placed on probation. In *Grijalva*, with a defendant sentenced to prison, the court abandoned that rationale entirely. At this point, there is no law that would prevent the State from bringing a new restitution claim decades after sentencing. *But see State v. Nuckols*, 229 Ariz. 266 (App. 2012) (trial court does not abuse discretion in disallowing State from bringing untimely restitution claim).

D. In addition to being unconstitutional, denying a jury trial and due process to criminal defendants on issues related to restitution is bad public policy.

The right to a jury is meant to act as “further protection against arbitrary action.” *Duncan*, 391 U.S. at 156. The judge, on the other hand, may exercise

discretion only “within fixed statutory or constitutional limits.” *Apprendi*, 530 U.S. at 482 (citations omitted). By leaving restitution to judges who often rely heavily, if not exclusively, on presentence reports prepared by probation officers in making restitution-related decisions, Arizona has implemented a restitution scheme with inadequate protections for defendants. While the presentence report is not binding on the trial judge, practice has shown that “court[s] will simply rubberstamp the probation officer’s report.” Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?*, 64 Ala. L. Rev. 803, 819 (2013); *see also* Jennifer S. Granick, *Faking It: Calculating Loss in Computer Crime Sentencing*, 2 I/S: J. L. & Pol’y Info Soc’y 207, 221 (2006) (finding that sentencing courts often matched the government’s suggested restitution award).

This is immensely problematic; such “bureaucratically prepared” reports are “hearsay-riddled.” *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting). In recommending restitution amounts, probation officers rely heavily on victims’ estimates of their own losses and have little ability to correct inaccuracies or false statements. The surest way to test the veracity and accuracy of restitution claims is the same as for any other evidence: “by testing it in the crucible of cross-examination,” *Crawford v. Washington*, 541 U.S. 36, 61 (2004), and having it

“confirmed by the unanimous suffrage of twelve of his equals and neighbours,”
Southern Union, 567 U.S. at 356 (internal quotations omitted).

1. *Unlike civil defendants, criminal defendants may face a presumptive amount of restitution, which is found by a judge rather than a jury and may be based on evidence that would be inadmissible in a civil trial.*

“The amount of a victim’s loss is normally determined as part of sentencing, and that is where the objection may be made, or a restitution hearing requested.”
Steffy, 173 Ariz. at 93. Thus, although “[t]he state has the burden of proving a restitution claim,” *Lewis*, 222 Ariz. 321, ¶7, the trial court presumes the correctness of the victim’s request until the defendant proves the contrary. The judge may base the presumptive award on evidence that would be inadmissible under the Rules of Evidence, including hearsay in presentence reports. *Compare* A.R.S. §13-804(I) (allowing the judge to consider “any evidence” heard), *with, e.g.*, Ariz.R.Evid. 403 (excluding evidence presenting risk of unfair prejudice substantially outweighing probative value); Rule 404(b) (excluding other crimes, wrongs, or acts as proof of character); Rule 408(a) (excluding evidence of compromise offers and negotiations to prove the amount of a claim); Rule 409 (excluding evidence of offers or promises to pay medical expenses); Rule 410 (excluding statements made during plea discussions); Rule 701 (excluding witness testimony not “rationally based on the witness’s perception”); Rule 802 (excluding hearsay); Rule 901 (excluding evidence lacking adequate foundation).

In a civil trial, the plaintiff receives no such presumption. To prevail in a civil trial, “the evidence supporting the propositions which a party has the burden of proving must outweigh the evidence opposed to it.” *Lewis v. N.J. Riebe Enterprises, Inc.*, 170 Ariz. 384, 398 (1992). The civil defendant may test the plaintiff’s evidence, including contemporaneous objections, to contest the amount of damages while the plaintiff is attempting to establish it.

Finally, even if the judge in a restitution hearing is not permitted to consider inadmissible evidence, reviewing courts may simply presume that the judge ignored any inadmissible evidence. *See State v. Gunther & Shirley Co.*, 5 Ariz.App. 77, 84 (1967) (presuming judge “ignored or disregarded all inadmissible evidence”). In a civil proceeding, a jury would not be permitted to consider this inadmissible evidence. *See, e.g., City of Phoenix v. Mubarek Ali Khan*, 72 Ariz. 1, 8 (1951) (finding reversible error where plaintiff’s damages were established in part by a witness’s inadmissible speculation).

2. Criminal defendants have few procedural avenues to gather information to defend themselves in restitution hearings.

The defendant’s access to information to contest this presumptive amount of restitution is far more limited than it would be in the context of civil litigation. For example, the criminal defendant is only entitled to disclosure of information held by the State. *Cf. Ariz.R.Crim.P.15.1(g)* (disclosure by other persons compelled only upon discretionary court order, and only after defendant shows “substantial need”

for material). Because Arizona case law does not view restitution as a criminal penalty, it is unclear that the State is even required to reveal all information that is helpful to the defendant in determining the proper amount of restitution; the Criminal Rules only require a prosecutor to reveal “information that *tends to mitigate or negate the defendant’s guilt* as to the offense charged, or which would *tend to reduce the defendant’s punishment* therefor.” Ariz.R.Crim.P. 15.1(b)(8) (emphasis added); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Furthermore, Ariz. Const. art. 2, §2.1(A)(5) prohibits a criminal defendant from compelling the victim to provide information. *Quijada*, 246 Ariz. 356, ¶¶37-39 (victim who submits restitution request but refuses to testify or provide supporting documentation suffers no consequence except an adverse inference). Moreover, defendants are commonly denied adequate opportunity to prepare for a restitution hearing. *See In re Richard B.*, 216 Ariz. 127, ¶¶5–6 (App. 2007) (restitution hearing held seven days after the State submitted its request for restitution).

In civil cases, on the other hand, the defendant would have access to any information that would help him or her contest the amount of restitution, including mandatory disclosure of witnesses and statements, detailed computations of damages and supporting documents, description and location of known documents and records, and information about insurance. *See Ariz.R.Civ.P. 26.1(a)*. The civil defendant can compel the person claiming injury to answer written questions; depose

the plaintiff and other witnesses; compel production of relevant documents or evidence; and, if personal injuries are claimed, require the person to submit to a medical examination. *See* Ariz.R.Civ.P. 30, 33, 34, 35, 45.

3. Criminal defendants are exposed to liability for the entire amount of victims' injuries in restitution hearings, even if only partially at fault for causing the injuries.

A criminal defendant's amount of restitution will generally be for the whole amount of the victim's injury, even if the defendant is only partially responsible for the injury. *See* A.R.S. §13-804(B) ("In ordering restitution for economic loss...the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted."); §13-804(F) (co-defendants jointly and severally liable for restitution). Criminal defendants have no procedure to limit their own exposure to anything less than liability for the victim's full damages, or to get contributions from other parties responsible for the victim's injury.

In contrast, in civil actions, "the liability of each defendant for damages is several only," A.R.S. §12-2506(A), unless multiple responsible parties were acting in concert or one was another's agent, §12-2506(D)(1)-(2). Defendants are entitled to have their liability proportionally reduced by the proportion of fault of others, even if not joined in the litigation. §12-2506(B). And, if the plaintiff was at least 50% responsible for the event leading to his or her own injury, the jury may award the plaintiff nothing at all. §12-711. In some situations, civil litigation requires third

parties to be brought into the litigation, for example when the defendant's situation leaves them "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Ariz.R.Civ.P. 19(a)(1)(B)(ii). And Ariz.R.Civ.P. 14(a)(1) allows civil defendants to join defendants from whom they are entitled to contribution.

CONCLUSION

AACJ asks this court to review the important issues presented in this case.

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