

STATE OF MINNESOTA
IN SUPREME COURT
A16-0198

Court of Appeals

Anderson, J.

State of Minnesota,

Respondent,

vs.

Filed: January 3, 2018
Office of Appellate Courts

Emile Rey,

Appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Kathryn M. Keena, Assistant County Attorney, Hastings, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

Michael Everson, Assistant Attorney General, Saint Paul, Minnesota, for amicus curiae Minnesota Attorney General.

S Y L L A B U S

1. The district court's imposition of mandatory-minimum restitution following appellant's conviction of identity theft did not result in a procedural or substantive due process violation.

2. The district court’s order requiring appellant to pay mandatory-minimum restitution of \$1,000 to each of the 66 direct victims of appellant’s offense was restitution, not an unconstitutional fine.

Affirmed.

OPINION

ANDERSON, Justice.

Appellant Emile Rey pleaded guilty to one count of identity theft involving eight or more direct victims,¹ Minn. Stat. § 609.527, subds. 2, 3(5) (2016). The district court ordered Rey to pay the mandatory-minimum restitution of \$1,000 to each of his 66 direct victims, totaling \$66,000. Minn. Stat. § 609.527, subd. 4(b) (2016). Rey appealed, asserting that the mandatory-minimum restitution he was ordered to pay violated his procedural and substantive due process rights and is an unconstitutional fine. The court of appeals affirmed. Rey asks us to declare the statute unconstitutional, vacate the restitution order, and remand the matter for a restitution hearing or a *Blakely* trial.² We affirm.

¹ Direct victims are defined as “any person or entity” who incurs loss or harm as a result of the defendant’s offense, “whose identity has been transferred, used, or possessed in violation of this section. Minn. Stat. § 609.527, subd. 1(b) (2016); *see also* Minn. Stat. § 611A.01(b) (2016) (defining “victim”). It is undisputed that all of Rey’s victims were direct victims.

² At a *Blakely* trial, the state must prove beyond a reasonable doubt aggravating factors that increase a defendant’s maximum sentence. *See State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016); *see also Blakely v. Washington*, 542 U.S. 296, 301–02 (2004).

FACTS

In March 2015, the Eagan Police Department began investigating the reported use of a cloned credit card³ by an unknown male at a Target store in Eagan. An investigator learned from Target's loss-prevention personnel that the same unknown male had been to the store on five other occasions to purchase gift cards with what appeared to be cloned credit cards. On one of the occasions, the unknown male was observed arriving at the Target store in a 2002 or 2003 Kia Spectra sedan.

In late March, Target loss-prevention personnel at a Bloomington store captured the license plate number of the Kia Spectra and forwarded it to the investigator. The investigator then spoke with the registered owner of the vehicle, who reported having sold it to another person, eventually identified as Rey's female accomplice, S.R. After obtaining a court order, an electronic tracking device was installed on S.R.'s vehicle.

Over the course of approximately one month, the investigator tracked the vehicle to Target stores on 39 occasions and to Walmart stores on nine other occasions. The investigator obtained a list of transactions from those stores during those visits. From that list, the investigator identified 25 different credit card numbers used to purchase gift cards. All of the credit card numbers were associated with credit cards issued by Wells Fargo that had been compromised by a recent breach of Home Depot's information systems.

The investigator learned from Target that some of the gift cards were redeemed in the greater Chicago area. The electronic tracking data from S.R.'s vehicle showed that on

³ Cloned credit cards are copies of legitimate credit cards created by encoding the magnetic strip of a blank card with information from a legitimate credit card. *See United States v. Keita*, 742 F.3d 184, 187 (4th Cir. 2014).

one day in May, the vehicle traveled to the Minneapolis-Saint Paul Airport, stayed for approximately one minute, and returned to S.R.'s residence. On that day, airport police, having received a photo of Rey (who was yet unidentified), reviewed surveillance video and observed him boarding a flight to Chicago. The airline provided the investigator with possible names. The investigator then identified Rey from his Facebook profile.

Several weeks later, Eagan police arrested Rey and S.R. after they attempted to use cloned credit cards at a Target store in Eagan. A search of S.R.'s residence that same day turned up 66 cloned credit cards and numerous gift cards. The investigator contacted at least 13 people whose credit cards had been cloned and confirmed that none of them had given permission to Rey or S.R. to use their credit card information.

The State charged Rey with one count of identity theft, involving more than eight direct victims. *See* Minn. Stat. § 609.527, subsd. 2, 3(5). Rey pleaded guilty, admitting to the possession and use of 66 cloned credit cards belonging to 66 different victims. Police sent forms for restitution requests and victim-impact statements to all 66 victims. By the time of sentencing, six victims had returned victim-impact statements and only one victim had returned a restitution-request form, which did not make a claim for restitution.

Rey moved the district court to declare the mandatory-minimum restitution provision in the identity-theft statute, Minn. Stat. § 609.527, subd. 4(b), unconstitutional on the grounds that it violated his procedural and substantive due process rights. Rey also argued that ordering the mandatory-minimum restitution in his case would amount to an unconstitutional fine. The district court denied the motion and ordered Rey to pay the mandatory-minimum restitution of \$1,000 to each of his 66 victims, totaling \$66,000. Rey

appealed, and the court of appeals affirmed. *State v. Rey*, 890 N.W.2d 135, 143 (Minn. App. 2017). We granted Rey’s petition for review.

ANALYSIS

The identity-theft statute requires a district court to order a person convicted of identity theft to pay restitution in an amount not less than \$1,000 to each direct victim of the crime. Minn. Stat. § 609.527, subd. 4(b). Direct victims are those whose identities were transferred, used, or possessed, and who suffered loss or harm. *See* Minn. Stat. §§ 609.527, subd. 1(b) (2016), 611A.01(b) (2016) (defining a “victim” generally as a natural person, corporation, or government entity “who incurs loss or harm as a result of a crime”). Unlike other proceedings for restitution under Minn. Stat. § 611A.045 (2016), the identity-theft statute does not expressly require a district court to consider the amount of economic loss suffered by the victim or the defendant’s ability to pay when ordering restitution.

Rey argues that the mandatory-minimum restitution requirement in the identity-theft statute is unconstitutional because it: (1) violates procedural due process; (2) violates substantive due process; and (3) amounts to an unconstitutional fine. We review constitutional challenges to statutes *de novo*. *See State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011). We presume statutes are constitutional and will exercise our “power to declare a statute unconstitutional with extreme caution and only when absolutely necessary.” *State v. Craig*, 826 N.W.2d 789, 791 (Minn. 2013) (citation omitted) (internal quotation marks omitted).

I.

The United States and Minnesota Constitutions provide that the government shall not deprive a person of “life, liberty, or property without due process of law.” U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. “The due process protection provided under the Minnesota Constitution is identical to the due proces[s] guaranteed under the Constitution of the United States.” *State v. Krause*, 817 N.W.2d 136, 144 (Minn. 2012) (alteration in the original) (citation omitted) (internal quotation marks omitted). Rey asks us to hold that the imposition of the mandatory-minimum restitution in the identity-theft statute violated procedural and substantive due process. We address each issue in turn.

A.

“Whether the government has violated a person’s procedural due process rights is a question of law that we review de novo.” *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). Fundamentally, procedural due process requires “notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.* (citation omitted) (internal quotation marks omitted). Rey argues that the procedures afforded to him were not constitutionally sufficient under the three-factor test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The three-factor balancing test in *Mathews* requires us to consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. But we are not persuaded that the *Mathews* test applies to a restitution order at a sentencing proceeding. See *Medina v. California*, 505 U.S. 437, 443 (1992) (“[T]he *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules [that] . . . are part of the criminal process.”). The restitution order here arises out of the criminal process, and Rey received the full range of procedural protections afforded to all criminal defendants.

Even if we applied the *Mathews* framework, however, Rey’s claim would fail. Rey does not weigh the first and third factors of the test—i.e., the private interest at stake and the government’s interest. *Mathews*, 424 U.S. at 335. Rey argues under the second factor that the risk of erroneous deprivation, *id.*, is so high that we should conclude that the mandatory-minimum-restitution requirement is unconstitutional. The risk of erroneous deprivation, however, is nil. Rey’s guilty plea included an express admission of the only material facts necessary for the restitution order: that 66 persons were direct victims of his criminal conduct. Rey’s argument—that the procedures afforded will result in erroneous deprivations because some victims may receive more in restitution payments than their actual loss or harm—takes aim at the substance of the law, not the adequacy of the procedures. Rey’s argument is really that the mandatory-minimum restitution will result in erroneous *compensation*, not that more or different procedures would have changed the amount of restitution awarded, which the Legislature has fixed at a minimum of \$1,000 per direct victim.

Moreover, there is no dispute that Rey received notice that he would be required to potentially pay \$66,000 in mandatory restitution, in the pre-plea investigation report and

elsewhere, if he were found guilty of the crime. Further, at sentencing, Rey was afforded an opportunity to be heard on any challenges to the restitution order. He could have requested a restitution hearing to challenge the number of victims or their status as direct victims under the identity-theft statute, but he declined to do so. *See* Minn. Stat. § 611A.045, subd. 3.

Because Rey received notice of the restitution and was afforded a meaningful opportunity to be heard on the matter, we hold that there was no procedural due process violation in this case. *See Hughes v. State*, 815 N.W.2d 602, 606 (Minn. 2012).

B.

We turn next to Rey’s argument that the mandatory-minimum restitution provision in the identity-theft statute violates substantive due process.⁴ Whether a law or government action violates substantive due process is a constitutional question, which we review *de novo*. *State v. Hill*, 871 N.W.2d 900, 905 (Minn. 2015). The Due Process Clauses of the United States and Minnesota Constitutions prohibit the government from “ ‘certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.’ ” *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)); *see* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7.

⁴ We assume without deciding that Rey’s challenge is best analyzed and decided as a substantive due process claim. “[W]here a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, [is] the guide for analyzing the[] claim[.]” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (citation omitted) (internal quotation marks omitted).

Courts subject challenged government actions or laws to different levels of scrutiny depending upon whether a fundamental right is implicated. “If a statute does not implicate a fundamental right, we assess its constitutionality using rational basis review.” *State v. Bernard*, 859 N.W.2d 762, 773 (Minn. 2015) (citing *State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997)). Under rational-basis review, we will uphold a statute when it provides a “reasonable means to a permissive objective” and is not “arbitrary or capricious.” *Id.*

Rey acknowledges that the State has a legitimate interest in ensuring that identity-theft victims are compensated in some way for any actual economic losses they suffer due to the unlawful use of their personal information. Rey nevertheless argues that the mandatory-minimum-restitution requirement in the identity-theft statute is arbitrary because some direct victims might receive restitution payments in excess of their actual losses. That possibility, however, does not make the requirement arbitrary. The United States and Minnesota Constitutions do not require the Legislature to devise precise solutions to every problem. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 780 (1975) (“Congress could rationally have concluded that any imprecision from which [the law] might suffer was justified by its ease and certainty of operation.”); *Guilliams v. Comm’r of Revenue*, 299 N.W.2d 138, 143 (Minn. 1980) (“If the classification has some reasonable basis, it does not offend the constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality.” (citation omitted) (internal quotation marks omitted)).

The loss or harm sustained by identity-theft victims is in many important ways distinct from the loss or harm caused by other offenses. For example, an assault victim’s

economic losses are usually concrete, measurable, and easily documented by the various receipts and invoices for ambulance services, emergency medical care, or prescription medication. *See, e.g., State v. Miller*, 842 N.W.2d 474, 476, 478 (Minn. App. 2014) (affirming the district court’s decision to order joint and several restitution for medical expenses), *rev. denied* (Minn. Apr. 15, 2014); *cf. State v. Palubicki*, 727 N.W.2d 662, 664–66 (Minn. 2007) (noting the award of funeral expenses and crime scene cleanup costs and upholding an award of lost wages and expenses to the next of kin). Similarly, a victim of car theft can measure and substantiate the loss by providing the book value of the car or an insurance payout. *See, e.g., State v. Olson*, 379 N.W.2d 524, 527 (Minn. 1986); *see also State v. Johnson*, 851 N.W.2d 60, 65 (Minn. 2014) (explaining that restitution ordered for damage to vehicle must be supported by the record).

Identity-theft victims may never be able to fully account for their losses or harm because the damage is hard to discover and measure. For example, identity-theft victims may not know the full extent of the damage until they attempt to finance a new purchase or refinance a home mortgage. *See, e.g., State v. Maxwell*, 802 N.W.2d 849, 852–53 (Minn. App. 2011) (upholding restitution award of more than \$200,000 where the victim was unable to refinance a home mortgage because of identity theft), *rev. denied* (Minn. Oct. 26, 2011). Because the difficulty extends not only to quantifying the loss or harm but also to discovering it, affording identity-theft victims some minimum amount of restitution is rational. The mandatory-minimum-restitution requirement in the identity-theft statute accounts for the “known unknown”: harm exists, but its nature and extent are often latent.

Because Rey has failed to demonstrate that the mandatory-minimum-restitution requirement in the identity-theft statute is arbitrary, there has been no substantive due process violation in this case.

II.

Having concluded that no due process violation occurred, we turn next to Rey's argument that the mandatory-minimum-restitution requirement in the identity-theft statute amounts to an unconstitutional fine, not restitution. In *United States v. Bajakajian*, the Supreme Court held that forfeiture of money for violating currency-reporting requirements was a form of criminal punishment subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. 524 U.S. 321, 327–28 (1998). The Court reasoned that a fine has always been “understood to mean a payment to a sovereign as punishment for some offense.” *Id.* at 327 (citation omitted) (internal quotation marks omitted). Rey argues that the mandatory-minimum restitution in the identity-theft statute operates similarly to the forfeiture in *Bajakajian* and that we should consider it a fine. We disagree.

We have long noted that restitution is intended to compensate crime victims for their losses. *Palubicki*, 727 N.W.2d at 666; *State v. Terpstra*, 546 N.W.2d 280, 283 (Minn. 1996); *State v. Maldi*, 537 N.W.2d 280, 286 (Minn. 1995); *State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984). The Legislature called the provision here “restitution,” and it operates as restitution. *See* Minn. Stat. § 609.527, subd. 4. Any money collected from wages that Rey earns while in prison or on supervised release will be paid to the victims, not to the State.

We recognize that, like the forfeiture in *Bajakajian*, the restitution order here was part of Rey's sentence, yet so are nearly all restitution orders. *See* Minn. Stat. § 609.10 (2016).

Given the modest amount of mandatory restitution imposed by the Legislature for each victim, it is sufficient here to hold that the mandatory-minimum-restitution requirement in the identity-theft statute is what it purports to be: restitution, not a fine.

Because we hold that the mandatory-minimum-restitution requirement is not a fine, we need not consider Rey's arguments with respect to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Alleyne v. United States*, 570 U.S. 99 (2013).

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.