NO. 44205-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

HENRY URQUIJO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR

The Honorable Gordon Godfrey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges at a private meeting.

2. The sentencing court erred in imposing a term of confinement and community custody that exceeds the 60-month statutory maximum for felony violation of a no-contact order.

Issues Pertaining to Assignments of Error

1. During jury selection, the court called the parties and the appellant to a sidebar for private peremptory challenges. Because the trial court did not analyze the Bone-Club[1] factors before conducting this portion of voir dire in private, did the court violate appellant's constitutional right to a public trial?

2. Did the sentencing court err in failing to reduce the community custody term to ensure that the combination of confinement and community custody did not exceed the 60-month statutory maximum sentence?

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

B. STATEMENT OF THE CASE[2]

The State charged Henry Urquijo with felony violation of a no-contact order, alleging he assaulted his girlfriend, Jennifer Gonzales, despite an order prohibiting contact between the two. The charge was elevated to a felony based on the theory that he had twice violated no-contact orders. CP 1-7; RCW 26.50.110(4), (5).

Following testimony, the court first asked the jury to decide whether Urquijo violated a no-contact order. CP 25; see also CP 29 (verdict form). The court then asked by special interrogatory whether Urquijo (1) intentionally assaulted Gonzales and (2) whether he was "previously convicted of two or more violations of a Domestic Violence No Contact Order." CP 30. The jury left the first question blank but answered "yes" to the second. CP 30.

Defense counsel requested a Drug Offender Sentencing Alternative (DOSA) and informed the court that under State v. Boyd,[3] the court must impose a specific term of community custody rather than noting the term could not exceed the statutory maximum. 2RP 113.

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[2] The brief refers to the verbatim reports as follows: 1RP – 10/30/2012 (voir dire) and 2RP – 10/30 and 11/13/2012 (trial and sentencing).

[3] State v. Boyd 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

The court denied the DOSA request and sentenced Urquijo to a 60-month statutory maximum term. CP 36; RCW 26.50.110(5); RCW 9A.20.021(1)(c). The court acknowledged the community custody term in addition to incarceration exceeded the statutory maximum but noted on the judgment and sentence that the community custody term was "to be equal to the length of earned early release not to exceed 12 months." CP 38. The court told Urquijo "I think you're going to go do 60 months and I think you're going to be under [Department of Corrections] supervision. And if some court [of] appeals or whatever says you're not supervised, so be it." 2RP 115.

Urquijo timely appeals. CP 46-47.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES IN PRIVATE.

Jury selection occurred on October 30, 2012. 1RP 2-58. After the parties finished asking potential jurors questions, the court directed counsel and Urquijo to a table, where, based on the clerk's minutes, it appears the parties made peremptory challenges. CP 48. The exercise of the challenges was not reported. 2RP 59. The court then called the names of the jurors being seated. 2RP 59; CP 48.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial it must first apply the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809. A violation of the right to a public trial is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The public trial right applies to jury voir dire, which is important to the adversaries as well as the criminal justice system. Orange, 152 Wn.2d at 804 (citing Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104

S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges, governed by CrR 6.4, constitutes a part of "voir dire." State v. Wilson, __ Wn. App. ___, 298 P.3d 148, 155-56 (2013); People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992); cf. State v. Sublett, 176 Wn.2d 58, 70-71, 77, 292 P.3d 715 (2012) (consistent with CrR 6.15, in-chambers discussion of jury question posed during deliberations did not implicate public trial right).

The right to a public trial is concerned with "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these crucial constitutional limitations, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. See State v. Slert, 169

Wn. App. 766, 772, 778-79, 282 P.3d 101 (2012) (holding an in-chambers conference at which various jurors were dismissed based on their questionnaire answers violated right to a public trial), review granted, 176 Wn.2d 1031 (2013).

The procedure in this case violated the right to a public trial. Although the procedure occurred in an otherwise open courtroom, it was essentially a sidebar, which occurs outside of the public's scrutiny and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also Harris, 10 Cal.App.4th at 684 (exercise of peremptory challenges in chambers violates defendant's right to a public trial); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 6-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenge could be held at sidebar if challenge and party making it was then immediately announced in open court).

The trial court violated appellant's right to a public trial by taking peremptory challenges at a private meeting. While parties need give no rationale for such challenges, their open exercise is essential given the

important limits on such challenges, which may be triggered solely by a juror's appearance. A written record of such challenges is inadequate given the need for scrutiny in the first instance. And, generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012).

The multitude of cases prohibiting private voir dire controls the result here. But should this Court hold that application of the "experience and logic" test is necessary, the result would be no different, as this Court recently held that not only voir dire, but also extensions of voir dire, must be conducted openly based on the application of this test. State v. Jones, __ Wn. App. ___, ___ P.3d ___, 2013 WL 2407119 at *7 (June 4, 2013) (off-the-record drawing to select alternate jurors violated public trial right, necessitating reversal of conviction). Because the error is structural, prejudice is presumed, and reversal is required. Wise, 176 Wn.2d at 16-19.

2. WHERE THE COURT IMPOSED THE MAXIMUM TERM OF INCARCERATION, IT ERRED IN IMPOSING A COMMUNITY CUSTODY TERM.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Under RCW 9.94A.701(3)(a), a court is directed to sentence an offender to one year of community custody if he is convicted of a "crime against persons" as defined by RCW 9.94A.411(2). A "domestic violence court order violation" is such a crime. Id. The court recognized the 60-month prison term[4] plus a 12-month community custody term exceeded the statutory maximum of 60 months and noted on the judgment and sentence that the term was "to be equal to the length of earned early release not to exceed 12 months." CP 38; 2RP 115.

The court's notation would have been correct under earlier case law. See State v. Franklin, 172 Wn.2d 831, 837, 263 P.3d 585 (2011) (under earlier statutes, the Department of Corrections was allowed to recalculate community custody terms to ensure the combination of confinement and community custody did not exceed the statutory maximum). But the legislature amended the pertinent statute in 2009, and in 2012 the Supreme Court held that sentencing courts must reduce the community custody term to ensure the combination does not exceed the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (citing RCW 9.94A.701(9)).

[4] Felony violation of a no contact order is a class C felony with a statutory maximum of 60 months. RCW 26.50.110(5); RCW 9A.20.021(1)(c).

The trial court disregarded controlling Supreme Court precedent, which is error. See 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("A decision by this court is binding on all lower courts in the state."). The proper remedy is to remand to the trial court to specify a term of community custody that does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 295 P.3d 782, 786-87 (2013).

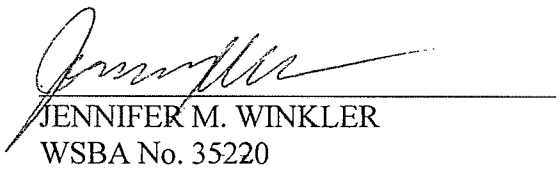
D. CONCLUSION

The trial court violated Mr. Urquijo's right to a public trial by taking peremptory challenges at a sidebar conference. This Court should therefore reverse his conviction. Resentencing is also required because the court erroneously imposed a community custody term in addition to a statutory maximum term of incarceration.

DATED this 7TH day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HENRY URQUIJO
DOC NO. 803790
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JUNE, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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