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DIVISION I COURT OF APPEALS

STATE OF WASHINGTON

STATE OF WASHINGTON,
RESPONDENT

v
JOHN HARRIS, JR.,
APPELLANT

No.

APPELLANT'S STATEMENT OF
ADDITIONAL GROUNDS

INTRODUCTION

COMES NOW, APPELLANT, JOHN HARRIS,
JR. AND FILES THIS STATEMENT OF ADDITIONAL
GROUNDS PURSUANT TO RAP 10.10.

II. ASSIGNMENT OF GROUNDS

A. GROUND ONE

MR. HARRIS' RIGHTS UNDER THE VI, XIV AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1 SECTIONS 3, 10 AND 22 UNDER THE WASHINGTON CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT, WITH MR. HARRIS ABSENT AND WITH HIM OBJECTING AFTER-THE-FACT, IMPERMISSABLY CLOSED THE COURTROOM WITHOUT CONDUCTING THE REQUISITE ANALYSIS SET FORTH IN STATE V BONE-CLUB, 128 WN 2d 254 (1995) AND WAS THEREFORE PREJUDICED.

III. ISSUES RELATED TO GROUNDS

A. DID MR. HARRIS RECEIVE A FAIR TRIAL WHERE:
(1) THE STATE AND DEFENSE COUNSEL HAD DISCUSSIONS OFF THE RECORD IN THE JUDGE'S CHAMBERS WITHOUT MR. HARRIS BEING PRESENT;
(2) WHERE THE COURT FAILED TO CURE THE DEFECT BY DECLARING A MISTRIAL AND EMPANELLING AN ENTIRELY NEW JURY POOL; (3) CAN THE PREJUDICE BE OVERCOME OUTSIDE OF AN ENTIRELY NEW TRIAL; AND (4) WHERE MR. HARRIS HAD ALREADY DEMONSTRATED

- A COMPLETE BREAKDOWN IN COMMUNICATIONS WITH HIS DEFENSE COUNSEL IN TWO SEPARATE AND DISTINCT TRIALS.

IV FACTS RELEVANT TO ERRORS

MR. HARRIS WAS CHARGED BY INFORMATION IN KING COUNTY SUPERIOR COURT WITH ONE (1) COUNT OF HIT AND RUN FELONY WITH AN AGGRAVATING FACTOR OF DEATH AND ONE (1) COUNT OF DRIVING WHILE LICENSE SUSPENDED A GROSS MISDEMEANOR. MR. HARRIS PLEADED NOT GUILTY AND TRIAL COMMENCED ON NOVEMBER 13, 2012.

DURING JURY SELECTION ON NOVEMBER 14, 2012, THE COURT AND COUNSEL FOR BOTH THE STATE AND THE DEFENSE HELD DISCUSSIONS RELATED TO THE TRIAL IN THE JUDGE'S CHAMBERS, OFF THE RECORD AND WITHOUT MR HARRIS BEING PRESENT. RP(11-14-2012) 154 AT 2-23

THE STATE VOICED ITS CONCERNS AFTER- THE FACT AND CHARACTERIZED THE DISCUSSIONS AS "MINISTERIAL" AND "DE MINIMUS". RP(11-14-12) 159 AT 18.

MR. HARRIS OBJECTED TO THE FORMER "CLOSED" DISCUSSIONS AND ANY FUTURE

DISCUSSIONS OUTSIDE OF HIS PRESENCE.

RP (11-14-2012) 156 AT 14-18

THE COURT ATTEMPTED TO CURE THE DEFECT BY BEGINNING THE JURY SELECTION PROCESS ANEW WITH THE SAME JURY POOL, ABSENT THOSE POTENTIAL JURORS FROM THE POOL WHO HAD ALREADY BEEN DISMISSED FOR CAUSE.

AT THE END OF THE DISCUSSIONS IN AN ATTEMPT TO CURE THE DEFECT, THE COURT DID NOT DECLARE A MISTRIAL; INSTEAD THE COURT DECIDED TO PROCEED WITH THE TRIAL UNDER THE TERMS AGREED TO BY BOTH THE STATE AND DEFENSE COUNSEL OVER MR. HARRIS' REPEATED OBJECTIONS, WHICH THE TRIAL COURT IGNORED ACKNOWLEDGING ONLY DEFENSE COUNSEL'S STATEMENTS:

THE COURT: WELL FOR THE RECORD, DOES THE DEFENSE OBJECT TO THE MANNER OF PROCEEDING AS I'VE - AND AGAIN, YOUR ATTORNEY CAN SPEAK FOR YOU. ANY OBJECTION TO PROCEEDING IN THAT MANNER?

MR. DURAN: NO OBJECTION
RP (11-14-2012) 162 AT 10-14

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TRIAL CONTINUED AND MR. HARRIS WAS FOUND GUILTY ON BOTH COUNTS. AS A DIRECT RESULT OF THOSE PROCEEDINGS MR. HARRIS FILES THIS STATEMENT OF ADDITIONAL GROUNDS.

VI ARGUMENT

A. THE TRIAL COURT VIOLATED MR. HARRIS' CONSTITUTIONAL RIGHT TO COUNSEL, DUE PROCESS AND A PUBLIC TRIAL UNDER AMENDMENTS VI, XIV OF THE U.S. CONSTITUTION AND ARTICLE 1 SECTIONS 3, 10 AND 22 OF THE WASHINGTON STATE CONSTITUTION WHEN IT IMPERMISSIBLY CLOSED THE COURTROOM AND HOLDING DISCUSSIONS WITH COUNSEL "IN CHAMBERS" OUTSIDE OF MR HARRIS' PRESENCE AND WITHOUT ENGAGING IN THE REQUISITE ANALYSIS SET FORTH IN STATE V BONE-CLUB, 128 WN 2d 254 (1995)

B. STANDARD OF REVIEW

CONSTITUTIONAL VIOLATIONS ARE REVIEWED DE NOVO. STATE V LYNCH, 87882-0, 2013 WL 5310164 --- WN 2d --- (2013). A MANIFEST ERROR AFFECTING A CONSTITUTIONAL

RIGHT MAY BE RAISED FOR THE FIRST TIME ON REVIEW. RAP 2.5(a)(3); STATE V KIRWIN, 165 Wn2d 818, 823 (2009)

1) CONSTITUTIONAL RIGHTS

IN RELEVANT PARTS: "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A... PUBLIC TRIAL... AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE." U.S. CONST. AMEND VI
"NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR DENY... THE EQUAL PROTECTION OF THE LAW." U.S. CONST. AMEND. XIV.

"NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW." WASH. CONST. ARTICLE 1 SECTION 3

"JUSTICE IN ALL CASES SHALL BE ADMINISTERED OPENLY..." WASH. CONST. ARTICLE 1 SECTION 10

"~~IN~~ ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL HAVE THE RIGHT TO APPEAR AND DEFEND IN PERSON, OR BY COUNSEL..."

TO HAVE A... PUBLIC TRIAL. WASH.
CONST. ARTICLE 1 SECTION 22.

2) CLOSURE OF THE COURTROOM

"WE REVIEW DE NOVO WHETHER A TRIAL COURT HAS VIOLATED THE RIGHT TO A PUBLIC TRIAL." STATE V WISE, 148 WN APP. 425, 433 (2009) CITING STATE V BRIGHTMAN, 155 WN 2D 506, 514 (2005). AND WE PRESUME PREJUDICE WHERE THE COURT PROCEEDINGS VIOLATE THAT RIGHT. ID. CITING BONE-CLUB, 128 WN 2D 254, 257 (1995).

"THE BONE-CLUB FACTORS ASSURE CAREFUL, CASE BY CASE ANALYSIS OF A CLOSURE MOTION, AND CONSISTS OF THE FOLLOWING DETERMINATIONS:

- 1) THE PROPONENT OF CLOSURE OR SEALING MUST MAKE SOME SHOWING [OF A COMPELLING INTEREST], AND WHERE THAT NEED IS BASED ON A RIGHT OTHER THAN AN ACCUSED'S RIGHT TO A FAIR TRIAL, THE PROPONENT MUST SHOW A 'SERIOUS AND IMMINENT THREAT' TO THAT RIGHT.
2. ANYONE PRESENT WHEN THE CLOSURE MOTION IS MADE MUST BE GIVEN AN OPPORTUNITY

- TO OBJECT TO THE CLOSURE.

3. THE PROPOSED METHOD FOR CURTAILING OPEN ACCESS MUST BE THE LEAST RESTRICTIVE MEANS AVAILABLE FOR PROTECTING THE THREATENED INTERESTS.

4. THE COURT MUST WEIGH THE COMPETING INTERESTS OF THE PROPONENT OF CLOSURE AND THE PUBLIC.

5. THE ORDER MUST BE NO BROADER IN ITS APPLICATION OR DURATION THAN NECESSARY TO SERVE ITS PURPOSE.

BONE-CLUB, 128 WN 2d AT 258-59

"A TRIAL COURT'S FAILURE TO UNDERTAKE THE BONE-CLUB ANALYSIS, WHICH DIRECTS THE TRIAL COURT TO ALLOW ANYONE PRESENT AN OPPORTUNITY TO OBJECT TO THE CLOSURE, UNDER CUTS THE GUARANTEES ENSHRINED IN BOTH ARTICLE 1 SECTION 10 AS WELL AS ARTICLE 1 SECTION 22 WISE, 148 WN APP. 425, 433-34 (2009) CITING BONE-CLUB, ID.

IN THE INSTANT CASE, NOT EVEN MR. HARRIS, THE DEFENDANT AND THE ONE PERSON WITH THE MOST AT STAKE, WAS PRESENT DURING THE CLOSURE AND NEVER HAD THE OPPORTUNITY TO OBJECT PRIOR TO ITS OCCURRENCE. AND WHILE THE COURT ATTEMPTED TO CURE THE ERROR AFTER-THE-FACT, MR. HARRIS

EXPRESSED HIS MISTRUST AND OBJECTIONS OPENLY AND WITH A DESIRE FOR A NEW TRIAL. THE TRIAL COURT IGNORED THESE REQUEST AND PROCEEDED WITH ITS AD-HOC REMEDY AND NO NEW TRIAL WAS GRANTED. UNDER THE FACTS OF THIS CASE, MR. HARRIS HAD ALREADY BEEN PREJUDICED ESPECIALLY GIVEN THE ONGOING DIFFICULTIES BETWEEN HIM AND HIS DEFENSE COUNSEL.

“THE REMEDY FOR A TRIAL COURT'S FAILURE TO FOLLOW BONE-CLUB IS TO REVERSE AND REMAND FOR NEW TRIAL. WISE, 148 WN. APP AT 433 CITING IN RE PERS. RESTRAINT OF ORANGE, 152 WN 2d 795, 814 (2004).

THEREFORE MR. HARRIS' CONVICTION SHOULD BE VACATED AND HE SHOULD BE GRANTED A NEW TRIAL.

3) CONFLICT WITH DEFENSE COUNSEL

WHILE MR. HARRIS' APPELLATE COUNSEL HAS FULLY BRIEFED THE ISSUE WHERE MR. HARRIS INTER ALIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, THE ISSUE BECAME AMPLIFIED WHERE COUNSEL FAILED TO

CONVEY MR. HARRIS' WISH FOR A NEW TRIAL AND/OR AT THE VERY LEAST OBJECT TO THE AD HOC PROCESS IMPLEMENTED BY THE TRIAL COURT IN ITS ATTEMPT TO CURE ITS ERROR.

"THE FEDERAL AND STATE CONSTITUTIONS PROVIDE A CRIMINAL DEFENDANT WITH THE RIGHT TO COUNSEL AND TO DUE PROCESS, U.S. CONST. AMEND'S VI, XIV; ART. I § 3, 22. COUNSEL'S CRITICAL ROLE IN THE ADVERSARIAL SYSTEM PROTECTS THE DEFENDANT'S

FUNDAMENTAL RIGHT TO A FAIR TRIAL. STRICKLAND V WASHINGTON, 466 U.S. 668 684-85 (1984); UNITED STATES V CRONIC, 466 U.S. 648, 656 (1984)

"THE RIGHT TO COUNSEL NECESSARILY INCLUDES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL." KIMMELMAN V MORRISON, 477 U.S. 365, 377 (1986); STATE V A. N. J. 168 WN 91, 96-98 (2010). THE RIGHT TO EFFECTIVE COUNSEL IS NOT FULFILLED SIMPLY BECAUSE AN ATTORNEY IS PRESENT IN COURT; THE ATTORNEY MUST ACTUALLY ASSIST THE CLIENT AND PLAY A ROLE IN ENSURING THE PROCEEDINGS ARE ADVERSARIAL AND FAIR." STRICKLAND, 466 U.S. AT 685; A.N.J. 168 WN 2d AT 98.

COMMUNICATION BETWEEN A CLIENT AND HIS ATTORNEY IS AN ESSENTIAL COMPONENT OF THE RIGHT TO COUNSEL. SEE *RIGGINS V NEVADA*, 504 U.S. 127, 144 (1992) (KENNEDY J., CONCURRING) ("WE HAVE HELD THAT A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE IS IMPAIRED WHEN HE CANNOT COOPERATE IN AN ACTIVE MANNER WITH HIS LAWYER. THE DEFENDANT MUST BE ABLE TO PROVIDE NEEDED INFORMATION TO HIS LAWYER AND TO PARTICIPATE IN THE MAKING OF DECISIONS ON HIS OWN BEHALF.") *id.* (EMPHASIS ADDED)

"WHERE A CRIMINAL DEFENDANT HAS, WITH LEGITIMATE REASON, COMPLETELY LOST TRUST IN HIS ATTORNEY, AND THE TRIAL COURT REFUSES TO REMOVE THE ATTORNEY, THE DEFENDANT IS CONSTRUCTIVELY DENIED COUNSEL." *DANIELS V WOODFORD*, 428 F.3d 1181, 1198 (9TH CIR. 2005) (QUOTING *BROWN V CRAVEN*, 424 F.2d 1166, 1169 (9TH CIR. 1970)).

THUS, NOT ONLY DID MR. HARRIS RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL, THE INTENSE CONFLICT, THE COMPLETE BREAKDOWN IN COMMUNICATIONS

COUPLED WITH THE TRIAL COURT'S REFUSAL TO REMOVE COUNSEL CONTRIBUTED TO THE TOTAL LACK OF TRUST HARBORED BY MR. HARRIS SUCH THAT ANY CONVERSATIONS OR PROCEEDINGS HELD OUTSIDE OF HIS PRESENCE COULD NOT BE CURED WITHOUT A COMPLETELY NEW TRIAL.

THEREFORE, MR. HARRIS' CONVICTION SHOULD BE VACATED AND HE SHOULD BE GRANTED A NEW TRIAL. SUBSEQUENTLY, ON REMAND, MR. HARRIS' CASE SHOULD BE DISMISSED WITH PREJUDICE ON DOUBLE JEOPARDY GROUNDS.

VI CONCLUSION

FOR ALL THE FOREGOING REASONS MR. HARRIS RESPECTFULLY REQUESTS THAT THIS COURT VACATE HIS CONVICTION, REMAND FOR NEW TRIAL WITH INSTRUCTIONS TO DISMISS WITH PREJUDICE.

RESPECTFULLY SUBMITTED THIS 2ND DAY OF DECEMBER, 2013

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