No. 44061-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEE McCLURE,

Appellant.

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

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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A. STATEMENT OF THE CASE

During Lee McClure's trial, the court addressed challenges to prospective jurors for cause or hardship in open court at various points in the voir dire process. 8/6/12 RP 52-53, 82-88; 8/7/12 RP 2-13, 57-62, 88-92. After the parties concluded their questioning of the prospective jurors on August 7, however, the court addressed additional challenges at an unrecorded sidebar to which the public and Mr. McClure were excluded.[1] CP 803; 8/7/12 RP 119-20.

The court did not engage in a Bone-Club analysis before the sidebar conference. 8/7/12 RP 106, 119. At least one member of the public, Mr. McClure's mother, was present in court. Id. at 92-93.

Two days later, the trial court related that Jurors 1, 15, 44, and 47 had been excused for cause at the private August 7 sidebar conference. 4RP 298-300. The court concluded that one juror could not be impartial and that jury service would have been a hardship for the other three. Id.

[1] See 8/7/12 RP 88 (court reserves ruling on defense counsel's challenge to Juror 15, to be renewed prior to peremptory challenges); CP 795-97 (Original Jury Panel Selection List lists Jurors 1, 15, 41, and 47 as excused for cause, but none of those jurors were excused on the record for August 6 and 7).

B. SUPPLEMENTAL ARGUMENT

Mr. McClure's constitutional right to a public trial was violated by the court's decision to excuse four prospective jurors for cause at a closed sidebar conference.

The accused has the constitutional right to a public trial, and the public has the right to open access to the court system. U.S. Const. amends. I, VI; Const. art. I, §§ 10, 22. The trial court may restrict the right to a public trial only if the court justifies the courtroom closure after conducting an on-the-record balancing of the Bone-Club factors. State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). In Mr. McClure's case, the use of a sidebar conference that could not be heard by the public to excuse four jurors for cause without addressing the Bone-Club factors violated his constitutional right to a public trial.

In light of recent Supreme Court decisions addressing the right to a public trial, this Court asked the parties to address "the issue of 'for cause' jury challenges on the record before us." Order Lifting Stay and Requesting Supplemental Briefing, 10/8/2014. While several of the recent decisions are fragmented, they reinforce Mr. McClure's argument that his constitutional right to a public trial was violated.

1. Mr. McClure's right to a public trial includes challenging and excusing jurors for cause.

Jury selection is a critical part of the criminal justice system that is important to the parties and the public. In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 219 (2005). Washington has long held that the right to a public trial extends to jury selection. State v. Wise, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012); Brightman, 155 Wn.2d at 515; Orange, 152 Wn.2d at 804-05. Recent Supreme Court decisions honor this precedent.

An in-chambers discussion of answers provided in juror questionnaires and the resulting dismissal of four jurors for cause was addressed in State v. Slert, ___ Wn.2d ___, 334 P.3d 1088 (2014). In light of pretrial publicity, the judge and attorneys reviewed completed juror questionnaires in chambers and decided to dismiss four jurors based on their answers. Slert, 334 P.3d 1088 at ¶¶ 4-5. Using the experience and logic test, the four-justice lead opinion concluded that reviewing the questionnaire answers before the jurors were questioned was not part of juror voir dire and the public trial right therefore did not apply. Id. at ¶¶ 10-16. The lead opinion is not applicable to Mr. McClure's case, where the closed sidebar occurred after the parties had finished questioning the jurors and was clearly part of voir dire.

Moreover, the four-justice lead opinion is not the holding of a majority of the court. When there is no majority opinion, the court's holding is "the narrowest ground upon which a majority agreed." In re Personal Restraint of Francis, 170 Wn.2d 517, 532 n.7, 242 P.2d 866 (2010); State v. Patton, 167 Wn.2d 379, 391, 219 P.2d 651 (2009). Thus, Slert's holding is found the views of the dissent and concurring opinions. Five justices agreed that the right to a public trial attaches to voir dire, which includes questioning of jurors and excusing them for cause.

The four-justice dissent in Slert concluded that the dismissal of four jurors for cause is part of voir dire. Slert, 334 P.3d 1088 at ¶¶ 28-35 (Stephens, J., dissenting). They reasoned that questions in the jury questionnaire were designed to evaluate fitness to serve and to excuse jurors for cause, and excusing jurors based upon their answers was part of the voir dire process. Id. at ¶ 29-35.

> No matter what form it takes, the dismissal of jurors by a judge for case-specific reasons is not merely a "prelude to a formal process," as the lead opinion believes. What occurred in chambers here was voir dire. Under well-settled precedent, voir dire must be conduct in open court unless the trial court justifies a closure under the Bone-Club factors.

Id. at ¶ 35 (citing Brightman, 155 Wn.2d at 515; Wise, 176 Wn.2d at 11-12; State v. Paumier, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012); and In

re Personal Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012)).

Justice Wiggins concurred only with the result of the lead opinion. Slert, 334 P.3d 1088 at ¶¶ 20-27. He agreed with the dissent and prior authority that voir dire – "the individual examination of jurors concerning their fitness to serve in a particular case" -- is part of the right to a public trial. Id. at ¶ 23. Thus, the in-chambers discussion of the questionnaires and resulting dismissal of four jurors "was voir dire." Id. at ¶ 22. (Wiggins, J., concurring in result). The opinion of the majority of the Slert Court is that the defendant's right to a public trial includes jury voir dire – the questioning of jurors concerning their fitness to serve. The private sidebar in this case thus violated Mr. McClure's constitutional right to a public trial.

The Court also addressed challenges for cause in State v. Njonge, ___ Wn.2d ___, 334 P.3d 1068 (2014). Jury selection in Njonge occurred in open court. Due to the small size of the courtroom, however, it was not clear if spectators were able to observe the proceedings when the court excused some jurors for hardship. 334 P.3d 1068 at ¶¶ 5-6. The Njonge Court concluded that the defendant had not established that that his right to a public trial was at issue because he could not show that anyone was actually excluded from the courtroom. Id. at ¶¶ 14-19.

In Mr. McClure's case, it is clear that the sidebar conference where four jurors were excused for hardship or cause was private. While it was held in the courtroom, the jurors and the public could not hear what was said, and it was not reported. This is why the trial court belatedly related what had happened at the sidebar conference on the record. Mr. McClure has established that the public was excluded from a portion of voir dire, and Njonge does not apply to his case.

2. The right to a public trial is a fundamental right that Mr. McClure may raise for the first time on appeal.

A violation of the right to a public trial is structural error, and the defendant may assert the right for the first time on appeal. State v Koss, ___ Wn.2d ___, 334 P.3d 1042 at ¶ 10 (2014); Wise, 176 Wn.2d at 15; Brightman, 155 Wn.2d at 514-15; Bone-Club, 128 Wn.2d at 257.

In Shearer, Njonge, and Frawley, the State asked the Supreme Court to overrule this precedent. State v. Shearer, ___ Wn.2d ___, 334 P.3d 1078 at ¶ 13 (2014); Njonge, 334 P.3d 1068 at ¶ 11; State v. Frawley, ___ Wn.2d ___, 334 P.3d 1022 at ¶ 24 (2014). The Court, however, refused to overrule the established rule. Shearer, 334 P.3d 1078 at ¶¶ 12-17 (Owens, J., lead opinion), ¶ 25 (Gordon McCloud, J., concurring); Njonge, 334 P.3d 1068 at ¶11 ("We decline the State's invitation to disturb settled law."); Frawley, 334 P.3d 1022 at ¶¶ 24-25 (C. Johnson, J.,

lead opinion), ¶ 29 (Stephens, J., concurring), ¶ 35 (Gordon McCloud, J., concurring in part, dissenting in part). Mr. McClure may therefore raise the public trial issue in this appeal

3. Mr. McClure did not waive his right to a public trial.

"A 'waiver' is an 'intentional relinquishment or abandonment of a known right or privilege.'" Frawley, 334 P.3d 1022 at ¶ 15 (C. Johnson, J., lead opinion) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). In Mr. McClure's case, the court heard and ruled on the challenges of jurors for cause without giving Mr. McClure an opportunity to object or mentioning the right to a public trial. The defendant, however, must have a meaningful opportunity to object before a waiver can be inferred from a silent record. Morris, 176 Wn.2d at 167, State v. Easterling, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006); Bone-Club, 127 Wn.2d at 261; accord Frawley, 334 P.3d 1022 at ¶¶ 42-46 (McCloud, J., concurring in part and dissenting in part). Thus, Mr. McClure did not knowingly, intelligently and voluntarily waive his right to a public trial.

A divided court addressed two potential waivers of the right to a public trial in Frawley. Frawley waived his constitutional right to be present before the trial court and counsel interviewed 35 prospective jurors in chambers. Frawley, 334 P.3d 1022 at ¶2 (lead opinion). Seven justices

of the court concluded that Frawley did not validly waive his right to a public trial because he was not informed of that right. Id. at ¶¶ 17-19 (C. Johnson, J., lead opinion), ¶ 29 (Stephens, J., concurring), ¶¶ 53 (Gordon McCloud, J., concurring in part, dissenting in part).

In a companion case, Applegate, the parties questioned one juror privately in chambers after the court asked if anyone objected to the proceeding. Frawley, 334 P.3d 1022 at ¶7. No one objected to the procedure, and defense counsel told the court that Applegate did not object. Id. This was found to be an adequate waive of the right to a public trial by the two dissenting and three concurring justices. Id. at ¶ 37 (McCloud, concurring in part, dissenting in part), ¶ 54 (Wiggins, J., dissenting).

In contrast, Mr. McClure was not given any opportunity to object to the sidebar conference. His right to a public trial was never mentioned, and he was never informed of the purpose of the closed meeting. He did not waive his right to a public trial.

4. The violation of Mr. McClure's public trial right was not de minimus.

The violation of the constitutional right to a fair trial cannot be excused as de minimus. Brightman,155 Wn.2d at 517; Easterling, 157 Wn.2d at 180-81. The issue was again raised in Shearer and Frawley, and

rejected in both cases. Shearer, 334 P.3d 1078 at ¶¶ 18-20 (Owens, J., lead opinion), ¶ 25 (Gordon McCloud, J., concurring); Frawley, 334 P.3d 1022 at ¶¶ 26-27 (C. Johnson, J., lead opinion), ¶ 28 (Stephens, J., concurring), ¶ 35 (Gordon McCloud, J., concurring in part, dissenting in part). As the lead opinion in Shearer explained, finding a public trial error to be de minimus conflicts with the court's holding that such violations are structural error. Shearer, 334 P.3d 1078 at ¶ 12. The sidebar in Mr. McClure's case thus cannot be excused as a de minimus violation of his right to a public trial.

5. Mr. McClure's conviction should be reversed.

Whether a trial court has violated a defendant's right to a public trial is a matter of law that this Court reviews de novo. Koss, 334 P.3d 1042 at ¶ 10; Wise, 176 Wn.2d at 9.

The discussion of evidentiary issues at a sidebar conference does not implicate the public trial right because such sidebars have traditionally been held outside the hearing of the public and the jury and allowing public access will not add anything positive to the process. State v. Smith, ___ Wn.2d ___, 334 P.3d 1049 at ¶¶ 18, 25 (2014). Tradition and logic, however, demonstrates that jury voir dire is a part of a trial that must be open to the public. Njonge, 334 P.3d 1068 at ¶ 8; Wise, 176 Wn.2d at 11-

12; Brightman, 155 Wn.2d at 515. Whether the private conference occurs in chambers or at sidebar is irrelevant.

The trial court violated Mr. McClure's constitutional right to a public trial when it heard challenges to jurors and excused jurors for cause at a sidebar that the public could not hear without conducting a Bone-Club analysis. Mr. McClure's conviction should be reversed and remanded for a new trial.

C. CONCLUSION

For the reasons stated above and in the Appellant's Supplemental Brief, Lee McClure respectfully asks this Court to reverse his convictions and remand for a new trial due to the violation of his constitutional right to a public trial.

DATED this 22nd day of October, 2014.

Respectfully submitted,

s/ Elaine L. Winters 23706

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

STATE OF WASHINGTON, Respondent, v. LEE MCCLURE, Appellant.	)))))))))	NO. 44061-0-II

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