Supreme Court No. 92387-6

Court of Appeals No. 26830-6-III (Consolidated with 26204-9-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

DALLIN DAVID FORT, Respondent

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

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Dallin Fort, Respondent here and PRP Petitioner below, and Defendant at the Spokane Superior Court trial level, answers the State of Washington's request that this Court review two issues from the Court of Appeals' published decision, *State v. Fort*, No. 26830-6-III consolidated with 26204-9-III. Dallin Fort is presently incarcerated by the State of Washington Department of Corrections.

II. STATE'S ISSUES PRESENTED FOR REVIEW

The State of Washington, as Petitioner, raises the following two issues for the Court to review.

1. Is there an irrefutable presumption that appellate counsel was ineffective for failing to raise an open court allegation when, at the time of appeal, approximately ten years ago, the complained-of voir dire was a favored trial practice employed purely to benefit the defendant's right to a fair trial?
2. Is a new ineffective assistance of appellate counsel claim first asserted in a 2015 amendment to a 2006 personal restraint petition (PRP), timely under RCW 10.73.090, where the new claim is asserted eight years after the mandate issued on defendant's first appeal resolving all issues relating to the trial and conviction? Or did defendant's meritless second appeal filed in 2008 after the re-sentencing with only a minor offender score adjustment, still under review in 2015, create a "super exception" to review by opening the door to any and all claims that could have been raised in the original appeal?

Respondent Dallin Fort respectfully requests that the Court deny review to these issues.

III. STATEMENT OF THE CASE

PROCEDURAL FACTS

Dallin Fort adopts the procedural history of this case as outlined in the Court of

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Appeals Appendix to its September 15, 2015 published opinion. A copy of this Appendix is attached to this answer.

IV. ARGUMENT TO REJECT REVIEW

ARGUMENT RE: STATES ISSUE NO. 1

The State suggests that the trial court's closing the courtroom was exclusively in the defendant's interests, ignoring the juror's interest in privacy; the court's interest in assuring a bias free jury and the public's interest in auditing the administration of justice. The State argues that:

1. Juror's would be more candid if there was closure;
2. Juror bias could more easily be discovered;
3. The closure was deminimus as only select juror's were privately interviewed, and
4. Jurors would be more comfortable in a private setting.

All of these reasons, even if correct, would not keep the court from doing a Bone-Club analysis prior to closure. The trial court was aware of the need for due process procedures before it could close a public trial. *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982); *State v. Bone-Club*, 128 Wn.2d at 258-59 (1995); *In re Orange*, 152 Wn.2d 795 (2004). Despite this precedence, the court was closed without regard to the public's right or the defendant's right to have the open administration of justice.

The State's argument that this was "a favored trial practice" does not lessen its unconstitutionality. The State's argument that closure was "employed purely to benefit the defendant's right to a fair trial" ignores the issues of fairness to the public and to the defendant required in the closure process.

The State believes that it was doing the defendant a favor by closing the courtroom. A long history of cases, both federal and state, interpreting both constitutions, requires that the "favor" be granted only after cautious analysis. There is a plethora of precedence that counsel is "irrefutably" ineffective for ignoring the trial court's failure to follow the

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procedures necessary to close the courtroom.

The State argues that the courtroom closure was 10 years ago and that closing voir dire was a "favored trial practice." It was not favored by appellate courts nor by state and federal constitutions as evidenced by *Ishikawa, Bone-Club, and Orange's* interpretation of Washington Constitution, Article 1, §10 and § 22 and United States Constitution, Amendment VI. There are no cases and no argument that closure is an allowable procedure without following the five *Bone-Club* procedures.

ARGUMENT RE: STATES ISSUE NO. 2

The Court of Appeals chronology appendix to its September 15, 2015 decision in *State v. Fort*, No. 26830-6-III, consolidated with 26204-9-III, is the case history that defendant Fort adopts for this answer to the State's Petition for Review. Defendant Fort filed a PRP on June 12, 2006 and it remained open and active until September 15, 2015. He argued that by closing the courtroom without *Bone-Club* analysis, his right and the public's right to the constitutionally protected open administration had been violated. Mr. Fort asked for a new trial. Mr. Fort did not claim the ineffectiveness of appellate counsel for failure to raise these issues as the trial court did not approve the transcription of voir dire until December 15, 2006, which was 52 days after appellate counsel had filed his appellate brief in Division III.

When the transcriptions were available on June 12, 2006, Mr. Fort filed a PRP claiming the failure of the trial court to ensure the open administration of justice under both state and federal constitutions. This PRP could have, but again, did not claim that appellate counsel was ineffective because it was unnecessary. Raising the defendant's and the public's open trial right was structural error. Also, when the opening brief was filed, counsel had no transcripts to support an argument that the *Bone-Club* rules had been ignored.

On January 14, 2008, Division III stayed its consideration of Mr. Fort's PRP pending a decision of the State Supreme Court on whether to accept review of *State v. Frawley*, 181 Wn.2d 452 (2014), a direct appeal involving closing a criminal trial's voir dire to the public. Mr. Fort's PRP case remained stayed in Division III for 7 years and 1 month, until February

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14, 2015. It was lifted after the State Supreme Court on December 11, 2014, rendered a decision in *State v. Speight*, 182 Wn.2d 103 (2014) and *State v. Coggin*, 182 Wn.2d 115 (2014). These cases, for the first time, decided that a constitutional violation of the open administration of justice was not presumptively prejudicial. Now the defendant must show actual and substantial prejudice if this issue is raised for the first time on a collateral attack. No such prejudicial showing is necessary if the issue was raised on a direct appeal and no such prejudicial showing is needed in collateral attack if, in addition to the public trial claim, the defendant also claims that his appellate counsel was ineffective in failing to raise the public trial issue.

Prior to *Coggin*, the law according to, *In Re Orange*, 152 Wn.2d 795 (2004) was that denial of a public trial was a structural error, and as such, was presumptively prejudicial. Mr. Fort had no need nor motivation to raise the issue of ineffectiveness of appellate counsel prior to the ruling in *Coggin* because if their was structural error denying a public trial right, the case would be remanded for a new trial. There was a basis to claim ineffective assistance in the PRP, but no need to raise this issue.

The Washington Appellate Project in Seattle was appointed by the Court of Appeals to prosecute Mr. Fort's first direct appeal. Upon reviewing the trial court record, appellate counsel recognized that the jury voir dire transcript had not been requested and moved to supplement the record to include this transcript. (RP 15). The supplemental transcript, however, was not received until after Mr. Fort's opening brief had been filed with this Court.

The appellate counsel was aware of the public trial violation because he had ordered the voir dire transcription for this very reason. The direct appeal attorney was also aware of the public trial violation because he knew of the PRP when it was filed on June 11, 2007. Nevertheless, appellate counsel did not supplement his brief and assign error to the violation of the state and federal constitutions public trial rule. Had he done so, Mr. Fort would have received a new trial. There was no tactical benefit or strategy in not raising this issue. This failure was ineffective assistance of counsel.

When the stay of Mr. Fort's PRP was lifted, Division III invited counsel to

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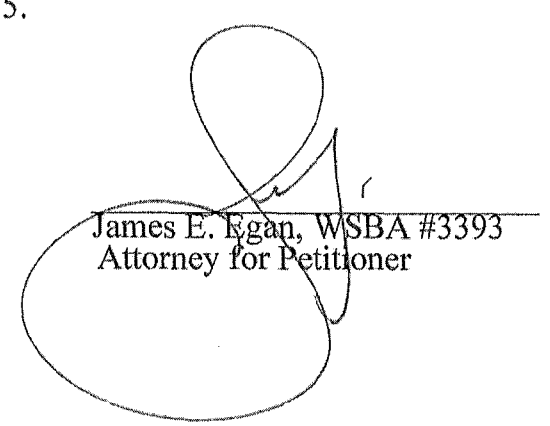
supplement their briefing in light of *Coggin*, *Frawley*, and *Speight*. Mr. Fort accepted this invitation arguing the issue of the ineffectiveness of appellate counsel in failing to raise the loss of Mr. Fort's public trial rights. The issue was then timely raised in a PRP that was filed in 2006, but stayed for 7 years and never decided until September 15, 2015. Since Mr. Fort's direct appeal was also not a final judgment until it was decided on September 15, 2015, the defendant raised the issue of ineffective assistance within one year of the final judgment as required by RCW 10.73.100.

CONCLUSION

Mr. Fort requests that the Court deny the State's Petition for Review of the decision on the PRP for the following reasons:

1. Mr. Fort and the public were unconstitutionally denied a public trial.
2. When Mr. Fort filed his PRP, the law of *In Re Orange* said that denial of a public trial was a structural error and prejudice was presumed.
3. There was no need to raise ineffective assistance in the PRP because of the presumed prejudice.
4. *Coggin* changed the presumed prejudice standard for collateral attacks on public trial rights that didn't also raise ineffective assistance claims.
5. Because of Mr. Fort's direct appeal was not final, the PRP ineffective assistance of counsel claim was within one year under RCW 10.73.090.

DATED this 13th day of November, 2015.



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Appendix

State v. Dallin Fort
Chronology

November 10, 2005 State filed charges against Fort.

January 30, 2006 Trial began. During voir dire, trial court interviews potential jurors in closed chambers.

February 3, 2006 Jury convicted Fort.

April 3, 2006 Trial court sentenced Fort to a minimum of 132 months.

April 21, 2006 Fort appealed to this court.

October 24, 2006 Fort filed the brief for his first direct appeal. Fort did not claim a violation of his public trial rights during this first appeal.

December 15, 2006 Trial court ordered voir dire and opening statements from Dallin Fort's trial to be transcribed at public expense.

June 12, 2006 Fort filed a personal restraint petition, in which he argued that the trial court violated his and the public's right to the open administration of justice.

September 4, 2007 In an unpublished opinion, this court affirmed Dallin Fort's convictions, but reversed the sentence and remanded for resentencing. This court held that the trial court erred in failing to count Fort's two convictions as the same criminal conduct.

September 13, 2007 This court published its decision in *State v. Frawley*, in which we reversed and remanded a criminal prosecution for a new trial because the trial court closed voir dire without weighing the *Bone-Club* factors on the record.

December 4, 2007 This court mandated Dallin Fort's case to the trial court for resentencing.

January 3, 2008 Fort moved the trial court to grant him a new trial or vacate his judgment and sentence based on this court's decisions in *State v. Frawley*.

January 14, 2008 This court stayed its consideration of Dallin Fort's personal restraint petition pending our Supreme Court's decision on whether to accept review in *Frawley*.

January 25, 2008 The trial court held a hearing to resentence Fort according to this court's September 4, 2007 decision and December 4, 2007 mandate. Before resentencing, the trial court heard argument on Fort's motion for a new trial because of a violation of public trial rights. The trial court refused to apply this court's ruling in *Frawley* retroactively and denied Fort's motion. The trial court resentenced Fort to a minimum of 108 months confinement with a maximum term of life.

February 5, 2008 Dallin Fort filed his second notice of appeal.

March 19, 2008 Dallin Fort filed his opening brief for his second direct appeal. Fort assigned error to the trial court's denial, at resentencing, of his motion for a new trial because of a violation of his public trial right.

July 8, 2008 This court stayed Dallin Fort's second direct appeal because of pending Supreme Court decisions.

February 26, 2013 This court lifted its stay of Fort's second direct appeal. We directed the parties to provide supplemental briefing.

April 8, 2013 The Supreme Court granted review of this court decision in *Frawley*.

April 26, 2013 This court scheduled Fort's second direct appeal for consideration on June 12, 2013 without oral argument.

May 3, 2013 This court reinstituted its stay of Fort's second direct appeal given our Supreme Court's granting of review of *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007). In the meantime, Fort's personal restraint petition remained stayed.

March 24, 2014 This court expanded the stay of Dallin Fort's personal restraint petition to await, in addition to *Frawley*, our Supreme Court's disposition and mandate in *In re Personal Restraint of Speight* and *In re Personal Restraint of Coggin*.

September 25, 2014 The state Supreme Court published its opinion in *Frawley*.

November 5, 2014 This court lifted its second stay of Fort's second direct appeal. We also granted the parties an opportunity to file supplemental briefing regarding the applicability of our Supreme Court's opinion in *Frawley*.

December 11, 2014 The Supreme Court published its decision in both *Speight* and *Coggin*.

February 19, 2015 This court lifted its stay of Fort's personal restraint petition and consolidated the petition with Fort's second direct appeal. Dallin Fort and the State both accepted this court's invitation to file supplemental briefing.

April 3, 2015 In his supplement brief, Fort argued for the first time that appellate counsel for his first direct appeal was ineffective for not asserting a public trial right violation.

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Attached you will find my answer to the State's Petition for Review. Jim Egan