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No. 68633-0-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

STATE OF WASHINGTON,

Respondent,

Vs.

ROBERT LEE FREEMAN

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF KING COUNTY

Cause No. 02-1-01727-1 KNT

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

On two separate occasions, members of the public were excluded from observing Mr. Freeman's 2003 trial – first during voir dire and then again during testimony. There is no record that the trial court ever considered any alternatives to closing the proceedings. When brought to the trial court's attention upon a motion for a new trial, the court failed to acknowledge that at the time of trial Mr. Freeman was entitled to have the court consider alternatives to closing the proceedings. While the law has not changed since the time of Mr. Freeman's trial, recent opinions from both the state and United States Supreme courts have emphasized the importance of the public trial right that was violated during Mr. Freeman's trial. Despite recently being facilitated the opportunity to correct the injustice that occurred during Mr. Freeman's trial, the trial court refused to do so. As such, Mr. Freeman respectfully begs this Court to consider the mistakes that occurred during his trial, the evolution of the law relating to the right to a public trial, and the injustice associated with the trial court's recent decision not to grant him a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Freeman's 7.8 motion.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied Mr. Freeman's 7.8 motion? (Assignments of Error #1)

IV. STATEMENT OF THE CASE

A. Procedural History

Petitioner Robert Lee Freeman was convicted of rape of a child in the first, second, and third degree and child molestation in first, second, and third degree following a jury trial on March 27, 2003. He was sentenced to a term of 280 months on September 12, 2003. CP 2.[1]

Since his 2003 sentencing, Mr. Freeman's case has continually been under the jurisdiction of the full range of appellate courts, including the Court of Appeals, State Supreme Court, US District Court, 9th Circuit, and the United States Supreme Court. CP 4-6.

Once the United States Supreme Court rejected Mr. Freeman's Petition for Writ of Certiorari, Mr. Freeman timely filed a motion to the trial court under CrR 7.8. CP 1-13. In that motion Petitioner Freeman sought a new trial. Id. That motion was denied. He now seeks relief from the Court of Appeals, requesting the court find the trial court erred when it refused to grant Mr. Freeman's motion for a new trial.

B. Facts

Petitioner Robert Lee Freeman was convicted of rape of a child in the first, second, and third degree and child molestation in first, second, and third degree

[1] All references to CP and RP, herein, include references to those materials pertaining to the CrR 7.8 Motion for a New Trial. Because this case has been previously appealed, references that pre-date the CrR 7.8 motion are separately specified using dates and are properly cited within Mr. Freeman's 7.8 brief (CP 1-13).

following a jury trial on March 27, 2003. He was sentenced to a term of 280 months on September 12, 2003. CP 2.[2]

During the course of trial, observers were required to leave the courtroom on two occasions. The first instance of spectator removal occurred during voir dire. CP 2, 37. After the court's off-the-record partial closing of the courtroom, the court referenced its actions on the record during a discussion about voir dire logistics:

> MR. COLASURDO: Okay. Because we both are working off charts, and if you start moving people around –
>
> THE COURT: That's why I told him his witnesses[3] probably can't sit in here, because people stay in the same seats.
>
> MR. COLASURDO: Great.
>
> THE COURT: It's a lot easier for everybody to pick their people that way.
>
> Okay. Any questions?

Id.

During the 7.8 motion, the court had the benefit of declarations of Aria Freeman, John Freeman, Mary Freeman, and Jean Freeman supporting that the public was removed twice during the trial. CP 58-65.

The second occasion of courtroom closure involved the court ordering Mr. Freeman's fiancé, Aria Rozotti, to leave the courtroom during the testimony of

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[2] All references to CP and RP, herein, include references to those materials pertaining to the CrR 7.8 Motion for a New Trial. Because this case has been previously appealed, references that pre-date the CrR 7.8 motion are separately specified using dates.

[3] The court misspoke when referencing "witnesses." There is no question the court meant Petitioner's family and supporters.

Mr. Freeman's ex-wife. CP 77[4]. As it relates to the removal of Ms. Rozotti, the following excerpt from the trial transcript is informative:

> MR. COLASURDO: . . . The other thing is – there's two other things The State would ask that during the testimony of Virginia Freeman and Amie Freeman that Ms. Aria Rozotti be excused. . . .

CP 77.

After Ms. Rozotti was identified, the prosecutor proceeded as follows,

> MR. COLASURDO: So, in fairness to the two witnesses who do have an anti-harassment order, I would ask that she be excluded during their testimony.

CP 78.

The dialogue continued:

> THE COURT: Any Objection?
>
> MR. FREEBORN: Your Honor, I mean, I don't think it's really relevant to this matter. However, you know, in the interest of just getting this thing running through smoothly, I don't have a problem with her stepping out for that testimony.
>
> THE COURT: All right. I will grant the motion.

CP 79.

In two separate incidents, the court closed a public courtroom without ever considering reasonable alternatives to closing the proceeding. Additionally, the court made no findings related to its decision to close the courtroom.

As shown comprehensively in his trial court briefing, Mr. Freeman's case, despite appearing old (it was a 2003 trial), has not rested since the time of trial. See, CP 1-13(thoroughly documenting the long procedural history and levels of

[4] Exhibit F was not originally obtained by Mr. Freeman's appellate counsel but has since been acquired (note certification date of October 15, 2008. RP (3/17/2003) 42).

appeal through which Mr. Freeman's case has travelled, and showing the present issue ripe for the present appeal.) It returned to the trial court for the mentioned CrR 7.8 Motion for a New Trial in as timely a manner as the appellate process allowed, given the full breadth appellate and federal court jurisdiction were pending in the interim. This appeal of the CrR 7.8 Motion for a New Trial timely follows. As the court is undoubtedly aware, virtually all levels of appellate courts have addressed the public trial issue over the course of the past decade. This appeal seeks application of law that the courts have subsequently held existed prior to and during Mr. Freeman's trial, and asks the court to reverse his case and remand it for a new trial for the very reason that his right to a public trial was violated.

During the recent CrR 7.8 hearing the trial court failed to recognize it had improperly handled the public trial issue at the time of trial. Therefore, the trial court erred when it denied Mr. Freeman's motion for a new trial.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN ITS JUSTIFICATIONS FOR DENIAL OF MR. FREEMAN'S 7.8 MOTION.

A trial court's denial of a motion for a new trial under CrR 7.8(b) is reviewed for abuse of discretion. State v. Olivera-Avila, 89 Wn. App. 313, 317, 949 P.2d 824 (1997) (*citing* State v. Ellis, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994)).

CrR 7.8(b)(5) permits a judgment to be vacated for "any other reason justifying release." In Re Personal Restraint of Cadwaller, 155 Wn.2d 867, 880, 123 P.3d 456 (2005). The rule does not apply when the circumstances offered for vacation existed at the time that the judgment was entered. State v. Zavala-Reynoso, 127 Wn.App. 119, 123, 110 P.3d 827 (2005). Relief from a final judgment may only be vacated in certain limited, extraordinary circumstances required by the interest of justice. State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992). These extraordinary circumstances must relate to fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the court's action. State v. Aguirre, 73 Wn.App. 682, 688, 871 P.2d 616, *review denied*, 124 Wn.2d 1028, 883 P.2d 326 (1994). "The time limit for seeking relief is `a reasonable time'." CrR 7.8(b); See State v. Golden, 112 Wn.App. 68, 47 P.2d 587 (2002) (8 ½ years was not an unreasonable time to bring a motion for relief from judgment).

Here, the trial court abused its discretion when it denied Mr. Freeman's motion for a new trial for the following reasons:

First, despite Mr. Freeman's argument that the law the court was asked to follow existed prior to Mr. Freeman's trial, the trial court erroneously found that, "...it is not contested that at the time of this trial existing current case law was followed." CP 140. It was indeed contested and the above facts were exemplified in briefing to show the trial court what mistakes were made during the trial and how those mistakes violated both the State and Federal constitutions at the time of

the trial. Most importantly, this issue was argued in the CrR 7.8 briefing arguing for a new trial, as well as during oral argument. See, CP 1-13, RP 2-36.

Second, the court erred in its reliance upon the judge's own memory as opposed to the official record of the proceedings, when it stated, "...the court does not have independent memory sufficient to verify that these events occurred and must depend on the official transcript for this purpose." Id. Respectfully, as noted above, there were two documented instances of courtroom closure. Each of the instances was elaborated upon and explained in the declarations that were also submitted by Mr. Freeman in his motion for new trial. The trial court's conclusions were erroneous.

Importantly, there is no doubt that Mr. Freeman's motion was properly before the trial court; and the court heard the motion on its merits. In fact, instead of filing a response brief to the trial court on this issue, the state filed a motion asking the trial court to send Mr. Freeman's requested relief to the Court of Appeals as a PRP. The trial court did not, and, as indicated, went ahead and heard the motion at a full hearing, denied relief, and entered findings and conclusions as indicated. See, CP 139-141. Accordingly, the matter is now before this court for review on direct appeal.

The public trial right was clearly violated by the two instances of courtroom closure in Mr. Freeman's case. Because this area of law has been substantially refined since Mr. Freeman's conviction in 2003, Mr. Freeman should have been granted a new trial.

As noted above, while Mr. Freeman's case was pending before the U.S. Supreme Court, Division I of the Washington Court of Appeals handed down its opinion in State v. Njonge, 161 Wn.App 568, 255 P.3d 753 (2011). The Njonge

opinion addressed removal of the public from the jury selection process. The court's reversal was based on the following holding:

> ...Because the court excluded the public from a portion of jury selection without applying the Bone-Club test, we reverse Njonge's conviction and remand for a new trial.

Id. at 580.

It is critical for the court to note that Njonge was published while Mr. Freeman's case was pending before the U.S. Supreme Court. The previous appellate court review related only to the second public trial right issue – the removal of Aria Rosetti during a witness's testimony. See, CP 107-108 (discussion of exhaustion of public trial issue). Because there was new law on the issue of voir dir courtroom closure, it was motion requesting a new trial. As mentioned, the trial court proceeded, but it denied the motion and requested relief.

Despite the age of the issue, the voir dire public trial issue is for the first time ripe to bring before the trial court. An examination of the appellate history, including habeas history, reveals that appellate review precluded bringing the new issue back before the court until final review occurred. Two reasons support this: First, the transcripts shedding light on the voir dire removal of the public were not available until produced for Habeas review - and this did not occur until Habeas jurisdiction was established in the U.S. District Court for the Western District of Washington. Second, the federal courts had jurisdiction over the case from the time the issue was discovered until finally review was denied by the United States Supreme Court. Therefore, Mr. Freeman could not have raised the issue in the

trial court until matters were completed in the Federal courts as the trial court loses jurisdiction during appellate review. See, ex. RAP 7.2(a). FRAP 41(d).

The United States Supreme Court's denial of the petition for habeas review does not preclude further application to this court. Supreme Court Rule 20 4(b) also addresses this issue. It states in relevant part as follows:

> ...Neither the denial of the petition, without more, nor an order of transfer to a district court ... is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

Supreme Court Rule 20 4(b). Again, the trial court went ahead and heard Mr. Freeman's motion for a new trial. Accordingly, this court should review the trial court's decision, as the matter is indeed ripe for adjudication in the court of appeals.

The Njonge court followed the United States Supreme Court's recent decision in Presley v. Georgia, supra. In Presley (decided January 19, 2010), the U.S. Supreme Court addressed the efforts trial courts must extend to protect the public's and defendants' rights to public trials. Among its conclusions, the Court stated, "The public has a right to be present whether or not any party has asserted the right." Presley v. Georgia, 130 S. Ct. 721, 724-725, 175 L. Ed. 2d 675 (2010). Upon the Court's holding in Presley, trial courts absorbed the duty, *sua sponte*, to make a record of the unavailability of alternatives to closing the courtroom. Id., at 130 S. Ct. 725 (majority), 727 (dissent). The Court stated,

> ...even assuming, *arguendo* that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to

decide.

Id. at 726.

As it relates to the United States Constitution, the right to a public trial is rooted in not just the Sixth and Fourteenth Amendments, but the First Amendment as well. See Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); Waller v. Georgia, supra; and Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). These opinions hold public trials a "fundamental right," and that valid closures "will be rare. . . ." Waller v. Georgia, 467 US 39, 104 S.Ct. 2210 (1984). The Waller court also emphasized that analyzing reasons for closure must be done "with special care." Id. And, further, the Court held that because an overriding interest overcoming the presumption of openness must be "narrowly tailored to serve that interest", the interest must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Id.

In Washington, a criminal defendant's right to a public trial is found in Article I § 22 and Article I § 10 – the latter of which states that "[j]ustice in all cases shall be administered openly." Id. Accordingly, the public trial right can only be overcome if courtroom closure is necessary to serve "an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values." State v. Lormor, No.84319-8, 2011 WL 2899578, at 4 (Wash. July 21, 2011). Specifically, when seeking to conduct a portion of a trial outside the presence of the public, the Court is required to consider the following

factors on the record:

1. The proponent of closure 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; and

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (*quoting* Allied Daily Newspapers of Wash. V. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Because courtroom closures affect the very integrity of a proceeding, in instances where Article I § 10 is violated, the remedy is a new, open trial – regardless of whether the complaining party can show prejudice. In re Det. Of D.F.F., 172 Wn.2d 37, 42, 256 P.3d 357 (2011). This is because "a courtroom closure bears the hallmarks of structural error. Id (*citing* State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009)(in the context of a criminal trial, "[a]n error is structural when it 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" (second alteration in

original (internal quotation marks omitted)(*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed 466 (2006))).

In Lormor, a case very recently decided by our Supreme Court, the defendant's daughter was removed from the courtroom during her father's trial. State v. Lormor, No.84319-8, 2011 WL 2899578 (Wash. July 21, 2011). The daughter was only four years-old, was very sick and thus required a noisy respirator to breathe. Id. The Supreme Court upheld the trial court's decision to remove the daughter based on the fact that her respirator constituted a "distraction," but emphasized that her removal was justified because "the trial court judge gave reasons on the record for the removal." Id.

Similarly, in another recently decided Supreme Court case, In re Det. Of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011), the Court held that the defendant's involuntary commitment proceedings were unconstitutional because the judge closed the proceedings to the public. Id. The Court reversed the finding that the defendant should be committed and held that she was entitled to a new set of proceedings. Id. In reaching the decision, the Court cited the five "Bone-Club factors" and stated:

> This is not the first case where this court has granted a new trial when a trial court closed proceedings without considering the five requirements to permit an exception to the open administration of justice right under article I, section 10 or the right to a public trial under article I, section 22. *See Easterling*, 157 Wn.2d at 171 ("We conclude that the trial court committed an error of constitutional magnitude when it directed that the courtroom be fully closed to Easterling and to the public during the joint trial without first satisfying the requirements set forth in [***Bone-Club***, 129 Wn.2d at 258-59]. The trial court's failure to engage in the

> required case-by-case weighing of the competing interests prior to directing the courtroom be closed rendered unfair all subsequent trial proceedings."); *State v. Brightman*, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) ("[T]he trial court erred when it directed that the courtroom would be closed to spectators during jury selection, without fulfilling the requirements set forth in [**Bone-Club**]. This error entitles Brightman to a new trial."). This result should be of little surprise. The open administration of justice is fundamental to the operation and legitimacy of the courts and to the protections of all other rights and liberties. *See Easterling*, 157 Wn.2d at 187 (Chambers, J., concurring) (The open administration of justice "is a constitutional obligation of the courts. It is integral to our system of government."). The jurisdiction of the courts may be set forth on paper, but the authority of the courts—like every other branch of government—is derived from the people. The ability to imprison or involuntarily confine a citizen is an awesome power and, as such, is always at risk to be abused—with devastating results. It is a historic trend that continues in many parts of the world today, that individuals who disagree with the powers-that-be are labeled mentally ill and their voices are silenced through involuntarily confinement. But the ratifiers of our constitution guaranteed better. The guaranty of open administration of justice is at the very heart of the fairness and legitimacy of judicial proceedings. The public bears witness and scrutinizes the proceedings, assuring they are fair and proper, that any deprivation of liberty is justified. Through this, citizens are guaranteed the strongest protection against unfair or unlawful confinement by the government—the protection afforded because the public is watching. D.F.F. is entitled to that protection. D.F.F. is entitled to new commitment proceedings.

Id.

Here, put quite simply, the trial court never considered any of the five Bone-Club factors when the public trial right was twice violated during Mr. Freeman's trial. No considerations were made when the audience was removed during voir dire, and no considerations were made when Mr. Freeman's fiancé

was removed during the testimony of his ex-wife – a fact remarked upon by a federal judge during Mr. Freeman's habeas proceedings. In both instances, the trial court was required to make findings supporting closure, and consider reasonable alternatives to closing the courtroom. The above passage from D.F.F is particularly applicable to this case because it emphasizes the policy reasons behind reversing convictions where the public trial right was violated, but it also highlights how much this area of law has evolved and grown since Mr. Freeman's conviction in 2003.

There can be little doubt that the trial court's actions during Mr. Freeman's trial were clearly contrary to Presley and In re Det. Of D.F.F. - as well as to the long established body of law requiring trials to be public, and grounds for limited closure to be addressed on the record. See Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); (holding that, before ordering a closure, a trial court must render "findings specific enough that a reviewing court can determine whether the closure order was properly entered."). Mr. Freeman has shown that his case involves a situation where relief is required by the current body of law – a body of law that was unavailable to him at the time of his conviction.

Moreover, even though these issues are constitutional in nature – and can be raised at any time – Mr. Freeman was handicapped during the appellate process by the fact that the two instances of courtroom closure were never properly addressed together by reviewing courts with the benefit of the current body of law on this issue. Simply put, the transcripts demonstrating the voir dire

closure never surfaced until the habeas proceedings.

As such, because Mr. Freeman's case is directly on point with the recently decided Presley case in that they both involved instances where members of the audience were removed during voir dire – and the trial court failed to make any record of alternatives to closure – the interests of justice required the trial court to grant a new trial. Combine that with the fact that there was another instance of closure – without a record suggesting alternatives to closure were considered – when Mr. Freeman's fiancé was removed from the courtroom, and his trial is clearly one that would not be allowed today.

Clearly, Mr. Freeman's CrR 7.8 motion requesting a new trial documented "extraordinary circumstances" that should have resulted in the trial court granting Mr. Freeman a new trial. This would have set aside an injustice that would never be allowed to occur today. For these reasons, Mr. Freeman respectfully requests that this court find the trial court abused its discretion when it failed to grant Mr. Freeman's motion requesting a new trial.

VI. CONCLUSION

Based on the above cited files and authorities, Mr. Freeman respectfully requests that this court reverse his conviction and grant him a new trial.

DATED this 10th day of August, 2012.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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