70044-8

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COA NO. 70044-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE GABINO,

Appellant.

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

The Honorable Steven J. Mura, Judge
The Honorable Deborra Garrett, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ARGUMENT IN REPLY

1. THE COURT VIOLATED GABINO'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF THE JURY SELECTION PROCESS IN PRIVATE.

a. The Public Trial Error Can Be Raised for the First Time On Appeal.

The State asks this Court to find Gabino waived the public trial error as an issue for appeal because he did not object below. Brief of Respondent (BOR) at 2-7.

Supreme Court precedent establishes a defendant does not waive his right to challenge an improper closure by failing to object to it. State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012); State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). The public trial issue may be raised for the first time on appeal. Wise, 176 Wn.2d at 9.

The Court of Appeals is not free to ignore controlling Supreme Court authority. Matia Contractors, Inc. v. City of Bellingham, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008) (citing 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006)).

And it hasn't. See State v. Lam, 161 Wn. App. 299, 305, 254 P.3d 891 (2011) (defendant did not waive public trial right for appeal by failing to object and participating in closed proceeding); State v. Njonge, 161 Wn. App. 568, 574, 255 P.3d 753 (2011) ("It is well settled that a criminal

defendant may raise the article I, section 22 right to a public trial for the first time on appeal."), review granted, 176 Wn.2d 1031, 299 P.3d 19 (2013).

Moreover, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012); see State v. Applegate, 163 Wn. App. 460, 470, 259 P.3d 311 (2011) ("To establish waiver in the public trial context, the record must show either that the defendant gave a personal statement expressly agreeing to the waiver or that the trial judge or defense counsel discussed the issue with the defendant prior to defense counsel's waiver."), review granted, 176 Wn.2d 1032, 299 P.3d 19 (2013).

Here, there was no discussion of Gabino's public trial right before the for-cause and peremptory challenges were exercised in secret. Further, the record is clear that the court did not engage in any meaningful review or balancing of Gabino's public trial right in relation to any other right or interest. See State v. Hummel, 165 Wn. App. 749, 774, 266 P.3d 269 (2012) (distinguishing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), recognizing public trial violation occurs where "the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right" (quoting State v. Strode, 167 Wn.2d 222, 228, 217 P.3d 310 (2009)), review denied, 176 Wn.2d 1023, 297 P.3d 708 (2013). There is no waiver.

b. Making An After-The-Fact Record Of What Occurred In Private Does Not Cure A Public Trial Violation Because The Bone-Club Factors Must Be Considered Before The Closure Takes Place.

In its brief, the State at times suggests sidebars take place in open court and therefore no closure occurred. BOR at 9, 11. Yet is also does not deny that sidebars by nature are inaccessible to the public. The linchpin for determining whether a closure occurs for public trial purposes is whether the proceeding at issue was held in a place or manner that was inaccessible to the public. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Sidebars are private. The public cannot hear what is happening at a sidebar.

The State nonetheless claims there was no public trial violation because the court put the for-cause and peremptory challenges sidebars on the record after the jury was empanelled. BOR at 10-12. The court did not put the basis for excusing any of the jurors for cause on the record. 2RP 3. That result was put on the record but not why it was appropriate for those jurors to be excused for cause.

The State's claim also fails because courts have repeatedly found a violation of the public trial right where the record subsequently showed what happened in private. See, e.g., Paumier, 176 Wn.2d at 32-33 (public trial violation where in-chambers questioning of prospective jurors "was

recorded and transcribed by the court"); Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom."); State v. Jones, 175 Wn. App. 87, 95-96, 103-04, 303 P.3d 1084 (2013) (public trial violation where alternate jurors chosen during recess and names of alternate jurors subsequently announced in open court); State v. Slert, 169 Wn. App. 766, 774, 776, 282 P.3d 101 (2012) (public trial violation where trial court dismissed four jurors for cause in chambers and then subsequently announced what happened in open court), review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013); State v. Leyerle, 158 Wn. App. 474, 477-78, 486, 242 P.3d 921 (2010) (public trial violation where prospective juror challenged for cause in chambers and then court announced in open court that juror was excused).

The Bone-Club[1] factors must be considered *before* the closure takes place. Wise, 176 Wn.2d at 12; see, e.g., Jones, 175 Wn. App. at 103 ("the trial court was required to consider the Bone-Club factors before permitting the alternate juror drawing off the record."). A proposed rule that a *later* recitation of what occurred in private suffices to protect the

[1] State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

public trial right would eviscerate the requirement that a Bone-Club analysis take place *before* a closure occurs.

In Gabino's case, the court announced which prospective jurors had been excused after the jury was seated. 1RP 102; 2RP 3; CP 135. Contemporaneous public observation of jury selection proceedings fosters public trust in the process and holds both the judge and the attorneys accountable at a time when it matters most — before the jury is seated. Once the jury is seated, the damage is done. It is unrealistic to expect that any post hoc concerns voiced by the public about a for-cause or peremptory challenge will result in any action being taken after the seated jury is sworn. Any improper challenges are effectively insulated from remedial oversight. The deterrent effect of public scrutiny is undermined when all the public is left with is an after-the-fact record of what happened.

c. Reversal Cannot Be Avoided By Characterizing The Violations As De Minimus.

The State finally claims the public trial violations were de minimus and therefore no relief is available. BOR at 14. Washington courts have "'never found a public trial right violation to be . . . de minimis.'" Strode, 167 Wn.2d at 230 (quoting State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006)). This Court has held "no de minimis rule is applicable to a public trial right violation." Lam, 161 Wn. App. at 307 (public trial

violation were one prospective juror questioned in chambers); see also Leyerle, 158 Wn. App. at 485 (guaranty of a public trial under Washington constitution has never been subject to a de minimis exception). Even if a de minimus standard were available, "a decision to retain or excuse a juror in a criminal case in a jurisdiction requiring a unanimous verdict to convict is not trivial." Lam, 161 Wn. App. at 307.

The State's brief inaccurately indicates the lead opinion in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) cited to People v. Virgil, 51 Cal.4th 1210, 1237-38, 253 P.3d 553, 126 Cal.Rptr.3d 465 (2011), cert. denied, 132 S. Ct. 1636, 182 L.Ed.2d 237 (2012). BOR at 9 (citing State v. Sublett, at 75-77). Chief Justice Madsen's concurring opinion in Sublett cited to Virgil. Sublett, 176 Wn.2d at 97 (Madsen, C.J., concurring). The lead opinion did not. Virgil is inapposite anyway because it held the public trial error was de minimus. Virgil, 51 Cal.4th at 1238. As set forth above, that standard for resolving public trial claims in Washington is unavailable.

2. THE SENTENCING CONDITION RESTRICTING CONTACT WITH CHILDREN VIOLATES GABINO'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN.

In the opening brief, Gabino challenged both the scope and duration of the community custody condition restricting contact with his minor children. BOA at 25-30. The State concedes the court did not

justify the lifetime duration of the order but suggests the scope of the order, in encompassing Gabino's minor children, might be reasonably necessary. BOR at 22-23. The State requests remand for clarification. BOR at 23.

The condition should be stricken altogether, not merely remanded for clarification, because the condition is not reasonably necessary and therefore violates Gabino's fundamental parental rights. It is not enough that the condition be crime-related. Because of the fundamental right involved, the State must prove the restriction is reasonably necessary to protect his minor children from harm. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 377, 229 P.3d 686 (2010). In this regard, the opening brief shows why Gabino's case is like State v. Letourneau, 100 Wn. App. 424, 441-42, 997 P.2d 436 (2000), where a restriction on contact with the defendant's own minor children was struck down, and unlike State v. Corbett, 158 Wn. App. 576, 599, 242 P.3d 52 (2010) and State v. Berg, 147 Wn. App. 923, 942-43, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), where such a restriction was upheld. BOA at 25-28. The State does not argue Gabino's analysis of those cases in relation to his own is wrong. The condition should be stricken.

3. THE PLETHYSMOGRAPH CONDITION VIOLATES GABINO'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

The State contends the plethysmograph condition of community custody is proper in its entirety. BOR at 23-24. Gabino disagrees.

There is a distinction to be drawn between plethysmograph testing done for the purpose of treatment at the direction of a treatment provider and plethysmograph testing done for the purpose of monitoring compliance with community custody conditions at the direction of the community corrections officer (CCO).

Plethysmograph testing is a "treatment device" for diagnosing and treating sex offenders and, as such, it is a valid condition when ordered incident to crime-related treatment. State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007) (citing State v. Riles, 135 Wn.2d 326, 343-46, 957 P.2d 655 (1998), abrogated on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010)). Thus, "[t]he testing can properly be ordered incident to crime-related treatment by a qualified provider." State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013).

In the present case, the court ordered Gabino to "[s]ubmit to polygraph and/or plethysmograph assessment at own expense as directed by Department of Corrections and therapist, but limited to topics related to monitoring compliance with crime-related sentencing conditions." CP 111.

That portion of the condition that orders testing as directed by a therapist is not objectionable if read to mean that the testing is conducted as an aspect of sex offender treatment.[2]

But the condition is unconstitutional insofar as it requires Gabino to submit to plethysmograph testing at the direction of the Department of Corrections for the purpose of monitoring compliance with sentencing conditions. Plethysmograph testing is not a routine monitoring tool subject only to the discretion of a CCO. Land, 172 Wn. App. at 605. The language of the condition itself shows it is intended to be nothing more than a monitoring tool, as it is expressly "limited to topics related to monitoring compliance with crime-related sentencing conditions." CP 111. The CCO, meanwhile, is not a treatment provider. The CCO is not a therapist. As written, the condition nonetheless authorizes the CCO to require Gabino to submit to plethysmograph testing in a non-treatment setting for the purpose of monitoring compliance with sentencing conditions. That is improper. Land, 172 Wn. App. at 605.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Gabino requests that this Court reverse the conviction and strike the challenged conditions of community custody.

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[2] Gabino does not challenge the polygraph aspect of the condition.

DATED this 18th day of February 2014

Respectfully Submitted,

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

STATE OF WASHINGTON Respondent, v. JOSE GABINO, Appellant.	)))))))))	COA NO. 70044-8-I

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 18TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF FEBRUARY 2014.

X Patrick Mayovsky