

FILED

MAR 29 2013

No. 268306

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
[Signature]

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

DALLIN D. FORT,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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A. Statement of the Case.

Mr. Fort was charged by Amended Information with three counts of Rape of a Child in the First Degree and one count of Molestation in the First Degree. (CP 11)

During jury selection, the trial court utilized a questionnaire that asked everyone on the jury panel if they, or anyone close to them, had any experience with sexual abuse as a witness, victim, or accused. (CP 75, Appendix B, RP 33) The trial court then stated that the "...people we need to talk to...will (be brought) into chambers to discuss these one at a time..." (CP 75, App. B, RP 35) The only people allowed at the in-chambers discussion were the judge, the court reporter, the attorneys, the defendants, and perhaps an investigator. (CP 75, App. B, RP 35) The trial court told the jury panel that after this process, the court would "get back in general session." (CP 75, App. B, RP 37) The trial court did not conduct a closure test. There were no Bone-Club factors analyzed or discussed. (CP 75, App. B, RP 34-39)

On the first day of jury selection, the trial court ordered potential juror Ms. Carol Boileau into chambers, outside the presence of the other jurors, the general public, and the news media, for a discussion of the above referenced material. (CP 75, App. B, RP 43) The same process was followed with 17 other prospective jurors, starting with juror No. 6

(CP 75, App. B, RP 47), No. 7 (CP 75, App. B, RP 52), No. 8 (CP 75, App. B, RP 58), No. 11 (CP 75, App. B, RP 67), No. 12 (CP 75, App. B, RP 73), No. 13 (CP 75, App. B, RP 78), No. 15 (CP 75, App. B, RP 86), No. 19 (CP 75, App. B, RP 99), No. 20 (CP 75, App. B, RP 109), No. 23 (RP 111), No. 25 (CP 75, App. B, RP 130), No. 26 (CP 75, App. B, RP 146), No. 37 (CP 75, App. B, RP 161), No. 42 (CP 75, App. B, RP 168), No. 46 (CP 75, App. B, RP 175), No. 47 (CP 75, App. B, RP 185), and No. 49 (CP 75, App. B, RP 194). The trial court then resumed its proceedings in the courtroom with the proceedings open to the public. (RP 200)

The jury selection process was observed by David Fort, Mr. Fort's father. He stated:

I was present in the courtroom when the trial court advised the prospective jurors that they would be taken into chambers to discuss the answers to the jury questionnaire. I was not aware that I could object to the closure of the courtroom. No one asked if I objected to the closure of the courtroom. Had I been asked, I would have objected to the courtroom being closed as I had a great interest in observing my son's trial.

(CP 112)

On February 3, 2006, the jury found Mr. Fort guilty of two counts of First Degree Child Rape and not guilty of First Degree Child Molestation. (CP 3-5) On April 3, 2006, Mr. Fort was sentenced to serve

a minimum term of 132 months to a maximum life term. (CP 11) On April 21, 2006, Mr. Fort filed a timely Notice of Appeal (First Direct Appeal). (CP 25)

Mr. Fort was represented at trial by Assistant Public Defender Alan D. Rossi. Mr. Rossi filed a Notice of Appeal on behalf of Mr. Fort. (CP 25) Mr. Rossi designated the portions of the transcript that would be transcribed for the appeal. (1/25/08 Sentencing Hearing, RP 15) Mr. Rossi did not designate the voir dire process to be transcribed. (RP 15)

David L. Donnan of the Washington Appellate Project in Seattle was appointed to prosecute Mr. Fort's appeal. Upon reviewing the trial court record, Mr. Donnan recognized that the jury voir dire process had not been requested and moved to supplement the transcript. (RP 15) However, the supplemental transcript was not received until after Mr. Fort's opening brief had been filed with this Court. Upon receipt of the voir dire transcript, on June 12, 2007, Mr. Fort filed a Personal Restraint Petition which, based on the supplemental transcript, raised the issue of whether Mr. Fort had been denied his right to a public trial. (RP 15)

On September 4, 2007, this Court issued an unpublished opinion on Mr. Fort's first direct appeal. It affirmed Mr. Fort's conviction but remanded the case for resentencing.

On December 4, 2007, this Court issued its mandate from the first direct appeal and remanded the case to the trial court for resentencing. (CP 64)

Upon receipt of the mandate, the trial court scheduled Mr. Fort's resentencing for January 25, 2008. (RP 2) Prior to that hearing, Mr. Fort filed a Motion for New Trial and/or Motion to Vacate Judgment. (CP 74) In that motion, Mr. Fort argued that his conviction should be vacated based upon the controlling precedent of State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), and that a new trial should be ordered due to the violation of his right to a public trial. (CP 75)

After this Court had issued its mandate, but before Mr. Fort was resentedenced, this Court entered an order on January 14, 2008 staying Mr. Fort's Personal Restraint Petition. This Court stated in its Order that the trial court did not examine the Bone-Club factors in Mr. Fort's case.

At the January 25, 2008 resentencing hearing, the trial court denied Mr. Fort's Motion for New Trial and/or Motion to Vacate Judgment, and Mr. Fort's Motion to Stay Judgment and Sentence Pending Appeal. (CP 131) The trial court ruled that the State v. Frawley decision should

not be retroactively applied. (RP 8) Mr. Fort was resentenced to a minimum sentence of 108 months to a maximum life sentence. (CP 117)

On February 5, 2008, Mr. Fort timely filed his second Notice of Appeal (Second Direct Appeal) (CP 133).

B. Argument.

1. Mr. Fort's right to a public trial was violated.

It is undisputed that the trial court did not conduct a closure test and failed to examine and consider the Bone-Club factors. Accordingly, Mr. Fort is entitled to a new trial. The recent cases of State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012); State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012); and In re PRP of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012) affirm this rule.

As early as 1923, the Washington Supreme Court has recognized both the public's right under Article I, §10 of the Washington State Constitution and the defendant's right under Article I, §22 to a public trial. State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923).

Article I, §10 of the Washington Constitution provides:

Justice in all cases shall be administered openly, and without unnecessary delay.

Article I, §22 of the Washington Constitution provides in pertinent part:

In criminal prosecutions, the accused shall have the right to... have a speedy public trial by an impartial jury of the county in which the offense is charged...

The Sixth Amendment of the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...

In State v. Bone-Club, *supra*, a unanimous Washington Supreme Court held that a trial court **must** apply a 5-part closure test before closing a courtroom. The court held at 258-9:

To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria:

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.

In this case, not one of the Bone-Club requirements were considered, much less met:

- 1) There was no showing of a serious or imminent threat to any rights inhering to right to a public trial.
- 2) The public in attendance in the courtroom was not consulted. The record contains a Declaration from Mr. Fort's father, David Fort, who was in the courtroom when it was announced that the prospective jurors would be taken into chambers. (CP 112) He was not asked if he objected to closing the courtroom. (CP 112) If asked, he would have objected as he had a great interest in observing his son's trial. (CP 112)
- 3) No alternatives to a complete closure were considered. Sequestering the prospective jurors but allowing the public to attend was not considered. Nor was any consideration given to questioning jurors regarding whether they felt uncomfortable about

public disclosure of their responses during the voir dire process.

- 4) The trial court did not weigh any competing interests.
- 5) The order for in-chambers examination was over-broad. While some prospective jurors may have been reluctant to speak publicly, there was no attempt to determine whether some or all of the selected jurors in fact needed to be interviewed in chambers. In some instances, the sensitive matter may have been remote in time, or an attenuated instance.

The right to a public trial extends beyond the taking of a witness' testimony at trial. It extends to pretrial proceedings. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (preliminary hearing); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004) (voir dire); Bone-Club, 128 Wn.2d at 257 (pretrial suppression hearing); Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (pretrial motions to dismiss).

In order to protect the accused's constitutional right to a public trial, a trial court may not close a courtroom without first applying and weighing the five requirements as set forth in Bone-Club and then entering

specific findings justifying the closure order. State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006).

The State's interest in protecting the transparency and fairness of criminal trials is ensured by requiring that all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure. State v. Easterling, supra at 178.

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. State v. Easterling, supra at 181; Bone-Club, supra at 261-62.

In State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), this court stated:

Our Supreme Court has made it clear that the trial of a criminal defendant may not be closed to the public absent a rigorous evaluation and balancing of a number of factors.

Frawley, supra at 715.

The failure to meet the Bone-Club requirement is "structural error" requiring retrial. State v. Wise, supra at 228 P.3d at 1115.

Where there is structural error "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" State v. Wise, at 1119 (citation omitted). Such an error is "not subject to

harmlessness analysis." Id. (Citation omitted). "Accordingly, unless the trial court considers the Bone-Club factors **on the record before closing a trial to the public**, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." Id. [Emphasis added]

The defendant anticipates that the State will argue that State v. Wise is not applicable but that dicta in State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009) controls (stating that not all closures are fundamentally-unfair structural error).

Most importantly, the Momah trial court "effectively considered the Bone-Club factors." State v. Wise, 288 at 1119-20. The record in this case does not support the "unique confluence of facts" showing that the public was aware of the rights at stake or that the court properly weighed those rights. Id. The court may have reconsidered or simply not been mindful of the closure, but the panel and the public were not given accurate notice or opportunity to react once the decision to close voir dire was made. The decision was made without adherence to Bone-Club's requirements.

Momah itself was criticized in Wise. The Wise court noted that the opinion in Momah incorrectly cabined "structural error" by limiting the test to "fundamental fairness". Wise, 288 at 1119 fn.7. Among the proper considerations for structural error is "the difficulty of assessing the

effect of the error" and the "irrelevance of harmlessness." Id. An extension of Momah's dictum regarding structural error to the facts here is improper. The difficulty in evaluating the effect of the error cannot be overcome.

Momah has other defects. That panel made the suggestion that "the better practice is to apply the five guidelines and enter specific findings before closing the courtroom". Momah, 167 Wn.2d at 152 fn.2. But the court in Wise plainly makes the point that the trial court does not have the option of cutting corners:

...unless the trial court considers the Bone-Club factors **on the record** before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error **presumed to be prejudicial**.
[Emphasis added]

Wise, 288 P.3d at 1119. And again:

A trial court is required to consider the Bone-Club factors **before** closing a trial proceeding that should be public. [Emphasis in original]

Wise, 288 P.2d at 1118 (citing Presley v. Georgia, 558 U.S. 209, 130 S.Ct 721, at 724 (2010)).

This rule was reaffirmed in State v. Paumier, supra at 35 ("Failure to conduct the Bone-Club analysis is structural error warranting a new trial because voir dire is an inseparable part of trial") and In re Personal Restraint Petition of Morris, supra at 166 ("...failing to consider

Bone-Club before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial on direct review").

On this record the State cannot overcome the presumption of prejudice to "foundational principle of an open justice system..." Wise, 288 P.3d at 1118.

It is undisputed that at Mr. Fort's trial, there was no discussion or analysis of the Bone-Club factors. The only right that was discussed by the trial court was Mr. Fort's right to be present during the voir dire process. (RP 40-42 attached) That discussion had nothing to do with whether the individual voir dire process took place in the courtroom or in chambers.

A person charged with a felony has a fundamental right to be present at every stage of his trial. Illinois v. Allen, 37 U.S. 337, 338, 90 S.Ct. 1057, 1058 (1970); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). This includes the right to be present during voir dire and impaneling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 254 (1912). The right of presence derives from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484 (1985).

The trial court did not advise, nor even discuss, with Mr. Fort his right to a public trial nor ask him to waive that valuable right. Mr. Fort could not have made a knowing, intelligent, and voluntary waiver of this constitutional right. When Mr. Fort was told he had the right to be present during individual questioning of the selected jurors and validly waived that right, that was all that he waived.

At the resentencing hearing, the trial court was faced with a motion for a new trial and/or to vacate Mr. Fort's conviction. In denying this motion, the trial court ruled that State v. Frawley constituted a change of law that did not operate to benefit Mr. Fort. The trial court also ruled that State v. Frawley is only "applicable to those cases where a finality of judgment has not been achieved." (RP 8) Finally, the trial court ruled that State v. Frawley has no retroactive application should it survive Supreme Court scrutiny. (RP 8) These rulings were erroneous in three respects.

First, the Frawley decision did not represent a change in the law. The right to a public trial has long been established in this state and has been applied uniformly to all types of judicial proceedings. Further, these rulings have been recently upheld by the Supreme Court in Wise, Paumier, and Morris.

In 1923, the right to a public trial was recognized in State v. Marsh, supra.

In 1980, in Federated Publications v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980), our Supreme Court ruled that the trial court must conduct a balancing test before closing a hearing to the public.

In 1982, in Seattle Times Co. v. Ishikawa, supra, the Supreme Court again spoke of the balancing test which the trial court must conduct before closing the courtroom.

In 1993, in Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993), the Supreme Court again addressed the closure issue and stated at 211:

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity. This right of access is not absolute, however, and may be outweighed by some competing interest as determined by the trial court on a case-by-case basis according to the Ishikawa guidelines.

In 1995, the Supreme Court in its decision in Bone-Club set forth the specifics of the five-part weighing test which the trial court must entertain.

In 2004, the Supreme Court held in In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), that the trial court must engage and weigh the five Bone-Club requirements, as well as enter specific findings justifying the closure order.

In 2006, in State v. Easterling, supra, the Supreme Court again made clear the exercise in which the trial court must engage before closing a courtroom.

The requirement that the trial court conduct a balancing test and enter appropriate findings is not new. It is long established and well settled.

Second, the trial court appears to have ruled that the Bone-Club factors only apply to cases which are on direct appeal. (RP 8) This distinction is legally and factually incorrect. A criminal defendant may raise the constitutional issue of the right to a public trial at any time, including for the first time on appeal. State v. Easterling, supra at 173; State v. Wise, supra. Additionally, Mr. Fort is raising this constitutional argument as part of a direct appeal. This argument is the same argument that is also pending before this Court on his Personal Restraint Petition.

Third, because the right to a public trial issue has been raised as part of a direct appeal, there was no need to engage in a retroactivity analysis. It is immaterial to this appeal whether Frawley is retroactively applied to cases not on direct review.

A new rule of law is generally applied retroactively to cases pending on direct review or not yet final. In re Personal Restraint of Vandelft, 158 Wn.2d 731, 737, 147 P.3d 573 (2006).

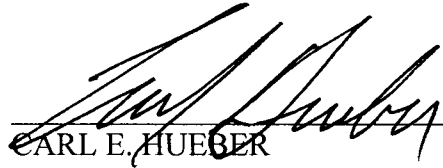
A judgment becomes final on the last of the following dates: When the judgment is filed with the Clerk of the trial court, when the appellate court issues its mandate terminating direct review, or when the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. RCW 10.73.090(3); In re Personal Restraint of Vandelft, supra at 737.

In this case, a mandate was issued which remanded the case to the trial court for resentencing. That mandate did not terminate direct review. Rather, it ordered the trial court to resentence Mr. Fort.

C. Conclusion.

Dallin Fort asks this Court to reverse the trial court and to order a new trial and/or vacate his conviction based upon the violation of his constitutional right to a public trial.

DATED this 29th day of March, 2013.


CARL E. HUEBER
WINSTON & CASHATT
Attorneys for Appellant

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

: ss

County of Spokane)

Cheryl R. Hansen, being first duly sworn upon oath, deposes and states as follows: At all times hereinafter mentioned I was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, and not a party to this matter. On March _____, 2013, I served the foregoing document on counsel for the State of Washington and upon appellant by causing a true and correct copy of said document to be mailed to said parties at the addresses shown below:

Andrew Metts
Spokane County Prosecuting Attorney's Office
1100 West Mallon
Spokane, WA 99260

Dallin D. Fort, 891250, H6 B109
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Cheryl R. Hansen

SUBSCRIBED AND SWORN to before me this 29th day of March, 2013.



394460

Cheryl Krenzel
Notary Public in and for the State of
Washington, residing at Covernaces
My commission expires 8/20/15

AFTERNOON SESSION

1
2
3 THE COURT: Okay. We are in chambers here
4 in the matter of State v. Fort. Present are myself with
5 the court reporter and Mr. Love and Mr. Rossi and Mr.
6 Fort.

7 Mr. Rossi has indicated that Mr. Fort wishes to
8 waive his presence here during the private interviews
9 that we will be conducting with these prospective
10 jurors.

11 Mr. Fort, I just want to make sure you understand
12 what you are doing here, because, number one, I am a
13 little bit reluctant to allow this, because it is one of
14 those critical stages of the trial that the court rules
15 say that a defendant should be present for. It is one
16 of those things that your attorney won't be able to
17 readily get your personal feeling about these people
18 without you being here to watch this. So, in large
19 measure, you know, you are kind of tying one of Mr.
20 Rossi's hands behind his back by doing that. I just
21 want you to understand that, you know, this has a down
22 side to it. Just, you know, so you understand, you
23 wouldn't be expected to do anything other than just sit
24 there while the prospective jurors are here. And then,
25 you know, you would have the opportunity to write

1 whatever notes or whisper in Mr. Rossi's ear or
2 whatever. But if you are not here, then, obviously, you
3 can't do that.

4 THE DEFENDANT: Yeah. Well, the reason why
5 I decided not to be present was because I felt if the
6 people had experiences, that if I was in the room with
7 them, then they would know what I have been charged with
8 and that they would feel uncomfortable with me in the
9 room and wouldn't be as open to discussion with my
10 attorney.

11 THE COURT: Well, I have done dozens of
12 these over the last several years, and it hasn't been a
13 problem before. I have heard just about everything
14 imaginable and with a defendant just sitting right
15 there. So it hasn't been a problem in the past.

16 I would, you know, Mr. Fort, I would strongly,
17 you know, really strongly urge you to reconsider this
18 and sit here and be with Mr. Rossi through this process.
19 Do you want to take a couple minutes and talk to him
20 about that?

21 THE DEFENDANT: Yeah.

22 THE COURT: Why don't you guys go out in the
23 courtroom and talk about it and come back.

24 (Recess is taken.)

25 THE COURT: Mr. Fort, have you had a chance

1 to talk to Mr. Rossi about this?

2 THE DEFENDANT: Yes.

3 THE COURT: What would you like to do?

4 THE DEFENDANT: I now realize that I will
5 have another chance at visiting with the prospective
6 jurors and would like to be absent during this portion.

7 THE COURT: Any further comments from
8 counsel?

9 MR. LOVE: No.

10 THE COURT: I have advised Mr. Fort. I have
11 told him that I would not personally consider this to be
12 an advisable thing to do, but I recognize that he has
13 his feelings about this. He has talked to his attorney
14 about this. I believe under Rule 3.4(a) he is
15 voluntarily permitted to be absent during this portion
16 of the proceedings.

17 All right, Mr. Fort. Very good.

18 MR. ROSSI: Is Mr. Fort excused for the day?

19 THE COURT: Yes.

20 Be back at 9:00 then.

21 THE DEFENDANT: 9:00 tomorrow same
22 courtroom?

23 THE COURT: Right.

24 (The Defendant is excused.)

25 THE COURT: What I will do, then, is tell