

FILED
MARCH 4, 2015
Court of Appeals
Division III
State of Washington



26476-9- III
(Consolidated with 27294-0-III)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY PARKS

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

**SUPPLEMENTAL BRIEF PURSUANT TO COURT OF APPEALS
LETTER DATED 11/04/2014 INVITING SUPPLEMENTAL
BRIEFING ON THE APPLICABILITY OF *STATE v. FRAWLEY***

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT'S ASSIGNMENTS OF ERROR 1

II. ISSUE PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 4

V. CONCLUSION 8

TABLE OF AUTHORITIES

WASHINGTON CASES

See State v. Koss, 181 Wn.2d 493, 334 P.3d 1042 (2014)..... 4

See State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) 6

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995)..... 7 fn. 7

State v. Frawley, 181 Wn.2d 452, 334 P.3d 1022 (2014)..... 4, 6, 7

State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014),
cert. denied, — U.S. —, 135 S.Ct. 880,
— L.Ed.2d —, 2014 WL 5502481 (2014)..... 4

State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012) 7 fn. 6

State v. Slerf, 181 Wn.2d 598, 334 P.3d 1088 (2014)..... 4

State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012) 7 fn. 5

STATUTES

RCW 2.36.095 5

RCW 4.44.260 3, 5

RULES

CrR 6.2 5

RAP 2.5 6

I. APPELLANT'S ASSIGNMENTS OF ERROR

Appellant's sole issue presented on appeal is whether "[t]he trial court erred by swearing in the jury panel off the record and outside the courtroom without first considering the *Bone-Club* factors, thus excluding the public from that portion of the jury voir dire process, and violating Mr. Park's constitutional right to a public trial." Brief of Appellant, p. 4 (February 28, 2008); Appellant's Supplemental Brief, p. 4 (December 3, 2014).

II. ISSUE PRESENTED

Does an open court violation occur where, prior to the start of the voir dire process, the trial court gives an oral explanatory instruction to the prospective jurors assembled in the jury assembly room?

III. STATEMENT OF THE CASE

Prior to beginning voir dire, the court apparently gave¹ the suggested, but not legally required, advance introductory oral instruction outlined in the first part of WPIC 1.01.² It is not clear how much of this

¹ Defendant has not provided a record of this event. However, it is probable that the educational oral instruction was given.

² WPIC 1.01 **Part 1—Before Voir Dire of Prospective Jurors:**

This is a criminal case brought by the [State] [City] [County] [against the defendant,(name of defendant)]. The prosecuting attorney is(name). The defense attorney is(name).

instruction was given, or how it was modified, or what kind of oath was administered - because the defendant agreed to the process and did not request that it be reported, recorded, or transcribed.

The advance oral instruction - in whatever form it took - was given in the jury assembly room to the potential jurors because the potential

The defendant is charged [in count] with the crime of (name of crime). Specifically, this charge alleges that (insert elements from the information, and supplement as appropriate with other facts that will help the jurors prepare for voir dire; *see* Note on Use). (Repeat for each count.)

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

To the charge[s] of [(name of crime)], the defendant has entered a plea of not guilty [and not guilty by reason of insanity]. The plea of not guilty means that you, the jury, must decide whether the [State] [City] [County] has proved every element of [the] [each] crime charged. The [State] [City] [County] has the burden of proving every element beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists. The defendant has no duty to call witnesses, produce evidence, or testify.

The defendant is presumed to be innocent. The presumption of innocence continues throughout the entire trial. The presumption means that you must find the defendant not guilty unless you conclude at the end of your deliberations that the evidence has established the defendant's guilt beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists. It may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

(The potential jurors are given an oath or affirmation for purposes of voir dire:

Do each of you solemnly swear or affirm that you will truthfully answer questions about your qualifications to act as jurors in this case [so help you God]? [Did any of you answer "no" or not answer?])

1 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (3d Ed)

juror panel was too large to fit into the defendant's courtroom. RP 1. The defendant and his attorney were provided an opportunity to object, but declined to object and thereby agreed to the process. RP 1. No voir dire or questioning was had or discussed in the juror assembly room. There is no showing that anyone from the public was excluded from the juror assembly room.

The general voir dire occurred in court. Immediately thereafter, the jury was properly sworn in. The juror's oath, required by law, was administered in open court. RCW 4.44.260.

THE COURT: Those of you who have not been selected, if you would take your numbers off, please, and hand them to Ms. Kilham. You are to call in after 5:30 this evening for your next assignment. Thank you. (Remainder of jury panel excused.)

THE COURT: All right. Ladies and gentlemen, you are about to become officers of this court. And that means you take an oath similar to mine. Would you please stand, and raise your right hand, face the clerk to be sworn. (Jury complies with request.)

THE CLERK: Do you and each of you solemnly swear or affirm that you will well and truly try the issue between the state and the defendant, according to the evidence and the instructions of the Court, so help you God, or, under the penalty of perjury? If so, say I do.

JURY (IN UNISON): I do.

(RP 225-26).

IV. ARGUMENT

There was no open court violation and there can be no allegation of error without an objection.

State v. Frawley, 181 Wn.2d 452, 334 P.3d 1022 (2014), is a companion case to *State v. Applegate*. The lead opinion indicates that in Applegate's case his appellate attorney may have overlooked the argument that no closure occurred. 181 Wn.2d at 460, fn. 8. Justice Stephens seized upon this omission, stating: "Nonetheless, the trial court's insistence that the in-chambers proceeding was not a closure strongly suggested that no public trial right was even implicated." 181 Wn.2d at 469.

In the present case no closure occurred as it did in *Frawley*. There is no legal or factual showing that by conducting an informational portion of juror education in the juror assembly room, a closure occurs, or that this pre-voir-dire educational occurrence is a "proceeding" to which the open court doctrine applies. As our State Supreme Court recently reiterated, the defendant has the burden of providing a record that shows that a courtroom closure occurred. *See State v. Koss*, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014); *State v. Slert*, 181 Wn.2d 598, 608, 334 P.3d 1088 (2014); *State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014), *cert. denied*, — U.S. —, 135 S.Ct. 880, — L.Ed.2d —, 2014 WL 5502481 (2014). Defendant has provided neither a record establishing any

type of closure, nor a record of what type of oral instruction was given to the jurors. Critically, the defendant has not established that anyone was excluded from the juror assembly room.

Jurors are summoned by the county clerk and are educated regarding the process of jury service. RCW 2.36.095 (summons); CrR 6.2 (Jurors' Orientation). There is no legal requirement that jurors be administered an oath or addressed by the judge prior to voir dire. See Note on Use and Comments to Oral Jury Instruction 1.01.³ Part 1 of the instruction is informational, concluding with an oath. The oath is not required by statute or case law. However, it aids the potential jury in any case by informing the potential jurors before the trial begins, before voir dire, of what they can expect. All of this takes part before voir dire begins. The oath that jurors are *legally* required to receive occurs, as it did in the instant case, at the close of voir dire. See RP 225-26; and see RCW 4.44.260.⁴ While *Frawley* reemphasizes that voir dire is a stage to which the open court doctrines apply, nothing in *Frawley* suggests that these same doctrines apply to the juror educational processes occurring

³ Note on use regarding Part one of this instruction states "Part 1 of this instruction is to be read to the jury panel before the jury is selected." The Note also states that "[t]he jurors will already have received A Juror's Guide, Appendix A, which contains some of this same information."

⁴ RCW 4.44.260 states: When the jury has been selected, an oath or affirmation shall be administered to the jurors, in substance that they and each of them, will well, and truly try, the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial.

prior to voir dire. This pre-voir-dire informational process is more administrative and educational than it is judicial.

Again, the defendant fails to show that the the explanatory and informational portion of juror education occurring in the juror assembly room was closed to the public. The fact that it occurred in a larger venue does not suggest a closure – there is no showing a closure occurred – a necessary prerequisite to a discussion of whether there was an open court violation. *See State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012):

Before determining whether there was a violation, we first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all. We recently held that a closure “occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.

Sublett, 176 Wn.2d at 71.

The defendant’s failure to object also prohibits review in this case. The plurality opinion in *Frawley* seemingly rejects the premise that one can waive a right to an open court on appeal. The State, in *Frawley*, argued that the defendant’s failure to object prevented review under RAP 2.5(a)(3). However, the lead opinion rejected this argument because

the “State has made no showing that the rule in *Wise, Paumier, Easterling*, and other cases is incorrect or harmful.” 181 Wn.2d at 465.

In this case RAP 2.5(a)(3) should prohibit review of Park’s open court claim because he failed to object, and because cases, such as *Wise*⁵ and *Paumier*,⁶ are harmful in that they incorrectly hold that all public trial violations that include a trial court’s failure to conduct a Bone-Club⁷ analysis, are structural error. As pointed out in the dissenting opinion of Justice Wiggins, concurred in by Chief Justice Madsen, not all error involving an open court violation involves structural error.⁸ Moreover, such an analysis leads to unnecessary, and therefore harmful retrials where there is absolutely no showing of prejudice.⁹ And where such error is not structural, and the defendant failed to object, the defendant is precluded from appeal on the issue. *Frawley*, 181 Wn.2d at 490-92. (Wiggins, J. dissenting).

Here, the appellant claims no prejudice. The jury was properly sworn in open court as provided by law. The defendant never objected to the procedure and has failed to establish that any open court violation

⁵ *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012).

⁶ *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

⁷ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

⁸ See *Frawley*, 181 Wn.2d at 478-79 (Wiggins, J. dissenting), explaining why our designation of all public trial violations as structural error is both incorrect and harmful.

⁹ *Frawley*, 181 Wn.2d at 485-88 (Wiggins, J. dissenting).

occurred. No voir dire took place prior to the jury being present in open court. This case is not like *Frawley*.

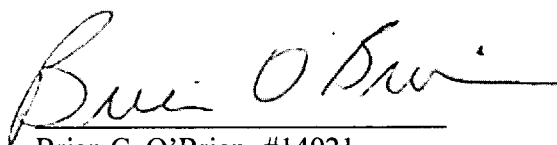
There was no error committed which prejudiced the defendant.

V. CONCLUSION

For the reasons stated, the conviction should be affirmed.

Dated this 4th day of March, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in cursive script, reading "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.) Cause No. 07-1-01179-1
)
ANTHONY PARKS,) C.O.A. No. 26476-9-III
)
Defendant.)

COPY

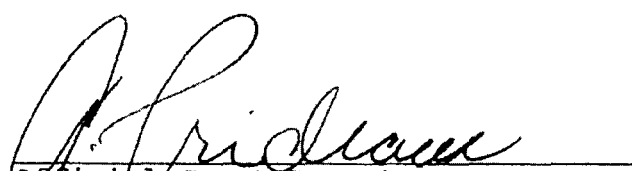
VERBATIM REPORT OF PROCEEDINGS
VOLUME 1 OF 4
(Pages 1-123)

BEFORE: The Honorable ROBERT D. AUSTIN, and Jury
DATE: June 25, 2007

APPEARANCES:

FOR THE PLAINTIFF: EDWARD D. HAY
Deputy Prosecuting Attorney
1100 West Mallon
Spokane, WA 99260-0270

FOR THE DEFENDANT: BROOKE D. HAGARA
Assistant Public Defender
1033 West Gardner
Spokane, WA 99260-0380



Official Court Reporter
Washington CSR #PR-ID-EAH 654J1

COPY
ORIGINAL FILED
DEC 31 2007
CLERK OF COURT
SPOKANE COUNTY WASH.

**DISK
ENCLOSED**

1 **MORNING SESSION**

2 **June 25, 2007**

3
4 **THE COURT:** Mr. Hay.

5 **MR. HAY:** This is State of Washington versus Anthony
6 Parks, Cause No. 07-1-01179-1.

7 Mr. Parks is present. He is represented by Brooke
8 Hagara. I'm Edward Hay, representing the State. We are
9 here for trial this morning. I understand the jury is
10 assembled in the jury room.

11 **THE COURT:** The jury assembly room.

12 Mr. Parks, you have a right to be present at all
13 stages of these proceedings.

14 We have a large jury panel. We probably can't get
15 them all in here at any one time. And I would propose that
16 -- I would ask if you have any objection to me swearing the
17 jury in the jury assembly room and handing them a
18 questionnaire regarding their history of involvement in
19 sexual abuse. You have a right to be present. I'm asking
20 if you would waive that right?

21 **THE DEFENDANT:** Yes, sir.

22 **THE COURT:** What?

23 **THE DEFENDANT:** I waive that.

24 **THE COURT:** Okay. Thank you. I will be back.

25 (Pause in proceeding.)

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF SPOKANE
3

4 STATE OF WASHINGTON,)
5)

6 Plaintiff,)

7 vs.)

8 ANTHONY PARKS,)

9 Defendant.)

COPY

Cause No. 07-1-01179-1

C.O.A. No. 26476-9-III

10
11 VERBATIM REPORT OF PROCEEDINGS
12 VOLUME 2 OF 4
(Pages 124-271)
13

14 BEFORE: The Honorable ROBERT D. AUSTIN, and Jury

15 DATE: June 26, 2007

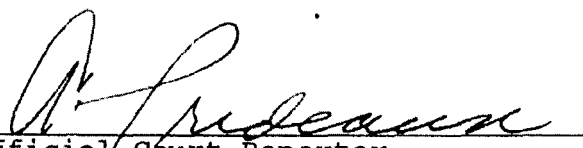
16 APPEARANCES:

17 FOR THE PLAINTIFF:

EDWARD D. HAY
Deputy Prosecuting Attorney
1100 West Mallon
Spokane, WA 99260-0270

18
19 FOR THE DEFENDANT:

BROOKE D. HAGARA
Assistant Public Defender
1033 West Gardner
Spokane, WA 99260-0380

20
21
22
23
24 
Official Court Reporter
25 Washington CSR #PR-ID-EAH 654J1

COPY
ORIGINAL FILED

DEC 31 2007

THOMAS R. FALLON
SPOKANE COUNTY CLERK

1 helpful if they're able to match their notes with a face.
2 So, if you see them craning around, and doing that, they're
3 trying to see who said what with the note they took.

4 So we will just sit here quietly while they make their
5 selections.

6 (Peremptory challenges exercised.)

7 THE COURT: For those of you that are elementary
8 school teachers, you notice the similarities between this
9 and first grade? We line you up by number. And we bring
10 you in. And after the lawyers have made their selection,
11 now we are going to play musical chairs.

12 Ms. Kenney, would you step down, please. And
13 Mr. Constable, if you would take her place.

14 And Ms. Grady, if you would step down, please, and
15 David Brown, if you would take her place.

16 And Mr. Earle, if you would step down, sir, and Gaiana
17 Daily, if you would take his place.

18 And let's see.

19 Kathy Good, if you would take the empty chair in the
20 first row.

21 And Mr. Koller, if you would take the grayish-brown
22 chair up there, please.

23 All right, ladies and gentlemen, this is the jury the
24 lawyers have selected. For those of you that have not been
25 selected, thank you very much for going through this process

1 and answering our questions. I hope you found it maybe
2 somewhat informative. If not too difficult to speak in
3 public.

4 And Ms. Schmidt, I'm going to tell you to tell the
5 jury coordinator that I have excused you from jury service.

6 JUROR NO. 31: (Nods assent.)

7 THE COURT: Due to health reasons. You don't need the
8 doctor's slip, I take your word for it. Okay.

9 And -- was there someone else that had a medical
10 problem. Yes.

11 Mr. Parman.

12 I'm not going to excuse you from service, I just think
13 that you can be more easily accommodated in a shorter trial.
14 Okay?

15 JUROR NO. 37: Okay. Thank you.

16 THE COURT: Those of you who have not been selected,
17 if you would take your numbers off, please, and hand them to
18 Ms. Kilham. You are to call in after 5:30 this evening for
19 your next assignment. Thank you.

20 (Remainder of jury panel excused.)

21 THE COURT: All right.

22 Ladies and gentlemen, you are about to become officers
23 of this court. And that means you take an oath similar to
24 mine. Would you please stand, and raise your right hand,
25 face the clerk to be sworn.

1 STATE OF WASHINGTON)

2 COUNTY OF SPOKANE)

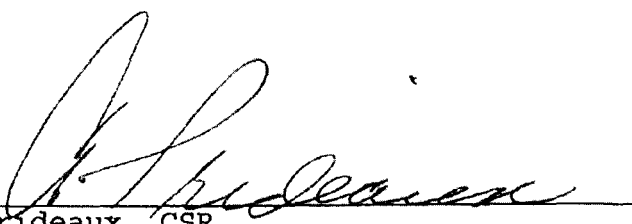
3 C E R T I F I C A T E

4
5 I, Ann Prideaux, Official Court Reporter of the
6 Superior Court of the State of Washington, in and for the
7 County of Spokane, sitting in Department Number 1 thereof,
8 hereby certify that the foregoing cause of action came
9 regularly on for jury trial before the Honorable Robert D.
10 Austin on the 25th day of June, 2007.

11 I further certify that the foregoing was transcribed
12 from my stenographic notes; that it is a true and accurate
13 verbatim transcription of said proceedings.

14 I further certify that I am in no way related to,
15 employed by, or interested in any of the parties to the
16 foregoing cause of action.

17 WHEREBY, I here affix my hand, dated this ^{1st} 31st day
18 of December, 2007.

19
20
21 

22 Ann Prideaux, CSR
23 Official Court Reporter - Dept. 1
24 Washington CSR No. PR-ID-EAH 654J1

25

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY PARKS,

Appellant,

NO. 26476-9-III

Consolidated with 27294-0-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 4, 2015, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Davis Gasch
gaschlaw@msn.com

and mailed a copy to:

Anthony Parks, DOC #308220
Airway Heights Corrections Center
PO Box 2019
Airway Heights, WA 99001

3/4/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)