

59309-2

59309-2

NO. 59369-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
ERIC VENTRESS,
Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF
ADDRESSING *STATE V. STRODE* AND *STATE V. MOMAH*

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

FILED
APPEALS DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
2010 APR 16 PM 4:47

TABLE OF CONTENTS

A. ARGUMENT 1

THE RECENT DECISIONS IN *STRODE* AND *MOMAH*
DICTATE THAT THE PRIVATE JURY VOIR DIRE
IMPERMISSIBLY CLOSED THE COURTROOM TO THE
PUBLIC IN VIOLATION OF THE SIXTH AMENDMENT AND
ART. I , SECTIONS 10 AND 22 OF THE WASHINGTON
CONSTITUTION 1

1. A trial court’s disregard of its affirmative duty to identify
an overriding interest and weigh alternatives before
privately questioning prospective jurors violates the
right to a public trial 1

2. Recent decisions explain the trial court’s duties 5

3. The trial court conducted part of voir dire in private
without any explanation or justification 7

B. CONCLUSION 11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Personal Restraint of Orange</u> , 152 Wn.2d 75, 100 P.3d 291 (2004)	2
<u>Seattle Times Co. v. Ishikawa</u> , 97 Wn.2d 30, 640 P.2d 716 (1982)	3
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).	2, 3, 5, 10
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005)	3
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006)	4, 10
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009)	1, 2, 5, 6, 10, 11
<u>State v. Strobe</u> , 167 Wn.2d 222, P.3d 310 (2009) .	1, 2, 3, 4, 5, 6, 9, 10, 11

United States Supreme Court Decisions

<u>Presley v. Georgia</u> , __ U.S. __, 130 S.Ct. 721 (2010)	1, 2, 4, 6, 10
<u>Press-Enterprise Co. v. Superior Court</u> , 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)	2
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984)	2

United States Constitution

First Amendment	1
Fourteenth Amendment	1
Sixth Amendment	1

Washington Constitution

Article I, section 10	1, 3, 4, 10
Article I, section 22	1, 4, 10

A. ARGUMENT

THE RECENT DECISIONS IN *STRODE* AND *MOMAH* DICTATE THAT THE PRIVATE JURY VOIR DIRE IMPERMISSIBLY CLOSED THE COURTROOM TO THE PUBLIC IN VIOLATION OF THE SIXTH AMENDMENT AND ART. I , SECTIONS 10 AND 22 OF THE WASHINGTON CONSTITUTION

1. A trial court's disregard of its affirmative duty to identify an overriding interest and weigh alternatives before privately questioning prospective jurors violates the right to a public trial. Strode and Momah affirm the trial court's fundamental obligation to conduct jury selection proceedings that are open to the public under both the defendant's constitutional right to a public trial and the public's constitutional right to open court proceedings. State v. Strode, 167 Wn.2d 222, 217, P.3d 310 (2009); State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009); see also Presley v. Georgia, ___U.S. ___, 130 S.Ct. 721, 725 (2010) ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," including the *voir dire* of prospective jurors); U.S. Const. amends. 1, 6, 14; Wash. Const. art. I, §§ 10, 22.

The presumption of open, publicly accessible voir dire may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly

tailored to preserve that interest.” Strode, 167 Wn.2d at 227; Momah, 167 Wn.2d at 148; see also Presley, 130 S.Ct. at 724 (circumstances in which the right to an open trial may be limited “will be rare,” and, “the balance of interests must be struck with special care”).

The trial court must articulate the “overriding interest” justifying any limit on public access to voir dire “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” Strode, 167 Wn.2d at 227.¹ The trial court “must ensure” that the “five criteria are satisfied” to close this portion of the trial. Id.

The five criteria, referred to as the Bone-Club factors, are mandatory.² “[A] trial court must engage in the Bone-Club analysis;

¹ Quoting In re Personal Restraint of Orange, 152 Wn.2d 75, 806, 100 P.3d 291 (2004); Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984); and Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Presley relies on the same standards, as explicitly set forth in Waller and Press-Enterprise. 130 S.Ct. at 724.

² The required factors are:

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

failure to do so results in a violation of the defendant's public trial rights." Strode, 167 Wn.2d at 228 (quoting State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005)). It is the trial court's "affirmative duty" to determine the compelling interest for privately questioning any jurors and to weigh the competing interests. Id. at 228 (quoting Bone-Club, 128 Wn.2d at 261).

An appellate court "cannot determine whether the closure was warranted" unless the record shows that the trial court considered the Bone-Club factors. Strode, 167 Wn.2d at 228. (citing Brightman, 155 Wn.2d at 518). The trial court's failure to consider the Bone-Club factors "prevents" the reviewing court from determining whether the private questioning of jurors was warranted. Id. at 229. It is not the merits of the courtroom closure, but the adequacy of the trial court's adherence to the mandatory procedural requirements before closing the court room that determine whether the public trial rights of Article I, sections 10 and

of closure and the public.

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, 258-59, 906 P.2d 325 (1995). Each requirement is explained in more detail in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-38, 640 P.2d 716 (1982).

22, and their federal counterparts, have been violated. Id. at 230 n.5.

The right to a public trial, including the public's right to access trial court proceedings, may be raised for the first time on appeal. Id. Any waiver must have been affirmatively executed in a knowing, intelligent, and voluntarily manner. Id. at 229 n.3.

Additionally, the public's right to open proceedings is entrusted to the court's protection. Id. at 230; Wash. Const. art. I, § 10. Courts are independently obligated to "ensure the public's right to open trials is protected." Id. at 230 n.4; see Presley, 130 S.Ct. at 724-25 ("The public has a right to be present whether or not any party has asserted the right," and therefore, "trial courts are required to consider alternatives to closure even when they are not offered by the parties").

Finally, Washington "has never found a public trial right violation to be [trivial or] de minimis." Strode, 167 Wn.2d. at 230 (quoting State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006)). For a courtroom closure to be trivial, it must be "brief and inadvertent." Id. A closure is not trivial when jurors are questioned in chambers and that information is used for purposes of jury selection. Id. Prejudice is presumed. Id. at 231.

2. Recent decisions explain the trial court's duties. In Strode, the trial judge, defendant, and attorneys spoke in the judge's chambers to prospective jurors who had answered "yes" on a confidential questionnaire that they had been the victim of sexual abuse or accused of a sexual offense. 167 Wn.2d at 224. Strode was accused of sexually abusing a child, and the judge said the reason for private questioning of these jurors was "obvious" and it did not want to "broadcast" the inquiry to all jurors. Id. at 228. The trial court conducted no "detailed review" of the need for private questioning under the mandatory Bone-Club analysis. Id. Because the closure was not justified by the trial court, and it could not be trivial when the parties substantively probed the qualifications of jurors, the courtroom closure was presumptively prejudicial and required remand for a new trial. Id. at 231.

In Momah, the Court recognized that there are narrow circumstances under which the "presumption in favor of openness" may be overcome. 167 Wn.2d at 148. Momah was a doctor accused of sexually assaulting his patients during physical examinations. Id. at 145. There was "extensive media coverage" of his case and the court summoned a large pool of prospective jurors. Id. Momah's attorney sought private questioning of jurors

because he feared certain prospective jurors could “contaminate the rest of the jury” and thus deny his client a fair trial. Id. at 146.

Momah himself “affirmatively assented to the closure.” Id. at 151. Before questioning the jurors individually in chambers, the court consulted with the prosecution and defense. Id. “[M]ost importantly, the judge closed the courtroom to safeguard Momah’s constitutional right to a fair trial by an impartial jury, not to protect any other interests.” Id. at 151-52.

Shortly after the Washington Supreme Court issued decisions in Strode and Momah, the United States Supreme Court held in Presley that the trial court denies a defendant the right to a public by failing to identify an overriding interest requiring courtroom closure. 130 S.Ct. at 725. The Court reasoned that if “generic” risks such as the fear jurors could hear prejudicial information justified closed courtrooms and overrode the constitutional right to a public trial, “the court could exclude the public from jury selection almost as a matter of course.” Id. The Presley Court further held,

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.”

130 S.Ct. at 725.

3. The trial court conducted part of voir dire in private without any explanation or justification. The trial court conducted part of jury selection in private without identifying an overriding interest necessitating courtroom closure or weighing alternatives. VDRP 128-146.³ The court's private, in chambers, questioning of jurors was undertaken as a matter of its routine practice and not because of case-specific threats to the fairness of the trial.

At the start of jury selection, the judge told the members of the jury venire that the lawyers would be asking questions of them. VDRP8. The court assured the prospective jurors it would intervene if counsel asked improper questions. Id.

Then the judge offered "a more private setting" to answer questions "for any reason." Id. at 9. The judge said to all prospective jurors:

if for any reason you don't want to give an answer in front of this large group of people, please just raise your hand and let us know you'd like to answer the question in a more private setting and then at some convenient time we can recess and go back into my chambers behind the courtroom here with just the

³ The voir dire proceedings occurred on October 30 & 31, 2006, and are contained in a single, separate volume of transcripts. They are referred to herein as VDRP.

attorneys and the clerk and the court reporter and the defendant present so you will have a smaller group of people to answer the question in.

Id. at 9. Next, the judge began his preliminary voir dire questioning by asking, “have any of you heard anything at all about this case?”

Id. Eight jurors responded but without giving any explanations of their knowledge. Id. The judge announced he would question “each of you individually at a later time.” Id.

These jurors, along with other jurors who wished to speak in a smaller setting, were questioned privately in the judge’s chambers.⁴ Before leaving the courtroom, the judge said:

We are going to recess to chambers. There’s some voir dire of individuals that we need to speak to so I’m going to let you all stay in place.

Id. at 128-29.

Before the first juror was called into the judge’s chambers for questioning, the defense attorney mentioned that one juror should be excused for cause based on her relationship with counsel. Id. at 129. The prosecution agreed and the court ruled it would excuse her. Id. The court and parties individually questioned seven jurors,

⁴ Two of these eight jurors (Jurors 23 and 36) were excused for other reasons before the private questioning occurred. VDRP 9, 106-07.

including those who “had heard anything at all about this case,” or who wanted to talk in private. Id. at 9.

None of the jurors discussed any information that would taint or improperly influence other jurors. See e.g., VDRP119-33 (Juror 2 said, “I have no real concrete recollection about the case”; Juror 13 might have heard a “glimpse” about the case,” but he felt he could not be fair juror for other reasons). After questioning the jurors, the court heard and decided cause challenges based on information gathered during this private voir dire, excusing Juror 13 for cause. VDRP 143-45.

Just as in Strode, the trial court individually questioned prospective jurors in chambers, outside of the public courtroom. VDRP128-45; see Id. at 9 (explaining chambers located behind courtroom and only people present are parties to case). The court also entertained cause challenges based on information privately raised during this private conference, and such a substantive closure “cannot be said to be brief or inadvertent.” Strode, 167 Wn.2d at 230; VDRP129, 144-45.

Prior to privately questioning individual jurors, the court did not identify a compelling interest in courtroom closure, which is an essential measure before cordoning off the public from any portion

of the trial. VDRP128-29; Strode, 167 Wn.2d at 227; see Presley, 130 S.Ct. at 724. Unlike Momah, no party sought private questioning of jurors because of a fear that public questioning would threaten the fairness of the trial. No one raised a serious and imminent threat that required private questioning of the jurors. VDRP 9. The court did not give anyone present an opportunity to object, Bone-Club factor two. Easterling, 157 Wn.2d at 176.

Moreover, in disregard of Bone-Club and contrary to the court's affirmative obligations as explained in Strode and Presley, the court did not make any specific findings that privately questioning individual jurors was the least restrictive method available for protecting threatened interests. Presley, 130 S.Ct. at 725; Strode, 167 Wn.2d at 227. The court did not try to limit the private inquiry to only people with particularly prejudicial information to share, but offered all jurors the opportunity to answer questions in private for any reason, including anyone who had heard "anything at all about this case" or who preferred to answer questions in small groups. VDRP at 9.

The substantive jury voir dire that occurred in the closed courtroom was not brief or inadvertent. It was not compelled by the overriding and necessary need to protect the right to a fair trial that

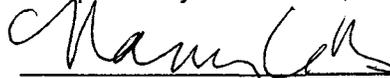
would otherwise be inevitably jeopardized. The closure of jury selection to the public violated Ventress's right to a public trial and the public's right to open court proceedings. Strode, 167 Wn.2d at 230-31. This Court need find no more, as reversal is required.

B. CONCLUSION.

For the foregoing reasons, Mr. Ventress respectfully requests this Court find that under the dictates of Strode and Momah and consistent with long-standing precedent, the courtroom closure violated the First, Sixth and Fourteenth Amendments and Article I, sections 10 and 22 of the Washington Constitution and requires reversal.

DATED this 16th day of April 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 59369-2-I
)	
ERIC VENTRESS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT ADDRESSING STATE V. STRODE AND STATE V. MOMAH** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> HILARY THOMAS, DPA
WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98225 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> ERIC VENTRESS
302982
CLALLAM BAY CC
1830 EAGLE CREST WAY
CLALLAM BAY, WA 9832 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

**FILED
STATE OF WASHINGTON
COURT OF APPEALS DIVISION #1
2010 APR 16 PM 4:17**

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF APRIL, 2010.

X _____ *[Signature]*