

60089-3

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NO. 60089-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK DIXON,

Appellant.

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

The Honorable Steven J. Mura, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT¹

UNDER STRODE AND MOMAH, DIXON'S CONVICTIONS MUST BE REVERSED.

1. Factual Review

Prior to trial, the court submitted a questionnaire for the prospective jurors. Supp. CP __ (sub no. 51, Jury Questionnaire). A cover letter states:

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any question might be embarrassing to you, you may indicate that you would prefer to discuss your answer in private. You will find instructions for this on the questionnaire.

Id. (cover letter). The questionnaire indicates:

Please read each of these questions carefully and answer them as candidly and fully as possible – if your answer to any of the following questions is of such a “sensitive nature” that you would like to discuss it “privately”, please identify those questions by number here: _____

Id. (first page of questionnaire).

Seven jurors initially indicated they would like to talk in private, but two were excused. 9RP 129. The judge and counsel spoke to

¹ This Court ordered additional briefing to address the decisions in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

the remaining five in the judge's chambers.² The court excused one juror for hardship. 9RP 131-32. The state asked questions of jurors 21 and 42.³ The court then invited the parties to make for-cause and peremptory challenges in chambers. Both parties did, then returned to open court with voir dire completed. 9RP 142-44.

There is no indication the trial judge advised Dixon of his right to open voir dire or expressly afforded him the chance to object to private questioning.

On appeal, Dixon has argued the trial court violated his constitutional right to public trial by conducting private voir dire in chambers, thereby precluding the public from observing the proceedings. Brief of Appellant at 27-34. In response the state asserts (1) Dixon waived the error, (2) there is no proof the courtroom was "closed," and (3) any closure error was de minimis.

² The transcript states "(The following proceedings were had in chambers)" 9RP 129; the minutes state "Court, Counsel, Defendant and Court Reporter move into Chambers" and later note "court, counsel, defendant and court staff return to Courtroom." Supp. CP __ (sub no. 49A, clerk's minutes page 2). Nothing suggests anyone else was invited or welcome at this private session.

³ The state asked 11 questions of number 21, defense counsel two. 9RP 135-38. The state asked 12 questions of number 42, defense counsel three. 9RP 140-42. Neither juror was challenged, nor chosen for jury duty. 9RP 143-44; Supp. CP __ (sub no. 49A, minutes).

BOR at 13-24. Based on Strode and Momah, this Court should reject the state's responses and reverse Dixon's convictions.

2. State v. Strode Requires Reversal of Dixon's Convictions.

Strode was charged with three sex offenses. Prospective jurors were asked in a confidential questionnaire whether they or anyone they were close to had ever been the victim of or accused of committing a sex offense. The prospective jurors who answered "yes" were individually questioned in the judge's chambers to determine whether they could nonetheless render a fair and impartial verdict. Before excluding the public from this private questioning, the trial court did not hold a "Bone-Club"⁴ hearing." Strode, 167 Wn.2d at 223-24.

While privately questioning some potential jurors, the trial court stated variously that "the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not be 'broadcast' in front of the whole jury panel." Strode, 167 Wn.2d at 224. The judge, prosecutor and defense counsel questioned the jurors, and challenges for cause were heard and ruled upon. Id.

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

A majority of the Supreme Court reversed Strode's conviction because the trial court failed to weigh the competing interests as required by Bone-Club. Strode, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring). The lead and concurring opinions differed, however, on whether a defendant can waive the issue through affirmative conduct.⁵ The lead opinion concluded a failure to object to closure does not waive the issue. Waiver occurs only if it is shown to be knowing, voluntary and intelligent. Strode, 167 Wn.2d at 229 n.3 (Alexander, C.J.).

The concurring opinion, however, concluded that defense participation in closed courtroom proceedings can, under certain circumstances waive the right to a public trial. Strode, 167 Wn.2d at 234-236 (Fairhurst, J., concurring). In Momah, for example, the trial court expressly advised that all proceedings are presumptively public. Id. at 234. Despite this, defense counsel affirmatively

⁵ The concurring opinion also disagreed with the lead opinion on whether a defendant could assert the rights of the public and/or press under article I, section 10. Compare 167 Wn.2d at 229-30 (lead opinion noting Strode could not waive the public's right to open proceedings) with 167 Wn.2d at 232, 236 (concurring opinion chastising lead opinion for conflating the right of a defendant, the media and the public). Because Dixon relies on his personal right as guaranteed by article I, section 22 and the Sixth Amendment, this split does not affect this case.

requested individual questioning in private, urged the court to expand the number of jurors privately questioned, and actively discussed how to accomplish this. Justice Fairhurst concluded counsel's conduct "shows the defendant intentionally relinquished a known right." Id.

Dixon's case mirrors Strode. Defense counsel did not request private questioning. The court neither addressed the Bone-Club factors nor in any other way weighed the competing interests before closing a portion of voir dire. As in Strode, the trial court violated Dixon's constitutional right to a public trial.

3. State v. Momah is Distinguishable and Does Not Control the Outcome of Dixon's Appeal.

The State charged Momah, a gynecologist, with committing sex offenses against several patients. Momah, 167 Wn.2d at 145. Unlike the "unexceptional circumstances" in Strode, 167 Wn.2d at 223 (Alexander, C.J.), Momah's case was "heavily publicized" and "received extensive media coverage." Momah, 167 Wn.2d at 145.

As a result, the court summoned more than 100 prospective jurors and gave a written questionnaire. By agreement of the parties, jurors who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned

individually in chambers. Id. at 145-46. Concerned about poisoning the panel, defense counsel also argued to expand private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

Momah, 167 Wn.2d at 146.

The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. Both the defense and prosecution actively participated in the in-chambers jury selection, most of which focused on prospective jurors' knowledge of the case gained from media publicity. Id. at 146-47 & n.1.

The six-justice majority in Momah noted that when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom[.]" the error is "structural in nature" and reversal is required. Momah, 167 Wn.2d at 149-51. The majority found reversal was not required because, despite failing to explicitly discuss the Bone-Club factors, the trial court balanced Momah's right to a public trial with his right to an impartial jury. Momah, 167 Wn.2d at 156.

In addition, drawing on the invited error doctrine, the Court

essentially found Momah "waived" his public trial right:

Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution.

167 Wn.2d at 151; see also 167 Wn.2d at 153-154 (discussing invited error). The court returned to this theme, presuming Momah made "tactical choices to achieve what he perceived as the fairest result[:]"

- Before any private voir dire, the parties and the judge discussed numerous proposals concerning juror selection;
- Although Momah was given a chance to object to the in-chambers procedure, he never objected;
- Momah never suggested closed voir dire might violate his right to public trial;
- Defense counsel deliberately chose to pursue in-chambers questioning to avoid tainting the panel; counsel "affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning."

Momah, 167 Wn.2d at 155.

Counsel's affirmative and aggressive pursuit of private voir dire is an atypical and distinctive feature of Momah. Much more common is the unexceptional case where a trial court merely informs the parties it will honor prospective jurors' requests to discuss some

matters privately. In short, Strode is ordinary, Momah the aberration. And because the Momah Court relied heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case.

Dixon's case is hardly rare; it is instead ordinary, like Strode. Unlike Momah, the trial court did not discuss various courses of action with the parties. The court instead stated that prospective jurors who wished private questioning would have it. Unlike Momah, there was no opportunity to object to private voir dire, and Dixon's counsel neither requested closed voir dire nor sought its expansion.

While Dixon's attorney did ask two jurors a total of five questions in chambers, mere participation is insufficient to waive this constitutional right. Strode's counsel also questioned jurors in chambers, but no waiver occurred. See Strode, 167 Wn.2d at 224 ("the trial judge and counsel for both parties asked questions of the potential jurors").

Finally, in what the Momah Court identified as "perhaps most important" to its decision, "the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests." Momah, 167 Wn.2d at 151-152. In Dixon's case, by contrast, the court expressed no interest in safeguarding his right to an impartial jury. Instead, the court simply

sought to avoid embarrassing panel members. The court made this clear when it told the venire, “If you feel that your answer to any question might be embarrassing to you, you may indicate that you would prefer to discuss your answer in private.” Supp. CP __ (sub no. 51, cover letter); Id. (first page of questionnaire, offering private discussions for topics of a “sensitive nature”); 9RP 9 (court offers broad opportunity whenever juror preferred “a private setting”).

As in Strode, the trial court gave no consideration to Bone-Club factors before moving part of voir dire into chambers. It failed to identify a compelling interest justifying closure, failed to expressly give anyone present the opportunity to object to the closure, failed to evaluate whether closure was the least restrictive means to protect whatever interest the court may have perceived was threatened, failed to weigh that interest against Dixon’s and the public’s interest in an open proceeding, and failed to ensure the closure was no broader or longer than necessary. Bone-Club, 128 Wn.2d at 258-59. This error requires reversal.

Momah and Strode also reject the state’s alternative claims there was no “closure” or the error was “de minimis.” The state bases its “no closure” claim on the Court of Appeals decision in Momah. BOR, at 19-20. That decision quite remarkably reasoned

that by moving into chambers and closing the door, the trial court had not excluded the public. State v. Momah, 141 Wn. App. 705, 712, 171 P.3d 1064 (2008) (court “will not speculate” what might have happened if anyone else had tried to come into chambers for the private questioning), at 714-15 (looking also at dictionary definitions).

After the Supreme Court granted review, there were six different majority, concurring, and dissenting opinions in Strode and Momah. Where none adopted this theory, it has died a mercifully quiet death.⁶ It also has no application here, given the trial court’s clear statement it was providing “a private setting” “with just the lawyers and myself and the court reporter and the clerk present.” 9RP 9. These chambers were closed to the public.

The state also has offered a theory that the error was “de minimis.” BOR at 21-23. The Momah and Strode courts rejected this theory. Where the court fails to recognize the competing interests of article 1, section 22, the error is structural. Strode, 167 Wn.2d at 231 (error is structural); at 230 (recognizing the court “has never found a public trial right violation to be [trivial or] de minimis.”)

⁶ The Momah majority made this clear in opening paragraph, stating the trial court “closed the courtroom[.]” Momah, 167 Wn.2d at 145.

(quoting State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006)), at 236 (Fairhurst, J., concurring) (error denying public trial required “automatic reversal”); Momah, 167 Wn.2d at 149-50.

4. Presley v. Georgia and State v. Paumier Require Reversal of Dixon's Convictions

Dixon has discussed why Strode and Momah require reversal. To the extent those two cases are difficult to harmonize or leave questions, reversal is required by Presley v. Georgia, ___ U.S. ___, 130 S.Ct. 721, 724, ___ L. Ed. 2d ___ (2010) and State v. Paumier, ___ Wn. App. ___, ___ P.3d ___ (No. 36341-6-II, April 27, 2010). The Paumier court addressed the trial court’s failure to conduct a Bone-Club analysis when it conducted part of voir dire in chambers. After closely analyzing Momah and Strode, and making a valiant effort to reconcile them, the Paumier majority largely gave up. Paumier, slip op. at 5-9 (parsing Momah and Strode in the context of prior Washington law). Instead, the majority relied on Presley.

The Presley court held voir dire must be open to the public, a requirement “binding on the states.” Presley, 130 S.Ct. at 723-24. “Absent consideration of alternatives to closure, the trial court could not constitutionally close voir dire.” Id., at 724 (quoting Press-Enterprise Co. v. Superior Court of California, Riverside County, 464

U.S. 501, 511, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). “Moreover ‘trial courts are required to consider alternatives to closure even when they are not offered by the parties,’ this is because ‘[t]he public has a right to be present whether or not any party has asserted the right.’” Paumier, slip op. at 11 (quoting Presley, 130 S. Ct. at 724-25). Findings are necessary, and “where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant’s conviction. Paumier, slip op. at 11 (citing Presley, 130 S. Ct. at 725).

The Paumier court also found his case to be more like Strode than Momah. While this too required reversal, “as we have explained Presley has eclipsed Momah and Strode and controls the outcome of Paumier’s case.” Paumier, slip op. at 11.

For these reasons, this Court should conclude the trial court violated Dixon’s right to a public trial, the violation was structural error, and reversal is required. Strode, 167 Wn.2d at 223, 236; Paumier, slip op. at 11.

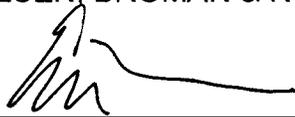
B. CONCLUSION

For the reasons set forth here and in the opening brief, Dixon asks this Court to reverse his convictions.

DATED this 29th day of April, 2010.

Respectfully submitted

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 60089-3-I
)	
PATRICK DIXON,)	
)	
Appellant.)	

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 29TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE, SUITE 201
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- [X] PATRICK DIXON
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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*