

60937-8

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NO. 60937-8-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ARLEN LEE LOPEZ,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

**RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING
STATE V. STRODE AND STATE V. MOMAH**

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I. SUMMARY OF SUPPLEMENTAL RESPONSE

State v. Momah and State v. Strobe clarify that automatic reversal is only a remedy in cases of structural error where the prejudice is clear. Otherwise, the remedy for the alleged violation of the right to public trial must be appropriate to the violation.

Here, the brief in-chambers conference with the judge regarding which witness names to read to the jury was trivial, does not amount to structural error and does not merit reversal.

II. ISSUES

1. Did the brief in-chambers conference with the judge constitute structural error?
2. If there was violation of the right to public trial by the conference, what remedy is appropriate to the violation?

III. RESTATEMENT OF PERTINENT FACTS

Prior to beginning jury selection, the trial court had the prosecutor and the defendant pro se meet with the court briefly in chambers 10/1/07 RP 3-4, see Appendix A attached hereto. The sole purpose of the discussion was for the trial court to make sure the trial court had the names of the actual witnesses scheduled to testify,

so that the names could be read to the jury. 10/1/07 RP 3. The parties agreed on the witness names to be called. 10/1/07 RP 4. No legal argument or factual issues were addressed before the trial court. 10/1/07 RP 4.

IV. SUPPLEMENTAL ARGUMENT

In response to this Court's request for supplemental briefing, the State presents the following analysis of State v. Momah and State v. Strode.

1. State v. Momah

In Momah, the Supreme Court determined that the defendant's right to a public trial was not violated because the closure of the courtroom was to preserve the defendant's right to a fair trial and that the closure was narrowly tailored to that purpose. State v. Momah, 167 Wn.2d 140, 145, 217 P.3d 321 (2009).

The Supreme Court reviewed case law and determined that in most prior cases examined the error was structural in nature, prejudice was clear and the required remedy was a new trial. State v. Momah, 167 Wn.2d at 151. The Court did not define structural error. Instead error in other cases was examined to find examples of structural error. In doing so, the Supreme Court looked at the United

State Supreme Court case of Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). In Waller, the United States Supreme Court had held that the closure of the courtroom over the objections of the defendant required remand for a new suppression hearing, but not automatically a new trial. The Court in Momah explained:

The Court reasoned that “the remedy should be appropriate to the violation,” and if it were to automatically grant a new trial without requiring a new hearing, the result would be a “windfall for the defendant” and would thus “not be in the public interest.” Waller, 467 U.S. at 50, 104 S.Ct. 2210. The Court did *not* conclusively presume prejudice and grant automatic reversal of the defendant's conviction and a new trial. Rather, in Waller, the Court required a showing that the defendant's case was actually rendered unfair by the closure.

Similarly, in our cases following Waller, **we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair.**

State v. Momah, 167 Wn.2d 140, 150, 217 P.3d 321 (2009) (bold emphasis added).

The Court in Momah went on to hold that the closure there did not constitute structural error, that the closure did protect his rights and did not actually prejudice him. State v. Momah, 167 Wn.2d at

156. The Court explained that the facts and impact of the closure in Momah were significantly different from prior cases. Id.

2. State v. Strode

The case of State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) was at the same time as Momah and resulted in a plurality opinion.¹

In Strode during voir dire jurors who had indicated in a questionnaire that they or a person close to them had been a victim of sexual abuse or accused of a sexual offense were questioned in chambers. State v. Strode, 167 Wn.2d at 224. Four justices concurring in the lead opinion determined that the error was structural, prejudice was presumed and the error could not be considered harmless. State v. Strode, 167 Wn.2d at 223, 231. The two concurring justices determined that the failure to conduct a Bone-Club analysis merited automatic reversal. State v. Strode, 167 Wn.2d at 236.

The lead opinion also addressed the issue of what the State there claimed was an insignificant closure. That opinion went on to note that some courts in other jurisdictions had held that there were

¹ A plurality opinion has limited precedential value and is not binding on the courts. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004), citing State v. Gonzalez, 77 Wn. App. 479, 486, 891 P.2d 743 (1995).

circumstances where the closure was too trivial to implicate one's constitutional right. State v. Strode, 167 Wn.2d at 230. The lead opinion went on to hold that the Washington Supreme Court had never found a public trial right violation to be trivial or de minimis. State v. Strode, 167 Wn.2d at 230, *citing*, State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006). The opinion noted that the closure was analogous to closure in Bone-Club, and Orange. Despite noting that the Washington Supreme Court had never found a public trial right violation to be trivial or de minimus, the Court went on to determine that the questioning of 11 jurors in chambers, at least 6 of which were dismissed for cause could not be brief or inadvertent.

3. Case law since Momah and Strode has applied a triviality standard.²

Since Momah and Strode, State v. Lormor has applied the triviality standard. State v. Lormor, 154 Wn. App. 386, 393-4, 224 P.3d 857 (2010). In Lormor, the Court of Appeals determined that exclusion of a nearly four-year-old child of the defendant by the trial

² An opinion issued yesterday, April 27, 2010, from Division II applied Strode, Momah and Presley v. Georgia, __ U.S. __, 130 S. Ct. 721, __ L.Ed 3d __ (2010) to exclusion of the public during examination of some jurors in chambers. State v. Paumier, __ Wn. App. __, __ P.3d __ (2010) (Slip. Op. #36346-1-II published April 27, 2010). Paumier involved a case where jury selection occurred in chambers

court did not undermine the defendant's right to a fair trial. State v. Lormor, 154 Wn. App. 386, 393-4, 224 P.3d 857 (2010) (citing U.S. v. Perry, 479 F.3d 885 (D.C.Cir. 2007) (applying triviality standard to exclusion of defendant's eight-year-old child).

4. Any closure here was not structural error and does not merit a new trial.

The Court in the earlier case of State v. Brightman suggested that a trivial closure analysis may exist.

Thus, even though a trivial closure does not necessarily violate a defendant's public trial right, the closure here was analogous to the closures in Bone-Club and Orange.

State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

State v. Easterling left open the issue of a trivial closure noting that closure was "deliberately ordered and was neither ministerial in nature or trivial in result." State v. Easterling, 157 Wn.2d at 182.

The analysis provided by Justice Madsen in her concurrence in Easterling explains the purpose of that analysis.

As many courts have recognized, a "de minimis" closure standard applies when a trial closure is too trivial to implicate the constitutional right to a public trial. The de minimis standard refers to a courtroom closure that is "too trivial to implicate the Sixth Amendment guarantee," i.e., no violation of the right to a public trial

without a Bone-Club analysis by the trial court. Thus, it was essentially the same situation as Strode.

occurred at all. United States v. Ivester, 316 F.3d 955, 960 (9th Cir.2003);

State v. Easterling, 157 Wn.2d at 832 (Justice Madsen concurring) (remaining portion of string citations omitted). Subsequent to Easterling, the Court of Appeals applied the trivial standard in a case.

Although the Brightman court noted that trivial closures may not violate a defendant's public trial right, the court made evident that its understanding of "trivial" derived from federal cases where "brief and inadvertent" closures had no real affect on the conduct of the proceedings. 155 Wn.2d at 517, 122 P.3d 150.

State v. Erickson, 146 Wn. App. 200, 208-9, 189 P.3d 245 (2008) (petition for review pending in Supreme Court #82050-3)

As noted above in Momah, the Washington Supreme Court has held that the remedy must be appropriate to the violation and ordered a new trial where the closure rendered the trial fundamentally unfair. State v. Momah, 167 Wn.2d at 150.

And Strode, although noting trivial or de minimis closure had yet to be found in Washington, addressed the claim.

But the Court in Momah and Strode do not provide a definition of structural error.³ In the absence of that definition, this Court should

³ Division II in State v. Paumier, reads Momah to identify structural error as "one that necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." State v. Paumier, Slip. Op. at page 8. The State believes this portion of Momah is not so much a definition as an explanation of why some instances of closure do not merit reversal of conviction.

apply the analysis as in Momah and determine whether the closure rendered the trial fundamentally unfair and if there is a violation that the remedy must be appropriate.

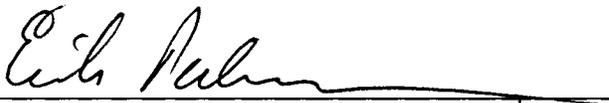
In addition to the arguments provided in the Respondent's Brief, the State contends that the brief meeting to discuss the list of witnesses the jury was to be told was not structural error but at most a trivial closure which did not render the trial fundamentally unfair. Furthermore, the remedy of automatic reversal is not appropriate to the claimed violation.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court find the defendant's right to public trial was not violated and reversal is not merited.

DATED this 28th day of April, 2010.

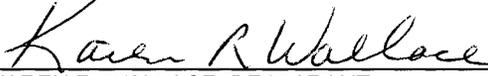
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:
I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Harlan R. Dorfman and Christopher H. Gibson, addressed as Nielsen Broman Koch PLLC,

1908 E Madison Street, Seattle, WA 98122 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 28th day of April, 2010.



KAREN R. WALLACE, DECLARANT

APPENDIX A

1 MOUNT VERNON, WASHINGTON

2 -- oo0oo --

3
4 (PROCEEDINGS HELD IN CHAMBERS)

5
6 THE COURT: Gentlemen, I wanted to meet briefly
7 to make sure when I read the names of witnesses to the jury
8 that I have a complete set. Mr. Lopez, you filed a 7-page
9 witness list. But we didn't talk about many of the people
10 in here. Did subpoenas go out; for example, all employees
11 of the health department? I assume they did not.

12 MR. PEDERSEN: No, Your Honor. When we had the
13 hearing there were certain identified witnesses who Mr.
14 Lopez believed he wanted to have subpoenaed. I filed a
15 supplemental witness list, which had those additional
16 witnesses. I provided Mr. Lopez a copy of that.

17 THE COURT: We eliminated some of those also?

18 MR. PEDERSEN: We had, Your Honor.

19 MR. LOPEZ: But the ones that were in question
20 that supplement list he gave me, it was delivered. He filed
21 it on the 21st of September, hand delivered it on the 24th.
22 And Joan and Marshall Peterson you said it was okay for them
23 when we were in court Friday. They weren't even notified.

24 THE COURT: But in terms of the other members of
25 this witness list we're okay with not bringing all of those

1 folks in?

2 MR. LOPEZ: Not at this point, yeah.

3 THE COURT: That's all I wanted to make sure. I
4 will read the witness list. And we've actually -- I've
5 already ruled on Dowhaniuk and Ruxton. Do you want me to go
6 ahead and read those just in case?

7 MR. PEDERSEN: I think that's probably the safest
8 way.

9 THE COURT: I will read your original witness
10 list from the State and the supplemental list Rhonda Hurst,
11 Marshall Joan Peterson, just in case the jury knows any of
12 those folks I just wanted to clear that up. We've put
13 questions on the board. Each juror will tell you a little
14 bit about themselves. When it comes to questioning the
15 entire panel, Mr. Lopez, I'm sort of hoping you can watch
16 Mr. Pedersen. And if you wish to talk to the panel and ask
17 general questions.

18 MR. LOPEZ: Right. I can ask questions?

19 THE COURT: You can ask the panel as a whole or
20 Number 13, 14. Let's go out. I've got quite a bit of
21 introductory things to do. It will be the State's burden.
22 Okay. Alright.

23 (JURY VOIR DIRE BEGINS, A PANEL IS SELECTED, AND OPENING
24 ARGUMENTS ARE GIVEN BY BOTH SIDES).

25 THE COURT: State may call its first witness.