

Q1479-1

Q1479-7

NO. 61479-7-I

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
TYLER HAWKER,  
Appellant.

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

The Honorable Steven J. Mura

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

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A. INTRODUCTION

During jury selection in Tyler Hawker's Whatcom County trial, the trial judge sua sponte decided to question jurors individually in chambers, in violation of the right to a public trial protected by the Sixth Amendment and article I, sections 10 and 22 of the Washington constitution. Although the judge briefly solicited objections from "anyone present", he did not consider the five requirements set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), obtain a knowing waiver of the right to a public trial from Hawker, or close the proceedings in order to protect Hawker's constitutional rights.

This Court stayed Hawker's appeal pending the decisions of the Washington Supreme Court 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 Court has since lifted the stay and ordered supplemental briefing addressing those decisions. This Court should conclude the order violated the right to a public trial.

B. ARGUMENT

THE TRIAL COURT'S CLOSURE OF JURY VOIR  
DIRE WAS A STRUCTURAL ERROR THAT  
REQUIRES REVERSAL OF HAWKER'S  
CONVICTION.

1. A trial court violates the right to a public trial by closing  
voir dire proceedings without engaging in the *Bone-Club* analysis.

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." Article I, section 22 of the Washington Constitution also guarantees "[i]n criminal prosecutions, that trials must be open "may be overcome 'only by an overriding interest the accused shall have the right to . . . a speedy public trial." And under article I, section 10 of the Washington Constitution, "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

The strong presumption that trials must be open

may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Strode, 167 Wn.2d at 227 (citation omitted).

In Presley v. Georgia, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, \_\_\_ L.Ed.2d \_\_\_ (2010), the Supreme Court reached the same conclusion: “the particular interest, and threat to that interest, must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” 130 S.Ct. at 725 (quoting Press Enterprise Co. v. Superior Court of Cal., Riverside County, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)).

Accordingly, before any closure will be found to be justified on appeal, the court must consider 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.

Bone-Club, 128 Wn.2d at 258-59.

2. In a criminal proceeding, a trial court's failure to weigh the defendant's right to a fair trial against the interest in closure renders a closure order structural error. In Strode, the Supreme Court concluded a closure order during voir dire necessitated reversal of the conviction. 167 Wn.2d at 223. Strode was prosecuted for three sex offenses against a child. Based on the jurors' answers to confidential questionnaires regarding prior history of sex abuse, the court questioned at least 11 jurors in chambers. Id. at 224-25. The court did not conduct a Bone-Club analysis. Id.

Although the trial court stated the reasons for individual questioning were "obvious", intimating that closure was justified by the interest of protecting the jurors' confidentiality and the need to ensure the jurors' answers were not "broadcast" to the rest of the panel, the Supreme Court disagreed. Id. at 228 (noting the record is "devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right").

The Court likewise rejected the contention that because Strode's attorney acquiesced to the closure, the error was waived or invited. Id. at 229 ("Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors

did not, as the dissent suggests, constitute a waiver of his right to a public trial”). In addition, the Court concluded that Strode could not waive the public’s right of an open trial. Id. at 229-30. The Court accordingly held that closure of the courtroom in these “unexceptional circumstances” was a structural error that necessitated reversal of Strode’s convictions. Id. at 223, 231.

By contrast, in Momah, a “heavily publicized” case involving multiple allegations that Momah, a gynecologist, had sexually abused his patients, Momah’s counsel not only affirmatively acquiesced to the questioning of certain jurors individually, he argued for its expansion. 167 Wn.2d at 145-46. In addition to specifically noting that some of the jurors might be disqualified from serving based on their prior knowledge of the case, Momah’s attorney argued “the real concern that they will contaminate the rest of the jury” justified closure. Id. at 146.

Although the trial court in Momah did not weigh the Bone-Club factors prior to closing the voir dire proceedings, the Supreme Court held that the closure order did not require reversal:

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. Finally, and perhaps most importantly, 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. Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.

Id. at 151-52 (emphasis added).

This analysis identifies the two key factual differences between Momah and Strode. In Momah the Court reasoned that because (1) Momah's attorney not only assented to closure but argued for its expansion and benefited from it; and (2) the trial court predicated the closure order on the need to safeguard Momah's constitutional rights; the error was not structural, but rather could be evaluated according to a constitutional harmless error analysis. Id. at 156.

In Strode, the lead opinion, authored by Justice Alexander, was signed by three other justices. Justices Fairhurst and Justice Madsen concurred in the result, however. They concluded reversal was required because the closure order in Strode was not entered to safeguard Strode's constitutional rights. Justice Fairhurst wrote:

I agreed to affirm Charles Momah's convictions because the facts presented circumstances where the trial court needed to close a portion of voir dire to the

public in order to protect the defendant's right to a fair trial. I reach a different conclusion here because Tony L. Strode's right to a public trial has not been waived nor has it been safeguarded as required under [Bone-Club].

Strode, 167 Wn.2d at 231-32 (Fairhurst, J., concurring).

Justice Fairhurst further explained:

The record shows that safeguarding Momah's rights to an impartial jury and a fair trial required the closure that occurred, and that all the attorneys, the defendant, and the trial court knew that all the proceedings were presumptively open and public. The purpose of the Bone-Club inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in Momah's case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude—the right to an impartial jury.

Id. at 233. Justices Fairhurst and Madsen further concluded that unlike Strode, Momah "intentionally relinquished a known right." Id. at 234.

3. The closure order here was unconnected to protection of any constitutional right of Hawker, but entered merely for the convenience of the jurors. In Hawker's case, unlike Momah, the trial court did not base its closure order on the desire to protect Hawker's constitutional rights. Nor did the court hold voir dire in chambers at Hawker's request. To the contrary, the trial court

interrupted Hawker's voir dire and sua sponte offered private questioning only to make the jurors feel more comfortable.

The court stated,

Let me interject one thing here. Ladies and gentlemen, I know there are three jurors who have indicated to the court they have some things they wish to talk in chambers about in a more private setting, so if you're one of these people and any question that's asked if you feel you need to give an answer and you wish, for some reason you're hesitant to in front of the big crowd, if you haven't already given us your number please raise your hand and just say I'd rather answer than question in a more private setting. Then we can talk to you later at a different time.

4RP 33-34.

Although the trial court allowed Hawker and "anyone here present" an opportunity to object to the closed proceeding, 4RP 79, there is no indication that Hawker intentionally relinquished a known right. Compare Strobe, 167 Wn.2d at 234 (Fairhurst, J., concurring). As in Strobe, Hawker's attorney's mere acquiescence does not constitute waiver. 167 Wn.2d at 229.

4. The closure order here requires reversal. Under Strobe and Momah, Hawker is entitled to a new trial. First, it is unquestioned that the court gave no consideration to the five Bone-Club criteria before peremptorily closing part of voir dire

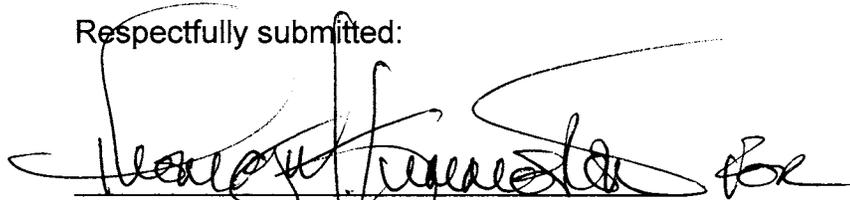
proceedings. Second, as in Strode, and unlike Momah, Hawker's acquiescence to the closure did not waive his right to a public trial. Compare Strode, 167 Wn.2d at 229, with Momah, 167 Wn.2d at 151-52. Third, and crucially, the court did not determine that closure was necessary to safeguard Hawker's right to a fair trial. Absent consideration of this compelling interest, the closure order cannot be harmless. Momah, 167 Wn.2d at 152; Strode, 167 Wn.2d at 233 (Fairhurst, J., concurring). Hawker's conviction must be reversed.

C. CONCLUSION

This Court should conclude that as in Strode, this case involved “unexceptional circumstances” which did not warrant closure of jury voir dire. Because the trial court did not identify a compelling interest favoring closure, did not ensure closure was the least restrictive means available to accomplish the court’s purpose, and did not weigh the jurors’ desire for privacy against Hawker’s constitutional rights, Hawker’s conviction must be reversed.

DATED this 3rd day of May, 2010.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Susan F. Wilk", written over a horizontal line.

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Attorneys for Appellant

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STATE OF WASHINGTON,	)	
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	)	
v.	)	NO. 61479-7-I
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TYLER HAWKER,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3<sup>RD</sup> DAY OF MAY, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** 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:

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| [ X ] | KIMBERLY THULIN, DPA<br>ERIC RICHEY, DPA<br>WHATCOM COUNTY PROSECUTOR'S OFFICE<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | ( X )<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [ X ] | TYLER HAWKER<br>315977<br>WCC<br>PO BOX 900<br>SHELTON, WA 98584   | ( X )<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF MAY, 2010.

X \_\_\_\_\_ *gr*

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