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Court of Appeals No. 62109-2-I
Skagit County Superior Court No. 03-1-00660-1

RECEIVED
COURT OF APPEALS
DIVISION ONE
JAN 25 2010

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

In re the Personal Restraint of:

PATRICK L. MORRIS.

Petitioner.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF REGARDING
MOMAH AND STRODE

By:

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I. INTRODUCTION

The Court granted Morris's request to file supplemental briefing in view of the Washington Supreme Court's rulings in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), and State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). After receiving an extension of time, the State filed a response. Morris now submits this reply.

II. ARGUMENT

A. THE STATE'S INTERPRETATION OF STRODE AND MOMAH IS FAULTY

The State seems to argue that Momah lost his courtroom closure claim simply because he participated in the closed jury selection and may have benefited from it. Such a holding would overrule decades of Washington Supreme Court authority. The Momah Court expressly disclaimed that it was making such a ruling. Momah, 167 Wn.2d at 154-156.

The State maintains that the concurrence in Strode most accurately reflects the views of the Supreme Court. Those concurring Justices voted to affirm Momah's conviction but to reverse Strode's. They stressed two points: 1) that the trial court had no choice but to close jury selection in Momah's case due to the high potential for juror contamination; and 2) that defense counsel did not merely fail to object to closure, but rather affirmatively sought private questioning. See Morris's Supplemental Brief at 4-5. Neither factor applies to Morris's case.

The Washington Supreme Court has recently denied the State's motion for reconsideration in Strode. See Exhibit A. In Momah, on the other hand, it has requested that the State respond to the defendant's motion for reconsideration. See Exhibit B. The net effect of these rulings is that, if the Washington Supreme Court decides to change its analysis at all, that change can only favor Morris.

A new ruling from the United States Supreme Court further confirms that Morris is entitled to relief. See Presley v. Georgia, -- U.S. --, 2010 WL 154813 (Jan. 19, 2010). In that case, the trial court closed the apparently small courtroom for jury selection out of concern that spectators would otherwise be sitting near jurors and possibly contaminate them. The Georgia Supreme Court affirmed, finding that the trial court had an "overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire," and that, in view of Presley's failure to offer alternatives to closing the courtroom, "there is no abuse of discretion in the court's failure to sua sponte advance its own alternatives." Id. at *1, quoting Georgia v. Presley, 285 Ga. 270, 273-74, 674 S.E. 2d 909 (2009). In a per curiam opinion, the U.S. Supreme Court summarily reversed, finding that the law was "well-settled" in view of Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), and Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Presley at *2-3. That "trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear." Id. at *4.

“The public has a right to be present whether or not any party has asserted the right.” Id. In Presley’s case, “[n]othing in the record shows that the trial court could not have accommodated the public at Presley’s trial.” Id. Further, the “generic risk of jurors overhearing prejudicial remarks” is not an overriding interest that could justify closure. Such “broad concerns” would permit a closure “almost as a matter of course.” Id.

The same reasoning applies with greater force in Morris’s case. The trial court closed the courtroom for jury selection without identifying *any* reason for closure.

In addition to the closure of jury selection on June 8, 2004, , Morris has argued that the evidentiary matters discussed before jury selection began on that day were also improperly closed. In its supplemental brief, the State concedes that the clerk’s minutes (App. B. to PRP) confirm that this hearing was closed. It notes, however, that the transcript of June 8, 2004, attached as App. B to the PRP, says “(Proceedings held in open court jury panel not present.)” Undersigned counsel was surprised to see that because the *original* transcript of June 8, 2004, clearly states: “(Proceedings held in chambers).” See Exhibit C to this brief at 2. That transcript, prepared for the direct appeal, did not include jury selection. Id. at 3. For that reason, undersigned counsel requested a complete transcript of that day from the court reporter, which became App. A to the PRP. For some reason, the reporter changed the parenthetical comment on page 2 in addition to adding the jury selection.

Because the original transcript is consistent with the clerk's notes, it is reasonable to conclude that it accurately reflects how the pretrial hearing was conducted. If the Court wishes, however, it could order a limited reference hearing to resolve the issue. Of course, that will not be necessary if the Court agrees with Morris that he is entitled to relief based on the undisputed closure of jury selection.

B. MORRIS NEED NOT PROVE SPECIFIC PREJUDICE

The State maintains that Morris must prove specific prejudice from courtroom closure. Other than the unique situation presented in Momah, however, the Washington Supreme Court has always found the error to be structural, that is, one that requires no showing of prejudice. It is difficult to imagine how a petitioner could ever prove that the closure of jury selection specifically prejudiced him. Nobody can say how the presence of the public might have influenced jury selection. Certainly the jurors cannot answer that question, since jurors are not permitted to give testimony concerning their thought processes. State v. Jackmon, 113 Wn.2d 772, 778-79, 783 P.2d 580 (1989). That is why, as in State v. Strode, the error leads to automatic reversal.

Further, as the State concedes, the Supreme Court reached the same result in In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), where the claim was raised in a personal restraint petition. In Orange, as here, the petitioner maintained that his appellate counsel was ineffective in failing to raise the issue. The Supreme Court agreed. Because Orange would have been entitled to automatic reversal on direct appeal, appellate

counsel could not have had a legitimate, strategic reason to omit the issue. The petitioner was prejudiced because, if not for appellate counsel's error, he would have won his appeal. The defendant was therefore entitled to a new trial based on ineffective assistance of counsel. Another way to characterize the analysis is that, when appellate counsel was ineffective in failing to raise an issue, the petitioner is entitled to the direct appeal standard on postconviction review. See In re Dalluge, 152 Wn.2d 772, 789, 100 P.3d 279 (2004).

The State suggests that Orange is distinguishable because in this case the failure to object to closure may have been "strategic" or "tactical" whereas in Orange it was not. The Orange court, however, did not focus on the conduct of *trial* counsel, however, but on the conduct of *appellate* counsel. See Orange, 152 Wn.2d at 814. The claim raised in Orange, as here, was not that trial counsel was ineffective in failing to object to closure but that appellate counsel was ineffective in failing to raise this issue – an issue that is preserved without any objection by trial counsel.

The same result would apply even without a claim of ineffective assistance on appeal. The federal courts, like the Washington courts, generally require a post-conviction petitioner to prove actual prejudice rather than requiring the government to prove that the error was harmless. Compare Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 383 (1993) (habeas petitioner must prove error had "substantial and injurious effect" on verdict), with In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982) (personal restraint petitioner must prove actual prejudice

from error). The Brecht Court “did not, however, change, and in fact reaffirmed, its longstanding doctrine treating ‘structural’ error as not subject to harmless error analysis and accordingly as prejudicial – hence reversible – per se.” Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* (4th Ed., 2001), § 31.3 at p. 1379, citing Brecht, 507 U.S. at 629-30, 638. “Thus, even in habeas corpus proceedings adjudicated under Brecht, ‘structural’ errors, as opposed to ‘errors of the trial type,’ are always considered ‘prejudicial’ and accordingly are reversible per se.” Id. at p. 1380.

Since Brecht, the federal courts have consistently found structural errors to be per se prejudicial, even on habeas review. See, e.g., Bell v. Cone, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (prejudice is presumed when petitioner was completely denied counsel, or the representation was so compromised as to be equivalent to denial of counsel); Cordova v. Baca, 346 F.3d 924, 930 (9th Cir. 2003) (because petitioner did not effectively waive his right to counsel in state-court trial, “[a]utomatic reversal of the conviction is the only lawful remedy”); Powell v. Galaza, 328 F.3d 558, 566-67 (9th Cir. 2003) (when trial court effectively directs a guilty verdict, the error is structural and requires no showing of prejudice; “[t]his principle applies on habeas review as well as on direct review”); Miller v. Dormire, 310 F.3d 600, 603-04 (8th Cir. 2002) (invalid waiver of right to jury trial was presumptively prejudicial, structural error).

The federal courts have specifically applied this principle to violations of the Sixth Amendment right to a public trial, when raised on habeas review. In Judd v. Haley, 250 F.3d 1308 (11th Cir. 2001), the Court explained that “once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way.” Id. at 1315. “The mere demonstration that his right to a public trial was violated entitles him to relief.” Id.

As a violation of the right to a public trial is structural error, Judd need not show that he was prejudiced by the closing of the courtroom. All he must demonstrate is that the trial court did not comply with the procedure outlined in Waller prior to its decision to completely remove spectators from the courtroom. Judd has successfully demonstrated that the closure of the courtroom in his case was not conducted in conformity with the standards articulated in Waller; therefore, he is entitled to relief on his Sixth Amendment claim.

Id. at 1319.

Similarly, in Walton v. Briley, 361 F.3d 431 (7th Cir. 2004), the state-court trial judge held two sessions after the courthouse had closed for the day, inadvertently preventing the public from attending. “Because Walton need not show specific prejudice, these facts are sufficient to show a violation of Walton’s right to a public trial.” Id. at 433. In Owens v. United States, 483 F.3d 48 (1st Cir. 2007), the federal defendant lost his direct appeal and then filed a habeas petition. Id. at 56. The First Circuit explained that his claim regarding courtroom closure required no showing of prejudice even though it was raised on collateral review. Id. at 63. See

also, Carson v. Fischer, 421 F.3d 83, 94-95 (2nd Cir. 2005) (“we have consistently held that prejudice is unnecessary in this context”).

The Washington courts have never suggested that a personal restraint petitioner could have a higher burden of proof than that of a federal habeas petitioner. In fact, the Washington case establishing the burden of proof in a personal restraint petition expressly adopted the federal habeas standard. In re Hagler, 97 Wn.2d at 824-26. The Hagler Court believed it important to stay in step with federal habeas law. Otherwise, “our state’s personal restraint procedure will come to be viewed as a necessary exhaustion of state remedies, rather than as a method by which serious constitutional claims may be heard.” Id. at 826.

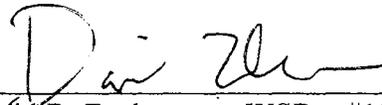
Thus, whether raised on direct or collateral review, a violation of the right to a public trial is generally structural error and requires no showing of specific prejudice.

III. CONCLUSION

Thus, for the reasons stated in this supplemental reply brief and in the prior briefing of petitioner, the Court should reverse because Morris’s right to a public trial was violated.

DATED this 22nd day of January, 2010.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Patrick L. Morris

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing pleading on the following:

Skagit County Prosecutor's Office
605 South 3rd Street
Mt. Vernon, Washington 98273

Mr. Patrick Morris #871931
McNeil Island Corrections Center
PO Box 881000
Steilacoom, WA 98388-0900

1/22/2010

Date



Steven Plastrik

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

TONY L. STRODE,

Petitioner.

ORDER DENYING MOTION FOR RECONSIDERATION

NO. 80849-0

C/A No. 25423-2-III

Ferry County No.
05-1-00030-9

The Court having considered the Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 11th day of January, 2010.

For the Court


CHIEF JUSTICE

FILED
SUPREME COURT
STATE OF WASHINGTON
10 JAN 11 AM 9:13
BY RONALD R. SPENCER
CLERK

167 Wn.2d 222

579/2

EXHIBIT A

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Petitioner.

NO. 81096-6

**ORDER CALLING FOR
ANSWER TO MOTION
FOR RECONSIDERATION**

The Court having considered the Petitioner's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Respondent is requested to file an answer to the motion for reconsideration by
not later than December 7, 2009.

DATED at Olympia, Washington this 19th day of November, 2009.

For the Court


CHIEF JUSTICE

FILED
SUPREME COURT
STATE OF WASHINGTON
09 NOV 19 AM 9:05
BY RONALD R. CRPENTER
CLERK

EXHIBIT B

573/35

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

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State of Washington,)	Skagit County Cause
)	No. 03-1-00660-1
Plaintiff,)	
)	
vs.)	Court of Appeals
)	No. 54924-3-I
)	
Patrick Morris,)	
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS

The Honorable Michael E. Rickert
Department II
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES:

For the Plaintiff: DONA BRACKE
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office
Mount Vernon, WA 98273

For the Defendant: CORBIN VOLLUZ
Attorney at Law
409 Main Street
Mount Vernon, WA 98273

DATE: June 8, 2004

REPORTED BY: Jennifer C. Schroeder, RPR, CCR #2221

1 Wednesday; June 8, 2004

2 9:00 A.M.

3 --oo0oo--

4 (Proceedings held in chambers).

5 THE COURT: Good morning, Mr. Morris. I wanted
6 to make you aware about what we did yesterday when you
7 weren't here. We went ahead with pretrial motion on things
8 that were going to be admitted and not admitted in the
9 trial. I understand from Mr. Volluz, you were aware that
10 was going to happen, you waived your presence in that
11 hearing; is that correct?

12 MR. MORRIS: Yes.

13 THE COURT: All right. That's all I want know.

14 MS. BRACKE: One more, the waiver to the child
15 hearsay hearing.

16 THE COURT: Yes, we have not done one; is that
17 right?

18 MR. VOLLUZ: No child hearsay hearing.

19 THE COURT: As I have understood, you've
20 considered it with your client?

21 MR. VOLLUZ: Well, I've certainly considered it,
22 Your Honor. I believe the child hearsay comes up at a point
23 after the child testifies, and it's based upon what the
24 child testifies to.

25 THE COURT: Is the child going to testify fairly

1 early?

2 MS. BRACKE: I intend to call her first.

3 THE COURT: We'll know then. If she doesn't have
4 any recollection of certain interviews of the event when she
5 gets on the stand, we may have some hearsay problems. But
6 other than that, recollection testimony is subject to cross.
7 I don't think there will be a problem.

8 Either of you have any concerns about her
9 competence?

10 MR. VOLLUZ: No. We have considered that. We're
11 not challenging her competency. She's 6 years old. She
12 seems competent.

13 THE COURT: We'll go ahead without the hearsay
14 hearing, if that's agreeable to both of you. Then we'll
15 deal with any issues that arise after her testimony. Does
16 that work?

17 MR. VOLLUZ: Very good.

18 (Proceedings held in the courtroom with the jury present).

19 THE COURT: Good morning, Ladies and Gentlemen.
20 Be seated.

21 (At which time the Judge addresses the jury panel, voir dire
22 begins, and a jury of 12 is selected).

23 We'll be ready to start at 9:30 tomorrow morning.

24 I have a few preliminary things to talk about that will
25 probably take about 15 minutes. We'll start right after