

NO. 65859-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

MUNNIER QUASIM,

Appellant.

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

The Honorable Catherine Shaffer

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON

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A. ARGUMENT IN REPLY

THE EXCLUSION OF THE JURORS DURING THE PEREMPTORY CHALLENGE PROCESS VIOLATED THE PUBLIC TRIAL GUARANTY.¹

1. Price, Erickson and Vega conflict with Momah and Strode. The State correctly observes that to the extent that they have considered the issue, Washington appellate courts have concluded that the exclusion of jury venire members during portions of jury selection does not violate the public trial right, under the theory that once venire members are sworn they are officers of the court. Br. Resp. at 11 (citing State v. Price, 154 Wn. App. 480, 487, 220 P.3d 1276 (2009), State v. Erickson, 146 Wn. App. 200, 205-06 n. 2, 189 P.3d 245 (2008);² State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008)). All of these decisions, however, either pre-date or are decided without reference to State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009), in which the Court intimated that

¹ Believing his arguments regarding the trial court's erroneous application of the corpus delicti rule and the sufficiency of the evidence to be well-presented in the Brief of Appellant, no further argument on these issues is presented here.

² In Erickson, the Court's discussion of the question was dicta.

the public trial right of jury venire members is not extinguished by their participation in the jury selection process.³

The State cites only one Washington Supreme Court decision pertaining to the public trial right, State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011). Br. Resp. at 11-12. Lormor, however, is not on point. Lormor concerned a trial court's discretionary exclusion of the defendant's four-year-old daughter during trial proceedings. 172 Wn.2d at 87-88. The child was terminally ill, confined to a wheelchair, and on a ventilator. Id.

The Supreme Court held that this exclusion did not amount to a violation of the right to a public trial because "only one person was excluded, and there was no general prohibition for spectators or any other exclusion of the public." Id. at 92. Here, by contrast, the entire jury venire was excluded. Cf., In re Orange, 152 Wn.2d 795, 807, 100 P.3d 291 (2004) (defendant's entire family excluded).

Because the State erroneously concluded that jury venire members have no right to a public trial, the State did not engage in any analysis of the trial court's exclusion order under the five

³ Price, which was decided on October 12, 2009, post-dated the publication of Strode and Momah by four days. It is fairly apparent, however, that the Court in Price did not consider either decision as the opinion cites to the Court of Appeals decision in Momah without reference to the Supreme Court decision. See 154 Wn. App. at 487 n. 7.

enumerated factors in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). As argued in Quasim's opening brief, application of these factors establishes that the right to a public trial was violated by the court's order excluding the jurors during the peremptory challenge process. To the extent that it is inconsistent with Momah and Strode, Price should be overruled.

2. The order excluding the jurors was an abuse of discretion. The State argues that if the exclusion order did not violate the public trial guaranty, then this Court should apply an abuse of discretion standard.

"An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." . . . "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." . . . "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' . . . and arrives at a decision 'outside the range of acceptable choices.'"

Mitchell v. Washington State Institute of Public Policy, 153 Wn. App. 803, 821-22, 225 P.3d 280 (2009), rev. denied, 169 Wn.2d 1012 (2010) (internal citations omitted).

The State contends that the trial court's ruling was not an abuse of discretion, alleging that Quasim gives "short shrift" to the reasons given by the trial court for excluding the jurors. Br. Resp. at 13. To the contrary, Quasim extensively analyzed each of the court's stated reasons for the exclusion. See Br. App. at 11-20. As Quasim's opening brief amply demonstrates, none of these bases survives scrutiny, as they were unsupported by facts in the record, based on an incorrect legal standard, and outside the range of acceptable choices.

It is the State that has failed to discuss the court's explanation for its exclusion order. In particular, the State skims over what arguably is the most concerning of the court's rationales: that it is somehow appropriate to bar from the peremptory challenge process jurors who may suffer a violation of their equal protection rights as stated in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny.

The State also claims that Quasim has not shown prejudice from the trial court's ruling. Again, the State is wrong. Quasim's counsel stated that it would be "significantly detrimental to [his] choices to not see who is being replaced." 6/10/10 RP 104-05; see also 6/2-3/10 RP 158. During the peremptory challenge process,

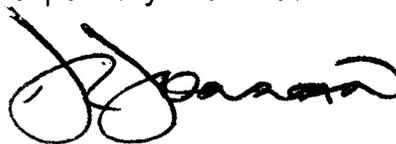
counsel advised the court that he had forgotten who a potential juror was. 6/10/10 RP 117-19. In short, assuming without conceding that an abuse of discretion standard applies, Quasim has shown both that the trial court abused its discretion and that its ruling prejudiced him.

B. CONCLUSION

For the foregoing reasons and for the reasons articulated in the Brief of Appellant, this Court should reverse Munnier Quasim's conviction.

DATED this 7th day of October, 2011.

Respectfully submitted:

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	
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MUNNIER QUASIM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **REPLY 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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<input checked="" type="checkbox"/> MUNNIER QUASIM 341755 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF OCTOBER, 2011.

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