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NO. 68846-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICKEY RAINEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES ROGERS

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS DIVISION I

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A. ISSUES PRESENTED

1. The constitutional right to a public trial is strictly applied, and trial courts should not order a courtroom closure absent unusual circumstances. However, Washington courts have recognized that an *in camera* hearing is appropriate when the trial court is called upon to determine whether a witness will be refusing to testify due to the privilege against self-incrimination. In this case, during a motion for retrial held five months after Rainey was found guilty, the trial court held a brief *in camera* hearing to determine whether a witness had a basis to claim a privilege against self-incrimination. Was this procedure appropriate?

2. The confrontation clause guarantees the right for a defendant to confront witnesses who bear testimonial evidence against him. To establish that Rainey's license was suspended in the third degree, Department of Licensing affidavits were admitted, however no witness testified about this information. Should this court accept the State's concession of error that the admission of these documents violated the confrontation clause and remand this matter for retrial on driving while license suspended in the third degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Rickey Rainey was charged by Amended Information with attempting to elude a pursuing police vehicle (Count I) and driving while license suspended in the third degree (Count II). CP 5-6. In Count I, Rainey was charged with the special allegation that persons were threatened with physical injury or harm by the actions of the defendant during the commission of the crime. CP 5. The offenses were alleged to have occurred on May 17, 2009. CP 5-6.

Rainey was found guilty as charged in a jury trial presided over by the Honorable James Rogers. CP 41-42. In a special verdict form, the jury found the special allegation for Count I. CP 43. The court imposed a standard range sentence of fifteen months and one day of incarceration. CP 153.

2. SUBSTANTIVE FACTS.

On May 17, 2009 at approximately 8:00 p.m., Sergeant Chris Sylvain of the Snoqualmie Police Department saw Rickey Rainey

driving his mother's silver Toyota pickup truck. 1RP¹ 25, 28, 30, 33. Sergeant Sylvain recognized Rainey from prior contacts and saw that there was a female passenger in the pickup. 1RP 30, 34. After verifying that Rainey's driver's license was suspended, Sergeant Sylvain activated his overhead lights and attempted to perform a traffic stop of Rainey. 1RP 32, 34-35.

Instead of stopping the vehicle, Rainey did a U-turn across two lanes of traffic and accelerated past Sergeant Sylvain. 1RP 35. Rainey drove the pickup so close to Sergeant Sylvain's patrol car that the sergeant believed Rainey was going to ram the patrol car. 1RP 35. Over the next several minutes, Rainey led Sergeant Sylvain on a chase over four and a half miles. 2RP 87. During the pursuit, Rainey drove the pickup over 90 miles per hour past schools and businesses. 2RP 30. Without slowing the vehicle, Rainey ran a red light and drove through a four-way stop intersection. 2RP 32-33, 38.

Eventually, Sergeant Sylvain lost sight of Rainey along a windy road as he drove into a more rural area. 2RP 42, 49. Approximately ten minutes after the pursuit started, Rainey's

¹ There are 6 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (March 9, 2010); 2RP (March 10, 2010); 3RP (July 2, 2010); 4RP (August 27, 2010); 5RP (August 27, 2010); and 6RP (May 4, 2012).

vehicle was located outside of his home. 2RP 54, 87. The female passenger from Rainey's vehicle, Fallon Mayhew, was in the front yard and appeared "distraught." 2RP 56. She pointed to indicate that the driver ran into the woods and told officers that the ride was the scariest of her life. 2RP 57. Rainey's wallet and identification were in the front seat of the vehicle. 2RP 64.

C. ARGUMENT

1. DURING A MOTION FOR RETRIAL AFTER RAINEY WAS FOUND GUILTY, THE TRIAL COURT PROPERLY HELD AN *IN CAMERA* HEARING TO DETERMINE WHETHER A WITNESS WOULD ASSERT HER PRIVILEGE AGAINST SELF-INCRIMINATION.

Rainey claims that the trial court violated his constitutional right to a public trial by holding a post-trial *in camera* hearing to ascertain whether Fallon Mayhew would claim her privilege against self-incrimination. Although Rainey is correct that the right to a public trial is strictly applied in most circumstances, pursuant to the experience and logic test, this hearing did not implicate Rainey's public trial right. Additionally, Washington case law approves of holding a hearing *in camera* to determine whether a witness

has a constitutional right not to testify due to the danger of self-incrimination.

a. Relevant Facts.

Rainey was found guilty after a jury trial on March 11, 2010. CP 41-43. Fallon Mayhew did not testify at the trial. CP 134. Mayhew was identified by Sergeant Sylvain at trial as the passenger he observed in Rainey's vehicle. 2RP 57. After Sylvain caught up to Rainey's vehicle at his home, Mayhew pointed in the direction that the driver ran into the woods. 2RP 56-57. Mayhew then gave a written statement to police stating that Rainey was the driver. CP 134. The State was unable to secure Mayhew's presence at trial to testify; Rainey's counsel indicated that he also had no knowledge of Mayhew's whereabouts. CP 134.

In June of 2010, Rainey brought a motion for a new trial based on several claims. CP 54-56. At an initial hearing on Rainey's motion, Mayhew appeared in court for the first time. Mayhew gave a statement to Rainey's counsel that she, not Rainey, was the vehicle's driver. CP 134. Rainey's counsel brought a second motion for a new trial based on newly discovered exculpatory evidence.

At the second hearing for a new trial in August of 2010, the court appointed an attorney for Mayhew to counsel her on the issues involved. 5RP 32. After speaking with Mayhew, her counsel informed the court that he had advised Mayhew not to testify in the hearing for a new trial or to give any additional statements due to her Fifth Amendment privilege. 5RP 60. When the trial court asked Rainey's counsel if she objected to an *in camera* hearing to determine whether Mayhew could exercise her privilege against self-incrimination, Rainey's counsel indicated she was unsure of the "appropriate procedure" and then stated the procedure should be determined by Mayhew's counsel. 5RP 62.

The court held a brief hearing *in camera* to determine whether Mayhew had a right to invoke the Fifth Amendment. 4RP 2. Mayhew, Mayhew's counsel, and the trial judge were present for the hearing; Rainey, Rainey's counsel, the prosecutor, and any spectators were excluded. 4RP 2; 5RP 66. The court issued an order stating, "under Bone-Club... the courtroom is sealed for the sole purpose of taking testimony to determine whether Ms. Fallon Mayhew has the right to assert her 5th Amendment privilege against self-incrimination in this new trial hearing." CP 164.

At the beginning of the *in camera* hearing, the court indicated, “Under State v. Bone-Club, I believe that gives me the ability to hold an in chambers conference in order to determine a matter of privilege so that [Mayhew] does not waive the privilege by speaking to me for purposes of making a legal determination.” 4RP 2. After hearing from Mayhew, the court concluded that she did have the right to invoke the Fifth Amendment. 4RP 4; 5RP 66. Open proceedings resumed, and the court denied Rainey’s motion for a new trial on all grounds. 5RP 72, 76, 77; CP 131-37.

b. The *In Camera* Hearing Did Not Implicate Rainey’s Public Trial Right.

A criminal defendant has a right to a public trial under both the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22. The state constitutional right in particular has been strictly applied:

Although the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.

State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The public trial right serves many important interests, including

ensuring that the defendant receives a fair trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The question of whether a public trial right has been violated is a question of law subject to *de novo* review on direct appeal. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

Although the public trial right “operates as an essential cog in the constitutional design of fair trial safeguards[,]” the right to public trial is not absolute. Bone-Club, 128 Wn.2d at 259. While openness is a hallmark of our judicial process, there are other rights and considerations that must sometimes be served by limiting public access to a trial. Waller v. Georgia, 467 U.S. 39, 45, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Before determining whether there was a public trial right violation, reviewing courts must consider whether the proceeding at issue implicates the core values of the public trial right, thereby constituting a closure at all. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (lead opinion).

In State v. White, this Court found that no public trial right was abridged where a court conducted a routine *in camera* review of a witness’s claimed privilege against self-incrimination. 152 Wn. App. 173, 182, 215 P.3d 251 (2009). As a result, this Court

noted that “[a]pplying the five [Bone-Club] factors before an *in camera* review would serve little purpose, because proper *in camera* proceedings would always satisfy them.” Id.

After the opinion in White was issued, the Washington Supreme Court adopted the experience and logic test to determine whether a proceeding implicates the public trial right. Sublett, 176 Wn.2d at 73. The experience prong of the test asks “whether the place and process have historically been open to the press and general public.” Id. quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II). Under this prong, “the court engages in an historical inquiry to determine whether the type of procedure is one that has traditionally been open to the public.” State v. Jones, No. 41902-5-II, 2013 WL 2407119, at *4 (Wash. Ct. App. Div. II June 4, 2013).

The logic prong of the test asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Sublett, 176 Wn.2d at 73 quoting Press II, 478 U.S. at 8. Relevant to this prong “are the overarching policy objectives of having an open trial[.]” Jones, at *4. If the answer to *both* prongs is yes, the public trial right attaches and the Bone-Club

factors must be considered on the record before closing the proceeding. Sublett, 176 Wn.2d at 73.²

Here, applying the experience prong indicates that the public trial right did not attach to the *in camera* proceeding in question.

The use of an *in camera* hearing or sealed record is appropriate for determining whether a witness has a basis to assert her privilege against self-incrimination. White, 152 Wn. App. at 182; Eastham v. Arndt, 28 Wn. App. 524, 533-34, 624 P.2d 1159 (1981); Seventh Elect Church v. Rogers, 34 Wn. App. 105, 114-15, 660 P.2d 280, rev. denied, 99 Wn.2d 1019 (1983); State v. Berkley, 72 Wn. App. 12, 20, 863 P.2d 133 (1993), rev. denied, 124 Wn.2d 1011 (1994). Furthermore, *in camera* proceedings “by definition, by historical practice predating this state’s constitution, and pursuant to case law predating Bone-Club were not open to the public.” White, 152 Wn. App. at 182. Because the process in question here has not historically been open to the press and general public, Rainey’s public trial right did not attach to this proceeding.

² The Bone-Club factors are as follows: 1) there must be a compelling interest justifying the closure and, if the interest is a reason other than the defendant’s right to a fair trial, there must be a serious and imminent threat to the interest in question; 2) anyone present when the closure motion is made must be given an opportunity to object; 3) the method of closure must be the least restrictive means available for protecting the threatened interest; 4) the court must weigh the competing interests of the proponent of closure and the public; and 5) the closure order must be no broader in application or duration than is necessary. Bone-Club, 128 Wn.2d at 258-59.

Moreover, applying the logic prong also indicates that Rainey's public trial right was not implicated by the proceeding here. The privilege against self-incrimination is clearly a fundamental constitutional right. See Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The federal and state constitutions provide that no person shall be compelled to be a witness or to give evidence against herself. U.S. Const. amend. V; Const. art. I, § 9. This privilege includes the right of a witness not to give incriminating answers in any court proceeding, including a criminal trial. State v. Hobbie, 126 Wn.2d 283, 289, 892 P.2d 85 (1995).

"The court, however, and not the witness, is the final judge of whether the chance of self-incrimination is genuine or contrived." Eastham, 28 Wn. App. at 531. The decision as to whether the constitutional privilege against self-incrimination applies "lies within the sound discretion of the trial court under all the circumstances then present." Hobbie, 126 Wn.2d at 291. Moreover, unless the basis for the claim of privilege is obvious, the witness must establish a factual basis for asserting the privilege. Id. at 290.

Public access to a witness's potentially incriminating testimony in open court would pose a serious and imminent threat

to that interest. Indeed, if a witness were compelled to provide a factual basis for her claim of privilege in open court, the privilege itself would be rendered meaningless. Because public access would greatly hinder the functioning of this procedure, the logic prong also demonstrates that the public trial right did not attach to the *in camera* hearing here. As a result, the hearing did not implicate Rainey's public trial right and the trial court was not required to consider the Bone-Club factors.³

Even if this Court determined that the *in camera* proceeding here violated Rainey's public trial right, the proper remedy would be for a new hearing *not*, as Rainey argues, for a new trial. In general, the presumptive remedy for a public trial right violation is a new trial. Easterling, 157 Wn.2d at 174; Brightman, 155 Wn.2d at 518. However, the Washington Supreme Court noted that "the remedy [for a public trial violation] should be appropriate to the violation." Bone-Club, 128 Wn.2d at 262.

³ Although the trial court was not required to consider the Bone-Club factors here, the court's order to seal the courtroom indicates that the court "decided to seal the courtroom under Bone[-]Club." CP 164.

Our supreme court further recognized that where the violation occurs at “some easily separable part of a trial” remand for a new hearing may be appropriate. State v. Wise, 176 Wn.2d 1, 19, 288 P.3d 1113 (2012). This is consistent with the United States Supreme Court’s holding in Waller, where the remedy for a violation of the public trial right at a suppression hearing was a new suppression hearing. 467 U.S. at 49-50.⁴

Here, the *in camera* hearing was clearly an easily separable part of the trial. The proceeding to assess Mayhew’s privilege against self-incrimination took place in the midst of a motion for retrial *five months after Rainey was found guilty*. CP 41-43, 164. Additionally, the *in camera* portion of the hearing was no broader in scope than necessary. The *in camera* proceeding was held solely to make a determination of Mayhew’s privilege, and upon its conclusion, the courtroom was again open to all parties and the public. CP 164; 5RP 66. *If this Court finds a violation*, given the easily separable nature of this proceeding and the scope of any potential violation, the proper remedy would be for a new hearing, not a new trial.

⁴ In Waller, the Court implied that if the hearing result was different on remand, a new trial might be required. 467 U.S. at 49-50.

In sum, application of the experience and logic test to the situation presented here confirms the ruling in White and what Washington courts have already acknowledged -- that an *in camera* hearing is appropriate when the trial court is called upon to determine whether a witness will invoke her privilege against self-incrimination. This Court should reject Rainey's claim to the contrary and affirm.

2. TESTIMONIAL EVIDENCE SOLELY RELATED TO DRIVING WHILE LICENSE SUSPENDED IN THE THIRD DEGREE WAS ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE.

Rainey argues that the admission of testimonial evidence without a witness violated the confrontation clause of the Sixth Amendment. The State concedes that the admission of Exhibit 2 was error.

The confrontation clause of the Sixth Amendment guarantees a defendant's right to confront witnesses who bear testimony against him. U.S. Const. amend VI. Testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Testimonial statements may not be introduced into evidence unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Id. at 68. In Crawford, the Court noted that certain statements, such as business records, were not testimonial by their nature, however courts were left to interpret what qualified as a “testimonial statement” for Sixth Amendment purposes. Crawford, 541 U.S. at 56; United States v. Martinez-Rios, 595 F.3d 581, 585 (5th Cir.2010).

In 2012, the Washington Supreme Court resolved the present issue. State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). In Jasper, the court held that certified records of driving records indicating that a driver’s license was suspended constituted a testimonial statement for purposes of the confrontation clause. Id. at 116. The court also held that a certified record stating that a diligent search of records had been conducted was a testimonial statement. Id.

Here, certified records were admitted into evidence under the business records exception indicating that Rainey’s driver’s license was to be suspended on May 7, 2009 and that a diligent search of records indicated that his license was suspended on May

17, 2009. 2RP 70-72; Ex. 2. These testimonial statements were entered without Rainey having the opportunity to cross-examine the witness who authored the certifications, thus the admission of the records violated Rainey's rights under the confrontation clause. 2RP 70-72.

Although Rainey's mother testified that Rainey's license was suspended, the only evidence on the *reason* for the suspension came from the affidavits in Exhibit 2. 2RP 149; Ex. 2. Without the affidavits, there is no evidence to support that Rainey's license was suspended for a reason that supports a conviction for driving while license is suspended in the third degree. See CP 27-28. As a result, the error was not harmless. Jasper, 174 Wn.2d at 118. Because Rainey's attempting to elude conviction was not tainted by the confrontation clause violation, the appropriate remedy is to remand for a retrial solely on the charge of driving while license suspended in the third degree. Id. at 120.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Rainey's conviction for attempting to elude a

pursuing police vehicle (Count I) and remand for retrial for driving while license suspended in the third degree (Count II).

DATED this 23 day of July, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RICKEY RAINEY, Cause No. 68846-4 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of July, 2013

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington