

No. 34424-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROY WAYNE RUSSELL, JR.,

Appellant.

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

The Honorable John P. Wulle

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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STATE OF WASHINGTON
BY _____
COURT OF APPEALS
DIVISION TWO

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A. ARGUMENT

THE COURT'S ORDER BARRING
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ART I., § 22 RIGHT TO OPEN PROCEEDINGS

Initially, the State takes great pains to clarify in its brief that it was not the television media that objected to the trial court's order barring photographing of the child witnesses, as noted in the Brief of Appellant, but the print media, specifically the Columbian in the person of its editor, Lou Brancaccio. Brief of Respondent at 3-6. While this appears to be correct, it was impossible to discern from the verbatim report of proceedings as Mr. Brancaccio was never identified as anything other than a representative of the media. Further, the fact that only the print media objected does not alter Mr. Russell's argument in the least as the court's order applied equally to print and television media as it barred *any* photographing of the child witnesses. RP 121. Finally, the fact the court did not completely close the courtroom but merely put infringements on the media's ability to report the proceeding also does not alter the analysis as the court's ruling effectively limited the press's freedom to report the proceedings in the court room, thus effectively taking on the same character as a full closure of the courtroom.

The State contends that the trial court appropriately complied with the requirements of GR 16 and *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Brief of Respondent at 7-16. On the contrary, Mr. Russell contends the court's actions failed to comply with the constitutional requirements necessary under art I, § 22.

In the latest pronouncement of our Supreme Court regarding the duties of the trial court in making the record necessary for courtroom closure and for subsequent appellate review when considering a closure of the courtroom, the Court stated:

The first *Bone-Club* guideline parallels the *Waller* [*v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)] requirement that the proponent must articulate an overriding interest; the third and fifth guidelines require, as in *Waller*, a narrow tailoring of the closure order to permit only the most minimal encroachment upon the defendant's public trial right; and the second guideline makes explicit the implicit *Waller* requirement that a hearing be held. The fourth *Bone-Club* guideline includes the remaining two procedural requirements from *Waller*, that the trial court must consider reasonable alternatives and make sufficiently specific factual findings. The *Bone-Club* court noted this court's prior indication that "a trial court's weighing of the competing interests should include entering specific findings." *Id.* at 260, *citing* [*Seattle Times v. Ishikawa*, 97 Wn.2d [30] 38 [640 P.2d 716 (1982)]]. Indeed, as amplified in *Ishikawa*, the fourth guideline requires the trial court to weigh the competing constitutional interests, consider the suggested alternatives to closure, and record the

results of those deliberations “in its findings and conclusions, which should be as specific as possible rather than conclusory.” *Ishikawa*, 97 Wn.2d at 38.

In re Personal Restraint of Orange, 152 Wn.2d 795, 807, 100 P.3d 291 (2004).

The best that can be said about the trial court’s ruling here is that the court did hold a hearing and did seek a response from a representative of the media. But, the court’s analysis is not a well-reasoned decision articulating an overriding state interest but a knee-jerk reaction to a “perceived” problem without any basis other than the court’s own perceptions. The resulting analysis by the court was a stream of consciousness statement which failed to presume Mr. Russell had the constitutionally protected right to an open courtroom. Rather, the court ruled that children need protecting therefore the rights of the media and Mr. Russell must yield. The court never considered a less restrictive alternative to a blanket ban on photographing the children, nor did it produce anything other than conclusory findings and conclusions.

In its response brief, the State, in attempting to justify the court’s ban, also ignored its own additional basis for seeking the ban in the first place which it articulated to the trial court; the fact the probable cause statement was put on the KGW website

immediately after it was filed. RP 135. This articulated basis indicates an intent to retaliate and undercuts any finding of an “overriding interest” which *Bone-Club* indicated is required by art. I, § 22 prior to closing the courtroom.

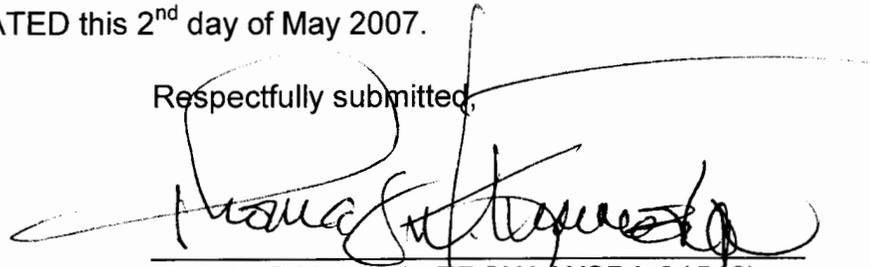
The court’s reasons for infringing the media’s access to the courtroom were not based upon any basis other than a generalized belief, the court failed to presume open access by the media to the courtroom, the court failed to articulate an overriding interest which outweighed the presumption of openness, failed to consider reasonable alternatives, and failed to make *specific* findings and conclusions. The court’s actions violated Mr. Russell’s constitutionally protected right to an open courtroom under art. I, § 22.

B. CONCLUSION

For the reasons previously stated in the Brief of Appellant as well as the instant reply brief, Mr. Russell submits this Court must reverse his conviction and/or sentence.

DATED this 2nd day of May 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Kummerow", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
Attorneys for Appellant

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Petitioner,)	
)	
v.)	
)	
ROY RUSSELL, JR.,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 3RD DAY OF MAY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> MICHAEL KINNIE, DPA ATTORNEY AT LAW 1200 FRANKLIN PO BOX 5000 VANCOUVER, WA 98666-5000	(X) () ()	U.S. MAIL HAND DELIVERY _____
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<input checked="" type="checkbox"/> ROY RUSSELL, JR. 713291 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) () (X)	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF MAY, 2007.

X _____ *gril*

BY _____
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DIVISION II

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