

Original

NO. 36885-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICIA HEATH,

Appellant.

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2008 MAR 28 PM 4:32

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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

The Honorable Michael J. Sullivan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated the appellant's constitutional rights to a public trial.

Issue Pertaining to Assignment of Error

The trial court heard pretrial motions and conducted a portion of voir dire in chambers, with only the judge, a court reporter, and the parties present. Where the trial court did not analyze the "*Bone-Club*"¹ factors before conducting these closed hearings, did the trial court's exclusion of the public violate appellant's constitutional rights to a public trial?

B. STATEMENT OF THE CASE

The Pacific County Prosecutor's Office charged Patricia Heath with two counts of unlawful possession of a firearm in the second degree. CP 10-12.

Defense counsel filed numerous motions in limine and, on August 7, 2007, the court held a hearing in open court to decide the motions and other pretrial issues. 3RP² 2-4. The court ruled on

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 629 (1995).

² This brief refers to the verbatim report of proceedings as follows: 1RP – July 20, 2007; 2RP – August 3, 2007; 3RP – August 7, 2007; 4RP – August 8, 2007 (voir dire); 5RP – August 8, 2007 (pretrial motions and trial); 6RP – October 19, 2007.

many of the motions but was unable to complete the process due to time constraints. 3RP 4-34. The court ordered the parties to convene in chambers the following morning to continue the hearing. 3RP 34.

On the morning of August 8, the judge, a court reporter, and the parties met in the judge's chambers. The parties litigated the remaining motions in limine, which the court ruled on. 5RP 3-12. They also discussed the process for voir dire, finalized the list of potential witnesses, and decided what instructions and information to give jurors prior to the presentation of evidence. 5RP 12-36.

Most of voir dire was conducted in open court. 4RP 2-18, 27-84. However, the court told prospective jurors:

if you want to say something but you really don't want to say it in public because you're concerned that maybe you might say something that you shouldn't say in front of everyone else, or if it's just a personal matter, just let me know that or let the attorneys know that when they ask you a particular question and I'll write your number down and we will take time to take all those people who are in that category, we'll have you go one at a time into chambers and on the record in there you can tell us what it is you didn't want to say out in front of everybody else.

4RP 12-13.

One juror – juror number 8 – responded affirmatively to a number of questions from the court aimed at determining whether

jurors had spoken to anyone with knowledge of the case and whether that affected their ability to be fair. 5RP 15-16. Although juror 8 did not request private voir dire, the judge indicated that the attorneys would be questioning juror 8 in chambers. 5RP 16.

Immediately following the court's general questions, the judge, a court reporter, the parties, and juror 8 headed into the judge's chambers, leaving the rest of the prospective jurors in the courtroom. 5RP 18-19. Through questioning from the court and counsel, juror 8 revealed that his daughter worked with Heath and he was uncertain he could be fair to the prosecution. 5RP 19-23. Juror 8 was excused and the rest of voir dire was conducted in open court. 5RP 23, 27-84.

The jury ultimately chosen convicted Heath, the court imposed a standard range 30-day sentence, and Heath timely filed her Notice of Appeal. CP 58-59, 65, 73.

C. ARGUMENT

THE TRIAL COURT VIOLATED HEATH'S
CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The trial court violated Heath's constitutional rights to a public trial by conducting a pretrial hearing and a portion of voir dire

outside the public eye. The violation of these rights requires reversal and remand for a new trial.

Under both the Washington and United States constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. *Easterling*, 157 Wn.2d at 174. The First Amendment implicitly protects the same right. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Prejudice is presumed where there is violation of the right to a public trial. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). The remedy is reversal of the convictions and remand for a new trial. *Orange*, 152 Wn.2d at 814.

Notably, the right to a public trial encompasses pretrial hearings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986); *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); *Bone-Club*, 128 Wn.2d at 257. The right also encompasses jury voir dire. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d

150 (2005). Even where, as in Heath's case, only a part of the proceedings are improperly closed to the public, such a closure violates a defendant's constitutional right to a public trial. See *State v. Frawley*, 140 Wn. App. 713, 719-21, 167 P.3d 593 (2007) (trial court's private portion of jury selection, which addressed each venire person's answers to a jury questionnaire, violated right to public trial).

The right to a public trial is not absolute. *State v. Bone-Club*, 128 Wn. 2d 254, 259, 906 P.2d 325 (1995). But a trial court may restrict the right only "under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial from the public, it must first apply on the record the five factors set forth in *Bone-Club*. *Orange*, 152 Wn.2d at 806-07, 809.

The *Bone-Club* requirements are:

1. The proponent of closure . . . 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 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In *Brightman*, the trial court told counsel it was barring all spectators from observing jury selection because of safety concerns. *Brightman*, 155 Wn.2d at 511. The court, however, failed to analyze the five *Bone-Club* factors. The *Brightman* court held because the record indicated the trial court did not consider Brightman's public trial right as required by *Bone-Club*, it was unable to determine whether the closure was proper. *Brightman*, 155 Wn.2d at 518. The court remanded for a new trial. *Brightman*, 155 Wn.2d at 518; see also *Frawley*, 140 Wn. App. at 721 (declining state's invitation to apply *Bone-Club* factors for first time on appeal because review is of trial court's consideration of factors as found in record and because trial court record was inadequate to apply factors).

The state argued Brightman failed to prove the trial court in fact closed the courtroom during jury selection and, if it was closed, the closure was de minimis. *Brightman*, 155 Wn.2d at 515-17.

The court rejected both arguments. The court first ruled when the plain language of a trial judge's ruling calls for closure, the state bears the heavy burden to overcome the strong presumption the courtroom was closed. *Brightman*, 155 Wn.2d at 516. Second, the court held where jury selection or a part of the selection is closed, the closure is not de minimis or trivial. *Brightman*, 155 Wn.2d at 517.

In Heath's case, there is nothing on the record indicating that pretrial motions had to be argued and decided in chambers. Neither party asked for this non-public forum. Similarly, regarding voir dire, juror 8 could have been examined in open court. Neither juror 8 nor the attorneys requested private voir dire. It was done at the court's suggestion. And rather than questioning this potential juror in chambers, the trial court could have removed the rest of the panel and conducted individual questioning in open court. By not considering this alternative, or applying the *Bone-Club* factors before conducting these hearings in chambers, the trial judge violated Heath's right to a public trial.

The state may argue this Court should reject Heath's claims under *State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007). Momah contended the trial court violated his constitutional rights to

a public trial by conducting a portion of voir dire in chambers. *Momah*, 141 Wn. App. at 711. He also maintained the state bore the burden of proving (1) there was no closure and (2) the trial court balanced the *Bone-Club* factors before engaging in the challenged voir dire. *Momah*, 141 Wn. App. at 711.

Division One disagreed with each assertion. The court first held the record failed to indicate the trial court closed part of voir dire for the purpose of precluding public access. *Momah*, 141 Wn. App. at 711. The record also did not demonstrate any members of the public were excluded from the individual voir dire. *Momah*, 141 Wn. App. at 712. The court refused to “speculate on whether the trial court would have ordered closure” had any citizen requested entry into chambers or the jury room. *Momah*, 141 Wn. App. at 712.

The court distinguished the pertinent Supreme Court authority, finding that the common thread tying those cases together was an order from the trial court that the courtroom be closed to the public. *Momah*, 141 Wn. App. at 712-14 (discussing *Bone-Club*, 128 Wn.2d at 256, 261; *Orange*, 152 Wn.2d at 802; *Brightman*, 155 Wn.2d at 511, 516). The court rejected *Momah*’s contention a proceeding is per se closed to the public if it takes

place in chambers. *Momah*, 141 Wn. App. at 714-16. The court held, "Of course, a 'door' to a courtroom being closed, which occurs in most court proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public." *Momah*, 141 Wn. App. at 715.

Heath urges this Court to reject *Momah's* reasoning. *Momah* relied on the absence of an express trial court order banning the public from certain proceedings to distinguish its facts from those in *Brightman, Orange, and Bone-Club*. This is a distinction without a difference. The core holding of the Supreme Court's well established authority is a trial court may not conduct trial proceedings outside the public eye.

No Washington court until *Momah* has conditioned a defendant's right to a public trial on the existence of an express closure order. The proper inquiry is whether the trial court used a procedure that effectively barred public observation, not whether the court expressly ordered the procedure.

Momah's strict construction of the language of the trial court's declaration of closure prohibits reviewing courts from making presumptions or drawing inferences from that language. Such slavish adherence to a trial court's words is contrary to

Orange, where the court held the nature of the closure is defined by “the presumptive effect of the plain language of the ruling itself[.]” *Orange*, 152 Wn.2d at 808. See *State v. Duckett*, 141 Wn. App. 797, 807 n.2, 173 P.3d 948 (2007) (“To the extent that the State’s argument is that the court did not enter a closure order, we look to the record to determine the presumptive effect of the court’s directive. The trial judge stated she intended to interview the selected jurors in a jury room. The State bears the burden on appeal to show that, despite the court’s ruling, a closure did not occur.”).

The *Momah* court refused to consider the presumptive effect of the trial court’s use of its chambers to question individual venire members. The court disregarded the nature of a court’s chambers and the reasons for convening a portion of voir dire in chambers. See *Houston Chronicle Pub. Co. v. Shaver*, 630 S.W.2d 927, 932 (Tex. Crim. App. 1982) (conducting part of hearing in chambers “is the functional equivalent of closing the court to spectators and news reporters.”); *B.H. v. Ryder*, 856 F. Supp. 1285, 1290 (N.D.Ill. 1994) (“The privacy of the judge’s chambers historically has provided an atmosphere conducive to candor and conciliation. No

one who knows anything about litigation is unfamiliar with this phenomenon.”).

In other words, proceedings occur in chambers to facilitate privacy. Indeed, at Heath’s trial, the judge specifically told prospective jurors they could request private questioning to avoid the public. See 4RP 12 (judge indicates privacy available “if you want to say something but you really don’t want to say it in public”).

The *Momah* court ignored the practical reality of in-chambers proceedings. The decision in *Momah* is illogical and contravenes the Supreme Court’s intent to foster open proceedings. Where a trial court, as here, obviously moves to chambers to shield prospective jurors from public scrutiny, the burden should be on the state to show the proceedings were open. *Duckett*, 141 Wn. App. at 807 n.2. The *Momah* court erred by shifting the burden to the defendant because “the trial court simply never ordered the proceeding be closed to any spectators or family members.” *Momah*, 141 Wn. App. at 714.

For these reasons, Heath requests this Court to reject *Momah*. Rather, this court should follow *Duckett* and *Frawley* and hold the trial court violated Heath’s constitutional right to a public trial.

The State may also argue because there is no showing Heath's counsel objected to the private hearings, the issue is waived. That argument fails. *Orange*, 152 Wn.2d at 801-02; *Brightman*, 155 Wn.2d at 517. Moreover, the waiver of a constitutional right must be knowing and voluntary. *Frawley*, 140 Wn. App. at 720.

The state may also attempt to distinguish Heath's case from *Brightman* because only portions of the hearings were private. Such an argument is also unavailing. The *Brightman* court ruled that where even a part of jury selection is closed, the closure is not de minimis or trivial. *Brightman*, 155 Wn.2d at 517. The *Frawley* court also found the defendant's right to a public trial violated where the trial court questioned individual venire members privately only as to their answers to a questionnaire. *Frawley*, 140 Wn. App. at 719-21.

The state may also contend Heath's case is distinguishable because in *Brightman* and *Orange* the trial courts closed the courtrooms rather than conducting the proceedings in chambers. But the constitutional public trial right is the right to have a trial open to the public. *Orange*, 152 Wn.2d at 804-05. This right is for the benefit of the accused because it guarantees the electorate

may observe he is dealt with fairly and emphasizes to the court, prosecutors and jurors the importance of their responsibilities. *Bone-Club*, 128 Wn.2d at 259.

Whether proceedings are conducted in a closed courtroom, a jury room, or a judge's chambers is a distinction without a difference. The point of the constitutional rights to a public and open trial is to guarantee access to the public, which the trial court failed to do in Heath's case.

Heath's convictions should be reversed and the cause remanded for a new trial.

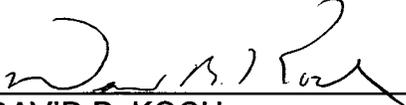
D. CONCLUSION

The trial court violated Heath's constitutional rights to a public trial by deciding pretrial motions and conducting a portion of voir dire in chambers. This Court should reverse Heath's convictions and remand for a new trial.

DATED this 28th day of March, 2008.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)

Respondent,)

vs.)

PATRICIA HEATH,)

Appellant.)

COA NO. 36885-4-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF MARCH 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MARCH 2008.

x Patrick Mayovsky

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