

No. 42520-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Wayne Burdette,

Appellant.

Lewis County Superior Court Cause No. 11-1-00422-2

The Honorable Judges James Lawler and Richard Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE CLOSED PROCEEDINGS VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

Criminal cases must be tried openly and publicly, unless the court properly analyzes the need for closure. *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Closure without analysis or consideration of reasonable alternatives requires reversal. *Bone-Club*, at 261-262, 257; *Presley*, 130 S.Ct., at 724-725.

Here, the trial judge held three hearings *in camera* without conducting the required analysis or considering alternatives. RP (8/17/11) 22; RP (8/19/11) 2; CP 26-27. Respondent does not dispute this; instead, Respondent argues (in essence) that whatever transpired behind closed doors was unimportant. Brief of Respondent, pp. 6-11. This issue will likely be resolved when the Supreme Court issues its opinion in *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010).¹ Accordingly, Mr. Burdette presents no additional argument on the subject.

¹ Oral argument in *Sublett* was heard in June of 2011.

The three closed proceedings violated the constitutional requirement of open and public criminal trials. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. Mr. Burdette’s conviction must be reversed and the case remanded for a new trial. *Id.*

II. ONE OF THE THREE *IN CAMERA* PROCEEDINGS VIOLATED MR. BURDETTE’S RIGHT TO BE PRESENT.

An accused person has a constitutional right to be present at all critical stages. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). Here, the trial judge consulted with counsel in chambers after jurors indicated they were deadlocked “over several issues relating to the defendant’s intent.” CP 26, 27. Mr. Burdette should have been present when the court decided to instruct jurors to continue deliberating.

Respondent erroneously contends that Mr. Burdette invited the error by failing to object. Brief of Respondent, pp. 14-15. This argument reflects a misunderstanding of the difference between waiver and invited error. A failure to object may *waive* but does not *invite* error: the invited error doctrine only bars review of errors set up by the defense. *See, e.g., State v. Sims*, 171 Wash. 2d 436, 447 n. 4, 256 P.3d 285 (2011).

Respondent also relies on *Sublett* to assert that response to a jury question is not a critical stage requiring the defendant's presence.² Brief of Respondent, p. 13. But in *Sublett*, the jury merely requested clarification of an instruction. Here, by contrast, the trial judge was faced with deciding how to respond to the jury's assertion that it was deadlocked.³ CP 26, 27. This is a critical stage, at which the defendant's presence is constitutionally required. See *United States v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir. 1995); *United States v. Fontanez*, 878 F.2d 33, 37 (2d Cir. 1989).

The court violated Mr. Burdette's constitutional right to be present by instructing jurors to keep deliberating "in an effort to reach verdicts" *Rodriguez, supra*. The convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE SEARCH OF MR. BURDETTE'S RESIDENCE WAS UNLAWFUL.

The police unlawfully entered Mr. Burdette's house without a warrant, and subsequently returned with a warrant based in part on information obtained during the illegal entry. Ex. 2 (7/27/11).

² As with the previous issue, the Supreme Court's decision in *Sublett* may influence the outcome of this issue.

³ The court's response, that the jury should continue deliberating "in an effort to reach verdicts" may have violated CrR 6.15's prohibition against suggesting the need to reach an agreement. CP 26, 27.

Respondent does not dispute this; instead, Respondent asks the Court to find the issue moot. Brief of Respondent, pp. 16-17.

But the issue is not moot. First, if Mr. Burdette's conviction is reversed, the unlawfully seized evidence may be introduced at any subsequent trial. Second, the lawfulness of the search may impact collateral matters, including any civil suit Mr. Burdette elects to pursue. *See, e.g., Hanson v. City of Snohomish*, 121 Wash. 2d 552, 561-62, 852 P.2d 295, 300 (1993).

Accordingly, the issue is not moot, and should be addressed on its merits.

IV. THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF A CRIME WOULD BE FOUND AT MR. BURDETTE'S RESIDENCE.

Mr. Burdette rests on the argument set forth in his Opening Brief and in the preceding section.

V. MR. BURDETTE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Burdette rests on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Burdette's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on April 30, 2012,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 30, 2012.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

April 30, 2012 - 11:56 AM

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