

No. 44756-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Sharples,

Appellant.

Skamania County Superior Court Cause No. 12-1-00038-5

The Honorable Judge E. Thompson Reynolds

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Sharples's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. Sharples's right to an open and public trial under Wash. Const. art. I, §§ 10 and 22.
3. The trial court violated the public's right to an open trial under the First and Fourteenth Amendments and art. I, § 10.
4. The trial court violated the constitutional requirement of an open and public trial by holding an *in camera* hearing outside the public's view.
5. The trial court erred by failing to conduct a *Bone-Club* analysis before closing the proceedings.

ISSUE 1: The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge held proceedings in chambers. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding closed proceedings without first conducting any portion of a *Bone-Club* analysis?

6. Mr. Sharples's sentence enhancement violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
7. Mr. Sharples's sentence enhancement violated his state constitutional right to notice of the charges against him, under Wash. Const. art. I, §§ 3 and 22.
8. The Information was deficient because it failed to properly allege the elements required to establish the enhancement for refusing a breath test.

ISSUE 2: A criminal Information must set forth all of the essential elements of a sentencing enhancement. The Information charging DUI alleged that Mr. Sharples "did refuse to take a test offered pursuant RCW 46.20.308." Did the Information omit essential elements of the "refusal" sentencing

enhancement in violation of Mr. Sharples's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22?

9. Mr. Sharples's conviction for the sentencing enhancement infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove essential elements of the enhancement.
10. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
11. The trial court erred by failing to instruct jurors regarding the state's obligation to prove a lawful arrest based on reasonable cause to believe that Mr. Sharples had driven under the influence of alcohol.
12. The special verdict form did not reflect a jury finding on all the elements of the "refusal" enhancement.
13. Mr. Sharples should not have been subjected to the mandatory minimum sentence for a DUI offender who refuses a breath test.

ISSUE 3: An offender may only be subjected to an increase in the mandatory minimum penalty for an offense if the jury finds the facts necessary to impose the enhancement. Here, the court's instructions relieved the state of its burden to prove the elements of the "refusal" enhancement, and the special verdict did not reflect a jury finding that the state had proved all the essential elements of the enhancement. Must Mr. Sharples's sentence be vacated and the case remanded for a new sentencing hearing?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Officers pulled over a car driven by James Sharples, and arrested him for Driving Under the Influence. CP 1; RP 139. The arresting officer took him to the ground by his hair, and then handcuffed him. RP 6-7, 135-136. Mr. Sharples felt his handcuffs were too tight. He complained that they were painful, both before and after the officer adjusted them. RP 10-12, 141-142, 146. At the station, he continued to express his unhappiness with the discomfort caused by the handcuffs. RP 12, 14, 152.

When asked if he was willing to take a breath test, Mr. Sharples replied that he had chronic obstructive pulmonary disorder. RP 16, 156. The officer told him that if he was unable to blow, they could do a blood test. RP 16. Mr. Sharples invoked his right to remain silent in response to the breath test question. RP 17. When asked after the 15 minute waiting period if he would blow, Mr. Sharples did not respond. RP 17, 159. The officer noted it as a refusal. RP 17, 23, 26-27. Later, as part of the booking process, Mr. Sharples was asked to blow into a portable test machine and he did. RP 33. The officer did not transport him for a blood test.

The state charged Mr. Sharples with DUI, and alleged that he “did refuse to take a test offered pursuant to RCW 46.20.308.” CP 1.¹ The court instructed the jury regarding the refusal:

A person refuses a law enforcement officer’s request to submit to a test to determine the person’s breath alcohol concentration when the person shows or expresses a positive unwillingness to do the request or to comply with the request.
CP 86.

The special verdict form read:

Did the defendant refuse to submit to a test of his breath which was requested by a law enforcement officer for the purpose of determining the alcohol concentration of the defendant’s breath?
CP 107.

The court did not give any other instructions regarding the alleged refusal.

The jury convicted Mr. Sharples of DUI, and answered “yes” to the special verdict. CP 4, 106-109. The court found Mr. Sharples subject to the mandatory minimum sentence for DUI offenders who refuse a breath test. The court imposed the mandatory minimum sentence for a refusal of 45 days in jail and a \$750 fine. CP 6-7.

Mr. Sharples timely appealed. CP 14.

¹ Based on Mr. Sharples’s alleged conduct at the station, the state also charged him with two counts of Intimidating a Public Servant and one count of Custodial Assault. CP 1-4. The jury did not reach a verdict on any of these charges. They are not the subject of this appeal. CP 4.

ARGUMENT

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

A. Standard of Review.

Whether a court violated the public trial right is a question of law reviewed de novo. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009). Improper exclusion of the public from trial proceedings is structural error, requiring automatic reversal without a showing of prejudice. *Id.* at 223. Harmless error analysis does not apply. *Id.*

B. The court infringed both the public’s and Mr. Sharples’s right to an open and public trial by holding an *in camera* conference without first addressing the *Bone-Club* factors.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. art. I, §§ 10 and 22; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). The public trial guarantee belongs both to the accused person and to the public (including the press).² The individual and the public right “serve complementary and interdependent functions in

² The accused person’s public trial rights stem from the Sixth Amendment and art. I, § 22. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The public’s open trial rights are protected by the First Amendment and art. I, § 10. *Id.*, at 179-80.

assuring the fairness of [the] judicial system.” *Bone-Club*, 128 Wn.2d at 259.

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, 128 Wn.2d at 258-259. An accused person “cannot waive the public's right to open proceedings,”³ and may win reversal of a conviction based on a violation of the public’s right. *Easterling*, 157 Wn.2d at 179-80.⁴

While the right to a public trial is not absolute, it is “strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances.” *Strode*, 167 Wn.2d at 226.

The public trial right attaches to a particular proceeding when “experience and logic” show that the core values protected by the right are implicated. *State v. Sublett*, 176 Wn.2d 58, 72-78, 292 P.3d 715 (2012). A reviewing court first asks “whether the place and process have historically been open to the press and general public,” and second, “whether public access plays a significant positive role in the functioning

³ *Strode*, 167 Wn.2d at 229 (plurality); *see also Presley*, 558 U.S. at 214 (“The public has a right to be present whether or not any party has asserted the right.”)

⁴ *But see State v. Wise*, 176 Wn.2d 1, 16 n. 9, 288 P.3d 1113 (2012) (“This court has not resolved whether a defendant may assert the public's right to an open trial.”)

of the particular process in question.” *Id.* at 73 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under *Bone-Club*. The public trial right can attach to a purely ministerial proceeding if it passes the “experience and logic” test. *Sublett*, 176 Wn.2d at 72.

At Mr. Sharples’s trial, the court convened an in-chambers conference. RP 89, 91. The court and the attorneys discussed general questions for *voir dire*. They also addressed the logistics of jury selection. This included the amount of time allotted to each side. RP 89, 91. In addition, the parties and the court also discussed the list of potential witnesses, the exclusion of those witnesses, and the number of alternate jurors. RP 91-92. There is no indication that Mr. Sharples was present for the in-chambers conference. RP 90-92.

This closure violated the public trial requirement.

First, the court did not conduct the required *Bone-Club* analysis prior to holding the closed conference. RP 89-90. The court did not consider less-restrictive alternatives. Nor did the court assess whether closure was necessary. RP 89-90. There was no danger that potential jurors would hear the discussions if held in open court: the jury venire did

not enter the courtroom until after the in-chambers proceeding was over.
RP 90.

Second, under the “experience and logic” test, the public trial requirement attached to the in-chambers proceeding. *Sublett*, 176 Wn.2d at 73. The public trial right attaches to jury selection. *Strode*, 167 Wn.2d at 217. Jury selection is “itself a matter of importance, not simply to the adversaries but to the criminal justice system.” *Id.* (internal citations omitted).

The experience prong of the test suggests that the proceeding should have been open. Discussions of the logistics of *voir dire*—including the questions the court will ask—traditionally occur in an open courtroom. *See e.g. State v. Bowen*, 157 Wn. App. 821, 826, 239 P.3d 1114 (2010) (court’s general questions to jury venire discussed on the record); *State v. Yates*, 161 Wn.2d 714, 748, 168 P.3d 359 (2007) (same); *State v. Brady*, 116 Wn. App. 143, 145-46, 64 P.3d 1258 (2003) (timing of *voir dire* discussed on the record).

The logic prong of the test also suggests that the proceeding should have been open. Basic fairness, the appearance of fairness, and confidence in the criminal justice system are all enhanced when such discussions are conducted in public. *Sublett*, 176 Wn.2d at 75. The court’s questioning of the venire is an important part of jury selection.

Excluding the public from a proceeding where the court's questions are formulated shrouds the process in mystery. There is no reason for privacy or secrecy, especially when there is no danger that prospective jurors will hear the discussions. RP 90.

The court violated Mr. Sharples's right to a public trial. The court also violated the public's right. The court should have addressed the *Bone-Club* factors before discussing important matters in chambers. *Strode*, 167 Wn.2d at 228. Mr. Sharples's conviction must be reversed. *Id.*

II. MR. SHARPLES'S SENTENCING ENHANCEMENT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. *Id.* Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.* The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed and reversal is required. *Id.*

B. The Information was deficient because it failed to allege that Mr. Sharples refused a breath test to determine alcohol concentration, that he had been lawfully arrested, and that the arresting officer had reasonable grounds to believe that he had committed DUI.

1. An Information must allege all elements of a sentencing enhancement.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.⁵ A similar right is secured by the Washington State Constitution. Wash. Const. art. I, § 22.

Under these provisions, all essential elements must be included in the charging document. *Zillyette*, 178 Wn.2d at 158. An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

The state must also plead and prove the essential elements of any sentencing enhancement. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). The rule applies where the enhancement raises the mandatory minimum for a conviction, even where it has no effect on the

⁵ This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

maximum. *Alleyne v. United States*, --- U.S. ---, ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Such enhancements are actually elements of a greater offense; they are not sentencing factors. *Id.*

Essential elements include both statutory and non-statutory facts that the state must prove beyond a reasonable doubt. *Zillyette*, 178 Wn.2d at 158. The “mere recitation of a numerical code section” in the charging document does not satisfy the essential elements rule. *Id.* at 162. This is so because accused persons should not have to search for the laws they are accused of violating. *Id.* at 163.

2. The Information omitted essential elements of the “refusal” enhancement.

The implied consent statute provides that:

Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration ... if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor...

RCW 46.20.308(1).

A separate statute imposes a mandatory minimum penalty whenever the state alleges and proves a refusal under the requirements of RCW 46.20.308. RCW 46.61.5055. A person with one prior DUI within

the preceding seven years is subject to a mandatory minimum of 45 days in custody and a \$750 fine. RCW 46.61.5055(2)(b).

A lawful arrest based on reasonable grounds to believe that a person has committed DUI is an “indispensible element” of refusal to submit to a breath test. *Clement v. State Dep't of Licensing*, 109 Wn. App. 371, 375, 35 P.3d 1171 (2001). The “reasonable grounds” requirement is separate from the requirement of probable cause to arrest. *Id.* Without a lawful arrest based on reasonable grounds, refusal to submit to a test is not illegal. *Johnson*, 119 Wn.2d at 147.

Mr. Sharples was charged with DUI. CP 2. The Information also purported to charge the “refusal” sentencing enhancement. CP 2. The language alleging the refusal reads as follows:

... the Defendant did refuse to take a test offered pursuant to RCW 46.20.308; contrary to the Revised Code of Washington 46.61.5055.
CP 2.

This language was defective because it omitted two essential elements. First, the Information failed to apprise Mr. Sharples of the requirement that the state prove a lawful arrest based on reasonable grounds to believe that he had driven under the influence. RCW 46.20.308(1); *Clement*, 109 Wn. App. at 375. Second, the Information

failed to specify that the test refused was a breath test to determine his alcohol concentration.

The document's "mere recitation" of the statutory number was inadequate. *Zillyette*, 178 Wn.2d at 158. Accordingly, the Information was deficient. *Id.*

The Information did not adequately apprise Mr. Sharples of the charges against him. *Zillyette*, 178 Wn.2d at 158. It did not include the essential elements of the sentencing enhancement for refusal to submit to a breath test. *Id.* The enhancement must be vacated. *Recuenco*, 163 Wn.2d at 442. Mr. Sharples's case must be remanded for resentencing without the mandatory minimum. *Id.*

III. MR. SHARPLES SHOULD NOT HAVE BEEN SUBJECTED TO AN INCREASE IN THE MANDATORY MINIMUM SENTENCE.

A. Standard of Review.

The adequacy of jury instructions is reviewed *de novo*. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Failure to instruct on an element of a sentencing enhancement denies the accused the right to a fair trial. *State v. Williams-Walker*, 167

Wn.2d 889, 897, 225 P.3d 913 (2010). Instructing the jury in a manner relieving the state of its burden to prove each element beyond a reasonable doubt creates a manifest error affecting a constitutional right and can be raised for the first time on appeal. *State v. Smith*, 174 Wn. App. 359, 365, 298 P.3d 785 (2013) *review denied*, 178 Wn.2d 1008, 308 P.3d 643 (2013); RAP 2.5(a)(3). Such an error is not subject to harmless analysis. *Id.*

B. The court's instructions relieved the state of its burden to prove an essential element of the sentencing enhancement, and the special verdict did not reflect a jury finding that the state had proved all the essential elements.

The right to a jury trial includes the right to have all elements that increase the punishment for an offense proven to the jury beyond a reasonable doubt. *Alleyne*, --- U.S. at ___; U.S. Const. Amend VI; XIV; Wash. Const art. I, §§ 21, 22. This includes factors that increase the mandatory minimum sentence. *Alleyne*, --- U.S. at ___. Jury instructions must properly inform jurors of the applicable law and permit each party to argue its theory of the case. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

Mr. Sharples was charged with DUI and the sentencing enhancement of refusal to submit to a breath test. CP 2. As noted above, the "refusal" enhancement requires proof of a lawful arrest based on

reasonable grounds to believe that the accused person drove under the influence. RCW 46.20.308(1); *Clement*, 109 Wn. App. at 375.

The court's instructions, however, failed to properly set forth all of the elements. In particular, the special interrogatory permitted the jury to find that Mr. Sharples had refused the breath test if it found that he:

Refuse[d] to submit to a test of his breath which was requested by a law enforcement officer for the purpose of determining the alcohol concentration of [Mr. Sharples's] breath
CP 107.⁶

Neither the instructions nor the special verdict outline the state's burden to prove a lawful arrest based on reasonable ground to believe that DUI had been committed. RCW 46.20.308(1); *Clement*, 109 Wn. App. at 375.

This was error.

The omission of essential elements allowed the jury to answer "yes" to the special verdict without finding each element of the enhancement. *Clement*, 109 Wn. App. at 375. The instructions relieved the state of its burden of proof and violated Mr. Sharples's right to a jury trial. *Alleyne*, ---U.S. _____. The jury's verdict did not reflect a jury finding

⁶ Similarly, the jury instruction defining refusal stated only that "[a] person refuses to submit to a law enforcement officer's request to submit to a test to determine the person's breath alcohol concentration when the person shows or expresses a positive unwillingness to do the request or to comply with the request." CP 86. The instruction says nothing about the requirement of a lawful arrest based on reasonable cause.

on each essential element. Accordingly, Mr. Sharples should not have been subjected to the mandatory minimum. *Id.* This structural error is not subject to harmless error analysis. *Id.*; *Smith*, 174 Wn. App. at 359, 365.

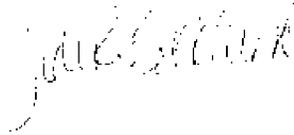
The court erred by instructing the jury in a manner relieving the state of its burden to prove each element of the sentencing enhancement. *Williams-Walker*, 167 Wn.2d at 897. The jury did not find that the state proved the essential elements of the “refusal” enhancement. Absent such a finding, the court lacked authority to impose the enhancement. *Alleyne*, ---U.S. _____. Mr. Sharples should not have been subjected to the mandatory minimum. *Id.* His sentence must be vacated, and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Sharples's conviction must be reversed and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on October 30, 2013,

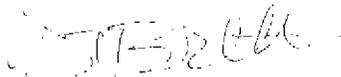
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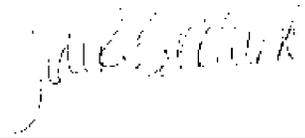
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening 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 October 30, 2013.



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