

**FILED**

JUL 16 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 28885-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

SAMUEL CASTRO,

Appellant.

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

The Honorable Michael E. Cooper, Judge

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to a public trial by deciding pretrial motions in chambers.

Issue Pertaining to Assignment of Error

Prior to trial, defense counsel filed motions in limine. The trial judge decided these motions in chambers and outside the public eye. Where the trial court did not analyze the "Bone-Club"<sup>1</sup> factors before conducting this closed hearing, did the court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

The Kittitas County Prosecutor's Office charged Samuel Castro with one count of possession of a controlled substance. CP 1. Prior to trial, defense counsel moved in limine to (1) exclude witnesses from the trial proceedings, (2) preclude the State from calling any witnesses not previously disclosed, (3) preclude the State from impeaching Castro under ER 609 with his prior criminal history, and (4) emphasize to all prosecution witnesses the need to avoid hearsay and improper opinions. CP 9-10.

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

On the first day of trial, the judge held a private meeting with counsel in his chambers. In addition to a general discussion of the case and the voir dire process, the judge decided the defense motions in limine. RP 5. Subsequently, the court placed its rulings on the record in open court. RP 5-6.

A jury found Castro guilty, the court imposed a standard range sentence, and Castro timely filed his Notice of Appeal. CP 25, 28-29, 38.

C. ARGUMENT

THE TRIAL COURT VIOLATED CASTRO'S  
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In the Matter of the

Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The constitutional public trial right is the right to have a trial open to the public. Orange, 152 Wn.2d at 804-05. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ." Bone-Club, 128 Wn.2d at 259 (citing In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 506 n. 25, 92 L. Ed. 682 (1948) (quoting Thomas M. Cooley, Constitutional Limitations 647 (8th ed. 1927))).

The right to public trial is not limited to the presentation of evidence before a jury. Easterling, 157 Wn.2d at 174. It also encompasses hearings related to a criminal prosecution, including pretrial motions. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (pretrial hearings); Easterling, 157 Wn.2d 167-182, 174, 137 P.3d 825 (2006) (motion to sever co-defendants' trials); Orange, 152 Wn.2d at 812 (voir dire); Bone-Club, 128 Wn.2d at 257 (suppression hearing); Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 32, 36, 640

P.2d 716 (1982) (hearing on motion to dismiss murder charge). Notably, the right includes resolution of motions in limine. See State v. Heath, 150 Wn. App. 121, 125-129, 206 P.3d 712 (2009).

While the right to a public trial is not absolute, 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)).

Trial proceedings conducted in chambers are closed to the public and violate the right to public trial. See Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 676-686, 230 P.3d 212 (2010); Heath, 150 Wn. App. at 125-129; State v. Frawley, 140 Wn. App. 713, 718-721, 167 P.3d 593 (2007).

At Castro's trial, the trial judge closed a portion of the proceedings by hearing and deciding the defense motions in limine in chambers without weighing the competing interests under Bone-Club. Division Two of this Court has expressly held that deciding motions in limine in this fashion violates the right to public trial. See Heath, 150 Wn. App. at 125-129 (reversing defendant's conviction where trial court decided motions in chambers without first weighing Bone-Club factors). This Court should find a similar violation in Castro's case.

The State may try to argue that because defense counsel did not object to this private hearing, the issue is waived. That argument fails. Defense counsel in Strode, Orange, and Heath also failed to object. Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Heath, 150 Wn. App. at 128. Compare State v.

Momah, 167 Wn.2d 140, 151-155, 217 P.3d 321 (2009) (issue waived where defense actively supported closure), abrogation recognized by Paumier, 155 Wn. App. 673. Thus, the issue is properly raised for the first time here.

Because the defense motions in limine were decided in the judge's chambers and outside the public eye, Castro's constitutional right to a public trial was violated.

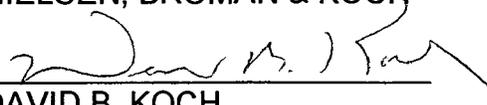
D. CONCLUSION

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

DATED this 13<sup>th</sup> day of July, 2010.

Respectfully submitted,

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