

FILED
July 15, 2015
Court of Appeals
Division III
State of Washington
No. 32965-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ALAN CRUTHERS,

Appellant.

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

The Honorable Carrie L. Runge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Cruthers' and the public's rights to an open trial were violated when a portion of the for-cause challenges and rulings were made at sidebar.

2. Mr. Cruthers' and the public's rights to an open trial were violated when peremptory strikes were made on paper, outside the public specter.

3. The trial court failed to find on the record that Mr. Cruthers had the ability to pay the Legal Financial Obligations (LFOs).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee the public and an accused the right to open and public trials. Accordingly, criminal proceedings, including jury selection and trial, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted at the bench, removed from public scrutiny without considering the *Bone-Club* factors, was Mr. Cruthers' and the public's right to an open trial violated, requiring reversal?

2. A court may impose discretionary LFOs only after making an individualized assessment of the defendant's financial situation and determining his ability to pay. This finding must be made on the record. The court here imposed over \$2870 in discretionary LFOs while making at best a cursory finding regarding Mr. Cruthers and his ability to pay. Is Mr. Cruthers entitled to reversal of his sentence and remand for a new sentencing hearing where the court will be required to make the necessary findings?

C. STATEMENT OF THE CASE

Nicholas Cruthers was charged with possession of a controlled substance. CP 19. Following jury *voir dire*, the parties conducted their for cause and peremptory challenges on paper at the sidebar.

11/10/2014RP 34.

Mr. Cruthers was subsequently convicted as charged. CP 35. At sentencing, after imposing a twelve month sentence, the court asked Mr. Cruthers "And you're sporadically employed at this time?"

12/15/2014RP 87. Mr. Cruthers answered:

Well, I'm still working for the same employer, just I haven't had work. And the work that we have had I've had court, so I wasn't able to go.

12/15/2014RP 87-88. The court's subsequent imposition of LFOs was short and succinct;

I would find you have the ability to pay, then. I'm imposing \$500 crime victim assessment, \$1,000 fine, \$100 felony DNA collection fee.

Court costs to include \$200 filing fee, \$250 jury demand fee, witness fess of \$21.20; attorney's fees of \$700

12/15/2014RP 88. At the prosecutor's request, the court also imposed a crime lab fee of \$100. *Id.*

D. ARGUMENT

1. Mr. Cruthers should be afforded a new, public trial because peremptory challenges were conducted at the bench, thus closed to the public without an on-the-record analysis by the trial court.

a. *The state and federal constitutions guaranteed Mr. Cruthers and the public open and public trials.*

Our state constitution requires that criminal proceedings be open to the public without exception. Const. art. I, § 10; Const. art. I, § 22.

Two provisions guarantee this right. First, article I, section 10 requires that "Justice in all cases shall be administered openly." Additionally, article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness

of our judicial system.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”); *see* U.S. Const. amends. I, V.

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ’ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

The public trial guarantee ensures “that the public may see [the accused] 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, *quoting In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

With regard to jury selection in particular, closed proceedings “harm[] the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by

preventing the venire from seeing the interested individuals.” *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005), citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004); accord Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, our courts have repeatedly held that a trial court may not conduct secret or closed proceedings “without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order.” E.g., *State v. Wise*, 176 Wn.2d 1, 12, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012); *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to “preserve higher values” and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

This Court reviews violations of the public trial right *de novo*, and a defendant does not waive his public trial right by failing to object

to a closure during trial. *Paumier*, 176 Wn.2d at 34, 36-37; *Wise*, 176 Wn.2d at 15-16.

- b. *Without analysis, the trial court closed proceedings when it conducted peremptory challenges by secret ballot.*

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed.2d 675 (2010); *State v. Sublett*, 176 Wn.2d 58, 71-72, 292 P.3d 715 (2012); *Wise*, 176 Wn.2d at 11-12. “The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” *Press-Enterprise I*, 464 U.S. at 505. Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *Sublett*, 176 Wn.2d at 73 (lead opinion); *id.* at 136 (Stephens, J. concurring).

In *State v. Love*, Division Two of the Court applied the experience and logic test to evaluate that appellant’s claim that similarly closed proceedings violated his public trial right. 176 Wn.App. 911, 309 P.3d 1209, 1212-14 (2013), *review granted*, 181

Wn.2d 1029 (2015).¹ The Court did not explain why the experience and logic test must be applied to the for-cause and peremptory challenge portion of jury selection but not to other parts of that process. However, if the experience and logic test applies, the State must bear the burden to convince this Court that the proceeding is not generally open to the public. *Sublett*, 176 Wn.2d at 70-71. The State cannot satisfy that burden - even under the experience and logic test, preliminary challenges to the venire must be held in open court absent on-the-record satisfaction of the *Bone-Club* factors. *E.g.*, *State v. Jones*, 175 Wn.App. 87, 98-99, 303 P.3d 1084 (2013).

The process of excusing prospective jurors is a critical part of *voir dire* that must also be open to the public. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures). Public scrutiny is essential because there are important limits on both parties' exercise of peremptory and for-cause challenges. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 47-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury

¹ The Supreme Court heard oral argument in *Love* on March 10, 2015. See http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2015Jan. A decision is pending.

selection, including in exercise of peremptory challenges, and critical role of public scrutiny). For example, neither may be exercised in a racially discriminatory fashion. *Id.*; see *State v. Sadler*, 147 Wn.App. 97, 193 P.3d 1108 (2008) (open trial right violated where *Batson* challenge conducted in private).

In *State v. Wilson*, this Court distinguished between hardship strikes made by the clerk prior to the commencement of *voir dire*, which is not subject to the open trial right, and the for-cause and peremptory challenge process, which is part and parcel of *voir dire*. 174 Wn.App. 328, 343-44, 298 P.3d 148 (2013). This Court observed that unlike hardship strikes made by a clerk, “*voir dire*” under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for-cause and peremptory challenges. *Id.* at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court’s and parties’ rights to excuse jurors based on cause and peremptory challenges. *Id.* at 343-44.

The trial court here closed the courtroom by instructing the parties to conduct peremptory challenges on paper. Although the public

was allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order and the process was conducted “of the record.” *Cf. State v. Leyerle*, 158 Wn.App. 474, 483-84 & n.9, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no basis to discern which jurors had been struck by which party. Further, there was no public check on the non-discriminatory use of challenges to the venire or the court’s rulings on such challenges. The procedure had the same effect as excluding the public from the courtroom. “Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power.” *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

c. *These errors require reversal and remand for a new trial.*

When the record does not reveal that “the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted” and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181. If the trial court fails to conduct a *Bone-Club* inquiry, “a ‘per se prejudicial’ public trial violation has occurred ‘even where the

defendant failed to object at trial.’” *Jones*, 175 Wn.App. at 96, *quoting Wise*, 176 Wn.2d at 18.

In Mr. Cruthers’ trial, the court provided no compelling interest that required peremptory strikes to be conducted in secret. Further, the court failed to consider any of the *Bone-Club* factors on the record. Allowing the error to “go unchecked ‘would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.’” *Jones*, 175 Wn.App. at 96, *quoting Wise*, 176 Wn.2d at 18). Mr. Cruthers’ conviction should be reversed and the matter remanded for a new, public trial.

2. The trial court erred in imposing court costs, fines, and attorney’s fees without making a finding regarding Mr. Cruthers’ inability to pay

- a. *The court may impose court costs and fees only after an individualized inquiry and a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those “expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision.”

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.” *See also State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015), (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant’s ability to pay).² In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs:

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

Id. at 839.

The court here failed to make this individualized inquiry and under *Blazina*, Mr. Cruthers is entitled to a new sentencing hearing.

² *See also* RCW 69.50.430(1) stating that the mandatory drug fine must be imposed “[u]less the court finds the person to be indigent.”

- b. *The trial court failed to make an individualized inquiry into Mr. Cruthers' ability to pay the Legal Financial Obligations (LFO).*

Blazina requires that prior to imposing discretionary LFOs, the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay.

Blazina, 182 Wn.2d at 839. In addition, the record must reflect this individualized inquiry:

Practically speaking, this imperative under RCW 10.01.160 (3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id., at 838.

Here, the trial court failed to make the individualized inquiry required under RCW 10.01.160, and even failed to make a boilerplate finding in the Judgment and Sentence. CP 39.

In addition, only the victim assessment and DNA collection fee were mandatory fees that could not be waived. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson*, 153

Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). All of the other fees imposed by the court were discretionary and could have been waived. Yet, the court failed to consider waiving these discretionary costs or even consider the impact that imposition of these fees would have on Mr. Cruthers as required by *Blazina*. This was error.

- c. *The sentencing court's perfunctory questioning regarding Mr. Cruthers' past employment was not the individualized inquiry into the ability to pay the Blazina court demanded.*

In making the individualized inquiry, the Supreme Court urged courts to look to the comment to GR 34³ in assessing the defendant's ability to pay:

For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts

³ GR 34(a) states in relevant part:

Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

should seriously question that person's ability to pay LFOs.

Id. at 838-39.

The discussion between the court and Mr. Cruthers at sentencing was extremely brief and consisted solely of the court questioning whether Mr. Cruthers was employed. 12/15/2014RP 87-88. Lacking in this discussion was any questioning about Mr. Cruthers' current income, if any, his debts and obligations and his overall ability to pay; both now and in the future. *See* RCW 10.01.160(3) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.)" This inquiry is not advisory, it is required.

d. *Mr. Cruthers may raise the issue for the first time on appeal.*

Despite the fact Mr. Cruthers did not object to the imposition of costs when they were ordered, he may raise it for the first time on appeal. *Blazina*, 182 Wn.2d at 839.

Neither of the name defendants in *Blazina* objected at the time of imposition of the costs. 182 Wn.2d 830. Nevertheless, the Court

reviewed both sentences and reversed the imposition of costs because of a failure of the sentencing judge to make the inquiry into the defendant's ability to pay:

At sentencing, judges ordered Blazina and Paige-Colter to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, *we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.*

Id. at 839 (emphasis added).

Here, although Mr. Cruthers did not object at sentencing, the sentencing court did not undertake the necessary inquiry and made no valid finding regarding his ability to pay. In light of the decision in *Blazina*, Mr. Cruthers may raise the court's failure to properly or accurately inquire into his ability to pay, he may raise this issue for the first time on appeal. *Id.*

- e. *The remedy for the court's failure to inquire into Mr. Cruthers' financial circumstances and make a finding of his ability to pay the LFOs is remand.*

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 182

Wn.2d at 839. This Court should remand Mr. Cruthers' matter to the trial court for a new sentencing hearing.

E. CONCLUSION

For the reasons stated, Mr. Cruthers asks this Court to reverse his conviction and remand for a new trial. Alternatively, Mr. Cruthers asks this Court to reverse his sentence and remand for a new sentencing hearing.

DATED this 15th day of July 2015.

Respectfully submitted,

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

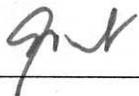
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 32965-8-III
)	
NICHOLAS CRUTHERS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREW MILLER [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] NICHOLAS CRUTHERS 1511 S DENNIS ST KENNEWICK, WA 99337	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JULY, 2015.

X _____


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