

NO. 34816-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS HERNANDEZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The closure of the courtroom during jury selection violated Carlos Hernandez's right to a public trial.

2. Mr. Hernandez's right to be present was violated when the court considered his retained attorney's motion to withdraw without Mr. Hernandez's presence, input and knowledge.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and Washington constitutions guarantee the accused and the public the right to open and public trials. Const. art. I, §§ 5, 10, 22; U.S. Const. amend. I, VI. Accordingly, a courtroom may be closed to the public only when the trial court performs the weighing test outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure justified. Jury selection is a part of trial subject to these open courtroom guarantees. Violation of the right to a public trial is presumptively prejudicial. Must this case be reversed for a new trial where the deputy bailiff excluded the public from jury selection without the court having conducted a *Bone-Club* inquiry and despite the fact that there was room in the courtroom for spectators?

2. The accused has the right to be present at all proceedings at which his presence has a reasonably substantial relation to the fullness

of his opportunity to defend against the charge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The accused must be included, even in in-chambers conferences, where necessary to ensure fundamental fairness. Was Mr. Hernandez's right to be present violated when the court considered his retained attorney's motion to withdraw without Mr. Hernandez's presence, input and knowledge?

C. STATEMENT OF THE CASE

Mr. Hernandez was charged with two misdemeanor driving offenses and possession of heroin. CP 115-16 (amended information). After he was initially appointed a public defender, Mr. Hernandez retained private counsel, John Crowley. CP 61-62. Six months later, Mr. Crowley moved ex parte and under seal to withdraw from the representation. Supp CP __ (Sub 67 (order on motion to seal)). The court granted Mr. Crowley's motion to withdraw. *Id.* (order sealing and granting withdrawal). Mr. Hernandez was not present at the hearing where the court determined whether Mr. Crowley could withdraw. Hrg RP 48-57.¹ Mr. Hernandez did not have an opportunity

¹ The verbatim report of proceedings are contained in two sets of consecutively paginated volumes. The trial volumes from July 27 and 28, 2016 are referred to as "RP." The set containing "various pre and post-trial hearings" is referred to as "Hrg RP."

to review Mr. Crowley's assertions or provide the court with Mr. Hernandez's own evidence or information. *Id.* Mr. Hernandez was not present for consideration of the motion and the only record of the proceedings are sealed. *Id.*; Supp CP __ (Sub 67 (order on motion to seal)). No basis is provided for Mr. Hernandez's exclusion. *Id.*

Following Mr. Crowley's withdrawal, Michael Morgan was reappointed to represent Mr. Hernandez. *See* CP 64-66.

During jury selection, four spectators approached the courtroom to view the proceedings but were turned away because the deputy bailiff believed the courtroom was filled by the panel of prospective jurors. RP 105-08, 113. A prosecutor unaffiliated with the case became aware that the courtroom had been closed to the public and interrupted proceedings to alert the court. RP 105-08, 110. The court allowed the spectators in, as there was room for them in the courtroom, and made a record that the deputy bailiff had turned them away from viewing jury selection on the belief there was no place for them to sit. RP 106-15. After this record was made, jury selection continued. RP 115-16. The court never conducted a *Bone-Club* analysis to determine the propriety of the courtroom closure and no waiver was obtained from Mr. Hernandez. *See* RP 105-15.

D. ARGUMENT

1. The courtroom was closed to spectators during jury selection without any *Bone-Club* analysis. A new trial is required.

The Washington Constitution mandates that criminal proceedings be open to the public without exception. Article I, section 10 requires that “Justice in all cases shall be administered openly.” 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.” *Bone-Club*, 128 Wn.2d at 259. 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. amend. I.

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. Wise*, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

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, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). “Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open.” *Wise*, 176 Wn.2d at 5. “Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

A courtroom cannot be closed to the public during jury selection unless the court conducts a five factor inquiry outlined in *Bone-Club* and finds closure favored. *Wise*, 176 Wn.2d at 9-10. “*Bone-Club* requires that trial courts at least: name the right that a defendant and the public will lose by moving proceedings into a private room; name the compelling interest that motivates closure; weigh these competing rights and interests on the record; provide the opportunity for objection;

and consider alternatives to closure, opting for the least restrictive.” *Id.* at 10.

If a courtroom is closed without the court having conducted the five-part *Bone-Club* analysis and finding closure favored, the error is structural and the only remedy is a new trial. *Wise*, 176 Wn.2d at 15.

Here, the deputy bailiff turned away four spectators during jury selection, wrongly believing the courtroom to be too full to allow in any members of the public. RP 105, 107, 113-14. The trial court did not conduct a *Bone-Club* inquiry prior to the spectators being excluded. Once the trial court became aware of the exclusion, it welcomed the spectators into the courtroom. RP 106, 111. Therefore, even if a *Bone-Club* inquiry had been made, it is plain that it would not have resulted in closure of the courtroom.

Although the closure was brought to the trial court’s attention, the court also did not conduct a post hoc *Bone-Club* inquiry and there was no attempt to obtain a personal waiver from Mr. Hernandez. *See State v. Herron*, 183 Wn.2d 737, 743–44, 356 P.3d 709, 712 (2015) (a defendant may only be found to have waived the right to a public trial through an “an affirmative and unequivocal personal expression of waiver” (quoting *State v. Frawley*, 181 Wn.2d 452, 461-62, 334 P.3d

1022 (2014) (plurality opinion)); RP 105-15 (no analysis of *Bone-Club* factors, no personal expression of waiver from defendant).

Because the courtroom was closed for a portion of jury selection without consideration of the public trial right and without Mr.

Hernandez's prior knowledge or waiver, a new trial is required. *Wise*, 176 Wn.2d at 15.

2. Mr. Hernandez was denied his right to be present when the trial court considered retained counsel's motion to withdraw in Mr. Hernandez's absence and without his knowledge and opportunity to be heard.

An accused person has the right to attend all critical stages of his trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The right derives from both the right to confrontation and the right to due process. *United States v. Gagnon*, 570 U.S. 522, 526, 105 S .Ct. 1482, 84 L. Ed. 2d 486 (1986). “[T]his right entitles a defendant to be present at every stage of his trial for which ‘his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge.’” *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008) (quoting, *inter alia*, *Snyder v. Massachusetts*, 291 U.S. 97, 105-08, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Although this privilege of presence is not guaranteed when “presence would be

useless, or the benefit but a shadow,” *Snyder*, 291 U.S. at 106-07, an accused “is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” *Id.*

Thus, “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence[.]” *Gagnon*, 570 U.S. at 526; accord *State v. Berry Smith*, 87 Wn. App. 268, 274, 944 P.2d 397 (1997). Although the Supreme Court has found that a defendant does not have an unqualified right to attend an in-chambers conference, his exclusion will violate his right to be present if presence is “required to ensure fundamental fairness.” *Gagnon*, 570 U.S. at 526.

Mr. Hernandez was not provided notice of the proceeding whereby Mr. Crowley moved to withdraw. He was also never afforded an opportunity to address the accusations against him. The court provided no justification for excluding Mr. Hernandez. *See* Supp CP ___ (Sub 67) (order on motion seal). These accusations focused on him; Mr. Crowley’s motion integrally regarded the attorney-client relationship. Yet, the court heard only from one side—the attorney. Considering Mr. Crowley was subsequently cited by the defense and

prosecution for being dishonest to the court when seeking continuances, it is particularly concerning in this case that the court and the file portrays only his assertions. Hrg RP 51-52, 61-62, 68-71.

State v. Lopez, 271 Conn. 724, 59 A.2d 898 (Conn. 2004) is instructive. There, the trial court held an in-chambers hearing without the defendant to determine whether defense counsel should withdraw so he could testify as a material witness. *Lopez*, 59 A.2d at 901, 903-04. On appeal, the Connecticut Supreme Court held that this violated the defendant's right to be present. The hearing was a critical stage because defense counsel had to decide whether he would testify on his client's behalf and, if the defendant had been present, he would have had an opportunity to question the sufficiency of the inquiry and to represent his own interests. *Id.* at 904-06. The court further held that the defendant's attorney, who was the object of the inquiry to withdraw, could not represent the defendant at such a hearing. *Id.* at 904-05. The error was structural. *Id.* at 906.

Likewise, in *California v. Ebert*, 244 Cal. Rptr. 447, 199 Cal. App. 3d 40 (Cal. Ct. App. 1988), the court reversed a conviction after the defendant, who was acting as his own counsel, was excluded from a hearing that resulted in the loss of his court-appointed advisory counsel.

The advisory counsel had moved to withdraw based on her belief that the defendant intended to commit perjury. 199 Cal. App. 3d at 47-48. The court found it important that the defendant was excluded, and the advisory counsel did not represent the defendant's interests at the hearing; therefore the defendant was without representation at this hearing. *Id.* at 46. Because the effect of the loss of counsel cannot be measured, the error was structural and reversal resulted. *Id.* at 47-48; accord *Myers v. State*, 254 So.2d 891, 892-93, 895 (Miss. 1971) (defendant had right to be present at hearing on whether counsel would be allowed to withdraw; having been denied that right, reversal is required).

In *Berrysmith*, the Court of Appeals held a defendant has no right to be present at a hearing on whether counsel has a reasonable basis to withdraw because that inquiry under the Rules of Professional Conduct is a purely legal matter. 87 Wn. App. at 277. However, although the court's final determination might amount to a legal one, the court must first be presented with evidence, or information, as to the basis for the requested withdrawal. The facts underlying the attorney's motion to withdraw are just that—a factual matter. And the

accused has the right to be present for factual matters. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

The accused also has the right to be present if his presence is required to ensure fundamental fairness—in other words, if a fair and just hearing would be thwarted by his absence. *Gagnon*, 570 U.S. at 526.

Mr. Hernandez was unrepresented in the proceedings regarding his relationship with retained counsel. When the prosecutor became aware that Mr. Hernandez himself was excluded from the *ex parte* proceeding—after Mr. Hernandez moved to dismiss in the trial court, the prosecutor recognized that it was likely a critical stage such that Mr. Hernandez’s right to be present was violated by his absence. RP 76.

The record that remains of this *ex parte*, sealed motion, moreover, continues to affect Mr. Hernandez. Mr. Crowley’s sealed declaration is available to the court—to any judge who presided over his criminal trial. The court, of course, rules on evidentiary matters including the admission and exclusion of witnesses, evidence, and lines of questioning. But the record lacks any information from Mr. Hernandez in response to Mr. Crowley’s assertions, which likely accuse Mr. Hernandez of expected perjury or witness tampering. *See*

Berrysmith, 87 Wn. App. at 277; *Ebert*, 199 Cal. App. 3d at 47-48. If Mr. Hernandez had elected to waive his right to a jury and submit to a trial with the court as fact-finder, a judge's review of the one-sided file might affect not only the evidentiary rulings but the verdict directly.

E. CONCLUSION

Because the courtroom was closed during jury selection without the court evaluating the five-part *Bone-Club* test, the case must be remanded for a new trial. Alternatively, Mr. Hernandez's right to be present was denied when his retained attorney's motion to withdraw was considered *ex parte*, without any notice to Mr. Hernandez, without any evidence from him, and without his knowledge.

DATED this 7th day of July, 2017.

Respectfully submitted,

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CARLOS HERNANDEZ,)	
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APPELLANT.)	

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