

FILED
May 17, 2017
Court of Appeals
Division III
State of Washington

No. 34899-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PATRICK W. KARAS,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred in hearing and ruling on some “legal issues” and various motions in limine in chambers rather than the open courtroom without conducting a *Bone-Club*¹ analysis.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court violate Mr. Karas’ constitutional right to a public trial when it heard unrecorded arguments and ruled on various motions in limine in chambers without conducting a *Bone-Club* analysis?

C. STATEMENT OF THE CASE

Patrick Karas was convicted by a jury of second degree burglary and third degree theft. CP 35-36. Following jury selection, the Court met with counsel in chambers to discuss some “legal issues,” hear and rule on various motions in limine. RP 82-83. The defendant was not present for this conference and the conference was not reported or recorded.² RP 82. Back on the record, the judge memorialized the conference as follows:

THE COURT: Okay. For the record, Counsel met in chambers, and discussed only legal issues. And we did discuss some motions.

One was a motion to exclude witnesses, by the defendant. The Court granted that motion.

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

And the Court was advised that the State will have Officer Josh Mathena as its representative, to be seated at counsel table. Everyone else is excluded.

There's also a motion, by the defendant, to keep out testimony by -- who was the officer? Corulli?

MR. FORD: Corulli.

THE COURT: Corulli, who, apparently, in his report, indicates some statements made by a cashier, at a business across from the alleged victim's business. And the Court granted that motion. Officer Corulli can't talk about what the cashier said.

It was also indicated that the alleged victim had that conversation with the cashier. And the Court did not grant a motion in limine, preventing the alleged victim from talking about what he said to the cashier.

And, the way it was presented, what the cashier said to him, was not being offered to prove the truth of the matter asserted.

So counsel can renew the objection to that, if you want. But, right now, it sounds like that's the route we got to go, at this point in time.

Anything else we need to put on the record?

² The court reporter confirmed to the undersigned counsel on 4/26/17, that the conference in chambers was not reported or recorded.

RP 82-83.

This appeal followed. CP 54-70.

D. ARGUMENT

The trial court violated Mr. Karas' constitutional right to a public trial when it heard unrecorded arguments and ruled on various motions in limine in chambers without conducting a *Bone-Club* analysis.

Defendants in criminal cases have a constitutional right to a public trial. U.S. Const. amend. VI; Const. art. I, §§ 10, 22. Article I, section 10 of our constitution commands, "Justice in all cases shall be administered openly, and without unnecessary delay." "The section 10 guaranty of public access to proceedings and the section 22 public trial right 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) (citing Const. art. I, § 10). A violation of the public trial right may be raised for the first time on appeal. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Whether the right to a public trial was violated is a question of law reviewed *de novo*. *Id.*

The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward,

and to discourage perjury. *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012), citing *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). Our Supreme Court underscored the importance of this safeguard in *Wise*:

A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passerby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities.

Wise, 176 Wn.2d at 4–6. The presumption is that all proceedings in a trial are open. *State v. Paumier*, 176 Wn.2d 29, 34–35, 288 P.3d 1126 (2012).

Competing rights and interests sometimes require trial courts to limit public access to a trial. *State v. Shearer*, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). Where a proceeding implicates the public trial right, the trial court may not close the courtroom without considering the five “*Bone-Club*” factors on the record.³ *Wise*, 176 Wn.2d at 10; *Bone-Club*, 128 Wn.2d at 258-59.

³ The five factors 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 the accused’s right

Closing the courtroom without considering the *Bone-Club* factors is structural error that is presumed prejudicial. *Shearer*, 181 Wn.2d at 569.

To determine whether the constitutional right to a public trial was violated, the reviewing Court considers three factors: (1) whether the public trial right was implicated; (2) whether, if the public trial right was implicated, there was in fact a closure of the courtroom; and (3) whether, if there was a closure, the closure was justified. *State v. Smith*, 181 Wn.2d 508, 513–14, 334 P.3d 1049 (2014).

To determine whether a court proceeding implicates the public trial right, the Court applies the “experience and logic” test. *Sublett*, 176 Wn.2d at 72–75. The “experience prong” asks “whether the place and process have historically been open to the press and general public.” *Id.* at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The “logic prong” asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* (quoting *Press-Enter.*, 478 U.S. at 8). If both

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; (3) the proposed method of closure 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; and (5) the order must be no broader in its

questions are answered yes, then the court proceeding implicates the public trial right. *Id.*

In *State v. Smith*, the trial court conducted 13 sidebar conferences during the jury trial to consider evidentiary objections. *State v. Smith*, 181 Wn.2d at 512, 334 P.3d 1049. The Cowlitz County courtroom has a peculiar layout that makes it difficult to have a traditional sidebar discussion outside of the jury's hearing. *Id.* To prevent the jury from hearing potentially prejudicial information, sidebars occur in a hallway outside of the courtroom. *Id.* The sidebar conference is videotaped and recorded and is, thus, part of the trial court record. *Id.*

The *Smith* court applied the “experience and logic” test and held that sidebar conferences do not implicate the defendant's public trial right. *Id.* at 515–19, 334 P.3d 1049. Proper sidebars deal with mundane issues implicating little public interest. *Smith*, 181 Wn.2d at 516 (citing *Wise*, 176 Wn.2d. at 5). “True sidebars are generally permissible—especially when held in open court.” *See State v. Sublett*, 176 Wn.2d 58, 140, 292 P.3d 715 (2012) (Stephens, J., concurring) (condoning “brief sidebars to allow counsel to raise concerns that may need to be taken up outside the jury’s presence”).” *Smith*, 181 Wn.2d at 542 fn 5 (Owens, J., dissenting).

application or duration than necessary to serve its purpose. *Bone-Club*, 128 Wn.2d at 258-59.

Smith cautioned that “merely characterizing something as a ‘sidebar’ does not make it so.” *Id.* at 516 fn10. The court explained “[t]o avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly recorded.” *Id.* The hallway conference in *Smith* was a “sidebar” because it was the most expedient method for resolving evidentiary objections, given the courtroom’s peculiar layout that allowed a jury to hear a traditional sidebar. *Smith*, 181 Wn.2d at 515.

More recently in *State v. Whitlock*, the Court of Appeals, Division Three, determined that an evidentiary conference was not a sidebar as contemplated by the *Smith* court. 195 Wn. App. 745, 753, 381 P.3d 1250 (2016), *review granted*, No. 93685-4, 2017 WL 34624 (Wash. Jan. 4, 2017).⁴ Unlike *Smith*, there was no expediency justification for holding the evidentiary conference outside the courtroom, since the trial was to the bench. *Whitlock*, 195 Wn. App. at 753. Rather, the trial court’s decision to recess court and hold an in-chambers argument and ruling actually disrupted the expedient flow of the trial. *Id.* Moreover, the in-chambers argument and ruling were neither recorded nor promptly memorialized on

⁴ Argued March 16, 2017.

the record. *Id.* The Court held that under these circumstances hearing argument and ruling on an evidentiary objection in chambers implicated the defendants' public trial right and constituted a closure. *Whitlock*, 195 Wn. App. at 755.

The situation in the present case is more like *Whitlock* than *Smith*. Here, the trial court heard and ruled on motions in limine and other "legal issues" outside the courtroom in a proceeding that was not equivalent to a traditional sidebar as contemplated in *Smith*. The defendant was not present for this conference and the conference was not reported or recorded. RP 82. The Court merely summarized its rulings from the in-chambers conference on the record. The Court did not explain its legal reasoning or discuss the arguments set forth by counsel. RP 82-83. Unlike *Smith*, there was no expediency justification for hearing these motions outside the courtroom in chambers, since the jury was out and the evidentiary portion of the trial had not yet commenced. RP 82-83.

Under these circumstances hearing argument and ruling on motions in limine and other "legal issues" in chambers implicated the defendants' public trial right and constituted a closure. "A closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified." *Smith*, 181 Wn.2d at 520. If the trial court fails to conduct an

express *Bone-Club* analysis, the reviewing court may examine the record to determine if the court effectively weighed the defendant's public trial right against other compelling interests. *Id.* If the court did not consider the *Bone-Club* factors—either explicitly or implicitly—the closure is not justified. *Whitlock*, 195 Wn. App. at 755.

Here, the court did not consider the *Bone-Club* factors either explicitly or implicitly. Therefore, the closure was not justified. *Id.* Closing the courtroom without considering the *Bone-Club* factors is structural error requiring reversal. *Shearer*, 181 Wn.2d at 569; *Whitlock*, 195 Wn. App. at 755.

E. CONCLUSION

For the reasons stated, the conviction should be reversed. Pursuant to RAP 15.2(f), Appellant's indigent status should continue throughout this appeal and he should not be assessed appellate costs if the State were to substantially prevail. See CP 71-76. Appellate counsel anticipates filing a report as to Appellant's continued indigency no later than 60 days following the filing of this brief.

Respectfully submitted May 17, 2017,

s/David N. Gasch
Attorney for Appellant
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 17, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Patrick W. Karas
374616
Ahtanum View Work Release
2011 South 64th Avenue
Yakima WA 98903

Douglas Shae
James Hershey
Prosecuting Attorney
prosecuting.attorney@co.chelan.wa.us

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

**GASCH LAW OFFICE
ATTORNEYS AT LAW**

FILED
6/20/2017 1:25 PM
Court of Appeals
Division III
State of Washington
Susan Marie Gasch

David N. Gasch

June 20, 2017

Renee S. Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N Cedar St
Spokane, WA 99201

RE: State v. Patrick W. Karas, No. 34899-7-III

Dear Ms. Townsley:

As permitted by RAP 10.8, Appellant cites as additional authority: *State v. Whitlock*, No. 93685-4 (June 15, 2017).

Sincerely,

s/David N. Gasch

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on June 20, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's letter citing additional authority:

Douglas Shae
James Hershey
Prosecuting Attorney
prosecuting.attorney@co.chelan.wa.us

s/David N. Gasch
Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX – None
gaschlaw@msn.com

GASCH LAW OFFICE

June 20, 2017 - 1:25 PM

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