

80727-2

No. ~~86513-2~~

IN THE SUPREME COURT FOR THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RONALD APPLGATE, Appellant.

FILED  
2013 AUG 28 A 9:14  
BY RONALD R. CAMPBELL  
CLERK

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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**A. SUPPLEMENTAL ISSUE**

1. Whether Art. 1 §22 provides greater protection of a defendant's right to public trial than the Sixth Amendment in the context of remedy where defendant alleges the in chambers voir dire of one venire member violated his right to public trial and where a Gunwall analysis shows the texts of the two constitutional provisions are nearly identical, there is no historical evidence the framers of the state constitution intended the defendant's right be broader than the federal right, pre-existing law did not require a reversal for every violation of the public trial right and federal precedent has been relied upon previously in applying the state constitutional provision.

**B. SUMMARY ANSWER**

Applegate asserts no violation of the right to public trial under Art. 1 §22 can be de minimis despite a number of federal opinions holding that there is a de minimis exception under the Sixth Amendment. Applegate asserts that under Gunwall the state constitutional provision is to be interpreted more broadly than the Sixth Amendment; however, his analysis focuses on Art. 1 §10, not Art. 1 §22. Applegate has failed to show that Art. 1 §22 should be interpreted to provide greater protection of a *defendant's* public trial right, as opposed to the public's right under Art. 1 §10. A review of the Gunwall factors demonstrates Art. 1 §22 should be interpreted as being co-extensive with the Sixth Amendment.

**C. ARGUMENT**

Applegate relies heavily upon an analysis of Art. 1 §10 in asserting that, under Gunwall, Art. 1 §22 provides broader protection than the Sixth

Amendment. In fact, Applegate provides scant analysis of Art. 1 §22. It may very well be that Art. 1 §10 is broader in scope than the federal right of access recognized under the First Amendment. However, as previously asserted by the State, Applegate does not have standing to assert the public's right to open proceedings under Art. 1 §10 and would not be entitled to the remedy of a new trial for any such violation.

In order to determine if a state constitutional provision should be interpreted independently of a related federal constitutional provision, courts review the criteria set forth in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Gunwall sets forth six factors: 1) the textual language of the state constitution; 2) significant differences between the texts of the federal and state constitutions; 3) state constitutional and common law history; 4) pre-existing state law; 5) differences in structure between the federal and state constitutions; and 6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d 54 at 61-62.

The first two Gunwall factors don't favor an independent interpretation when the language of the state and federal constitutional provisions is nearly identical. State v. Iniguez, 167 Wn.2d 273, 286, 217 P.3d 768 (2009). Textual differences do not, in and of themselves, provide a basis for concluding that the state constitutional provision

should be interpreted in a broader manner<sup>1</sup>. State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998). Minor differences do not support an independent interpretation, particularly where the interpretation of the provisions has been substantially the same. *Id.*

The Sixth Amendment provides in relevant part: “In criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]” U.S. CONST., Amend. 6. The relevant portion of the state constitution provides: “In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]” WASH. CONST. Art. 1, § 22 (10<sup>th</sup> amendment).

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<sup>1</sup> This Court has generally held that Art. 1 § 22 is not broader in scope than the Sixth Amendment except where there are significant linguistic differences between the two provisions. *See, Iniguez*, 167 Wn.2d at 286 (Art. 1 §22 does not provide greater protection than Sixth Amendment regarding right to speedy trial despite speedy trial court rule); State v. Brown, 132 Wn.2d 529, 598, 940 P.2d 546 (1997) (state constitution does not provide greater protection than Sixth Amendment’s right to jury trial in context of death qualification of jurors); State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992) (Art. 1 §22 does not provide broader protection than Sixth Amendment in context of charging documents); State v. Schaaf, 109 Wn.2d 1, 13-16, 743 P.2d 240 (1987) (no greater right to jury trial for juveniles under state constitution despite art. 1 §21’s provision that jury trial shall remain inviolate); *but see, State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011) (Art. 1 §22 provides greater protection than Sixth Amendment regarding defendant’s right to appear and defend in context of cross-examination of defendant given differences in text); Foster, 135 Wn.2d at 459, 465 (in split decision, state confrontation right should be analyzed independently of Sixth Amendment in context of statute providing for testimony via closed-circuit television given state language requiring “face-to-face” confrontation); Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982) (state constitution provides greater protection for right to jury trial regarding adult misdemeanors because of explicit language regarding “petty offenses” whereas federal provision contains no such language and doesn’t include such a right).

Applegate focuses on the language in Art 1 §10 and the different standard under the First Amendment regarding public access to judicial proceedings in analyzing this factor, but ignores the language of Art. 1 §22. The language of Art. 1 §22 and the Sixth Amendment is nearly identical: the only differences are the use of the word “enjoy” rather than “have,” the insertion of an “and” between “speedy” and “public,” the placement of a comma, and the jurisdictional element. The similarity in language strongly suggests that the two provisions are coextensive.

The third Gunwall factor reviews the state constitutional and common law history. It is the defendant’s burden to provide evidence that the framers of the state constitution intended a broader scope of protection. Iniguez, 167 Wn.2d at 286. “Washington, like the vast majority of relatively newer states, copied much of its Declaration of Rights from the constitutions of older states, rather than from the federal charter.” Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491, 496-97 (1984). There is very little historical evidence about the intentions of those who drafted the Washington Bill of Rights. See, e.g. Foster, 135 Wn.2d at 460. Neither contemporary sources nor recent treatises provide much insight. See The Journal of the Washington State Constitutional Convention 510-12 (Beverly Paulik Rosenow ed.,

William S. Hein & Co. 1999) (1962); Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 22-24, 35-37 (2002) (discussing rights of accused persons). Again, Applegate focuses solely on Art. 1 §10 in asserting this factor weighs in favor of greater protection.

Under the fourth factor, the court reviews pre-existing state law in the context in which the constitutional issue is raised. Foster, 135 Wn.2d at 461. The focus is on the law that existed prior to adoption of the specific constitutional provision. State v. Meggysey, 90 Wn. App. 693, 702-03, 958 P.2d 319, *rev. den.*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156 (2005). In interpreting Art. 4 §23, the court in Peterson v. Dillon noted that not all judicial proceedings at the time occurred in “open court” as opposed to “at chambers”:

Under our present system, when an act of a judicial nature is performed by the judge, it is, in contemplation of law, done in open court, although the act may in reality be done in the private room or office of the judge. When the framers of the constitution used the term ‘at chambers’ in speaking of the duties performed by the judges at chambers, they had in view a certain object, and, in order to ascertain what this was, we must have recourse to the meaning of the term ‘at chambers’ as it was understood at the time this particular provision of the constitution was framed. The courts established by the constitution were to supersede the territorial courts. The men who framed the constitution were familiar with the powers then exercised by the judges at chambers, and in using that term it is fair to infer that they had reference to such powers. ... Under the law as it then existed, judges of territorial courts could at chambers entertain, try, hear, and determine all actions,

causes, motions, demurrers, and other matters not requiring a trial by jury. Section 2138, Code 1881.

Peterson v. Dillon, 27 Wash. 78, 83-84, 67 P. 397, 399 (1901).<sup>2</sup>

Shortly after adoption of the state constitution, this Court addressed an issue regarding the taking of testimony outside of the courtroom, and held that where there wasn't any injury from the claimed error, reversal wasn't warranted:

The respondent was not able to go to the courthouse at the time of the trial, and his testimony was taken at his residence, in the presence of the judge, jury, and counsel for the respective parties; and the appellant now claims that the proceeding was contrary to law, and that the judgment ought to be reversed on account thereof. The proceeding was, no doubt, irregular, but it does not appear that it was objected to at the time, nor can we see that the appellant was in any wise injured or prejudiced thereby. Error without injury is not a sufficient ground of reversal.

Sutton v. Snohomish, 11 Wash. 24, 33, 39 Pac. 273 (1895). Therefore, it appears at the time Art. 1 §22 was adopted not all judicial proceedings were held in "open court", and by law and the constitutional provisions,

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<sup>2</sup> See also, State v. Claypool, 132 Wash. 374, 375, 232 P. 351 (1925):

... the powers of a judge at chambers, as defined by section 2138 of the Code of 1881, were these:

'The several judges of the district courts ..., may, at chambers, in vacation, entertain, try, hear and determine, all actions, causes, motions, demurrers and other matters not requiring a trial by jury; and all rulings, orders, judgments and decrees, made or rendered by a judge of the district court at chambers, ..., and shall have like force and effect as though made or rendered at a regular term of the district court.'

were permitted to occur “at chambers.” Furthermore, “irregularities” regarding open proceedings was not necessarily grounds for reversal.

Subsequently, in 1957 this Court did not reverse a conviction despite the fact that a trial court had locked a courtroom door during closing arguments at the request of the prosecutor so that the jury would not be disturbed. State v. Collins, 50 Wn.2d 740,746, 314 P.2d 660 (1957).<sup>3</sup> In doing so, it noted the defendant had made no claim of actual prejudice and had not objected below, concluding that the “defendant did have a public trial within the purview of our constitutional provisions.” *Id.* at 748. On the other hand, where there was a complete deprivation of the right to public trial, where the criminal trial of a young adult “was held in private” under the auspices of a juvenile proceeding, and where no court reporter was present and no verbatim record of the trial was made, the court reversed the conviction, without requiring a show of prejudice. State v. Marsh, 126 Wash. 142, 143-47, 217 P. 705 (1923).

Decisions over the years have not made a distinction between the federal right to public trial constitutional provision and the state constitutional provision. *See, e.g.*, State v. Wise, 176 Wn.2d 1, 9-14, 288 P.3d 1113 (2012); State v. Brightman, 155 Wn.2d 506, 514-17, 122 P.3d

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<sup>3</sup> While the Court rested its decision on the theory that the defendant could not raise the issue for the first time on appeal, the result is the court permitted a partial closure of the courtroom to occur without overturning the conviction. Collins, 50 Wn.2d at 748.

150 (2005); State v. Gaines, 144 Wash. 446,464, 258 P. 508 (1927) (no violation of defendant’s right to public trial guaranteed by the state constitution or federal constitution where general public was admitted to extent of courtroom’s capacity). Moreover, throughout its jurisprudence this Court has relied upon federal decisions in interpreting the state constitutional right to public trial. For example, the closure standard under Bone-Club mirrors the closure standard announced in Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). State v. Bone-Club, 128 Wn.2d 254, 259-60, 906 P.2d 325 (1995). The remedy for a violation of the right to public trial is also derived from Waller. *See, Wise*, 176 Wn.2d 1, at 16-19; State v. Momah, 167 Wn.2d 140, 149-50, 217 P.3d 321 (2009), *cert. den.* 131 U.S. 160 (2010). Recently, in State v. Sublett, this Court adopted the federal “experience and logic” test to determine whether the right to public trial extends to a particular proceeding. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012).

The only context in which this Court has deviated from federal analysis has been regarding issue preservation. Contrary to federal law, in Washington a defendant need not object at the time of the alleged closure in order to be able to assert the issue on appeal. *See, Bone-Club*, 128 Wn.2d at 257; *but see, Levine v. U.S.*, 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960). However, the issue of waiver is not an issue subject

to Gunwall analysis. *See, State v. Benitez*, 175 Wn. App.116, 302 P.3d 877, 883 (2013) (Gunwall determines scope of a state constitutional right, not whether the right may be waived or the legal standard for waiving it).

The fifth factor always supports an independent state constitutional analysis because the U.S. Constitution is a grant of limited authority, whereas the State Constitution imposes limitations on governmental power. *Foster*, 135 Wn.2d at 458-59. While this factor generally supports the notion that the state constitution is more protective, it “does not shed any light” on the analysis of a particular constitutional provision. *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

When considering the sixth factor, the court is “to determine whether the right claimed, in the context of the particular case before us, is a matter of such singular state interest or local concern that our constitution should be interpreted independently of the federal constitution.” *Foster*, 135 Wn.2d at 461. While the concerns underlying a *defendant’s* right to a public trial are not unique to Washington, the State recognizes that Washington has a greater public interest in open proceedings given its explicit provision in Art. 1 §10. However, this greater interest in the public’s right does not mean that a *defendant’s* public trial right is of such a singular state concern that Art. 1 §22 should be interpreted independently of the Sixth Amendment.

**D. CONCLUSION**

Appellate has failed to demonstrate that a *defendant's* right to public trial under Art. 1 §22 should be analyzed independently. Even if an independent analysis were warranted, it would not mean that a de minimis exception would violate the state constitution. *See, Martin*, 171 Wn.2d at 536 (although Art. 1 §22 warranted an independent analysis under Gunwall in context of scope of cross examination of defendant, state didn't violate Art.1 §22 where defendant's credibility was at issue); Foster, 135 Wn.2d at 474, J. Alexander concurring (although independent analysis under Art. 1 §22 was warranted, statute permitting certain witnesses to testify via closed-circuit did not violate state constitution). Permitting a de minimis exception under the state constitution would be consistent with this Court's continued reliance on Waller, which stands for the proposition that not every violation of a defendant's right to public trial results in structural error warranting a new trial.

DATED this 28<sup>th</sup> day of August, 2013.

Respectfully submitted,

  
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## OFFICE RECEPTIONIST, CLERK

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Dear Clerk, Attached please find the Supplemental Brief of Respondent in Case No. 86513-2, State of Washington vs. Ronald Applegate filed by Attorney Hilary Thomas, Deputy Prosecuting Attorney, WSBA # 22007  
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