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NO. 36625-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC WISE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 23 PM 4:28

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

The Honorable Toni A. Sheldon, Judge

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DIVISION II
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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED WISE'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The trial court conducted private, in-chambers voir dire of 10 prospective jurors. The court did not first engage in the requisite balancing test articulated more than a decade ago in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Yet the state contends this Court should affirm appellant Eric D. Wise's convictions because the court did not "close" the courtroom during the procedure.[1] Brief of Respondent (BOR) at 4-15. Wise disagrees.

While the court did not order the actual courtroom to be closed or emptied of all spectators, it did the functional equivalent by conducting individual voir dire in the privacy of chambers. The state's claim should be rejected.

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[1] The state begins by asking this Court to defer a decision of this issue pending our Supreme Court's decision in *State v. Strode*, No. 80849-0. According to the "Acords" database, *Strode* will not be argued until June 10, 2008. Wise requests this Court reject the state's invitation and rule on the merits of his case.

a. State v. Momah does not comport with well-established Supreme Court case law and should be rejected.

The state skates on thin jurisprudential ice by relying on *State v. Momah*,[2] which Wise discussed extensively in his Brief of Appellant (BOA) at 10-14. The basic premise of *Momah* is that a judge's chambers are presumptively open to the public upon request to enter during the course of private, individual voir dire:

> Other than the entry and exit of the individual jurors and the questioning that ensued for each, there is nothing in this record indicating any attempt by either the press or the public (including members of Dr. Momah's family) to gain admittance to witness voir dire. We simply do not know what would have happened if such an attempt had been made either during the morning or afternoon sessions of voir dire. We will not speculate on whether the trial court would have ordered closure if any attempt had been made by anyone to join the judge, counsel, Dr. Momah, and the court reporter in chambers or in the jury room.

Momah, 141 Wn. App. at 712.

With all due respect to the court's opinion in *Momah*, there need be no "record to indicate that any member of the public . . . or the press was excluded from voir dire" when questioning of individual jurors occurred in the court's chambers. *Momah*, 141 Wn. App. at 712. The notion that members of the press or public would have been admitted into

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[2] 141 Wn. App. 705, 712, 171 P.3d 1064 (2007), *review granted*, No. 81096-6, 2008 Wash. LEXIS 283 (4/1/2008).

the court's chambers to observe private voir dire had they requested entry would not only have defeated the purpose of the procedure, but is realistically ludicrous.

Proceedings occurred in chambers in Wise's case to facilitate privacy. *See* BOA at 4-5; BOR at 4-5. "Privacy" does not exist when the judge's chambers becomes a public viewing area. If that were the case, there would be no need to question prospective jurors in chambers rather than in the courtroom. An open courtroom in which nothing is happening is hardly what the founding fathers meant by a "public trial." The state can find no legally supportable refuge in *Momah* and this Court should reject the state's reliance on that flawed case.

b. The state's reliance on "HIPAA"[3] is misplaced.

The state maintains that had one of the 10 prospective jurors "been forced to discuss his/her personal and/or family medical concerns in open court, HIPPA [*sic*] would have been breached." BOR at 13-14. Wise disagrees.

The Health Insurance Portability and Accountability Act has no application here. "HIPAA protects individuals from unwarranted dissemination of medical and mental health records by restricting access to

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[3] Health Insurance Portability and Accountability Act of 1996.

such records without the individual's direct consent." *In re the Matter of C.B.*, 865 N.E.2d 1068, 1072 (Ind. App. 2007).

The juror in Wise's case obviously consented to sharing medical information about him/herself. Neither the court nor the parties compelled the prospective jurors to reveal anything about their medical conditions. Nor was there a request for disclosure of medical or mental health records.

In addition, the state's argument fails to address the private voir dire of the other nine prospective jurors. This Court should summarily reject the state's claim.

c. Voir dire must occur in open court.

The obvious and proper procedure for dealing with prospective venire panel contamination or embarrassment is to temporarily remove remaining panel members from a courtroom otherwise left open to the public and media. BOA at 9. Only in this manner can the public right to trial be honored. Personal embarrassment does not trump this right. *See, e.g.*, *People v. Gacy*, 103 Ill.2d 1, 36, 468 N.E.2d 1171, 1184, 82 Ill.Dec. 391, 404 (1984) ("While it is true that prospective jurors may be reluctant to discuss their attitudes towards homosexuality, or prior dealings with the criminal justice system, this danger may exist in any voir dire, and the presence of the news media was not reason enough to close the proceedings to the public."), *cert. denied*, 470 U.S. 1037 (1985).

The state objects to this procedure, calling it "illogical, for it accomplishes the same effect as bringing jurors into chambers." BOR at 14. This statement suggests an inability to grasp the constitutional importance of a public trial. A courtroom open to the public has no meaning if trial proceedings, including voir dire, are held elsewhere. Bringing individual jurors into chambers deprives the defendant of his right to a public trial and of the public's right to view a justice system its tax money funds. Far from accomplishing "the same effect," private, in-chambers voir dire accomplishes the opposite effect of Wise's proposed solution.

The state also raises the question of "what would have become of the venire had they been sent out of the courtroom." BOR at 14. The "likely" result would have been, according to the state, a "contaminat[ion of] the greater portion of the venire[.]" BOR at 15.

Setting aside the speculative nature of this claim, the state's concerns could be assuaged by an instruction from the trial court directing prospective jurors not to discuss anything associated with the case and not to conduct independent research. This instruction is used in trial every day in courts across the state, every time sitting jurors recess for lunch and at the end of each trial day.

Crafting such an instruction would add no additional burden, because WPIC 1.01 provides the following in pertinent part:

> It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.
>
> Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.
>
> During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult any reference materials, such as dictionaries and the like. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate.
>
> Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

There is no reason to believe such an instruction would not have the desired effect. After all, jurors are presumed to follow the court's instructions. *State v. Daniels*, 160 Wn.2d 256, 264, 156 P.3d 905 (2007).

Wise urges this Court to reject the state's arguments.

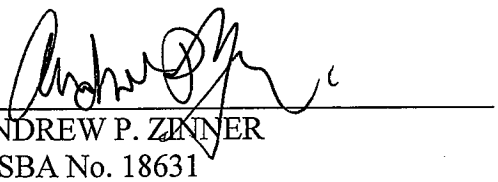
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Wise requests this Court to reverse his convictions and remand for retrial.

DATED this 23 day of April, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Respondent,	)	
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vs.	)	COA NO. 36625-8-II
	)	
ERIC D. WISE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF APRIL 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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x Patrick Mayovsky

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