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No. 36625-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC D. WISE,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Toni A. Sheldon, Judge
Cause No. 07-1-00190-5

BRIEF OF RESPONDENT

EDWARD P. LOMBARDO
Deputy Prosecuting Attorney for
Gary P. Burlison, Prosecuting Attorney

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Tel: (360) 427-9670 Ext. 417
Fax: (360) 427-7754

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A. ASSIGNMENT OF ERROR

1. The trial court violated the appellant's constitutional rights to a public trial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Wise receive a public trial when the trial court judge never closed the courtroom?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Supplemental Report of Proceedings shall be referred to as "SUPP-RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Wise's recitation of the procedural history and facts and adds the following:

During voir dire, Juror No. 43 requested to go back into chambers twice to discuss his/her concerns. SUPP-RP 17: 19; 20: 6. Once in chambers, the clerk noted the following:

Juror No. 43 taken into chambers for questioning and the following is heard in the presence of all parties. SUPP-RP 21: 6-7.

In chambers, Juror No. 43 made several comments, two of which pertained to medical issues. SUPP-RP 21: 14-25; 22: 1-5. As Juror No. 43 stated:

And then I work in EFI Friday and I have a bad back and I can't stand being sitting down for a lot of time. And I'm ready to go and take care of my daughter also that havin' a – she's havin' a baby in Chicago. I'm leaving the 10th and I'm not coming back until the 17th. SUPP-RP 22: 1-5.

Later in her comments to all parties in chambers, Juror No. 43 reiterated these concerns and added that “there's another little problem too”:

I was going to – I didn't make an appointment, but I was going to go to the doctor today, my day off today. I think that I might have some kind of infection in my eyes. I don't know if it's pink eye or a different...it's scaring me though. SUPP-RP 23: 3-9.

In response to Juror No. 43's medical concerns, the trial court responded by stating:

Well, with the constellations of things that you have going on, I will excuse you as a juror and I'll ask that you call back into the jury recording number this evening after 5:00 PM to find out what your next instructions are. SUPP-RP 23: 10-14.

Later during voir dire and after answering questions from Wise's attorney, Juror No. 42 told the court: “I would like to discuss something in chambers, though.” SUPP-RP 61:16-17. In chambers, the following colloquy occurred between Juror No. 42 and the parties:

The Court: Juror No. 42, if you'll have a seat on this chair. And you indicated that there was something to bring to our attention. So, when you're settled there, go ahead.

Juror No. 42: On the burglary, I was the defendant. I don't know if you guys knew that or not.

Mr. Schuetz: Well, I appreciate it.

Juror No. 42: [Inaudible] didn't want it to come out later on and then, obviously, I'm embarrassed by this whole thing.

Mr. Schuetz: Appreciate it. We're not here to embarrass you.

SUPP RP 70: 13-25.

Throughout voir dire, eight additional jurors either requested or were asked to go into chambers to discuss various concerns: Nos. 9, 14, 19, 20, 22, 29, 48, and 49. SUPP-RP: 23: 23-25 (No. 9); 71: 71: 25; 72: 1-5 (No. 14); 25: 5-7 (No. 19); 32: 6-8 (No. 20); 26: 16-18 (No. 22); 34: 3-5 (No. 29); 28: 20-22 (No. 48); 36: 9-12 (No. 49).

Following peremptory challenges, the panel was accepted as constituted through Juror No. 38. SUPP-RP 78: 7-17. Wise's case ultimately went to trial, and the jury convicted him of burglary second degree and theft in the first degree on June 28, 2007. RP 228: 5-13.

3. Summary of Argument

Wise received a public trial because the trial court judge never closed the courtroom, which would have triggered a Bone-Club analysis. Bone-Club does not apply in Wise's case. Because the State Supreme Court heard oral argument on this issue in State v. Strode, No. 80849-0, on February 14, 2008, the State asks for a stay pending decision should this Court decide that the Bone-Club factors do apply.

Had the trial court judge conducted individual voir dire in chambers without Wise being present and/or on the record, then his public trial rights could have been breached. The trial court judge correctly conducted individual voir dire in chambers with all parties present on the record because it both afforded Wise a public trial and upheld the privacy rights and dignity of the jurors themselves. A defendant's right to a public trial is not absolute, and should not come at the expense of violating HIPPA for those jurors with medical conditions. Division 1's rationale in State v. Momah is correct, in that:

[A] 'door' to a courtroom being closed, which occurs in most proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public. Momah, 141 Wash.App. 705, 715, 171 P.3d 1064 (2007).

Division 3's rationale in State v. Duckett that individual juror questioning in-chambers violates a defendant's public trial rights is illogical, for it fails

to properly address: (a) the privacy rights of the jurors themselves; and (b) HIPPA for any jurors that have medical concerns.

The trial court's decision in Wise's case is complete, correct and should be affirmed.

E. ARGUMENT

1. WISE RECEIVED A PUBLIC TRIAL BECAUSE THE TRIAL COURT JUDGE NEVER CLOSED THE COURTROOM.

Wise received a public trial because the trial court judge never closed the courtroom.

Whether a trial court procedure violates the right to a public trial is a question of law that is reviewed de novo. State v. Duckett, 141 Wash.App. 797, 802, 173 P.3d 948 (November 27, 2007, Div. 3) Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. State v. Momah, 141 Wash.App. 705, 708, 171 P.3d 1064 (November 13, 2007, Div. 1); see Duckett, 141 Wash.App. at 803. Similarly, article I, section 10 provides that '[j]ustice in all cases shall be administered openly...' Momah, 141 Wash.App. at 708; see State v. Easterling, 157 Wash.2d 167, 174, 137 P.3d 825 (2006). These rights extend to jury selection, which is essential to the criminal trial process. Momah, 141 Wash.App. at 708; see In re Pers. Restraint of Orange, 152 Wash.2d 795, 804, 100 P.3d 291 (2004).

To protect these rights, a court faced with a request for trial closure must weigh five factors, known as the Bone-Club factors, to balance the competing constitutional interests. Momah, 141 Wash.App. at 709; see State v. Bone-Club, 128 Wash.2d 254, 258-259, 906 P.2d 325 (1995).

The five Bone-Club factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right 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 to the closure;
3. The proposed method for curtailing open access 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 application or duration than necessary to serve its purpose.
Bone-Club, 128 Wash.2d at 258-259.

To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. Momah, 141 Wash.App. at 708. The trial court must consider the alternatives and balance the competing interests on the record. This test mirrors the one articulated by the United States Supreme Court to protect the Sixth

Amendment right to a public trial and the First Amendment right to open hearings. We look to the plain language of the closure request and order to determine whether closure occurred, thus triggering the Bone-Club factors.

Once the reviewing court determines there has been a violation of the constitutional right to a public trial right, '[p]rejudice is presumed' and a new trial is warranted. 141 Wash.App. at 709. On the other end of the spectrum from a full closure is a trial court's inherent authority and broad discretion to regulate the conduct of a trial. Thus, a 'closure' in which one disruptive spectator is excluded from the courtroom for good cause will not violate the defendant's right to a public trial even absent an analysis of the Bone-Club factors. Likewise, limited seating by itself is insufficient to violate the defendant's public trial right.

When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request. 45 CFR 164.502(b)-Uses and disclosures of protected health information: general rules-Health Insurance Portability and Accountability Act (HIPAA) of 1996.

Two cases, Momah and Duckett, issued by Divisions 1 and 3 on November 13 and 27, 2007 respectively, are comparable to Wise's case because they squarely address the issue of voir dire in terms of public trial rights. In Momah, the defendant was charged with multiple sex crimes. Momah, 141 Wash.App. at 707. Due to the nature of the charges and the extensive media coverage, a large number of potential jurors were called for voir dire by the parties and the trial court. Some of the potential jurors asked to be questioned individually, and the court and both counsel agreed to honor those specific requests. Some jurors had been exposed to media coverage about the case, also requiring individual juror questioning to avoid jury contamination.

On the second day of voir dire, the trial court had 52 potential jurors that needed to be examined further, as 48 of them had been excused the previous day. Momah, 141 Wash.App. at 709. The trial court informed all parties that it had a list of eight jurors who wanted private questioning, and both the prosecution and defense agreed that this should occur. Momah, 141 Wash.App. at 709-710. The trial court then divided the prospective jurors who were to be questioned individually into two groups, the first group of 20 to be questioned that morning. Momah, 141 Wash.App. at 710. The rest were released with instructions to return for questioning that afternoon.

Shortly after the second group of potential jurors had been released, the record reflects that the trial court, the prosecution, defense, defendant Momah and the court reporter moved into chambers adjoining the presiding courtroom. Once in chambers, the record states:

We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36...Momah, 141 Wash.App. at 710.

Following questions by counsel and the court, prospective juror number 36 left chambers and prospective juror number 2 entered chambers. The record does not reflect whether the door to chambers was closed during this questioning or subsequent individual questioning of the prospective jurors during the morning session. During the afternoon session, the individual questioning continued with the second group of prospective jurors in a similar manner. Momah, 141 Wash.App. at 711. A jury was empanelled, the trial occurred, and defendant Momah was found guilty of rape and indecent liberties. Momah, 141 Wash.App. at 707.

On appeal, defendant Momah made two main arguments: (1) The record establishes that the trial court closed voir dire, infringing on his right to a public trial; and (2) the record supports his view that the burden of proving there was no closure and that the requirements of Bone-Club

and its progeny were fulfilled and shifted to the State. Momah, 141 Wash.App. at 711.

Division 1 of the Court disagreed with both of defendant Momah's arguments. Per the Court, nowhere in the record is there any evidence that the trial judge expressly closed voir dire to the public or press in violation of any of the controlling cases. Rather, the record expressly shows that the trial court, in response to the express request of defendant Momah, agreed to allow voir dire by individual questioning of prospective jurors who indicated prior knowledge about the case. Momah, 141 Wash.App. at 710-711.

Significantly, defendant Momah's request was based on the concern that prospective jurors might have knowledge about the case that could disqualify them, or that they might contaminate the rest of the prospective jurors with such knowledge. In addition, the trial court and the parties agreed to individually question jurors in response to their express requests. Per the Court, there is simply no indication in the record that the individual questioning was for the purpose of excluding either the press or the public from the trial. Momah, 141 Wash.App. at 712-713. The Court also reasoned that nothing in the record indicates that any member of the public, including defendant Momah's family, or the press was excluded from voir dire. The record is also devoid of any mention

that either the press or the public attempted to gain admittance to witness voir dire.

In looking at the plain-language of the transcript, the Court reasoned that no statement or order by the trial court triggered the application of the Bone-Club factors or shifted the burden to the State to prove that the proceeding was open. Momah, 141 Wash.App. at 714. Instead, the Court reasoned that a proceeding is not automatically closed to the public if it occurs in chambers and stated:

[A] ‘door’ to a courtroom being closed, which occurs in most proceedings, is not the same as a ‘proceeding’ in that courtroom being closed to the public. Momah, 141 Wash.App. at 715.

To the extent that Frawley holds that all in-chambers proceedings are per se closed to the public, Division 1 of the Court declined to follow Division 3’s reasoning in that case. See State v. Frawley, 140 Wash.App. 713, 167 P.3d 593 (2007).

Division 3 of the Court in State v. Duckett, by contrast, held that defendant Duckett’s right to a public trial was violated because the trial judge never advised him of his right to a public trial, nor asked him to waive this right. Duckett, 141 Wash.App. at 806-807.

In Duckett, the State charged the defendant with multiple sex crimes and one count of burglary in the first degree. Duckett, 141

Wash.App. at 801. The case proceeded to trial in Spokane County Superior Court, and the trial judge told the prospective jurors that they would be provided with a questionnaire containing ‘some questions that are somewhat of a personal nature.’ Specifically, the questionnaire asked two questions concerning the prospective jurors’ experiences with sexual abuse. The trial judge told the jurors that the questionnaires would be filed in the court file under seal and would not be accessible to anyone without a court order.

The trial court told defendant Duckett and his attorney that follow-up questioning of those jurors whose questionnaire responses indicated some experience with sexual abuse would take place outside the courtroom stating, “I generally do it in my jury room, Counsel, so as to maintain some privacy.” A total of 16 jurors were apparently questioned in chambers, although the record did not contain any transcript of this voir dire. Defendant Duckett waived his right to be present during this questioning. A jury was selected and empanelled, and following a two-day trial Duckett was found guilty of rape in the second degree.

On appeal, Division 3 reversed defendant Duckett’s conviction, reasoning that the guaranty of open criminal proceedings extends to ‘the process of juror selection,’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’ Duckett, 141

Wash.App. at 806-807, Quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The Court reasoned that while only a limited portion of voir dire was held outside the courtroom, the trial court was required to engage in a Bone-Club analysis.

As the State Supreme Court recognized in Orange and Easterling, the guaranty of a public trial under our constitution has never been subject to a de minimus exception. Orange, 152 Wash.2d at 812-814; Easterling, 157 Wash.2d at 180-181. Per Division 3, the closure in Duckett was deliberate and the questioning of the prospective jurors concerned their ability to serve; something that, per the Court, cannot be characterized as ministerial in nature or trivial in result. Duckett, 141 Wash.App. at 809.

Ultimately, Division 3 held that the trial court violated defendant Duckett's public trial right by conducting a portion of voir dire in chambers without first weighing the necessary factors. Prejudice is presumed, and the remedy is a new trial. Duckett, 141 Wash.App. at 809; citing Bone-Club, 128 Wash.2d at 261-262.

In Wise's case, Bone-Club was never triggered because the trial court judge never closed the courtroom. While approximately 10 jurors were questioned in chambers, Nos. 42 and 43 expressly requested to talk with the parties outside the presence of the venire. SUPP-RP 61: 16-17 (No. 42); SUPP-RP 17: 19 (No. 43). Had Juror No. 43 been forced to

discuss his/her personal and/or family medical concerns in open court, HIPPA would have been breached. 45 CFR 164.502(b). As Division 1 succinctly reasoned in Momah:

[A] 'door' to a courtroom being closed, which occurs in most proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public. Momah, 171 P.3d at 1069.

Division 3's rationale in Duckett is inconsistent with the day to day reality of how the criminal justice system functions. Were the rationale in Duckett controlling, a defendant's right to a public trial would be achieved at the expense of the public itself; jurors would be forced to explain oftentimes embarrassing or humiliating medical conditions and/or personal situations in open court.

By allowing jurors who have such concerns to go back into chambers with all parties on the record both protects a defendant's public trial right and preserves the privacy and dignity of the jurors, not to mention the integrity of the criminal justice system itself. Wise's argument that the courtroom itself be cleared and the individual questioning occur in open court is illogical, for it accomplishes the same effect as bringing jurors into chambers. Wise's argument also raises the question of what would have become of the venire had they been sent out of the courtroom.

Not having been released from their jury service yet, they likely would have stood around in the hallways or waited outside the courthouse until the individual questioning was over. This in turn could have created situation where the venire would talk with others who were not involved in the case, or perhaps even potential witnesses, the media and/or the press. Contaminating the greater portion of the venire in Wise's case at the expense of questioning a few jurors individually would simply have frustrated judicial economy and unnecessarily thrown a wrench into the wheels of justice.

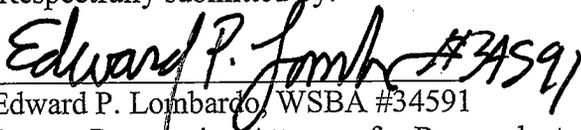
Wise received a fair and public trial, and the decision of the trial court is complete, correct and should be affirmed.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 24TH day of MARCH, 2008

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

08 MAR 26 PM 1:03

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

STATE OF WASHINGTON
BY _____
DEPUTY

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No. 36625-8-II
DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

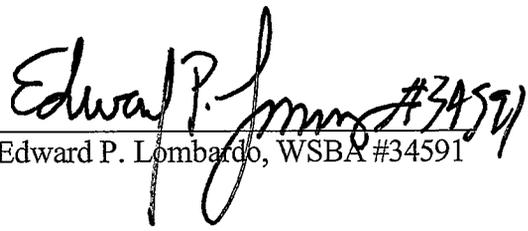
I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, MARCH 24, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Andrew P. Zinner
Nielson, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 24TH day of MARCH, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591