SUPREME COURT NO. 84585-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RENE P. PAUMIER,

Respondent.

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King County Prosecutor
Appellate Unit

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ANSWER TO STATE'S AMICUS CURIAE BRIEF

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A. ISSUES IN RESPONSE TO STATE'S AMICUS CURIAE BRIEF

In its amicus curiae brief, the Washington Association of Prosecuting Attorneys (WAPA) asks this Court to overrule its recent decisions[1] and to hold a criminal defendant waives the right to appeal a trial court's exclusion of the public during a portion of jury selection by failing to contemporaneously object.

Does the State's request miss the precise point of this Court's decision in State v. Bone-Club?[2]

Do the recent decisions "diverge," as the State maintains, from earlier precedent requiring such an objection?

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[1] State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); State v. Momah, 167 Wn.2d 140, 155, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010); State v. Brightman, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005); see also In re Personal Restraint of Orange, 152 Wn.2d 795, 801-02, 814, 100 P.3d 291 (2004) (despite defense trial counsel's failure to object, appellate counsel's failure to challenge trial court's exclusion of defendant's family from jury selection "was both deficient and prejudicial and therefore constituted ineffective assistance of counsel.").

[2] State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995).

B. ARGUMENT

FAILURE TO CONTEMPORANEOUSLY OBJECT TO AN EXCLUSION OF THE PUBLIC FROM A PORTION OF VOIR DIRE DOES NOT EFFECT A WAIVER FOR PURPOSES OF CHALLENGING THE EXCLUSION ON APPEAL.[3]

1. Introduction

WAPA urges this Court to hold that a defendant waives the right to challenge a trial court closure if he or she fails to contemporaneously object at trial. In other words, it asks this Court to reverse a well-established rule that properly places the responsibility on the trial court to weigh five factors, known as the "Bone-Club" factors, before closing a court proceeding to the public. After all, when a trial court is contemplating a closure of any kind, it is aware or should be aware of the implications of its actions, no matter who seeks closure. It is the judge and the judge alone who controls public access to his or her courtroom.

This is the point of this Court's Bone-Club decision. If this Court adopted a contemporaneous objection rule, the parties rather than the trial court would control the Bone-Club requirements. But it is the trial judge, not the parties, who bears the responsibility to ensure justice is

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[3] WAPA makes the same argument in its amicus curiae briefs in State v. Wise, Supreme Court No. 82802-4, and State v. Paumier, Supreme Court number 84585-9. Counsel refers to both Wise and Paumier in this response.

administered openly. See State v. Momah, 167 Wn.2d 140, 158-59, 217 P.3d 321 (2009) (Alexander, C.J, dissenting) ("Findings spread on the record are particularly critical in a case where no one objects to closure, since in such circumstances the judge has an overriding responsibility to safeguard the constitutional right to a public trial."); State v. Easterling, 157 Wn.2d 167, 187, 137 P.3d 825 (2006) (Chambers, J., concurring) ("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.").

The State overlooks or ignores this fundamental point.

Furthermore, WAPA's central claim is premised on a fallacy:

> A great deal of conflict has resulted in the appellate courts over how to adjudicate these appeals because, on the one hand, the courts recognize the importance of the right, but on the other hand, *they recognize the injustice of applying a harsh automatic reversal rule to a claim that was never brought to the attention of the trial court.*

WAPA Amicus Brief at 2 (emphasis added). WAPA apparently believes a waiver rule is required to remedy the "injustice" of reversing convictions where the trial court shirks its duty to safeguard public justice. If fails, however, to present examples indicating the courts share this concern.

Even in Momah, this Court considered defense counsel's failure to object to in-chambers voir dire as merely one factor supporting its

conclusion a reversal and remand for retrial was not the appropriate remedy. 167 Wn.2d at 155. In finding Momah tactically chose to use private questioning, this Court considered: (1) defense counsel, the prosecution, and the judge discussed numerous proposals regarding jury selection; (2) Momah's failure to object; (3) "defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid 'contamination'" of the venire by jurors with some knowledge of the case; and (4) defense counsel "affirmatively" agreed to, participated in, and "even argued for the expansion of in-chambers questioning." Id. Critically, this Court also found, "Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests." Momah, 167 Wn.2d at 151-52.

The State's overall argument, based as it is on a faulty premise, should fall. For these reasons alone, this Court should reject WAPA's proposal.

2. There is no historical pattern of applying a contemporaneous objection rule where a trial court closes a proceeding.

WAPA asserts public trial claims have historically been subject to a waiver rule. Amicus Brief at 9-15. The problem for WAPA is that,

nearly 100 years ago, this Court in State v. Marsh, 126 Wash. 142, 145-46, 217 P. 705 (1923), rejected the same argument long ago. Marsh remains vital today. See Bone-Club, 128 Wn.2d at 257 ("We also note Defendant's failure to object contemporaneously did not effect a waiver. State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923))."

The State charged Marsh, an adult, with contributing to the delinquency of a minor. Because the crime was defined and punishment fixed by a section of the Juvenile Court Law, Marsh's trial was called in the juvenile department of Spokane County Superior Court. Marsh, 126 Wash. at 142-43. The matter of a jury was not mentioned, the court did not impanel a venire, and neither Marsh nor anyone on his behalf demanded a jury. The defendant was advised of and waived his statutory right to obtain an attorney. Id. at 143.

The trial was held in private, but for the presence of Marsh's parents and "several ladies representing social service organizations, per custom of the court." Id. This was consistent with a Juvenile Court Law provision authorizing the trial court to exclude members of the general public except for those having a direct interest in the case. Id. at 144. Marsh was convicted as charged. Id. at 142.

For the first time on appeal, Marsh "assigned as error that he was not given the right to a public trial as guaranteed by article 1, § 22, of the state Constitution." Id.

The State – just as it does here – argued Marsh waived the issue by failing to object to the closure at trial. Just as it should here, this Court emphatically rejected the waiver claim. This Court first relied on State v. Crotts, 22 Wash. 245, 60 P. 403 (1900), where the defendant argued the trial court violated article 4, section 16, by commenting on the evidence. Marsh, 126 Wash. at 145-46. Rejecting the same waiver claim asserted here, the Crotts Court held:

> Again, where the constitutional right has been invaded, it has been held by this court that no failure of objection or exception should stand in the way of considering errors based on the violation of such provisions.

Crotts, 22 Wash. at 249.

The Marsh Court also cited to what it described as "the well-considered case of" State v. Hensley, 75 Ohio St. 255, 261-62, 79 N.E. 462 (1906), where the trial court closed to the general public most of the criminal trial. The defendant did not object to the closure, and the State argued his failure waived the challenge that the trial court violated his state constitutional right to a public trial. Hensley, 75 Ohio St. at 266.

The Ohio Supreme Court concisely repudiated this waiver claim in the following language quoted by this Court in Marsh: "This objection ignores the force and effect of the constitutional provision. The right to a public trial is guarantied." Hensley, 75 Ohio St. at 266, cited by Marsh, 126 Wash. at 146.

Having plainly rejected the State's waiver argument, the Marsh Court had little trouble finding a violation of the right to a public trial:

> The juvenile court is a department of the superior court, its judge is a superior court judge, and the fact that that department is given jurisdiction in the trial of such criminal cases does not authorize the deprivation of the right of a defendant in a criminal case *to a public trial*, simply because of the right or the power of the judge of that department to conduct a private hearing in a case involving only a delinquent or dependent child.

Marsh, 126 Wash. at 144 (emphasis added).

This rather exhaustive discussion of Marsh is in contrast to, and designed to expose the fallacies of, the State's dismissive presentation of the case in note 5 of its Amicus Brief at 12. There the State points out the proceeding was

> wholly closed, without a jury, without a lawyer, and without a court reporter to make a record. Not surprisingly, this Court found that the entire proceeding was illegal and reversed the conviction on appeal, even though objection was never made at trial.

This is misleading; Marsh assigned error under the public trial right guaranteed to criminal defendants by article 1, section 22, and this Court

held the "failure of the court to give the appellant a public trial was reversible error." Marsh, 126 Wash. at 147.

This Court was neither asked to, nor did, rule on the appellant's right to a jury trial, or to counsel, or to the preservation of a record for appeal. Marsh plainly held the failure to contemporaneously object does not waive the right to challenge a closure for the first time on appeal.

In further support of its waiver argument, the State relies on an Arizona case cited by this Court in State v. Collins, 50 Wn.2d 740, 748, 314 P.2d 660 (1957). That case, Keddington v. State, 19 Ariz. 457, 459, 172 P. 273 (1918), is not apt here.

First, the trial court initially ordered the public be excluded from the courtroom but for witnesses and relatives of the defendants. The appellant objected, contending the order would deprive him of a public trial. The court later modified the closure order by permitting newspaper reporters to remain at trial as well. To this expansion the appellant did not object. Keddington, 19 Ariz. at 458.

The court held the failure to object to the modified order constituted a waiver of his right to raise a public trial challenge. Keddington, 19 Ariz. at 462. More specifically, the Court reasoned:

> [W]e think it reasonably appears that the appellant was satisfied with the modified order for, although he objected to the order as

> first made, he made no objection or protest after its modification allowing newspaper reporters to remain at the trial. One of the reasons for requiring a public trial is that the accused can have whatever protection it may afford him. It is, then, to a certain extent, for his personal benefit. If he expresses a desire to have the attendance of the public limited or entirely prohibited, or if he, by his conduct, leads the court to believe he is satisfied with the order in that regard and the court acts in good faith, and not arbitrarily, it would seem that, in all fairness and justice, he should be precluded, after conviction, from urging for reversal in order that he invited, or tacitly consented to, by remaining silent.

Id., 19 Ariz. at 462.

In other words, Keddington holds that by failing to object to the modified order expanding public access, after objecting to the court's more limited closure motion, the defendant "invited" the limitation on public access, or at least tacitly led the court to believe the modification satisfied him. Having done that, it would not be fair and just to then permit the defendant to challenge the expanded order on appeal. Keddington, 19 Ariz. at 462.

Keddington's waiver analysis, considered within its factual context, bears some logical resemblance to this Court's decision in State v. Momah, 167 Wn.2d 140, 151, 217 P.3d 321 (2009), albeit to achieve different results. Momah relied on the defendant's unusual degree of participation and particular request for private jury selection not to find waiver, but rather to deny him the remedy of a retrial. 167 Wn.2d at 151-52. Indeed,

this Court acknowledged that "[w]hile Momah does not present a classic case of invited error, the doctrine and the factors courts have used in cases applying it are helpful for the purposes of determining the appropriate remedy in this case." 167 Wn.2d at 154.

Notably, however, this Court did not find Momah waived his right to raise the challenge to the trial court's closure; it instead held only that "being able to raise an issue on appeal does not automatically mean reversal is required." 167 Wn.2d at 155.

Just as in Momah, the unusual facts presented in Keddington begat an unusual, case-specific result. Counsel found no Arizona cases that have cited Keddington. Keddington's facts do not apply in either Wise or Paumier, because neither defendant invited the trial court's closures or tacitly signaled his acquiescence to the private nature of the proceedings after an earlier objection.

Furthermore, it appears the Keddington Court would not have reached the same result under the facts in Wise or Paumier. The Court observed that

> [n]o authority can be found that would sustain an order excluding everybody from attending a trial except the defendant, his counsel, the jury, the court, and the officers of the court. Some of the public not actually engaged in the trial must be privileged or allowed to attend the trial to constitute it public, but no irreducible minimum has ever been proposed or named as yet.

Keddington, 19 Ariz. at 459. The Court chose not to meddle in the trial court's exercise of discretion, but only because some members of the public were permitted to attend:

> The trial court must be the judge as to the restrictions, if any, he would impose upon the attendance in the trial of each case as it arises, and as long as his discretion is wisely and soundly exercised, *and it does not deprive the accused of the right to have present a reasonable portion of the public*, this court will refuse to revise his judgments in that regard.

Keddington, 19 Ariz. at 464 (emphasis added). Using this test, the Keddington Court would not have found the trial court's total exclusion of the public during a portion of voir dire, as occurred in Wise and Paumier, a "wise and sound" exercise of discretion. This is yet another reason for this Court to reject Keddington as inapplicable.

Collins suffers from the same problem. The trial court granted the prosecutor's request to lock the courtroom during closing argument to minimize disruptions. Collins, 50 Wn.2d at 746. Notably, those members of the public who were already in the courtroom were permitted to remain. Id. This Court excused the trial court's order, finding a "reasonable number of people" remained in attendance and there had been "no partiality or favoritism in their admission." Id. at 748. See State v. Bone-Club, 128 Wn.2d 254, 258, 906 P.2d 325 (1995) ("where a trial court

ordered the courtroom doors locked while allowing a reasonable number of spectators to remain, the Collins court held a partially closed hearing did not rise to the level of a constitutional violation.").

In addition to this factual distinction with Wise and Paumier, the law declared in Collins betrays the State's cause. This Court held a contemporaneous objection is not required when the trial judge excludes *all* members of the public from viewing a proceeding: "If an order of a trial court clearly deprives a defendant of his right to a public trial, as in People v. Jelke, 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425, it is unnecessary for the defendant to raise the question by objection at the time of trial." Collins, 50 Wn.2d at 747-48 (citing Marsh, 126 Wash. at 145-46).

In Jelke, the trial judge excluded all members of the press and the general public, with the exception of friends and relatives of defendant, from the courtroom until the close of the State's case. 308 N.Y. at 61, 123 N.E.2d at 770-71. The New York Court of Appeals held, "A trial open only to such a limited class of persons may not be regarded as public, particularly if no representative of the press is permitted to attend." 308 N.Y. at 67, 123 N.E.2d at 774.

In contrast to a court order banning *all* members of the public during an otherwise open proceeding, an order permitting *some* members of the public to attend, Collins held, could not be challenged for the first time on appeal absent contemporaneous objection:

> However, if, as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists. The issue then becomes whether the trial court abused its discretion in so ordering, i. e., whether the order complained of was necessary to prevent interference with the orderly procedure of the trial. Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter.

Collins, 50 Wn.2d at 747-48.

In Wise and Paumier, the trial judges banned all members of the public from attending the challenged portions of voir dire. Under Collins, therefore, neither defendant waived his right to challenge the closure by failing to contemporaneously object.

This historical examination renders specious the State's characterization of Bone-Club's rejection of the contemporaneous objection rule as a "deviation" from precedent. WAPA Amicus Brief at 12. Bone-Club did not deviate from precedent; it merely followed Marsh for the proposition that "Defendant's failure to object contemporaneously did not effect a waiver." Bone-Club, 128 Wn.2d at 257.

The State attempts to obfuscate this simple holding by conflating the trial court's duty to weigh the five "Bone-Club" factors with the defendant's failure to object. To do this, the State asserts this Court in Bone-Club wrongly treated the following quoted portion of Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 39, 640 P.2d 716 (1982), "as an exception to the contemporaneous objection rule." WAPA Amicus Brief at 12-13:

> We also dismiss the State's argument that Defendant's failure to object freed the trial court from the strictures of the closure requirements. To the contrary, this court has held an opportunity to object holds no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests. . . . The motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure. The summary closure thus deprived Defendant of a meaningful opportunity to object.

Bone-Club, 128 Wn.2d at 261. The State notes "Ishikawa is not a case about failure to object, as the trial court was plainly put on notice that the newspapers objected . . . ." Amicus Brief at 13.

That is correct. But Bone-Club did not rely on Ishikawa to carve out an "exception to the contemporaneous objection rule." It had already cited Marsh to find the failure to object was not a waiver. The quoted portion says nothing about waiver. It instead addresses the State's argument that Bone-Club's failure to object "freed the trial court from the strictures" of the five-part test. Bone-Club, 128 Wn.2d at 261. This Court

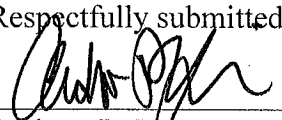
wanted to emphasize, and did, that the request to close – not an objection – "triggered the trial court's duty" to consider the factors. Id. The State's use of this portion of Bone-Club is inaccurate and does not help its pursuit of a waiver rule.

C. CONCLUSION

WAPA misses the point of Bone-Club by advocating for a contemporaneous objection rule. It also fails to show what it purports to be a historical pattern in Washington law requiring a defendant to contemporaneously object in order to raise a constitutional challenge to a trial court's closure of a presumptively open proceeding. In fact, the opposite appears true. For these reasons and those contained in the WACDL amicus brief and the briefs in Wise and Paumier, this Court should reject the State's request to impose a contemporaneous objection preservation requirement. This Court should reverse the Court of Appeals decision in Wise and affirm the decision in Paumier.

DATED this 22 day of April, 2011.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Petitioner,	)	
	)	
vs.	)	NO. 84585-9
	)	
RENE PAUMIER,	)	
	)	
Respondent.	)	

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 22ND DAY OF APRIL 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO STATE'S AMICUS CURIAE BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TIMOTHY HIGGS
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SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF APRIL 2011.

x Patrick Mayovsky