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NO. 85996-5

WASHINGTON STATE

SUPREME COURT

STATE OF WASHINGTON,

Plaintiff,
Respondent,

vs.

FREDERICK DAVID RUSSELL,

Defendant,
Appellant.

SUPPLEMENTAL BRIEF ON PUBLIC TRIAL RIGHT

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ARGUMENT

The right to a public trial is specifically guaranteed by Const. art. I, §§ 10 and 22. Section 10 pertains to the public's right. Section 22 pertains to a criminal defendant's right.

Courtroom closures should be used sparingly. When a courtroom is to be closed to the public there is a detailed procedure that must be followed. It was initially adopted in *Federated Publications, Inc. v. Kurtz*, 95 Wn.2d 5, 62-65, 615 P.2d 440 (1980). This five (5) step procedure is based upon the concurring opinion of Justice Powell in *Gannett Co. v. DePasquale*, 443 U.S. 368, 398-99, 99 S. Ct. 2898, 61 L. Ed.2d 608 (1979) . Since the decision in that case the public trial right has been expanded from the civil sphere to the criminal arena.

In *State v. Bone-Club*, 128 Wn.2d 254, 258, 906 P.2d 325 (1995) the Court addressed the Const. art. I, § 10 right and stated:

This series of section 10 cases, where media challenged closure of a hearing or court records conceded the public's right to open proceedings is not absolute, but emphasized the high order of that constitutional protection mandated a trial court limit closure to rare circumstances.

The Court went on to set out the five (5) part test as follows:

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 the 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.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, supra, 258-59.

In the almost twenty (20) years since *Bone-Club* there have been a plethora of cases addressing the public trial right under Const. art. I, § 10.

Mr. Russell filed his Petition for Discretionary Review in 2011. The Supreme Court has limited his petition to the issue of whether or not an in-chambers hearing on hardship issues during the jury selection process violated Const. art. I, §§ 10 and 22 due to the trial court’s failure to analyze the *Bone-Club* factors.

The Court of Appeals ruled that the matter was ministerial in nature and did not violate Mr. Russell’s constitutional rights. The case law which has evolved since the filing of Mr. Russell’s petition fully supports the fact that Const. art. I, §§ 10 and 22 were violated.

The underlying facts are that on the first two (2) days of trial the judge, court clerk, prosecuting attorneys, defense attorneys and Mr.

Russell adjourned to the jury room to discuss juror questionnaires and hardship issues without an announcement of closure. Nowhere in the record is there any evidence that the trial court analyzed the *Bone-Club* factors before adjourning to the jury room. (RP 1294, ll. 5-10; RP 1303, ll. 6-10; RP 1306, l. 22 to RP 1307, l. 18; RP 1309, ll. 21-24; RP 1310, ll. 3-9; RP 1570, ll. 11-16; RP 1572, ll. 1-8; ll. 12-14; RP 1573, ll. 6-22)

There is nothing in the record to indicate that a colloquy was conducted with Mr. Russell by the trial court. There is no written waiver. A waiver cannot be implied. *See: State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005); and *State v. Frawley*, 181 Wn.2d 452, 462 (2014).

The State, in its motion for an extension of time to file a supplemental brief indicates that it will rely upon the experience and logic test adopted by *State v. Sublett*, 171 Wn.2d 58, 292 P.3d 715 (2012). The *Sublett* Court set forth that test at 73:

... [T]he United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated. The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” [Citation omitted.] The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” [Citation omitted.] if the answer to both is yes, the public trial right attaches and the ... *Bone-Club* factors must be considered before the proceeding

may be closed to the public. [Citation omitted.] We agree with this approach and adopt it in these circumstances.

Factually, the *Sublett* case is not on point. It involved a discussion of a jury question during the course of deliberations.

Jury *voir dire* is historically an open process. The general public is entitled to attend. *See: Personal Restraint of Coggin*, 182 Wn.2d 115 (2014) (*voir dire* is an inseparable part of a trial and failure to conduct a *Bone-Club* analysis is a structural error requiring a new trial.)

Since Mr. Russell's case qualifies under the experience prong of the experience and logic test, the next question is whether or not it qualifies under the logic prong. In addressing the logic prong Mr. Russell urges the Court to remain aware of the *Sublett* Court's statement at 72 that: "We decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other."

The logic prong addresses the issue of openness during court proceedings. Adjourning to the jury room to discuss hardship issues can hardly be considered open. Hardship issues generally involve questions of potential adverse impact upon a juror's employment, health, vacation plans, necessary medical and/or dental appointments, etc.

More specifically a hardship issue may involve whether or not a juror is qualified to serve. Under RCW 2.36.070

[a] person shall be competent to serve as a

juror in the state of Washington unless that person:

- (1) Is less than eighteen years of age;
- (2) Is not a citizen of the United States;
- (3) Is not a resident of the county in which he or she has been summoned to serve;
- (4) Is not able to communicate in the English language; or
- (5) Has been convicted of a felony and has not had his or her civil rights restored.

What is even more important is that the reasons underlying an excuse from jury service are of significant import to the entire jury selection process and the public. RCW 2.36.100(1) states:

Except for a person who is not qualified for jury service under RCW 2.36.070, **no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court** for a period of time the court deems necessary.

(Emphasis supplied.)

A member of the public sitting in a courtroom who sees a judge, court clerk, the attorneys, and the defendant go into a separate closed room has to wonder what is occurring when no announcement is made to explain the procedure that is being employed. Then, when all of the individuals return to the courtroom and certain jurors are excused, the public again must wonder what occurred in that closed room.

This question of hardship issues conducted out of the presence of the public was recently addressed in *Personal Restraint of Speight*, 182

Wn.2d 103, 106 (2014). The burden of proof in a personal restraint case differs from that in a direct appeal. Mr. Speight did not carry his burden of proof; yet, the Court ruled that questioning of prospective jurors in chambers in the absence of a *Bone-Club* analysis violates the public trial right.

The *Speight* Court recognizes that the experience and logic test is applicable to the questioning of jurors in chambers, and that a direct violation of the public trial right occurs when a court adjourns without conducting a *Bone-Club* analysis.

A sampling of cases since Mr. Russell filed his petition for discretionary review will show that he is correct in his analysis and that the experience and logic test does not dictate what the State advocates. *State v. Hummel*, 165 Wn. App. 749, 774, 266 P.3d 269 (2012), *review denied*, 176 Wn2d 1023, 297 P.3d 708 (even if a trial court asks in open court whether “anyone” objects to closure, a court’s failure to engage in any meaningful review or balancing of the defendant’s right to an impartial jury versus public trial rights requires reversal); *State v. Wise*, 176 Wn2d 1, 13-15, 288 P.3d 1113 (2012) (violation of the public trial right constitutes a structural error and failure to object does not constitute a waiver of the right. Prejudice is presumed and a new trial is warranted where hardship issues are discussed in chambers during *voir dire*); *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012) (the right to a public trial is violated when a trial court individually questions potential jurors in

chambers); *Personal Restraint of Morris*, 176 Wn.2d 157, 166-67, 288 P.3d 1140 (2012) (failure to advise a defendant of the public trial right precludes a finding of waiver); *State v. Frawley*, *supra* (even questioning a single juror in chambers without conducting a *Bone-Club* analysis constitutes a violation of the public trial right).

CONCLUSION

Mr. Russell's constitutional right to open proceedings and a public trial under Const. art. I, §§ 10 and 22 was clearly violated by the trial court. It is structural error. The experience and logic test supports Mr. Russell's contention. Mr. Russell is entitled to have his convictions reversed and the case remanded for a new trial.

DATED this 23rd day of April, 2015.

Respectfully submitted,

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WASHINGTON STATE

SUPREME COURT

STATE OF WASHINGTON,)	
)	WHITMAN COUNTY
Plaintiff,)	NO. 01 1 00083 1
Respondent,)	
)	CERTIFICATE OF SERVICE
FREDERICK DAVID RUSSELL,)	
)	COURT OF APPEALS NO. 26789-0-III
Defendant,)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on this 23rd day of April, 2015, I caused a true and correct copy of the *SUPPLEMENTAL BRIEF ON PUBLIC TRIAL RIGHT* to be served on:

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