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NO. 87946-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADONIJAH SYKES,

Petitioner.

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

The Honorable Gregory Canova, Judge

ANSWER TO AMICUS CURIAE

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A. ARGUMENT

1. DRUG COURT STAFFINGS ARE PART OF THE ADMINISTRATION OF JUSTICE AND THEREFORE MUST BE PRESUMPTIVELY OPEN TO THE PUBLIC.

The Washington State Association of Drug Court Professionals, as amicus curiae, raises several arguments in support of its position that Drug Court staffings are exempt from the article I, section 10 mandate that judicial proceedings in all cases be open to the public. Those arguments, while well intentioned, are not well taken.

- a. Privacy Concerns Do Not Exempt Drug Court Staffings From The Open Court Mandate Of Article I, Section 10.

No one disputes Drug Court is a good thing. Drug Court will continue to be a good thing when the staffings are held in open court. Amicus, however, strikes a dramatic "sky is falling" tone, warning Drug Court will no longer be viable if staffings are held in open court. Amicus at 2. According to amicus, "[t]he efficacy of drug courts in reducing drug offender recidivism will be dramatically impacted if staffings must be done in open court. The willingness to share crucial, often sensitive therapeutic information such as history of abuse, medical conditions and the like will be chilled." Amicus at 4.

As noted before, the Pierce County Drug Court does not hold private staffings. RP 6. Amicus does not allege the Pierce County Drug

Court is dysfunctional or no longer able to achieve its goal because its staffings are held in open court.

Indeed, neither amicus nor the superior court is able to come up with anything beyond mere assertion of a chilling effect. No studies. No data. No empirical evidence. The Adult Drug Court Best Practices Standards does not mention anything about closed staffings being needed to avoid a chilling effect on participation. Nat'l Assoc. of Drug Court Professionals, Adult Drug Court Best Practices Standards, Vol. I (2013).

The assertion itself is implausible. Drug Court is a gift to those privileged enough to get into it. Drug Court not only provides treatment for those in desperate need but also holds out the prized prospect of avoiding a criminal conviction and its serious consequences, including total loss of liberty. It is unrealistic to claim a significant number of participants would choose to forgo those two highly valuable opportunities because personal information is disclosed in open court staffings.

The participant is not even present at the staffings. CP 9, 56. Even so, private information presented during the staffings is discussed in open court as part of the status hearings. Sykes's counsel represented the majority of her private information ended up being discussed in open court. RP 35. That makes sense because what is discussed in the staffings

provides the basis for what is discussed and decided in open court at the review hearings.

But even assuming the need to ensure privacy of health information in staffings is more real than imagined, the solution is not to close off the staffings from the public altogether by declaring them categorically exempt from the article I, section 10 mandate. If privacy in health information is a compelling interest in a given case at a given time, then there is a procedure for closing the courtroom to account for and protect it. It's called consideration of the Bone-Club or Ishikawa factors. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982); State v. Bone-Club, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995).

For example, if a participant is unwilling to share crucial, sensitive therapeutic information in open court that would result in Drug Court goals being thwarted, then the court can balance the requisite factors to justify closure of that particular proceeding. No one is saying the staffings can never be closed. They can be closed in proper circumstances so long as the court first follows the requisite procedure. Amicus nowhere counters this simple solution to the perceived problem that an open courtroom threatens the integrity of Drug Court staffings.

Amicus's argument also possesses the unfortunate quality of proving too much. By its logic, not merely the staffings but the entire

Drug Court process, from beginning to end, ought to be held in private because at any point in the process a participant's private information may be revealed. Further, as amicus notes, there are over 74 specialty and therapeutic courts operating in Washington in which private information may be revealed. Laws of 2013, ch. 257 § 1. All such courts should be closed to the public if amicus's argument is accepted. Amicus's proposed exception would swallow the rule.

There is no need to treat Drug Court with kid gloves. Drug Court will continue to fulfill its mission when staffings are open to the public.

b. The Staffings Should Be Open Because They Implicate Core Open Court Values.

Amicus contends the "experience and logic" test used in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) shows Drug Court staffings are not open to the public as a matter of constitutional law. Amicus at 18. In so doing, amicus assumes the "experience and logic" test is now the gold standard for determining every open court issue. The Supreme Court has never applied the "experience and logic" test apart from article I, section 22.

In any event, the experience and logic test was never intended to be a "one size fits all" approach to determining open court issues. The lead opinion in Sublett described the test as a "useful tool" for determining

whether the public trial right attaches to a particular process, while recognizing "the failure of any test to identify a closure with accuracy." Sublett, 176 Wn.2d at 75 (C. Johnson, J., lead opinion); see also 176 Wn.2d at 141 (Stephens, J, concurring) (describing the logic and experience analysis as helpful while recognizing "the lead opinion is correct to reject any litmus test for deciding when a particular proceeding implicates the public trial right.").

Amicus acknowledges drug courts and other therapeutic courts are a "relatively recent phenomenon." Amicus at 4. The King County Drug Court was implemented in 1994. CP 69. The legislature first authorized Drug Courts statewide in 1999. Laws of 1999, ch. 197 § 9. Mental Health Courts were created in 2005. DUI Courts were created in 2011. See Amicus at 8 n.7. Does the recent nature of such courts mean that nothing that transpires in them need be open to the public? Novelty should not dictate the presence or absence of the constitutional right to an open court.

By amicus standards, new forms of judicial proceedings would forever be exempt from the open court requirement on the basis that they are too new to have built up a history of openness. That crude approach does a disservice to the values that article I, section 10 is designed to protect. When there is no history of any significant duration for a

particular kind of proceeding, the "experience" prong of the "experience and logic" test is rendered inoperable.

In D.F.F., all nine justices agreed a court rule that closed commitment proceedings violated article I, section 10 even though there was no "experience" of holding the proceedings in open court during the years the rule was in effect. In re Detention of D.F.F., 172 Wn.2d 37, 47, 256 P.3d 357 (2011) (Sanders, J., lead opinion); 172 Wn.2d at 47 (J.M. Johnson, J., concurring); 172 Wn.2d at 49 (Madsen, C.J., dissenting). D.F.F. proves Sykes's point.

The real meat of the "experience and logic" test is whether the proceeding at issue implicates the core values the public trial right serves. Sublett, 176 Wn.2d at 72; see also 176 Wn.2d at 98-99 (Madsen, C.J., concurring) ("Under the experience and logic test, history is one source of guidance as to whether a particular part of the proceedings is one to which the right to a public trial attaches. If precedent or other history, or both, are silent, then the second part of the analysis involves inquiry into whether the particular procedure, hearing, discussion, decision, or other aspect of the case is one to which the public trial right should apply.").

If "public access plays a significant positive role in the functioning of the particular process in question,"¹ then there is no constitutionally sound reason to shield that process from the public. Sykes's opening brief already articulates why core values of the open court guarantee are served by having the staffings in open court. See Brief of Petitioner at 12-13.

Amicus emphasizes Drug Court is a diversionary program and as such should be exempt from the open court requirement. Amicus at 18. Article I, section 10's directive that justice in all cases be administered openly "is not limited to trials but includes all judicial proceedings." Mills v. Western Washington University, 170 Wn.2d 903, 913, 246 P.3d 1254 (2011). Drug Court does not exist in some isolated universe. Drug Court is operated by the superior court. Its staffings are "judicial proceedings." A superior court judge presides over the staffings. The staffings form the basis for what the judge does at the review hearings and ultimately inform what the judge does in the event the case manager or the prosecutor requests a defendant be terminated from the Drug Court program. CP 34-53, 71, 94.

Amicus also stresses the non-adversarial nature of Drug Court. Amicus at 10-11. Amicus does not explain any more than the superior court was unable to explain why Drug Court would become less

¹ Sublett, 176 Wn.2d at 73.

collaborative or more adversarial were the staffings, like the rest of the process, held in open court. There is nothing mystical about an open courtroom that transforms otherwise well intentioned actors working towards a common goal into obstructionist enemies.

Moreover, in the midst of stakeholders seeking to work together, there is still an inherent adversarial aspect to the staffings. See Brief of Petitioner at 22-23. The Drug Court manual itself recognizes there will be times when the parties do not reach consensus. CP 71. Certainly there will be debate over evidentiary allegations related to noncompliance and the appropriate course of action in response to noncompliance.

Drug Court participants have counsel to represent them for a reason. Counsel is not a potted plant. Counsel is present at the staffings to advocate for the client's interests while keeping in mind the client's Drug Court goals. If a harsh sanction is recommended, for example, defense counsel doing his or her job may very well dispute whether it is warranted. If a serious allegation is lobbed against the client, counsel may dispute its veracity or the circumstances surrounding its occurrence. The prosecutor, meanwhile, is present at the staffings to ensure public safety is protected during the course of considering the best course of treatment or appropriate sanction for a Drug Court participant. There will be some

conflict because interests diverge. That's no more than human nature at play.

Amicus also seeks to insulate the staffings from public scrutiny on the theory that no actual decision is made during the staffings, such decision being reserved for the review hearings held in open court. Amicus at 19-20. This Court has already rejected the proposed distinction between informal and formal decision-making settings. Under article I, section 10, "the public must — absent any overriding interest — be afforded the ability to witness the complete judicial proceeding," including material relevant to a formal decision later made by the court. Rufer v. Abbott Labs., 154 Wn.2d 530, 549, 114 P.3d 1182 (2005); accord Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 67, 69, 256 P.3d 1179 (2011); Bennett v. Smith Bundy Berman Britton, PS, 176 Wn.2d 303, 310, 291 P.3d 886 (2013) (Chambers, J., lead opinion). Material considered by the court in reaching its decision must be open in order to assure the public that courts are operating fairly and appropriately. State v. McEnroe, 174 Wn.2d 795, 807, 279 P.3d 861 (2012). That rule encompasses the information considered by the judge during the staffings, upon which the judge relies to make a formal decision at the review hearings.

c. The Article I, Section 22 Claim Is Available For Review.

This case is capable of being resolved on article I, section 10 grounds alone. In an abundance of caution, Sykes raised a related public trial claim under article I section 22 and the Sixth Amendment in the opening brief in the event this Court thought it helpful and necessary to reach the issue.

Amicus contends Sykes waived her right to a public trial under article I, section 22 and the Sixth Amendment in her Drug Court Waiver and Agreement. Amicus at 1 n.1, 11.² The issue is not so clear cut. The waiver is not as broad as amicus assumes it is.

The Drug Court waiver and agreement states that Sykes understands she gives up "[t]he right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed." CP 18.

Language in a contract is given its ordinary, usual, and popular meaning unless the contract clearly demonstrates a contrary intent. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The ordinary meaning of the word "trial" encompasses its classic sense: "[a] formal judicial examination of evidence and determination of

² The State drops a similar footnote on waiver in its brief. Brief of Respondent at 2 n.1.

legal claims in an adversary proceeding." Black's Law Dictionary 1543 (8th ed. 2004). The ordinary meaning of "public trial" is "[a] trial that anyone may attend or observe." Id.

As part of the Drug Court contract, Sykes at most waived her right to a public trial in which evidence is admitted and considered by the jury as trier of fact in determining whether the State has proven guilt beyond a reasonable doubt. She did not waive her right to have the Drug Court staffings be open to the public because those staffings are not encompassed within the ordinary meaning of "trial."

That the ordinary meaning of "trial" is intended in the contract is made abundantly clear by looking at the related provisions in which Sykes waived (1) her right to remain silent "before and during trial," (2) the right to refuse to testify against herself, (3) "the right at trial to testify and to hear and question the witnesses against me," and (4) the "right to have witnesses testify for me at trial." CP 18. Those are classic trial rights attached to the ordinary sense of the term "trial."

Further, the language speaks to "a speedy and public trial *by an impartial jury.*" CP 18 (emphasis added). The ordinary meaning of that language is that Sykes waived her right to a public trial *by jury.* The contract does not mention waiving her right to a public trial by a judge. The closest thing to a "trial" in Drug Court in its ordinary sense is when

the judge, following termination, reviews the stipulated evidence and determines whether there is sufficient evidence to find guilt. See CP 18 ("I understand that the judge will review the evidence presented by the State and will decide if I am guilty or not guilty of this charge based solely on that evidence."); State v. Drum, 168 Wn.2d 23, 38-39, 225 P.3d 237 (2010) (drug court judge reviews stipulated evidence to determine whether guilt proved beyond a reasonable doubt). No one has ever suggested that this bench trial takes place in private or that Sykes waived her right to have it take place in public.

The language of article I, section 22 certainly has a technical meaning known to lawyers and judges schooled in the intricacies of criminal law. They know through the development of common law that the term "public trial" in article I, section 22 encompasses not only the criminal trial itself but also various other events associated with the trial. They also know the right to a public trial under in article I, section 22 includes bench trials as well as jury trials. The ordinary sense of the language used in the Drug Court contract, however, conveys something different. To confound matters further, the periodic review hearings were held in an open courtroom, which undermines the premise that the parties, in entering the Drug Court contract, intended all aspects of the Drug Court proceedings to be closed to the public.

Further, ambiguities in a contract are construed against the drafter. Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984). Sykes did not draft this contract. Any ambiguity in terms of whether she waived her article I, section 22 right to have the staffings open to the public must be construed against the State.

Amicus also complains the question of whether the Drug Court staffings violate article I, section 22 is outside the scope of review. Amicus at 1 n.1.

While the scope of review of is generally limited to the questions raised in the petition for review and the answer, this Court has discretion to waive the rule to "serve the ends of justice." Tuerk v. State, Dep't of Licensing, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994) (citing Kruse v. Hemp, 121 Wn.2d 715, 721, 853 P.2d 1373 (1993) (quoting RAP 1.2(c)). For example, the Court has the inherent discretionary authority to reach other issues if necessary for the decision. Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. No. 16, 151 Wn.2d 203, 213, 87 P.3d 757 (2004).

If the Court in its discretion deems it useful to a fair resolution of the case, there is no impediment to considering Sykes's article I, section 22 claims. The issue on review presents a pure issue of constitutional law. The rights under article I, section 10 and article I, section 22 are distinct

but related, with one informing the other in terms of what judicial proceedings must be open to the public. Indeed, amicus and the State cite a plethora of article I, section 22 case law in their respective briefs covering the article I, section 10 question. Further, because Sykes raised the issue in the opening brief, the State, and amicus for that matter, has not been sandbagged. Each had full opportunity to substantively respond to Sykes's article I, section 22 argument but chose not to.

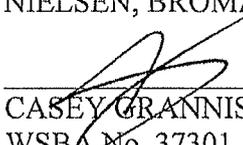
B. CONCLUSION

For the reasons stated above and in the opening brief, Sykes respectfully requests that this Court hold the Drug Court staffings violated her right to open and public court proceedings and grant her the appropriate remedy.

DATED this 30th day of April 2014

Respectfully Submitted,

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Attached for filing today is an answer to amicus curiae for the case referenced below.

State v. Adonijah Sykes

No. 87946-0

Answer to Amicus Curiae

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