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NO. 87946-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADONIJAH SYKES,

Petitioner.

STATE'S RESPONSE TO BRIEF OF AMICUS CURIAE WSADCP

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A INTRODUCTION

As noted in its original brief, the State agrees that drug courts are a valuable tool for assisting chronic, drug-addicted offenders to regain control of their lives and to end a cycle of recidivism. To that extent, the State agrees with the brief of Amicus Washington State Association of Drug Court Professionals (“WSADCP”) that drug courts are a laudable and desirable aspect of our law. The State disagrees, however, that drug court staffings should be closed to the public.

Our State Constitution clearly provides that “[j]ustice in all cases shall be administered openly...” Const. art. I, § 10. A criminal prosecution initiated in the superior court of the state of Washington is unquestionably a “case” and the court’s administration of that prosecution is clearly the administration of justice. The narrow question presented by this appeal is whether a component of such a criminal case—judicial staffings in Drug Diversion Court (DDC)—must be administered openly. The answer is yes.

Drug court staffings are administered by judges of constitutional courts of the state of Washington and the citizens of this state have a right to monitor the proceedings occurring in all courts. Judicial staffings are perhaps the most important component of the administration of justice in drug court cases; to close them would be to thwart the constitutional

command. There is no basis in experience or logic to distinguish these important processes from other similar important constitutional processes. The State does not attempt to address all of Amicus' arguments, but will respond to a number of points raised in Amicus' brief.

B. ARGUMENTS IN REPLY TO AMICUS WSADCP

1. PROCEEDINGS IN DRUG COURT—ESPECIALLY STAFFINGS—ARE PART OF THE ADMINISTRATION OF A CRIMINAL CASE AND MUST BE OPEN.

Amicus claims that “the decisional law in Washington on drug courts . . . make[s] clear that a drug ‘court’ is not truly a ‘court’ but rather an intensive treatment program, a pretrial diversion program for non-violent drug-related offenders.” Br. of Amicus at 10 (citing State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010) and State v. Little, 116 Wn. App. 346, 349, 66 P.3d 1099 (2003)). The State respectfully disagrees with this assertion for several reasons.

First, WSADCP's argument seeks to exploit the fact that the term “drug court” is arguably something of a misnomer. The legislature has clearly not created a whole new category of specialized statutory courts to administer cases with drug-addicted defendants. However, this point does not advance WSADCP's argument because the program, regardless of what it is called, is authorized to operate within the constitutional courts of

the state of Washington. See Const. art. IV, § 1 (“The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide). Drug court programs are specialized programs designed to operate within the superior courts. Thus, there can be no question that these programs are a part of superior court operations and are administered by the judges of those courts.

Second, the statutory language certainly treats drug courts as a component of a court proceeding. Under the statutes, a “specialty court” or a “therapeutic court” is defined to mean “a specialized pretrial or sentencing *docket* in select criminal cases where agencies coordinate work to provide treatment for a defendant who has particular needs.”

RCW 2.28.166 (italics added). A drug court is

... a *court* that has special *calendars* or *dockets* designed to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing felony and nonfelony offenders, whether adult or juvenile, by increasing their likelihood for successful rehabilitation through *early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions* and other rehabilitation services.

RCW 2.28.170(2) (italics added). The legislature asked this Court to promulgate rules for drug courts because such rules concerned practice and procedure in courts, and rules of court are the province of the courts.

See RCW 2.28.165(1) and RCW 2.40.190. A tribunal that is called a drug “court” and that has dockets and calendars, and that by design mandates intense judicial supervision over a court process, and that authorizes the imposition of “sanctions” for failure to meet program requirements is most certainly a “court.” Thus, drug courts are clearly “courts” in the relevant statutory and constitutional senses.

Third, the holdings of the two cases cited by WSADCP are narrow and do not support WSADCP’s broad assertions that drug courts are not really courts. In State v. Drum, this Court simply held that a stipulation to facts that will be used upon revocation from drug court is not binding on the trial court and is thus not tantamount to a guilty plea. 168 Wn.2d at 34, 39. Although this Court discussed the legislative history of the statute, including the fact that drug courts were intended to place offenders in court-supervised treatment programs, nothing in Drum suggests that a drug court “is not truly a court.” In State v. Little, the issue was whether the Equal Protection Clause required that drug courts be made available in all Washington counties. The Court of Appeals held that equal protection principles were not violated by allowing counties to decide for themselves whether to implement a drug court. Little, 116 Wn. App. at 349. In so holding, the court said: “nor, ... does the statute create a ‘court’ to which all state citizens have a right of access.” Id. This sentence says simply

that not all Washington citizens will benefit from the drug court program as created. The sentence does not suggest in any way that drug courts are not administered by true "courts," nor does it suggest that the court's detailed involvement in management of the participant's case is not the administration of justice as that notion is understood in the state constitution.

Fourth, Amicus cites to comparisons courts have made between drug courts and deferred prosecutions, apparently to suggest that the treatment aspect of drug courts should operate outside the public view, because the treatment aspects of some deferred prosecutions are generally not open to the public. Br. of Amicus at 10, n.10. But, even if drug courts are analogous in certain respects to deferred prosecutions, they are also different in a very material sense. The trial court in a deferred prosecution simply authorizes the deferral and receives reports later as to whether a person has successfully completed the program. Even if there is testimony in addition to the report, the testimony and the arguments of the parties should be conducted in open court. The trial court does not, however, preside over the minutiae of a court-ordered deferred prosecution in the same way the trial court regularly directs and consults with the parties in drug court staffings. This intensive judicial involvement in drug court

staffings is a defining and a beneficial aspect of drug court, but is a component of drug court that demands public oversight.

Fifth, nothing in the statute requires that a drug court operate as a *pre-trial* diversion program. Indeed, the program operated in Clark County is a post-conviction program. http://www.clark.wa.gov/courts/documents/drug_court_pamphlet.pdf (last accessed 4/28/14).¹ Thus, it is simply a mistake to analogize drug courts to pre-trial diversion programs.

In a similar vein, Amicus argues that drug court is essentially a pre-trial diversion program that “*avoids* the adversarial structure of the traditional court system.” Br. of Amicus at 11 (*italics in original*).² However, unlike mediations, which are an attempt to judicially facilitate the voluntary dismissal of a case, drug court cases must be adjudicated on their merits, either after a successfully completed treatment program, or after a formal revocation process, an adjudication of the facts, and sentencing on the original charge. Throughout this process, the parties remain in an essentially adversarial posture.

¹ The Clark County Drug Court pamphlet provides: “If a person is eligible and wishes to participate, they must plead guilty to the charges, sign a Drug Court contract, Waiver of Speedy Sentencing and releases of information. The case will not be dismissed even if a person successfully completes the program. If the person is ineligible for Drug Court, the case will be handled in the traditional manner.”

² It is unclear what record WSADCP relies upon to claim that drug court proceedings are “not adversarial.” No verbatim record—written or electronic—is made at the staffings. Generally, a court staff member summarizes the case status in cryptic notes. *See* CP 29-53.

Even the spare record of the staffings in this case demonstrate this point. *See e.g.* CP 36 (note for 6/8/2011). Although the parties may cooperate to achieve the best result possible, the role of defense counsel in the drug court process is and must remain, focused on protecting the defendant's interests. The prosecutor, too, must advocate for the safety and security of the public. Often, those differing perspectives lead to adverse recommendations for treatment or different recommendations on sanctions when the rules are not followed. Thus, WSADCP is technically correct in saying that the program avoids the adversarial "structure" of the "traditional court system," but that fact alone does not mean that drug courts are a non-adversarial adjunct to the court, because whether a proceeding is "adversarial" does not determine whether it must be open. State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) ("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.").

For these reasons, drug court proceedings are court processes administering justice in a criminal case. The program structure and the unique responsibilities given to judges managing the program illustrate why staffings *should* be subject to article I, section 10, not that they should be *excepted* from that constitutional provision.

2. DRUG COURT STAFFINGS ARE NOT
CATEGORICALLY EXEMPT FROM ARTICLE I, § 10.

Amicus argues that “certain types of judicial proceedings are categorically exempt from the reach of [article I,]section 10.” Br. of Amicus at 12 (citing juvenile courts and administrative proceedings). This argument should be rejected; the cases cited do not support WSADCP’s argument that drug court should be closed. In In re Lewis, a trial court judge excluded people from a juvenile proceeding. In rejecting a claim of error based on article I, section 10, this Court held:

The purpose of excluding the public from proceedings such as these is, of course, to protect the child from notoriety and its ill effects. This court, along with by far the majority of other courts in the United States, early recognized that the purpose of statutes such as ours is not to punish the child, but to inquire into his welfare where reasonable cause exists, and to provide an environment which will enable him to grow into a useful and happy citizen, where his parents have failed in that regard.

Lewis, 51 Wn.2d 193, 198, 316 P.2d 907 (1957). To the extent this decision carves out an exception for juveniles, the exception may be *sui generis*.⁴ There is no precedent for treating drug-addicted adult

⁴ It is debatable whether Lewis survives modern open courts jurisprudence. This Court has not revisited Lewis and the article I, section 10 question since the underlying rationale of Lewis—that juveniles have limited due process rights that did not include a right to open adjudication of their cases—was called into question by In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Much more consistent with modern constitutional analysis is the relatively recent decision in State v. Loukaitis, 82 Wn. App.

offenders as a specially protected class who must be shielded from public scrutiny.

WSADCP also relies on Mills v. Western Washington University, 170 Wn.2d 903, 246 P.3d 1254 (2011), but that case, too, is inapposite. This Court held in Mills that article I, section 10 was inapplicable to administrative proceedings precisely because the proceeding was not conducted in a court. “[W]hen article I, section 10 was drafted, the word ‘case’ was defined as ‘In law: a cause or suit in court; any instance of litigation; as the case was tried last term...’” Mills v. W. Washington Univ., 170 Wn.2d at 914. This Court has also made clear, however, that

the term “judicial power” in article IV, section 1 did not embrace the quasi-judicial power exercised by administrative and executive bodies, even though the drafters of the state constitution knew that such power had been exercised from “time immemorial.” Since the exercise of quasi-judicial power was not embraced by the term “judicial power” in article IV, section 1, there is no reason to assume that it was meant to be embraced by the term “justice in all cases” in article I, section 10.

Mills, at 915 (discussing Bellingham Bay Improvement Co. v. City of New Whatcom, 20 Wash. 53, 54 P. 774, aff’d, 20 Wash. 231, 55 P. 630 (1898)). Thus, because a disciplinary proceeding by an administrative agency is not a “case” in court, such proceedings may be closed by

460, 466, 918 P.2d 535 (1996). The issue of whether or to what extent juvenile proceedings are subject to article I, section 10 is currently pending in Division One of the Court of Appeals in State v. S.J.C., No. 69154-6-I.

legislative directive. Id. Drug courts are clearly article IV, section 1 courts and the proceedings are part of the adjudication of a criminal case.

Additionally, WSADCP argues that this court “has specifically authorized closure of court proceedings in a number of recent cases without applying the *Ishikawa* factors.” Br. of Amicus at 13. The cases cited do not support that claim. In Tacoma News Tribune, Inc. v. Cayce, 172 Wn.2d 58, 256 P.3d 1179 (2011), this Court held that the taking of a single video deposition was simply a discovery matter, not a court proceeding, so article I, section 10 did not apply. This was not an exception to the rule that court proceedings must be open; it was a holding that the deposition was not a court proceeding at all. This holding followed from previous decisions holding that mere discovery that is not used to make a judicial decision is not subject to article I, section 10. *See e.g. Dreiling v. Jain*, 151 Wn.2d 900, 909-10, 93 P.3d 861 (2004). Drug court staffings are hardly mere discovery. They are designed to shape the court’s view on the best course of action for the defendant, including imposition of sanctions, and the information and impressions gathered in the process clearly shape the judge’s ultimate decision.

State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011), is also distinguishable. In Lormor, this Court held that exclusion of a single person from a courtroom was not a “closure” of the courtroom, but rather

was the reasonable exercise of discretion to avoid disruption of the proceedings. There can be no doubt that excluding from staffings everyone except the lawyers, treatment providers, court staff and the judge is a closure of the court.

The decision in State v. Ringdorfer, 172 Wn.2d 318, 290 P.3d 163 (2012), does not advance WSADCP's argument. That case simply holds that the public does not necessarily have a right of access to juror information held by the clerk where that information is not used in judicial decision-making. As noted above, staffings are clearly used to shape a judge's decision on treatment, incentives, sanctions, and revocation.

3. EXPERIENCE AND LOGIC REQUIRE THAT STAFFINGS BE OPEN.

WSADCP argues that neither experience nor logic requires openness of drug court staffings. The State respectfully disagrees.

In State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012), this Court adopted the experience and logic test for determining whether a court proceeding must be open to the public. 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. Sublett, 176 Wn.2d at 73. "The logic prong asks 'whether public access plays a significant positive

role in the functioning of the particular process in question.” Id. (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II)). Each factor should be examined in light of the purposes of the open courts doctrine. Sublett, at 72 (“... the right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury”).

The experience prong of the test is somewhat unhelpful in this context because the treatment court model is new, meaning there is no true “historical” practice to examine. It cannot be sufficient to simply observe that a given process has always been closed, because otherwise every new process would pass the experience prong of the test, regardless of whether the public had an important right to observe the process. Indeed, this Court effectively decided as much when it rejected the long-standing but not historically-based practice of holding mental health proceedings behind closed doors. In re Det. of D.F.F., 172 Wn.2d 37, 41, 256 P.3d 357 (2011).

The real question in this circumstance is whether a proceeding of this character should logically be open. The issue in Press II was whether the trial court erred by refusing to release a transcript of a 41-day

preliminary hearing in an infamous California murder case. The Supreme Court held that the trial court erred, in part because of the importance of the preliminary hearing. Such hearings, the Supreme Court noted, can be the final and most important step of the criminal proceeding. The Supreme Court also noted that, because there was no jury present to act as a safeguard, public access was even more significant. Press II, 478 U.S. at 10-13.

The same can be said here. Staffings are an integral part of the drug court process and the discussion that occurs during those meetings can shape a judge's decision on important matters in the case that could result in termination from drug court. Even if no formal decision is announced at staffing, it is surely the case that strong impressions are formed. Thus, a citizen might justifiably feel that a decision formally announced in open court was a *fait accompli*. No jury serves as a check on the decision-making power of the court. Under such circumstance, the right to public access "serves to . . . remind the prosecutor and judge [and defense counsel and court staff] of their responsibility to the accused." Sublett, at 72. Article I, section 10 would seem an empty promise if it cannot guarantee public access to a court proceeding of this character. Thus, logic requires that drug court staffings be open.

4. WSADCP's OTHER ARGUMENTS DO NOT JUSTIFY CLOSURE.

WSADCP also argues that there is less need for openness because drug courts process mostly victimless crimes. Br. of Amicus at 20. This assertion is inaccurate. The list of crimes ineligible for drug court is short, prohibiting only sex offenses, offenses involving firearms, and serious violent offenses. RCW 2.28.170. Many nonviolent and violent crimes, including thefts and burglaries, have victims. *See* RCW 9.94A.030(33) (definition of "nonviolent offense") and (53) (list of "violent offenses"). Victims and citizens certainly have a right to monitor the court's handling of these prosecutions. Moreover, there is reason to believe that drug court handles serious offenders. According to the National Association of Drug Court Professionals (NADCP), the target population for drug courts is "high-risk offenders who have more severe antisocial backgrounds or poorer prognoses for success in standard treatments." Br. of Amicus at Appendix G-3 (Research Update on Adult Drug Courts). The public certainly has an interest in determining how decisions are being made as to this class of offenders.

Amicus also suggests that drug courts need not be open because this Court has authorized some *ex parte* communications with counsel. Br. of Amicus at 9 (citing CJC 2.9(A)(1)). But, the *ex parte* contact

authorized in the Code of Judicial Conduct is limited to a very narrow set of circumstances. Isolated ex parte contact between a lawyer and the court is far different than categorically excluding the public from drug court staffings.

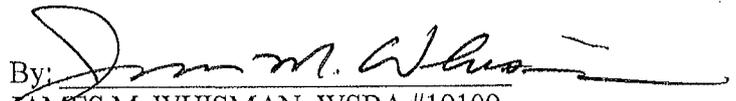
C. CONCLUSION

For the foregoing reasons, this Court should reject the arguments of WSADCP and hold that drug court staffings must be open to the public unless compelling circumstances warrant closure.

DATED this 30th day of April, 2014.

Respectfully submitted,

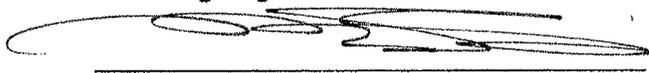
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Dear Supreme Court Clerk:

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Please let me know if you have problems opening the attachment.

Thank you,

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