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SUPREME COURT NO. 89465-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Rolando Reyes,

STATE OF WASHINGTON,

Respondent,

v.

ROLANDO REYES,

Petitioner.

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

The Honorable Craig J. Matheson, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED

1. Whether the interests at stake in involuntary civil commitment proceedings warrant the same public trial protection afforded criminal trials under article 1, section 22,¹ such that improper closure of an involuntary commitment proceeding in violation of article 1, section 10's open courts requirement² requires reversal.

2. Whether the appellant from an involuntary commitment order has standing to assert an open courts violation under article 1, section 10, for the first time on appeal.

B. STATEMENT OF THE CASE

The State filed a petition in 2004 seeking to have Reyes indefinitely committed under Chapter 71.09 RCW. CP 3. While awaiting evaluation at the Special Commitment Center (SCC), Reyes committed two assaults and was sentenced to concurrent 36-month sentences. The State's petition was dismissed without prejudice. CP 3-4, 43-44, 46. In January 2008, two days prior to Reyes's scheduled release, the State re-filed its Chapter 71.09 RCW petition. CP 1-2, 4.

¹ Wash. Const. article 1, section 22 provides: "In criminal prosecutions the accused shall have the right to . . . have a speedy public trial . . ."

² Wash. Const. article 1, section 2 provides: "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

Because Reyes has a severe brain injury, the court appointed a Guardian Ad Litem (GAL). CP 286-87. The GAL moved to dismiss the State's petition for lack of jurisdiction, which was denied after a hearing. CP 58-78; 1RP³ 16-17. The hearing was held in the trial judge's chambers, with counsel for the State appearing telephonically. 1RP 2-21. The hearing was reported, but there is no record of a motion to hold the hearing in chambers, nor any record of the court conducting the required procedures for closing the proceedings. There is no indication Reyes, the GAL or Reyes's attorney objected to the closed proceeding.

Following a bench trial, the judge found Reyes met the criteria for commitment and ordered him held indefinitely at the SCC. 3RP 561-65.

On appeal, Reyes argued the closed in-chambers hearing violated his right to a public trial under article 1, section 10. The Court of Appeals agreed the trial court erred in holding a closed hearing without first applying the five factors outlined in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).⁴ In re Det. of Reyes, 176 Wn.

³ There are three volumes of verbatim report of proceedings referenced as follows: 1RP - 5/22/09 and 6/1/09; 2RP - 6/2/09 and 6/3/09; and 3RP - 6/4/09 and 6/5/09.

⁴ The five Ishikawa factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is

App. 821, 315 P.3d 532, 542 (2013) review granted, 182 Wn. 2d 1001, 342 P.3d 326 (2015). It refused to reverse the indefinite commitment order, however, concluding Reyes failed to show actual prejudice arising from the improper closure. Id. at 542-44. The court held the improper closure was not structural error for which prejudice should be presumed because it was a civil proceeding to which structural error does not apply. Id. at 544.

The court also opined Reyes lacked standing to assert the general public's article 1, section 10 rights, at least in part because he could not show actual prejudice. Id. at 544-45.

This Court granted review. 182 Wn.2d at 1001.

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

State v. Bone-Club, 128 Wn.2d 254, 258-599, 906 P.2d 325 (1995) (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

C. ARGUMENTS

1. INVOLUNTARY COMMITMENT PROCEEDINGS WARRANT THE SAME PROTECTION AGAINST IMPROPER COURTROOM CLOSURES AS CRIMINAL TRIALS.

Public trials have an important role in ensuring the fair administration of justice. State v. Wise, 176 Wash.2d 1, 288 P.3d 1113 (2012). In Wise, this Court noted Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L.Ed.2d 675 (2010), which recognized that the benefits arising from public judicial proceedings are to the defendant in a criminal proceeding. 176 Wn.2d at 116 (citing Presley, 130 S.Ct. at 724). The benefit includes helping to assure a fair trial by allowing "the public to see justice done, and it serves to hold the justice system accountable." Wise 176 Wn.2d at 17.

The right to a public trial provides the same protections and benefits in civil proceedings. See Bennett v. Smith Bunday Berman Britton, PS, 176 Wn.2d 303, 291 P.3d 886 (2013)⁵; In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011).⁶ "Essentially, the public-trial

⁵ "The public, including the press, is entitled to be informed as to the conduct of the judiciary and judges. Scrutiny by the public is a check on the conduct of judges and of the power of the courts." 176 Wn.2d at 310.

⁶ When the state seeks involuntary commitment, section 10 provides the respondent the "fundamental assurance that her proceedings are observed,

guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring)).

The right to a public trial is a unique right that is important to both the defendant and the public. Moreover, assessing the effects of a violation of the public trial right is often difficult. Requiring a showing of prejudice would effectively create a wrong without a remedy.

State v. Paumier, 176 Wn.2d 29, 37, 288 P.3d 1126 (2012) (citations omitted).

Involuntary civil commitment, similar to criminal proceedings, results in a "massive curtailment of liberty." In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010); see also D.F.F., 172 Wn.2d at 40. This Court has previously acknowledged involuntary commitment proceedings and criminal prosecutions implicate similar due process concerns. For example, in In re Detention of Halgren, this Court rejected the State's argument "that the criminal law unanimity cases are inapplicable" in involuntary commitment proceedings, noting:

scrutinized, and legitimized through administration open to the public." 172 Wn.2d at 46.

While differences exist in terms of proving underlying acts versus the defendant's mental status, in both criminal and [involuntary civil commitment proceedings] the jury is asked to find the existence of some fact as a component of placing the defendant in confinement. Moreover, in both cases the jury is operating under a constitutionally prescribed unanimity requirement. Given that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases.

In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714, 720 (2006)

Moreover, while most criminal sentences have an end date, involuntary commitment under Chapter 71.09 RCW is indefinite. Compare RCW 9.94A.510 (determinate sentence ranges for all but the most serious offenses) with RCW 71.09.060 (noting a person will involuntarily remain at the SCC until he has "so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community"). As such, it is at least as important to encourage judges, lawyers, witnesses and jurors to perform their functions responsibly, and to hold the commitment system publicly accountable. Id. Where liberty is curtailed, it makes little

difference whether the label is “civil” or “criminal.” Reducing the likelihood of wrongful deprivation is equally important in both contexts.

This Court’s most recent public trial decision relating to involuntary commitment is In re D.F.F. This Court unanimously held that MPR 1.3, which required automatic closure of involuntary commitment proceedings under Chapter 71.05 RCW, violated article 1, section 10. 172 Wn.2d at 41. The Court was divided, however, over the proper remedy. The lead opinion held the violation was structural and therefore D.F.F. was entitled to new commitment proceedings without showing prejudice. 172 Wn.2d at 42-43 (Sanders, J. plurality). The concurrence opined “structural error” did not apply to civil proceedings, but concluded relief was warranted because D.F.F. had demonstrated sufficient prejudice. 172 Wn.2d at 48 (J.M. Johnson, J. concurrence). The dissent concluded D.F.F. lacked standing to raise the section 10 violation and also opined, “structural error analysis has no place in the civil arena.” 172 Wn.2d at 49, 53 (Madsen, C.J. dissenting, joined by Fairhurst, J. and C.W. Johnson, J.).⁷

⁷ See Saleemi v. Doctor's Associates, Inc., 176 Wn.2d 368, 385-86, 292 P.3d 108 (2013)(citing the concurrence and dissents in D.F.F., “Five justices of this court explicitly rejected the proposition that the concept of “structural error” had a place outside of criminal law.”).

D.F.F., and the subsequent decision in Saleemi v. Doctor's Associates, Inc., reveals an apprehension about applying structural error to civil matters. Reyes does not seek its wholesale adoption in to the civil arena, but only in involuntary commitment cases where the stakes are as high as in criminal proceedings, *i.e.*, when a person's fundamental liberty is at stake. See In re Adoption of M.S.M.-P., 181 Wn. App. 301, 314, 325 P.3d 392, 399 (2014), review granted, 182 Wn.2d 1001, 342 P.3d 326 (2015) (noting involuntary commitment proceedings, like criminal proceedings, can result in confinement and are therefore more deserving of protection against improper closure than other types of civil proceedings). Closed involuntary commitment proceedings that result in lost liberty raise the same problems as closed criminal proceedings that result in lost liberty.

The label applied to the litigation should not determine the remedy when the right to open courts is violated. The stakes should guide the remedy. The higher the stakes, the greater the need to ensure against wrongful deprivation. When fundamental constitutional rights are at stake, the highest protection is warranted.

More importantly, it is equally difficult to specifically quantify the prejudicial effect of a wrongfully closed involuntary commitment proceeding. The absence of public oversight causes inherent prejudice in both instances. Paumier, 176 Wn.2d at 37.

Reversing a criminal litigant's conviction for an open court violation but not an involuntary commitment for the same violation makes no sense. Lost liberty is lost liberty in either case. A different rule for each only promotes ridicule for the law and a lack of respect for those who engage in its practice.

This case presents this Court with the opportunity to acknowledge and establish that proceedings leading to lost liberty warrant the highest protection against error, and a direct remedy when those protections are not properly followed. It makes no difference whether the case is labeled "civil" or "criminal". As such, this Court should hold the improper closure of the hearing was error for which reversal is required.

2. REYES HAS STANDING TO RAISE THE ARTICLE 1, SECTION 10 VIOLATION FOR THE FIRST TIME ON APPEAL.

A majority of the D.F.F. Court held an involuntary committed person has standing to raise an open courts violation for the first time on appeal. 172 Wn.2d at 40 (Sanders, J., lead opinion, joined by Alexander, J., Owens, J., and Stephens, J.); 172 Wn.2d at 48 (J.M. Johnson, J. concurring, joined by Chambers, J.). Because D.F.F. is not incorrect and harmful on this point, it should be followed. In re Restraint of Yates, 177 Wash.2d 1, 25, 296 P.3d 872 (2013) (party urging the overruling of a prior decision bears burden to show it is harmful and wrongly decided).

This is not to say that constitutional rights to a public trial cannot be waived. In Herron, for example, the court informed the defendant of his right to public voir dire and he expressly waived them. State v. Herron, 177 Wn. App. 96, 104, 318 P.3d 281 (2013), review granted, 182 Wn.2d 1001 (2015).⁸ But the waiver of constitutional rights is never presumed. A party asserting the waiver of a constitutional right bears the burden to show a knowing, intelligent, and voluntary waiver. See e.g., State v. Frawley, 181 Wn.2d 452, 463, 334 P.3d 1022, 1028 (2014) (“we require an independent knowing, voluntary, and intelligent waiver of the public trial right”); Herron, 177 Wn. App. at 104. This requires “an intentional relinquishment or abandonment of a known right or privilege.”

⁸ As Division Three stated,

Mr. Herron waived his § 22 right to a public trial under these standards. He knew that he had the right to have voir dire conducted in the courtroom in the presence of any member of the public who might have been in attendance. Suggestions were made that would have allowed him to conduct private voir dire in public. Believing that he would learn more by having the inquiries made in private, he expressly opted for questioning the jurors in chambers. He intentionally relinquished one known right in order to further his equally important right to obtain an impartial jury.

Herron, 177 Wn. App. at 104.

Herron, at 104 (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

Whether a litigant can waive his or her article 1, section 10 right and later assert the public's right is not at issue here. Reyes never knowingly waived his right. Therefore, waiver cannot be the basis for refusing to consider his article 1, section 10 violation claim.

Moreover, allowing Reyes to raise an open courts claim despite no contemporaneous objection helps ensure that all involuntary commitment respondents are not wrongly deprived of liberty through secret proceedings. It also helps preserve the public's right to scrutinize the justice system by providing all interested parties an opportunity to be heard on whether a court should be closed before the court is closed. This does not happen when, as here, the public was never informed the in-chambers hearing was held. See 1RP 2-21 (no indication in the transcript of the hearing or anywhere else in the record that a *closed* hearing was ever publicly contemplated).

Requiring Reyes to attain third party standing to raise an open courts claim is unwarranted. As noted above, just like criminal defendants, involuntary commitment respondents stand to lose their liberty. The same potential loss allows criminal defendants to raise article 1, section 22 violations for the first time on appeal, and the same should

hold true for involuntary commitment respondents. M.S.M.-P., 181 Wn. App. at 314. There is no logical distinction between the two.

Moreover, if litigants in Reyes's position are required to attain third party standing to raise an open courts violation for the first time on appeal, then courts will have little incentive to comply with article 1, section 10. Washington courts apply the three-factor test of third party standing used by the United States Supreme Court:

The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, ... the litigant must have a close relation to the third party, ... and there must exist some hindrance to the third party's ability to protect his or her own interests.

Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (internal citations omitted).

As this Court recognizes, showing an "injury in fact" from improper courtroom closure is virtually impossible. Paumier, 176 Wn.2d at 37 (quoted supra). As such, third party standing to raise an open courts claim will likely never arise. Allowing lower courts to ignore fundamental aspects of our judicial system serves no good purpose and will only tarnish the judiciary's reputation. Reyes should be entitled to relief from this erroneous court closure.

D CONCLUSION

For the reasons stated, this Court should reverse and remand for a new commitment proceeding.

DATED this 25th day of March 2015

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Rolando Reyes,)	
)	
STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	NO. 89465-5
)	
ROLANDO REYES,)	
)	
Petitioner.)	

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 25TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF PETITIONER TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROLANDO REYES
SPECIAL COMMITMENT CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF MARCH 2015.

X Patrick Mayovsky

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Attached for filing today is the supplemental brief of petitioner for the case referenced below.

State v. Rolando Reyes

No. 89465-5

Supplemental Brief of Petitioner

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