

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 03, 2015, 11:54 am
BY RONALD R. CARPENTER
CLERK

NO. 89571-6

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRY A. HERRON,

Petitioner.

Filed *E*
Washington State Supreme Court

APR 14 2015

Ronald R. Carpenter
Clerk *R/C*

BRIEF OF WASHINGTON ASSOCIATION
OF PROSECUTING ATTORNEYS
AS AMICUS CURIAE

MARK K. ROE
Snohomish County Prosecutor

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Amicus Curiae.

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333



ORIGINAL

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE 1

II. ISSUE 1

III. ARGUMENT 2

 A. THE PUBLIC INTEREST IS SERVED BY PROCEDURES THAT
 ENCOURAGE OPEN TRIALS, NOT BY PROCEDURES THAT
 REWARD DEFENDANTS FOR REMAINING SILENT WHEN
 TRIALS ARE CLOSED..... 2

 B. SINCE THE PUBLIC IS REPRESENTED IN THIS CASE BY ITS
 OWN CHOSEN ATTORNEY, THE OPPOSING PARTY IS NOT
 ENTITLED TO ASSERT THE PUBLIC'S RIGHTS..... 5

IV. CONCLUSION..... 7

TABLE OF AUTHORITIES

WASHINGTON CASES

Callahan v. Jones, 200 Wash. 241, 93 P.2d 326 (1939)..... 6
Dreiling v. Jain, 151 Wn.2d 900, 93 P.3d 861 (2004)..... 5
In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 2
State v. Powell, 166 Wn.2d 73, 206 P.3d 321 (2009)..... 4
State v. Walker, ___ Wn.2d ___, 341 P.3d 976 (2015)..... 5
State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012) 3, 4
Trinity Universal Ins. Co. v. Ohio Casualty Ins. Co., 176 Wn. App.
185, 312 P.3d 976 (2013), review denied, 179 Wn.2d 1010 (2014)
..... 1

FEDERAL CASES

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101
(1972)..... 3
Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct.
819, 78 L.Ed.2d 629 (1984)..... 2

WASHINGTON CONSTITUTIONAL PROVISIONS

Art. 1, § 10..... 2

I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. The Prosecuting Attorneys have a strong interest in fair procedures that properly protect the public interests, including the public's constitutional right to the open administration of justice.

II. ISSUE

After a criminal defendant fails to object to the closure of proceedings, or even encourages that closure, can he assert on appeal a violation of the public's right to the open administration of justice?¹

¹ In posing this issue, amicus does not mean to suggest that the public's right was violated in this case. The issue involves the defendant's standing. If a party lacks standing, his claims cannot be resolved on the merits and must fail. Trinity Universal Ins. Co. v. Ohio Casualty Ins. Co., 176 Wn. App. 185, 199 ¶ 26, 312 P.3d 976 (2013), review denied, 179 Wn.2d 1010 (2014).

III. ARGUMENT

A. THE PUBLIC INTEREST IS SERVED BY PROCEDURES THAT ENCOURAGE OPEN TRIALS, NOT BY PROCEDURES THAT REWARD DEFENDANTS FOR REMAINING SILENT WHEN TRIALS ARE CLOSED.

The defendant in this case asked the trial court to excuse the public from portions of voir dire. Now he seeks to overturn his conviction by asserting the public's right to have justice administered openly. Const., art. 1, § 10. His request should be rejected. The public has no interest in rewarding criminal defendants for their successful efforts to restrict the public's rights. Rather, the public interest is in having procedures that encourage defendants to *prevent* violations of the public's rights.

The issue here arises from a partial closure of voir dire. "[T]he process of juror selection ... is itself a matter of importance, not simply to the adversaries but to the criminal justice system." In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004), quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). This is because of the public interest in "knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." Press-Enterprise Co., 464 U.S. at 509. Conducting voir dire in public helps ensure that jurors are fairly treated by both parties and by the court.

If a *defendant's* public trial rights are improperly infringed, the resulting harm can normally be remedied by a new trial. The harm to the *public* cannot be remedied in this fashion. If jurors were unfairly treated, that historical fact cannot be changed. If the public is uncertain about what happened during court sessions, they will always remain uncertain. Whatever was closed at the first trial remains closed forever, regardless of the grant of a new trial.

Rather than remedying the harm to the public, a new trial compounds it. This court has recognized the cost of retrying a case. State v. Wise, 176 Wn.2d 1, 20 ¶ 33, 288 P.3d 1113 (2012). Trials are expensive, and most of the expense is borne by the taxpayers. The delay between the original trial and a new trial often results in memories fading and witnesses becoming unavailable. Because the State bears the burden of proof, this often benefits defendants. See Barker v. Wingo, 407 U.S. 514, 521, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). But loss of evidence impedes the search for truth, so it always harms the public, whose interest is ascertaining the truth. New trials also cause additional stress to victims and other witnesses, which is likewise harmful to the public.

Defendants have a strong interest in allowing trial judges to make errors that could lead to a new trial. They are therefore

greatly benefited by procedural rules that let them raise issues on appeal after sitting silent or even encouraging the error in the trial court. The public, however, has no such interest. The only public interest is in doing it right the first time. The public interest is therefore served by rules that encourage the correction of errors before they occur.

This public interest is the fundamental reason for a basic procedural rule: on appeal, a party may ordinarily not raise an objection that was not properly preserved at trial. "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." State v. Powell, 166 Wn.2d 73, 82 ¶ 19, 206 P.3d 321 (2009). When a *defendant's* right to a public trial is in issue, this court has recognized an exception to that rule. Wise, 176 Wn.2d at 9 ¶ 9. Perhaps such an exception is necessary to protect the defendant's interests. But the exception in no way serves the public's interests. When a defendant has failed to object to the closure of proceedings, he should not thereafter be allowed to assert the public's rights that were harmed with his assent or as a result of his silence.

B. SINCE THE PUBLIC IS REPRESENTED IN THIS CASE BY ITS OWN CHOSEN ATTORNEY, THE OPPOSING PARTY IS NOT ENTITLED TO ASSERT THE PUBLIC'S RIGHTS.

There is a further reason why the defendant in this case should not be allowed to assert the public's interest. The public already has a representative in these proceedings: *the prosecutor*. "[A] prosecutor functions as the representative of the people in a quasijudicial capacity in a search for justice." State v. Walker, ___ Wn.2d ___, 341 P.3d 976, 984 ¶ 19 (2015).

In the present case, the trial prosecutor fulfilled this duty. He recognized the public interest in open judicial proceedings. At the same time, he recognized that this interest must sometimes "be limited to protect other interests, such as a defendant's right to a fair trial." Dreiling v. Jain, 151 Wn.2d 900, 913, 93 P.3d 861 (2004). The prosecutor was undoubtedly also conscious of the damage to the public that can result from appellate reversal. Recognizing the potential conflicts among these varying public interests, the prosecutor suggested several ways in which they could be reconciled. The defendant chose the alternative that provided the greatest protection for his individual interests, at the greatest expense to the public's interest in an open trial. Now he wishes to

make his own choice the basis for granting a new trial – a remedy that will further benefit him at the public's expense.

"The prosecutor represents the people, and his right to do so ... cannot be restricted or superseded excepting in the manner provided for by law." Callahan v. Jones, 200 Wash. 241, 248, 93 P.2d 326 (1939). In the present case, the defendant now disagrees with the manner in which the prosecutor balanced the conflicting public interests. The defendant therefore wishes to supersede the prosecutor's representation of the prosecutor's client with the defendant's own version of that client's interests. This is improper. So long as the people's chosen representative is legitimately performing his duties, he cannot be superseded by anyone – especially not by his opponent.

The public in this case has not been left without an advocate. Throughout the proceedings, they have been represented by the Prosecuting Attorney, whom they elected for that purpose, acting through deputies that he appointed to carry out his duties. Those deputies have worked diligently to protect their client's multifarious interests. The defendant, acting through his own chosen attorney, is entitled to advocate for his own interests. He is not entitled to advocate for the interests of the opposing party.

IV. CONCLUSION

In this proceeding, the defendant should not be allowed to assert the public interest in open trials. His attempts to do so are harmful, not helpful, to the public interest. The people's interests are represented by their own chosen attorney, not by her opponent. Unless the defendant can demonstrate an infringement of his own individual rights, the conviction should be upheld.

Respectfully submitted on April 3, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Amicus Curiae

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 03, 2015, 11:54 am
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JERRY ALLEN HERRON,

Petitioner.

No. 89571-6

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 3rd day of April, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

1. BRIEF OF WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
AS AMICUS CURIAE
2. MOTION TO FILE BRIEF AS AMICUS CURIAE

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and:

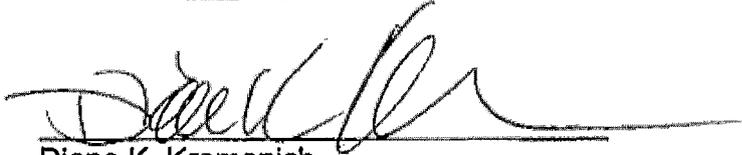
DENIS P. TRACY
WHITMAN COUNTY PROSECUTING ATTORNEY
denis@co.whitman.wa.us

JENNIFER P. JOSEPH
SPECIAL DEPUTY PROSECUTING ATTORNEY
ATTORNEY(S) FOR PETITIONER
Jennifer.joseph@kingcounty.gov

JEFFRY K. FINER
ATTORNEY FOR PETITIONER
jeffry@finer-bering.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of April, 2015, at the Snohomish County Office.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

OFFICE RECEPTIONIST, CLERK

To: Kremenich, Diane; 'jennifer.joseph@kingcounty.gov'; 'jeffry@finer-bering.com';
'denist@co.whitman.wa.us'
Subject: RE: State v. Jerry Allen Herron

Received 4-3-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kremenich, Diane [mailto:Diane.Kremenich@co.snohomish.wa.us]
Sent: Friday, April 03, 2015 11:53 AM
To: OFFICE RECEPTIONIST, CLERK; 'jennifer.joseph@kingcounty.gov'; 'jeffry@finer-bering.com';
'denist@co.whitman.wa.us'
Subject: RE: State v. Jerry Allen Herron

Good Morning...

I am resending previous e-mail, as Mr. Denis' e-mail address was missing a letter.

RE: State v. Jerry Allen Herron
Supreme Court No. 89571-6

Please accept for filing the attached documents:

1. BRIEF OF WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
AS AMICUS CURIAE
2. MOTION TO FILE BRIEF AS AMICUS CURIAE
3. DECLARATION OF SERVICE

Please let me know if there is a problem opening any of the attachments.

Thanks.

Diane.

Diane K. Kremenich
☞☞☞ Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
(425) 388-3501
Diane.Kremenich@snoco.org

CONFIDENTIALITY STATEMENT

This message may contain information that is protected by the attorney-client privilege and/or work product privilege. If this message was sent to you in error, any use, disclosure or distribution of its contents is prohibited. If you receive this message in error, please contact me at the telephone number or e-mail address listed above and delete this message without printing, copying, or forwarding it. Thank you.

 please consider the environment before printing this email