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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

In re Personal Restraint Petition of

ZAHID A. KHAN,

Petitioner.

No. 66398-4-1

S U P P L E M E N T A L
R E S P O N S E T O P E R S O N A L
R E S T R A I N T P E T I T I O N

I. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner is restrained pursuant to a judgment and sentence convicting him pursuant to jury verdict of one count each of second degree child molestation, second degree rape of a child, third degree rape of a child, third degree child molestation and attempted third degree child molestation. Ex. 1 (attached to State's initial Response to Personal Restraint Petition).

II. SUMMARY OF SUPPLEMENTAL ISSUE(S)

The petitioner had argued that the trial court's sealing the juror questionnaires without weighing the five "Bone-Club¹ factors" was reversible error and requires a new trial, even though he had

not objected below. On October 3, 2011, this Court issued a stay pending the resolution of cases presenting this issue by the Supreme Court. On February 8, 2013, the State submitted a statement of additional authority reflecting the Supreme Court's decision in Beskurt. In April petitioner moved to lift the stay in light of Beskurt. On July 26, 2013, this Court did so, directing the parties to brief "the validity of [petitioner's] public trial claim in light of Beskurt" and any "caselaw decided since the original briefing was completed that affects the analysis of any of [petitioner's] remaining claims."

As discussed below, the Supreme Court's recent decision in Beskurt affords the petitioner no relief. And the "Haverty rule," barring relitigation of an issue previously determined (as petitioner seeks to do), remains good law.

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS.

The substantive facts describing the petitioner's repeated rapes and molestation of his stepdaughter are set forth in this Court's opinion on direct appeal affirming the convictions, as well as in the facts portion of the State's initial Response. State v. Khan, COA

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

61207-7-I, Unpubl. Slip Opinion of Apr. 20, 2009 at 1, 2 (2009 WL 1058626) (attached to Response as Ex. 2); State's Response 4-10. Facts concerning charges, sentencing, procedural setting, and issues raised on direct appeal (including prior claims of prosecutorial misconduct and ineffective assistance) are likewise set forth in this Court's opinion on direct appeal and in the State's Response. Khan, Unpubl. Slip Op. at 2-6; State's Response 10-13.

B. VOIR DIRE AND JUROR QUESTIONNAIRES

Per common practice, prospective jurors in this case filled out questionnaires/biographical forms that included personal data. See Appendix J, attached to original PRP (blank juror biographical form). The questionnaires/forms were filed and sealed "per GR 31" after opening statements. Ex. 8, p. 6 (trial minutes, attached to State's Response); Ex. 9 (Order Sealing Record, attached to State's Response). Petitioner acknowledges his counsel failed to object to sealing. Appendix B to original PRP, para. # 20.

The questionnaires, and answers on them, were discussed openly and repeatedly during voir dire. Voir Dire RP 4 (discussing procedure), 25-31 (questioning by court and counsel, based on questionnaire answers), 59-63 (questioning of individual jurors), 67-73 (same), 89-90, 92, 106, 110, 121-22, 126-27 (referencing

biographical data in questioning of entire panel).² The State's chief investigator, who sat at counsel table, recalls:

I assisted Ms. Larsen [the trial prosecutor] in jury selection. I took notes during jury selection and have reviewed them. I recall having access to, and using, the individual juror questionnaires. I recall the questionnaires were on the tables for the use of the attorneys and anyone else sitting there. They were not kept in a special box or envelope.

Ex. 21 (attached to State's Response).

IV. SUPPLEMENTAL ARGUMENT

A. THE ORDER SEALING JURY QUESTIONNAIRES ENTERED AFTER THE JURY HAD BEEN SELECTED IS NOT A COURTROOM CLOSURE ENTITLING THE PETITIONER TO A NEW TRIAL.

Petitioner presents the juror questionnaires as the equivalent of secret questioning in a closed courtroom that denied him his right to an open and public trial. He adds, mistakenly, that "[i]t is highly likely that the answers to questions on the 'questionnaire' were never discussed in open court." Initial PRP at 34. He asserts that his trial attorney was ineffective by not having explained to that the juror questionnaires were confidential and closed to the public, noting that he would not have waived his right to a public trial had

² Respondent referenced the Voir Dire Report of Proceedings in the initial Response, see Response at 32, but did not attach it. By separate motion Respondent seeks to supplement the record with the full Voir Dire RP, marked as Ex. 22, believing it helpful to the Court on this issue.

he been properly advised about the questionnaires' secrecy. Initial PRP at 36, 38.

This Court has requested simultaneous supplemental briefing on the viability of this issue in light of State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013).

In Beskurt the defendant asserted that he was entitled to a new trial on the basis of facts that are very similar if not identical to those presented here. Prior to trial, jurors were provided with a questionnaire that informed them that responses to questions would not be available to the public. The attorneys used the questionnaires to determine who would be questioned individually. The attorneys used the questionnaire to assist in questioning prospective jurors. All questioning occurred in open court. After jury selection was concluded the trial court entered an order sealing those juror questionnaires. Beskurt, 176 Wn.2d at 442-44.

On appeal the defendant argued sealing juror questionnaire constituted a closure under Washington Constitution art. I, §22. He claimed that closure constituted a structural error which entitled him to a new trial. Id. at 445. A unanimous Supreme Court disagreed for various reasons. A majority of the court found no violation under article 1, §22. Four members of the court reasoned that the

questionnaire was used by the parties as a screening tool, which the parties and the court used during the course of jury selection. While some jurors were asked to elaborate on their written responses, others were asked no questions about their written responses. “Nothing suggests the questionnaires substituted actual oral voir dire.” Id. at 447. Because the public had the opportunity to observe jury selection no closure implicating the defendant’s public trial rights had been implicated. Id. at 447-48. Two justices concurred, finding there was no evidence in the record showing juror questionnaires were withheld from scrutiny by the defendant, defense counsel, or the public throughout the trial. Id. at 457. The remaining three members of the court held that the defendant failed to preserve the issue for review, reasoning that he had not shown any prejudice necessary under RAP 2.5(a)(3) in order to justify review. Id. at 449-56.

The Supreme Court subsequently considered this issue again, in light of Beskurt, in In re Yates, 177 Wn.2d 1, 29-30, 296 P.3d 872 (2013). There the court found the petitioner had failed to meet his burden of proof because he had presented no evidence that any of the challenges for cause were based on the

questionnaires as opposed to the oral voir dire that was open to the public. Id.

Here, just as in Beskurt, the written answers on the questionnaires/biographical forms were not the only basis on which jurors were selected. They certainly did provide a start, when used initially as a screening tool. See Voir Dire RP 4, 25-31. Based on that information, four jurors were questioned individually. Voir Dire RP 59-63, 67-73. During that questioning, and later during questioning of the entire panel, both counsel used the questionnaires in open court, asking questions from them repeatedly during the course of jury selection. Voir Dire RP 59-63 and 67-73 (of four individual jurors); Voir Dire RP 89-90, 92, 106, 110, 121-22, 126-27 (of the panel as a whole). Petitioner and his trial counsel obviously had access to the questionnaires. Ex. 21 (attached to initial Response). There is nothing in this record to suggest, as the Supreme Court observed, that “the questionnaires substituted [for] actual oral voir dire.” Beskurt, 176 Wn.2d at 447. The petitioner has not demonstrated, and cannot demonstrate on this record, that any juror excused for cause was based on the questionnaires and not on questioning in open court. Just as no

closure implicating the defendant's rights occurred in Beskurt or Yates, no such closure occurred here.

The Court also addressed whether a closure implicating the public's right trial under Art. 1, §10 was implicated by the sealing order. Because the information in the questionnaires were presumed private under GR 31(j), and no one had sought to access that information, no issue under Art 1, §10 had been raised. Beskurt, 176 Wn.2d at 448. The same applies here. Although the petitioner cites to Art. 1, §10 and argues he can raise the issue and assert the public right, until a request for access to the documents is made by a member of the public, no Art. 1, §10 issue arises. Compare original PRP 31, 35 with Beskurt, 176 Wn.2d at 448.

B. RECENT AUTHORITY UPHOLDS THE RELITIGATION BAR.

The petitioner continues to assert he can raise ineffective assistance and prosecutorial misconduct claims piecemeal, some on direct appeal, and some on collateral attack, as long as the factual predicates are different. See PRP Reply 2-6. He cannot. Recent authority makes clear that the "Haverty rule" remains good law:

[A] petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and

rejected on direct appeal unless the interests of justice require relitigation of that issue. The interests of justice are served by reconsidering a ground for relief if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *A petitioner may not avoid this requirement merely by supporting a previous ground for relief with different factual allegations or with different legal arguments.*

In re Yates, 177 Wn.2d at 17 (citations and internal quotations omitted; emphasis added). If this relitigation bar holds true in a capital case, it holds all the more true here.

C. A REFERENCE HEARING IS NOT TRIGGERED BY THE MERE ASSERTION OF DISPUTED FACTS.

The petitioner continues to argue that, when assessing the merits of a petition, this Court cannot weigh evidence. Rather, he reasons, once a petitioner asserts a disputed fact, or once the State as respondent disputes a fact asserted by a petitioner, a reference hearing in the trial court *must* follow. Initial PRP 15; PRP Reply 1, 5-6, 7, 14. This would make reference hearings frequent and routine in collateral attacks. And they are not. There is no reason this Court cannot make – indeed, it must make – a determination on the quality of the evidentiary record on collateral attack when deciding under RAP 16.11(b) if a claim is frivolous. And Yates reiterates the standard that, before being entitled to a remand for a

reference hearing, a petitioner must make a prima facie showing of actual (not theoretical or speculative) prejudice. Yates, 177 Wn.2d at 17-18. This is a different and much more onerous standard than one that would require a reference hearing to resolve any disputed fact, and it governs here.

V. CONCLUSION

In light of Beskurt and Yates, as well as authorities cited and argument presented in the State's initial Response, the personal restraint petition should be *dismissed*.

Respectfully submitted on August 29, 2013.

MARK K. ROE
SNOHOMISH COUNTY PROSECUTING ATTORNEY

By: 
CHARLES FRANKLIN BLACKMAN, #19354
Deputy Prosecuting Attorney
Attorney for Respondent

EXHIBITS AND ATTACHMENTS

Exhibit 22 — Report of Proceedings of Voir Dire (attached to separate motion to supplement the record).