

NO. 59995-0-1

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

In re the Matter of Application for Relief
From Personal Restraint of:

ROLAND SPEIGHT,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Alan Hancock, Judge

REPLY BRIEF OF PETITIONER

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A. ARGUMENT IN REPLY

THE TRIAL COURT VIOLATED SPEIGHT'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The state concedes the individual voir dire of 14 jurors conducted in chambers was closed to the public. Response to Personal Restraint Petition (BR), at 1-2, 5. The state also concedes this was "an important part of voir dire." BR, at 12. The state's concession requires reversal of Speight's conviction.

The state's concession that an important portion of voir dire was closed to the public is amply supported by the trial judge's expressly stated intentions in conducting individual voir dire in chambers.

THE COURT: We're gathered here in chambers, as you know, because you [juror 3] had requested to be questioned outside the presence of the other jurors, and we'll certainly honor that request. I want you to know we're going to keep these as private as possible. It is required that the attorneys and the defendant be present for this process. So we're doing the best we can, ma'am.

Petitioner's Supplemental Brief (PB), at 4 (citing to VRP from May 24, 2005, attached thereto).

It is abundantly clear from the court's statement that it did not intend to allow members of the general public access to its privately held individual voir dire. The court practically apologized for allowing Speight and his attorney to be present. Speight's case is therefore distinct from this

Court's recent decision in State v. Momah, ___ Wn. App. ___, ___ P.3d ___ (2007 WL 3348441), where this Court found no public trial right violation because "[T]here simply is no indication in the record that individual voir questioning was for the purpose of excluding either the press or the public from this trial." Momah, 2007 WL 3348441, *3.

The court's exclusion of the public from this portion of voir dire violated Speight's right to a public trial. See State v. Frawley, 140 Wn. App. 713, 167 P.3d 593, 595-97 (2007) (trial court's private portion of jury selection, which addressed each venire person's answers to a jury questionnaire, violated right to public trial); Commonwealth v. Patry, 48 Mass. App. Ct. 470, 473-75, 722 N.E.2d 979 (Mass. App. Ct. 2000) (trial court's entry of jury room with counsel and a court reporter to answer juror's questions three times during deliberations violated Sixth Amendment right to public trial), review denied, 431 Mass. 1103 (2000).

Despite the state's concession, the state argues -- in the absence of any showing that the court even considered Speight's public trial right -- that closure was appropriate under the Bone-Club¹ factors. BOR, at 12. As an initial matter, our State Supreme Court has refused to consider for the first time on appeal whether closure was warranted under the Bone-Club

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1984).

factors. State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005) (because the record lacked "any hint that the trial court considered Brightman's public trial right as required by "Bone-Club, we cannot determine whether the closure was warranted"); This Court should likewise refuse. See also Frawley, 167 P.3d at 596-97 (declining state's invitation to apply Bone-Club factors for first time on appeal because review is of trial court's consideration of factors as found in record and because trial court record was inadequate to apply factors).

In any event, the record does not support the conclusion that closure was warranted under the Bone-Club factors. Addressing the first factor, the state claims closure was warranted because it allowed "jurors to speak candidly about their experience with sexual assault, their potential biases in a rape case, and their ability to be fair and neutral jurors." BOR, at 12. But when the supposed need for closure is based on a right other than an accused's right to a fair trial, such as juror privacy in the instant case, the proponent for closure must show a "serious and imminent threat to that right." State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The state has made no such showing. Nor can it on this record.

Second, the state claims that the judge's announcement that he would begin interviewing jurors individually in chambers provided the "defendant

or a member of the public [with] an opportunity to object." BOR, at 12. State v. Gregory,² cited by the state, does not support the state's assertion that the judge's announcement amounted to an "opportunity to object." Gregory involved the exclusion of one individual from the court -- Gregory's aunt. And regarding her exclusion, the court specifically asked, "Is there any objection to that from the defense?" Gregory, 158 Wn.2d at 815. The judge here did not fulfill the court's obligation to seek the defendant's objection to any closure. State v. Easterling, 157 Wn.2d 167, 175-76 n.7, 137 P.3d 825 (2006).

Third, the state claims that the method for closure was the least restrictive alternative available, because it enabled jurors to speak candidly without "tainting the jury pool." BOR, at 13. But the state's concerns easily could have been addressed without closing the proceeding to the public. Instead of providing for the private examination of certain jurors, the trial court could simply have moved the rest of the venire panel out of the courtroom and questioned the individuals in open court. Storer Broadcasting Co. v. Circuit Court, 131 Wis.2d 342, 350, 388 N.W. 633 (Wis. App. Ct. 1986). The risk of contaminating the entire panel would

² State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).

have been avoided without trampling on the public's right to know what was happening during trial. Storer, 131 Wis.2d at 350.

Regarding the fourth factor, the state admits the court did not weigh the competing interests at stake. Accordingly, the record is not sufficiently developed for this Court to address this factor. Brightman, 155 Wn.2d at 518.

Citing to federal precedent, the state claims the fifth factor is established because the court closed voir dire "for the shortest time possible to complete the individual interviews." BOR, at 15. But the Brightman Court ruled where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial. Brightman, 155 Wn.2d at 517; see also Frawley, 167 P.3d at 595-97. In short, assuming review of the Bone-Club factors is appropriate for the first time on appeal, they do not support closure of Speight's trial.

The state next argues that assuming the court erred in closing the courtroom, it was invited and therefore does not require reversal. In support of its argument, the state claims Speight "agreed to the in chambers hearings and benefitted from them." BOR, at 17 (citing 5/23/05 VRP 5-6). This portion of the record indicates only that Speight agreed to the use of

a juror questionnaire, however.³ Although the record does not indicate an objection from defense counsel, the failure to object is not invited error. Indeed, defense counsel in both Orange⁴ and Brightman also failed to object to the closed jury voir dire. Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517. The Court in Brightman held failure to object did not waive the right to a public trial. Brightman, 155 Wn.2d at 517 (citing Bone-Club, 128 Wn.2d at 257). Moreover, the waiver of a constitutional right must be knowing and voluntary. Frawley, 167 P.3d at 596.

Finally, the state argues that because Speight is raising this issue for the first time in a personal restraint petition, he must demonstrate "actual prejudice" to obtain a new trial. The state is incorrect. Prejudice is presumed where there is violation of the right to a public trial whether the violation is alleged on direct appeal or personal restraint petition. In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); Momah, 2007 WL 33348441, *2. Orange likewise argued in a personal restraint petition that his public trial right was violated. The Supreme Court held the error was presumptively prejudicial and entitled

³ This portion of the record is attached as an appendix.

⁴ In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

Orange to a new trial, the same remedy he would have received had his attorney raised the issue on direct appeal. Orange, 128 Wn.2d at 261-62.

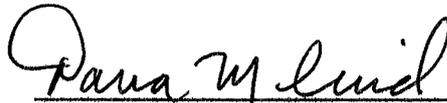
B. CONCLUSION

The state appropriately concedes an important part of voir dire was closed to the public. That concession entitles Speight to a new trial.

DATED this 7th day of December, 2007.

Respectfully submitted,

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record ~~at the address of the appellant/plaintiff~~ containing a copy of the document to which this declaration is attached.

SAN JUAN T.
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Sh. Stone 12-7-07
Name Done in Seattle, WA Date

1 back to their patients after they testified on Wednesday
2 morning.

3 THE COURT: You don't have any objection to
4 that, do you, Ms. Kenimond?

5 MS. KENIMOND: No, not at all, Your Honor.

6 THE COURT: Thank you.

7 MS. KENIMOND: For your information, my
8 trials tend to be a little faster than some others so I
9 think we'll be fine.

10 THE COURT: Okay. Thank you very much,
11 counsel.

12 Let me just ask, since I know you've
13 inquired about it informally, do counsel plan to have a
14 written questionnaire for the jury panel?

15 MS. KENIMOND: Your Honor, I have it in my
16 hand, and it is agreed to. Shall I give it to the clerk
17 to ask that it be reproduced?

18 THE COURT: Well, we'd like to have counsel
19 make the necessary copies of it, if possible.

20 MR. SILVERMAN: I believe it was provided by
21 the Court and defense attorney indicates she feels it's
22 appropriate. I've looked it over, Your Honor. I have
23 no objection to it. Since it is an alleged sexual
24 assault, sometimes having a questionnaires make it
25 easier for the jurors, if you find that appropriate.

1 THE COURT: Yes. I think it is appropriate
2 to have a written questionnaire like this. I do want to
3 make sure there's something in there that indicates that
4 the person answering the questions can be interviewed
5 individually and not in the presence of the other
6 members of the panel. Is there something like that in
7 there?

8 MR. SILVERMAN: I believe Your Honor has a
9 cover sheet that says to prospective witnesses that I
10 believe covers those issues, and we'll make sure that
11 that cover sheet accompanies the questionnaire.

12 THE COURT: Okay. The other thing was, in
13 reviewing the state's trial brief, a courtesy copy of
14 which I received, there was a reference to the state
15 wanting to introduce evidence about other alleged
16 misconduct or bad acts between the defendant, and it
17 wasn't clear who exactly was referring -- the state was
18 referring to there; another name was used, but do I
19 understand the state to be asking to allow evidence
20 about other alleged 404(b) evidence between the
21 defendant and the alleged victim but not other persons?

22 MR. SILVERMAN: That's correct. Just the
23 defendant -- incidents between the defendant and the
24 alleged victim. It would be under 404(b) and would also
25 show lustful disposition.