

NO. 59960-7-I

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

In re the Personal Restraint Petition of:

WILLIAM COGGIN,

Petitioner.

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

The Honorable Steven J. Mura, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ARGUMENT¹

UNDER STRODE AND MOMAH, COGGIN'S CONVICTIONS MUST BE REVERSED.

1. Factual Review

The Whatcom County prosecutor charged petitioner William Coggin with various counts including four counts of rape. The prosecutor drafted a questionnaire that included questions asking (1) if the juror, family member, or other person close to the juror had been a victim of sexual assault, (2) if the juror, family member, or other close person had been accused of or convicted of a crime, and (3) whether the juror had heard anything about the case. The questionnaire also states:

Some of these questions may call for information of a personal nature that you may not discuss in public. If you feel that your answer to any questions may invade your right to privacy or might be embarrassing to you, you may indicate on the form that you would prefer to discuss your answer in private. The court will give you an opportunity to explain your answer in a closed hearing.”

Response to Personal Restraint Petition, App. C. Defense counsel requested a single change to the State-proposed questionnaire related to the listing of certain witnesses. Response to PRP at 3.

¹ On March 15, 2010, this Court ordered additional briefing to address the decisions in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

On June 27, 2005, the court conducted jury voir dire. After reading the panel of prospective jurors the court's initial instructions, Judge Mura stated a portion of voir dire would occur in chambers with certain prospective jurors while the remaining jurors stayed in the courtroom:

I know that you filled out questionnaires and there are some jurors that we are going to need to speak to individually, we are going to do that at the beginning of the process before we ask the questions to the open panel. So once I'm done in here in a couple minutes we'll start the process in my office.

The rest of you, if you would just please be comfortable, you can stand or sit [or] whatever you want to do, but we ask that you stay in the courtroom so that we can start the group process we are done in chambers.

RP 10-11.

The court asked the panel some initial questions. One prospective juror indicated he had heard a news report on the case. The court informed him he would be added to the list of those to be spoken to in chambers. RP 11-12. The court then stated:

We'll get back to all of you at a later time on these issues. I think what we'll do now is I will go ahead and go to chambers with counsel and the court reporter and there are some individual jurors that we'll call in and ask some individual questions of. The rest of you just remain comfortable and we'll be back in session as soon as we are finished.

RP 20. The court reporter then notes, "The following proceedings were had in chambers." RP 20. The clerk's minutes note that "Court, counsel, [defendant], court reporter retired to chambers of private voir dire." Trial minutes at 2 (attached to Supp. Reply Brief of Petitioner).

The prosecutor, defense counsel, and the court inquired individually of jurors 8, 20, 10, 11, 32, 2, 42, 50, 48, 21, 22, and 35. RP 21-59. Most of the jurors called into chambers (10) had an affiliation with individuals accused of sex crimes or were themselves victims of sex crimes, although a few had heard limited media reports (3). RP 21-59. After the process was complete, the court informed the parties of the jurors it planned to excuse, including those interviewed privately in chambers. RP 59-63. At that point, the court reporter notes, "The following proceedings were had in the hearing and presences of the jury panel." RP 64. The court informed the parties and panel members which prospective jurors would be excused, and the remainder of jury selection occurred in open court. RP 64-121.

2. State v. Strode Requires Reversal of Coggin's Conviction.

Strode was charged with three sex offenses. His prospective jurors were asked in a confidential questionnaire whether they or anyone they were close to had ever been the victim of or accused of committing a sex offense. The prospective jurors who answered "yes" were individually

questioned in the judge's chambers to determine whether they could nonetheless render a fair and impartial verdict. Before excluding the public from this private questioning, the trial court failed to hold a Bone-Club² hearing. State v. Strode, 167 Wn.2d 222, 223-24, 217 P.3d 310 (2009).

While privately questioning some potential jurors, the trial court stated variously that "the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not be 'broadcast' in front of the whole jury panel." Strode, 167 Wn.2d at 224. The trial judge, prosecutor and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon. Id.

A majority of the Supreme Court reversed Strode's conviction because the trial court failed to weigh the competing interests as required by Bone-Club. Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring).

The lead and concurring opinions differed, however, on whether a defendant can waive the issue through affirmative conduct. The lead opinion concluded a defendant's failure to object to courtroom closure does not constitute a waiver of the issue for appeal, and that waiver occurs

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

only if it is shown to be knowing, voluntary and intelligent. Strode, 167 Wn.2d at 229 n.3 (Alexander, C.J.).

The concurring opinion, however, concluded that defense participation in the closed courtroom proceedings can, under certain circumstances, constitute a valid waiver of the right to a public trial. Strode, 167 Wn.2d at 234-236 (Fairhurst, J., concurring). As an example, Justice Fairhurst noted that in Momah, the trial court expressly advised that all proceedings are presumptively public. Id. at 234. Despite this admonishment, defense counsel affirmatively requested individual questioning of panel members in private, urged the court to expand the number of jurors subject to private questioning, and actively engaged in discussions about how to accomplish this. Id. Justice Fairhurst concluded counsel's conduct "shows the defendant intentionally relinquished a known right." Id.

The facts in Coggin's case are like those in Strode. Defense counsel did not request private questioning.³ The court neither addressed the Bone-Club factors nor in any other way weighed the competing

³ In an affidavit attached to the State's Response to Coggin's Personal Restraint Petition, the trial prosecutor attests to defense counsel's wish that certain jurors be questioned away from the rest of panel, i.e., individual questioning. Response to PRP, App. B. Even assuming that defense counsel's feelings – rather than his words or conduct before the court – were pertinent to this case, individual questioning is not the same as private questioning and may be accomplished in open court.

interests before closing a portion of voir dire. As in Strode, the trial court violated Coggin's constitutional right to a public trial.

3. State v. Momah is Distinguishable and Does Not Control the Outcome of Coggin's Petition.

The State charged Momah, a gynecologist, with committing sex offenses against several patients. State v. Momah, 167 Wn.2d 140, 145, 217 P.3d 321 (2009). Unlike the "unexceptional circumstances" in Strode, 167 Wn.2d at 223 (Alexander, C.J., lead opinion), Momah's case was "heavily publicized" and "received extensive media coverage." Momah, 167 Wn.2d at 145.

As a result, the court summoned more than 100 prospective jurors and gave them a written questionnaire. By express agreement of the parties, jurors who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned in chambers. Id. at 145-46.

Concerned about poisoning the entire panel, defense counsel also argued for expansion of the private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

Momah, 167 Wn.2d at 146.

The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. Id. Both the defense and prosecution actively participated in the in-chambers jury selection, most of which focused on prospective jurors' knowledge of the case gained from media publicity. Id. at 146-47 and n.1.

The six-justice majority in Momah noted that when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom[,]" the error is "structural in nature" and reversal is required. Momah, 167 Wn.2d at 149-51. But the majority found reversal was not required because, despite failing to explicitly discuss the Bone-Club factors, the trial court balanced Momah's right to a public trial with his right to an impartial jury. Momah, 167 Wn.2d at 156.

In addition, drawing on the invited error doctrine, the Court essentially found Momah "waived" his public trial right: "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution." 167 Wn.2d at 151; see also 167 Wn.2d at 153-54 (discussing invited error).

Counsel's affirmative and aggressive pursuit of private voir dire is an atypical and distinctive feature of Momah. See State v. Lucero, 223 Ariz. 129, 220 P.3d 249, 258 (2009) (invited error doctrine should remain limited to those litigants who are affirmatively the source of the proposed error, such as in the Momah case). Much more common is the unexceptional case where a trial court honors prospective jurors' requests to be spared the embarrassment of revealing sensitive matters in open court, yet fails in its affirmative obligation to balance competing interests on the record. In short, Momah is the aberration and Strode is the ordinary. And because the Momah Court relied so heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case.

Coggin's case is ordinary like Strode. Unlike Momah, the trial court did not discuss various courses of action with the parties; instead, the court indicated with no discussion and no balancing it would conduct a portion of voir dire in chambers. Unlike Momah, the court offered was no opportunity to object to private voir dire. Unlike Momah, Coggin's counsel neither requested closed private voir dire, nor sought its expansion.

While Coggin's attorney did participate in questioning the jurors in the judge's chambers, such participation is insufficient to waive this constitutional right. Defense counsel in Strode also questioned jurors in

the judge's chambers. See Strode, 167 Wn.2d at 224 (“the trial judge and counsel for both parties asked questions of the potential jurors”).

Finally, in Momah, “the trial judge closed the courtroom to safeguard Momah’s constitutional right to a fair trial by an impartial jury, not to protect any other interests.” 167 Wn.2d at 151-152. In Coggin’s case, in contrast, the court encouraged jurors to request private questioning regarding sensitive matters. While some discussion of trial publicity occurred, the bulk of the closed voir dire dealt with veniremembers’ and their families’ prior experiences with sexual assault. Jurors’ possible exposure to media coverage appears to have been an afterthought. In any event, it is unclear how private questioning rather than individual questioning would be necessary in regard to exposure to media coverage.

As in Strode, the trial court gave no consideration to the Bone-Club factors before moving part of voir dire into chambers, as was its duty. See Presley v. Georgia, ___ U.S. ___, 130 S.Ct. 721, 724, ___ L. Ed. 2d ___ (2010) (courts required to consider alternatives to closure even when they are not offered by the parties). It failed to identify a compelling interest justifying closure, failed to expressly give anyone present the opportunity to object to the closure, failed to evaluate whether closure was the least restrictive means to protect whatever interest the court may have perceived was threatened, failed to weigh that interest against Coggin’s

and the public's interest in an open proceeding, and failed to ensure the closure was no broader or longer than necessary. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); see also Presley, 130 S.Ct. at 724-25.

For all the reasons stated above, this Court should conclude that the trial court violated Coggin's right to a public trial, that the violation was structural error, and that reversal is required. Strode, 167 Wn.2d at 223.

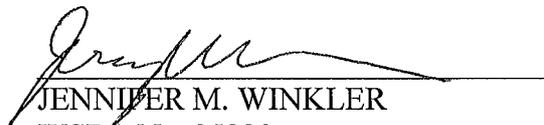
C. CONCLUSION

For the reasons stated above and in Coggin's opening brief, reply brief, and supplemental reply brief, his petition should be granted and his convictions reversed.

DATED this 7TH day of April, 2010.

Respectfully submitted,

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

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| In re the Personal Restraint Petition of: |) | |
| |) | |
| WILLIAM COGGIN, |) | COA NO. 61911-0-1 |
| |) | |
| 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 7TH DAY OF APRIL, 2010, 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] HILARY THOMAS
WHATCOM COUNTY PROSECUTOR'S OFFICE
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BELLINGHAM, WA 98227

- [X] WILLIAM COGGIN
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STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*