71383-3

71383-3

No. 91905-4

NO. 71383-3-I

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

In re the Personal Restraint Petition Of:

HECTOR SALINAS,

Petitioner

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF PETITIONER

DAVID B. KOCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JAN -5 PM 4:09

TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY 1

1. THE STATE'S MOTION FOR STAY SHOULD BE DENIED 1

2. SALINAS DID NOT WAIVE HIS PUBLIC TRIAL RIGHTS 2

3. HAD APPELLATE COUNSEL RAISED THE VIOLATION OF SALINAS' PUBLIC TRIAL RIGHTS, HIS CONVICTIONS WOULD HAVE BEEN REVERSED 4

4. THERE IS NO REASON FOR A REFERENCE HEARING 5

B. CONCLUSION 6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In the Matter of the Personal Restraint of Roland Speight
___ Wn.2d ___, 2014 WL 7003794 (2014) 1, 3

In the Matter of the Personal Restraint of William Coggin
___ Wn.2d ___, 2014 WL 7003796 (12/11/14) 1, 2

State v. Bone-Club
128 Wn.2d 254, 906 P.2d 325 (1995) 3, 4

State v. Frawley
___ Wn.2d ___, 334 P.3d 1022 (2014) 2, 3

State v. Hummel
165 Wn. App. 749, 266 P.3d 269 (2012)
review denied, 176 Wn.2d 1023, 297 P.3d 708 (2013) 4, 5

State v. Momah
167 Wn.2d 140, 217 P.3d 321 (2009)
cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010) 2, 4

State v. Strode
167 Wn.2d 222, 217 P.3d 310 (2009) 4, 5

A. ARGUMENT IN REPLY

1. THE STATE'S MOTION FOR STAY SHOULD BE DENIED.

Citing In re Coggin[1] and In re Speight,[2] and noting the Supreme Court's decisions in these cases would likely be dispositive on the issue of invited error, the State requested a stay until those cases were decided. See Motion to Stay Proceedings and Supplemental Response To Personal Restraint Petition, at 3-4. Both cases have now been decided. Therefore, the motion for stay should be denied.

In Coggin, defense counsel affirmatively expressed a desire for individual voir dire and then approved a questionnaire informing potential jurors that "if they preferred to discuss their answers in private, the court would give them an opportunity to explain the answers in a 'closed hearing.'" Coggin, at *1 (quoting the questionnaire). As in Salinas' case, the Whatcom County Prosecutor's Office argued this was invited error and precluded relief. Id. at *2. The Supreme Court disagreed, noting that it was

---

[1] In the Matter of the Personal Restraint of William Coggin, ___ Wn.2d ___, 2014 WL 7003796 (12/11/14).

[2] In the Matter of the Personal Restraint of Roland Speight, ___ Wn.2d ___, 2014 WL 7003794 (2014).

the trial judge that had decided to handle questioning in chambers. Id. The Court also noted that, even in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010), it had rejected invited error as an impediment to review. Id.

Under Coggin,[3] Salinas' trial counsel did not invite the violation of his public trial rights. There is no need for a stay.

2. SALINAS DID NOT WAIVE HIS PUBLIC TRIAL RIGHTS.

After Salinas filed his Supplemental Opening Brief, the Supreme Court decided State v. Frawley, ___ Wn.2d ___, 334 P.3d 1022 (2014). In Frawley, all nine judges agreed that there could be no waiver of the right to public trial unless, at a minimum, it met the constitutional waiver standard, i.e., the record revealed a knowing, voluntary, and intelligent waiver of that specific right. Frawley, 334 P.3d at 1027-1028 (lead opinion authored by C. Johnson, J.) (joined by Owens, J.); 1030-1031 (Stephens, J., concurring) (joined by Fairhurst, J.); 1031-1035 (Gordon McCloud, J., concurring in part and dissenting in part) (joined by J.M. Johnson, J., and Gonzalez, J.), 1035 (Wiggins, J., dissenting) (joined by Madsen, CJ).

It appears that five of the justices would require, at a minimum, a personal waiver from the defendant or a statement of the defendant's waiver by counsel if the record also reveals "that the defendant knew, heard, understood, and agreed with what the lawyer was saying." Frawley, 334 P.3d at 1034 (Gordon McCloud, J., concurring in part and dissenting in part); 1035 (Wiggins, J., dissenting). Two additional justices would require even more: a written waiver expressly acknowledging and waiving the right or an equivalent colloquy and, perhaps, even a Bone-Club[4] analysis. Id. at 1027-1029.

As the State properly concedes, the record in Salinas' case does not even show a waiver under Justice Gordon-McCloud's more lenient standard, approved by a majority of the Court. See RP (3/9/10) 1-53; Motion To Stay Proceedings and Supplemental Response to Personal Restraint Petition, at 6 ("an affirmative waiver in accord with Justice Gordon-McCloud's concurrence does not appear in the record"). Therefore, it can be said with confidence that a majority of the Supreme Court would not find a waiver in Salinas' case. Nor should this Court.

---

3 The Court's decision Speight does not address invited error.

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

3. HAD APPELLATE COUNSEL RAISED THE VIOLATION OF SALINAS' PUBLIC TRIAL RIGHTS, HIS CONVICTIONS WOULD HAVE BEEN REVERSED.

The State argues that Salinas cannot demonstrate his public trial argument would have prevailed on appeal because State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), and State v. Momah were the leading cases at the time and Salinas' case is like Momah. Motion To Stay Proceedings and Supplemental Response To Personal Restraint Petition, at 7-11.

The State took this same approach in State v. Hummel, 165 Wn. App. 749, 266 P.3d 269 (2012), review denied, 176 Wn.2d 1023, 297 P.3d 708 (2013). Like Salinas, Hummel was prosecuted in Whatcom County, and the trial judge was the Honorable Charles Snyder. Id. at 749. Like Salinas' case, defense counsel proposed, and Judge Snyder adopted, a questionnaire indicating jurors should inform the court if a juror "would prefer to discuss your answer in private." Id. at 773. Like Salinas' case, Judge Snyder asked if there were any objections to questioning jurors who had expressed a preference for privacy in chambers and, hearing none, proceeded to do so without a full Bone-Club analysis. Id. 773-774. Like Salinas' case, the State argued the situation was like Momah

and, therefore, Hummel was not entitled to relief. Id. at 771-772. This Court, however, found the situation analogous to Strode and reversed. Id. at 772-774.

Hummel makes it clear that, under Strode – a decision available at the time of Salinas' direct appeal – Salinas would have prevailed had Ms. Wilk raised the issue on his behalf.

4. THERE IS NO REASON FOR A REFERENCE HEARING

The State maintains its request for a reference hearing to determine whether Ms. Wilk's decision not to raise the winning public trial issue that would have avoided a life sentence for Salinas was tactical. For the reasons already explained in Salinas' Opening Brief, the request should be denied for two reasons: (1) the State has not presented any competent evidence or information establishing a material dispute and (2) there is nothing Ms. Wilk could offer as an explanation that would be deemed reasonable. See Petitioner's Opening Brief, at 17-20.

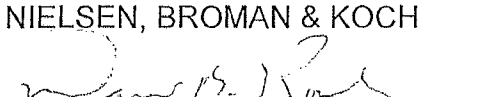
B. CONCLUSION

For the reasons discussed in Salinas' opening brief and above, this Court should reverse.

DATED this 2nd day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Petitioner

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

In re the Personal Restraint Petition of:	)	
	)	
HECTOR SALINAS,	)	
	)	COA NO. 71383-3-I
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 5TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLYBRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE, SUITE 201
BELLINGHAM, WA 98227
Appellate_Division@co.whatcom.wa.us

[X] HECTOR SALINAS
DOC NO. 726671
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JANUARY 2015.

x Patrick Mayovsky