IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. DANIAL R. HALVERSON, Appellant.	)	NO. 42761-3-II SUPPLEMENTAL MEMORANDUM

01. IDENTITY

DANIAL R. HALVERSON, the Appellant, by and through his court-appointed counsel THOMAS E. DOYLE, files this Supplemental Memorandum addressing the issues below.

02. ISSUES PRESENTED

This court ordered supplemental briefing on (1) the application of the "experience and logic" test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), to Halverson's claim that the trial court had violated his constitutional right to an open and public trial, and (2) the application of State v. Blazina, ___ P.3d ___, WL 2217206 (Div. 2, 2013), to Halverson's claim that the trial court had erred in finding he had the current or future ability to pay legal financial obligations.

03. FACTS RELEVANT TO ISSUES

Halverson incorporates and adopts by reference the statement of the case set forth in his Brief of Appellant on file herein.

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04. ARGUMENT

04.1 THE EXPERIENCE AND LOGIC TEST INDICATES THAT THE QUESTIONING OF A JUROR IN CHAMBERS REGARDING THAT JUROR'S MISCONDUCT, SANS A BONE-CLUB ANALYSIS, CONSTITUTED A CLOSURE, ENTITLING HALVERSON TO A NEW TRIAL.

Citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II), our State Supreme Court recently adopted that court's "experience and logic" test for determining whether a particular proceeding implicates a defendant's public trial right. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). "(T)he experience prong … asks 'whether the place and process have historically been open to the press and general public.'" Sublett, 176 Wn.2d at 73 (quoting Press II, 478 U.S. at 8). "The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id. If the answer to both is yes, the public trial right attaches, requiring the trial court to consider the requirements enumerated in Bone-Club before closing the proceeding to the public. Sublett, 176 Wn.2d at 73.

04.1.1 Experience Prong

In Sublett, the trial court met with counsel in chambers to discuss a question submitted by the jury during deliberations concerning the court's accomplice liability instruction. Counsel agreed to the court's response "telling the jury to reread the instructions." Sublett, 176 Wn.2d at 67. Applying the experience and

logic test, the Supreme Court rejected the claim that this in-chambers conference implicated a public trial right, holding that it didn't satisfy the experience prong:

> Because the jury asked a question concerning the instructions, we view this as similar in nature to proceedings regarding jury instructions in general. Historically, such proceedings have not necessarily been conducted in an open courtroom.

Sublett, 176 Wn.2d at 75.

In contrast, the in-chambers conference here involved a matter historically addressed in open court. The trial court met with counsel and a deliberating juror to ask questions that could reveal a proper basis for excusing the juror: Whether or not he had discussed with other jurors the results of his reference to a dictionary? Whether or not his looking up words in the dictionary would influence his deliberations? [RP 10/07/11 1021-22; Br. of Appellant at 19]. The juror was excused the next day following a hearing in open court. [RP 10/07/11 1026-27, 1034-35; Br. of Appellant at 19].

Where a trial court is asked to determine, as here, whether a particular juror should be excused, which inherently involves factual and credibility determinations, the procedure has traditionally been open to the public. See State v. Sadler, 147 Wn. App. 97, 118, 193 P.3d 1108 (2008) (right to public trial exists in the context of a Batson hearing, which "involves factual and credibility determinations and is relevant to the fairness and integrity of the judicial process as a whole…."). Likewise, it is instructive to note that the public trial right applies to jury voir dire proceedings. See State v. Paumier, 176 Wn.2d 29, 35-37, 288 P.3d 1126 (2012); State v. Wise, 176 Wn.2d 1, 11-13, 15, 288 P.3d 1113 (2012). Analogously, this is relevant to this

discussion for a critical purpose of voir dire is to ask a prospective juror questions that may reveal a proper basis for excusing the juror from the trial, see CrR 6.4(b), which, as in Sadler and Paumier and Wise, involves factual and credibility determinations and serves as the underlying justification for such procedures to be addressed in open court.

The above reveals that the procedure for asking questions of a juror that may reveal a proper basis for excusing the juror from the trial, where such questions inherently involve factual and credibility determinations, has been and remains open to the public.

04.1.2 Logic Prong

In analyzing the logic prong, attention is centered "on the purposes of the public trial right and the constitutional assurance of open courts." State v. Jones, ___ P.3d ___, WL 2407119 *7 (Div. 2, 2013). In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), our Supreme Court acknowledged that the public trial right, in part, serves to ensure a fair trial, 155 Wn.2d at 514, which is implicated in this case.

The trial court, having been informed that one of the jurors had looked up words in a dictionary, which was in violation of Court's Instruction 1 as to the limitation on evidence the jury could consider [CP 45], questioned the deliberating juror in chambers in a manner aimed at revealing a proper basis for excusing the juror. [Br. of Appellant at 19]. As this inherently involved factual and credibility determinations, which are traditionally exposed and revealed in open court and, as in Sadler, are "relevant to the fairness and integrity of the judicial process as a whole….,"

147 Wn. App. at 118, there is a lack of assurance as to the candidness and honesty of the in-chambers disclosures concerning the juror's misconduct, which nurtures meaningful questions regarding the fairness of the trial, which, in turn, implicates "the core values the public trial serves." Sublett, 176 Wn.2d at 72.

04.1.3 Conclusion

Given that Halverson's public trial right attached under the experience and logic test, and given that the trial court failed to engage in a meaningful and required five-part Bone-Club analysis before questioning the deliberating juror in chambers, and given that Halverson's failure to object to the process does not constitute a waiver, and given that prejudice is presumed, this court must reverse Halverson's convictions and remand for a new trial. State v. Wise,176 Wn.2d at 19.

04.2 THE TRIAL COURT, WITHOUT INQUIRY INTO HALVERSON'S INDIVIDUAL FINANCIAL CIRCUMSTANCES, ERRED IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

In light of this court's opinion in State v. Blazina, ___ P.3d ___, 2013 WL 2217206 (Div. 2, 2013), based on the record in this case, Halverson maintains that the issue regarding the imposition of discretionary legal financial obligations (LFOs) may be be raised for the first time on appeal but does not challenge the mandatory fees: $100 criminal filing fee (RCW 36.18.020(2)(h)), $500 victim penalty assessment (RCW 7.68.035) and DNA collection fee (RCW 43.43.7541). [CP 11].

Blazina makes clear that RAP 2.5(a) does not compel review of finding of future ability to pay discretionary LFOs for first time on appeal where the record fails to indicate circumstances that might reduce a defendant's likely future ability to pay discretionary obligations commencing within 60 days of sentencing. Blazina, WL 22217206 at *3.

The record in this case indicates such circumstances. At sentencing, the trial court imposed $45,624.83 in discretionary legal financial obligations: $5,372.52 (court costs), $24,862 (court appointed attorney fees), $1,5290.31 (defense costs) and $100 (crime lab fee). [CP 11]. As in State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012), the record reveals no evidence or analysis that Halverson has the current or future ability to pay the discretionary LFOs. To the contrary, similar to the case in Bertrand, 165 Wn. App. at 404, Halverson's circumstances cast serious doubt on his likely future ability to pay the obligations, which were to commence "immediately." [CP 12]. He is a 54-year-old indigent defendant who is serving a 25-year sentence and has an extensive criminal history involving attempted murder in the first degree, assault in the first degree, unlawful possession of a firearm and possession of LSD. [CP 7-8]. He has no real property, personal property valued at $551, no income from any source and debts totaling $10,824.58. [CP 235-36]. There is virtually no realistic hope of his satisfying the challenged obligations. Before the State can collect discretionary LFOs from Halverson, "there must be a determination that (he) has the ability to pay these LFOs,

taking into account (his) resources and the nature of the financial burden on (him)."

Bertrand, 165 Wn. App. at 405 n.16.

DATED this 7th day of June 2013.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Tim Higgs timh@co.mason.wa.us	Danial R. Halverson #353343 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326

DATED this 7th day of June 2013.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

June 07, 2013 - 1:38 PM

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timh@co.mason.wa.us