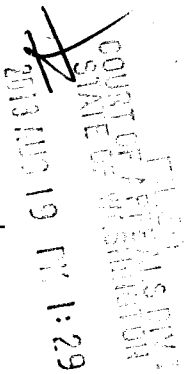
No. 66202-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE



STATE OF WASHINGTON, Respondent,

vs.

RANDY WHITMAN, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL BRIEF ISSUE

The Court has directed the parties to address how the new test announced in State v. Sublett, 176 Wn.2d 58, 71-72, 292 P.3d 715 (2012), regarding when a court's closure implicates the right to public trial, should be applied in this case.

B. ISSUES

1. Whether a defendant's right to public trial under Art. 1 §22 and the 6th Amendment extended to an in-chambers discussion regarding a motion to join the defendant's two causes for trial where no testimony was taken, no government misconduct was alleged, the issue was procedural in nature, defense counsel had previously moved in open court to join the causes for trial, and the values underlying the right to public trial were not hindered by holding the proceeding in chambers.

C. RELATED FACTS

On April 16, 1996 Whitman was charged under cause number 96-1-00293-6 with Felony Violation of a No Contact Order (hereinafter "felony VNCO"), alleged to have occurred on or about April 7th, 1996. CP 63-64. He was subsequently charged on December 26, 1996 under cause number 96-1-01058-1 with Felony Telephone Harassment alleged to have occurred on or about October 18th, 1996. CP 58-59. A warrant was issued in 1997 when Whitman failed to appear on both cases. CP 75-78.

On Oct. 25th, 2010, defense counsel moved to "join"[1] both cause numbers for trial in open court. RP 3; CP 69. Apparently counsel had assumed that the offenses would be tried together. RP 3. Both cases were scheduled to start trial that day and defense was prepared to try both. Id. The prosecutor informed the court that the offenses had not been joined, but he might agree to it if the State's witnesses were available. RP 3-4. The court ruled that since the cause numbers had not been joined, the felony VNCO case would be tried first, with the other case to start immediately afterwards. RP 4.

When the court reconvened at 1:30 p.m., the parties and judge were in-chambers. CP 70; RP 10. While the venire panel waited in the courtroom, the judge stated:

> The record should reflect that we are in chambers on the State v. Whitman matter, and to alleviate the State's concerns that this brief hearing that we are going to have in chambers might not be open to the public I sent the clerk out to the courtroom, she asked if there was anybody in the courtroom that was not a juror and nobody raised their hand and therefore there isn't anybody out there that would care to attend this hearing.

RP 9-10; CP 69-70. The State informed the court then that it was agreeing to defense's earlier motion to "join" the two cause numbers for trial. RP 11. The prosecutor also affirmatively requested the court "join the two

[1] While defense counsel referred to joining the causes for trial, the more accurate term would be "consolidating" the causes for trial. CrR 4.3.1.

cause numbers for trial" due to the cross-admissibility of the evidence and judicial economy. Id. Defense counsel then reversed his earlier position and objected to having the matters joined for trial because he believed the evidence was not cross admissible and was prejudicial to Whitman. RP 12. After reviewing the probable cause affidavits, the court concluded that the evidence in the VNCO case would be admissible in the telephone harassment case under ER 404(b) to show defendant's motive and granted the State's motion to "join" the cases for trial. RP 13-14. The court recommended that the older cause number be joined in the information on the newer cause number. RP 14.

The prosecutor presented an order joining the two causes for trial and filed a First Amended Information alleging both counts the next day in open court. RP 22-26; CP 54-62. Whitman was tried by a jury and found guilty of the felony VNCO and not guilty of the felony Telephone Harassment. CP 28. Whitman has not appealed from the court's order consolidating the counts for trial, nor from the amended information.

D. ARGUMENT

1. Whitman's right to a public trial under the 6th Amendment and Art. 1 §22 did not extend to the in-chambers motion to join the causes for trial because the values advanced by the public trial right would not have been furthered by requiring the proceeding to be open.

Under the experience and logic test adopted in State v. Sublett, the right to public trial did not extend to the in-chambers discussion regarding the motion to consolidate because the purposes served by the right to public trial would not have been furthered by holding the hearing in public. It is Whitman's burden to demonstrate how the specific proceeding implicated his right to public trial and to show that both prongs of the experience and logic test have been met. He cannot do so because the court only made a legal conclusion that the two causes should be consolidated, a determination it could have made on its own without a hearing, no testimony was taken, and the procedural motion did not involve any allegations of government misconduct, was discussed in open court both before and after the in-chambers discussion and was recorded. Even if the motion should have been heard in open court, no structural error occurred here warranting the relief requested by Whitman, reversal of his conviction on the first count. The in-chambers proceeding only affected how the trial would proceed, not the substance of the trial, and was separable from the trial.

"[N]ot every interaction between the court, counsel, defendants ... implicate[s] the right to public trial, or constitute[s] a closure to the public," Sublett, 176 Wn.2d at 71. Therefore, the first question to resolve when a violation of the right to public trial is alleged is whether the courts

have previously determined that the particular proceeding implicates the right to public trial. Id. In Sublett, the court adopted the "experience and logic test" that arose out of 1st Amendment right of public access cases in federal court in order to determine whether a particular proceeding or hearing implicates a defendant's right to public trial under Art. 1 §22, if no such determination has previously been made. The label given to the proceeding, however, does not dictate whether the right to public trial attaches to a particular proceeding. Id. at 72-73.

The experience and logic test is used to determine if the core values of the right to public trial are implicated. Sublett, 176 Wn.2d at 72-73. Under the experience prong, the court inquires "whether the place and process have historically been open to the press and general public." Id. at 73. Under the logic prong, the court's inquiry is "whether public access plays a significant positive role in the functioning of the particular process in question." Id. In applying the logic prong, the court should also consider the values served by the public trial right: 1) to ensure a fair trial; 2) to remind the prosecutor and the judge of their responsibility to the defendant and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury. Id. at 72, 74. The defendant must demonstrate that both prongs of the test are met or the right to public trial does not attach to the proceeding. In re Yates, 177

Wn.2d 1129, 296 P.3d 872 (2013); State v. Wilson, 174 Wn. App. 328, 341, 298 P.3d 148 (2013).

In Sublett, the court determined that the judge's in-chambers discussion with counsel regarding how to respond to a jury question during deliberations did not implicate the defendant's right to public trial. In determining that the right to public trial did not attach to the trial court's in-chambers discussion, the Sublett court compared the discussion to in-chambers discussions regarding jury instructions, which historically have not necessarily been conducted in an open courtroom. Sublett, 176 Wn.2d at 75-76. The court also noted that the court rules contemplate that the answer be in writing, which had been done in the case. Id. at 76. The court therefore concluded that the right to public trial did not attach to that in-chambers discussion. Id. at 77. In doing so, it also noted that none of the values served by the right to public trial were affected by an in-chambers discussion on the jury's question, no witnesses were involved, testimony had already been taken, and the jury's question and the judge's answer were in writing and in the record, available for public scrutiny. Id.

Counsel for Respondent has not been able to find any cases in Washington that hold that the right to public trial under Art. 1 §22 or the 6th Amendment attaches to motions to join or consolidate cases for trial or to the type of follow-up discussion that occurred in this case. Therefore,

this Court should apply the experience and logic test to determine if the right attaches to the specific proceeding that occurred.

a. motion to consolidate proceeding

In general, under English common law the public did not have a right to attend pretrial criminal proceedings. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 388-89, 99 S.Ct. 2898, 2910-11, 61 L.Ed.2d 608 (1979). The U.S. Supreme Court in Gannett concluded that the public did not have a 6th or 14th Amendment right to attend criminal trials because of the historical precedent in English common law and within this country of closed pretrial proceedings. Id. at 390-91. Subsequent to Gannett, the U.S. Supreme Court held that the defendant does have a 6th Amendment right to public trial for certain pretrial suppression hearings. Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

More recently, the Ninth Circuit in Waters noted that the right to public trial under the 6th Amendment extends to those hearings "that are an integral part of the trial, such as jury selection and motions to suppress evidence," as well as to those "whose subject matter involves the values that the right to a public trial serves." U.S. v. Waters, 627 F.3d 345, 360 (9th Cir. 2010). In that case the court held that the right to public trial extended to an omnibus hearing in which motions in limine were heard because the values served by the public trial right were implicated by the

motions, one of which resembled a motion to suppress evidence. Id. at 360. That motion sought dismissal due to government misconduct.

> The hearing would therefore have benefitted from the "salutary effects of public scrutiny." *Waller,* 467 U.S. at 47, 104 S.Ct. 2210. Opening the hearing to the public might have encouraged other witnesses to come forward and discouraged perjury. Further, as with any allegation of misconduct, government agents must be reminded of their "responsibility to the accused and the importance of their function." *Id.* Last but not least, the public has an interest in learning of all allegations of government misconduct, including prosecutorial misconduct.

Id. at 360-61. On the other hand, where those values are not implicated, the 6th Amendment right to public trial does not extend to pretrial hearings regarding the admissibility of evidence. *See*, State v. McBale, __ P.3d __ (Oregon 2013), 2013 WL3864322 at 15-16 (rape shield statute requiring hearing regarding admissibility of victim's past sexual conduct to be held outside presence of public did not violate 6th Amendment).

Motions to join or consolidate cases or counts for trial are governed by statute and court rules. RCW 10.37.060 provides:

> When there are several charges against any person, ... for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several ... informations the whole may be joined in one ... information, in separate counts; and, if two ... or more informations filed, in such cases, the court may order such ... informations to be consolidated.

RCW 10.37.060 (2013). Offenses properly joined under CrR 4.3 shall be consolidated for trial unless severance is ordered. CrR 4.3.1(a). The court on its own may order consolidation of two or more informations if the offenses could have been joined in a single charging document under CrR 4.3. CrR 4.3.1(c).

Whitman bears the burden of demonstrating that the right to public trial attaches to the in-chambers discussion. While the State believes that motions to consolidate are probably generally heard in open court, the court rule permits the court on its own to order consolidation, so the rules contemplate that consolidation can occur without a public hearing. Moreover, it is hard to see how public access would have had a significant positive role in the actual consolidation motion proceeding, particularly where the matter was addressed in open court both before and afterwards, the discussion was recorded and reflected in filed documents. The court made a legal conclusion that the causes should be consolidated. There was no allegation of government misconduct, no testimony was taken. None of the values served by the right to public trial were implicated by the in-chambers proceeding.

Furthermore, even if the right to public trial attached to the in-chambers motion, that does not mean that the trial on the felony VNCO itself was impacted by the closure of that proceeding. Whitman must

demonstrate that the closure impacted his felony VNCO conviction in order to warrant reversal of that conviction. Whitman would only be entitled to have the motion heard in public, but as he has not asserted any error related to consolidating the counts for trial, a re-do of the hearing in public would seem pointless. *See,* Waters, 627 F.3d at 360-61 (deciding what relief defendant would be entitled to due to unconstitutional closure of pretrial hearing would be difficult because error was not structural and violation "may have been vindicated by the public availability of a transcript")[2]. Moreover, Whitman was found not guilty of the second count, the count that was the subject of the joinder motion. No structural error occurred here that affected the trial.

E. CONCLUSION

Based on the foregoing the State requests this Court deny Whitman's appeal and affirm his conviction for felony violation of a no contact order.

Respectfully submitted this 16th day of August, 2013.

HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

[2] The State would not oppose the transcript of the in-chambers proceeding being filed with Superior Court, so that the full record of the hearing is easily available to the public.

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, GREGORY C. LINK, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101

Sydney A. Hopkins — 08/16/2013
LEGAL ASSISTANT — DATE