90345-0

SUPREME COURT NO. _____
NO. 44205-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HENRY URQUIJO,

Petitioner.

FILED
JUN -9 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
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FILED IN COA ON JUNE 4, 2014

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A. IDENTITY OF PETITIONER

Petitioner Henry Urquijo asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' unpublished decision in State v. Urquijo, filed May 6, 2014, attached as an Appendix.

C. ISSUE PRESENTED FOR REVIEW

Did the trial court violate the petitioner's right to a public trial by taking peremptory challenges in a private proceeding?

D. STATEMENT OF THE CASE[1]

The State charged Henry Urquijo with felony violation of a no-contact order, alleging he assaulted his girlfriend, Gonzales, despite an order prohibiting contact between the two. The charge was elevated to a felony based on the theory that he had twice violated no-contact orders. CP 1-7; RCW 26.50.110(4), (5).

Following testimony, the court first asked the jury to decide whether Urquijo violated a no-contact order. CP 25; see also CP 29 (verdict form). The court then asked by special interrogatory whether Urquijo (1) intentionally assaulted Gonzales and (2) whether he was

[1] This petition refers to the verbatim reports as follows: 1RP – 10/30/2012 (voir dire) and 2RP – 10/30 and 11/13/2012 (trial and sentencing).

"previously convicted of two or more violations of a Domestic Violence No Contact Order." CP 30. The jury left the first question blank but answered "yes" to the second. CP 30.

Defense counsel requested a Drug Offender Sentencing Alternative (DOSA) and informed the court that under State v. Boyd,[2] the court must impose a specific term of community custody rather than noting the term could not exceed the statutory maximum. 2RP 113.

The sentencing court denied the DOSA request and sentenced Urquijo to a 60-month statutory maximum term. CP 36; RCW 26.50.110(5); RCW 9A.20.021(1)(c). The court acknowledged the community custody term in addition to incarceration exceeded the statutory maximum but noted on the judgment and sentence that the community custody term was "to be equal to the length of earned early release not to exceed 12 months." CP 38. The court told Urquijo "I think you're going to go do 60 months and I think you're going to be under [Department of Corrections] supervision. And if some court [of] appeals or whatever says you're not supervised, so be it." 2RP 115.

Urquijo appealed. CP 46-47. He argued the trial court violated his constitutional right to a public trial by taking peremptory challenges privately. Brief of Appellant (BOA) at 3-7. He also argued the court

[2] 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

erred in imposing 60 months of incarceration plus community custody. BOA at 7-9

In its May 6, 2014 opinion, the Court of Appeals rejected the first argument, relying on the court's own recent opinion in State v. Dunn, ___ Wn. App. ___, 321 P.3d 1283 (Apr. 8, 2014). Opinion (Op.) at 2. That decision, in turn, relied on Division Three's decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) in rejecting a similar argument.[3] Consistent with Urquijo's second argument, the Court of Appeals remanded, however, to amend the community custody term or resentence under Boyd. Op. at 3.

E. REASONS REVIEW SHOULD BE ACCEPTED

WHERE THE OPINION CONFLICTS WITH THIS COURT'S PUBLIC TRIAL DECISIONS AND THE DIVISION'S OWN DECISION IN *STATE v. WILSON*, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (2).

Jury selection occurred on October 30, 2012. 1RP 2-58. After the parties finished asking potential jurors questions, the court directed counsel and Urquijo to a table, where, based on the clerk's minutes, the parties made peremptory challenges by passing a list of names back and forth. CP 48, 52-53; Brief of Respondent (BOR) at 3. The exercise of the

[3] A petition for review was filed in Love under case no. 89619-4. On April 4, 2014 this Court stayed consideration of the petition. A petition for review was filed in Dunn on May 7 and is set to be considered in August 5, 2014 under case no. 90238-1.

challenges was not reported. 2RP 59. The court then called the names of the jurors being seated. 2RP 59; CP 48.

In rejecting Urquijo's argument that this practice violated his public trial rights, Division Two relied on its own decision in Dunn, 321 P.3d at 1285, which primarily relied on the decision of Division Three in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013). Op. at 2.

Contrary to the decision in Love, however, this Court's decisions in Strode, State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Division Two's own decision in State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) support the conclusion that peremptory challenges must be made in open court, not at a private bench conference or by passing a sheet of paper back and forth. This Court should accept review because, in relying on Love, Division Two disregarded opinions by this Court and its own prior decision. RAP 13.4(b)(1) and (2)

Jury selection in a criminal case is considered part of the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). In State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), this adopted an "experience and logic" test for determining whether an event constitutes a courtroom closure. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the

functioning of the process. Id. at 73. It is well settled, however, that the right to a public trial extends to jury selection. In re Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring).

Other than Love, there are no Washington cases directly addressing this issue. This Court's decision in Strode, however, supports the conclusion that the public trial right attaches to parties' challenges of jurors. There, jurors were questioned, and "for-cause" challenges conducted, in chambers. This Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the public trial rights. Strode, 167 Wn.2d at 224, 227, 231.

Division Two's Wilson decision also supports that the public trial right attaches not only to "for-cause" but also to peremptory challenges. There, the court applied the experience and logic test to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, Division Two expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Thus, Division Two correctly recognized that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly.

But the result of analysis under the experience and logic test is no different. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system"). While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. Thus, it is just as important for the public to be able to

scrutinize the parties' exercise of peremptory challenges as it is for "for-cause" challenges.

Regarding the historic practice, Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact that Thomas challenged the practice suggests it was atypical even at the time. Labeling Thomas "strong evidence" is an overstatement.

Finally, although the State did not make this argument below, BOR at 2-6, the fact that a jury information sheet may be part of the record does not remedy the public trial right violation with regard to the parties' exercise of peremptory challenges. For example, it would be difficult for a layperson to understand the document, or for a member of the public with access the document at some later time to draw a correlation between the names of the jurors and the person excused. In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1.

Filing a juror information sheet or similar document is therefore insufficient to protect the public trial right.

Because the Court of Appeals' opinion conflicts with this Court's decisions as well as Wilson, this Court should accept review. RAP 13.4(b)(1) and (2).

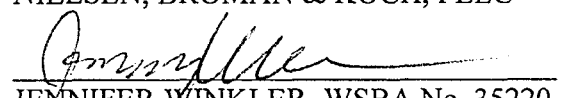
F. CONCLUSION

For the foregoing reasons, this Court should accept review.

DATED this 4TH day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HENRY URQUIJO, Appellant.	No. 44205-1-II UNPUBLISHED OPINION

MELNICK, J. — Henry Urquijo appeals his conviction for felony violation of a domestic violence no contact order and the community custody term of his sentence. He argues that (1) the trial court violated his public trial right when it heard peremptory challenges in private and (2) the trial court erred when it imposed a community custody term in excess of the statutory maximum. He also includes a pro se statement of additional grounds (SAG) arguing ineffective assistance of counsel and challenging witness credibility. We hold that the trial court's decision to hear peremptory challenges at a table in the courtroom did not violate Urquijo's right to an open and public trial. The issues in Urquijo's SAG are outside the record. The trial court erred when it sentenced Urquijo to the maximum term of confinement plus community custody for a term equal to the length of early release. Therefore, we affirm the conviction but remand to the trial court to amend the community custody term or to resentence.

FACTS

The State charged Urquijo with felony violation of a domestic violence no contact order. After voir dire, the trial court stated,

> "Ladies and Gentlemen, I'm going to allow you to stand and stretch. I would ask that you stay in the courtroom, the attorneys and I are going to step over to the table with Mr. Urquijo. We are going to be having a chat and can—rest assured, we're talking about you."

Report of Proceedings (Jury Voir Dire) at 59. Neither party objected. Although the record of proceedings ends at this point, the clerk's voir dire minutes show that peremptory challenges began at 10:12 A.M. and the jury was empanelled shortly thereafter.

The jury found Urquijo guilty. The trial court sentenced him to 60 months of confinement and community custody for a "term to be equal to [the] length of earned early release, not to exceed 12 months." Clerk's Papers (CP) at 38. Urquijo appeals.

ANALYSIS

I. PUBLIC TRIAL RIGHT

Urquijo first argues that the trial court violated his public trial right when it conducted peremptory challenges at a table inside the courtroom. This contention fails. In *State v. Dunn*, No. 43855-1-II, 2014 WL 1379172 (Wash. Ct. App. Apr. 8, 2014), we previously decided the issue Urquijo raised. In *Dunn*, we held that the trial court did not violate a defendant's right to a public trial when the attorneys exercised peremptory challenges during a sidebar. 2014 WL 1379172, at *3. In deciding this issue, we adopted the reasoning of Division Three of our court in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013) (peremptory challenges at sidebar). *Dunn*, 2014 WL 1379172, at *3. Following our rationale in *Dunn*, we hold that the trial court did not violate Urquijo's public trial right.

II. SENTENCING

Urquijo next argues that the trial court erred when it imposed a community custody term in excess of the statutory maximum. The State agrees and suggests that the community custody term be omitted from the judgment and sentence. We remand to the trial court to comply with RCW 9.94A.701(9).

Under RCW 9.94A.701(9), "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." The statutory maximum for felony violation of a no contact order is 60 months. RCW 26.50.110(5); RCW 9A.20.021(1)(c). The trial court sentenced Urquijo to 60 months of confinement plus community custody for an amount "equal to [the] length of earned early release, not to exceed 12 months." CP at 38. But "the trial court, not the Department of Corrections, is required to reduce an offender's term of community custody to ensure that the total sentence is within the statutory maximum." *State v. Land*, 172 Wn. App. 593, 603, 295 P.3d 782 (remanding for resentencing after the trial court sentenced the defendant to community custody for the longer of the period of early release or 36 months, as capped by the statutory maximum), *review denied*, 177 Wn.2d 1016 (2013). The remedy for a violation of RCW 9.94A.701(9) is remand to the trial court to amend the community custody term or to resentence. *See State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). Consequently, we remand to the trial court to amend the community custody term or to resentence Urquijo.

III. STATEMENT OF ADDITIONAL GROUNDS

Urquijo asserts that he was denied effective assistance of counsel because (1) his attorney did not ask witnesses all of the questions that Urquijo wanted him to ask and (2) Urquijo believes his attorney is friends with the prosecutor outside of court. These claims rely on matters outside the record and will not be reviewed in an appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). They are better suited to a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

Urquijo next asserts that two of the State's witnesses were not credible. Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006). Therefore, this claim also fails.

Based on the foregoing, we affirm Urquijo's conviction, and we remand to the trial court to amend the community custody term or to resentence Urquijo.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick J.
Melnick, J.

We concur:

Hunt, J.

Worswick C.J.
Worswick, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. HENRY URQUIJO, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 44205-1-II

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 4TH DAY OF JUNE, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HENRY URQUIJO
DOC NO. 803790
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF JUNE, 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 04, 2014 - 3:16 PM

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