FILED
Feb 19, 2015
Court of Appeals
Division III
State of Washington

SUPREME COURT NO. 91329-3

NO. 31859-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN OSTER,

Petitioner.

FILED
FEB 24 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Bruce A. Spanner, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Steven Oster requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Oster, No. 31859-1-III, filed January 20, 2015. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

During jury selection, the parties exercised peremptory challenges silently on paper. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important part of jury selection privately, did the court violate petitioner's constitutional right to a public trial?[2]

C. STATEMENT OF THE CASE

By amended information, the Benton County prosecutor charged Oster with two counts of felony violation of a no-contact order with a domestic violence designation. CP 11-13. The jury found him guilty on each count and answered yes to the domestic violence special verdicts. CP 51-54. The court imposed concurrent standard range sentences of 60 months confinement and twelve months community custody. CP 57, 60, 61. Notice of Appeal was timely filed. CP 66.

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] This Court granted review of this issue in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4).

After questioning by both parties, it appears peremptory challenges were exercised silently on paper. 3RP[3] 64-65. The trial minutes state only, "11:00AM Peremptory challenges begin. Sidebar with Court Reporter. Peremptory Challenges resume. Remaining jurors are thanked for their service and excused." CP 73. The verbatim report of proceedings is no more informative. The court stated, "Now it's time for peremptory challenges. Go ahead." 3RP 64. The next notation in the transcript states simply, "(Whereupon preemptory [sic] challenges were taken.)." 3RP 65. At a sidebar reported on the record, the court pointed out one of the State's peremptory challenges was procedurally inappropriate, and was stricken. 3RP 65. Then, the court announced, "All right. That concludes preemptory [sic] challenges." 3RP 65. The attorneys apparently challenged potential jurors by writing the potential juror's name and number on a sheet of paper that was passed back and forth between them. CP 68. The resulting list of the names of potential jurors challenged by each side was filed in the court record. CP 68.

On appeal, Oster argued the silent exercise of peremptory challenges violated his right to a public trial. The Court of Appeals concluded silent exercise of peremptory challenges on paper was not a courtroom closure. Oster asks this Court to grant review.

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[3] There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – June 5, 2013; 2RP – June 17, 18, Aug. 7, 2013; 3RP – June 17, 2013 (jury selection).

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF THE PUBLIC TRIAL ISSUE BECAUSE DIVISION III'S DECISION CONFLICTS WITH STATE V. STRODE AND STATE V. WISE AND INVOLVES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Jury selection is a critical part of trial that must be open to the public. State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113, 1118 (2012); State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). Even if it were not already clear that the public trial right prohibits closed jury selection proceedings, such proceedings also violate the public trial right under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

However, relying on its decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), rev. granted 340 P.3d 228 (2015), as well as State v. Webb, 183 Wn. App. 242, 333 P.3d 470 (2014), rev. denied, ___ Wn. App. ___ (Feb. 4, 2015), and State v. Dunn, 180 Wn. App. 570, 321 P. 3d 1283, rev. denied, 340 P.3d 228 (2014), the Court of Appeals held that silent, on-paper exercise of peremptory challenges does not implicate the public trial right. Oster asks this Court to grant review because that decision conflicts with this Court's decisions in Strode and Wise as well as Division II's decision in State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013).

RAP 13.4(b)(1), (2). Additionally, the application of the public trial right to peremptory challenges raises significant constitutional questions of substantial public interest. RAP 13.4(b)(3), (4).

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[4] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may close proceedings to public view only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a closure, the court must first apply on the record the five factors set forth in Bone-Club. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-09, 100 P.3d 291 (2004).

The public trial right applies to "the process of juror selection, which is itself a matter of importance, not simply to the adversaries but to the

[4] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

criminal justice system." Id. at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). In Wise, 10 jurors were questioned privately in chambers during voir dire, and six were excused for cause. 176 Wn.2d at 7. The court held the public trial right was violated because jurors were questioned in a room not open to the public without consideration of the Bone-Club factors. Id. at 11-12. Wise does not indicate any reason to depart from this holding when the private part of voir dire is peremptory challenges.

In Strode, jurors were questioned, and for-cause challenges were conducted, in chambers. 167 Wn.2d at 224. This Court treated the for-cause challenges in the same manner as individual questioning and held their occurrence in chambers violated the public trial right. Id. at 224, 227, 231. Review is warranted because the Court of Appeals' holding that peremptory challenges may be exercised out of the public's view without first considering the Bone-Club factors is in conflict with this Court's holdings in Wise and Strode. RAP 13.4(b)(1).

The practice is not redeemed merely because the paper on which the peremptory challenges were written was ultimately filed in the public record. In Wise, the private, in-chambers questioning was transcribed and also made part of the public record of the trial. 176 Wn.2d at 7-8. The court nonetheless held the proceedings were closed because they were held in a

place not ordinarily accessible to the public. Id. at 11. The piece of paper filed in this case was no more accessible to the public at the time than the judge's chambers in Wise.[5] This second conflict with this Court's precedent also warrants review. RAP 13.4(b)(1).

The Court of Appeals' opinion in this case also conflicts with Division II's case law supporting the conclusion that the public trial right attaches to peremptory challenges. In Wilson the court applied Sublett's experience and logic test to find that the administrative excusal of two jurors for sickness did not violate the defendant's public trial right. Wilson, 174 Wn. App. at 347. The court noted that historically, the public trial right has not extended to administrative hardship excusals granted by the court before voir dire begins. Id. at 342. But in doing so, the court expressly differentiated between the administrative excusal at issue in that case and a jury selection proceeding involving for-cause and peremptory challenges, which the court said historically, are exercised in open court. Id. Thus, under Wilson's application of the experience prong of the experience and logic test, for-cause and peremptory challenges historically are done in open court.

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[5] But see State v. Filitaula, __ Wn. App. ___, 339 P.3d 221, 223-24 (2014) (holding it is sufficient to file written form containing names and numbers of prospective jurors removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them). Filitaula's petition for review, no. 91192-4, is pending before this Court.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), Division II held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. Like Wilson, the Jones decision refers to the exercise of peremptory challenges as a part of jury selection that must be public. Id.

In addition to the historical experience referenced in Wilson and Jones, logic dictates that public exercise of peremptory challenges serves the values of the public trial right. The right to a public trial includes circumstances where "the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)); State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010).

The peremptory challenge process, an integral part of jury selection,[6] is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Because of these crucial constitutional limitations, designed to prevent and remedy discrimination in jury selection, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. Discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013), cert. denied, 134 S. Ct. 831 (2013). Therefore, "It is crucial that we have meaningful and effective procedures for identifying racially motivated juror challenges." Saintcalle, 178 Wn.2d at 41. An open peremptory process is part of that procedure. The Peremptory Challenges document lists names; it does not reveal race. CP 68. Without the ability to hear and see the selection of jurors as it occurs, the public has no ability to assess whether challenges are being handled fairly and within the

[6] People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (1992).

confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection is a primary means to "enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Public trials are a check on the judicial system that provides for accountability and transparency. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Open exercise of peremptory challenges safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged. The exercise of peremptory challenges directly impacts the fairness of a trial. Both experience and logic indicate it is inappropriate to shield that process from public scrutiny.

Because Division III's decision conflicts with Strode and Wise, as well as with Division II's decisions in Wilson and Jones, this Court should grant review. RAP 13.4(b)(1), (2). This Court's opinion in Saintcalle noting the importance of deterring racially motivated jury selection also

demonstrates that application of the public trial right to peremptory challenges is an important constitutional issue of substantial public interest. RAP 13.4(b)(4); Saintcalle, 178 Wn.2d at 41.

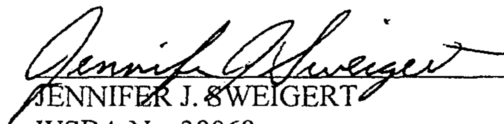
E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of constitutional law and public interest. Oster, therefore, requests this Court grant review under RAP 13.4 (b)(1), (2), (3), and (4).

DATED this 19th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,	)	No. 31859-1-III
Respondent,	)	
v.	)	
STEVEN D. OSTER,	)	UNPUBLISHED OPINION
Appellant.	)	

KORSMO, J. — Steven Oster appeals from a jury determination that he committed two felony violations of a no contact order, arguing that his public trial rights were violated during the exercise of peremptory challenges. We affirm the convictions, but remand for the court to strike the term of community custody.

FACTS

During jury selection, the parties exercised their peremptory challenges by marking them on a sheet of paper that was passed back and forth between counsel in the courtroom. There was no objection to the process.

After the jury returned the two guilty verdicts, the trial court imposed a sentence consisting of concurrent 60 month prison terms followed by 12 months of community custody. The judgment and sentence carried a notation indicating that the combined term of incarceration and community custody could not exceed 60 months. Mr. Oster promptly appealed to this court.

ANALYSIS

The appeal presents two issues concerning the jury selection process and the term of community custody. We conclude that Mr. Oster's right to a public trial was not violated when the parties exercised their peremptory challenges, but that the trial court erred in imposing the term of community custody. We will address those two matters in that order.

Public Trial

Mr. Oster contends that by silently exercising peremptory challenges on paper, he was denied his right to a public trial. Several recent cases have rejected this argument.

Article I, § 22 of the Washington Constitution guarantees a criminal defendant the right to a "public trial." Article I, § 10 requires that justice "in all cases shall be administered openly." In a criminal case, these complementary provisions serve the same function of ensuring that the defendant receives a public trial. *State v. Herron*, 177 Wn. App. 96, 106, 318 P.3d 281 (2013). Courts may only close proceedings after a proper balancing of competing interests. *State v. Bone-Club*, 128 Wn.2d 254, 258-59,

906 P.2d 325 (1995). The *Bone-Club* balancing test is applicable to both constitutional provisions. *Id.* at 259. The threshold question of whether a particular matter is required to be heard in open court is determined by using the experience and logic test set out in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

The practice of conducting written peremptory challenges has been subject to several recent public trial challenges. *E.g.*, *State v. Love*, 176 Wn. App. 911, 914 n.1, 309 P.3d 1209 (2013). Applying the experience and logic test, we determined in *Love* that the practice of conducting peremptory challenges at sidebar did not constitute a closure of the courtroom.[1] *Id.* at 920. *Accord*, *State v. Dunn*, 180 Wn. App. 570, 574, 321 P.3d 1283 (2014). Subsequently, this court held that conducting peremptory challenges "on paper" did not constitute a closure of the courtroom. *State v. Webb*, 183 Wn. App. 242, 246-47, 333 P.3d 470 (2014).

On the basis of *Love*, *Dunn*, and *Webb*, we conclude once again that the public trial right does not preclude the written exercise of peremptory challenges in the courtroom. There was no violation of Mr. Oster's right to a public trial.

---

[1] The Washington Supreme Court, after applying the experience and logic test to sidebar conferences, concluded that sidebar conferences do not violate the public trial right. *State v. Smith*, 181 Wn.2d 508, 511, 333 P.3d 388 (2014) (sidebar conferences on several issues).

Community Custody

The parties agree that the trial court erred by imposing a term of community custody. We agree and remand the case with directions to strike the term of community custody.

A sentence includes periods of total or partial confinement, as well as any term of community custody imposed by the court. RCW 9.94A.030(8); RCW 9.94A.505(2)(a)(i), (ii). RCW 9.94A.701(9) provides that the period of community custody "shall be reduced" when the "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." Felony violation of a no contact order is a class C felony. RCW 26.50.110. The maximum sentence for a class C felony is five years. RCW 9A.20.021(1)(c).

Because the 60 month sentence of incarceration and the 12 month term of community custody together exceed the statutory maximum sentence of 60 months, the trial court erred by adding the term of community custody. The addition of the notation limiting the total of the two terms to the 60 month period is ineffectual in light of statutory amendments. *See State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).[2] We therefore remand the matter with directions to strike the term of community custody.

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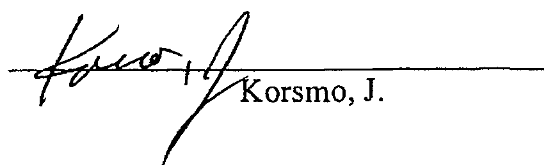
[2] We note that the notation would have been effective if the 60 month term of incarceration had been an exceptional sentence rather than a standard range sentence. *See In re PRP of McWilliams*, No. 88883-3, 2014 WL 7338498 (Wash. Dec. 23, 2014).

Affirmed and remanded.

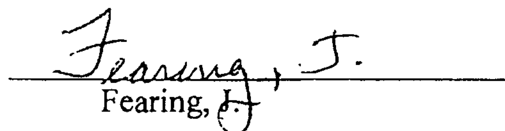
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Korsmo, J.

WE CONCUR:

Brown, A.C.J.



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State v. Steven Oster

No. 31859-1-III

Certificate 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 19th day of February, 2015, I caused a true and correct copy of the **Petition for Review** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

Steven Oster
2013 Tinkle Street
Richland, WA 99354

Signed in Seattle, Washington this 19th day of February, 2015.

x Patrick Mayovsky