No. 268306

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

DALLIN D. FORT,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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I. INTRODUCTION

Dallin Fort appealed the trial court's denial of his motion for a new trial and/or vacating his conviction. The Court of Appeals stayed Mr. Fort's appeal, pending the Washington Supreme Court's decision in State v. Frawley. The Supreme Court published the Frawley decision on September 25, 2014, and the stay on Mr. Fort's appeal was subsequently lifted. This Court has asked counsel to file supplemental briefs regarding the applicability of Frawley to Mr. Fort's case.

The Frawley decision reiterates the necessity for a full Bone-Club analysis, on the record, before a trial court conducts jury selection in-chambers. It is undisputed that the trial court in Mr. Fort's case did not conduct a Bone-Club analysis before conducting jury selection in-chambers. Mr. Fort was denied his constitutional right to a public trial, the public was denied their right to a public trial, and the proper remedy is a new trial and/or vacating his conviction.

II. ISSUE

Does the State v. Frawley decision apply to require that Mr. Fort receive a new trial because the trial court failed to conduct a Bone-Club analysis before conducting jury selection in-chambers?

III. STATEMENT OF THE CASE

Mr. Fort was charged by Amended Information with three counts of Rape of a Child in the First Degree and one count of Molestation in the First Degree. (CP 11)

During jury selection, the trial court utilized a questionnaire that asked everyone on the jury panel if they, or anyone close to them, had any experience with sexual abuse. (CP 75, Appendix B, RP 33) After the questionnaire was completed by the jurors, the trial court stated that the "...people we need to talk to... will (be brought) into chambers to discuss [the jurors' answers] one at a time..." (CP 75, App. B, RP 35) The only people allowed at the in-chambers discussion were the judge, the court reporter, the attorneys, the defendant, and perhaps an investigator. (CP 75, App. B, RP 35) The trial court told the jury panel that after this process, the court would "get back in general session." (CP 75, App. B, RP 37) The trial court did not conduct a closure test. There were no Bone-Club factors analyzed or discussed. (CP 75, App. B, RP 34-39)

On the first day of jury selection, the trial court individually ordered 17 potential jurors into chambers, outside the presence of the other jurors, the general public, and the news media, for a discussion of

the above referenced material. (CP 75, App. B, RP 43, 47, 52, 58, 67,73, 78, 86, 99, 109, 111, 130, 146, 161, 168, 175, 185, 194) Afterwards, the trial court resumed its proceedings in the courtroom open to the public. (RP 200)

The selection process was observed by David Fort, Mr. Fort's father. He stated:

> I was present in the courtroom when the trial court advised the prospective jurors that they would be taken into chambers to discuss the answers to the jury questionnaire. I was not aware that I could object to the closure of the courtroom. No one asked if I objected to the closure of the courtroom. Had I been asked, I would have objected to the courtroom being closed as I had a great interest in observing my son's trial.

(CP 112)

On February 3, 2006, the jury found Mr. Fort guilty of two counts of First Degree Child Rape and not guilty of First Degree Child Molestation. (CP 3-5) On April 3, 2006, Mr. Fort was sentenced to serve a minimum of 132 months to a maximum life term. (CP 11) On April 21, 2006, Mr. Fort filed a timely Notice of Appeal (First Direct Appeal). (CP 25)

Mr. Fort was represented at trial by Assistant Public Defender Alan D. Rossi. Mr. Rossi filed a Notice of Appeal on behalf of Mr. Fort. (CP 25) Mr. Rossi designated the portions of the transcript that

would be transcribed for the appeal. (1/25/08 Sentencing Hearing, RP 15) Mr. Rossi did not designate the voir dire process to be transcribed. (RP 15)

David L. Donnan of the Washington Appellate Project in Seattle was appointed to prosecute Mr. Fort's appeal. Upon reviewing the trial court record, Mr. Donnan recognized that the jury voir dire process had not been requested and moved to supplement the transcript. (RP 15) The supplemental transcript, however, was not received until after Mr. Fort's opening brief had been filed with this Court. Upon receipt of the voir dire transcript, on June 12, 2007, Mr. Fort filed a Personal Restraint Petition which, based on the supplemental transcript, raised the issue of whether Mr. Fort had been denied his right to a public trial. (RP 15)

On September 4, 2007, this Court issued an unpublished opinion on Mr. Fort's first direct appeal. It affirmed Mr. Fort's conviction but remanded the case for resentencing.

On December 4, 2007, this Court issued its Mandate from the first direct appeal and remanded the case to the trial court for resentencing. (RP 64)

Upon receipt of the Mandate, the trial court scheduled Mr. Fort's resentencing for January 25, 2008. (RP 2) Prior to that hearing, Mr. Fort filed a Motion for New Trial and/or Motion to Vacate Judgment. (CP 74) In that Motion, Mr. Fort argued that his conviction should be vacated based upon the controlling precedent of State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), and that a new trial should be ordered due to the violation of his right to a public trial. (CP 75)

After this Court had issued its Mandate, but before Mr. Fort was resentenced, this Court entered an order on January 14, 2008 staying Mr. Fort's Personal Restraint Petition. At the January 25, 2008 resentencing hearing, the trial court denied Mr. Fort's Motion for New Trial and/or Motion to Vacate Judgment, and Mr. Fort's Motion to Stay Judgment and Sentence Pending Appeal. (CP 131) Mr. Fort was resentenced to a minimum sentence of 108 months to a maximum life sentence. (CP 117)

On February 5, 2008, Mr. Fort timely filed his second Notice of Appeal (Second Direct Appeal). (CP 133)

On July 3, 2008, the Court of Appeals issued a notation ruling that provided:

> These proceedings are stayed pending the decision and mandate by the Washington State Supreme Court in State v. Duckett, case #809658 and in State v. Frawley, case #807272.

On April 8, 2013, the Supreme Court denied review of State v. Duckett, 141 Wn.App. 797 (2007), review denied, 170 Wn.2d 1031, 299 P.3d 18 (2013).

On September 25, 2014, the Supreme Court issued its decision on Frawley.

On November 6, 2014 the Court of Appeals issued a notation providing:

> The Washington State Supreme court has decided and mandated State v. Frawley, case #80727-2. Therefore, the stay of these proceedings is lifted.

IV. ARGUMENT

The concurring opinions in State v. Frawley, ___ Wn.2d ___, 334 P.3d 1022 (2014)[1] reiterate the necessity for a proper Bone-Club analysis, on the record, before jury selection is carried out in-chambers during a criminal trial. An adequate Bone-Club analysis safeguards a

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[1] The lead opinion was written by Justice C. Johnson, with Justice Owens concurring. Justice Stephens filed a separate concurring opinion joined by Justice Fairhurst. Justice Gordon McCloud concurred in part and dissented in part and filed an opinion joined by Justice Pro Tem J.M. Johnson, and Justice Gonzalez. While the ultimate opinion was a plurality, all of the concurrences reach the same result in their analyses of the issue here.

defendant's and the public's right to a public trial. See, State v. Duckett, 141 Wn.App. 797, 805, 173 P.3d 948 (2007). Therefore, Mr. Fort's right to a public trial was violated after the trial court failed to conduct a proper Bone-Club analysis, on the record, before holding jury questioning in-chambers.[2]

Whether a trial court's procedure has violated a defendant's right to a public trial is a question of law reviewed de novo. See, State v. Duckett, 141 Wn.App. at 802-03 (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

The Frawley decision consolidated two cases, State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007) and State v. Applegate, 163 Wn.App. 460, 259 P.3d 311 (2011). See, Frawley, 334 P.3d at 1022. These cases involve whether a defendant can waive his right to a public trial under the Washington Constitution. Id.

As early as 1923, the Washington Supreme Court has recognized the public's right under Article I, §10[3] of the Washington

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[2] Along with violating Mr. Fort's right to a public trial, the trial court's failure to conduct a proper Bone-Club analysis before closing the courtroom violated the public's right to a public trial. WA. Const. Art I, §10.

[3] Article I, §10 provides: "Justice in all cases shall be administered openly, and without unnecessary delay."

State Constitution and the defendant's right under Article I, §22[4] to a public trial. See, State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923). Furthermore, the Sixth Amendment of the United States Constitution provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

A defendant's right to a public trial extends to a range of pre-trial proceedings,[5] including the individual questioning of jurors. See, State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012); see also, State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012). To protect the accused's right to a public trial, a trial court may only close courtroom proceedings after making specific findings using the five factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325, justifying the courtroom's closure to the public. See, Wise, 176 Wn.2d at 15; see also, State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). This analysis also ensures the state's interest in protecting the transparency and fairness of criminal trials by requiring that all stages

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[4] Article I, §22 provides in pertinent part: "In criminal prosecutions, the accused shall have the right to... have a speedy public trial by an impartial jury of the county in which the offense was charged."

[5] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.C. 2735, 92 L.Ed.2d 1 (1986) (preliminary hearing); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004) (voir dire); Bone-Club, 128 Wn.2d at 257 (pretrial suppression hearing).

of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure. State v. Easterling, 157 Wn.2d at 178.

Washington's Supreme Court compared the facts from Wise to Applegate and Frawley to determine whether the defendants' rights to a public trial were violated. Frawley, 334 P.3d at 1026. The trial court in Wise initiated in-chamber questioning of jurors without a Bone-Club analysis on the record. Id. The conviction in Wise was reversed because implementing closure without a proper Bone-Club analysis violated the defendant's right to a public trial. Id.; see also, Frawley, 334 P.3d at 1026. The analyses in State v. Frawley and State v. Applegate establish Mr. Fort's right to a new trial.

A. The State v. Frawley decision affirms the necessity for a Bone-Club analysis before closing the courtroom.

In Frawley the Court of Appeals reversed a conviction for first degree murder because the trial court improperly closed the courtroom for individual voir dire without performing a Bone-Club analysis. See, Frawley, 334 P.3d at 1022. The State petitioned this Court for review, and consideration of the petition was deferred pending the resolution of State v. Strode, 167 Wn.2d 222, 217 P.3d 321 (2009), State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), and State v. Wise, 176 Wn.2d

at 1. Following those decisions, specifically Wise, the Supreme Court in Frawley affirmed the Court of Appeals decision holding that the absence of a Bone-Club analysis before closure was a structural error, violating the defendant's right to a public trial. Frawley, 334 P.3d at 1027.

B. State v. Applegate establishes that the Bone-Club analysis must be explicit and on the record, before closing the courtroom.

In Applegate, the defendant was convicted of second degree rape of a child. Prior to voir dire, the trial judge asked the courtroom if either party or any member of the public would object to conducting jury questioning in-chambers. Id. The State raised the issue that this procedure would exclude the public from the trial. Id. The trial court responded that this issue could be addressed later, additionally the 'factors' did not need to be specifically addressed. Id. During voir dire, the court again asked for objections and stated a belief that the Bone-Club factors had been met, the extent of the trial court's on the record analysis. Id.

The Supreme Court reversed the decision in Applegate, again relying on Wise. A violation of the defendant's right to a public trial will be found with an inadequate Bone-Club analysis, as well as the

absence of one. By articulating the Bone-Club factors on the record, the trial court ensures that court proceedings are not closed for the mere sake of convenience. See, Presley v. Georgia, 558 U.S. 209, 215, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). The Court concludes that:

> In light of the important purpose served by each factor, it would be counterintuitive to hold that a trial judge's obligation to articulate and assess every Bone-Club factor on the record is excused by a single statement that he believed that the factors "ha[d] been met."

Frawley, 334 P.3d at 1027 (quoting trial judge, RP (August 10, 2009) at 119).

C. Mr. Fort's right to a public trial was violated.

The Supreme Court's decision in Frawley does not represent a change in the law. The right to a public trial has been long established in this state and has been applied uniformly to all types of judicial proceedings. State v. Marsh, 126 Wash. at 142; State v. Easterling, 157 Wn.2d at 167; State v. Wise, 176 Wn.2d at 1. The requirement that a trial court conduct a balancing test before closing the courtroom is not new, but rather long established and well settled.

The weight of concurrence in State v. Frawley supports the contention that Mr. Fort's right to a public trial was violated during jury selection. Before closing jury selection, a trial court must explicitly

conduct a Bone-Club analysis on the record. See, Duckett, 141 Wn.App. at 802-803. Similar to the court in Frawley, the trial court in Mr. Fort's case closed jury questioning without conducting a Bone-Club analysis. See, Frawley, 334 P.3d at 1022; see also, State v. Wise, 176 Wn.2d at 1. The imperative of conducting an explicit Bone-Club analysis before closing the courtroom in Mr. Fort's case is supported by the reversal of the conviction in Applegate.

The Supreme Court's decision in Frawley reaffirms the necessity of a Bone-Club analysis before courtroom closure.[6] The trial court's decision should be reversed and an order for a new trial and vacating Mr. Fort's conviction should be granted. See, Wise, 176 Wn.2d at 15; see also, In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

It is undisputed that the trial court in Mr. Fort's case did not conduct a closure test and failed to examine and consider the Bone-Club factors. This is similar to Frawley, where the Supreme Court held that the absence of an analysis of the Bone-Club factors deprived

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[6] On the same day that Frawley was decided, the Washington Supreme Court published opinions for State v. Njonge, 334 P.3d 1068 and State v. Shearer, 334 P.3d 1078. Similar to Frawley, these cases involved a defendant's right to a public trial, and the Court reiterated that a trial court may only close a public trial after conducting a proper Bone-Club analysis.

defendant of his constitutional right to a public trial. Applegate was remanded for a similar absence of an explicit Bone-Club analysis in the record.

V. CONCLUSION

Dallin Fort asks this Court to reverse the trial court and to order a new trial and/or vacate his conviction based upon the violation of his constitutional right to a public trial.

DATED this 8th day of December, 2014.

CARL E. HUEBER, WSBA #12453
WINSTON & CASHATT
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AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
: ss
County of Spokane)

Cheryl R. Hansen, being first duly sworn upon oath, deposes and states as follows: At all times hereinafter mentioned I was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, and not a party to this matter. On December 8, 2014, I served the foregoing document on counsel for the State of Washington and upon appellant by causing a true and correct copy of said document to be mailed to said parties at the addresses shown below:

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Dallin D. Fort, #891250
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Cheryl R Hansen

SUBSCRIBED AND SWORN to before me this 8 day of December, 2014.

JANELL MARTINDALE NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES JUNE 27, 2015
620276

Janell Martindale
Notary Public in and for the State of Washington, residing at Spokane
My commission expires 6/27/15