

FILED

APR 06 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY *[Signature]*

5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NO. 268306-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON

v.

DALLIN DAVID FORT

IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF:
DALLIN DAVID FORT,
Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER
FOR PERSONAL RESTRAINT PETITION

JAMES E. EGAN
Attorneys for Appellant
315 W. Kennewick Ave.
Kennewick, WA 99336
(509) 586-3091

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ISSUES FOR REVIEW	3
ARGUMENT	4
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

<i>In Re Coggin</i> , ___ Wn.2d ___ 340 P.3d 810 (2014)	3, 4, 5, 7, 8
<i>In Re Morris</i> , 176 Wn.2d 157 (2012)	3, 4, 5
<i>In Re Orange</i> , 152 Wn.2d 795 (2004)	2, 3, 4, 5, 6, 7, 8
<i>In Re Speight</i> , ___ Wn.2d ___ 340 P.3d 207 (2014)	4, 7
<i>State v. Frost</i> , 160 Wn.2d 765, 779-782 (2007)	5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATEMENT OF FACTS

Dallin Fort was convicted of felony crimes in Spokane Superior Court on April 3, 2006. (CP 3-5). He filed an appeal from this conviction on April 21, 2006. (CP 25). This appeal raised several issues, including a pro se argument of ineffective assistance of counsel. Along with several other issues, he claimed counsel was ineffective for allowing a juror, who worked as a sexual assault victims advocate, to remain on the jury. This juror was one of several who was talked to privately in chambers in a closed courtroom setting. *State v. Fort*, No. 25139-0-III (Wn. App. 9/4/07; unpublished) at p. 7. The pro se ineffective assistance of counsel claim, in this first direct appeal, did not specifically allege that trial counsel was ineffective in allowing the courtroom to be closed in violation of the State and Federal Constitutions, but the ruling of the court did note that this juror was questioned in chambers, not in open court. Mr. Fort now expands his open and still pending PRP to include the allegation that appellate counsel was ineffective in failing to raise the public trial violation in the first direct appeal.

When the decision in the first direct appeal was issued on September 4, 2007, the defendant/appellant had already filed his Personal Restraint Petition on June 11, 2007. This petition asked for a new trial because of the public trial violation. The defendant filed a PRP, but did not in addition, supplement his appeal. Mr. Fort had

1 been represented at trial by Assistant Public Defender Alan D. Rossi. Mr. Rossi filed
2 a Notice of Appeal on behalf of Mr. Fort. (CP 25). Mr. Rossi designated the portions
3 of the transcript that would be transcribed for the appeal. (1/25/08 Sentencing
4 Hearing, RP 15). Mr. Rossi did not designate the voir dire process to be transcribed.
5 (RP 15).
6

7 David L. Donnan of the Washington Appellate Project in Seattle was appointed
8 by the Court of Appeals to prosecute Mr. Fort's appeal. Upon reviewing the trial
9 court record, Mr. Donnan recognized that the jury voir dire transcript had not been
10 requested and moved to supplement the record to include this transcript. (RP 15).
11 The supplemental transcript, however, was not received until after Mr. Fort's opening
12 brief had been filed with this Court.
13

14 The appellate counsel was aware of the public trial violation because he had
15 ordered the voir dire transcription for this very reason. The direct appeal attorney
16 was also aware of the public trial violation because he knew of the PRP when it was
17 filed on June 11, 2007. Nevertheless, appellate counsel did not supplement his brief
18 and assign error to the violation of the state and federal constitutions public trial rule.
19 Had he done so, Mr. Fort would have received a new trial. There was no tactical
20 benefit or strategy in not raising this issue. This failure was ineffective assistance of
21 counsel.
22
23
24

25 After the receipt of the voir dire transcript, Mr. Fort filed a Personal Restraint
26 Petition on June 11, 2007, which was based on the supplemental transcript and raised
27 the issue of whether Mr. Fort had been denied his right to a public trial. (RP 15). Mr.
28

1 and Article 1, section 10 of the Washington State Constitution (justice in all cases
2 shall be administered openly) and the United States Constitution Amendment IV (in
3 all criminal prosecutions the accused shall enjoy the right to a speedy and public
4 trial). These constitutional violations are structural errors, those mistakes that require
5 automatic reversal. *State v. Frost*, 160 Wn.2d 765, 779-782 (2007).
6

7 The lead opinion in *Coggin* stated, “while, as mentioned above, we have carved
8 out an exception and will presume prejudice for petitioners who allege a public trial
9 right violation by way of an ineffective assistance of appellate counsel claim, we
10 refuse to extend this exception further.
11

12 The *Coggin* Court continued to allow an exception to the actual and substantial
13 prejudice proof requirement. *Coggin* continued the presumption of prejudice
14 standard in PRP’s that raise the public trial violation via a claim of ineffective
15 assistance of appellate counsel as outlined in *Orange* and *Morris*. This
16 *Morris/Orange* exception to the general rule of requiring the petitioner to prove by a
17 preponderance of the evidence actual substantial prejudice substitutes a presumption
18 of prejudice if petitioners allege their public trial right violation by way of an
19 ineffective assistance of counsel claim.
20
21

22 In *In Re Morris*, 176 Wn.2d 157 (2012), the court considered, on collateral
23 attack, via PRP, a claim that Mr. Morris’ appellate counsel was ineffective for failure
24 to raise a public trial violation on direct appeal. The Washington State Supreme
25 Court ruled on the PRP stating:
26

27 Here, there is little question that the second prong of
28 this test [prejudice] is met. In [*State v.*] *Wise*[, 176 Wn.2d 1,

1 288 P.3d 1113 (2012)] and [*State v. Paumier*, [176 Wn.2d
2 29, 288 P.3d 1126 (2012)] we clearly state that a trial
3 court's in-chambers questioning of potential jurors is
4 structural error. Had Morris's appellate counsel raised this
5 issue on direct appeal, Morris would have received a new
6 trial. See [*In r Pers. Restraint of Orange*, 152 Wn.2d
7 (795,) 814[, 100 P.3d 291 (2004) (finding prejudice where
8 appellate counsel failed to raise a courtroom closure issue
9 that would have been presumptively prejudicial error on
10 direct appeal). No clearer prejudice could be established.

11 If the Court declines to allow Mr. Fort to expand his PRP to claim not just a
12 violation of his public trial right, but also an ineffective assistance of appellate
13 counsel claim for failure to raise this public trial violation, Mr. Fort argues that his
14 public trial violation should be considered to have been raised in his first direct
15 appeal. The Court had this claim under consideration, via the PRP, during the first
16 direct appeal and therefore the rules of presumptive prejudice on direct appeal should
17 apply in this case. In addition, Mr. Fort should not be penalized by a need to show
18 actual and substantial prejudice because when he filed his PRP alleging a public trial
19 right, the *In Re Orange* precedent taught him that his public trial violation would be
20 analyzed under the presumptive prejudice standard. Under these circumstances, to
21 require the "impossible" task of showing actual and substantial prejudice would be
22 unjust.

23 CONCLUSION

24
25
26
27 Petitioner Dallin Fort requests that he be given a new trial in this case for the
28

1 following reasons:

- 2 1. The first trial was not a public trial. It was conducted in violation of Article 1,
3 section 10 and section 22 of the Washington State Constitution and the 6th
4 Amendment of the United States Constitution.
5
- 6 2. A public trial violation in the State of Washington was considered to be
7 structural error and prejudice to the defendant was presumed to exist until the
8 December 11, 2014 decisions in *Coggin* and *Speight*.
9
- 10 3. The Washington Supreme Court had found presumptive prejudice in *In Re*
11 *Orange*, 152 Wn.2d 795 (2004) in identical circumstances on November 10,
12 2004. This was two and one-half years before Dallin Fort filed his PRP.
13
- 14 4. Dallin Fort filed a PRP alleging a public trial violation, but appellate counsel
15 failed to supplement his first direct appeal with a claim of a public trial
16 violation. He may have believed that under the *In Re Orange* ruling of
17 presumptive prejudice, the type of pleading (appeal v. PRP) did not matter, but
18 this failure is still deficient. If appellate counsel had raised the public trial
19 issue, Mr. Fort would get a new trial and no clearer prejudice could be
20 established.
21
- 22 5. Division III of the Court of Appeals had Dallin Fort's public trial objections
23 under consideration in the PRP, 3 months before it ruled on the first appeal.
24
- 25 6. The *Coggin* decision states, "We have carved out an exception and will
26 presume prejudice for petitioners who allege a public trial right violation by
27 way of an ineffective assistance of appellate counsel claim, we refuse to extent
28

1 this exception any further.” Dallin Fort is a petitioner who alleges a public trial
2 right violation by way of an ineffective assistance of counsel claim and he
3 made his claim of a public trial violation before the appellate court ruled on his
4 appeal. He now claims, in this PRP, both the public trial violation and
5 ineffective assistance of counsel claim.
6

7 7. The *Coggin* Court stated, . . . “after a conviction becomes final and a defendant
8 raises a public trial right violation on collateral review, the social costs . . . are
9 much greater.” Dallin Fort’s appeal was not decided, let alone final, when he
10 raised, by PRP, the public trial violation.
11

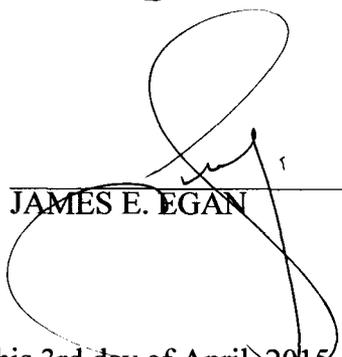
12 8. The *Coggin* Court stated, “the interests of finality and the process underlying
13 appellate review, require us to draw the line at some point.” Drawing the line
14 to sever Mr. Fort’s new trial is too harsh, given the timing of his raising this
15 issue and the state of the law (*In Re Orange*) when it was raised.
16
17

18 DATED this 3rd day of April, 2015.
19

20
21
22 James E. Egan, WSBA #3393
23 Attorney for Petitioner
24
25
26
27
28

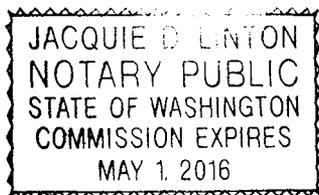
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

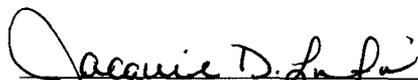
DATED this 3rd day of April, 2015.



JAMES E. EGAN

SUBSCRIBED and SWORN to before me this 3rd day of April, 2015.





NOTARY PUBLIC in and for the State
of Washington residing at Pasco
My Commission Expires: 05/01/16

AFFIDAVIT OF MAILING

JAMES E. EGAN, PS
Attorney at Law
315 W. Kennewick Ave.
Kennewick, WA 99336
(509) 586-3091/FAX: (509) 586-2832