Cause No. 263541-III

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

STATE OF WASHINGTON

Respondent,

v.

JERRY ALLEN HERRON

Appellant,

SUPERIOR COURT No. 07-1-00022-9
WHITMAN COUNTY
HONORABLE DAVID FRAZIER

APPELLANT'S 3rd SUPPLEMENTAL BRIEF ("STANDING")

Jeffry K. Finer
Law Offices of JEFFRY K FINER, P.S.
35 West Main • Suite 300
Spokane, WA • 99201
(509) 464-7611
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE AUTHORITY

A. BASIS FOR SUPPLEMENTAL BRIEF

On April 2, 2013, this Court ordered the parties to provide supplemental briefing on the issue of the defendant's standing to challenge the lower court's alleged *Bone-Club* violations.

B. SUPPLEMENTAL FACTS

As an aid to the issue of standing, the following additional facts are pertinent.

Originally, defense counsel and Mr. Herron requested that the venire be sequestered from one another, not that the matter be handled in a closed hearing. Defense counsel simply asked for sequestration.

> [C]ertainly we've discussed it and we would have no objection if somebody answers one of [the written questionaires] in a way that would merit going into chambers, or going someplace else out of the — out of the hearing of the other panel members, we don't have any objection. You can certainly inquire of Mr. Herron, but on his behalf we would certainly be prepared to waive that.

RP Vol I 104.

The State indicated that mere sequestration, however, left the risk that the public's presence would affect the individual juror's responses even if the remainder of the panel was absent. RP Vol I 106-07. The trial court concurred with the State and offered an

option beyond sequestration, recommending in-chambers questioning out of the hearing of the public.

Simple sequestration, the trial court stated,

> would still leave it open for anyone that's interested to come in and listen, outside spectators — The concern I have is that jurors looking around and see a lot of people in the courtroom, they might be reluctant to make full and complete disclosure.

RP Vol I 107-08.

The defendant then agreed to waive a public voir dire choosing to have the prospective jurors interviewed in chambers rather than in another courtroom apart from other prospective jurors. (RP Vol I 108-9). The defendant clearly modified this waiver following the prosecutor's and trial court's remarks, at RP Vol I 104-08, that sequestration of the venire from one another but within the view of the public was insufficient to protect Mr. Herron's right to a fair and impartial jury.

At no point, however, did the Defendant agree to proceed without notice to the public, nor did he waive *Bone-Club*'s 5-step requirements. The record shows that the defendant did not waive the trial court's supervisory role to adhere to the requirement of a public trial absent a proper showing on the record. The record also

does not contain any suggestion that the defendant invited error or in any way suggest that the trial court was relieved of its independent obligation to protect the right to a public trial.

ARGUMENT

I. THE RIGHT TO A PUBLIC TRIAL IS HELD BY THE PUBLIC AND BY THE DEFENDANT

Standard of Review This Court reviews *Bone Club* errors *de novo*, *State v. Easterling*, 157 Wn.2d 167, 173-74 (2006), and the matter may be raised for the first time at appeal. *State v. Brightman*, 155 Wn.2d 506, 514-15 (2005).

Argument

a. *Defendants have a personal right to a public trial before an impartial jury.*

Criminal defendants have a personal right to a public trial. *Gannett v. DePasquale*, 443 U.S. 368, 380-81 (1979) (mandamus; comparing right to public trial to *Faretta* right to self-representation).

Criminal defendants also has the personal right to an unbiased jury. *In re Yates*, ___ Wn.2d ___, 296 P.3d 872 886-87 (2013) (PRP).

b. *Public, too, has a right to a public trial.*

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise v. Superior Court of Riverside*, 464 U.S. 501 at 505 (1984). The public, too, has a right to be present whether or not any party has asserted the right. *Presley v. Georgia*, 130 S.Ct. 721, 724-25 (2010). In *Press-Enterprise*, for instance, neither party requested an open courtroom during *voir dire* proceedings —both specifically argued to keep the transcript of the proceedings confidential. *Press-Enterprise*, 464 U.S. at 503-04. The Supreme Court, however, found that it was error to close the courtroom. *Id.* at 513.

c. *The public and defendant's rights are generally distinct.*

A criminal defendant's right to an impartial jury and the right to a public trial are generally considered distinct from one another. *State v. Green*, 157 Wn. App. 833 (Div. 1, 2010). Herron's request to withdraw portions of voir dire from open court was plainly based on his concern over his ability to get candid responses during voir dire: a notion grounded within the concept of an impartial jury. The right Herron sought to protect was to an impartial jury by

encouraging his venire to answer voir dire honestly. The *means* he choose, with the court's and prosecutor's input, required that he give up a portion of his right to a public trial.

II. IMPROPER CLOSURE OF JURY TRIAL IS STRUCTURAL ERROR AND IS DEEMED FUNDAMENTALLY UNFAIR.

State v. Wise explicitly held that closure of a criminal trial absent faithful adherence to *Bone-Club* procedures results in a fundamentally unfair trial. Where there is structural error "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *State v. Wise*, at 1119 (citation omitted). Such an error is "not subject to harmlessness analysis." *Id.* (Citation omitted). "Accordingly, unless the trial court considers the *Bone-Club* factors *on the record before closing a trial to the public*, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." *Id [emphasis added].*

> A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceding that should be public.

Wise, 288 P.2d at 1118. [Emphasis in original] (Citing *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct 721, at 724 (2010). This duty is an independent obligation. *State v. Strode*, 167 Wn.2d 222, 230 (2009).

And see footnote 4, *id.*, wherein the fourth *Bone-Club* responsibility explicitly addresses the overriding responsibility to ensure that the public's right to open trials is protected. As shown, in part IV, below, the means to review this "overriding responsibility" are curtailed by practical considerations except in the rare high-profile case.

III. THE DEFENDANT DID NOT WAIVE THE REQUIREMENT THAT THE COURT PROCEED UNDER *BONE-CLUB'S* 5-STEP PROCEDURES

It is correct that Herron did not object to the trial court's shortcuts,[1] it is also plain that the defendant did not them. *State v. Erickson*, 146 Wn.App. 200 (Div. 2, 2008) (use of questionnaire did not cause court to circumvent *Bone-Club* requirements). The lower court has an independent overriding responsibility to handle a criminal defendant's waiver in a proper fashion, not just shrug its duties upon a defendant's sincere on-the-record waiver. Defendant's request for closure triggers the analysis, but does not substitute for the court's proper effectuation. *See for example, Jensen v. Hernandez*, 864 F. Supp. 869, 901 (E.D. Cal, 2012) (*Faretta* waiver of counsel is *per se* prejudicial error if *Faretta* criteria not followed).

---

[1] Defendants may challege a *Bone-Club* violation for the first time on appeal. *State v. Brightman*, 155 Wn.2d 506, 514-15 (2005). Here, Herron's failure to object to the lower court's truncated procedures is neither a waiver nor forfeiture.

Various cases state that the defendant's failure to object does not constitute a waiver. See, *State v. Strode*, 167 Wn.2d 222, 229 (2009). No case stands for the proposition that the request to sequester or close voir dire is a waiver of the trial court's independent obligation to fulfill the requirements of *Bone-Club*. But see, *id.,* at 236 (Fairhurst, J. concurring: "defendant should not be able to assert the right of the public").[2] Mindful of the *Strode* concurrence, it strips all meaning from the notion of an independent obligation if a lower court can *sua sponte* forego *Bone-Club* fundamental fairness protections because a defendant agreed to a partial closure.

In any event, apart from the Herron's request for closure, it cannot be argued that he asked the court to abandon its independent duty nor that he personally had the authority to waive the public's right to a public trial. *Strode*, at 229-30.

---

[2] The concurrence has been cited in inapposite cases, such as where the challenged order only sealed juror questionnaires but did not close the courtroom. *State v Lee*, 159 Wn.App. 795 (Div. 1, 2011).

IV. A FAIR TRIAL REQUIRES THAT THE COURT FOLLOW *BONE-CLUB* AND WHERE THE COURT FAILS, A DEFENDANT HAS STANDING TO ASSERT THE RIGHT TO A FAIR TRIAL

a. Statutory standing

The question of defendant's standing to challenge on appeal the lower court's *improper* closure has not been directly litigated. The vast majority of cases regarding standing to challenge closure orders involve members of the media. See *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982). These cases arise when high-profile matters are tried and members of the press are present. The cases are not reviewed on appeal, but via mandamus. Mandamus is necessary, as, not being proper parties, neither the media nor the public has a statutory right to intervene in a prosecution and seek pretrial appeal. *United States v. McVeigh*, 106 F.3d 325 (10th Cir., 1977) (government lacked statutory authority to seek interlocutory review; witnesses lacked standing under Victim Witness Protection Act; media and public have standing to seek mandamus).

Thus, unless a member of the public or media is present and *receives the required notice*, the closure order cannot be challenged by either media or public. *Globe Newspaper v. Superior Court*, 457 U.S. 596, at 609 n.25 (1982) ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'").

In this case, notice was not given. The narrow circumstances here resulted in the court's abbreviation of one of the cornerstones to a fair trial.

b. Classic standing

Finally, in addition to Herron's limited waiver arguments in Parts I-III, above, it serves to consider the classic elements of "standing." Standing is a threshold issue in every case, determining the power of the court to entertain the suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *State v. Cook*, 125 Wn.App. 709, 720-21 (Div. 2, 2005).

A person seeking relief must first show an injury in fact, that is, an invasion of a legally protected interest that is concrete and particularized and actual or imminent. *Id.*, at 560. Herron had a legally protected interest in a fair and public trial, for which he gave a limited

waiver (open questioning of certain panelists on sensitive issues), but he did not waive his right to the *Bone-Club* requirements. These requirements were concrete and particularized as to him. The injury was actual: *Bone-Club* was not followed.

Next a person must show a causal connection between the injury and the conduct complained of; it cannot be the result of a third party not before the court. *Id.,* 560-61. Herron has shown that the *Bone-Club* violation was not due to his misconduct or error, nor to the act of any third party. Compare, *State v. Erickson*, 146 Wn.App. 200, 212 (Div. 2, 2008) (dissent to new trial based on "invited error" doctrine). The trial judge failed to follow the rules, not Herron.

Lastly, the challenger must show that it must be likely — not speculative — that the injury will be redressed by a favorable decision. *Id.,* 561. Herron seeks a new trial based upon the structural defect caused by the lower court's failure to follow *Bone-Club*. The appeal does not seek a speculative remedy: on retrial, even if Herron again seeks to partially close the voir dire, he can be assured that his trial court will conduct the process in a manner consistent with the bedrock "fair trial" procedures mandated in *Wise*.

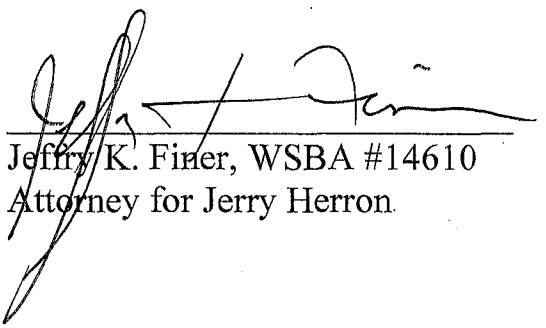
Viewing the classic "standing" elements, Herron suggests that the issue before this court is less one of standing than whether Herron's on-the-record waiver was an abandonment of his rights to the *Bone-Club* procedures. This case does not raise, even in an academic perspective, any of the classic questions related to standing. The case may raise, insofar as Herron himself requested closure, the issue of the extent of his waiver and whether the lower court's errors affecting a fair trial are attributable to the defendant.

CONCLUSION

For the reasons set forth above, Jerry Herron respectfully asks this Court to vacate the verdict and remand for new trial.

DATED THIS 24th day of April, 2013.

Law Offices of JEFFRY K FINER



Jeffry K. Finer, WSBA #14610
Attorney for Jerry Herron

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 24 day of April, 2013, I caused the foregoing *Appellant's Third Supplemental Brief*, to be served, via USPS, postage prepaid, on the following:

Dennis Tracy
Whitman County Prosecutor
PO Box 30
Colfax, WA 99111

Jerry Herron
DOC #711463
Airway Heights Corrections Center
PO Box 2049, Unit M-B-27
Airway Heights, WA 99001

DATED this 24 day of April, 2013.

Danette Lanet

Danette Lanet, Legal Assistant