

59921-6

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NO. 59921-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO RAMOS,

Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF
ADDRESSING STATE V. STRODE AND STATE V. MOMAH

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FILED
COURT OF APPEALS DIV. 01
STATE OF WASHINGTON
2018 APR 16 PM 4:48

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A. ARGUMENT.

THE RECENT DECISIONS IN *STRODE* AND *MOMAH* DICTATE THAT THE PRIVATE JURY VOIR DIRE IMPERMISSIBLY CLOSED THE COURTROOM TO THE PUBLIC IN VIOLATION OF THE SIXTH AMENDMENT AND ART. I , SECTIONS 10 AND 22 OF THE WASHINGTON CONSTITUTION

1. A trial court's disregard of its affirmative duty to identify an overriding interest and weigh alternatives before privately questioning prospective jurors violates the right to a public trial. Strode and Momah affirm the trial court's fundamental obligation to conduct jury selection proceedings that are open to the public under both the defendant's constitutional right to a public trial and the public's constitutional right to open court proceedings. State v. Strode, 167 Wn.2d 222, 217, P.3d 310 (2009); State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009); see also Presley v. Georgia, __U.S. __, 130 S.Ct. 721, 725 (2010) ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," including the *voir dire* of prospective jurors); U.S. Const. amends. 1, 6, 14; Wash. Const. art. I, §§ 10, 22.

The presumption of open, publicly accessible voir dire may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly

tailored to preserve that interest.” Strode, 167 Wn.2d at 227; Momah, 167 Wn.2d at 148; see also Presley, 130 S.Ct. at 724 (circumstances in which the right to an open trial may be limited “will be rare,” and, “the balance of interests must be struck with special care”).

The trial court must articulate the “overriding interest” justifying any limit on public access to voir dire “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” Strode, 167 Wn.2d at 227.¹ The trial court “must ensure” that the “five criteria are satisfied” to close this portion of the trial. Id.

The five criteria, referred to as the Bone-Club factors, are mandatory.² “[A] trial court must engage in the Bone-Club analysis;

¹ Quoting In re Personal Restraint of Orange, 152 Wn.2d 75, 806, 100 P.3d 291 (2004); Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984); and Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Presley relies on the same standards, as explicitly set forth in Waller and Press-Enterprise. 130 S.Ct. at 724.

² The required factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent

failure to do so results in a violation of the defendant's public trial rights." Strode, 167 Wn.2d at 228 (quoting State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005)). It is the trial court's "affirmative duty" to determine the compelling interest for privately questioning any jurors and to weigh the competing interests. Id. at 228 (quoting Bone-Club, 128 Wn.2d at 261).

An appellate court "cannot determine whether the closure was warranted" unless the record shows that the trial court considered the Bone-Club factors. Strode, 167 Wn.2d at 228. (citing Brightman, 155 Wn.2d at 518). The trial court's failure to consider the Bone-Club factors "prevents" the reviewing court from determining whether the private questioning of jurors was warranted. Id. at 229. It is not the merits of the courtroom closure, but the adequacy of the trial court's adherence to the mandatory procedural requirements before closing the court room that determine whether the public trial rights of Article I, sections 10 and

of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Each requirement is explained in more detail in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-38, 640 P.2d 716 (1982).

22, and their federal counterparts, have been violated. Id. at 230 n.5.

The right to a public trial, including the public's right to access trial court proceedings, may be raised for the first time on appeal. Id. Any waiver must have been affirmatively executed in a knowing, intelligent, and voluntarily manner. Id. at 229 n.3.

Additionally, the public's right to open proceedings is entrusted to the court's protection. Id. at 230; Wash. Const. art. I, § 10. Courts are independently obligated to "ensure the public's right to open trials is protected." Id. at 230 n.4; see Presley, 130 S.Ct. at 724-25 ("The public has a right to be present whether or not any party has asserted the right," and therefore, "trial courts are required to consider alternatives to closure even when they are not offered by the parties").

Finally, Washington "has never found a public trial right violation to be [trivial or] de minimis." Strode, 167 Wn.2d. at 230 (quoting State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006)). For a courtroom closure to be trivial, it must be "brief and inadvertent." Id. A closure is not trivial when jurors are questioned in chambers and that information is used for purposes of jury selection. Id. Prejudice is presumed. Id. at 231.

2. Recent decisions explain the trial court's duties. In Strode, the trial judge, defendant, and attorneys spoke in the judge's chambers to prospective jurors who had answered "yes" on a confidential questionnaire that they had been the victim of sexual abuse or accused of a sexual offense. 167 Wn.2d at 224. Strode was accused of sexually abusing a child, and the judge said the reason for private questioning of these jurors was "obvious" and it did not want to "broadcast" the inquiry to all jurors. Id. at 228. The trial court conducted no "detailed review" of the need for private questioning under the mandatory Bone-Club analysis. Id. Because the closure was not justified by the trial court, and it could not be trivial when the parties substantively probed the qualifications of jurors, the courtroom closure was presumptively prejudicial and required remand for a new trial. Id. at 231.

In Momah, the Court recognized that there are narrow circumstances under which the "presumption in favor of openness" may be overcome. 167 Wn.2d at 148. Momah was a doctor accused of sexually assaulting his patients during physical examinations. Id. at 145. There was "extensive media coverage" of his case and the court summoned a large pool of prospective jurors. Id. Momah's attorney sought private questioning of jurors

because he feared certain prospective jurors could “contaminate the rest of the jury” and thus deny his client a fair trial. Id. at 146.

Momah himself “affirmatively assented to the closure.” Id. at 151. Before questioning the jurors individually in chambers, the court consulted with the prosecution and defense. Id. “[M]ost importantly, the judge closed the courtroom to safeguard Momah’s constitutional right to a fair trial by an impartial jury, not to protect any other interests.” Id. at 151-52.

Shortly after the Washington Supreme Court issued decisions in Strode and Momah, the United States Supreme Court held in Presley that the trial court denies a defendant the right to a public by failing to identify an overriding interest requiring courtroom closure. 130 S.Ct. at 725. The Court reasoned that if “generic” risks such as the fear jurors could hear prejudicial information justified closed courtrooms and overrode the constitutional right to a public trial, “the court could exclude the public from jury selection almost as a matter of course.” Id. The Presley Court further held,

even assuming, *arguendo*, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.”

130 S.Ct. at 725.

3. The trial court conducted part of voir dire in private without any explanation or justification. The court conducted a portion of the jury voir dire in private. 1RP 40-41.³ When one prospective juror said he had “a personal exception,” the court called that juror into its chambers for private questioning. 1RP 7.

Before leaving the courtroom to speak to Juror 18 in chambers, the court did not identify the overriding interest threatening the fairness of the trial, ask for objections, “consider all reasonable alternatives to closure,” or take any “special care.” Presley, 130 S.Ct. at 724-25; Strode, 167 Wn.2d at 227; Momah, 167 Wn.2d at 148. The only record the judge made was: “[W]e need to speak with Juror No. 18. Why don’t we go into chambers with Juror No. 18 right now and get challenges for cause in a moment.” 1RP 40.

The court, attorneys, Ramos, and the court reporter were the only people who accompanied Juror 18 into the judge’s

³ As mentioned in Appellant’s Opening Brief: 1RP refers to April 9, 2007 (jury selection); and 2RP refers to April 9, 10, & 12, 2007 (trial and sentencing).

chambers. Id. In chambers, the court told the juror, “We are on the record. You expressed a desire to speak privately.” 1RP 41.

The juror explained his religious affiliation does not allow him to sit in judgment of others. 1RP 41. The court expressed sympathy with the juror and, without asking any party for their opinion, the court told him he would be excused for cause. 1RP 41. The court told the juror to return to the courtroom and the court raised several reasons that four other jurors should be excused for cause. 1RP 41-42. The court ruled that it would excuse four additional jurors before parties, judge, and defendant returned to the courtroom. 1RP 41-43.

The court’s private questioning of a juror and its closed door consultation regarding jurors it wished to excuse for cause was not preceded by the court’s affirmative identification of a compelling interest in courtroom closure as required. No serious and imminent threat required private questioning of the jurors. The court did not give anyone present an opportunity to object to the private questioning of individual jurors, as mandated by Bone-Club. Strode, 167 Wn.2d at 230.

Having failed to identify the compelling interests at stake, the court did not weigh the public’s right of access and importance of a

public trial against the need for closure. Because there was not finding that the closure was necessary to serve a compelling interest, there can be no finding that the closure was no longer than necessary to serve this unidentified interest. All interests must all be identified for the court to engage in the meaningful weighing required by the constitution.

There was no compelling reason to question the juror in a closed hearing, as the juror would not have tainted the other jurors. 1RP 41. The juror had not even asked for private questioning, he only said he had a “personal exception” and the court *sua sponte* decided to address it in a closed courtroom. Additionally, Juror 18 was a somewhat prominent community member, as he owned a local store. 1RP 6. By excusing jurors for reasons voiced only in private, the public is precluded from understanding the reason the juror was unqualified and would be left to speculate about what connection he had to the case or what influence he had over the court.

4. The court violated the public’s right of access. Both the public right of access and the defendant’s right to a public trial must be protected by the court under the same analysis as set forth in the Bone-Club factors. Strode, 167 Wn.2d at 230; Easterling, 157

Wn.2d at 175. Courts are independently obligated to “ensure the public’s right to open trials is protected.” Id. at 230 n.4; see Presley, 130 S.Ct. at 724-25. A member of the public is not required to assert the public’s right of access in order to preserve this issue for appeal. Presley, 130 S.Ct. at 724; Easterling, 157 Wn.2d at 176 n.8. The trial court neglected its affirmative duty to ensure the trial is conducted openly and violated the public’s right to open court proceedings.

5. The violation of the right to a public trial is presumptively prejudicial and not inadvertent or de minimis. Washington “has never found a public trial right violation to be [trivial or] de minimis. Strode, 167 Wn.2d. at 230. In Strode, the court noted that a courtroom closure would have to be “brief and inadvertent” to be trivial enough to not violated article I, sections 10 and 22. Id. Strode held that a closure is not trivial when jurors are questioned in chambers and that information is used for purposes of jury selection. Id. Prejudice is presumed. Id. at 231.

Strode did not find the error trivial where the court questioned prospective jurors in private and some were dismissed for cause based on information gathered in an improperly closed courtroom. 167 Wn.2d at 230. Presley held that the court’s failure

to identify an overriding interest in a closed courtroom proceeding or weigh possible alternative necessarily violates the defendant's right to a public trial as well as the public's right to attend court proceedings. 130 S.Ct. at 725.

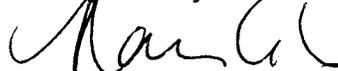
While the closure of Ramos's trial was not long, it was purposefully done and involved substantive factual proceedings. The court's failure to identify any reason to discuss substantive matters of jurors qualifications in private or weigh alternatives such as excusing the jurors from the courtroom violated both Ramos's right to a public trial and the public's right to be present for the proceedings. The violation of the right of the public to open court proceedings and of Ramos' public trial is a structural error and reversal is required.

B. CONCLUSION.

For the foregoing reasons, Mr. Ramos respectfully requests this Court find that under the dictates of Strode and Momah, he was denied his right to a public trial and reversal is required.

DATED this 16th day of April 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.)
)
ANTONIO RAMOS,)
)
APPELLANT.)

NO. 59921-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT ADDRESSING STATE V. STRODE AND STATE V. MOMAH** TO BE FILED IN THE COURT OF APPEALS – DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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	311 GRAND AVENUE		
	BELLINGHAM, WA 98225		

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF APRIL, 2010.

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