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Court of Appeals No. 61980-2-1
Snohomish County Superior Court No. 02-1-02368-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re the Personal Restraint of:

JOHN A. WHITAKER.

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF REGARDING MOMAH
AND STRODE

By:

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I. INTRODUCTION

In his personal restraint petition (PRP), Whitaker argues that his right to a public trial was violated when the trial court closed the courtroom for significant portions of jury selection. PRP at 8-14. On May 13, 2009, this Court stayed the proceedings pending rulings in State v. Momah, No. 81096-6, 2009 WL 3210404, and State v. Strode, No. 80849-0, 2009 WL 3210389. Those rulings issued on October 8, 2009. As discussed below, the rulings confirm without doubt that Whitaker's conviction must be reversed.

II. ARGUMENT

A. THE NEW RULINGS

In Strode, the Supreme Court reversed the defendant's conviction because the trial court closed the courtroom during jury selection, under circumstances similar to those presented here. In Momah, the courtroom closure was not reversible error in view of the unusual need to protect the defendant from prejudicial pretrial publicity. Both cases confirm that Whitaker is entitled to relief.

In State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), the Court of Appeals held that the trial court did not close proceedings to the public by holding them in chambers. None of the Supreme Court justices endorsed that reasoning. See, e.g., State v. Strode, concurring opinion of Justice Fairhurst, slip op. at 1, n.1 ("a de facto closure occurred [in

Momah’s case] as a result of the locations and physical conditions existing when jurors were individually questioned outside the courtroom in a room not ordinarily accessed by the public with the door closed”). Six justices, however, affirmed Momah’s conviction because the trial court’s action was necessary to protect Momah’s right to an impartial jury. As the majority noted, Article I, section 22 of the Washington Constitution guarantees a criminal defendant the right to a “public trial by an impartial jury.” State v. Momah, No. 81096-6, slip op. at 5. “While our previous article I, section 22 cases have focused on the defendant’s right to a public trial, this case implicates both the right to a public trial and the right to an impartial jury.” Id. at 1. “One right privileges openness, while the other may necessitate closure.” Id. at 14. Momah’s case was “heavily publicized, having received extensive media coverage.” Id. at 2. Because of that, the trial court directed that several jurors be questioned in a closed setting so that they would not contaminate the remainder of the jury pool.

For several reasons, the Supreme Court found Momah’s case distinguishable from others in which it had found the closure of a courtroom to be structural error. First, defense counsel did not merely fail to object to the closure, but “affirmatively assented to the closure” and “argued for its expansion.” Id. at 11-12. Second, the trial court “not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution.” Id. at 12. “Finally, *and perhaps most importantly*, the trial 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. (emphasis added). Although the trial court failed to expressly discuss the five factors set out in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), it was clear from the record that the court was aware of the factors, that it “recognized the competing article I, section 22 interests in this case” and “in consultation with the defense and the prosecution, carefully considered the defendant’s rights and closed a portion of voir dire to safeguard the accused’s right to an impartial jury.” Id. at 19. Further, the closure was “narrowly tailored” to the impartial jury concerns. Id. at 19-20.

The Court expressly distinguished Momah’s unique situation from that in all of the Court’s prior courtroom closure decisions; it did not overrule or question any prior ruling. Id. In particular, the Court reaffirmed that the mere failure to object does not waive a courtroom closure claim. Id. at 17.

Chief Justice Alexander issued a dissent joined by two other justices, in which he argued that failure to strictly follow the Bone-Club factors is automatic error, even under the unusual facts of Momah’s case.

That Momah did not effect any change in the law relevant to Whitaker’s case is confirmed by the Supreme Court’s simultaneous decision in State v. Strobe, No. 80849-0. Because the charges in that case dealt with child sexual abuse, the confidential questionnaire asked the jurors whether they had any experience with sexual abuse. Those who answered “yes” were called into the judge’s chambers for private questioning. Id., slip op. at 2. The trial court believed the need for this to

be “obvious” but did not discuss the Bone-Club factors. Defense counsel did not object to the procedure and fully participated in it. Id. at 2-3, 8.

Justice Alexander issued the lead opinion, joined in full by three other justices. He relied on prior cases holding that mere acquiescence in closed proceedings does not waive a public trial violation. Id. at 8. He further suggested that Strode could not waive the *public’s* right to a public trial. Id. at 9. Justice Alexander found the closure to be structural error and therefore reversed without any specific showing of prejudice. Id. at 10-11.

Justice Fairhurst, joined by Justice Madsen, wrote a separate, concurring opinion. Although both justices had voted to affirm Momah’s conviction, they agreed that Strode’s conviction must be reversed. As Justice Fairhurst explained, the different result in Momah was based on two factors unique to that case. First, although the trial court did not expressly weigh each Bone-Club factor in Momah, it was clear from the record that the judge and all parties were aware of those factors, considered them, and adopted the only procedure consistent with them. State v. Strode, slip op. (concurrence) at 2-4. “Due to the highly publicized nature of Momah’s case, the trial court in that case had no available means of avoiding jury contamination but for closing a portion of the voir dire to individually interview potential jurors.” Id. at 1.

Second, “[w]hile it is true the failure to object, alone, does not constitute waiver of the right to a public trial, the record in Momah shows

more than a failure to object.” Id. at 5. Rather, “the defense affirmatively sought individual questioning of the jurors in private.” Id.

In responding to the Strode dissent, Justice Fairhurst agreed that “public exposure of jurors’ personal experiences can be both embarrassing and perhaps painful for jurors.” Id. at 7. She also agreed that “jurors’ privacy is a compelling interest that trial courts must protect”, and that the defendant’s right to an impartial jury could be implicated if the jurors were reluctant to be candid during voir dire. Id. “But the potential for jeopardizing a defendant’s right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court.” She therefore agreed with Justice Alexander that automatic reversal was required. Id. at 8.

In view of this concurrence, six justices of the Washington Supreme Court agreed on every point essential to Whitaker’s claims. Justice Fairhurst wrote separately only because, in her view, the lead Strode opinion “conflates the rights of the defendant, the media, and the public.” Concurrence at 1. Specifically, she maintained that a defendant could waive the right to a public trial, and that such a waiver would not necessarily require the same sort of full colloquy required for a waiver of the right to a jury trial. Id. at 5-6.

B. WHITAKER IS ENTITLED TO A NEW TRIAL IN VIEW OF THE NEW RULINGS

This case is directly controlled by the new ruling in Strode. Whitaker’s trial judge closed the courtroom whenever any juror requested

a closed hearing, with no consideration of the Bone-Club factors. See PRP at 8-10. Unlike in Momah, the trial court did not close the courtroom to protect any right of the defendant. In further contrast to Momah, the trial court showed no awareness of the Bone-Club factors, and the procedure it followed was inconsistent with them. For example, several of the jurors who requested a private hearing were never questioned about the matters they wished to keep private. See PRP at 9-10. Had the court inquired in advance, it would have learned that there was no need to close the courtroom for those jurors.

In its Response to the PRP, the State has raised only two arguments: 1) the defendant's failure to object to closure waived the issue; and, 2) the defense invited the error by proposing a juror questionnaire that authorizes the jurors to request private questioning.

The first argument can be readily disposed of. Both Momah and Strode confirm that the mere failure to object to closed jury selection, and participation in the closed hearings, does not waive the issue. See Momah, majority opinion, slip op. at 17 (mere failure to object does not waive issue, but Momah actually advocated for closure); State v. Strode, lead opinion, slip op. at 8 ("Strode's failure to object to the closure and his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial."); concurring opinion, slip op. at 5 (Strode's conduct "does not show a knowing waiver of the right to a public trial").

The State's second argument must be considered in light of the actual record in this case. The juror questionnaire was prepared by the trial court, not by defense counsel. See Reply on PRP at 1-3. Further, it did not authorize any improper closure of the courtroom; it merely permitted the jurors to *request* the opportunity to speak in a closed setting. See Reply on PRP at 4-6. As Justice Fairhurst pointed out in her Strode concurrence, it is proper for a trial court to consider whether jurors will give more candid answers to sensitive questions at a closed hearing. But such considerations do not in themselves justify closure; they merely justify a full weighing of the Bone-Club factors to determine whether, and to what extent, the courtroom should be closed. See Strode, concurrence slip op. at 7.

Thus, the new decisions in Momah and Strode confirm that Whitaker's right to a public trial was violated, and that he has not waived the issue.

III. CONCLUSION

Thus, for the reasons stated in this supplemental brief and in the prior briefing of petitioner, the Court should reverse because Whitaker's rights to presence and to a public trial were violated.

DATED this 15th day of October, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing pleading and accompanying exhibits on the following:

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