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NO. 67484-6-I

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

In re Personal Restraint Petition of

JEFFREY MCKEE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglas McBroom, Judge

REPLY BRIEF OF PETITIONER

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A. ARGUMENT IN REPLY

THE INDIVIDUAL QUESTIONING OF POTENTIAL JURORS
IN A CLOSED COURTROOM VIOLATED MCKEE'S PUBLIC
TRIAL RIGHT.

The court sua sponte closed the courtroom to conduct voir dire of several jurors who indicated they wished to be questioned individually. Because the court failed to consider McKee's right to a public trial or any of the other Bone-Club¹ factors before closing the courtroom, McKee's right to a public trial right was violated. Supp. Brief of Petitioner (SBOP) at 6-13 (Facts Relating to Public Trial Violation), 14-22 (Argument Petitioner's Constitutional Public Trial Right Was Violated).

As further argued by McKee, the public trial right violation is an issue that may be raised for the first time in a personal restraint petition, as the violation is presumptively prejudicial. SBOP, at 22-26 (citing In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004)). Alternatively, McKee argued he is entitled to relief on grounds he received ineffective assistance of appellate counsel for failure to raise the issue on direct appeal. SBOP, at 26-29 (citing In re Orange, 152 Wn.2d at 814).

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In response, the state argues: (1) there is no evidence establishing a closure actually occurred; (2) the case is controlled by State v. Momah,² and (3) the court's decision in Orange – reaffirmed in In re Morris³ -- is "incorrect and harmful" and should not be followed by this Court. State's Response to Personal Restraint Petition (Response) at 18-30. For the reasons set forth below, these arguments should be rejected.

1. The Courtroom Was Closed

Under the Supreme Court's decision in Orange, the record establishes a closure. In Orange, due to limited space, the court ruled it would exclude Orange's family members from the courtroom during voir dire. Orange, 152 Wn.2d at 803. In a personal restraint petition, Orange argued the exclusion of his family members, in the absence of consideration of the Bone-Club factors, violated Orange's right to a public trial. Orange, at 799, 804.

² State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009) (although de factor closure occurred, private questioning of jurors did not violate Momah's right to a public trial, as trial court was aware of right to public trial, implicitly considered Bone-Club factors and defense counsel affirmatively sought individual counseling in private and sought to expand the number of jurors subject to such private questioning).

³ In re Personal Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

In holding that a closure had in fact occurred, the Supreme Court looked to the presumptive effect of the plain language of the trial court's ruling:

Looking solely at the transcript of the trial court's ruling in the present case, the court ordered a permanent full closure of voir dire: "I am ruling no family members, no spectators will be permitted into this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. That's my ruling."

Orange, 152 Wn.2d at 807-808.

Although the Supreme Court had ordered a reference hearing to determine the effect of the trial court's ruling on courtroom closure, the court held "the more particular inquiry in the post-trial evidentiary hearing was superfluous[,]" in light of the plain language of the court's ruling. Orange, 152 Wn.2d at 809. Thus, the court's ruling and its presumptive effect sufficiently established a closure, *even on collateral review*.

Similarly here, the presumptive effect of the plain language of the court's ruling establishes a closure:

THE COURT: Okay. So that is one thing we do. I mean, if there's – if you have personal information you are hesitant to share in front of a bunch of people, we will talk to you individually. There will still be the court staff here and the lawyers, but anybody that wants to have sort of a semi-private – and of course nobody will be allowed in the courtroom

– question and answer session about something that they just don't feel real comfortable talking about in front of a group full of people, that will be part of it. . . .

SBOP, Appendix N, pages 72-73.

But in addition to the plain language of the court's ruling, the comments of the potential jurors who were questioned individually also indicate the questioning occurred in a closed courtroom. Juror 48 explained he requested individual voir dire because he "didn't want this information about the family to be heard in public." SBOP, Appendix N, at 107. Juror 71 explained he requested individual voir dire because he preferred not to discuss his sister's rape "in open court." Appendix N, at 115.

Moreover, under State v. Wise⁴ McKee is not required to show "that any member of the public attempted to attend any portion of individual voir dire but was prevented from doing so, or that any member of the public was asked to leave the courtroom after entering the courtroom." Response, at 21. In Wise, the court expressly noted there was no indication any members of the public were present in the courtroom when the court moved individual questioning of potential jurors to chambers. Wise, 176 Wn.2d at 8 ("The record does not reflect whether any members of the public

⁴ State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012).

were present in the courtroom besides the venire panel”). This Court should reject the state’s argument McKee has not established a closure occurred.

2. This Case Is Unlike Momah

The state’s comparison to Momah should be rejected because there is no hint on the record whatsoever the court was aware of McKee’s right to a public trial or that the court *constructively* considered the Bone-Club factors. As the court recently reiterated in Wise, the presence of these two factors in Momah’s case was crucial to the court’s conclusion that Momah’s public trial right was not violated. Wise, 176 Wn.2d at 13-15.

During voir dire in Wise, the judge instructed the jurors that if there was anything they did not feel comfortable discussing in a group setting to let the court know and they could be questioned privately in chambers. A total of ten jurors were questioned in chambers, two at the jurors’ request and eight at the court’s direction, due to the jurors’ responses to questions by the court. The record reflected that the trial judge, the prosecutor and defense counsel were present in chambers for the questioning. Of the ten jurors, six were excused for cause. Wise, 176 Wn.2d at 6-8.

Because the trial court did not consider the Bone-Club factors before closing the proceeding, the questioning of jurors in chambers violated Wise's public trial right. Wise, Wn.2d at 12-13. In so holding, the court distinguished Momah on grounds there was evidence in that case the trial judge was aware of the public trial right and constructively considered the Bone-Club factors in deciding to close the courtroom:

We do not find any discussion by the trial court in the record that would allow us to distinguish this case like we did in Momah based on constructive consideration of the Bone-Club factors. See Strode, 167 Wn.2d at 233, 217 P.3d 310 (Fairhurst, J., concurring) ("The record [in Momah] shows that safeguarding Momah's rights to an impartial jury and a fair trial required the closure that occurred, and that all the attorneys, the defendant, and the trial court knew that all the proceedings were presumptively open and public.").^[5]

Wise, 176 Wn.2d at 13, n.5.

In contrast to the trial court in Momah, the trial court in Wise's case "simply decided to privately question individual prospective jurors and indicated to all that this is the regular practice." Wise, at 13. Moreover, the Supreme Court indicated its general refusal to "comb through the record or attempt to infer the trial court's

⁵ State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (in chambers questioning of jurors and for cause challenges in absence of consideration of Bone-Club factors violated defendant's right to a public trial).

balancing of competing interests where it is not apparent in the record. Wise, at 12.

Relying on Strode and United States Supreme Court precedent, the court concluded the error was structural. Wise, 176 Wn.2d at 13 (citing *inter alia*, Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Again, the court distinguished Momah, noting the trial judge there effectively considered the Bone-Club factors:

Momah was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in Momah effectively considered the Bone-Club factors.

Wise, 176 Wn.2d at 14.

The unique facts of Momah were not present in Wise's case. Indeed, the court emphasized: "it is unlikely that we will ever again see a case like Momah where there is effective, but not express, compliance with Bone-Club." Wise, 176 Wn.2d at 15.

As the Supreme Court acknowledged, Momah represents a unique set of facts the likes of which will not likely be repeated. They have not been repeated here. First, unlike the circumstances in Momah, there is no evidence the court was aware of McKee's

public trial right. It was never mentioned. Second, unlike the trial court in Momah, the trial court here was not concerned with ensuring McKee's right to a fair trial. Rather, the court was concerned with protecting the jurors' privacy. As the state concedes in its response, the trial court stated that the jurors' privacy was of paramount concern. Response, at 28 (citing RP 4/6/05) 76.

Accordingly, this case stands in stark contrast to Momah, where the court knew of the defendant's right to a public trial and concluded closure was necessary nonetheless to safeguard the defendant's right to a fair trial. Rather, as in Wise, the trial court here "simply decided to privately question individual prospective jurors and indicated to all that this is the regular practice." Wise, at 13.

Perhaps recognizing the lack of similarity between Momah and McKee's case with regard to the trial court's consideration of the Bone-Club factors, the state focuses on the Supreme Court's additional reason for finding no public trial right violation in Momah's case, i.e. that the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure. But these factors are similarly absent in McKee's case.

McKee did not affirmatively assent to the closure of voir dire or actively participate in designing the trial closure. His proposed juror questionnaire merely asked if jurors wished to answer questions about sensitive topics outside the presence of other jurors. Similarly, the state's proposed questionnaire – which the court asked to be combined with the defense's into one questionnaire – merely asked if jurors wished to answer questions outside the presence of other jurors. SBOP, Appendices I-L. It was the court that sua sponte ordered the courtroom closed out of concern for jurors' privacy. SBOP, Appendix N, at 72-73. Although McKee did not object, he did not waive his public trial right by virtue of his silence. Wise, 176 Wn.2d at 15.

As the state points out, the defense did request individual questioning of jurors 53 and 58. Response, at 27; SBOP, Appendix N, at 140, 144-45. But it was the court that dictated the procedure for individual questioning, not counsel. Regardless, the request was born out of a desire to protect against tainting the remainder of the venire with prior knowledge about the case, not concerns for jurors' privacy. SBOP, Appendix N, at 139-43. Accordingly, to the extent waiver applies, it applies only to individual voir dire of jurors 53 and 58.

In short, there is no evidence the trial court was aware of McKee's public trial right or the court's closure was necessary to protect McKee's right to a fair trial. Because the court failed to consider the Bone-Club factors, expressly or constructively, its decision to close the courtroom violated McKee's right to a public trial.

3. This Court is Bound to Follow Orange, Reaffirmed in Morris.

McKee's direct appeal was decided in 2007. SBOP, Appendix A. Undersigned counsel represented McKee on direct appeal and did not raise the public trial right issue. Id. As the Supreme Court held in Morris, however, it has been well established since 2004, when Orange was decided, "both that Bone-Club applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on appeal." Morris, 176 Wn.2d at 167. Accordingly, counsel's failure to raise it on direct appeal amounts to ineffective assistance of counsel and entitles a petitioner on collateral review to a new trial. Id. at 168.

As the state acknowledges in its Response, this Court is bound by rulings by the state Supreme Court. 1000 Virginia Ltd.

P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

This applies to the decisions in both Morris and Orange. Thus, it is unnecessary to address the state's claim that Morris is incorrect and harmful.

B. CONCLUSION

For the reasons stated in petitioner's supplemental brief and this reply, this Court should reverse McKee's convictions and remand for a new trial.

Dated this 18th day of June, 2013.

Respectfully submitted,
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