

70168-1

70168-1

NO. 70168-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LeCLECH

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA

**BRIEF OF RESPONDENT**

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A. ISSUES

1. Does the invited error doctrine—in either its classic form or in the form recently recognized by the Supreme Court—bar appellate review or limit appellate remedies where a defendant enters and participates in drug court for a year, knowing that some matters will be closed to the public?

2. Does the defendant have standing to raise an open courts challenge where he waived his own right to a public trial and where he actively participated in proceedings from which the public was excluded?

B. FACTS

On April 29, 2011, LeClech was arrested for delivering ecstasy<sup>1</sup> a controlled substance; he was charged on August 25, 2011. CP 1-4. He first appeared at King County's Drug Diversion Court (DDC) in September, 2011 for a question and answer session, and he participated in numerous hearings over the next several months. CP 105-07.

On February 28, 2012, about six months after being charged, he formally entered King County Drug Diversion Court

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<sup>1</sup> Methylenedioxymethamphetamine (MMDA).

(DDC) by signing a Drug Diversion Court Waiver and Agreement. CP 6-10. That agreement said that he waived his "...right to a speedy and public trial..." CP 6 (¶ 1), and it allowed treatment providers to share information with trial counsel, the prosecutor, and the court. CP 7 (¶ 7). He promised to obtain a Participant Handbook and to know all the rules and procedures in the handbook. CP (¶ 8). An Order of Participation in Drug Court was entered. CP 11.

LeClech was formally in DDC for about one year but he had participated for about six months before opting in. During his time in DDC, he participated in no fewer than 20 hearings in open court. See Appendix A (List of hearings). It is apparent that the parties and the court conferred with each other in closed proceedings when deciding how to adjudicate LeClech's case. See CP 92-107 (Client File Notes). For example, on March 26, 2012, LeClech was summoned to court because he failed to meet a requirement of the program. CP 104. Almost immediately after starting the hearing, LeClech's counsel asked to speak with her client and the parties at sidebar. The Court told LeClech to have a seat while the court and counsel conferred with court staff and the lawyers. RP (3/26/12) 3-4. It appears that neither LeClech nor the public could participate in

this staffing. After the closed conference, a level 1 sanction was imposed. RP (3/26/12) 6-7.

Almost one year after LeClech entered DDC, on February 7, 2013, the State filed a "State's Petition to Terminate the Defendant from Drug Court." CP 17-20. The alleged violations included ingesting of controlled substances and alcohol on multiple occasions, forging treatment documents, lying to staff about the forgery, mistreatment of drug court and jail staff, and the submission of a diluted urine sample. Id. Before the termination hearing on March 4, 2013, it appears that defense counsel, the prosecutor, court staff, and the court met for "staffings" on January 15, January 24, and February 19, 2013 to discuss whether LeClech should be terminated from the program. See Appendix A; CP 92-93. Consistent with DDC policies, these staffings appear to have been conducted in private.

A full termination hearing was held in open court on March 4, 2013. Defense counsel first clarified that LeClech would not voluntarily leave the drug court program. RP (3/4/13) 1. Counsel said that LeClech was "not contesting the allegations," RP (3/4/13) 6, but that he wanted to remain in drug court. RP (3/14/13) 4. LeClech personally emphasized his strong desire to continue in the

program, saying, "I really want to stay in drug court." RP (3/4/13) 9.

He explained his reasoning as follows:

I just feel like drug court has helped me so much in my recovery, because I was going out of control before I entered drug court. And I started off on a good track, but I still have some issues that I need to deal with, with my recovery. But I know that treatment and these meetings and working with my sponsor will help me.

RP (3/14/13) 11.

LeClech's request to remain in drug court was denied and he was terminated from drug court for non-compliance. CP 33; RP (3/4/13) 13-19 (court's oral ruling). He was found guilty of the underlying drug charge and was sentenced to a term of confinement of 12 months plus one day in the Department of Corrections. CP 80; RP (3/4/13) 19-25.

C. ARGUMENT

LeClech argues that he is entitled to revocation of his drug court agreement because a "team meeting" was held immediately before his termination from drug court and both he and the public were excluded from that meeting. That argument should be rejected. LeClech specifically agreed to participate in drug court knowing full well that "team meetings" would be private, he

expressly waived his personal right to an open proceeding, and he participated in drug court for nearly a year during which closed team meetings were held. Even after the State moved to terminate LeClech from DDC, he asked the court to allow him to stay. This long-standing participation in a court process that clearly anticipated closed proceedings constitutes invited error that either bars review or limits LeClech's remedies. Moreover, even if LeClech did not invite error, he does not have standing to assert the public's right to openness where he participated for over a year in a process that was clearly designed to include closures for the benefit of DDC participants.

1. BECAUSE LECLECH INVITED ERROR, EITHER APPELLATE REVIEW IS BARRED, OR ANY REMEDY MUST BE TAILORED TO THE HARM.

A criminal defendant has the right to a "speedy and public trial," art. I, § 22, and the constitution requires that "justice be administered openly." Art. I, § 10. Similar rights are recognized under the federal constitution. U.S. Const. amend VI; Press-Enterp. Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial,

these constitutional rights are violated and a new trial may be required. State v. Marsh, 126 Wash. 142, 217 P. 705 (1923) (adult tried in superior court as if he were a juvenile, closing the entire proceeding and failing to provide counsel); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) (trial court summarily granted State's request to clear the courtroom for the pretrial testimony of an undercover detective); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) (trial court ordered the courtroom closed for the entire 2 ½ days of *voir dire*, excluding the defendant's family and friends); In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (trial court summarily ordered the defendant's family and friends excluded from all *voir dire*); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) (trial court ordered defendant and attorney excluded from pretrial motions regarding the co-defendant). Under these authorities, closure of DDC team meetings was impermissible.<sup>2</sup>

Still, a defendant who invites error – even constitutional error – may not later claim that the error requires a new trial. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (counsel may

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<sup>2</sup> The Washington Supreme Court is considering whether DDC is subject to the usual constitutional provisions requiring open court proceedings. State v. Sykes, No. 87946-0. Briefing is complete and the case will be argued on May 13, 2014.

not request an instruction and then challenge the instruction on appeal); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (same); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defendant who participated in drafting of jury instruction may not challenge the instruction on appeal). Invited error precludes review even if counsel inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (defective jury instruction). The invited error rule recognizes that “[t]o hold otherwise would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

To determine whether the invited error doctrine applies, courts consider whether the petitioner “affirmatively assented to the error, materially contributed to it, or benefited from it.” In re Pers. Restraint of Copland, 176 Wn. App. 432, 442, 309 P.3d 626, 631 (2013) (citing State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009)). Cf. In re Detention of Ticeson, 159 Wn. App. 374, 381-83, 246 P.3d 550 (2011). In Momah defense counsel agreed to private questioning of potential jurors, argued for expansion of the closure, actively participated in questioning jurors during the closure, and benefitted from that participation. Id. at

145-47. The trial court failed to address the propriety of closure, so the Washington Supreme Court held that error had occurred.<sup>3</sup>

Although the court in Momah found that this was not a “classic case of invited error,” it applied the basic premise of the invited error doctrine to determine what relief should be granted. Id. at 154-55. Because defense counsel “made a deliberate choice to pursue in-chambers voir dire to avoid ‘contamination’ of the jury pool by jurors with prior knowledge of [Mr.] Momah’s case” and actively participated in questioning as a tactical choice, the court in Momah held “the factors courts have used in applying [the invited error doctrine] are helpful for purposes of determining the appropriate remedy in this case.” Id. The court held that such factors weighed in favor of denying Momah’s request to reverse his conviction, even if a violation of open court principles had occurred. Id. at 154-55.<sup>4</sup>

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<sup>3</sup> The court repeated that although proceedings are presumed to be open, “the right is not absolute . . . [and] . . . may be overcome by an overriding interest . . . essential to preserve higher values . . .” Momah, 167 Wn.2d at 148. Where article I, sections 10 and 22 conflict, a court “must harmonize the right to a public trial with the right to an impartial jury.” Momah, at 152-53 (citing Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 61, 615 P.2d 440 (1980)).

<sup>4</sup> On the same day as the court decided Momah, it also decided State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). A majority of the court voted to reverse Strode’s conviction but there was no majority opinion, so the rationale for reversal is less than clear. It is clear, however, that invited error was not at issue because the record was wholly silent as to the reasons for closure, and Strode’s lawyer did not ask for closure.

A key component of the court's decision in Momah was the recognition that granting a new trial would be a windfall to Momah. The rights to open courts should be construed "in light of the central aim of the criminal proceeding: to try the accused fairly." Momah, at 152-53. "[N]ot all courtroom closure errors are fundamentally unfair . . ." Id. at 150 (discussing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). An appellate court should "devise a remedy appropriate to [the] violation." Momah, at 149.<sup>5</sup>

This case falls somewhere on the spectrum between a classic case of invited error and the Momah-type of hybrid invited error. LeClech's lawyer expressly asked the trial court to close the team meeting on March 26, 2012 when counsel asked for a private "sidebar." RP (3/26/12) 3. It is less clear whether counsel

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<sup>5</sup> The issue in Waller was whether a suppression hearing was properly closed. In rejecting Waller's request for a new trial, the Supreme Court said:

[T]he remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest. ...

In these cases, it seems clear that unless the State substantially alters the evidence it presents to support the searches and wiretaps here, significant portions of a new suppression hearing must be open to the public. We remand to the state courts to decide what portions, if any, may be closed. This decision should be made in light of conditions at the time of the new hearing, and only interests that still justify closure should be considered. A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties.

Waller v. Georgia, 467 U.S. at 50 (internal citations omitted).

expressly asked for closures on other occasions, or whether the closures occurred simply because everyone knew and agreed that closures were integral to the DDC process. In any event, by expressly waiving his personal rights and by participating for a solid year in a process that required closure of team meetings, LeClech certainly invited any closures that were visited upon his case. For these reasons, his claim should not be reviewed.

Alternatively, any remedy for improper closure should be strictly limited based on active and enthusiastic participation in DDC over the course of a year. LeClech's participation was much more extensive than the mere two- or three-day period during which Momah acquiesced in sporadic closures. And, like Momah, LeClech certainly benefitted from the closed team meetings, as they allowed his lawyer, the prosecutor, and the DDC judge to fashion the best possible program to ensure his success. For these reasons, LeClech should not be permitted to unilaterally revoke his DDC contract. Such a remedy is a windfall.

At a minimum, LeClech's claim should be rejected because it was not preserved. RAP 2.5(a). Although the Supreme Court appears to have held that courtroom closures may be challenged for the first time on appeal, State v. Wise, 176 Wn.2d 1, 288 P.3d

1113 (2012), several justices have disagreed on this point. See, e.g., State v. Sublett, 176 Wn.2d 58, 156, 292 P.3d 715, 763 (2012) (Wiggins, J, concurring) (“A defendant who raises a public trial violation for the first time on appeal must comply with RAP 2.5(a)(3) by showing that the violation actually prejudiced the defendant: that the asserted error had “practical and identifiable consequences in the trial of the case.”). This court is bound by the decision in Wise but the State raises this argument in the event the Court reconsiders its position on RAP 2.5(a)(3).<sup>6</sup>

2. LECLECH DOES NOT HAVE STANDING TO ASSERT THE PUBLIC’S RIGHT TO OPENNESS.

LeClech quite plainly waived his personal right to a public trial under article I, section 22. CP 6 (¶ 1). The question remains, however, whether he has standing to invoke the public’s right to the open administration of justice under article I, section 10. See In re Copland, 176 Wn. App. at 448 (noting State v. Wise, 176 Wn.2d 1, 15-16 n.9, 288 P.3d 1113 (2012) (citing Strode, 167 Wn.2d at 229 (four-justice plurality opinion stating that the defendant cannot waive the public’s right to open proceedings) and

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<sup>6</sup> Such arguments are presently before the Washington Supreme Court. State v. Grisby, III, No. 86216-8 (argued 1/16/14).

at 236 (Fairhurst, J., concurring, and stating that the defendant should not be able to assert the right of the public or the press in order to overturn his or her conviction)).

Generally, a defendant does not have standing to assert the rights—constitutional or otherwise—of others. Rakas v. Illinois, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) (search and seizure); State v. Walker, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998) (failure of police officers to obtain husband’s consent to search marital residence did not invalidate search as to wife); In re Pers. Restraint of Benn, 134 Wn.2d 868, 909, 952 P.2d 116 (1998) (failure to challenge search of the jail cell of another inmate was not ineffective assistance of counsel); State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358 (1993) (one cannot assert the Fourth Amendment rights of another); State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213 (violation of Fifth Amendment rights may not be asserted by a co-defendant), review denied, 110 Wn.2d 1032 (1988).

To prove standing, a litigant must satisfy both prongs of a two-pronged test. State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090, 1099 (2014); Branson v. Port of Seattle, 152 Wn.2d 862, 876, 101 P.3d 67 (2004). First, he must show “a personal injury fairly

traceable to the challenged conduct and likely to be redressed by the requested relief.” High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). Second, he must show that his claim falls within the zone of interests protected by the statute or constitutional provision at issue. Branson, 152 Wn.2d at 875. If a party lacks standing for a claim, an appellate court need not reach the merits of that claim. Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 896, 913 P.2d 793 (1996).

LeClech does not have standing to challenge closure under article I, section 10. First, he cannot show a “personal injury fairly traceable to the challenged conduct” because he cannot show any injury at all. He participated in a drug diversion court with closed team meetings precisely because that structure served rather than defeated his interests. There is absolutely no indication that closed team meetings prejudiced LeClech in any way. Indeed, even after a failed year in the program, he pleaded with the court to allow him to continue.

Second, LeClech cannot show that his claim falls in the appropriate “zone of interests.” The constitution protects the zone of interests of criminal defendants through application of article I, section 22. The constitution protects the zone of interests of the

public through application of article I, section 10. For purposes of this case, LeClech is a criminal defendant—a litigant—not a member of the “public.” Since he waived his personal right to openness, he should not be permitted to invoke a right intended to protect the public, especially where his waiver of his own right effectively undermined the right of the public.

D. CONCLUSION

Because LeClech invited the problem he now challenges on appeal, and because he does not have standing to make that challenge, the State respectfully asks that the trial court's order terminating him from drug court and entering judgment on the pleadings should be affirmed.

DATED this 31<sup>st</sup> day of March, 2014.

Respectfully submitted,

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# **APPENDIX A**

LIST OF HEARINGS OR “STAFFING” IN DRUG COURT  
(“staffing” indicated by italics)

Date	Event and Subject Matter
9/7/11 – 2/28/12	Numerous hearings or meeting as defendant prepares to enter drug court CP ____ (Client File Notes pp. 14-16)
2/28/12	Entry of DDC waiver and admission to drug court
3/26/12	Discussion of missed group meetings
4/09/12	Missing “sober support slip”
4/16/12	Missed / late urinalysis
5/21/12	Discussion of interplay between medical difficulties, medical benefits and drug treatment
6/05/12	Urinalysis positive for THC; discussion of prescription medications for illness; work crew imposed as sanction for THC
6/26/12	No audio on disc
7/03/12	Successfully obtained Medicare benefits; sober; meeting appointments
7/31/12	Alcohol use and avoidance of urinalysis process; 10-day jail sanction. Indicates next “staffing” to occur on 8/22
8/22/12	<i>Notes regarding staffing</i>
8/23/12	Disrespect toward drug court staff
8/28/12	<i>Note to file refers to “staffing” regarding sanctions for violations.</i>
8/30/12	Forged sober reports; sanctions imposed
9/27/12	Back on track, showing improvement
10/23/12	Status hearing– still on track
10/26/12	No audio
11/8/12	Positive urinalysis – 2 days in jail. Court notes that “We’re also going to staff your case for next steps, see if we’re doing everything that’s necessary, and I’m going to put you on focused zero tolerances for honesty until you graduate. RP (11/8/12) 4.
11/13/12	<i>Staffing regarding violations – recommendation is for closer monitoring of defendant and placing him on “Zero Tolerance” status. CP ____ (Client File Notes pp. 4-5)</i>
11/15/12	Possible dirty u/a, bad behavior upon release from jail, had to be kicked out? Didn’t like the time of his release. RP (11/15/12) 4 (“Mr. LeClech, we staffed your case yesterday, just looking at how you’ve done in the program overall. The question that we were addressing yesterday was what else, if anything, do we need to do as a program to help you succeed in this program, or have we done everything we can do, and you’re still not succeeding. Well, the recommendations I received were to keep you in the program because you are working hard. ....”)
1/8/13	Used controlled substance on 12/23. Prosecutor asks that he be remanded to custody. “We staff this case next Wednesday. ... We’ve seen Mr. LeClech in custody Thursday. I do not agree that we should open staffing to include Mr. Schoutens at this point. ... We haven’t historically had sponsors come to a staffing.” Court: “I am going to set this case for staffing for next steps, which can include and will include the possibility of setting this case for termination.” RP 1/8/13 1-5. Remand to custody
1/15/13	<i>Staffing held – recommendation for termination</i>
1/24/13	<i>Parties meet to discuss termination hearing – it appears to be a joint request at this point</i>
2/19/13	Reference to previous staffing; indicates that defendant wants to remain in drug court
2/21/13	Set termination hearing for March 4 <sup>th</sup> ; defendant admits recent marijuana use
3/4/13	Termination hearing

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MICHAEL JOSEPH LECLECH, Cause No. 70168-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

3/31/14  
Date 3/31/14