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**FEB 01 2008**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 35628-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID L. ERICKSON,

Appellant.

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

The Honorable Thomas J. Felnagle, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT VIOLATED ERICKSON'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The state contends this Court should reject Erickson's public trial claim under *State v. Momah*.<sup>1</sup> BOR at 6-8. Erickson disagrees.

Momah contended the trial court violated his constitutional rights to a public trial by conducting a portion of voir dire in chambers. He also maintained the state bore the burden of proving there was no closure and the trial court balanced the *Bone-Club* factors before engaging in the challenged voir dire. *Momah*, 171 P.3d 1064, 1067.

Division One disagreed with each assertion. The court first held the record failed to indicate the trial court closed part of voir dire for the purpose of precluding public access. *Momah*, 171 P.3d at 1067. The record also did not demonstrate any members of the public were excluded from the individual voir dire. *Momah*, 171 P.3d at 1067. The court refused to "speculate on whether the trial court would have ordered closure" had any citizen requested entry into chambers or the jury room. *Momah*, 171 P.3d at 1067-68.

The court distinguished the pertinent Supreme Court authority, finding the common thread tying those cases together – an express order

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<sup>1</sup> \_\_\_ Wn. App. \_\_\_, \_\_\_, 171 P.3d 1064 (2007).

closing the courtroom to the public – was absent in Momah’s case. *Momah*, 171 P.3d at 1068.<sup>2</sup> The court rejected Momah’s contention a proceeding is per se closed to the public if it takes place in chambers. *Momah*, 171 P.3d at 1069. The court held, “Of course, a ‘door’ to a courtroom being closed, which occurs in most court proceedings, is not the same as a ‘proceeding’ in that courtroom being closed to the public.” *Momah*, 171 P.3d at 1069.

Erickson urges this Court to reject *Momah*. The distinction upon which the court relied in *Momah*, as well as the court’s tortured reasoning, ignores the well-established Supreme Court rule requiring a trial court to engage in a strict balancing analysis before taking the constitutionally drastic step of conducting trial proceedings outside the public eye.

No Washington court until *Momah* has conditioned a defendant’s right to a public trial on the existence of an express closure order. The proper inquiry is whether the trial court used a procedure that effectively barred public observation, not whether the court expressly ordered the procedure.

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<sup>2</sup> *Momah* discussed and distinguished *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005), *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), and *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). See also *State v. Frawley*, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007) (trial court’s private portion of jury selection, which addressed each venire person’s answers to a jury questionnaire, violated right to public trial).

*Momah*'s strict construction of the language of the trial court's declaration of closure prohibits reviewing courts from making presumptions or drawing inferences from that language. Such slavish adherence to a trial court's words is contrary to *Orange*, where the court held the nature of the closure is defined by "the presumptive effect of the plain language of the ruling itself[.]" *Orange*, 152 Wn.2d at 808. See *State v. Duckett*, \_\_\_ Wn. App. \_\_\_, \_\_\_, 173 P.3d 948, 953 n.2 (2007) ("To the extent that the State's argument is that the court did not enter a closure order, we look to the record to determine the presumptive effect of the court's directive. . . . The trial judge stated she intended to interview the selected jurors in a jury room. The State bears the burden on appeal to show that, despite the court's ruling, a closure did not occur.").

The *Momah* court refused to consider the presumptive effect of the trial court's use of its chambers to question individual venire members. The court disregarded the nature of a court's chambers and the reasons for convening a portion of voir dire in chambers. See *Houston Chronicle Pub. Co. v. Shaver*, 630 S.W.2d 927, 932 (Tex. Crim. App. 1982) (conducting part of hearing in chambers "is the functional equivalent of closing the court to spectators and news reporters."); *B.H. v. Ryder*, 856 F.Supp. 1285, 1290 (N.D.Ill. 1994) ("The privacy of the judge's chambers historically has provided an atmosphere conducive to candor and conciliation. No one

who knows anything about litigation is unfamiliar with this phenomenon.”). In other words, proceedings occur in chambers to facilitate privacy.

*Momah* also ignored the practical reality of in-chambers proceedings. The decision in *Momah* is illogical and contravenes the Supreme Court’s intent to foster open proceedings. Where a trial court, as here, moves to chambers to shield prospective jurors from public scrutiny, the burden should be on the state to show the proceedings were open. *Duckett*, 173 P.3d 948, 953 n.2. The *Momah* court erred by shifting the burden to the defendant because “the trial court simply never ordered the proceeding be closed to any spectators or family members.” *Momah*, 171 P.3d at 1068.

For these reasons, Erickson requests this Court to reject *Momah*. In the alternative, or in addition to, the above argument, this Court should not apply *Momah* to Erickson’s case because it is factually distinguishable. The purpose of in-chambers voir dire in *Momah* was to insulate the entire venire from potential contamination caused by answers from individuals with knowledge of the case. *Momah*, 171 P.3d at 1066, 1069.

In contrast, the trial court in Erickson’s case adjourned to the jury room for private questioning with individual jurors despite first excusing

the remainder of the venire for the lunch recess. RP 288-89. Had the court sought merely to exclude other potential jurors, and not the general public, it could continued in open court because the panel had left. This distinction takes Erickson's case out of *Momah's* scope.

This Court should follow *Duckett* and *Frawley* and hold the trial court violated Erickson's constitutional right to a public trial.

2. THE TRIAL COURT ERRED BY DENYING ERICKSON'S NEW TRIAL MOTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.

Erickson's new counsel filed a motion for a new trial under CrR 7.5(a)(8) based on ineffective assistance of original trial counsel. CP 33-39; RP 1026-27, 1033-37.<sup>3</sup> Counsel supported the motion with a

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<sup>3</sup> CrR 7.5 provides in pertinent part:

(a) The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...

(8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

declaration swearing he or his investigator spoke with four potential defense witnesses who would have testified Erickson had a good reputation for decency and sexual morality. CP 81-83. Counsel requested the trial court to accept his declaration as an offer of proof as to what the witnesses would have said at trial in lieu of the witnesses' own affidavits as required by CrR 7.5(a). RP 1041. The trial court granted counsel's request and assumed his factual representations were accurate. RP 1043. The court denied the new trial motion. RP 1043-46.

The state now contends the trial court did not abuse its discretion in denying the motion because it was not supported by the required affidavits. Brief of Respondent ("BOR") at 11-13. Erickson disagrees.

The trial court has the inherent power to grant a new trial on its own motion for a reason not listed in the applicable rule or statute. *State v. Hawkins*, 72 Wn.2d 565, 569, 434 P.2d 584 (1967). And a trial court may initiate its own proceedings to obtain additional evidence when a defendant's affidavits supporting a new trial motion are insufficient. *Hawkins*, 72 Wn.2d at 570. It logically follows, then, that a trial court has the power and the discretion to consider affidavits that substantially comply with CrR 7.5(a). This Court should reject the state's contention that Erickson waived his new trial claim.

The state also claims that in any event, Erickson failed to show original counsel's failure to call the four witnesses was deficient performance. BOR 16-17. Erickson disagrees.

Counsel's decision whether to call a witness is generally considered a matter of trial tactics or strategy. *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007). Legitimate trial strategy does not ordinarily serve as the basis for a claim of ineffective assistance of counsel. *In re Personal Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). A defendant may, however, establish deficient performance where there is no legitimate tactical explanation for counsel's decision. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel's failure to call the witnesses here was not a legitimate trial tactic. Because there were no eyewitnesses to the alleged sexual misconduct, the verdict hinged on the credibility of the complainant and Erickson. And especially relevant was proof of Erickson's character for sexual morality. *State v. Woods*, 117 Wn. App. 278, 280, 70 P.3d 976 (2003) (sexual morality is pertinent character trait in sex offense cases), *review denied*, 151 Wn.2d 1012 (2004). Favorable character evidence thus could have swung jurors in favor of Erickson. Trial counsel's failure to present such evidence was deficient.

The state asserts even if counsel's performance was deficient, it caused no prejudice. The state maintains evidence of Erickson's good sexual morality and decency would not have changed the outcome of the trial because the complainant's grandmother and mother testified they never suspected Erickson of sexual foul play. BOR at 17-18. Stated another way, the evidence was not necessary because the state did not attack Erickson's character and morality.

Erickson disagrees. Allegations of sexual misconduct against a young child inherently besmirch the accused's moral character. *State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000) (sexual morality pertinent character trait in child molestation case), *abrogated on other grounds*, *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Good character evidence could have tempered the damage and bathed Erickson in a more credible light.

Further, had counsel presented the evidence, Erickson could have benefited from an instruction stating good character evidence should be considered in determining guilt. *State v. Thomas*, 110 Wn.2d 859, 866-67, 757 P.2d 512 (1988); WPIC 6.12.<sup>4</sup>

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<sup>4</sup> WPIC 6.12 states:

Any evidence that bears upon good character and good reputation of the defendant should be considered by

For these reasons, as well as those contained in the Brief of Appellant, counsel's failure to present character evidence from the four specified witnesses was deficient and resulted in prejudice. Counsel deprived Erickson of his constitutional rights to effective assistance of counsel. Where counsel is ineffective, "substantial justice had not been done" under CrR 7.5(a)(8). *State v. Dawkins*, 71 Wn. App. 902, 907, 863 P.2d 124 (1993). The trial court therefore abused its discretion by denying Erickson's new trial motion. His convictions should be reversed.

3. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY BY ORDERING ERICKSON TO PARTICIPATE IN A CHEMICAL DEPENDENCY ASSESSMENT.

The state maintains the trial court properly ordered Erickson to participate in a chemical dependency assessment under RCW 9.94A.712(6)(a). BOR 23-26. Erickson disagrees.

RCW 9.94A.712(6) is a general sentencing provision applicable to certain offenders. It is entitled, "Sentencing of nonpersistent offenders." The statute permits a trial court to "order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct

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you, along with all other evidence, in determining your verdict. However, even if you find that the defendant is a person of good character or reputation, you should not acquit if you are convinced beyond a reasonable doubt of the defendant's guilt.

reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. . . .”

Two other provisions, however, are specific to the chemical dependency sentencing condition. RCW 9.94A.500(1) specifies a procedure by which a trial court may impose a chemical dependency condition. In pertinent part, a trial court must order a “chemical dependency screening report” and find “the offender has a chemical dependency that has contributed to his or her offense.”

RCW 9.94A.607(1), titled “Chemical dependency,” authorizes a sentencing court to impose a chemical dependency condition “[w]here the offender has a chemical dependency that has contributed to his or her offense” and where rehabilitative programs or other affirmative conduct is “reasonably necessary or beneficial to the offender or the community in rehabilitating the offender.”

An applicable specific sentencing statute supersedes a relevant general statute. *State v. Moon*, 124 Wn. App. 190, 193, 100 P.3d 357 (2004). Under this well-established rule, RCW 9.94A.500(1) and RCW 9.94A.607(1) govern imposition of a chemical dependency sentencing condition.

The trial court did not follow the procedure set forth in these latter two provisions. The record does not show Erickson’s self-reported

marijuana use contributed to his offenses. Because specific statutes trump general ones, the trial court's failure to follow RCW 9.94A.500(1) and .607(1) requires vacation of the chemical dependency condition.<sup>5</sup>

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<sup>5</sup> Erickson challenges two other conditions of his sentence. He first contends the trial court's prohibition of possession or perusal of pornography is unconstitutionally vague. The Supreme Court has accepted review of this assertion in *State v. Bahl*, \_\_ Wn.2d \_\_ (Supreme Court No. 79988-1. Erickson stands on the argument made in the Brief of Appellant at 26-34.

Erickson also challenged the trial court's order prohibiting possession of alcohol. The state concedes this prohibition is not authorized by statute. BOR at 24. Erickson urges this Court to accept this concession.

B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, the trial court violated Erickson's constitutional rights to a public trial and to effective assistance of counsel. The court abused its discretion by denying Erickson's mistrial motion. The trial court exceeded its sentencing authority by prohibiting Erickson from possessing alcohol and by ordering participation in a chemical dependency assessment. Finally the trial courts order prohibiting possession or perusal of pornographic materials is unconstitutionally vague. This Court should reject the state's claims to the contrary and reverse Erickson's convictions or, alternatively, vacate the improper sentencing conditions and remand for resentencing.

DATED this 28 day of January, 2008.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 35628-7-II
	)	
DAVID ERICKSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF JANUARY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF JANUARY 2008.

x *Patrick Mayovsky*