

NO. 36346-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RENE P. PAUMIER,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 FEB 11 PM 4:13

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

The Honorable Toni A. Sheldon, Judge

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

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

The state contends this Court should reject Paumier's public trial claim under *State v. Momah*.¹ Brief of Respondent (BOR) at 10-18. Paumier 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 that the trial court balanced the *Bone-Club* factors before engaging in the challenged voir dire. *Momah*, 171 P.3d at 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.

¹ ___ Wn. App. ___, 171 P.3d 1064 (2007).

The court distinguished the pertinent Supreme Court authority, finding the common thread tying those cases together – an express order closing the courtroom to the public – was absent in *Momah*'s case. *Momah*, 171 P.3d at 1068.² 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.

Paumier 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

² *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).

barred public observation, not whether the court expressly ordered the procedure.

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, Paumier requests this Court to reject *Momah*. In the alternative, or in addition to, the above argument, this Court should not apply *Momah* to Paumier’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 Paumier's case adjourned to the jury room for private questioning with individual jurors who did not wish to expose themselves to embarrassment that may have resulted from public disclosure of personal information. This distinction takes Paumier's case out of *Momah's* scope.

The state attempts to distinguish *Bone-Club* by noting in that case, the court cleared the courtroom of spectators, whereas here the court convened in chambers for private examination of five venire members. BOR at 17. This is a distinction without a difference. As now-Justice Stephens wrote in *Duckett*, the state bears the burden of showing voir dire of selected panelists in the jury room was not a closure. *Duckett*, 173 Wn. App. at 953 n.2. The "presumptive effect" of such a procedure is closure. *Duckett*, 173 Wn. App. at 953 n.2.

The state also claims private voir dire was permissible to protect jurors from public embarrassment and humiliation. BOR at 18. This may be true, but can occur only after the trial court decides closure is required after weighing the *Bone-Club* factors. The privacy interests of prospective jurors are part of the *Bone-Club* analysis. *Duckett*, 173 P.3d at 953. "The presumption of open judicial proceedings requires a case-by-case consideration under the five-part [*Bone-Club*] analysis." *Duckett*, 173 P.3d at 953. Paumier does not contend a trial court may never conduct

private voir dire; instead, he asserts closure may occur only after a proper, on-the-record weighing of the five factors. The *Frawley* court put it best: “Considerations of jury privacy can and should influence the judge's decision to exclude the public from certain phases of a trial, [but] they do not trump constitutional requirements that the trial be public.” *Frawley*, 140 Wn. App. 713, 720, 167 P.3d 593 (2007).

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

2. THE TRIAL COURT VIOLATED PAUMIER’S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF AT TRIAL.

In the Brief of Appellant (BOA), Paumier went to considerable lengths to show the trial court erred by failing to engage in the required colloquy and instead summarily denying Paumier’s request to proceed *pro se*. BOA at 15-23. The state maintains Paumier’s request came too late and was “far from unequivocal.” BOR at 22. Paumier disagrees.

After jurors were chosen, Paumier said he was dissatisfied with trial counsel’s performance. He told the judge, “I don’t feel it should have gotten this far, and I’d just rather present my, you know, my case myself.” RP1 9. The trial court summarily rejected the request, finding it untimely. RP1 9.

But Paumier's request to proceed *pro se* did not affect the timeliness of the proceedings. He did not request substitute counsel, who likely would have needed more time to prepare for trial. Nor did he request a continuance because he apparently did not need one. Paumier had a copy of discovery throughout the proceedings. Therefore granting his request would have caused no delay in the trial. Moreover, the case was not complicated; the trial lasted about four hours and the state called four witnesses. Supp. CP __ (sub no. 50, Log of Proceedings, 5/9/2007).

Nor was Paumier's request equivocal. Indeed, because it did not involve a request for substitute counsel, Paumier's case is an even stronger one for concluding his request to proceed *pro se* was unequivocal. *Cf. State v. Stenson*, 132 Wn.2d 668, 739-740, 742, 940 P.2d 1239 (1997) (where nearly all conversation between trial judge and defendant concerned his wish for different counsel, court properly denied motion to proceed *pro se* where defendant said, "I would formally make a motion then that I be able to allow [*sic*] to represent myself. I do not want to do this but the court and the counsel that I currently have force [*sic*] me to do this."), *cert. denied*, 523 U.S. 1008 (1998).

Even a request to proceed *pro se* that is driven by denial of a motion for substitute counsel is not necessarily equivocal. *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) ("Mr. DeWeese's

remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his *Faretta*³ waiver.”).

If a request spawned by denial of a motion for substitute counsel can nevertheless be unequivocal, surely Paumier’s request was unequivocal. Paumier did not request new counsel. Denying Paumier his request to proceed *pro se* violated his constitutional rights. And the trial court’s summary denial constituted an abuse of discretion. The state’s arguments to the contrary should be rejected and Paumier’s convictions should be reversed and remanded for a new trial.

³ *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, the trial court violated Paumier's constitutional rights to a public trial. The court also abused its discretion by denying Paumier's motion to proceed *pro se* and, in so doing, violated his constitutional right to self-representation. This Court should reverse Paumier's convictions and remand for a new trial.

DATED this 11 day of February, 2008

Respectfully submitted,

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