

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

IN RE PERSONAL RESTRAINT PETITION OF
FELIX JOSEPH D'ALLESANDRO,
PETITIONER.

PETITIONER'S SUPPLEMENTAL BRIEF

RECEIVED
COURT OF APPEALS
STATE OF WASHINGTON
BY _____
JUL 11 10
2010

Rita Joan Griffith #14360
4616 25th Ave NE
PMB 453
Seattle, WA 98105-4523
(206) 547-1742

Jeffrey E. Ellis #17139
Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

Attorneys for Mr. D'Allesandro

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | FACTS | 2 |
| III. | ARGUMENT | 3 |
| | A. Basic Principles in the Closed Courtroom Cases | 3 |
| | B. <i>Strode</i> and <i>Momah</i> Reaffirm that Closure Without a <i>Bone-Club</i> Hearing Constitutes a Structural Error Mandating Reversal | 5 |
| | C. This Case Mirrors <i>Strode</i> , Not <i>Momah</i> | 9 |
| IV. | CONCLUSION | 13 |

TABLE OF AUTHORITIES

| | |
|---|---------------|
| <i>State v. Boyer</i> , 91 Wn.2d 342, 588 P.2d 1151 (1979) | 11 |
| <i>State v. Momah</i> , ___ Wn.2d ___, 217 P.3d 321 (2009) | <i>passim</i> |
| <i>State v. Strode</i> , ___ Wn.2d ___, 217 P.3d 310 (2009) | <i>passim</i> |

I. INTRODUCTION

Recently, the Washington Supreme Court decided two closed courtroom cases: *State v. Strode*, __ Wn.2d __, 217 P.3d 310 (2009), and *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (2009).¹ The cases were argued on the same day; decided on the same day; and involved similar facts. However, the court reached opposite outcomes (affirming in *Momah* and reversing in *Strode*). Thus, it is important to understand what made the cases different—legally speaking.

The answer (although admittedly not easily ascertained from a cursory reading of the opinions filed the two cases) is simple: in *Momah*, the Court conducted the virtual equivalent of a *Bone-Club* hearing during which time the defense not only agreed to the closure, but sought to broaden its scope. In *Strode*, no closure hearing of any sort was conducted.

This case is much more like *Strode*, than *Momah*. Here, the trial court did not conduct a *Bone-Club* hearing or anything resembling it prior to either of the two times the court was closed. Absent any showing that the court was aware of and considered the right to a public trial before closing the courtroom, reversal is required.

¹ Although this Court dissolved the stay previously entered in this case shortly after the opinions in *Strode* and *Momah* were announced, as of this writing neither decision is final. In both cases, motions to reconsider have been filed. In fact, the Supreme Court has called for a response from the State in *Momah*. So far, the Court has not called for a response from *Strode*.

II. FACTS

D'Allesandro reiterates here the facts relevant to this claim only:

At the start of jury selection, D'Allesandro's attorney asked to privately question certain jurors before the lawyers questioned the entire prospective jury panel. 1RP 2. Defense counsel suggested that the questioning take place in an "empty" courtroom, explaining "[b]y that I mean apart from the remaining prospective jurors." 1RP 2. In response, the trial court agreed and additionally proposed "temporarily" closing the courtroom to the public. Neither counsel for the defendants, nor the prosecutor objected to the Court's proposal. 1RP 5.

The court then told the "observers" that they were welcome throughout the trial and most of *voir dire*, but not when those prospective jurors who requested privacy were questioned. 1RP 5-8. Members of the public, including Mr. D'Allesandro's parents, were asked to leave and were excluded through the questioning of approximately one-third of the prospective jurors. Fourteen jurors were excused while the courtroom was closed. 1RP 25, 160.

Later, during the trial, the court again closed the courtroom to inquire whether a juror knew one of the witnesses. RP 734-735. The court asked "all of you [the audience] to just file out temporarily and then you'll be welcome to come back in." The court stated only that it was easier to close the courtroom than moving the parties into chambers. RP 733.

During the inquiry, Juror 11 reported that the witness “may have gone to school with one of my friends, to college. I just recognize her so I’m not sure if it’s for sure the same person.” RP 734. Juror 11 assured the court that she could remain impartial. RP 737. After the court determined that there was no basis for disqualifying the juror, the courtroom was re-opened. RP 738.

As the attached declarations attest, D’Allesandro’s parents were present at every part of the trial, except when the court was closed—when they sat outside of the courtroom.

III. ARGUMENT

A. Basic Principles Found in the Closed Courtroom Cases

D’Allesandro starts with a brief overview of the settled law—the common legal principles from both cases.

The right to an open and public trial includes jury selection. *Strode*, 217 P.3d at 314; *Momah*, 217 P.3d at 327 (“the right to a public trial applies to all judicial proceedings, including jury selection”). Following this logic, the right to open and public proceedings also applies to the inquiry about a juror’s ability to fairly judge the case that comes up during the course of the trial.

A Bone-Club hearing must be conducted before the courtroom is closed. It cannot be conducted by the appellate court for the first time on review. *Strode*, 217 P.3d at 314-15; *Momah*, 217 P.3d at 329. In *Strode*,

the Supreme Court held “the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents us from determining whether conducting part of the trial in chambers was warranted.” 217 P.3d at 315.

No objection is necessary to preserve a closed courtroom claim.

Instead, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. *Strode*, 217 P.3d at 315;

Likewise, *a defendant's failure to lodge a contemporaneous objection at trial does not constitute a waiver.* *Id.*

A de minimis exception does not exist. Interviewing only a small number of jurors in a closed courtroom is a violation of the constitutional right. For example, in *Strode* the court rejected the State’s argument that the closure of a trial for only a portion of jury selection is too trivial to implicate the constitutional rights at issue here. 217 P.3d at 316 (In *Strode*, at least 11 prospective jurors were examined in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. “This closure cannot be said to be brief or inadvertent.”).

Where the trial court closes a court without a Bone-Club hearing, reversal is required. Denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed. *Strode*, 217 P.3d at 316; *Momah*, 217 P.3d at 326-27. Absent the *Bone-Club* inquiry, the

defendant cannot knowingly, intelligently or voluntarily waive the right to a public trial. *Strode*, at 316; *Momah*, at 326-27.

B. *Strode* and *Momah* Reaffirm that Closure Without a *Bone-Club* Hearing Constitutes a Structural Error Mandating Reversal

Although the Supreme Court could have made the distinction much more clear, the legal line that separates *Momah* from *Strode* is that in *Momah*, the Court conducted a *Bone-Club* hearing or at least its equivalent; and in *Strode*, no *Bone-Club* hearing took place.

When a *Bone-Club* hearing takes place in the trial court, the issue on appeal is whether the court abused its discretion in weighing the factors warranting closure. On the other hand, when no hearing takes place, the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents a reviewing court from determining whether conducting part of the trial in chambers was warranted. Likewise, where a trial court conducts a *Bone-Club* hearing prior to closing the courtroom, it can secure a knowing, intelligent and voluntary waiver of the constitutional right from the defense. Where it does not, it cannot.

Justice Fairhurst's (the swing vote) concurring opinion in *Strode* explains why *Strode* was reversed and *Momah* affirmed: the conduct of a hearing in one case, but not the other. The *Strode* concurrence notes that "(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court." "Even if the requirements were not

sufficiently satisfied on the record in *Momah*, the court could properly conclude that the defendant waived his public trial right.” *Strode*, 217 P.3d at 318 (Fairhurst, J. concurring). While the *Bone-Club* factors could have been more explicitly detailed in the record, Justice Fairhurst’s concurring opinion (in *Strode*) concluded:

The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in *Momah*'s case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude—the right to an impartial jury.

Id.

The concurring opinion then recited the facts which upheld the trial court’s decision to close the courtroom.

Prior to *voir dire*, the defendant was expressly advised that *all proceedings* are presumptively public. Nonetheless, the defense affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this. At no time did the defendant or his counsel indicate in any way that any of the proceedings held in a closed room that was not a courtroom violated his public trial right. The record shows the defendant intentionally relinquished a known right.

Id. (emphasis in original).

In contrast, “(u)nlike the situation presented in *Momah*, here [in *Strode*] the record does not show that the court considered the right to a public trial in light of competing interests.” And, “(t)he record does not show a knowing waiver of the right to a public trial.” *Strode*, at 318.

The opinion in *Momah* reinforces this distinction.

The *Momah* court noted that previous reversals occurred where “(t)he court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom.” 217 P.3d at 327. In contrast, “*Momah* affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it.” *Id.* In short, a closure hearing took place. “Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution.” *Id.* During the hearing, (d)efense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning.” *Id.* at 329. And, the trial court’s decision to close the courtroom was supported by the facts: “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.* at 329.

While an adequate hearing took place in *Momah* prior to the closure of the courtroom, the Court reminded that “(i)n order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom.” *Id.* at 327, n.2.

Although the dissent took a different view of the *facts*, it agreed that the *legal* outcome turned on whether an adequate hearing took place.

“Except for Momah's tacit participation in the closed-door questioning, there is no support in the record for any of these conclusions.” *Id.* at 329 (Alexander, C.J., dissenting). As the majority put it: “Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.” *Id.* at 327. .

Thus, *Momah* stands for the proposition that while closure of the courtroom after a hearing implicates a constitutional right, it does not mandate reversal where the court weighed the relevant concerns before closure and where the defendant clearly waived one constitutional right in favor of another. “The closure occurred to protect Momah's rights and did not actually prejudice him.” *Id.* at 329. On the record, the trial court considered and weighed the relevant criteria. “The court, 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. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial.” *Id.* at 329.

In contrast, the trial court in *Strode* did not conduct a constitutionally meaningful pre-closure hearing, reversal was required—there was “no

indication in the record that the trial judge engaged in the required *Bone-Club* analysis or made the required formal findings of fact and conclusions of law relevant to the *Bone-Club* criteria.” *Strode*, 217 P.3d at 315. *See also* 217 P.3d at 313.

It was not enough in *Strode* for the State to suggest to the appellate court post-*hoc* reasons supporting closure, even if those reasons arguably benefit the defendant. The findings must be made by the trial court, prior to closure. “Although the trial judge mentioned several times that juror interviews were being conducted in private either for ‘obvious’ reasons, to ensure confidentiality, or so that the inquiry would not be ‘broadcast’ in front of the whole jury panel, the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.” 217 P.3d at 315.

Put another way, where there is no *Bone-Club* hearing, “the merit of the closure is not the issue. Instead, we focus only on the procedure used by the trial court prior to closure.” *Id.* at 316, n.5.

C. This Case Mirrors *Strode*, Not *Momah*.

It is indisputable that the trial court closed the courtroom twice—once during a portion of *voir dire* and later when it questioned a juror during trial. It is also indisputable that neither closing was preceded by the requisite hearing and findings by the court. Applying *Strode* and *Momah* to the facts in this case mandates reversal.

Here, in response to defense counsel's request to speak to certain prospective jurors privately, *i.e.*, "apart from the remaining jurors," the trial court decided to question prospective jurors "outside of what's open to the general public," so that "personal" or "embarrassing" matters would not be disclosed to the "glare of the whole community." 1RP 4. *See also* 1 RP 7 ("I'm thinking maybe what we'll do is maybe close this courtroom temporarily...we'll just ask members of the public to leave."). The record is clear that courtroom was, in fact, closed: "I'm going to ask all the public to now leave, except for the jurors. If you'd do that please." 1RP 25. The transcript then notes: "Public leaves." *Id.*

Even less occurred prior to the second closure.

Both times, prior to closing the courtroom, the trial judge conducted no *Bone-Club* hearing. No members of the public (who were required to leave) were given an opportunity to address the court. In addition, the trial court made no formal findings justifying the closure. His brief remarks preceding closure make no mention of weighing competing interests or why complete closure was the least restrictive means available to protect the privacy interests of potential jurors.

Trial counsel did not request to close the courtroom. Instead, trial counsel requested to question prospective jurors apart from other jurors, as counsel explained: "I mean apart from the remaining prospective jurors." 1RP 2. The trial court agreed, but then added that questioning would take

place in a closed courtroom. *Id.* Trial counsel did not object. However, a defendant does not invite error by failing to object.

Where there is no pre-closure hearing, neither the failure to object, nor participation in *voir dire* constitutes a waiver. In *Strode*, the State contended that because Strode and his attorney were present and participated during this individual questioning, Strode waived his right to argue that his right to a public trial had been violated. The Court rejected this argument. “Strode's failure to object to the closure or 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.” 217 P.3d at 315.

Instead, the “right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.” *Id.* at 315, n.3.

The same result must follow in this case.

This is also not a case of invited error.

Invited error occurs when the defense *proposes* the same course of action complained about on appeal. *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979) (“A party may not request an instruction and later complain on appeal that the requested instruction was given.”). The invited

error doctrine applies only where the defendant engages in some affirmative action by which he knowingly and voluntarily set up the error. Participation without an objection does not constitute invited error. *Strode*, 217 P.3d at 315.

While *Momah* did not present a “classic case” of invited error, where there is a *Bone-Club* hearing, the defense position at that hearing can certainly be considered on appeal when a defendant is challenging the closure. Thus, the *Momah* Court viewed the fact that trial counsel “affirmatively advocate[d] for closure,” and “argue[d] for the expansion of the closure,” as part of the contemporaneously created trial record in support of the decision to close the hearing. *Momah*, 217 P.3d at 328. Thus, while *Momah* was not precluded from raising the issue on appeal, his affirmative position in response to a motion to close was a factor that could be considered by the appellate court as supporting the trial court’s decision to close.

In this case, there was no complete or even partial *Bone-Club* hearing in the trial court—only a failure to object. Thus, *Momah* is easily distinguished.

In sum, the Supreme Court noted that “*Momah's* situation is distinguishable from that of other defendants in closure cases.” *Id.* at 328. *Momah* and his counsel were both aware of the right to an open trial during jury selection, carefully considered and weighted the competing tactical

interests, argued for even greater closure than contemplated by the court, and explained the rights sought to be protected by closure *on the record before closure*.

On the other hand, *Strode* is indistinguishable from D'Allesandro's situation. Thus, reversal is required.

IV. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 23rd day of November, 2009.

JEFF ELLIS for

Rita J. Griffith, WSBA 14350
Counsel for Petitioner

Jeffrey E. Ellis, WSBA 17139
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on November 23, 2009 I served the parties listed below with a copy of *Petitioner's Supplemental Brief* as follows:

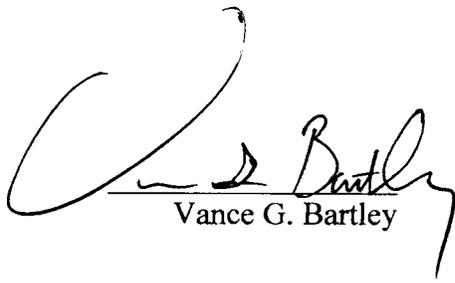
Jeremy Randolph
Prosecuting Attorney
PO BOX 1206
Cannon Beach, OR 97110-1206

Felix Joseph D'Allesandro
DOC NO. 869392
WSRU/MCC
PO BOX 777
Monroe, WA 98272

Rita Joan Griffith #14360
4616 25th Ave NE
PMB 453
Seattle, WA 98105-4523

11-23-09 Seq WA
Date and Place

ORDER OF SERVICE
STATE OF WASHINGTON
COUNTY OF KING
BY: ZON
DEPUTY


Vance G. Bartley