

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

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

FILED
COURT OF APPEALS
DIVISION II
10 FEB 17 PM 2:03
STATE OF WASHINGTON
BY  DEPUTY

PETITIONER'S SUPPLEMENTAL REPLY

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I. INTRODUCTION

The State repeats, nearly verbatim, the arguments advanced and rejected by the Washington Supreme Court in *State v. Strode*, 167 Wn.2d 140, 217 P.3d 321 (2009). Just as importantly, in doing so the State distorts the record in order to try to make the law fit its desired outcome.

D’Allesandro’s counsel did not request a closure of the courtroom. Instead, counsel requested to question jurors one by one in an open courtroom. In response, the Court proposed closing the courtroom. Defense counsel did not object. Defense counsel did not propose to privately question a juror. He only failed to object. However, defense counsel did not object in the vast majority of closed courtroom reversals. *Strode* makes it clear that the failure to object does not constitute a waiver of the claim.

II. ARGUMENT

A. D’Allesandro’s Counsel Did Not Invite or Waive D’Allesandro’s Right to an Open and Public Trial.

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, explaining that he wanted to question jurors “...apart from the remaining prospective jurors.” 1RP 2. In response, the trial court proposed “temporarily” closing the courtroom to the public. Counsel did not object. 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. Fourteen jurors were excused while the courtroom was closed. 1RP 25, 160.

Later, during the trial, the court again *sua sponte* 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.” *Id.*

Nevertheless, the State argues in the face of this record that it was defense counsel who requested closure. The State is simply wrong.

The State’s argument in this case is no different from the State’s argument in *Strode*: “The State also asserts that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors.” *Id.* at 229. The *Strode* court answered the State’s argument, as follows: “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.” *Id.*

This Court should do the same.

The concurring opinion in *Strode* recited the facts which distinguish it from *Momah*.

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. at 233 (emphasis in original).

The opinion in *Momah*, which is still pending a motion to reconsider, reinforces this distinction. "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." 217 P.3d at 327.

Invited error occurs only 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). Thus, the facts in *Momah* supported a finding of invited error. The facts in this case do not.

B. No Bone-Club Hearing Took Place in This Case.

The Washington Supreme Court noted that "(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court." *Strode*, at 234 (Fairhurst, J. concurring). For example, the *Strode* concurring opinion notes:

The trial court in *Momah* was aware at all times of the requirement that the trial be public. On October 6, 2005, before voir dire began, the trial court advised the attorneys that a television station had contacted the court about viewing jury selection. One of the defendant's attorneys was quite concerned about this and said, "I would very much object to jury selection being televised." TP

Momah (Oct. 6, 2005), No. 81096-6, at 93. He added that his experience was that “they can't show the jurors anyway.” *Id.* One of the prosecuting attorneys noted that *State v. Brightman*, 155 Wash.2d 506, 122 P.3d 150 (2005), had been decided that day and “talked about the fact that jury selection is open and public ... so long as it's open and public in some way, it doesn't matter to me.” TP Momah (Oct. 6, 2005), No. 81096-6, at 93.

The trial court added that new GR 16 “presumes all proceedings are open.” *Id.* The trial court ruled that if there was any proposed restriction of cameras, the trial court would invite the media's reaction and hold a hearing. Defense counsel noted that his experience was “that the press has in the past agreed that they will not do this ... [v]oluntarily.” *Id.* at 94. The trial court responded that such restrictions sounded reasonable but expressed concern that GR 16 required that all proceedings are presumed open.

Id. at 233. The Court continued:

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.

Id. at 234 (emphasis in original).

Here, the State does not cite to any place in the record where D'Allesandro was expressly advised that all proceedings are presumptively open. Likewise, the State does not point to any place in the record where the trial court weighed the right to an open and public trial against other constitutional rights.

Strode reinforces: “Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing

interests. As far as we can tell, the trial court did not consider whether there were less restrictive alternatives to closure available.” *Id.* at 229. The same is true of the instant case. No *Bone-Club* hearing or anything approaching it took place in this case—prior to either closure of the courtroom.

C. Questioning a Juror About Her Ability to Serve is Never a “Ministerial” or “Trivial” Act.

The State’s last argument is that questioning the single juror during trial about her ability to ability to fairly decide the case is so trivial that reversal should not follow, even if a *de facto* violation occurred.

Once again, that position was soundly rejected in *Strode*. “Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. Trivial closures have been defined to be those that are brief and inadvertent. This court, however, has never found a public trial right violation to be trivial or *de minimis*.” *Id.* at 316 (internal citations and quotations removed).

The State can, if it wishes, make its argument in a petition for review to the Supreme Court. However, it is plainly contrary to current law.

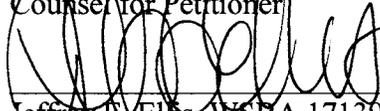
III. CONCLUSION

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

DATED this 16th day of February, 2010.

JEFF ELLIS for

Rita J. Griffith, WSBA 14360
Counsel for Petitioner

A handwritten signature in black ink, appearing to read "Jeffrey B. Ellis", written over a horizontal line.

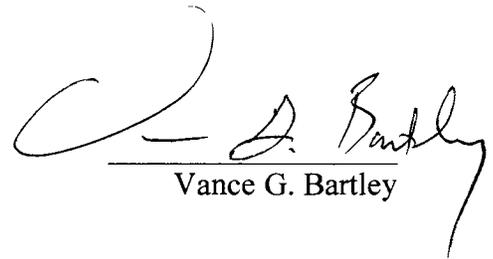
Jeffrey B. Ellis, WSBA 17139
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on February 15, 2010 I served the parties listed below with a copy of *Petitioner's Supplemental Reply* as follows:

Jeremy R. Randolph
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Vance G. Bartley

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