

COA NO. 43737-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ESPEY,

Appellant.

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

The Honorable Linda Lee, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SEARCH WARRANT FOR THE VEHICLE IS UNSUPPORTED BY PROBABLE CAUSE DUE TO LACK OF NEXUS AND STALENESS.

The State is unable to refute Espey's argument that probable cause did not support the warrant to search the vehicle Espey was driving on May 25, 2011. The State maintains the requisite nexus exists between the robbery on April 8, 2011 and the search of the green Cadillac on May 25, 2011. It suggests the green Cadillac is analogous to Espey's residence for purposes of storing belongings (and evidence of the robbery) because Espey had no fixed residence. See Brief of Respondent (BOR) at 25 (Espey was not associated with any single fixed address as a residence and "the issuing magistrate could infer that Espey was primarily associated with the vehicle in which he was arrested").

But if a nexus is lacking to search a drug dealer's residence based on a belief that drug dealers commonly keep evidence of drug dealing in their residences, then it is impossible to reasonably conclude a nexus exists between the April 8 robbery and the vehicle Espey was driving on May 25. See State v. Thein, 138 Wn.2d 133, 138-39, 146-47, 150, 977 P.2d 582 (1999) (insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the place searched).

The nexus the State has attempted to construct is too attenuated to establish probable cause. "[T]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 556, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978). Espey was certainly suspected of committing the April 8 robbery, but the State was unable to establish he was the owner of the property searched (the green Cadillac) or that he was ever in control of that property before his arrest on May 25. The affidavit reveals only that Espey was observed driving the green Cadillac on a single occasion — the date he was arrested on May 25.

Critically, the green Cadillac searched by police was not the vehicle used in the robbery on April 8. CP 20, 23. There is no probable cause to believe evidence associated with the April 8 robbery would be found in a vehicle that had no connection to the crime. Cf. United States v. Christenson, 549 F.2d 53, 57 (8th Cir. 1977) ("The 1964 Ford Falcon was driven by Christenson to Donovan's Motel. Immediately after the burglaries, Christenson checked out of Donovan's Motel and left the area in the Ford Falcon. As there was probable cause to believe that Christenson committed the burglaries, it is reasonable to infer that he

removed the stolen items from the Redwood Falls area by the only apparent means of transportation available to him and that the contraband would still be in the automobile the day following the burglaries. Therefore, there existed a justifiable nexus between the burglaries and the 1964 Ford Falcon [citation omitted] and the issuing judge properly concluded that there was probable cause to search the vehicle for the contraband."); United States v. Evans, 447 F.2d 129, 132 (8th Cir. 1971) ("The affidavit here in question gives a detailed description of the car to be searched and the stolen property expected to be discovered. It also contains statements showing that the Post Office in Crawfordsville had been burglarized the night before. Three residents of Crawfordsville had personally seen the vehicle at the scene of the crime at the time of its commission. This information provides the nexus between the burglary in Crawfordsville and the car"), cert. denied, 404 U.S. 1047, 92 S. Ct. 727, 30 L. Ed. 2d 735 (1972).

2. THE COURT VIOLATED ESPEY'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF THE JURY SELECTION PROCESS IN PRIVATE.

The State contends sidebars to address administrative matters do not implicate the right to a public trial. BOR at 42, 46. That proposition may be sound, but it has no application here. It is already established that the right to a public trial encompasses jury selection and it is unnecessary

to re-establish that proposition by engaging in a complete "experience and logic" test. State v. Wise, 176 Wn.2d 1, 11, 12 n.4, 288 P.3d 1113 (2012). Portions of jury selection were conducted at sidebar and, at the third trial, in the judge's chambers. 3RP 120-21; 5RP 94-96; 10RP 63-64; CP 259-62.

Voir dire had indisputably commenced in each instance. The voir dire component of jury selection is not an administrative proceeding. See Gomez v. United States, 490 U.S. 858, 874, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (voir dire process is not an administrative empanelment process); State v. Wilson, 174 Wn. App. 328, 342-44, 346, 298 P.3d 148 (2013) (distinguishing administrative removal of prospective jurors *before* the voir dire process began from later portions of the jury selection process).

The State contends the courtroom was open to the public and therefore no public trial violation occurred and "neither the court nor the parties left it." BOR at 42. The court and the parties did leave the courtroom when they went to chambers, at which time four jurors were excused. 10RP 63-64. Furthermore, sidebars, like in-chambers actions, are inaccessible to public observation and therefore constitute a closure for public trial purposes.

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may

leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers. Lormor, 172 Wn.2d at 93; Wise, 176 Wn.2d at 12.

Whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. A closure occur even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process at sidebar than they are able to enter a locked courtroom or access the judge's chambers.

The practical impact is the same — the public is denied the opportunity to scrutinize events. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013). Doubtless the public could *see* that something was going on at sidebar, but the public could not *hear* what was

happening. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

The trial court violated Espey's right to a public trial by holding a portion of jury selection in chambers or at sidebar rather than in public. See Slert, 169 Wn. App. at 769 (right to public trial violated where four potential jurors excused in an in-chambers meeting without first conducting Bone-Club¹ analysis).

The State also claims there is no public trial violation because the record indicates what occurred off the record. BOR at 46. That claim fails because the Supreme Court has repeatedly found a violation of the public trial right where the record showed what happened in private. See, e.g., State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom.").

In Slert, four jurors were excused in chambers and following the in-chambers conference, the trial court indicated on the record that it had

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

previously conferred with both counsel and that the parties had mutually agreed to excuse four jurors from the jury venire. Slert, 169 Wn. App. at 771, 774. This Court found a public trial violation. Id. at 769, 774. There is no basis to treat Espey's case differently.

Established law dictates that the Bone-Club factors be considered *before* the closure takes place. Wise, 176 Wn.2d at 12. The rule proposed by the State — that a *later* recitation of what occurred in private suffices to protect the public trial right — would eviscerate the requirement that a Bone-Club analysis take place *before* a closure occurs.

3. THE PROSECUTOR IMPERMISSIBLY COMMENTED
ON ESPEY'S EXERCISE OF CONSTITUTIONALLY
PROTECTED RIGHTS.

Espey stands by the argument set forth in the opening brief. There is no need to repeat it here.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Espey requests that this Court reverse each conviction, dismissing counts III and V with prejudice.

DATED this 23rd day of October 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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DIVISION TWO

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THOMAS ESPEY,)	
)	
Appellant.)	

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 23RD DAY OF OCTOBER 2013, 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 AND/OR VIA EMAIL.

[X] THOMAS ESPEY
DOC NO. 938101
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF OCTOBER 2013.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

October 23, 2013 - 2:30 PM

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