

FILED  
DECEMBER 3, 2014  
Court of Appeals  
Division III  
State of Washington

25850-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PAUL R. LIVINGSTON, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

APPELLANT'S SUPPLEMENTAL BRIEF

---

Janet G. Gemberling  
Attorney for Appellant

JANET GEMBERLING, P.S.  
PO Box 8754  
Spokane, WA 99203  
(509) 838-8585

**INDEX**

A. STATEMENT OF THE CASE.....1

B. ARGUMENT.....1

C. CONCLUSION.....5

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. FRAWLEY, -- Wn.2d --,  
334 P.3d 1022 (2014)..... 1, 2, 3, 5

**CONSTITUTIONAL PROVISIONS**

Const. Art. I, sec. 10 ..... 1, 5  
Const. Art. I, sec. 22 ..... 1, 5

## A. STATEMENT OF THE CASE

Paul Livingston was charged with murder in the first degree, and conspiracy to commit murder in the first degree. (CP 1) Before jury selection, the court expressed its intention to question select jurors in the jury deliberation room, and defense counsel acquiesced. (IV RP 39-40) A number of prospective jurors were subsequently questioned in separate voir dire. (VI RP 272, 574, 579) Mr. Livingston appealed his convictions on both charges, asserting violation of his constitutional right to a public trial. This court stayed his appeal pending the Supreme Court's decision in *State v. Frawley*, -- Wn.2d --, 334 P.3d 1022 (2014). *Frawley* having been decided, this court has requested supplemental briefing.

## B. ARGUMENT

In *State v. Frawley*, the justices agreed on several principles relating to the right to public trial: Washington's constitution guarantees a criminal defendant the right to an open and public trial, Const. Art. I, sections 10 and 22, 334 P.2d at 1026; the right to a public trial applies to jury selection and individual voir dire, 334 P.2d at 1026, 1028 and 1031; and a defendant's waiver of the right to a public trial must be knowing, voluntary and intelligent. 334 P.3d at 1027, 1031, 1033, 1035.

The Supreme Court divided on the resolution of issues relating to

whether the trial court's failure to apply *Bone-Club* factors on the record requires reversal without regard to whether the defendant waived the right to an open trial; and if not, then what constitutes a sufficient waiver; and whether a public trial violation may be first raised on appeal and whether the appellant must show prejudice.

All nine justices agreed that a defendant's waiver of the public trial must be knowing, voluntary and intelligent. In the lead opinion two justices held "a knowing, voluntary, and intelligent waiver of the public trial right would require, at the very least, a written waiver signed by the defendant expressly acknowledging and waiving the right." 334 P.3d at 1027-28 (Johnson, J.) (plurality opinion). But, in addition, Justice Johnson opined that absent an analysis of the *Bone-Club* factors, even a waiver by the defendant would be insufficient to cure the constitutional error. *Id.* at 1026-27, 1029.

Two justices agreed that neither "defendant waived his right to challenge the closure under our constitutional waiver standard' since neither 'made a knowing, voluntary and intelligent waiver of their right to a public trial . . .'" but disagreed with the lead opinion's suggestion such a waiver would be ineffective absent the requisite *Bone-Club* analysis. 334 P.3d at 1030, 1031 (Stephens, J., concurring) (plurality opinion).

Three justices agreed "that a defendant's waiver of this right

cannot be presumed from a silent record, from a waiver of some other right, or from the defendant's decision to participate in a proceeding once the court has closed it to the public . . . ." 334 P.3d at 1031 (Gordon McCloud, J., concurring) (plurality opinion). But when the standard for a valid waiver is met, absence of the *Bone-Club* analysis does not override the defendant's waiver. *Id.* Moreover, the written waiver or equivalent colloquy suggested by the lead opinion is unnecessary. *Id.* at 1034. Rather, "a statement on the record by defense counsel can support a waiver when the record, fairly read, indicates that the defendant knew, heard, understood, and agreed with what the lawyer was saying." *Id.* at 1034.

Even the dissenting opinion agrees "that a criminal defendant may affirmatively waive his or her right to a public trial as long as the waiver meets the constitutional standard for waiver." *Id.* at 1036 (Wiggins, J. dissenting). The dissent parts company with the other opinions, however, arguing that the Court should overrule its prior decisions holding denial of the public trial at the trial court level is structural error that requires reversal without any showing of prejudice. *Id.* at 1035-36.

In short, all nine justices agree that an effective waiver of the open trial right must meet the minimum constitutional standard of a knowing and voluntary waiver of the right. The standard enunciated by Justice

Gordon McCloud represents the absolute minimum circumstances that would constitute such a waiver, namely, defense counsel's statement on a record that demonstrates the defendant understands and agrees with the lawyer's statement.

The circumstances in Mr. Livingston's case demonstrate that even this minimum constitutional standard for a waiver of the right to an open public trial was not met. (RP 39-40) The record does not suggest that Mr. Livingston was ever advised of his right to a public trial, or that the right applied to jury voir dire. No circumstances demonstrate that defense counsel consulted with Mr. Livingston before assenting to the judge's preferred procedure for conducting voir dire. Nothing in the record indicates that Mr. Livingston had any understanding of the meaning of defense counsel's expression of acquiescence.

C. CONCLUSION

The *Frawley* decision requires reversal of Mr. Livingston's conviction and remand for a trial conducted in accordance with the requirements of Const. Art. I, sections 10 and 22.

Dated this 3rd day of December, 2014.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 25850-5-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
PAUL R. LIVINGSTON,	)	
	)	
Appellant.	)	

---

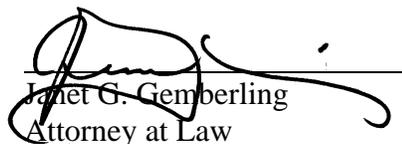
I certify under penalty of perjury under the laws of the State of Washington that on December 3, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark Lindsey  
SCPAappeals@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on December 3, 2014, I mailed a copy of the Appellant's Brief in this matter to:

Paul Ray Livingston  
#302109  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

Signed at Spokane, Washington on December 3, 2014.

  
Janet G. Gemberling  
Attorney at Law