

FILED  
U.S. DISTRICT COURT  
SPOKANE, WASHINGTON

NO. 25999-4-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

RUDOLFO DAVID NICACIO,  
Defendant/Appellant.

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UPDATED SUPPLEMENTAL BRIEF OF APPELLANT NICACIO

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A. UPDATED STATEMENT OF THE CASE

Among the various note-worthy issues raised on appeal by the appellant, RUDOLFO DAVID NICACIO, is the claim, inter alia, that his and the public's constitutional rights to a public trial were violated during the criminal proceedings held before the Superior Court of Douglas County, State of Washington, in Cause No. 06-1-00160-9. As a result of said prosecution, Mr. NICACIO was ultimately convicted, on a jury verdict of guilty, and sentenced to fifteen [15] month imprisonment by the Superior Court on March 19, 2007, for the alleged crime of indecent liberties [RCW 9A.44.100(1)(d)] [RP 791-94, 813; 111-25, 203-4, 205-16] involving the allegations of the complaining witness and supposed victim, Crystal Reynolds. [RP 791-94; CP 42-52, 53-61, 123-24]. This appeal followed. [CP 225-26].

As an aside, it should be noted that during the pendency of this appeal, and the Washington State Supreme Court's review and deposal of

various Court of Appeals' decisions focusing on the public trial right including State v. Duckett, 141 Wn.App. 797, 173 P.3d 948 (2007), review denied, slip opinion no. 80965-8 (April 8, 2013), and State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), aff'd, slip opinion no. 80727-2 (consolidated with no. 86513-2) (September 25, 2014), Mr. NICACIO has long since completed his sentence and term of imprisonment.

1. Factual Background Re: the Jury Selection Process. Jury selection took place in Mr. NICACIO's case on February 20, 2007. [RP 56-167]. During the course of this process, there were at least three [3] occasions when the parties counsel went into closed chambers with the trial court to discuss whether certain potential jurors would be subject to challenge for cause. [RP 68-70, 78-79, 142-44, 156]. In this regard, there is no clear indication in the record whether Mr. NICACIO was afforded the opportunity to attend or participate in these in-chambers proceedings, wherein certain jurors

were, in fact, dismissed for cause. [RP 68-70, 78-79, 142-44, 156]. Nor is there any record of the defendant, and appellant herein, ever having been asked to waive or did, in fact, waive said public trial right to be in attendance while counsel met in closed chambers with the trial court. [RP 68-70, 78-79, 142-44, 156].

Also, there were at least two [2] more occasions when certain potential jurors were examined in camera, and outside the presence of members of the public. [RP 87-101, 151-56]. By the same token, there is no clear indication in the record whether the defendant was afforded the opportunity to attend these in camera proceedings wherein said jurors were, in fact, dismissed for cause. There is nothing in the record whatsoever suggesting that Mr. NICACIO was ever asked to waive or did, in fact, waive said public trial right to be participate in this in camera examination of potential jurors examinations. [RP 87-101, 151-56].

In addition to the foregoing errors

associated with violations of Mr. NICACIO's public trial right, there is nothing in this case suggesting the trial court ever contacted, canvassed or queried any members of the public who were in attendance in court concerning their views, opinions, agreement or disagreement, as to the court conducting this private voir dire process taking place and which involved some five [5] jurors. This was notwithstanding the fact that the record clearly reflects that members of the public were, in fact, in attendance in the courtroom during this aspect of the jury selection. [RP 87-101, 101-02, 151-56]. In turn, the record fails to show whether Mr. NICACIO himself was ever advised of, or waived any right to, have these particular jurors examined in open, or than closed, court in terms of his and the public's constitutional right to a public, rather than private, trial. [RP 87-101, 151-56].

Next, and after the jury was impaneled, a question arose as to whether a juror had been

contaminated or prejudiced when coming in contact with, and having briefly spoken with, Detective Steve Groseclose outside the courtroom on the morning of February 22, 2007. [RP 724-27]. The record indicates the defendant, Mr. NICACIO, was neither asked nor permitted to attend this in camera interview of this seated jury member, which would be an additional violation of his constitutional right to a jury trial as envisioned under the language and rationale of this court's decision in State v. Frawley, supra. [RP 724-27]. Finally, there is nothing in the record suggesting the trial court made any assessment, or took into account any, of the criteria of State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), which this court held in State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), was required before any aspect of the jury selection process could be conducted outside the scrutiny or view of the public. See also, Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210, 848 P.2d 1258

(1993). As indicated above, this court's holding in Frawley has since been affirmed by the Washington State Supreme Court in its recent plurality opinion entered in slip opinion no. 80727-2 (consolidated with State v. Applegate no. 86513-2) (September 25, 2014).

As discussed in further detail below, it is clear that, under the Supreme Court's reasoning in Frawley, affirming this court's underlying decision, the Bone Club criteria applies to the jury selection process as well as other aspects of criminal trial process in terms of matters being held outside open court, rather than within the presence and view of the public in general.

2. Procedural History and Update of Related Cases. On October 10, 2007, Mr. NICACIO filed a Motion to Supplement his original Appellate Brief pursuant to Rule 10.1(h) of the Washington Rules of Appellate Procedure [RAP], and the Motion was duly granted by "Commissioner's Ruling" entered on November 27, 2007. On December 27, 2007, the "Supplemental Brief of Appellant Nicacio" was

served and filed with this court.

Since that time, the Washington State Supreme Court has entered certain public trial decisions in at least three [3] related cases including State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Wise, 176 Wn.2d 1, 288 P.3d 113 (2012). During this same time frame, the United States Supreme Court has also weighed in on a defendant's public trial right under the Federal Constitution in Presley v. Georgia, 558 U.S. 209, 175 L.Ed.2d 675, 130 S.Ct. 721 (2010). With regard to Presley, the appellate court in State v. Paumier, 155 Wn.App. 673, 685, 230 P.3d 212 (2010), aff'd, 176 Wn.2d 29, 288 P.3d 1126 (2012), held that, by way of the Presley decision, federal law has now "eclipsed" Momah and Strode, leaving no question as to what is the appropriate remedy when the guidelines under State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) are not properly employed by the trial court's sequestration jury

voir dire.

Finally, and once again, the Washington Supreme Court in September entered its plurality opinion in State v. Frawley, slip opinion case no. 80727-2 (consolidated with State v. Applegate no. 86513-2) (September 25, 2014), after denying review in the related case of State v. Duckett, 141 Wn.App. 797, 173 P.3d 948 (2007). See, slip opinion case no. 80965-8 (April 8, 2013).

Finally, by way of a notation ruling as set forth in a letter decision, dated November 4, 2014, this Court is now allowing counsel to file additional supplemental briefing on the issues of a violation of the public trial right in light of the foregoing Supreme Court decisions. The present briefing of Appellant is in response to this opportunity now being afforded by this Court.

#### B. EXTENDED SUPPLEMENTAL ARGUMENT

a. Related Facts in the Frawley Case. The facts in Frawley are, without question, very

similar in nature to those in Mr. NICACIO's pending case. In some instances the absence of any record associated with portions of the jury voir dire process conducted outside open court are even more egregious or compelling in Mr. NICACIO's case, than in Frawley.

Brian Frawley was charge with first degree felony murder. Jury voir dire was divided into two [2] phases involving the process of individual as well as general voir dire. In terms of the latter, some jurors were questioned by the judge in chambers concerning their answers to their jury questionnaires. Before this occurred, and unlike Mr. NICACIO's case, the trial court went to an extensive colloquy concerning the defendant's right to be present during this process, and Mr. Frawley chose to waive his right to be present. Counsel for both side, along with the court, then examined some thirty-five [35] prospective jurors in chambers wherein eleven [11] of these were later stricken for cause.

Also, during the general voir dire process, the trial court proposed closing the courtroom to the public, based upon the limitations in space. However, before doing so, and again unlike Mr. NICACIO's case, the court once more engaged in an extensive colloquy as to whether the defendant would waive his further right to have the public present and eventually concluded that Mr. Frawley had done so in terms of this general voir dire process. The jury ultimately convicted Mr. Frawley as charged.

Mr. Frawley appealed. Following the reversal of the Superior Court in a split decision by the appellate court in State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), the Washington State Supreme Court accepted discretionary review. By way of its plurality opinion in slip opinion no. 80727-2 (September 25, 2014), the Supreme Court upheld the earlier decision of this court.

b. Additional Argument Regarding Supreme Court Decision in Frawley. The reasoning and

holding in lead opinion in Frawley authored by Johnson, J., along with the "concurring opinion" and "concurring in part opinion," authored respectively by Stephens and McCloud, JJ., require reversal in the instance appeal of Mr. NICACIO.

1. Presley decision and its progeny. Before directly focusing on the plurality and concurring opinions in Frawley themselves, it should once more be borne in mind that the United States Supreme Court decision in Presley v. Georgia, 558 U.S. 209, 175 L.Ed.2d 675, 130 S.Ct. 721, 723-24 (2010), may well have superseded and preempted any decision of the Washington State Court. There, the Federal Court, by way of a per curiam opinion, held that, under the First and Sixth Amendments to the United States Constitution, voir dire of prospective jurors must be open to the public, and this constitutional requirement is fully "binding on the States." This seminal decision has since been addressed and considered by the courts of Washington.

As later opined in State v. Paumier, 155 Wn.App. 673, 685, 230 P.3d 212 (2010), aff'd, 176 Wn.2d 29, 288 P.3d 1126 (2012), the Presley decision has essentially "eclipsed" the earlier State Supreme Court holdings in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), and State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), leaving no doubt that dismissal is the appropriate remedy when the State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) guidelines are not employed or followed prior to closure of the jury voir dire process.

Thus, the net effect of Presley was to essentially reaffirm the earlier state appellate court holdings in State v. Duckett, 141 Wn.App. 797, 173 P.3d 948 (2007), and State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007). See, Paumier, at 679, 683-86. In this regard, Paumier, at 684-85, emphasized and outlined the major principles espoused by Presley, 558 U.S. at 214-16. Specifically, the Paumier court, at 683-86, observed:

"[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," . . . [T]he Court reiterated that "'[a]bsent considerations of alternatives to closure, the trial court could not constitutionally close the voir dire.'" Presley, 130 S.Ct. at 724 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 511, 104 S.Ct.819, 78 L.Ed.2d 629 (1984) (Press-Enter. I)). Moreover, "trial courts are required to consider alternative to closure even when they are not offered by the parties;" this is because "[t]he public has a right to be present whether or not any party has asserted the right."

. . .

Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings. . . . [W]here the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction.

2. Lead Opinion in Frawley. Next, even if the foregoing reasoning and logic of Paumier concerning the net effect of Presley were not dispositive of Mr. NICACIO's case, the Washington Supreme Court's decision in Frawley certainly

mandates a reversal under the State Constitution. See, Wash.St.Const., Art.I, §§ 10 & 22.

a). Bone Club Analysis. First, Justice Johnson's lead opinion in Frawley speaks in terms of the mandatory nature of a Bone Club analysis under those rights guaranteed under Article I, sections 10 and 22, of the Washington State Constitution. In this vein, "[c]losure of the courtroom without this analysis is a structural error for which a new trial is the only remedy. Frawley, slip opinion no. 80727-2 (September 25, 2014), at page 7 (citing State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 113 (2012)). By the same measure, "in-chambers questioning of jurors constitute[s] a closure of the courtroom under Wise, 176 Wn.2d 1." Frawley, at page 9. In neither instance did the trial court in Mr. NICACIO's case under take any analysis of the factors in Bone Club prior to instituting closure. Thus, both closures in this case were a violation of the defendant's public trial right. Id.

b). Affirmative waiver. Justice Johnson

then addresses, at pages 9 through 13, the issue of possible waiver of the public trial right by Mr. Frawley. Ultimately, it is determined that notwithstanding the trial court's lengthy colloquy on the issue of closure, Mr. Frawley's public trial right before individual juror questioning was never mentioned. Rather, only his right to be present during the same was spelled out by the court. Accordingly, in terms of the lead opinion, the Supreme Court could "not equate a waiver of the right to be present with a waiver of the right to a public trial . . . there must be an independent knowing, voluntary, and intelligent waiver of the public trial right." Frawley, lead opinion, at page 12 through 13. See also, In re Personal Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

Here, there is nothing in the trial court record to suggest a waiver of either of these rights as discussed in Justice Johnson's lead opinion. Thus, as spelled out by Justice Johnson, there can be no question whatsoever that

Mr. NICACIO's right in this regard remained intact and was violated by the trial court in terms of the constitutional guarantees afforded under Article I, §§ 10 and 22.

c). Non-Issues Associated with a Claimed Failure of Contemporaneous Objection and Alleged Absence of De Minimis Violation. In turn, Justice Johnson flatly rejected the prosecution's remaining assertions in Frawley (1) that there must be a "contemporaneous objection" in order for a defendant to preserve for appeal his public trial right [Frawley, at pages 15 Through 16], and (2) that the violation in this case was "De Minimis." Frawley, at page 16 through 17. The same can likewise be said in terms of any further challenge by the State in Mr. NICACIO's case.

3. Concurring Opinions in Frawley. Finally, the foregoing result reached in the lead opinion in Frawley was, in turn, confirmed in "concurring opinion," at page 1 through 4, and "concurring in part opinion," page 1 through 2, authored respectively by Stephens and McCloud, JJ. The

additional question raised by McCloud, J., is not in any sense germane to the facts in Mr. NICACIO'S case. In effect, there is no suggestion of any affirmative waiver by him of the public trial right. Thus, by way of a majority of the Supreme Court in Frawley, reversal is mandated under state constitutional law in terms of the present appeal of Mr. NICACIO.

In a separate dissent authored by Wiggins, J., joined by Madsen, C.J., the dissent took issue with whether a violation or error associated with the public trial right was structural in nature and should, therefore, be presumed prejudicial as held by a majority of the justices. Consequently, the dissent reasoned that the convictions in Frawley and Applegate should be affirmed.

4. Related Decision in Duckett. Insofar as the Washington Supreme Court has denied review in the related case of State v. Duckett, 141 Wn.App. 797, 173 P.3d 948 (2007); see, slip opinion case

no. 80965-8 (April 8, 2013), reaffirms his earlier argument concerning the applicability of that Appellate Court decision in Duckett as set forth on pages 14 through 16, and 20, of his original "Supplemental Brief," which was filed with this Court on December 27, 2007 and, by this reference is incorporated herein. The net effect is that the reasoning and holding in Duckett, as well as the related Appellate and Supreme Court decisions in Frawley, require the same result of reversal in the present case of Mr. NICACIO.

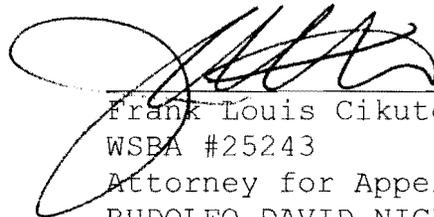
In light of the now confirmed failures on the part of the Superior Court to insure the integrity of the public trial right shared between the defendant, Mr. NICACIO, and the public, the subject conviction, and judgment and sentence should now be reversed in terms of this appeal. RAP 12.2. Both the governing provisions of the State and Federal Constitutions require nothing less under the indisputable facts and circumstances presented in this case. Id.

C. CONCLUSION

Based upon the foregoing Supplemental Points and Additional Authorities, the Appellant, RUDOLFO DAVID NICACIO, once again respectfully requests that his criminal conviction and judgment and sentence in this matter be reversed, and the subject charge against him be dismissed with prejudice, insofar as he has already served and completed the sentence of imprisonment imposed by the Superior Court.

DATED this 22nd day of December, 2014.

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