

No. 26084-4-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

FILED  
JAN 24, 2013  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MICHAEL DAVID LINDSEY,

Defendant/Appellant.

APPEAL FROM THE KLINKITAT COUNTY SUPERIOR COURT  
Honorable E. Thompson Reynolds

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SUPPLEMENTAL BRIEF OF APPELLANT RE *STATE V. WISE*

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A. ISSUE

Applicability of State v. Wise<sup>1</sup> to the issue of whether the trial court violated Appellant's constitutional public trial right by excluding the public from portions of the jury voir dire without first analyzing the Bone-Club<sup>2</sup> factors.

B. STATEMENT OF THE CASE<sup>3</sup>

On the first day of trial, January 26, 2007, the jury was selected. RP<sup>4</sup> 35–121. Prospective juror No. 17, Mr. West, indicated in general questioning that he knew potential witness Lester Howtopat. RP 42. The State later explored this relationship.

[PROSECUTOR]: Mr. West. You indicated you knew Mr. Howtopat

MR. WEST: Yes. When he was a little kid we used to pick him up for church.

[PROSECUTOR]: If you were a juror, would that cause you any problems?

MR. WEST: I haven't associated with him for a number of years.

[PROSECUTOR]: You could listen to him like anyone else?

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<sup>1</sup> State v. Wise, \_\_ Wn.2d \_\_, 288 P.2d 1113 (82802-4, November 21, 2012).

<sup>2</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

<sup>3</sup> The facts relevant to this issue are summarized in Brief of Appellant at page five (5), last paragraph, and are more fully set forth in Supplemental Brief of Appellant at pages 1–2. Additional relevant facts are set forth herein.

<sup>4</sup> The bulk of the trial proceedings were transcribed as Volumes One through Eight, numbered consecutively. These are designated RP. Two supplemental transcripts, each labeled 'Volume One', contain additional hearings. They will be referred to simply by date, e.g. "3/5/07 RP \_\_\_\_."

MR. WEST: Yes.

RP 53.

The noon recess appeared to last one hour and 26 minutes. RP 56.

After the noon lunch recess, the trial court made the following statements before *voir dire* continued.

We are back on the record and for the record, counsel, jurors number 62 and 17 have been excused for cause. Mr. West, you are free to go. Thank you for coming. And Ms. Hearn, no, number 4 not 62. Ms. Hearn was ill and has been excused for cause. Number 17 and number 4.

Mr. Juris (the prosecutor), you have 50 minutes left. ...

RP 56.

On the third day of trial, January 30, 2007, the following colloquy took place after the lunch recess but before testimony resumed, with the jury not present.

...

TRIAL COURT: Defense have anything else?

[DEFENSE COUNSEL]: Well, we have one concern about chambers conferences being recorded on the record. We have had three chambers conferences, day of jury selection, yesterday and this morning. Forgive me if I am wrong but I don't believe those have been memorialized on the record.

TRIAL COURT: Well, that's not on the record. Ok, I see. Well, before jury selection we went over procedures for selecting the jury. ... Anything else you wish to put on concerning that conference"

[DEFENSE COUNSEL]: Yes, there was one after the lunch recess on the 29<sup>th</sup> [sic].

TRIAL COURT: And, what did we discuss then?

[DEFENSE COUNSEL]: Well, questioning of panel members in chambers. I believe that should be on the record, I believe.

TRIAL COURT: Well, those were jurors who - -. Well, go ahead and put it on the record, have at it.

[DEFENSE COUNSEL]: Yes, three jury panel members were brought into your chamber after the noon recess on January 26, 2007 because they might, during the continuation of *voir dire* questioning speak of matters relating to one [witness,] Lester Howtopat[,], that might taint the panel or some concern about that. These three people were questioned individually. I believe two were excused because of that. But just for the record, it was not done on the record, the public was not invited, my client was not present for the court's questioning of those individuals on the 26<sup>th</sup>. Does that comport with your honor's understanding?

TRIAL COURT: Yes, and counsel made no objections to that procedure.

[DEFENSE COUNSEL]: And then the chambers conference yesterday and this morning, your honor.

PROSECUTOR: If we could just go back to the one we just got done for correction. Two people were interviewed, juror 14 and I don't remember the other juror's number, but one was later excused for cause and the other excused on preemptory challenges. You honor did put that on the record when we came back into court.

TRIAL COURT: Okay. Go ahead.

[DEFENSE COUNSEL]: Yesterday, chamber conference, we discussed general matters, we did have some discussion about evidentiary issues. I'm sorry I don't have my notes at hand.

TRIAL COURT: Excuse me, counsel. It's what happens in the courtroom that is the record and I don't object to you putting things on, but no decisions were done in chambers and I think that everything done in chambers that came up that needed to be argued [was] argued on the record. I don't want the record to reflect that

we did anything in chambers that was not part of the record. As you know, attorneys always meet with the court informally during trials of this nature, like planning for the day and things of that nature. I don't think it is necessary to put all of that on the record, otherwise we could just do it out here on the record in open court. I don't think that is really necessary. ...

RP 344–346.

C. ARGUMENT

**The trial court violated Mr. Lindsey's right to a public trial by conducting a portion of voir dire in chambers without analyzing the need for a closure or considering alternatives on the record.**

In State v. Wise, our Supreme Court reiterated the same constitutional principles it had previously set forth in State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) and its progeny—that the private questioning of prospective jurors in chambers during voir dire is a closure that requires consideration of the *Bone-Club* criteria. State v. Wise, \_\_ Wn.2d \_\_, 288 P.3d 1113, 1118 (82802-4, November 21, 2012). To balance the public trial right and other competing rights and interests, there are five criteria that a trial court must consider on the record in order to close trial proceedings to the public:

*Bone-Club* requires that trial courts at least: name the right that a defendant and the public will lose by moving proceedings into a private room; name the compelling interest that motivates closure; weigh these competing rights and interests on the record; provide

the opportunity for objection; and consider alternatives to closure, opting for the least restrictive.

Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1117. A trial court's failure to consider and apply *Bone-Club* before closing part of a trial to the public is error. Id. at 1119 (citation omitted). Because the violation of the public trial right constitutes structural error and absence of an objection is not a waiver of the public trial right, prejudice is presumed, and a new trial is warranted. Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1119–1122.

In Wise, voir dire began in the open courtroom, and the trial court and prosecuting attorney suggested an available option for prospective jurors—if a question proved sensitive or if they'd feel more comfortable in answering it—to request private questioning in chambers. 10 jurors were privately questioned in chambers; 2 had requested it and the remaining 8 were apparently called into chambers through a process seemingly related to particular answers of those prospective jurors to questions by the court. The trial judge, the State, and defense counsel were present in chambers for the questioning. 6 of the 10 jurors were ultimately excused for cause. The questioning in chambers was recorded and transcribed. Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1118.

On appeal, the Washington Supreme Court acknowledged there may be reasons to close part of a trial, but “protection of this basic

constitutional right [to a public trial] clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” ‘ Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1117 (citing Bone-Club, 128 Wn.2d at 259). The conducting of a *Bone-Club* analysis on the record and conclusion that a closure is warranted offers assurance that “the foundational principle of an open justice system is preserved,” absent an abuse of discretion. Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1117–1118. Without the “simple process” of a *Bone-Club* analysis, a reviewing court “[will] not comb through the record or attempt to infer the trial court’s balancing of competing interests where it is not apparent in the record.” Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1118, 1122 (citing Bone-Club, 128 Wn.2d at 261). The Court held Wise’s public trial right was violated by the closure of part of voir dire proceedings without the requisite consideration of *Bone-Club*. “We accordingly vacate his conviction and remand this case for a new trial that is open to the public, except as the trial court may direct a closure upon full scrutiny and consideration of the public trial rights under *Bone-Club*.” Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d at 1122.

Here, unlike in Wise, there is nothing in the record to suggest why the trial court chose to conduct individual questioning of 2 or 3 prospective jurors in chambers. The record does not disclose whether the

court, counsel or prospective jurors requested it. Juror No. 17, Mr. West, indicated in general questioning that although he had known potential witness Lester Howtopat in the past, he could listen to his testimony like that of anyone else. This information would not seem to generate a need for further individual questioning. Further, the in-chambers questioning was neither reported nor transcribed. Thus there is little basis for this court to surmise that a closure may have been warranted.

More importantly, as Wise requires, the trial court failed to consider the *Bone-Club* factors on the record, analyzing the need for a closure or considering reasonable and least restrictive alternatives. Mr. Lindsey's conviction must be vacated and the case remanded for a new trial that is open to the public.

#### B. CONCLUSION

For the reasons stated here and in the initial and supplemental briefs of appellant, the conviction should be reversed and remanded for a new trial.

Respectfully submitted on January 23, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 23, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant re *State v. Wise*:

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