



26918-3-III  
COURT OF APPEALS  
DIVISION III

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JAN 23, 2013  
Court of Appeals  
Division III  
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

IGOR V. SAMOLYUK, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

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APPELLANT'S SUPPLEMENTAL BRIEF

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**INDEX**

A. STATEMENT OF THE CASE.....1  
B. ARGUMENT.....2  
C. CONCLUSION.....6

## TABLE OF AUTHORITIES

### WASHINGTON CASES

IN RE ORANGE, 152 Wn.2d 795, 100 P.3d 291 (2004).....	3
STATE V. BONE-CLUB, 128 Wn.2d 254, 906 P.2d 325 (1995).....	3, 4, 5
STATE V. BRIGHTMAN, 155 Wn.2d 506, 122 P.3d 150 (2005).....	2
STATE V. EASTERLING, 157 Wn.2d 167, 137 P.3d 825 (2006).....	2, 3, 4
STATE V. MOMAH, 167 Wn.2d 140, 217 P.3d 321 (2009).....	5
STATE V. PAUMIER, -- Wn.2d --, 288 P.3d 1126 (2012).....	3
STATE V. SADLER, 147 Wn. App. 97, 193 P.3d 1108 (2008).....	3
STATE V. STRODE, 167 Wn. 2d 222, 217 P.3d 310, 313 (2009).....	2
STATE V. WISE, -- Wn.2d --, 288 P.3d 1113 (2012).....	2, 4, 5

### SUPREME COURT CASES

PRESS-ENTERPRISE CO. V. SUPERIOR COURT, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).....	3
--	---

### CONSTITUTIONAL PROVISIONS

ARTICLE I, § 10 .....	2
ARTICLE I, § 22 .....	2

A. STATEMENT OF THE CASE

The charge against Mr. Samolyuk was tried to a jury. Jury selection was completed, and the jurors were seated late in the afternoon of November 27. (RP 305-306) Later in the afternoon, the bailiff advised the court and counsel that when he went to close the jury room he found a newspaper spread across the table. (RP 318, 333) Defense counsel told the court he had reviewed the newspaper, which contained a detailed article about the case against Mr. Samolyuk. (RP 319) He asked the court to investigate this information and to provide an opportunity for counsel to question the jurors about their possible exposure to the newspaper. (RP 318-19)

When the jury reconvened on December 3, the court interviewed each juror individually. (RP 401-433) The court did not place in the record any information regarding where these interviews took place. During their interviews, three jurors made statements indicating that their interviews were taking place in a jury room. (RP 409, 418, 423) Based on these interviews the court denied the defense motion to strike the jurors. (RP 433)

## B. ARGUMENT

Article I, § 22, of the Washington State Constitution guarantees criminal defendants the right to a speedy public trial. Additionally, Article I, § 10, provides a guarantee of public access to judicial proceedings. “The public trial right protected by both our state and federal constitutions is designed to ‘ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.’” *State v. Strode*, 167 Wn. 2d 222, 226, 217 P.3d 310, 313 (2009) quoting *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Although not challenged in the trial court, the procedure followed in this case may be questioned for the first time in this appeal:

Whether a criminal accused’s constitutional public trial right has been violated is a question of law, subject to de novo review on direct appeal. *State v. Easterling*, 157 Wash.2d 167, 173–74, 137 P.3d 825 (2006). Such a claim may be raised for the first time on appeal. See *State v. Brightman*, 155 Wash.2d 506, 514–15, 122 P.3d 150 (2005).

*State v. Wise*, -- Wn.2d --, 288 P.3d 1113, 1116 (2012).

A trial court is required to consider the *Bone-Club* factors before closing a trial proceeding that should be public. *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). The public trial right extends to various pretrial proceedings. *Easterling*, 157 Wn.2d at 174

citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (public trial right extends to preliminary hearing); *In re Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (public trial right extends to *voir dire*); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (public trial right extends to pretrial suppression hearing).

The public trial right applies to the evidentiary phases of the trial, *and to other 'adversary proceedings.'* *Rivera*, 108 Wash.App. at 652-53, 32 P.3d 292 (emphasis added) (quoting *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir.1997)). The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, "a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ... during *voir dire*," and during the jury selection process. *Rivera*, 108 Wash.App. at 653, 32 P.3d 292 (citing *Press-Enter. Co.*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629).

*State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108, 1117 (2008).

Here, determination of whether the jury should be dismissed based on their possible exposure to highly prejudicial pretrial publicity, was a critical stage that directly affected Mr. Samolyuk's right to a fair trial and relied on receiving the jurors' statements into evidence. This was a "trial proceeding that should be public." *Easterling*, 157 Wn.2d at 174-75.

Generally, to protect the right to a public trial, a trial court must address the five factors outlined in *Bone-Club* prior to trial closure. *State v. Paumier*, -- Wn.2d --, 288 P.3d 1126, 1129 (2012). The five

*Bone-Club* factors are: (1) the proponent of closure must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right; (2) anyone present when the closure motion is made must be given an opportunity to object; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the compelling interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *State v. Easterling*, 157 Wn.2d at 173-74 (citing *Bone-Club*, 128 Wn.2d at 256).

Here, as in *Wise*, there was "no opportunity for objection by the State, defense, or public; there was no articulation of a compelling interest for closure; there was no balancing of whatever that interest might have been against the public trial right; and there was no consideration of alternatives to closure."

Failure to conduct the *Bone-Club* analysis is structural error and not subject to harmless error analysis; "[v]iolation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." *State v. Wise, supra*.

An apparent exception to this harmless error rule was made in *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009). But, as the Court explained in *Wise, Momah* is “distinguishable from other public trial violation cases . . . .” *State v. Wise, supra* at 12-13.

(1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the Bone-Club factors. *Id.* at 151-52; *Strode*, 167 Wn.2d at 234 (Fairhurst, J., concurring). At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with Bone-Club, the record made clear -- without the need for a post hoc rationalization -- that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

*State v. Wise, supra* at 13. None of those facts appears in this case.

“[A] defendant does not waive his right to a public trial by failing to object to a closure at trial.” *State v. Wise, supra* at 1120. Here, as in *Wise*, although Mr. Samolyuk did not object to closure, he did not waive his right to a public trial.

The trial court’s decision to remove individual jurors from the courtroom for individual examination, without considering the *Bone-Club* factors, was structural error that requires this court to vacate Mr. Samolyuk’s conviction and remand the charges for a new trial. *State v. Wise, supra*.

C. CONCLUSION

Mr. Samoluyk's conviction should be reversed and the matter remanded for a new trial.

Dated this 23rd day of January, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 26918-3-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
IGOR V. SAMOLYUK,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on January 23, 2013, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller  
prosecuting@co.benton.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on January 23, 2013, I mailed a copy of the Appellant's Supplemental Brief in this matter to:

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Signed at Spokane, Washington on January 23, 2013.

  
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