

No. 81225-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

RICHARD D. HARTMAN

CONSOLIDATED APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 06-1-00246-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. Appellant’s Assignments of Error.....1

B. Issues Pertaining to Assignments of Error.....2

C. Evidence Relied Upon.....2

D. Statement of the Case.....2-4

 1 & 2. Procedural History & Statement of Facts.....2-4

 3. Summary of Argument.....4

E. Argument.....4-17

 (a) HARTMAN’S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED BECAUSE THE TRIAL COURT NEVER CLOSED THE COURTROOM.....5-14

 (b) HARTMAN WAS CORRECTLY SENTENCED WITH AN OFFENDER SCORE OF AT LEAST 9 BECAUSE HE HAD 14 PRIOR FELONY CONVICTIONS.....14-16

 (c) HARTMAN’S ARGUMENTS REGARDING OFFENDER SCORE, DECAY/WASHOUT AND CONTRACT LAW FAIL BECAUSE THEY ARE IRRELEVANT.....17

F. Conclusion.....17

TABLE OF AUTHORITIES

1. Table of Cases

In re Pers. Restraint of Orange, 152 Wash.2d 795,
100 P.3d 291 (2004).....5, 12

State v. Bone-Club, 128 Wash.2d 254,
906 P.2d 325 (1995).....4, 6, 7, 9, 10, 12, 13

State v. Duckett, 141 Wash.App. 797, 173 P.3d 948
(November 27, 2007, Div. 3).....5, 7, 11, 12, 13

State v. Easterling, 157 Wash.2d 167, 137 P.3d 825 (2006).....5, 12

State v. Frawley, 140 Wash.App. 713, 167 P.3d 593 (2007).....11

State v. Harvey, 5 Wash.App. 719, 491 P.2d 660 (1971).....14

State v. Momah, 141 Wash.App. 705, 171 P.3d 1064
(November 13, 2007, Div. 1).....5, 6, 7, 8, 9, 10, 11, 13 14

State v. Strode, 80849-0.....4

2. Other Jurisdictions

Press-Enter. Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78
L.Ed.2d 629 (1984).....12

3. Court Rules

RAP 10.3(b).....2

4. Statutes

Art. 1, Section 10, U.S. Const.....1, 5

Art. 1, Section 22, WA ST Const.....5
Art. 1, Section 23, WA ST Const.....1
RCW 9.94A.525(2)(b).....14
RCW 9.94A.525(2)(c).....15

A. ASSIGNMENTS OF ERROR/ISSUES

1. Personal Restraint Petition-2/19/08 & Statement of Additional Grounds RAP 10.10

- (a) Does the Mason County Superior Court's tacit closure of proceedings during voir dire require reversal of Mr. Hartman's conviction, and a new trial?

2. Personal Restraint Petition-2/20/2008

- (b) The petitioner was erroneously sentenced with an offender score of 9.
- (c) Is the petitioner under cognizable restraint?
- (d) Is the washout provision contracted by the petition in his prior class C felony adjudications an indivisible non-severable feature of those plea agreements?
- (e) Does the savings clause protect the petitioner's entitlement to washout or decay of his prior class C felonies at his most recent sentencing?
- (f) Do article 1, section 10, of the United States Constitution, and article 1, section 23 of Washington's constitution, require the current sentencing court to honor the washout/decay provisions in force when the prior class C felonies were bargained for?
- (g) Does the use of offenses contracted to wash out in prior plea bargains, in subsequent sentencing, violate ex post facto proscriptions?
- (h) Did the trial court impair the obligation of contracts, within the meaning of state and federal constitutional prohibitions, when it used the prior class C felonies which were contracted to 'wash out', when it calculated the offender score?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Hartman's right to a public trial breached when he was tried in open court?
2. Was Hartman incorrectly sentenced with an offender score of 9 when he had convictions for 14 prior felonies?
3. Are Hartman's arguments regarding offender score, decay/washout and contract law relevant?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Hartman's recitation of the procedural history and facts and adds the following:

Hartman's case went to trial on November 17, 2006. RP 24: 1-10. Retained counsel for Hartman noted on that day that he had "had discovery for over a week." RP 25: 6-7. During jury selection, the trial court noted that it:

[H]as some concerns about whether Mr. Hartman is physically able to go forward with the trial today. As I was looking at him a couple of times during the course of our voir dire here in chambers-and he's only perhaps seven feet away from me-his eyes tend to narrow to the point that I'm

not sure they're fully open, and I'm just concerned----that he doesn't look like he may be fully able to comprehend what's going on. RP 29: 9-15; 18-21.

By way of explanation, Hartman stated that at that time he felt, "kind of light headed" and "sick." RP 29: 16-17. The trial court allowed counsel for Hartman time "to address" this issue with his client. RP 29: 19-21. Later in the proceedings, counsel for Hartman explained that his client had informed him that he had "had hepatitis C for 30 years" and that this condition "does cause fatigue." RP 34: 5-8. Defense counsel also noted that if Hartman's eyes "start falling to half-mast," that "he may need a break to get some fresh air and to...snap out of that fatigue." RP 34: 10-12.

Prior to the start of testimony, the trial court made a record outside the presence of the jury that it was concerned because Hartman had "stood up" during voir dire and "walked right in front of all...the jurors and actually left the courtroom." RP 40: 9-13. The trial court stated that Hartman "didn't ask permission to do so or for a brief recess," and that Hartman's actions were "tremendously inappropriate." RP 40: 16-17. Defense counsel later stated, "I think that [Hartman] is competent" because "[h]e's providing me with assistance in his own defense." RP 45: 12-13. Counsel for Hartman also stated that his client's "competence is an issue at least to raise and then dismiss." RP 45: 22-23. Testimony began

on November 17, 2006, and ended on November 22, 2006. RP 54: 4-8; 179: 10-12.

3. Summary of Argument

Hartman's right to a public trial was not violated because the trial court never closed the courtroom. Accordingly, Bone-Club was never triggered. Should the Court hold that Bone-Club was triggered, the State asks for the Court to stay a decision on Hartman's consolidated PRP until it renders a decision in State v. Strode, 80849-0. In addition, although Hartman argues that affidavits that he submitted with his brief should be considered, the Court should refrain from doing so because there is no way at this juncture to determine their validity.

The trial court also properly sentenced Hartman with an offender score of 9 because his history included: (a) 14 prior felonies and (b) did not show that he had remained crime-free for even five years under RCW 9.94A.525. Lastly, Hartman's arguments regarding offender score, decay/washout and contract law fail because they are irrelevant. Hartman cannot challenge the validity of a plea bargain in a prior case, and then bootstrap that argument into a claim here that his offender score was improperly calculated. The decision of the trial court is complete, correct and should be affirmed.

E. ARGUMENT

1. State's Response to Hartman's Personal Restraint Petition-2/19/08 & Statement of Additional Grounds RAP 10.10

(a) HARTMAN'S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED BECAUSE THE TRIAL COURT NEVER CLOSED THE COURTROOM.

Hartman's right to a public trial was not violated because the trial court never closed the courtroom.

Whether a trial court procedure violates the right to a public trial is a question of law that is reviewed de novo. State v. Duckett, 141 Wash.App. 797, 802, 173 P.3d 948 (November 27, 2007, Div. 3) Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. State v. Momah, 141 Wash.App. 705, 708, 171 P.3d 1064 (November 13, 2007, Div. 1); see Duckett, 141 Wash.App. at 803.

Similarly, article I, section 10 provides that '[j]ustice in all cases shall be administered openly...' Momah, 141 Wash.App. at 708; see State v. Easterling, 157 Wash.2d 167, 174, 137 P.3d 825 (2006). These rights extend to jury selection, which is essential to the criminal trial process. Momah, 141 Wash.App. at 708; see In re Pers. Restraint of Orange, 152 Wash.2d 795, 804, 100 P.3d 291 (2004).

To protect these rights, a court faced with a request for trial closure must weigh five factors, known as the Bone-Club factors, to balance the competing constitutional interests. Momah, 141 Wash.App. at 709; see State v. Bone-Club, 128 Wash.2d 254, 258-259, 906 P.2d 325 (1995).

The five Bone-Club factors are:

1. The proponent of closure or sealing 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 to the closure;
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened 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. Bone-Club, 128 Wash.2d at 258-259.

To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. Momah, 141 Wash.App. at 708. The trial court must consider the alternatives and balance the competing interests on the record. This test mirrors the one articulated by the United States Supreme Court to protect the Sixth

Amendment right to a public trial and the First Amendment right to open hearings. We look to the plain language of the closure request and order to determine whether closure occurred, thus triggering the Bone-Club factors.

Once the reviewing court determines there has been a violation of the constitutional right to a public trial right, '[p]rejudice is presumed' and a new trial is warranted. Momah, 141 Wash.App. at 709. On the other end of the spectrum from a full closure is a trial court's inherent authority and broad discretion to regulate the conduct of a trial. Thus, a 'closure' in which one disruptive spectator is excluded from the courtroom for good cause will not violate the defendant's right to a public trial even absent an analysis of the Bone-Club factors. Likewise, limited seating by itself is insufficient to violate the defendant's public trial right.

Two cases, Momah and Duckett, issued by Divisions 1 and 3 on November 13 and 27, 2007 respectively, are comparable to Hartman's case because they squarely address the issue of voir dire in terms of public trial rights. In Momah, the defendant was charged with multiple sex crimes. Momah, 141 Wash.App. at 707. Due to the nature of the charges and the extensive media coverage, a large number of potential jurors were called for voir dire by the parties and the trial court. Some of the potential jurors asked to be questioned individually, and the court and both counsel

agreed to honor those specific requests. Some jurors had been exposed to media coverage about the case, also requiring individual juror questioning to avoid jury contamination.

On the second day of voir dire, the trial court had 52 potential jurors that needed to be examined further, as 48 of them had been excused the previous day. Momah, 141 Wash.App. at 709. The trial court informed all parties that it had a list of eight jurors who wanted private questioning, and both the prosecution and defense agreed that this should occur. Momah, 141 Wash.App. at 709-710. The trial court then divided the prospective jurors who were to be questioned individually into two groups, the first group of 20 to be questioned that morning. Momah, 141 Wash.App. at 710. The rest were released with instructions to return for questioning that afternoon.

Shortly after the second group of potential jurors had been released, the record reflects that the trial court, the prosecution, defense, defendant Momah and the court reporter moved into chambers adjoining the presiding courtroom. Once in chambers, the record states:

We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36...Momah, 141 Wash.App. at 710.

Following questions by counsel and the court, prospective juror number 36 left chambers and prospective juror number 2 entered chambers. The record does not reflect whether the door to chambers was closed during this questioning or subsequent individual questioning of the prospective jurors during the morning session. During the afternoon session, the individual questioning continued with the second group of prospective jurors in a similar manner. Momah, 141 Wash.App. at 711. A jury was empanelled, the trial occurred, and defendant Momah was found guilty of rape and indecent liberties. Momah, 141 Wash.App. at 707.

On appeal, defendant Momah made two main arguments: (1) The record establishes that the trial court closed voir dire, infringing on his right to a public trial; and (2) the record supports his view that the burden of proving there was no closure and that the requirements of Bone-Club and its progeny were fulfilled and shifted to the State. Momah, 141 Wash.App. at 711.

Division 1 of the Court disagreed with both of defendant Momah's arguments. Per the Court, nowhere in the record is there any evidence that the trial judge expressly closed voir dire to the public or press in violation of any of the controlling cases. Rather, the record expressly shows that the trial court, in response to the express request of defendant Momah, agreed to allow voir dire by individual questioning of prospective jurors

who indicated prior knowledge about the case. Momah, 141 Wash.App. at 710-711.

Significantly, defendant Momah's request was based on the concern that prospective jurors might have knowledge about the case that could disqualify them, or that they might contaminate the rest of the prospective jurors with such knowledge. In addition, the trial court and the parties agreed to individually question jurors in response to their express requests. Per the Court, there is simply no indication in the record that the individual questioning was for the purpose of excluding either the press or the public from the trial. Momah, 141 Wash.App. at 712-713.

The Court also reasoned that nothing in the record indicates that any member of the public, including defendant Momah's family, or the press was excluded from voir dire. The record is also devoid of any mention that either the press or the public attempted to gain admittance to witness voir dire.

In looking at the plain-language of the transcript, the Court reasoned that no statement or order by the trial court triggered the application of the Bone-Club factors or shifted the burden to the State to prove that the proceeding was open. Momah, 141 Wash.App. at 714. Instead, the Court reasoned that a proceeding is not automatically closed to the public if it occurs in chambers and stated:

[A] ‘door’ to a courtroom being closed, which occurs in most proceedings, is not the same as a ‘proceeding’ in that courtroom being closed to the public. Momah, 141 Wash.App. at 715.

To the extent that Frawley holds that all in-chambers proceedings are per se closed to the public, Division 1 of the Court declined to follow Division 3’s reasoning in that case. See State v. Frawley, 140 Wash.App. 713, 167 P.3d 593 (2007).

Division 3 of the Court in State v. Duckett, by sharp contrast, held that defendant Duckett’s right to a public trial was violated because the trial judge never advised him of his right to a public trial, nor asked him to waive this right. Duckett, 141 Wash.App. at 806-807.

In Duckett, the State charged the defendant with multiple sex crimes and one count of burglary in the first degree. Duckett, 141 Wash.App. at 801. The case proceeded to trial in Spokane County Superior Court, and the trial judge told the prospective jurors that they would be provided with a questionnaire containing ‘some questions that are somewhat of a personal nature.’ Specifically, the questionnaire asked two questions concerning the prospective jurors’ experiences with sexual abuse. The trial judge told the jurors that the questionnaires would be filed in the court file under seal and would not be accessible to anyone without a court order.

The trial court told defendant Duckett and his attorney that follow-up questioning of those jurors whose questionnaire responses indicated some experience with sexual abuse would take place outside the courtroom stating, "I generally do it in my jury room, Counsel, so as to maintain some privacy." A total of 16 jurors were apparently questioned in chambers, although the record did not contain any transcript of this voir dire. Defendant Duckett waived his right to be present during this questioning. A jury was selected and empanelled, and following a two-day trial Duckett was found guilty of rape in the second degree.

On appeal, Division 3 reversed defendant Duckett's conviction, reasoning that the guaranty of open criminal proceedings extends to 'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.' Duckett, 141 Wash.App. at 806-807, Quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The Court reasoned that while only a limited portion of voir dire was held outside the courtroom, the trial court was required to engage in a Bone-Club analysis.

As the State Supreme Court recognized in Orange and Easterling, the guaranty of a public trial under our constitution has never been subject to a de minimus exception. Orange, 152 Wash.2d at 812-814; Easterling, 157 Wash.2d at 180-181. Per Division 3, the closure in Duckett was

deliberate and the questioning of the prospective jurors concerned their ability to serve; something that, per the Court, cannot be characterized as ministerial in nature or trivial in result. Duckett, 141 Wash.App. at 809.

Ultimately, Division 3 held that the trial court violated defendant Duckett's public trial right by conducting a portion of voir dire in chambers without first weighing the necessary factors. Prejudice is presumed, and the remedy is a new trial. Duckett, 141 Wash.App. at 809; citing Bone-Club, 128 Wash.2d at 261-262.

In Hartman's case, Bone-Club was never triggered because the trial court judge never closed the courtroom. In his Statement of Additional Grounds to Division II, Hartman makes assertions without citing to the official Report of Proceedings and/or Clerk's Papers. Among these assertions are, "the jury pool took every seat in the Mason County superior courtroom," and "[a]ppellant Hartman's mother, wife and younger brother were excluded from those proceedings on November 17, 2006." AB 7. Just because Hartman says this occurred does not mean that it actually did. Nothing in the official record indicates that the trial court judge ordered the courtroom closed, and any voir dire that may have occurred in chambers did not violate Hartman's right to a public trial. As Division 1 correctly reasoned in Momah:

[A] ‘door’ to a courtroom being closed, which occurs in most proceedings, is not the same as a ‘proceeding’ in that courtroom being closed to the public. Momah, 141 Wash.App. at 715.

Lastly, although Hartman also asks the Court to consider “Affidavit’s of Family Members” regarding this issue, the Court should refrain from doing so because it would be impossible at this point to determine whether they are true or false. See State v. Harvey, 5 Wash.App. 719, 723, 491 P.2d 660 (1971). Hartman received a fair, public trial, and the trial court did not err.

2. State’s Response to Hartman’s Personal Restraint Petition-2/20/2008

(b) HARTMAN WAS CORRECTLY SENTENCED WITH AN OFFENDER SCORE OF AT LEAST 9 BECAUSE HE HAD 14 PRIOR FELONY CONVICTIONS

Hartman was correctly sentenced with an offender score of at least 9 because he had 14 prior felony convictions.

Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.9A.525(2)(b).

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2)(c).

As the deputy prosecutor for the State related to the trial court at Hartman's sentencing:

The defendant has 14 prior felonies, and as this worksheet reflects, after the first two, he went to prison for basically three months, from September 24th to December 16th of '85, based on the offender reporting system, FORS, Felony Offender Reporting System that we get out of SCOMIS. It tracks movement history once they are linked to DOC.

He then got out, and between '84 and '88 committed felonies 3 through 10 in Skagit, Kitsap and Pierce. And there are three Class Bs in there, number 3, 4 and 5; the rest are Class Cs.

And then we move to the prison and work release time that he did as a result of being sentenced out of Kitsap on January 11th of '89. On January 13th of '89, he began his prison term. He was sentenced the next week at Pierce County on January 17th, but SCOMIS indicates that that was recognized in there. And he did unbroken prison and/or work release stretch from January 13th of '89 to July 19th of '91.

There was then, as far as I could tell, only one intervening potentially-potentially that might have kept anything not a-anything lower than a Class B alive, we show a PSP 3rd out of Shelton Municipal. It has a date of

August 8th, '95. It's really more a-much ado about nothing because, even if you ignore that, he's still a 9, in that they next four felonies, 11, 12, 13 and 14 out of [Mason] county, committed in '97 and '98, and all sentenced on April 16th, '98, resulted in his being in prison from April 17th, '98, to September 19th of '02.

He has not had a 5-year stretch, obviously, since that release from prison, since we are now in '06, and that wouldn't have happened until next year sometime. And so, as a result, the three Class Bs in the second group, No. 3, 4 and 5, remain alive because he has never done a 10-year stretch, and the four felonies, both Class B and Class C, from 11 through 14, remain alive because he hasn't done 5 years, much less 10, since being released from prison in '02.

Nos. 4 and 5 have the multipliers of two as burglaries as to this cause, and so he's got 4 for those and then a 5 for the other 5, for a total of 9. And even if the Shelton Muni PSP kept anything else alive, he would be a 9-plus, and there are no aggravating factors available to the Court in a single felony conviction in this case. RP 246: 8-25; 247: 1-21.

As the deputy prosecutor correctly argued, Hartman's offender score was at least 9 at the time of his sentencing. Even if Hartman's conviction for a gross misdemeanor for PSP3 did not keep his earlier history alive, Hartman's offender score still would have been 9 given his Class B felony history and the multipliers involved. The trial court sentenced Hartman correctly and no error occurred.

(c) HARTMAN'S ARGUMENTS REGARDING OFFENDER SCORE, DECAY/WASHOUT AND CONTRACT LAW FAIL BECAUSE THEY ARE IRRELEVANT.

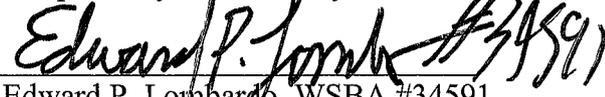
Hartman's arguments regarding offender score, decay/washout and contract law fail because they are irrelevant. While Hartman argues these points in subsections (c) through (h), none of them have merit because he confuses contract law with criminal law and procedure. In addition, Hartman appears to challenge the validity of at least one plea bargain that is part of his criminal history in terms of contract law (see AB 9-10). Unless Hartman has filed a timely appeal regarding that specific case, he cannot bootstrap that argument here to challenge the basis of a conviction that is properly part of his current offender score. The trial court did not err, and Hartman's judgement and sentence should be affirmed.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 14TH day of MAY, 2008

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 81225-0
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
RICHARD D. HARTMAN,)	
)	
Appellant,)	
_____)	

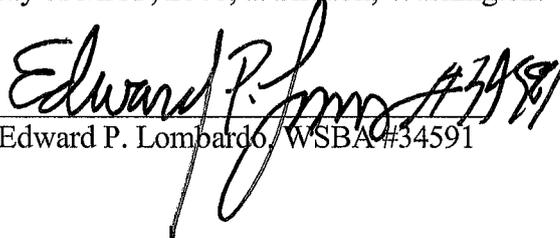
I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, MAY 14, 2008, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Richard D. Hartman
Stafford Creek Corrections Center
#299896
191 Constantine Way
Aberdeen, WA 98520

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 14TH day of MAY, 2008, at Shelton, Washington.



Edward P. Lombardo, WSBA #34591