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NOV 23 2009

King County Prosecutor
Appellate Unit

NO. 60015-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TINH TRINH LAM,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey Ramsdell, Judge

SECOND SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT¹

UNDER STRODE AND MOMAH, LAM'S CONVICTIONS MUST BE REVERSED.

After Lam's jury was sworn and impaneled, the court decided *sua sponte* to hold an in-chambers conference to discuss concerns expressed to the bailiff by one of the impaneled jurors. CP 102-03; SuppRP² 5-6. Present were the judge, the concerned juror, Lam's attorneys, the prosecutor and, presumably, the court reporter. Lam was excluded from the conference, as was the press and general public. SuppRP 2. After the juror left, the judge explained that he decided to hold the conference in chambers because he had been contacted by the press regarding Lam's trial, and because there were others in the courtroom who he did not know. SuppRP 8. At the conclusion of the conference the judge noted: "The inquiry from the press came right at noon. I didn't respond. I forwarded it to [the bailiff]. I doubt she's had a chance to respond yet. That may be a good thing. Because otherwise they would want to know what we're doing back here as if it was something sinister." SuppRP 10-11. On appeal, Lam challenges the trial

¹ On November 6, 2009, this Court directed the parties to file supplemental briefs addressing the recent decisions in *State v. Strode*, __ Wn.2d __, 217 P.3d 310 (Slip Op. filed October 8, 2009) and *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (Slip Op. filed October 8, 2009).

² "SuppRP" refers to the verbatim report of proceedings for the "sealed" in-chambers conference on March 15, 2007.

court's decision to exclude the public from the in-chambers conference, arguing his conviction must be reversed because the decision violated his right to a public trial. Brief of Appellant at 22-25; Reply Brief of Appellant at 1-4. The Washington Supreme Court's recent decisions in Strode and Momah support Lam's argument.

Strode was charged with various sex offenses. His prospective jurors were asked in a confidential questionnaire whether they or anyone they were close to had ever been the victim of or accused of committing a sex offense. The prospective jurors who answered "yes" were individually questioned in the judge's chambers to determine whether they could nonetheless render a fair and impartial verdict. Strode, 217 P.3d at 312. Before excluding the public from this private questioning, the trial court failed to hold a "Bone-Club hearing." 217 P.3d at 313.

During the closed hearing, the trial court "alluded to the fact that the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not be 'broadcast' in front of the whole jury panel." 217 P.3d at 313. Counsel for both the State and Strode questioned the prospective jurors, and challenges for cause were heard and ruled upon. *Id.*

In concluding Strode's conviction must be reversed, both the four-justice lead opinion and two-justice concurring opinion agreed that where

the record fails to so much as "hint" that the five Bone-Club factors were considered by the trial court, reversal is required. 217 P.3d at 315 (Alexander, C.J., lead opinion) (quoting State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005)); 217 P.3d at 318 (Fairhurst, J. concurring). The lead and concurring opinions differed, however, on whether a defendant can waive the issue through affirmative conduct.³ The lead opinion concluded a defendant's failure to object to courtroom closure does not constitute a waiver of the issue for appeal, and that waiver occurs only if it is shown to be knowing, voluntary and intelligent. 217 P.3d at 315 n.3 (Alexander, C.J.) The concurring opinion, however, concluded that defense participation in the closed courtroom proceedings can, under certain circumstances, constitute a valid waiver of the right to a public trial. 217 P.3d at 318 (Fairhurst, J., concurring)(citing Momah as an example of waiver by conduct).⁴

Like Strode, Momah was charged with various sex offenses. Unlike

³ The concurring opinion also disagreed with the lead opinion on whether a defendant could assert the rights of the public and/or press under Art. I, §10, in order to obtain a new trial. Compare 217 P.3d at 315 (lead opinion noting Strode could not waive the public's right to open proceedings) and 217 P.3d at 316, 319 (concurring opinion chastising lead opinion for conflating the right of a defendant, the media and the public).

⁴ The three-justice dissent in Strode concluded the trial court adequately considered the Bone-Club factors. 217 P.3d at 321 (C. Johnson, J. dissenting).

in *Strode*, however, Momah's case was "heavily publicized" and "received extensive media coverage." 217 P.3d at 324. As a result, more than 100 prospective jurors were summoned and responded to a questionnaire. By agreement of the parties, jurors who said they had prior knowledge of the case, could not be fair, or specifically requested private questioning, were questioned individually in chambers. *Id.* The defense specifically requested individual questioning of those jurors who said they knew about the case to avoid "contaminating the rest of the jury." *Id.* Both the defense and prosecution actively participated in the in-chambers individual voir dire. *Id.*

The six-justice majority in *Momah* noted that when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom[,]" the error is "structural in nature" and reversal is required. 217 P.3d at 326. The majority found reversal was not required because, despite failing to explicitly discuss the *Bone-Club* factors, the trial court balanced Momah's right to a public trial with his right to an impartial jury. 217 Wn.2d at 329. In addition, the court essentially found Momah "waived" his public trial right:

Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard

Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

217 P.3d at 327.

Lam's case is readily distinguishable from Momah. Unlike the defense in Momah, Lam did not affirmatively assent to closing the courtroom, was not given the opportunity to object to the closure, and did not seek to expand the closure. Instead, the trial court decided to close the courtroom sua sponte, without any discussion of the Bone-Club factors. SuppRP 8.

Moreover, unlike in Momah, where the trial court closed proceedings specifically to protect Momah's constitutional right to an impartial jury, 217 P.3d at 327, here no specific reason was given. It appears, however, the trial court decided to close the courtroom to prevent Lam, the general public and the press from knowing the nature of the juror's concerns and how the court would decide to deal with those concerns, rather than to protect any of Lam's rights or interests.

Here, as in Strode, there was no "hint" the trial court gave any consideration to the five Bone-Club factors in deciding to close the courtroom. It failed to identify a compelling interest justifying closure, failed to give anyone present the opportunity to object to the closure, failed to evaluate whether closure was the least restrictive means to protect

whatever interest the court may have perceived was threatened, failed to weigh that interest against the public's interest in an open proceeding, and failed to ensure the closure was no broader or longer than necessary. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). This Court should conclude the trial court violated Lam's right to a public trial, the violation was structural error, and reversal is required. Strode, 217 P.3d at 312.

B. CONCLUSION

For the reasons set forth here and in his opening, reply and first supplemental briefs, Lam requests that this Court reverse his conviction.

DATED this 23rd day of November, 2009.

Respectfully submitted

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF NOVEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SECOND SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TINH TRINH LAM
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MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF NOVEMBER 2009.

x *Patrick Mayovsky*