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NO. 28167-1-III

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

In re Detention of Rolando Reyes

STATE OF WASHINGTON,

Respondent,

v.

ROLANDO REYES,

Appellant.

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

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

The Honorable Craig J. Matheson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT [1]

THE SUPREME COURT'S DECISION IN STATE V. WISE SUPPORTS REYES' CLAIM THAT REVERSAL IS REQUIRED.

As noted in the "Reply Brief of Appellant" (RBOA), the decision by the Court of Appeals in State v. Wise, 148 Wn. App. 425, 200 P.3d 266 (2009), reversed, __ Wn.2d __, 288 P.3d 1113 (2012), was an aberration that failed to adhere to Washington Supreme Court precedent, was at odds with decisions by the same division of the court, and therefore provided questionable support for the State's claim Reyes lacks standing to raise the public trial issue. RBOA at 7. Moreover, Wise lends support to Reyes' claim that the same analysis used for court closures that violate article 1, section 22, should apply to closures that violate article 1, section 10, when the proceeding is one that could lead to a loss of liberty.

1. The Supreme Court rejected Division Two's conclusion that participation in the closed proceedings without objection constitutes waiver.

Division Two held Wise waived his public trial right by failing to object to and by actively participating in the private questioning of potential jurors. Wise, 148 Wn. App. at 438. The court also held Wise could not raise the claim by asserting the public's right to open judicial

[1] On January 2, 2013, this Court ordered supplemental briefing regarding the applicability of State v. Wise, __ Wn.2d __, 288 P.3d 1113 (Slip Op. filed November 21, 2012).

proceedings under article 1, section 10, because he could not meet the criteria for third party standing. 148 Wn. App. at 441-43.

The Supreme Court reversed, noting the rule in Washington since at least 1923 has been that an objection is not required for a defendant to preserve his public trial rights under article 1, section 22. 288 P.3d at 1120 (citing State v. Marsh, 126 Wash. 142, 145–47, 217 P. 705 (1923)). Sub silentio, the Court rejected the conclusion that lack of an objection coupled with participation in private proceedings constituted waiver. Id.

2. The Supreme Court's decision eliminates all support for the State's claim that Reyes lacks standing to raise the public trial issue.

It was unnecessary for the Supreme Court to consider the standing issue under section 10 in light of its holding under section 22. The State's claim that Reyes lacks standing to raise the public trial violation issue was, however, based exclusively on Division Two's decision in Wise. Brief of Respondent (BOR) at 5-10. The Supreme Court's wholesale reversal of that decision eviscerates the State's claim.

Moreover, it is now settled that Reyes *does* have standing to raise a challenge under section 10 from a civil commitment order. In In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011), six of nine justices held the respondent in an involuntary civil commitment proceeding has standing to challenge the closure of a court proceeding for

the first time on appeal. 172 Wn.2d at 40 (Sanders, J., lead opinion, joined by Alexander, J., Owens, J., and Stephens, J.); 172 Wn.2d at 48 (J.M. Johnson, J. concurring, joined by Chambers, J.). The State's claims to the contrary therefore lack merit.

Moreover, allowing Reyes to assert the public trial right under Section 10 helps ensure that respondents in involuntary civil commitment petitions are not wrongly deprived of their liberty. It also helps preserve the public's right to scrutinize the justice system by requiring that all interested parties be provided an opportunity to be heard on the issue of court closure before a decision is made. This does not happen when, as here, the public was likely never aware the in-chambers hearing was held. See 1RP 2-21 (no indication in the transcript of the hearing or anywhere else in the record that a *closed* hearing was ever publically contemplated).

3. The Wise decision does not affect the determination of whether the Article 1, Section 10 violation constitutes "structural error".

The Wise Court did not decide whether an article 1, section 10 violation was structural error. As such, it has no binding effect on the issue. The Wise Court did, however, recognize the important interests protected by the public trial right. Specifically, the Court cited to that

portion of Presley v. Georgia[2] that recognized the benefits arising from public judicial proceedings are to the defendant in a criminal proceeding. 288 P.3d at 1120. Those benefits include helping to assure a fair trial by allowing "the public to see justice done, and it serves to hold the justice system accountable." Wise 288 P.3d at 1121. The Court has recognized these same considerations apply in the civil context. See Bennett v. Smith Bunday Berman Britton, PS, __ Wn.2d __, __ P.3d __ (Slip Op. filed January 10, 2013)[3] and D.F.F., 172 Wn.2d at 46.[4] "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring)).

These intangible benefits cannot be measured:

> The right to a public trial is a unique right that is important to both the defendant and the public. Moreover, assessing the effects of a violation of the public trial right is often

[2] 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)

[3] "The public, including the press, is entitled to be informed as to the conduct of the judiciary and judges. Scrutiny by the public is a check on the conduct of judges and of the power of the courts." Slip Op at 7.

[4] Section 10 provides the respondent in a commitment petition the "fundamental assurance that her proceedings are observed, scrutinized, and legitimized through administration open to the public."

> difficult. Requiring a showing of prejudice would effectively create a wrong without a remedy.

State v. Paumier, __ Wn.2d __, 288 P.3d 1126, 1130 (Slip Op. filed November 21, 2012) (citations omitted).

Like the accused in a criminal proceeding, the respondent to a civil commitment petition faces the prospect of a significant loss of liberty. D.F.F., 172 Wn.2d at 40. Under such circumstances it is just as important to encourage judges, lawyers, witnesses and jurors to perform their function responsibly, and to hold the judicial system accountable. Id. The desired result, whether in the criminal or civil context, is to reduce the likelihood a person's liberty is wrongly curtailed.

The Court in D.F.F. unanimously invalidated the automatic closure requirement set forth in MPR 1.3 for involuntary commitment proceedings held under Chapter 71.05 RCW. The justices disagreed, however, however, as to the proper remedy. The lead opinion held the violation was structural and D.F.F. was entitled to new commitment proceedings without having to show prejudice. 172 Wn.2d 42-43 (Sanders, J. plurality). The concurrence opined "structural error" is inapplicable to civil proceedings, but concluded relief was warranted because D.F.F. had demonstrated sufficient prejudice. 172 Wn.2d at 48 (J.M. Johnson, J. concurrence). The dissent concluded D.F.F. lacked standing to raise the Section 10 violation

and remarked that "structural error analysis has no place in the civil arena." 172 Wn.2d at 49, 53 (Madsen, C.J. dissenting, joined by Fairhurst, J. and C.W. Johnson, J.). As such, the question remains unsettled, even after Wise.

B CONCLUSION

The Supreme Court's reversal of Division Two's decision in Wise eviscerates the State's claim that Reyes lacks standing to raise the Section 10 claim. Moreover, the Supreme Court's decision in D.F.F. conclusively establishes Reyes *does* have standing to raise this claim. And although the Wise and Paumier decisions are limited to Section 22 claims, they provide further support for the conclusion that violations of the public trial doctrine constitutes "structural error" when the proceeding is one that can lead to curtailment of liberty. For this reason, and the reasons set forth in the previously filed briefs, this Court should reverse the involuntary commitment order entered against Reyes.

DATED this 23rd day of January 2013.

Respectfully submitted,

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Certificate of Service by email

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 January, 2013, I caused a true and correct copy of the **Supplemental Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 23rd day of January, 2013.

x Patrick Mayovsky