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Court of Appeals
Division III
State of Washington

NO. 28167-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In re the Detention of:

ROLANDO REYES,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. PROCEDURAL HISTORY

Reyes was committed as a sexually violent predator following a jury trial in 2009. He appealed. On appeal, he argued, *inter alia*, that the public's right to an open trial had been violated when the trial court held a hearing in chambers which was not open to the public. Appellant's Second Amended Brief at 35-40. The State filed its responsive brief on August 3, 2010. On December 14, 2010, this Court stayed further proceedings pending the Washington State Supreme Court's decision in *State v. Wise,* Supreme Court Cause No. 828024. The Supreme Court's decision in *Wise* issued on November 21, 2012. *State v. Wise*, __ Wn.2d ___, 288 P.3d 1113 (2012). This Court has now lifted the stay and asked the parties to submit briefing on the effect, if any, of the Supreme Court's decision on this case.

II. ARGUMENT

In its opening brief, the State argued that Reyes lacks standing to claim a violation of the constitutional requirement of an open proceeding under article I, Section 10. Rsp. Br. At 5-10. Because the Washington Supreme Court in *Wise* explicitly failed to resolve this issue, its decision in that case does not affect this case.

Even if this Court were to determine that Reyes has standing, his claim fails. Applying the "experience and logic" test adopted by the State

Supreme Court in *State v. Sublett*, No. 84856-4, 2012 WL 5870484 (Wash. Nov. 21, 2012), it is clear that the May 22 hearing was not of a type that is encompassed within article I, section 10. This Court should deny Reyes' appeal and affirm his civil commitment as a sexually violent predator.

A. The State Supreme Court's Decision In *State v. Wise* Does Not Resolve Reyes' Claim Under Article I, Section 10Of The Washington State Constitution.

Wise was convicted of second degree burglary and first degree theft after a jury trial. *State v. Wise*, 148 Wn. App. 425, 430, 200 P.3d 266 (2009). During jury selection, the trial court conducted portions of voir dire in the trial judge's chambers without first conducting an analysis under *State v. Bone–Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). On appeal, Wise argued that by doing so, the trial court had violated his federal and state constitutional right to an open trial under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, as well as the public's right to an open trial under article I, section 10 of the Washington Constitution.

Affirming his conviction, the Court of Appeals rejected Wise's claim that his rights to an open trial had been violated. The court held that Wise could not appeal the trial court's decision based on his own right to an open trial under article I, section 22 because he had waived this right at

trial by both failing to object to the procedure and actively engaging in (and benefiting from) it. 148 Wn. App. at 437-38. The court further rejected Wise's argument that the courtroom closure constituted structural error "affecting the framework within which the trial proceeds." *Id.* at 439.

Turning to his claim under article I, section 10, the court concluded that, because Wise did not meet the requirements for third party standing to assert a violation of the public's open trial right, his claim failed. *Wise,* 148 Wn. App. at 442. A plaintiff, the court noted, "may only raise the rights of another person when '(1) the party asserting the rights has suffered an injury in fact, giving him a sufficiently concrete interest in the outcome of the litigation, (2) there is a sufficiently close relationship between the litigant and the person whose rights are being asserted so that the litigant will be an effective proponent of the rights being litigated, and (3) there is some hindrance to the third party's ability to protect his own interests.'" *Id.* (citing *United States v. De Gross,* 960 F.2d 1433, 1437 (9th Cir., 1992) (citing *Powers v. Ohio,* 499 U.S. 400, 409-13, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). In rejecting Wise's section 10 claim, the court noted that Wise did not point to any injury caused by the alleged violation, and that he had not been barred from attending the juror questioning. As such, he did not have a "sufficiently close relationship" to the public's open trial right to create standing. *Id.* at 442-43. This

requirement of standing, the Court of Appeals noted, serves several important functions: It ensures that parties with actual and substantial interests in the issue are before the court, and thus guarantees that the parties will be motivated and appropriately situated to fully and factually articulate those interests. *Id.* at 442. By contrast, allowing a party to raise the constitutional interests of those who are not parties to the case and have not sought to participate in the case, invites the court to resolve important legal issues on the basis of speculative uninformed claims, and in that respect diminishes the court's ability to fully analyze and resolve the issue. The general prohibition against standing to raise the rights of third parties "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' and it assures the court that the issues before it will be concrete and sharply presented." *Sec'y of State of Maryland v. Munson,* 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984) (quoting *United States v. Raines,* 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (footnote and citation omitted). The court affirmed Wise's conviction.

The Washington State Supreme Court reversed. In doing so, however, it decided the case on the basis of article I, section 22 alone, explicitly declining to decide the article I, section 10 issue. Wise, the

Court determined, did not waive his public trial right under section 22, and the trial court's failure to consider and apply the *Bone-Club* factors before closing part of a trial to the public was structural error, not subject to a harmlessness analysis. *Wise*, 288 P.3d at 1119-1120.

Having determined structural error requiring reversal on the basis of its analysis of error under section 22, the Court specifically declined to decide the question of whether he had standing to raise a challenge under section 10: "Because Wise did not waive his public trial right under article I, section 22 of the Washington Constitution, we are not faced with the question of whether he has standing to raise a challenge under article I, section 10." 288 P.3d at 1120. The Court of Appeals' decision in *Wise* with regard to article I, section 10, then, remains good law.[1]

B. Even Assuming *Arguendo* That Reyes Has Standing, There Was No Violation Of The Constitutional Requirement Of An Open Proceeding

Even if this Court determines that Reyes has standing to pursue his section 10 claim, that claim still fails. Under the "experience and logic" test adopted by the Washington State Supreme Court in *State v. Sublett*, in

[1] The Court then went on to observe, in a footnote, that it had "not resolved whether a defendant may assert the public's right to an open trial," citing several cases in which the Court has reached seemingly inconsistent results. 288 P.3d at 1120, n. 9. (For whatever reason, the Court did not mention *In re D.F.F.*, 172 Wn.2d 37,40, 256 P.3d 357 (2011)(RCW 71.05 detainee has standing to raise challenge under article I, section 10)). Although some of the language in the cases identified by the Court is helpful, none of the cases is directly on point, in that none addresses a pre-trial motion involving no contested evidentiary issues in the context of a civil proceeding.

that the case does not fall within the "open justice" mandate of the state constitution .

In its Opening Brief, the State argued that, because the issues considered at the May 22 hearing were either "purely legal or uncontested ministerial matters and did not dispose of the case on its merits," the case did not fall within the "open justice" mandate of the state constitution. Rsp. Br. at 10-14. While this particular analysis has now been rejected by the State Supreme Court, the conclusion in this case remains the same: Because of the nature of the hearing in question, there was no violation of the constitutional requirement of an open proceeding.

In *Sublett,* the appellant claimed a violation of his rights under article I, section 22 when the trial judge considered, in chambers and with counsel present, a question posed by the jury during its deliberations. 2012 WL 5870484, at *1. The Court of Appeals determined that Sublett's public trial right was not violated by a trial court's conference with counsel on how to resolve the "purely legal" question posed by the jury. *State v. Sublett,* 156 Wn. App. 160, 181, 231 P.3d 231 (2010). In doing so, it noted with approval *State v. Sadler,* 147 Wn. App. 97, 114, 193 P.3d 1108 (2008), in which the Court of Appeals had held that a criminal defendant did not have a right to a public hearing "on purely ministerial or

legal issues that do not require the resolution of disputed facts." *Sublett,* 156 Wn. App. at 181.

Sublett appealed. The Supreme Court affirmed his conviction, but arrived at that result by means of a different analytic framework: Before determining whether there was a violation of the appellants' rights, the Court first considered "whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." *Sublett*, 2012 WL 5870484, at *4. "Not every interaction between the court, counsel, and defendants," wrote the Court, "will implicate the right to a public trial, or constitute a closure if closed to the public." *Id.* at *4. Rejecting the approach of the Court of Appeals, the Court declined "to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other." *Id.* The Court determined that "whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceedings," instead adopting the "experience and logic" test as formulated by the United States Supreme Court. *Id.* at *5.[2] The first part of this test, the "experience" prong, asks "whether the place and process

[2] The *Wise* Court noted that, while application of this test was appropriate in *Sublett,* there was no need to apply this test in *Wise* because "it is well settl ed that the right to a public trial also extends to jury selection" (citing *State v.Brightman,* 155 Wn.2d at 515, 122 P.3d 150). *Wise,* 288 P.3d 1118 n 4.

have historically been open to the press and general public." *Id.*at *5. (citing *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). The "logic prong," the Court wrote, "asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* If the answer to both is yes, the public trial right attaches and the *Bone–Club* factors must be considered before the proceeding may be closed to the public. *Id.* The advantage of this approach, the Court noted, is that "it allows the determining court to consider the actual proceeding at issue for what it is, without having to force every situation into predefined factors." *Id.*

Applying this test to the facts of Sublett's case, the Court first noted that "the petitioners have not identified any case that holds that these proceedings are a closure or violate the defendants' constitutional rights, and we cannot find one either." *Id.* at *6. Likewise, the Court concluded that there were no rules that required that discussions related to a jury question must be open to the public. *Id.* While the court rules require that the question, answer and objection must be put in the record, the Court concluded that "historically…a proceeding in open court to discuss the question itself and any appropriate answer has not been required." *Id.* As such, "no closure occurred because this proceeding did not implicate the

public trial right..." *Id.* at *7. In so holding, the Court turned to the purpose of the right to public trial, noting that,

> None of the values served by the public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review. This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. Neither Sublett nor Olsen[3] claim or argue any of these rights, nor could they since such rights are inapplicable in the discussion of, or resolution of, questions from the jury. We hold the petitioners have not established that a closure or public trial right violation occurred.

Id. at *7.

Applying this analysis to the facts of Reyes' case yields the identical result. Reyes has not identified any case that holds that a pre-trial hearing such as that held on May 22 is a closure or violates the constitutional rights of a respondent in a civil case. Nor are any of the values served by the public trial right violated under the facts of this case: No witnesses were involved in the disputed hearing, which involved only a discussion of case scheduling, the status of the GAL on the case, and a

[3] Olsen was Sublett's co-defendant.

brief argument relating to a motion to dismiss based on the case having been filed in the wrong county.[4] No testimony was involved, and hence no risk of perjury existed. The appearance of fairness was satisfied by having the entire proceeding on the record and transcribed, "remind[ing] the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review." *Sublett*, 2012 WL 5870484, at *7. This brief hearing was "not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." *Id.* Like Sublett, Reyes did not claim or argue any of these rights, nor could he have done so since such rights are inapplicable in the discussion or resolution of the issues addressed by the trial court's in-chambers hearing. Because Reyes has not established that a closure or public trial right violation occurred, his argument should be rejected and his commitment affirmed.

III. CONCLUSION

Reyes does not have standing to argue that the public's right to open proceedings was violated by the brief in-chambers hearing held on May 22. Even if he does, experience and logic compel the conclusion that

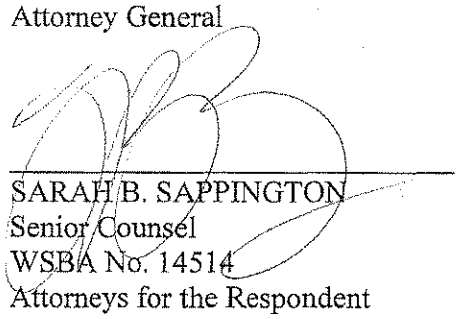
[4] A lengthier discussion of the hearing can be found in the State's Opening Brief at 2-3.

the hearing was not one to which article I, section 10 applies. The purpose of the public trial provision of the Washington State Constitution is, ultimately, to ensure a fair trial and to safeguard the integrity of judicial proceedings. There is no evidence that Reyes' rights to a fair trial were in any way compromised or even implicated by the May 22 hearing. The State respectfully urges this Court to find that no closure or public trial right violation occurred and to affirm Reyes' commitment.

Even if Reyes' constitutional rights were violated by the in-chambers hearing, reversal would not be an appropriate remedy. Any constitutional violation can be remedied through either remand to the superior court with instructions to file a complete 21-page transcript of the May 22 hearing. In the alternative, this Court could remand this matter for a new hearing on the motion to dismiss, which hearing would be held in open court.

RESPECTFULLY SUBMITTED this 24th day of January, 2013.

ROBERT W. FERGUSON
Attorney General



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WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of: ROLANDO REYES, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On January 29, 2013, I deposited in the United States mail, and sent by e-mail, true and correct cop(ies) of Respondent's Supplemental Brief and Declaration of Service, postage affixed, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29TH day of January, 2013, at Seattle, Washington.

ALLISON MARTIN