

COURT OF APPEALS NO. 59995-0-I

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

In re the Matter of Application for Relief,
From Personal Restraint of:

ROLAND SPEIGHT,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Alan R. Hancock, Judge

PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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DIVISION ONE
SEATTLE, WA

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A. SUPPLEMENTAL STATEMENT OF FACTS

At a pre-trial telephonic conference held May 23, 2005, the parties and court discussed a jury questionnaire for voir dire, apparently provided by the court:

THE COURT: Okay. Thank you very much, counsel.

Let me just ask, since I know you've inquired about it informally, do counsel plan to have a written questionnaire for the jury panel?

MS. KENIMOND [defense counsel]: Your Honor, I have it in my hand, and it is agreed to. Shall I give it to the clerk to ask that it be reproduced?

THE COURT: Well, we'd like to have counsel make the necessary copies of it, if possible.

MR. SILVERMAN [prosecutor]: I believe it was provided by the Court and defense attorney indicates she feels it's appropriate. I've looked it over, Your Honor. I have no objection to it. Since it is an alleged sexual assault, sometimes having a questionnaire make it easier for the jurors, if you find that appropriate.

THE COURT: Yes. I think it is appropriate to have a written questionnaire like this. I do want to make sure there's something in there that indicates that the person answering the questions can be interviewed individually and not in the presence of other members of the panel. Is there something like that in there?

MR. SILVERMAN: I believe that Your Honor has a cover sheet that says to prospective witnesses that I believe covers those issues, and we'll make sure that that cover sheet accompanies the questionnaire.

1RP (5/23/05) 5-6 (emphasis added).

As mentioned by the prosecutor, the court's cover page provided in relevant part:

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any questions may invade your privacy or be embarrassing to you, you may so indicate on the form that you would prefer to discuss your answer in private. The court will give you an opportunity to explain your request for confidentiality outside the presence of the other jurors.

See Cover Sheet and Questionnaire, attached as an Appendix.

At the end of the questionnaire, jurors were asked:

If you have answered "Yes" to any of the above questions, would you prefer that the attorneys question you individually in court, or would you be comfortable discussing your answers in front of others?

I request individual questioning.

I do not request individual questioning.

Appendix (emphasis added).

On May 24, 2005, while the jury was filling out the questionnaires, the parties and the judge went privately into chambers, whereupon the judge ruled on several pretrial motions. See Supplemental Brief of Petitioner (SBOP) at 2-3.

The judge thereafter reviewed the jurors' responses, identified those who requested individual questioning, and sent the clerk to bring back the first of the 14 jurors who would be questioned privately in the

judge's chambers. SBOP, Appendix H at 9-10. There is no indication the trial judge advised Speight of his right to open voir dire or expressly afforded him the chance to object to private questioning.

B. SUPPLEMENTAL ARGUMENT¹

UNDER STRODE AND MOMAH, SPEIGHT'S CONVICTION MUST BE REVERSED.

Not only was a significant portion of jury voir dire conducted in private chambers, but the court made discretionary rulings in private as well. Our Supreme Court's decisions in Strode and Momah require reversal of Speight's conviction, based on the violation of his public trial right.

Strode was charged with three sex offenses. His prospective jurors were asked in a confidential questionnaire whether they or anyone with whom they were close 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. Before excluding the public from this private questioning, the trial court failed to hold a "Bone-Club"² hearing." Strode, 167 Wn.2d at 223-224.

¹ On March 15, 2010, this Court ordered additional briefing to address the decisions in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

² State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

While privately questioning some potential jurors, the trial court stated variously 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." Strode, 167 Wn.2d at 224. The trial judge, prosecutor and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon. Id.

A majority of the Supreme Court reversed Strode's conviction because the trial court failed to weigh the competing interests as required by Bone-Club. Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (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. Strode, 167 Wn.2d at 229 n.3 (Alexander, C.J.).

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 article I, section 10. Compare 167 Wn.2d at 229-230 (lead opinion noting Strode could not waive the public's right to open proceedings) with 167 Wn.2d at 232, 236 (concurring opinion chastising lead opinion for conflating the right of a defendant, the media and the public). Because Speight relies on his personal right as guaranteed by article I, section 22, this split should not affect this Court's decision in his case.

The concurring opinion, however, concluded that defense participation in the closed courtroom proceedings may, under certain circumstances, constitute a valid waiver of the right to a public trial. Strode, 167 Wn.2d at 234-236 (Fairhurst, J., concurring). As an example, Justice Fairhurst noted that in Momah, the trial court expressly advised that all proceedings are presumptively public. Id. at 234. Despite this admonishment, defense counsel affirmatively requested individual questioning of panel members in private, urged the court to expand the number of jurors subject to private questioning, and actively engaged in discussions about how to accomplish this. Id. Justice Fairhurst concluded counsel's conduct "shows the defendant intentionally relinquished a known right." Id.

The facts in Speight's case are like those in Strode. Defense counsel did not request private questioning. It was the court that indicated its concern with potential embarrassment and wanted to ensure jurors could be questioned privately, if desired. Although the questionnaire (that was agreed) contained a provision for jurors to request individual questioning, the form indicated such questioning would occur in court. There is no indication defense counsel ever suggested in-chambers questioning. Rather, the record shows it was the court that sought to isolate prospective jurors from the public eye. The court neither addressed

the Bone-Club factors nor in any other way weighed the competing interests before closing a portion of voir dire and the pretrial hearing. As in Strode, the trial court violated Speight's constitutional right to a public trial.

State v. Momah is distinguishable and does not control the outcome of Speight's appeal. The State charged Momah, a gynecologist, with committing sex offenses against several patients. Momah, 167 Wn.2d at 145. Unlike the "unexceptional circumstances" in Strode, 167 Wn.2d at 223 (Alexander, C.J., lead opinion), Momah's case was "heavily publicized" and "received extensive media coverage." Momah, 167 Wn.2d at 145.

As a result, the court summoned more than 100 prospective jurors and gave them a written questionnaire. By agreement of the parties, jurors who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned individually in chambers. Id. at 145-146.

Concerned about poisoning the entire panel, defense counsel also argued for expansion of the private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or

we have the real concern that they will contaminate the rest of the jury.

Momah, 167 Wn.2d at 146.

The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. Id. Both the defense and prosecution actively participated in the in-chambers jury selection, most of which focused on prospective jurors' knowledge of the case gained from media publicity. Id. at 146-147 and n.1.

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. Momah, 167 Wn.2d at 149-151. 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. Momah, 167 Wn.2d at 156.

In addition, drawing on the invited error doctrine, 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.” 167 Wn.2d at 151; see also 167 Wn.2d at 153-154 (discussing invited error).

The court reiterated this theme later in the opinion, presuming Momah made the following "tactical choices to achieve what he perceived as the fairest result[:]"

- Before any private voir dire, the parties and the judge discussed numerous proposals concerning juror selection;
- Although Momah was given a chance to object to the in-chambers procedure, he never objected;
- Momah never suggested closed voir dire might violate his right to public trial;
- Defense counsel deliberately chose to pursue in-chambers questioning to avoid tainting the panel; counsel "affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning."

Momah, 167 Wn.2d at 155.

Counsel's affirmative and aggressive pursuit of private voir dire is an atypical and distinctive feature of Momah. Much more common is the unexceptional case where a trial court merely informs the parties it will honor prospective jurors' requests to be spared the embarrassment of revealing sensitive matters in open court. In short, Momah is the aberration and Strode is the ordinary. And because the Momah Court

relied so heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case.

Speight's case is ordinary, like Strode. Unlike Momah, the trial court did not discuss various courses of action with the parties; instead, the court indicated it wished to honor the wishes of prospective jurors who preferred private questioning. As the prosecutor noted, the court had a ready cover sheet explaining to jurors they could request private questioning. Unlike Momah, there was no opportunity for Speight to object to private voir dire, as it appeared to be standard operating procedure in cases involving allegations of sexual misconduct in San Juan County. And unlike Momah, Speight's counsel neither requested closed voir dire nor sought its expansion.

While Speight's attorney did participate in questioning the jurors in the judge's chambers, mere participation is insufficient to waive this constitutional right. Defense counsel in Strode also questioned jurors in the judge's chambers. See Strode, 167 Wn.2d at 224 ("the trial judge and counsel for both parties asked questions of the potential jurors").

Finally, in what the Momah Court identified as "perhaps most important" to its decision, "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." Momah, 167 Wn.2d at 151-152. In

Speight's case, by contrast, the trial court expressed no interest in safeguarding his right to an impartial jury. Instead, the trial court simply sought to avoid embarrassing panel members. See Verbatim Report of Proceedings from May 25, 2005, page 10, appendix H to Speight's SBOP; see also page 27-28, 53 of same.

B. CONCLUSION

For all these reasons, this Court should hold the trial court violated Speight's right to a public trial, that the violation was structural error, and that reversal is required. Strode, 167 Wn.2d at 223.

Dated this 27th day of April, 2010.

Respectfully submitted,

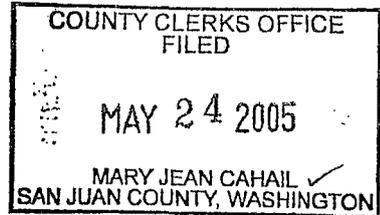
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SAN JUAN

STATE OF WASHINGTON,)	05 1 05003 6
)	
Plaintiff,)	SEALED DOCUMENT
v)	
)	
ROLANDA SPEIGHT,)	
Defendant.)	
)	
)	

Docket No. Juror Questionaires
Sealed per the Honorable Alan R. Hancock.
(In a Separate White Packet.)

MAY 24 2005

TO PROSPECTIVE JURORS

MARY JEAN CAHILL ✓
SAN JUAN COUNTY, WASHINGTON

This questionnaire is designed to elicit information with respect to your qualifications to sit as a juror in a pending case. This questionnaire will substantially shorten the process of jury selection.

This questionnaire is part of the jury selection process. You must answer the questions to the best of your ability and you must fill out the questionnaire by yourself. As you answer the questions that follow, please keep in mind that there are no right or wrong answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers because they make long questioning unnecessary and by doing that, they shorten the time that it takes to select a jury.

Please make every effort to answer each one of the questions. During the questioning by the attorneys and the court, you will be given an opportunity to explain or expand any answers if necessary. If you wish to make further comments regarding any of your answers, or if you feel that there is something important that we failed to ask, please include this information on the final sheet of the questionnaire.

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any questions may invade your privacy or be embarrassing to you, you may so indicate on the form that you would prefer to discuss your answer in private. The court will give you an opportunity to explain your request for confidentiality outside the presence of the other jurors.

After you have completed the questionnaire, please hand it to the Bailiff.

Thank you for your cooperation.

5/24/05



Hon. Alan R. Hancock, Judge
San Juan County Superior Court

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JUROR QUESTIONNAIRE

Juror Number: _____

Introduction

The purpose of this questionnaire is to allow you to answer questions about your personal experiences that may relate to the current trial and to do so is a way that reduces embarrassment and maintains some privacy. The attorneys in the case may ask you about your answers to the questions in individual voir dire, without the public and other jurors present, to further maintain your privacy if you prefer. Please answer these questions as fully and honestly as you would any other voir dire questions.

Fill out the questionnaire and hand it to the bailiff when you are done. If a question does not apply, please indicate "N/A".

1) a) Have you ever been charged with, or arrested for, any sex crime or crime committed with "sexual motivation"?

Yes ___ No ___

b) If yes, please list the crime(s) below:

c) How was the case above closed (e.g., charges dropped, arrested but never charged, acquitted at trial, found guilty at trial, case being appealed, etc.)?

d) If the charges were dropped or not filed, why?

e) How do you feel about the above experience?

2) a) Have you ever been privately accused of a sexual assault or other sexual impropriety (e.g., sexual harassment, etc.)?

Yes ___ No ___

b) If yes, please describe the circumstances below.

c) Was any legal action suggested or mentioned by anyone on the matters in 2)b)?
Yes ___ No ___ Please explain below.

d) How was the accusation resolved (e.g., accuser left town, I denied it, got fired, accuser's parents kept it quiet, etc.)?

e) How do you feel about the above experience?

3) a) Do you personally know anyone who has been accused of any sex crime or other sexual impropriety, either officially or privately?
Yes ___ No ___

b) Please describe the circumstances below.

c) What do you think about the above circumstances?

4) a) If you answered yes to any of the above, do you think that you could be fair in deciding similar issues in this case?
Yes ___ No ___ Please explain below.

5) a) Are you ever concerned that someone would accuse you or a friend or loved one?
Yes ___ No ___ Do not know ___

b) Why?

6) a) Are you concerned that a sexual offense may be committed against you, a friend, or a loved one?

Yes ___ No ___

b) Why?

7) Do you believe that these topics should be kept more private?

Yes ___ No ___ Do not know ___ Please explain below.

8) Have you ever been the victim of a sexual assault; rape or other sexual impropriety?

Yes ___ No ___

9) If the answer to #8 is yes, do you know who committed the act?

Yes ___ No ___

10) If the answer to #9 is yes, was the act committed by a relative of the victim (please specify) _____
a friend of the victim _____
an acquaintance of the victim _____
a stranger to the victim _____

11) If you were sexually assaulted, etc., please indicate how old you were at the time. Age _____

12) If you were sexually assaulted, etc., please indicate if you were assaulted more than once and/or if by more than one person.

13) If you were sexually assaulted, etc., did you report the incident to anyone (e.g., a parent, counselor, friend or the police).

Yes ___ No ___

14) If the answer to #13 is yes, to whom did you report the incident and what were the circumstances of your disclosure?

15) If you did report the act, was anyone ever prosecuted?

Yes ___ No ___

16) If they were prosecuted, were they convicted?

Yes ___ No ___ Please explain below.

17) If you were sexually assaulted, etc., did you suffer any physical injury as a result of the incident?

Yes ___ No ___

18) If you were sexually assaulted, etc., did you suffer any emotional distress as a result of the incident?

Yes ___ No ___

19) If you were sexually assaulted, etc., and if you did report the incident, do you believe you were treated fairly or reasonably by those to whom you reported the assault (e.g., relatives, friends, counselors, the police, etc.)?

Yes ___ No ___

20) Do you know if any friend, relative or acquaintance of yours has ever been sexually assaulted, raped or subjected to any sexual impropriety?

Yes ___ No ___ Please explain below.

21) If the answer is yes, do you know who committed the assault?

Yes ___ No ___

22) If the answer is yes, was the assault committed by

a relative of the victim _____

a friend of the victim _____

an acquaintance of the victim _____

a stranger to the victim _____

23) How old was the victim when he or she was sexually assaulted?

24) Do you know if the victim of the sexual assault, etc. was assaulted more than once and/or by more than one person?

Yes ___ No ___ Do not know ___

25) Was the sexual assault reported to anyone?

Yes ___ No ___ Do not know ___

26) Was the perpetrator of the sexual assault ever prosecuted?

Yes ___ No ___ Do not know ___

27) Was the perpetrator of the sexual assault ever convicted?

Yes ___ No ___ Do not know ___

28) Was the victim of the sexual assault physically injured?
Yes ___ No ___ Do not know ___

29) a) Did the victim of the sexual assault suffer emotional distress?
Yes ___ No ___ Do not know ___ Please explain below.

30) Do you believe the victim of the sexual assault was treated fairly and reasonably by the authorities?
Yes ___ No ___ Do not know ___ Please explain below.

31) Do you believe you have any special training, knowledge or expertise in the subject matter of sexual assaults?
Yes ___ No ___ Please explain below.

32) If you were the victim of a sexual assault, etc., and/or if you know a relative, friend or acquaintance who was a victim of sexual assault, etc., do you believe you would tend to favor or be prejudiced against either party to this case?
Yes ___ No ___ Please explain below.

33) Have you ever contacted or had Child Protective Services, the police, or any social welfare agency come to your home regarding a child?
Yes ___ No ___

34) Have you ever participated in any juvenile court proceeding involving a child?
Yes ___ No ___

35) Do you belong to any organizations involved in protecting the rights of abused children or parents of abused children?
Yes ___ No ___

If you have answered "Yes" to any of the above questions, would you prefer that the attorneys question you individually in court, or would you be comfortable discussing your answers in front of others?

___ I request individual questioning.
___ I do not request individual questioning.

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

In re the Matter of Application for Relief)
From Personal Restraint of:)

ROLAND SPEIGHT,)
Petitioner.)

COA NO. 59995-0-1

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 27TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SECOND SUPPLEMENTAL BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES BURI
BURI FUSTON MUMFORD PLLC
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BELLINGHAM, WA 98225

- [X] ROLAND SPEIGHT
DOC NO. 863245
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STATE OF WASHINGTON
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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF APRIL, 2010.

x. Patrick Mayovsky