

No. 59995-0-1

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

In the Personal Restraint Petition of
ROLAND SPEIGHT, Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY
#05-1-05003-6

**SUPPLEMENTAL RESPONSE TO PERSONAL
RESTRAINT PETITION**

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2010 APR 26 PM 10:57

COURT OF APPEALS
STATE OF WASHINGTON
CLERK
[Signature]

ORIGINAL

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INTRODUCTION

The Washington Supreme Court on October 8, 2009 released two opinions that reached opposite results on the same issue. In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the Court held that a trial court's failure to review the Bone-Club factors before closing its courtroom was not structural error requiring a new trial. Momah, 167 Wn.2d at 145 ("we hold the closure in this case was not a structural error and affirm Charles Momah's conviction"). State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995)

In State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), a plurality of the Court reached the opposite conclusion. "By conducting a portion of the trial (jury voir dire) in chambers without first weighing the factors that must be considered prior to closure, prejudice to Strode is presumed." Strode, 167 Wn.2d at 231. Why the different outcomes? Two justices, Justice Fairhurst and Justice Madsen, concluded that the facts were sufficiently distinct to require opposite outcomes.

In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), I agreed to affirm Charles Momah's convictions because the facts presented circumstances where the trial court needed to close a portion of voir dire to the public in order to protect the

defendant's right to a fair trial. I reach a different conclusion here because Tony L. Strode's right to a public trial *has not been waived nor has it been safeguarded as required under State v. Bone-Club*.

State v. Strode, 167 Wn.2d 222, 231-232, 217 P.3d 310, 316 (2009) (Fairhurst, J., concurring) (emphasis added).

Because defendant Roland Speight waived his right to interview all potential jurors in public, and the trial court protected defendant's right to a fair, public trial, the State of Washington respectfully requests this Court to deny defendant's petition for a new trial. The opinion in Momah controls this case.

I. ISSUE PRESENTED IN THIS SUPPLEMENTAL BRIEF.

The Court of Appeals has requested supplemental briefing on the impact of Momah and Strode on defendant's personal restraint petition. This raises one issue: does Momah or Strode decide this case?

II. UNDER MOMAH, DEFENDANT SPEIGHT "AFFIRMATIVELY ASSENTED" TO LIMITED VOIR DIRE IN CHAMBERS.

Defendant Speight seeks a new trial because the trial court conducted supplemental interviews of 11 prospective jurors in chambers. (2RP 10; Appendix H to Defendant's Petition). Because defendant actively participated in these interviews – and

benefited directly from it – he cannot now claim that it deprived him of a fair, public trial.

The Supreme Court in Momah upheld limited closure of voir dire when defendant requests it to protect his constitutional right to a fair trial.

Here, 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.

Momah, 167 Wn.2d at 151-152. The same facts exist in this case.

First, defendant Speight assented to the closure, participated in it, and benefited from it. As detailed in the State's Response to Defendant's Petition, defendant's counsel agreed to the interviews, actively questioned the potential jurors in chambers, and used the information to strike jurors and chose an impartial jury. (Response Brief at 17-18) (2RP 9-61) (transcript of in chambers interviews).

Second, the trial judge closed the courtroom after consulting with defendant. On May 23, 2005, the day before voir dire, the court and counsel had a pretrial conference by telephone. The

minute entry from that conference confirms that defense counsel provided the written questionnaire for the jury panel.

Court. Do counsel plan to have a written questionnaire for the panel?

Ms. Kenimond [defense counsel] Yes. Shall I give it to Clerk to produce?

Court. No counsel to make the necessary copies.

State. Provided by court; no objection to it, makes it easier for jurors if you find appropriate.

Court. Yes, that's appropriate. And something for them to know they can be interviewed individually.

(5/23/05 Minute Entry at 2; Attached as Appendix A).

The cover page to the juror questionnaire, provided by defendant, gave potential jurors the opportunity to discuss confidential information in private.

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.

(Cover Page to Juror Questionnaire; Attached as Appendix B). No dispute should exist that defendant agreed to the in-chambers interviews, participated in them, and benefited directly from them.

Third, the trial judge closed the courtroom to safeguard defendant Speight's constitutional right to a fair trial. The ultimate

reason for the juror questionnaire was to protect defendant, not the potential jurors. Defense counsel provided the questionnaire and agreed to the in-chambers interviews because it was the most effective method to disclose a juror's bias or unfitness to serve. Certainly, the confidential interviews protected the juror's privacy, but if they interfered with, rather than promoted, selection of an impartial jury, the trial judge would have conducted the interviews in open court.

In her concurrence in Strode, Justice Fairhurst concluded that a juror's right to privacy alone did not justify closing the courtroom.

The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that "public exposure of jurors' personal experiences can be both embarrassing and perhaps painful for jurors." Dissent at 320. I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have "undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and *potentially* the defendant's right to an impartial jury." Id. at 320 (emphasis added). But the *potential* for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike

in Momah, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the Bone-Club analysis on the record is required. The trial court here erred in failing to engage in the Bone-Club analysis.

State v. Strode, 167 Wn.2d 222, 235-236, 217 P.3d 310 (2009).

The trial court here did not close the voir dire interviews solely to protect jurors' privacy. The State's Response Brief describes how the trial court actions complied with the Bone-Club factors. (Response Brief at 11-16). Furthermore, unlike in Strode, defendant Speight knowingly and voluntarily waived his right to have all voir dire conducted in open court. As the Momah court ruled,

to ensure that a criminal defendant receives a fundamentally fair trial, we permit the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result. In our adversarial system, these are basic rights of the accused. Accordingly, the choices a party makes at trial may impact their ability to seek relief from an alleged error or may affect the remedy they receive.

Momah, 167 Wn.2d at 153. When defense counsel provided the juror questionnaire to the trial court, she did so to protect defendant's rights. That choice, which hindsight confirms as essential, restricts defendant's ability to request a new trial.

The Supreme Court's opinion in Momah establishes a limited exception to a trial court's duty to weigh the Bone-Club factors on the record. Where defendant advocates for the courtroom closure, and it is essential to protect defendant's right to a fair trial, the court's failure to weigh the factors on the record is not fatal.

We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors 'or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 interests in this case. The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it.

Momah, 167 Wn.2d at 156.

III. STRODE DOES NOT REQUIRE REVERSAL

In Strode, a plurality of the Supreme Court described a much broader rule, requiring reversal *whenever* a trial court fails to weigh the Bone-Club factors on the record.

The determination of a compelling interest for courtroom closure is "the affirmative duty of the trial

court, not the court of appeals.” Bone-Club, 128 Wn.2d at 261, 906 P.2d 325. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four Bone-Club steps to thoroughly weigh the competing interests.

Strode, 167 Wn.2d at 229.

The plurality reached this result by concluding that a defendant cannot waive the Bone-Club analysis.

Strode cannot waive the public's right to open proceedings. As we observed in Bone-Club, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a Bone-Club analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration.

Strode, 167 Wn.2d at 230.

This is where the plurality and the concurrence parted ways. The concurring justices did not agree that Bone-Club was a non-waivable requirement.

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under Bone-Club or has been waived.

Strode, 167 Wn.2d at 236 (Fairhurst, J., concurring).

The majority in Momah, and the concurrence in Strode, concluded that defendant may waive his right to a completely public trial. That is the ultimate ruling from both cases. It is also the reason why Strode does not require a new trial for defendant Speight. Unlike defendant Strode, defendant Speight *requested* in chambers voir dire and provided the jury questionnaire to accomplish it. “A waiver is an intentional relinquishment or abandonment of a known right or privilege.” Strode, 167 Wn.2d at 234. Defendant Speight intentionally relinquished his right to hold all of voir dire in public. He did so for a more compelling reason – to question whether the potential jurors could be fair and impartial.

CONCLUSION

The general rule is that a trial court must examine the Bone-Club factors on the record before closing the courtroom. In Momah and the concurrence to Strode, the Supreme Court recognized a limited exception to this rule: where a trial court “in consultation with the defense and the prosecution, carefully considered the defendant's article I, section 22 rights, closed the courtroom to preserve his right to an impartial jury, and narrowly tailored the closure to secure that right,..closure...was not a structural error.”

Momah, 167 Wn.2d at 145. The State respectfully requests this Court to apply the same exception here and deny defendant Roland Speight's personal restraint petition.

DATED this 23rd day of April, 2010.

RANDALL K. GAYLORD
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By 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Supplemental Brief of Respondent** to:

Nielsen Broman Koch PLLC
1908 E Madison St
Seattle WA 98122

DATED this _____ day of April, 2010.

HEIDI MAIN

APPENDIX A

COUNTY CLERK'S OFFICE
FILED

MAY 23 2005

MARY JEAN GAHAIL ✓
SAN JUAN COUNTY WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SAN JUAN

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15 STATE OF WASHINGTON,)
16)
17 Plaintiff,)
18)
19 vs)
20)
21)
22)
23 ROLAND A. SPEIGHT,)
24)
25)
26)
27 Defendant.)
28)
29)
30)
31)

MINUTE ENTRY

Date: May 23, 2005

No. 05 1 05003 6

Judge Alan R. Hancock

Court Reporter Jeanne Wells

Court Clerk Joan White

32 Time: 1:15 PM TELEPHONIC with Judge Hancock and Court Reporter in Island Co.

33
34 This matter came on for Motion for Time to Interview Witness Hearing.

35 The State appeared through Counsel Charles Silverman.

36 The Defendant appeared through Counsel Colleen Kenimond.
37
38
39

40 Ms. Kenimond. For the purpose of scheduling matter, wish to inform the Court that at this very
41 ~~moment we propose to take our hearing and the immediate witness hearing Court is ready~~
42 that during the course of tomorrow, pick jury, recess and interview complaining witness.
43
44

45 State. Willing to do whatever the Court wishes.
46
47

48 Ms. Kenimond. Will probably take an hour.
49

50 State. Can you make arrangement for alleged victim for tomorrow. She is available. Planning for her to be here at noon.

Court. Very well, alleged victim to be interviewed by Defense sometime afternoon tomorrow.

57 AW

1 Not going to direct this occur after jury selection and indicate they would not be dismissed.
 2 Want to make sure good use of our time. If by noon, allow interview and proceed right after
 3 that. Perhaps between 12 and 1:30 be made available. Emphasize good use of time. Many
 4 matters in Island County to hear Friday. Understand need, but must make good use of our time.
 5 Confer in the morning.
 6

7
 8 ~~State. One other matter: Two medical individuals testifying and did ask them to be here and~~
 9 ready to start off Wednesday morning. Cleared their schedule. Hoping their situation can be
 10 accommodated for them to go back to their patients.
 11

12
 13 Ms. Kenimond. No objections. And just for your information, tend to be faster than others.
 14

15 Court. Do counsel plan to have a written questionnaire for the panel?
 16

17 Ms. Kenimond. Yes. Shall I give to Clerk to produce?
 18

19 Court. No, counsel to make the necessary copies.
 20

21 State. Provided by court; no objection to it, makes it easier for jurors if you find appropriate.
 22

23 Court. Yes, that's appropriate. And something for them to know they can be interviewed
 24 individually.
 25

26 State. Cover sheet covers that too,
 27

28 Judge. In the State's Trial Brief, reference to State wanting to introduce evidence, other bad acts
 29 between defendant and another name.... Do I understand other evidence?
 30

31 State. Just between Defendant and alleged victim 404B and lustful disposition.
 32

33 Court. Wanted to clarify...
 34

35 State. Apologize.
 36

37 Court. Anticipate any length Motions in Limine tomorrow?
 38

39 State. One -- prior convictions of victim.
 40

41 Court. Delivery and possess? Yes, in the a.m.
 42

43 Defense. Nothing lengthy.
 44

45 Court. Meet in chambers at 8:30 AM. He can attend; but not required to.
 46

47 Defense. Sheriff's Office scheduled defendant to be brought over tomorrow.
 48

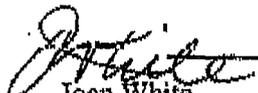
49 Court. Not later than 8:30 AM.
 50

State. Will make sure that's clear.
 Court. Today.

Defense. His clothing for trial here.
 Court. In street clothes.

In chambers at 8:30 in the morning.
 Nothing further.

1:30p


 Joan White
 Court Clerk

APPENDIX B

COUNTY CLERKS OFFICE
FILED

MAY 24 2005

TO PROSPECTIVE JURORS

MARY JEAN CANAIL ✓
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

5/24/05