

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

In re the Personal Restraint Petition of William R. Coggin,

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM R. COGGIN,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 NOV 21 PM 3:04

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

The Honorable Steven J. Mura, Judge

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

JENNIFER M. WINKLER
Attorney for Petitioner

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ containing a copy of the document to which this declaration is attached.
Whatcom County prosecutor

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

Patrick Mayorsky *11/21/2007*
Name Done in Seattle, WA Date

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A. SUPPLEMENTAL ISSUES IN REPLY

This Court ordered petitioner to address the impact of State v. Castro, __ Wn. App. __, __ P.3d __ (no. 25533-6-III, Oct. 30, 2007).

Castro presents the following issues:

1. Did petitioner knowingly, intelligently, and voluntarily waive the constitutional rights to a public trial?
2. Does the record show the trial court reviewed the Bone-Club¹ factors before conducting a portion of jury voir dire in private?

B. SUPPLEMENTAL ARGUMENTS IN REPLY

1. UNLIKE THE ACCUSED IN CASTRO, COGGIN MADE NO “KNOWING, INTELLIGENT, AND VOLUNTARY” WAIVER OF CONSTITUTIONAL PUBLIC TRIAL RIGHTS.

Castro correctly notes an accused may waive his constitutional rights. Castro, slip. op. at 3 (quoting State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994)). But even though waiver requirements differ based on the nature of the right at issue, Castro, slip. op. at 3, the State must show a voluntary, knowing, and intelligent waiver occurred. In the Matter of the Personal Restraint of James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). Moreover, the failure by an accused to object at trial does not

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

waive the right to a public trial. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (citing Bone-Club, 128 Wn.2d at 257).

Castro found a waiver of an appellant's public trial rights based on the following facts:

[D]efense counsel clearly stated he discussed the public trial right with Mr. Castro, and Mr. Castro wished to waive his right for the limited purpose of questioning jurors in chambers regarding personal sexual matters. Mr. Castro stated he agreed with defense counsel's statement.

Slip. op. at 4. The court concluded, "Based on this record, Mr. Castro provided a valid limited waiver." Id.

In contrast, nothing resembling an on-the-record waiver occurred here. Reply Brief of Petitioner (RBOP) at 4-5.

Respondent's supplemental brief fails to set forth any acts by Coggin that might constitute an on-the-record knowing, voluntary, and intelligent waiver. The brief instead appears to reiterate respondent's argument Coggin lacks standing to raise this claim. Supplemental Brief of Respondent (SBOR) at 1-3; Response to Personal Restraint Petition at 7-8. For the reasons stated in petitioner's reply brief, that argument should be rejected. RBOP at 1-2.

Because Coggin, unlike Castro, did not explicitly waive his public trial rights, Castro supports reversal of Coggin's convictions.

2. UNLIKE THE CASTRO TRIAL COURT, THE COURT HERE ENGAGED IN NO BALANCING OF THE BONE-CLUB FACTORS.

As discussed in Castro, following a motion by the court or the prosecutor, a court may partially or completely close public trial proceedings. Castro, slip op. at 3. In order to do so, however, the court must first consider whether the following criteria are satisfied:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

In re Personal Restraint of Orange, 152 Wn.2d 795, 801-02, 100 P.3d 291 (2004) (quoting Bone-Club, 128 Wn.2d at 258-59).

These factors protect both the public trial rights of an accused and the public's constitutional right to open proceedings. Castro, slip op. at 4 (citing Orange, 152 Wn.2d at 804-05). Where a closure has occurred, the record must demonstrate the trial court reviewed these factors. Castro, slip op. at 4 (citing Orange, 152 Wn.2d at 811-12).

Castro found the trial court properly considered the Bone-Club factors on the record. Slip. op. at 4; Orange, 152 Wn.2d at 811-12.

Here, on the other hand, nothing in the record suggests the trial court considered the factors before conducting private in-camera voir dire proceedings. Supplemental Brief of Petitioner at 3-4 (citing RP 10-12, 20); Appendix at 2 (sub no. 47, Jury Trial Minutes, Whatcom County Sup. Ct. no. 04-1-01098-8, filed 6/27/2005); see Brightman, 155 Wn.2d at 516 (citing Orange, 152 Wn.2d at 807-08) (appellate court's review of the trial court's balancing of the factors is based on record made at the trial court).

Here, a portion of jury voir dire was conducted in chambers, closed to the public and other prospective jurors, with only the judge, the court reporter, and the parties present. RBOP at 2-3. The record lacks any indication the court considered, much less analyzed, the Bone-Club factors. Even if the closure occurred to minimize the risk of jury pollution, it does not explain why the public was excluded. Orange, 152 Wn.2d at 813-14. Because the trial court never considered the Bone-Club factors, this portion of Castro supports reversal.

Finally, absent citation to authority, respondent appears to argue a different result is required because this case is being considered as a personal restraint petition. SBOR at 4-5. Assuming this is respondent's argument, it should be rejected. Orange reached the Supreme Court on a

personal restraint petition and held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised in Orange's direct appeal. 152 Wn.2d at 814 (citing Bone-Club, 128 Wn.2d at 261-262); see also Brightman, 155 Wn.2d at 516 n. 6 (discussing Orange rationale). Although this is a personal restraint petition, once a violation is shown prejudice to Coggin is presumed.

The trial court violated Coggin's public trial rights because, unlike in Castro, it failed to analyze the Bone-Club factors before ordering a portion of jury voir dire be private. Orange, 152 Wn.2d at 812. For this reason too, Coggin's convictions should be reversed.

C. CONCLUSION

For the reasons stated above and in Coggin's opening and reply briefs, his petition should be granted and his convictions reversed.

DATED this 21ST day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Petitioner

APPENDIX

DOCKETED

29

SCOMIS CODES

NJTRIAL

JTRIAL

MODHRG

(other)

VOIR

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

State of Wash.

No. 04-1-01098-8

JUDGE Mura

vs.

William Coagin

REPORTER Quinn

Bailiff: Seelers

CLERK Hutchison

DATE 6-27-05

David McEachran
Attorney for Plaintiff/Petitioner

Travis Stearns
Attorney for Defendant/Respondent

This matter came on for JURY TRIAL this 27th day of June, Judge Steven J. Mura presiding. Court convened at 9:52 AM. State appeared by and through Pros. David McEachran.

Defendant appeared in person, in custody, with atty. Travis Stearns. Court excused juror #156 for cause, prior to court convening. Court welcomed and informed jurors of case to be heard and introduced parties. Court qualified jurors for term. Jurors were sworn for cause and term by the clerk.

State

vs.

Coagion

Plaintiff/Petitioner

Defendant/Respondent

Court counsel, Dept, Court reporter
retired to chamber for private voir
dire 10:17 AM

Jurors # 187, #151, #222, #223, #476, #599,
#231, #71, #65, #146, #186, #183 had private
in chambers voir dire

Court, counsel, Dept, Court reporter
return to courtroom 11:26 AM

Court recessed jurors # 97, #290, #231,
#222, #187, #476, #223, #186, #599, #79, #72
~~for cause.~~

Jurors are questioned on voir dire
Court recessed 12:00 PM Reconvened 1:38 PM

Dept present, in custody
voir Dire continues

Peremptory challenges at the Bench
The following jurors were sworn to
try this cause by the clerk:

1. 198

7. 162

2. 75

8. 151

3. 239

9. 251

4. 573

10. 148

Cause No. 04-1-01098-8

State
Plaintiff/Petitioner

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Defendant/Respondent

5. 301

11. 229

6. 276

12. 92

Alternate: 209

Balance of jurors were excused with instructions re: further jury duty. Court read Preliminary Instructions. Court recessed 2:56 PM Reconvened 3:19

Def. present, in custody.

Pls. #1 - #17 Marked prior to court convening
Jury Returned

Mrs. McEachran made Opening Statement 3:19 PM

Atty Stearns made Opening Statement 3:54 PM

The following were called, sworn, and testified on behalf of State:

Kerion Rohde

Pls. #1 Premarked Offered ADMITTED

Pls. #6 Premarked Offered ADMITTED

Pls. #18 M O ADMITTED

Pls. #2 - #5 Premarked O ADMITTED

Pls. #7 - #15 Premarked O ADMITTED

Court recessed 4:28 PM

Tuesday June 28, 2005

State

vs.

Coagion

Plaintiff/Petitioner

Defendant/Respondent

Atty Stearns cross examined
Pros. McEachern examined on re-direct

2) Kyla Rohde

Pla. Ex #16, #17 Proff Marked

ADMITTED

Atty Stearns cross-examined

Pros McEachern examined on re-direct

Court recessed 10:45 AM Reconvened 11:03 AM

Def. present, in custody

Jury returned

3) Kendra Rohde

Atty Stearns cross-examined

4) MaryAnn Rohde

Atty Stearns cross examined

5) Senay Rohde

Court recessed 11:59 AM Reconvened 1:35 PM

Def. present, in custody

Pla. Ex #32 = 52 Marked prior to court concerning

Atty Stearns objects to Pla. Ex #33

Court and counsel discuss

Court sustained

Jury returned

State
Plaintiff/Petitioner

vs. Logan
Defendant/Respondent

LeRoy Rohde resumed the stand
Direct continued

Atty Stearns cross-examined
Pros McEachran examined on re-direct

6) Deputy Paul Murphy (W.C.S.O.)

Pls Ex # 32, # 34 Pre-Marked

ADMITTED

Atty Stearns cross-examined

Court recessed 2:45 PM Reconvened 3:04 PM

Deft. present, in custody.

Court and counsel discuss re: a juror.

Jury returned

7) Deputy Paul Murphy resumed stand

Pros McEachran examined on re-direct.

Atty Stearns examined on re-cross

Pls Ex # 53 M

7) Sgt. Doug Burks (W.C.S.O.)

Pls Ex # 53

ADMITTED

Atty Stearns cross-examined

Pros McEachran examined on re-direct

8) Dep. Colin Bertand (W.C.S.O.)

Atty Stearns cross-examined

9) Det. Mark Joseph

State
Plaintiff/Petitionervs. Coagin
Defendant/Respondent

Pl. En # 35 - # 52	Premarked	0	ADMITTED
Pl. En # 21	Premarked	0	ADMITTED
n " # 20	Premarked	0	ADMITTED
n " # 27	Premarked	0	ADMITTED
n " # 26	Premarked	0	ADMITTED
n " # 22	Premarked	0	ADMITTED
n " # 23	Premarked	0	ADMITTED
n " # 25	Premarked	0	ADMITTED
n " # 24	Premarked	0	ADMITTED
n " # 30	Premarked	0	ADMITTED
n " # 28, 29	Premarked		
Pl. En # 54	M		
n " # 19	Premarked		ADMITTED

Atty Stearns cross-examined

Pros. McEachran examined on re-direct

Atty Stearns examined on re-direct

Pros. McEachran questioned again

Court recessed 4:24 PM

Wednesday, June 29, 2005 State's case resumed

Court convened at 9:41 AM

State present by and through David McEachran

Def. present, in custody, with Travis Stearns

State
Plaintiff/Petitioner

vs. Coagion
Defendant/Respondent

Pros McEachron addressed court re:
Stipulation Between the Parties.

Pros McEachron addressed court re:
testimony re: Deft. masturbating and
penial swabbings.

Court and counsel discuss re: juror #2

Juror #2 returned to courtroom

Court inquired of juror #2

Juror #2 left courtroom

Court and counsel discuss

Jury returned to courtroom

Pros McEachron reviewed stipulations
for the jurors

Court reviewed meaning of stipulation
for the jurors

10) Michael Croteau (W.S.P. Crime Lab)
Atty Stearns inquired

Direct continued

Pls Ex #55, #56, #57 M

Atty Stearns cross examined

Pros McEachron examined on re-direct

11) Dr. Gary Goldfogel

State
Plaintiff/Petitioner

vs. Coagin
Defendant/Respondent

Atty Stearns CROSS-examined
Pros. McEachran examined on re-direct
Jury left courtroom

ADMITTED

Pl. Ex #56 0

State rests 11:06 AM

Atty Stearns and court discuss
re: Def. not testifying

Def. rests 11:09 AM

Atty Stearns made motion-in-limine
to dismiss charges re: Rape

Pros. McEachran responds

Court denied

Atty Stearns made motion-in-limine
to dismiss charges re: Burglary

Pros. McEachran responds

Court denied

Court and counsel discuss instructions

Court recessed 11:20 AM Reconvened 11:54 AM

Def. not present

Pros. McEachran objects to giving of
the Court's proposed instructions #8

Court grants, will substitute ^{states} supplemental

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Plaintiff/Petitioner

vs. Coagin
Defendant/Respondent

#6 in place of ^{Court's Instruction} #6

Pros McEachran and Atty Stearns agree to use Defense Instruction #15.

Court agrees to substitute Def. Instruction #15 in place of Court's #15.

Court recessed 11:59 AM Reconvened 1:34 PM
Def. present, in custody.

Atty Stearns addressed court re the word victim being used in closing.
Court and counsel discuss

Court allows word victim in closing.
Jury returned

State and Defense rest (1:37 PM)
Court read instructions to the jury.

Pros McEachran made closing argument (2:06 PM)
Court recessed 2:45 PM Reconvened 2:55 PM

Def. present, in custody
Jury returned

Atty Davis made closing argument (2:56 PM)
Pros McEachran made rebuttal argument (3:16 PM)

Bailiff Mercia Savers was sworn in charge of the jury.

State

vs.

Coagin

Plaintiff/Petitioner

Defendant/Respondent

Case was given to the jury for their deliberation at 3:26 PM

Court recessed 3:26 PM

(Verdict)

Jury reached a verdict at 4:12 PM

Court convened at 4:31 PM

Pros McEachran present for the state.

Defendant present, in custody and with Atty. Stearns.

Jury returned to courtroom. Bailiff, Jowers, stated what was said for alternate court. Found Verdict was in proper form and accused jurors for further deliberation.

Court recessed 4:34 PM Reconvened 4:37 PM

Pros McEachran present for the state.

Def. present, in custody and with Atty. Stearns.

Jury returned to the courtroom. Court found Verdict was in proper form and was read by the clerk as follows:

VERDICT

We, the jury find the defendant, not

State
Plaintiff/Petitionervs. Coagin
Defendant/Respondent

William R Coagin, Guilty of the crime of Burglary In The First Degree as charged in Count I

We, the jury, find the defendant, William R Coagin Guilty of the crime of RAPE In The First Degree as charged in Count II.

We the jury find the defendant William R. Coagin, Guilty of the crime of RAPE IN THE FIRST DEGREE as charged in Count IV.

We the jury find the defendant, WILLIAM R COGIN, Guilty of the crime of RAPE IN THE FIRST DEGREE as charged in Count V.

We, the jury, find the defendant, WILLIAM A COGIN GUILTY of the crime of Assault In The Second Degree as charged in Count VII.

We, the jury, find the defendant, William R Coagin, GUILTY of the crime of Robbery IN THE FIRST Degree as

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Coagan
Defendant/Respondent

Charged in Count VII

We the jury, find the defendant, William R Coagan GUILTY of the crime of Robbery In The First

Degree as charged in Count VIII

We the jury, find the defendant, William R Coagan, GUILTY of the crime of Robbery In The First

Degree as charged in Count IX

We the jury, find the defendant, William R Coagan, GUILTY of the crime of Robbery In The First Degree as

Charged in Count X

We the jury, find the defendant, William R Coagan, GUILTY of the crime of Robbery In The First Degree as charged in Count XIWe the jury, find the defendant, William R Coagan, GUILTY of the crime of Unlawful Possession of A FIREARM IN THE FIRST Degree as charged in Count XII

We the jury, find the defendant, William

Cause No. 04-1-01098-8

State

vs.

Coagion

Plaintiff/Petitioner

Defendant/Respondent

R. Coagion GUILTY of the crime
of Unlawful Possession of a
Pistol in the First Degree, as
charged in Court XIII.

4

Providing for

* See page 15 for Special Verdict
Form as read by Clerk.

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DATE:

6-29-05

FILED IN OPEN COURT

6-29 2005

WHATCOM COUNTY CLERK

Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,)

Plaintiff,)

NO. 04-1-01098-8

) SPECIAL VERDICT FORM

vs.)

) VERDICT FORM

) Reached 4:12 PM

WILLIAM R. COGGIN,)

Defendant.)

We, the jury, return a special verdict by answering as follows:

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of BURGLARY IN THE FIRST DEGREE as charged in Count I.

Answer YES (Yes or No)

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vs

COGGIN

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Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of RAPE IN THE FIRST DEGREE as charged in Count II.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of RAPE IN THE FIRST DEGREE as charged in Count III.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of RAPE IN THE FIRST DEGREE as charged in Count IV.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of RAPE IN THE FIRST DEGREE as charged in Count V.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of ASSAULT IN THE SECOND DEGREE as charged in Count VI.

Answer YES (Yes or No)

State

vs

04-1-01098-8
COGGIN

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of ROBBERY IN THE FIRST DEGREE as charged in Count VII.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of ROBBERY IN THE FIRST DEGREE as charged in Count VIII.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of ROBBERY IN THE FIRST DEGREE as charged in Count IX.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of ROBBERY IN THE FIRST DEGREE as charged in Count X.

Answer YES (Yes or No)

Was the defendant, WILLIAM R. COGGIN armed with a firearm at the time of the commission of the crime of ROBBERY IN THE FIRST DEGREE as charged in Count XI.

Answer YES (Yes or No)

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Presid-Juror
ing

Cause No. 04-1-01098-8

State

vs.

Coagun

Plaintiff/Petitioner

Defendant/Respondent

Jury is called by the clerk and
found to be unanimous in their
verdict.

Court thanked jurors and excused
jurors from the courtroom.
Court adjourned 4:45 PM.