

No. 91905-4

No. 71383-3-I

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

**IN RE THE PERSONAL RESTRAINT PETITION OF
HECTOR SALINAS, Petitioner.**

**MOTION TO STAY PROCEEDINGS
and SUPPLEMENTAL RESPONSE TO
PERSONAL RESTRAINT PETITION**

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007/ ADMIN #91075**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 NOV 24 11:11:06

Table of Contents

A.	AUTHORITY OF RESTRAINT OF PETITIONER	1
B.	ISSUES	1
C.	RELEVANT FACTS	1
D.	ARGUMENT	1
	1. This Court should stay the proceedings in this case pending the decisions in In re Coggin and In re Speight, which decisions will likely address the issue of invited error in the context of a defendant’s right to public trial.....	3
	a. waiver.....	5
	2. Salinas has failed to meet his burden to affirmatively establish that appellate counsel was ineffective in failing to assert a violation of the right to public trial given the law at the time of the direct appeal and the facts in this case.....	7
	3. This Court should order a reference hearing before granting the requested relief.....	11
E.	CONCLUSION	15

TABLE OF AUTHORITIES

Federal Cases

<u>Charbonneau v. U.S.</u> , 702 F.3d 1132 (8 th Cir. 2013)	8
---	---

State Cases

<u>In re Copland</u> , 176 Wn. App. 432, 309 P.3d 626 (2013)	4
<u>In re D'Allesandro</u> , 178 Wn. App. 457, 314 P.3d 744 (2013)	8
<u>In re Isadore</u> , 151 Wn.2d 294, 88 P.3d 390 (2004)	5
<u>In re Morris</u> , 176 Wn.2d at 185	9, 11
<u>In re Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004)	9
<u>In re Pers. Restraint of Netherton</u> , 177 Wn.2d 798, 306 P.3d 918 (2013)	8
<u>In re Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992)	12, 13
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995)	3
<u>State v. Bowen</u> , 157 Wn. App. 821, 239 P.3d 1114 (2010)	9
<u>State v. Frawley</u> , ___ Wn.2d ___, 334 P.3d 1022 (2014)	5, 6
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009)	2
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009)	2
<u>State v. Zakel</u> , 61 Wn. App. 805, 812 P.2d 512 (1991) <i>affirmed</i> , 119 Wn.2d 563, 834 P.2d 1046 (1992)	5

State Rules

RAP 17.1(a)	4
-------------------	---

A. AUTHORITY OF RESTRAINT OF PETITIONER

Petitioner Hector Salinas is under sentence pursuant to Judgment and Sentence entered in Whatcom County Superior Court cause number 08-1-000877-3.

B. ISSUES

1. Whether the petition should be stayed pending the cases of *In re Coggin* and *In re Speight*, since it is likely that the Supreme Court will address the invited error doctrine as it relates to the right to public trial in those cases.
2. Whether petitioner has demonstrated that appellate counsel was ineffective in failing to raise an issue regarding the right to public trial where Washington Supreme Court caselaw at the time was not favorable and the record showed that he invited the error by requesting private voir dire, such that appellate counsel could have strategically chosen not to assert the error in the direct appeal.
3. Whether the Court should remand this matter to the trial court to resolve disputed material facts as to why appellate counsel did not raise the alleged violation of right to public trial and whether the defendant invited the error.

C. RELEVANT FACTS

The relevant facts, and the evidentiary support, are set forth in the State's Response to Personal Restraint Petition ("Response").

D. ARGUMENT

Salinas asks this Court to find that his appellate counsel was ineffective for failing to brief an alleged violation of his right to public trial and to reverse his conviction. He has *not* alleged ineffective

assistance of trial counsel. Under the invited error doctrine, Salinas would have been precluded from raising the issue on appeal. The issue would not have been meritorious, and therefore Saminas has failed to demonstrate ineffective assistance of appellate counsel int his collateral attack. As the Washington Supreme Court is currently considering the doctrine of invited error in the context of the right to public trial, the State is moving to stay this case. In addition, given the law at the time his appeal brief was filed, Salinas cannot demonstrate that the alleged violation would have been meritorious because it is likely an appellate court would have determined that the facts of this case are more similar to State v. Momah¹ than State v. Strode².

If this Court were to find that the record as currently presented is insufficient to preclude Salinas's collateral attack based on invited error, the State submits there are material disputed facts as to why appellate counsel did not assert a violation of the right to public trial and whether the defense requested private voir dire, and requests a reference hearing.

¹ State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

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

- 1. This Court should stay the proceedings in this case pending the decisions in *In re Coggin* and *In re Speight*, which decisions will likely address the issue of invited error in the context of a defendant's right to public trial.**

Salinas contends questioning seven prospective jurors in chambers without a complete weighing of the Bone-Club³ factors on the record constituted a violation of his right to a public trial and that appellate counsel's failure to raise this issue on appeal was ineffective assistance of counsel. The State has asserted that the invited error doctrine precludes consideration of this issue since Salinas has not alleged that defense counsel was ineffective in inviting the error. The defense filed three separate questionnaires that called for private voir dire, the prosecutor did not request private voir dire, the defense did not object when the court asked twice if anyone in the courtroom objected to private voir dire, and the defense actively participated in and expanded the scope of the private voir dire. The record supports a conclusion that Salinas invited the error by proposing the private voir dire in his proposed questionnaires and his subsequent actions. The Supreme Court currently is considering the issue of the invited error doctrine⁴ as it relates to a defendant's right to public in

³ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

⁴ The State set forth the law regarding to the invited error doctrine in its Response. The State therefore will not reiterate that argument in this brief. The State continues to adhere to its arguments set forth in its Response, and this brief is intended to merely supplement those arguments.

at least two cases, *In re Coggin* and *In re Speight*. The State therefore moves for a stay of proceedings pending the decisions in those cases.

There are currently two cases before the Washington Supreme Court in which the Court is considering the doctrine of invited error as it applies to a defendant's right to public trial, *In re Roland Speight*, Sup. Ct. No. 89693-3 and *In re William Coggin*, Sup. Ct. No. 89694-1. Both cases were argued in May of 2014 and issues regarding the invited error doctrine and its application to a defendant's constitutional right to public trial were discussed at those arguments.⁵ One of the cases the State previously cited, *In re Copland*, 176 Wn. App. 432, 309 P.3d 626 (2013), squarely presents the issue of invited error and its applicability to the right to public trial and is currently pending a motion for discretionary review before the Washington Supreme Court, which motion has been stayed pending *In re Coggin* and *In re Speight*. See Washington Sup. Ct. No. 893683.

Under RAP 17.1(a), a party may seek relief other than a decision on the merits by filing a motion for that relief. The State believes the cases of *In re Coggin* and *In re Speight* will have a significant, and potentially dispositive, impact on Salinas's petition. The State therefore requests that this petition be stayed pending decisions in those cases.

⁵ See, www.tvw.org/index.php?option=com_tvoplayer&eventID=2014050008, www.tvw.org/index.php?option=com_tvoplayer&eventID=2014050009.

a. waiver

The State also argued in its Response that Salinas's conduct waived the alleged error he asserts in his petition. While the Supreme Court explicitly addressed that issue in its decision in State v. Frawley, its decision was a fractured decision and provides little guidance to this court regarding what is specifically required for a defendant to waive his/her right to public trial. "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992). As a plurality opinion Frawley provides questionable guidance in addressing the issue under the circumstances of this case.

While it appears from the multiple opinions filed in State v. Frawley, that a defendant can affirmatively waive his or her constitutional right to public trial and that the waiver must be knowing, intelligent and voluntary, there was no agreement as to what specifically was required for a defendant to affirmatively waive the right. State v. Frawley, ___ Wn.2d ___, 334 P.3d 1022, 1030-31, 1035 (2014) (Concurrence, J. Stephens; Concurrence J. Gordon-McCloud; Dissent, J. Wiggins). It appears a

majority of the court would find that waiver of the right is valid at a minimum where there was either a personal expression from the defendant or there is an indication that the right had been discussed with the defendant prior to counsel's waiver on behalf of the defendant. *Id.* at 1034, 1035. (Concurrence, J. Gordon McCloud; Dissent, J. Wiggins). However it is not clear whether a majority would hold that something less than that would suffice. Justice Stephens concurrence states that the record must be clear that the waiver was knowing, intelligent and voluntary. *Id.* at 1031. Given that Frawley is a plurality opinion, its precedential value is limited. While an affirmative waiver in accord with Justice Gordon-McCloud's concurrence does not appear in the record currently before this Court, it is likely there was a discussion with the parties before the trial judge decided to permit private voir dire since the questionnaire used is not the same as the one submitted by Salinas's counsel. Should this matter be remanded for a reference hearing, the limited, plurality opinion in Frawley may apply.

2. Salinas has failed to meet his burden to affirmatively establish that appellate counsel was ineffective in failing to assert a violation of the right to public trial given the law at the time of the direct appeal and the facts in this case.

Salinas asserts that under In re Morris⁶ he is entitled to reversal of his conviction and a new trial. Salinas must demonstrate that if the right to public trial violation he now asserts had been raised on direct appeal, it would have been successful. He cannot because it was invited error, and he would have been precluded from asserting it on direct appeal. Appellate counsel may have strategically chosen not to assert the issue believing it would have been precluded under the invited error doctrine or that it would not have been successful under the state of the law at the time the brief was filed. At that time In re Morris had not been issued, and the only decisive opinions that had been issued were State v. Momah and State v. Strode. Given that the facts and circumstances in this case more closely resembled those in Momah, the record is insufficient to demonstrate that appellate counsel was ineffective in failing to assert a right to public trial violation on appeal.

In order to successfully raise an ineffective assistance of appellate counsel claim, the defendant, in addition to showing prejudice, must demonstrate the merit of the legal issue that appellate counsel was

⁶ In re Personal Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

allegedly ineffective in failing to raise. In re Pers. Restraint of Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013). Appellate counsel's representation is presumed effective, and in fact review is particularly deferential when the alleged ineffectiveness is based on the failure to raise an issue on appeal. Charbonneau v. U.S., 702 F.3d 1132, 1136 (8th Cir. 2013). In order to demonstrate prejudice in an ineffective assistance of appellate counsel claim, the petitioner must show that the issue the petitioner claims should have been raised would have resulted in reversal of the conviction. *See*, In re D'Allesandro, 178 Wn. App. 457, 314 P.3d 744 (2013) (in order to establish prejudice from appellate counsel's failure to assert a right to public trial issue in the petition for review from the direct appeal, the petitioner must demonstrate that the Supreme Court would have granted review and reversed the conviction). Unless Salinas can provide specific, contrary evidence, this Court should presume that appellate counsel's failure to raise an issue was sound appellate strategy. *See*, Charbonneau, 702 F.3d at 1136-37.

At the time appellate counsel filed the opening brief in the direct appeal in June 2011, In re Morris, relied upon by Salinas, and many of the right to public trial cases outlining the parameters of the right, had not been decided. The only Washington Supreme Court appellate opinions that had been decided were Momah and Strode, and Strode was a plurality

opinion. A number of the Court of Appeals opinions that addressed subsequent right to public trial claims essentially tried to determine whether the facts of the case were more like those in Momah or those in Strode. *See e.g., State v. Bowen*, 157 Wn. App. 821, 831, 239 P.3d 1114 (2010) (“We conclude that the circumstances in this case are more similar to those in Strode than those in Momah.”)

While In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), had also been decided, the defendant in that case had specifically objected to the closure, whereas here not only did Salinas fail to object, he proposed the private voir dire when he filed the questionnaires that called for it. In re Orange also involved the exclusion of family members from the courtroom during the entire voir dire over the defendant’s objection solely due to concerns regarding courtroom capacity. In re Orange, 152 Wn.2d at 801-02. The court specifically found that the defendant had been harmed by the closure of the voir dire because the defendant’s family had been unable to contribute their insight into the jury selection process and the venire had not seen that they were interested individuals. *Id.* at 812. The error in In re Orange was “conspicuous in the record,” and thus appellate counsel should have known to raise it on direct appeal. In re Morris, 176 Wn.2d at 185 (Wiggins, J., dissenting). The facts in In re Orange would

not have alerted appellate counsel that asserting a violation of the right to public trial in Salinas's appeal would be meritorious.

Salinas asserts the holding in Momah has been narrowed significantly by subsequent opinions. While the Washington Supreme Court subsequent decisions have emphasized the "unique" facts of the Momah decision, those decisions were not published at the time the opening brief was filed, and in fact, Momah still has not been overruled. Here, defense counsel sought private voir dire as evidenced by the questionnaires defense counsel proposed. The discussion that occurred before the private voir dire shows the court was aware of the right to public trial because it informed the parties that if anyone objected, they would not be able to do voir dire outside of the courtroom. The compelling interest, the jurors' privacy, was obvious from the the court's reference to the sensitive nature of the questions. The judge specifically inquired of the entire courtroom if anyone objected to in chambers questioning of those jurors who wished to speak privately on sensitive issues. Defense counsel actively participated in the in-chambers questioning and even expanded it beyond those issues identified by the jurors. The facts of this case are more comparable to Momah than those in Strode. Therefore, appellate counsel was not ineffective in failing to raise

the issue because the law at the time didn't dictate that the issue would have been meritorious.

Moreover, In re Morris is factually distinguishable because in that case the defendant did not invite the violation of the right to public trial. It was the trial court that ordered the private voir dire. In re Morris, 176 Wn.2d at 166-67. The State only asserted that the defendant's waiver of his right to be present was effective to waive his right to public trial and did not otherwise assert that appellate counsel was not ineffective. *Id.* The court in In re Morris found that appellate counsel had been ineffective in failing to raise the issue on appeal, and in doing so, found that the issue on appeal would have been determined to be meritorious. *Id.* at 166. It then concluded that prejudice would be presumed because it would have been presumed on appeal. *Id.*

3. This Court should order a reference hearing before granting the requested relief.

Salinas asserts that the State has failed to identify any material disputed issues of fact. On the contrary there are two issues: 1) whether appellate counsel's failure to raise the alleged violation of the right to public trial on appeal was strategic, as the State alleges, or due to ineffectiveness, as Salinas alleges; and 2) whether the trial court permitted private voir dire of individual jurors because trial counsel for Salinas

requested it, as the State alleges, or whether the trial court utilized the private voir dire process on its own initiative, as Salinas alleges. While the State believes the record is sufficient to permit this Court to dismiss the petition based on invited error, should it find the record insufficient to establish that, the State asks this Court to remand this matter for a reference hearing to address those two material disputed issues of fact.

As a threshold matter, a petitioner must state the facts underlying the claim of unlawful restraint, and the evidence to support those facts, in the petition. In re Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). The petition “must state with particularity facts which, if proven, would entitle him to relief.” *Id.* at 886. If the factual allegations are based on knowledge in the possession of others, the petitioner “may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence.” *Id.* The point of this requirement is to make sure the petition is not based on speculation, conjecture of inadmissible hearsay. *Id.*

The State in turn must meet the allegations in the petition and identify material disputed questions of fact, and in doing so must present its own competent evidence. *Id.* If the evidentiary materials presented identify a material disputed question of fact, the matter is remanded for the

superior court to hold a reference to resolve the disputed issue of fact. *Id.* at 886-87.

Salinas did not include in his petition any affidavit from his appellate counsel as to why she did not raise the right to public trial issue on appeal. Due to attorney client privilege, he was in the best position to provide such an affidavit. An attorney's representation is presumed effective. Given this presumption and the privilege, Salinas should have filed an affidavit from his appellate counsel as to why she didn't raise the issue in order to provide the requisite evidence to support his claim that her representation was ineffective.

The record supports a conclusion that but for defense request for private voir dire of jurors on questions of a personal nature, the court would not have conducted the individual voir dire of jurors in a closed setting. Salinas filed three separate questionnaires, each of which requested private voir dire. Two were right before trial⁷ was actually held and before the court ever made its statements about the individual voir dire procedure. The first was filed over a month before that, presumably before a previous trial date. The questionnaires informed the jurors that they could indicate they would prefer to answer questions of a "personal

⁷ The three proposed questionnaires appear to be nearly identical, except for some of the names listed as potential witnesses. See Appendix B, C, D of State's Response

nature” “in private,” and then one of the questions queried, “Would you prefer to discuss the answer to any of these questions privately rather than in open court?” The trial deputy averred in her affidavit that she did not request that the jurors be questioned in private and that she was opposed to some of the questions proposed in the defense questionnaire.

If appellate counsel believed that Salinas invited the error, it would have been a legitimate appellate strategy not to raise the issue, particularly given the number of other issues that appellate counsel did raise. The current record certainly supports the State’s position that Salinas invited the alleged right to public trial violation by defense counsels’ actions in seeking private voir dire, coupled with failing to object when the court specifically inquired of everyone in the courtroom if they objected to questioning those jurors who had indicated they wished to be questioned in private on questions that were of a “sensitive nature.”

Salinas speculates that there was no strategic reason that appellate counsel did not raise the right to public trial issue, that it only could have been due to ineffectiveness. If this supposition is competent evidence regarding appellate counsel’s rationale, then the State submits there is a disputed issue as to a material fact. The evidence presented thus far indicates that defense counsel sought private voir dire of jurors and the prosecutor did not. Given this, and given the state of law regarding the

right to public trial at the time the opening appellate brief was filed, appellate counsel could have strategically chosen not to raise the public trial issue. If this evidence is not sufficient to convince this Court that defense counsel invited the error and that the appellate counsel's failure to raise the issue on appeal could be due to this strategic reason, the matter should be remanded for a reference hearing.

E. CONCLUSION

This Court should stay this matter pending the Supreme Court's decisions in *In re Coggin* and *In re Speight*, and possibly *In re Copland* should review of that case be accepted after decisions are rendered in *Coggin* and *Speight*.

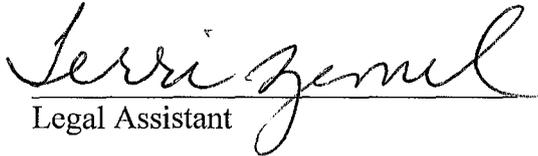
Respectfully submitted this 21st day of November, 2014.


HILARY A. THOMAS, WSBA #22007
Admin. No. 91075
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel, David Koch, addressed as follows:

David Koch
Nielsen Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122-2842


Legal Assistant


Date