

No. 93038-4

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COURT OF APPEALS
STATE OF WASHINGTON
By: 30

No 31227-5-III
(consolidated with 31338-7-III)

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

IN RE THE RESTRAINT OF:

ALEKSANDR PAVLIK,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

Judgment in Spokane County Superior Court No. 08-1-01641-3
The Hon. Jerome Leveque, Presiding

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A. SUPPLEMENTAL ARGUMENT

1. *Introduction*

In his amended PRP, Mr. Pavlik raised a series of constitutional objections to holding “for cause” challenges and hardship exemptions at a bench conference, from which both the defendant and the public were excluded. Mr. Pavlik argued that the bench conference violated both the right to a public trial in an open courtroom and his right to be present in violation of the First, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 22 of the Washington State Constitution. Moreover, Mr. Pavlik specifically argued that his appellate counsel rendered ineffective assistance of counsel on appeal, in violation of the Fifth and Fourteenth Amendments and article I, sections 3 & 22, because he not only failed to order the transcripts of jury selection, but he did not raise the public trial/right to be present argument on direct appeal. *Amended Personal Restraint Petition* at 31-32, 48-49; *Opening Brief of Petitioner* at 3-8.

On February 27, 2014, this Court stayed consideration of Mr. Pavlik’s PRP pending resolution of two cases in the Supreme Court, *In re Speight*, No. 89693-2 and *In re Coggin*, No. 89694-1. On December 11,

2014, the Supreme Court issued its decisions in these two cases. By order entered on January 27, 2015, this Court lifted the stay and ordered supplemental briefing as the applicability of the Supreme Court's new decisions.

2. ***Speight and Coggin Do Not Provide Much Precedential Authority for Deciding this Case***

The Supreme Court issued split decisions in *Speight* and *Coggin*, with the same 4-1-4 vote breakdown in each case. An analysis of the multiple opinions reveals that, despite the one year delay to this case, caused by the stay, *Speight* and *Coggin* really add very little to the resolution of Mr. Pavlik's case.

a. ***Coggin***

In *Coggin*, 12 prospective jurors were questioned in chambers and six were dismissed for cause. Mr. Coggin did not raise a public trial issue on direct appeal, and, on collateral attack, raised a challenge under article I, section 22. He apparently did not raise challenges under the First and Sixth Amendment, nor did he raise challenges based upon the right to be present and the right of effective assistance of appellate counsel under the Sixth and Fourteenth Amendment and article I, sections 3 & 22. *Coggin*, Slip Op. at 3.

The lead opinion, authored by Justice Johnson (joined by Justices Wiggins, Gonzalez and Justice Pro Tem Kulik), held that there was an unconstitutional closure by the in-chambers questioning of jurors without a *Bone-Club*¹ analysis. The lead opinion further held that this error was not “invited” by the defense. *Coggin*, Slip Op. at 4-6 (Johnson, J., opinion). However, Justice Johnson concluded that the petitioner could not make out a showing of “actual and substantial prejudice,” thus (with Justice Madsen’s concurring vote) denied the PRP. *Coggin*, Slip Op. at 6-11 (Johnson, J., opinion).

In contrast, the dissenting opinion, authored by Justice Stephens (joined by Justices McCloud, Fairhurst and Owens), criticized Justice Johnson for applying a harmless error test to a structural error. *Coggin*, Slip Op. at 7-12 (Stephens, J., dissenting). Justice Stephens would have held that a finding that the public trial right was violated itself proves the necessary prejudice to grant a PRP: “[T]he prejudice from a public trial violation inheres in the error.” *Coggin*, Slip Op. at 3 (Stephens, J., dissenting). The four dissenters would have granted relief, pointing to prior collateral attack decisions that granted relief on this issue under the

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

rubric of ineffective assistance of appellate counsel. *Coggin*, Slip Op. at 2, 7, 10-11, citing *In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), and *In re Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012).

Justice Madsen concurred with the lead opinion, but only with the ultimate remedy – denial of the PRP – thereby providing the necessary fifth vote. *Coggin*, Slip Op. at 1 & 5 (Madsen, C.J., concurring) (“I agree with the lead opinion’s decision to deny William Coggin’s personal restraint petition . . . I concur with the lead opinion’s decision to deny Coggin’s petition.”). Justice Madsen agreed that there was constitutional error, but concluded that the defendant invited the error. Thus, she would not reach the issue of whether a special showing of prejudice was required in the collateral attack context. *Coggin*, Slip Op. at 2-5 (Madsen, C.J., concurring).

Justice Madsen did state:

Nevertheless, because guidance is needed I would agree with the majority that the error here, failure to engage in the analysis outlined in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), requires a petitioner in a personal restraint petition to prove prejudice unless he can demonstrate that the error in his case “infect[ed] the entire trial process” and deprive the defendant of “basic protections,” without which “no criminal punishment may be regarded as fundamentally fair.” *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)

(quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); *Rose v. Clark*, 478 U.S. 570, 577, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)).

Coggin, Slip Op. at 1-2 (Madsen, C.J., concurring).

However, Justice Madsen never returned to this topic in the rest of her opinion. Thus, she did not explain how her recitation of the general principles of collateral attack cases in any way differed from Justice Stephens' application of those same principles or if she was adopting the lead opinion's conclusions.² Specifically, Justice Madsen never discussed or disagreed with Justice Stephens' conclusion that, for a public trial violation, proof of the violation constitutes proof of the prejudice. Ultimately, had Justice Madsen's opinion garnered a majority of votes, her statements about prejudice would have been mere dicta, not necessary to the outcome of the case and thus lacking in precedential value. *See Piper v. Dep't of Labor and Industries*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004) (appellate court not bound by dicta).

² The dissent actually agreed with the lead opinion (and Justice Madsen) that prejudice must be proven to grant relief in a collateral attack case. *Coggin*, Slip Op. at 2 (Stephens, J., dissenting) ("The lead opinion begins with the unremarkable proposition that a personal restraint petitioner must prove substantial and actual prejudice by a preponderance of the evidence in order to obtain relief."). Thus, Justice Madsen's recitation of the familiar test is simply an agreement with the position shared by all the other eight members of the Court and adds little to the mix.

b. Speight

In *Speight*, while jurors were completing questionnaires, “the trial judge, counsel, the clerk, the sheriff's deputy, and the court reporter went into the judge's chambers for motions in limine. Then, in response to the juror's answers to the questionnaires, 14 prospective jurors were questioned in chambers without the court engaging in the analysis required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Several prospective jurors were then excused or dismissed for cause.” *Speight*, Slip Op. at 2 (Johnson, J., opinion). In his PRP, Mr. Speight raised only a public trial challenge to the in-chambers jury selection and rulings on motions in limine, not raising challenges based upon ineffective assistance of appellate counsel or right of the defendant to be present.

Justice Johnson authored the lead opinion, again joined by Justices Wiggins, Gonzalez and Justice Pro Tem Kulik. Following *Coggin*, the lead opinion found a violation of the right to a public trial based on the in-chambers jury selection, but essentially side-stepped the issue of whether the public trial right was violated by the rulings in chambers on motions in

limine. *Speight*, Slip Op. at 4-5 (Johnson, J., opinion).³ However, the lead opinion dismissed the PRP because of a lack of showing of prejudice.

Speight, Slip Op. at 5-7.

Justice Stephens, joined again by Justices McCloud, Owens and Fairhurst, dissented. Justice Stephens incorporated her dissent to *Coggin*, and would have held “that personal restraint petitioners should not have to make a special showing of prejudice beyond establishing the prejudice of structural public trial error.” *Speight*, Slip Op. at 1 (Stephens, J., dissenting). Further, Justice Stephens criticized the lead opinion for “ignoring the motion in limine issue,” an issue that she would not have to reach because she would have granted relief on the jury selection issue.

Id. at 1-2.

Justice Madsen again concurred with the lead opinion:

but for different reasons. First, I believe that this court must decide whether motions in limine implicate the public trial right, and I would decide this question in the negative. Second, I would hold that Mr. Speight invited the judge to conduct portions of voir dire in chambers. Thus, in contrast to the lead opinion and in line with my concurrence in *Coggin*, I believe we need not determine the prejudice showing required of personal restraint petitioners.

³ With regard to the motions in limine, Justice Johnson stated: “Since jurors were privately questioned, a closure occurred, and we need not decide whether a second closure exists in this case.” *Speight*, Slip Op. at 5 (Johnson, J., opinion).

Speight, Slip Op. at 1 (Madsen, C.J., concurring). Again, Justice Madsen agreed with the general principle – “because guidance is needed” – that prejudice needed to be shown in the collateral attack situation. *Id.* However, ultimately, because of invited error, she “*would not reach the question of prejudice considered by the majority.*” I concur in the majority’s decision to deny Mr. Speight’s petition.” *Speight*, Slip Op. at 7 (Madsen, C.J., concurring) (emphasis added). Thus, as in *Coggin*, Justice Madsen’s discussion of the prejudice issue is conclusory, without application to the issue at hand, and would be dicta if in a majority opinion.

3. *Application to Mr. Pavlik’s Case*

“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.” *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). An analysis of the various opinions in *Speight* and *Coggin* reveals that the narrowest ground of the lead four-justice opinions and Justice Madsen’s concurring opinions is simply that, although there was public trial error when jury selection was conducted in chambers, the PRPs in those two cases should be denied. There is no other common ground between the lead and concurring opinions.

As for Justice Madsen's passing statements about the necessity of prejudice, her comments (which would be dicta if in a majority decision) do not differ significantly from Justice Stephens' recognition of the prejudice requirement. Justice Madsen's failure to discuss how the prejudice requirement in collateral attack may or may not be satisfied by the prejudice inherent in a structural error gives no clue as to whether she would agree with Justice Stephens' opinion or Justice Johnson's opinion on this subject.

Thus, despite the fact that Mr. Pavlik's case has been delayed for a year (while he has been incarcerated), *Speight* and *Coggin* have limited further precedential value for deciding his case.

On the other hand, the only area of implicit agreement of the justices is the fact that eight of the justices appear to recognize that there would be a different outcome if the petitioners had raised their claims under the rubric of ineffective assistance of appellate counsel.⁴ Justice Johnson recognized this to be the case:

We carved out an exception to this general rule in *In re Personal Restraint of Morris*, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012), where we held that we will presume prejudice for a petitioner who alleges a public trial right

⁴ Justice Madsen's opinions do not address this issue.

violation through an ineffective assistance of appellate counsel claim. But in *Coggin* we refused to extend this exception any further.

Speight, Slip Op. at 6 (Johnson, J., opinion). See also *Coggin*, Slip Op. at 6 (“Because we decided *Morris* on ineffective assistance of appellate counsel grounds, we did not address whether a meritorious public trial right violation is also presumed prejudicial on collateral review.”).

In dissent, Justice Stephens criticized Justice Johnson’s opinion for this distinction:

Moreover, how do the relative interests weigh differently simply because a personal restraint petitioner alleges ineffective assistance of appellate counsel for failing to raise a public trial violation (as in *Orange* and *Morris*) as opposed to a direct public trial violation?

Coggin, Slip Op. at 7 (Stephens, J., dissenting). In fact, Justice Stephens saw the question at stake in *Speight* as revolving around the issue of whether someone raised the right to a public trial under the ineffectiveness rubric:

This case turns largely on the same issue as *In re Personal Restraint of Coggin*, No. 89694-1 (Wash. Dec. 11, 2014): whether a personal restraint petitioner who suffered a violation of his right to a public trial should be denied a new trial when the petitioner does not also allege ineffective assistance of appellate counsel.

Speight, Slip Op. at 1 (Stephens, J., dissenting).

In this sense, eight of nine justices have not retreated from the decisions in *Morris* and *Orange* regarding ineffectiveness of appellate counsel for not raising a public trial claim on direct appeal. Thus, if *Speight* and *Coggin* have any precedential value at all, it is that if a collateral attack petitioner raises a claim that his or her counsel on direct appeal failed to litigate a public trial issue, and the issue would have been grounds for reversal, relief will be granted under the rubric of ineffective assistance of appellate counsel.

Thus, *Speight* and *Coggin* both support granting relief to Mr. Pavlik in this case, where he has made claims in his PRP based both on a violation of the public trial right and on ineffective assistance of appellate counsel (who did not even order the transcripts of jury selection).

Moreover, Mr. Pavlik has raised additional claims not raised in *Speight* and *Coggin*. These claims include the constitutional violation that occurred when Mr. Pavlik was not present at the bench conference during jury selection, an argument not made in either *Coggin* or *Speight*.⁵ Mr.

⁵ In *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014), a five-member majority of the Court held that there was no constitutional violation to holding a sidebar conference during the trial which addressed evidentiary matters. However, jury selection at sidebar was not an issue. With regard to sidebars during jury selection, the Supreme Court recently granted review of this Court's decision in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), *rev. granted* No. 89619-4 (1/7/15), which does address issues
(continued...)

Pavlik also is basing his claims on the right of the public to be present under the First and Sixth Amendments and article I, section 10, claims that were not apparently litigated in *Coggin* or *Speight*.

Accordingly, *Coggin* and *Speight* are of limited precedential value here, except to the extent that the majority of the Court recognizes that relief can be granted under the rubric of ineffective assistance of appellate counsel.

B. CONCLUSION

For the foregoing reasons, and the reasons set out in prior briefing, the Court should grant the petition.

DATED this 9 day of February 2015.

Respectfully submitted,

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Attorney for Petitioner

⁵(...continued).
related to the public's and defendant's right to be present at bench conference during jury selection involving challenges for cause. App. A.

Mr. Pavlik opposes staying his case pending resolution of *Love* in the Supreme Court. Mr. Pavlik is incarcerated and has other meritorious issues (such as jury instruction errors) that should result in relief. He therefore asks that his case not be delayed further for the issuance of possibly yet another split opinion by the Supreme Court.

APPENDIX A

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

UNTERS LEWIS LOVE,

Petitioner.

NO. 89619-4

ORDER

C/A NO. 30809-0-III

(consol. w/ 30810-3-III & 30811-1-III)

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Fairhurst, Wiggins, and Gordon McCloud, considered at its January 6, 2015, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted only as to the public trial and right to be present issues. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d).

DATED at Olympia, Washington this 7th day of January, 2015.

For the Court

Madsen, C.J.
CHIEF JUSTICE

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

IN RE THE RESTRAINT OF:

ALEKSANDR PAVLIK,
Petitioner.

CAUSE NO. 31227-5-III
(consol with 31338-7-III)

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare that on 9th day of February 2015, I deposited a copy of the attached SUPPLEMENTAL BRIEF OF PETITIONER into the United States mail, with proper first class postage attached, in an envelope addressed to:

Lawrence H. Haskell
Spokane County Prosecuting Attorney
Brian Clayton O'Brien & Andrew J. Metts, Deputy
1100 W. Mallon
Spokane, WA, 99260-0270

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

2-9-2015-SEATTLE, WA
DATE AND PLACE


ALEX FAST