

NO. 61980-2-1

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

In re the Personal Restraint of

JOHN A. WHITAKER,

Petitioner,

2009 DEC 14 AM 11:18
CLERK OF COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 2

 A. THE PETITIONER IS NOT ENTITLED TO A NEW TRIAL. 2

 B. THE PETITIONER MUST SHOW HE WAS ACTUALLY AND SUBSTANTIALLY PREJUDICED WHEN THE COURT ORDERED A BRIEF TEMPORARY COURTROOM CLOSURE DURING PORTIONS OF INDIVIDUAL VOIR DIRE. THE PETITIONER HAS NOT MET HIS BURDEN OF PROOF. 7

IV. CONCLUSION..... 11

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 8, 10
In re St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992) 7, 8
State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 2, 8
State v. Momah, ___ Wn. 2d ___. 217 P.3d 321 (2009) 1, 2, 3, 5, 6, 7,
9, 10
State v. Strobe, ___ Wn. 2d ___, 217 P.3d 310 (2009)..... 1, 6, 9
State v. Zakel, 61 Wn. App. 805, 812 P.2d 512 (1991) affirmed, 119
Wn.2d 563, 834 P.2d 1046 (1992) 6

FEDERAL CASES

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.E.d.2d 31
(1984)..... 10

WASHINGTON CONSTITUTIONAL PROVISIONS

Article 1, §22 2

WASHINGTON STATUTES

RCW 7.36.130..... 10

I. ISSUES

1. Where the petitioner's trial was highly publicized prior to trial and the petitioner demonstrated a concern regarding the impact of pre-trial publicity on the jury should the petitioner get a new trial because the court permitted a brief temporary closure of the courtroom during individual voir dire examination of 6 members of the venire?

2. When the defendant alleges a violation of his right to an open public trial on collateral review must he show that he was actually and substantially prejudiced in order to be entitled to relief?

II. STATEMENT OF THE CASE

The Court stayed this case until the Supreme Court ruled on State v. Strode, __ Wn. 2d __, 217 P.3d 310 (2009) and State v. Momah, __ Wn. 2d __, 217 P.3d 321 (2009). After those cases were decided the petitioner sought an order lifting the stay and granting supplemental briefing. This Court granted both motions and ordered the State to file a supplemental brief in response to the petitioner's supplemental brief.

The statement of the case has been adequately outlined in the State's initial response to this personal restraint petition. It is incorporated herein by reference.

III. ARGUMENT

A. THE PETITIONER IS NOT ENTITLED TO A NEW TRIAL.

In Momah the Court was asked to decide whether a defendant's constitutional right to a public trial under Article 1, §22 of the Washington State Constitution was violated when the trial court closed a portion of voir dire to safeguard the defendant's right to trial by an impartial jury. Momah, 217 P.3d at 323-24. Under the circumstances of the case the Court found closure was not a structural error and affirmed Momah's conviction. Id. at 324.

Momah's case was highly publicized pre-trial. Jurors were required to fill out a jury questionnaire pretrial. Based on the juror's responses the judge, prosecutor, and defense attorney created a list of jurors to be questioned individually. Defense counsel agreed to privately questioning those jurors in chambers. Jurors who stated a preference for private questioning were among that group of persons who were privately questioned. Defense counsel participated in the private questioning. As a result of that questioning counsel exercised numerous challenges for cause. Id. at 324. The trial court did not conduct a Bone-Club analysis prior to in chambers questioning.

The Court considered the defendant's right to an open public trial in light of his potentially competing right to an impartial jury. "One right privileges openness, while the other may necessitate closure." Momah 217 P.3d at 327. To achieve the correct balance between those two rights the court considered those rights in light of the central aim of the criminal proceeding to try the accused fairly. To that end the defendant is entitled to make tactical decisions to advance what he perceives will result in a fair trial. Id. at 327-328. The Court presumed Momah did just that. Id. at 328.

The Court concluded that the closure in that case was not a structural error because it was done to protect Momah's right to a fair jury and did not prejudice him. Momah was given the opportunity to object to closure but did not do so. He never gave the court any indication that the procedure would violate his right to a public trial. His counsel actively participated in the procedure, and took advantage of it causing several jurors to be removed from the panel.

There are many similarities between what occurred in Momah and what happened in the petitioner's case. There was a significant amount of pre-trial publicity. The petitioner's trial was the third trial held within weeks of the trials of two co-defendants.

Petitioner's trial counsel expressed concern about the amount of pre-trial publicity remarking "the pretrial publicity in this case is more intense than I've seen in recent years." 3-5-04 RP 16. On the first day of trial before jury selection began trial counsel made a motion to change venue. 5-24-04 RP 120-121. The court denied the motion initially but invited defense counsel to renew the motion if it appeared they would not be able to select an impartial jury. 5-24-04 RP 121-122.

Prior to jury selection the trial court asked the parties to submit a proposed juror questionnaire. The defendant advocated for a much longer questionnaire than the one proposed by the State.¹ Ultimately the Court did give the longer questionnaire. The defense was given the opportunity to object to the entire questionnaire or any portion of it. Defense counsel stated they were satisfied with the questionnaire. 5-24-04 RP 9. That questionnaire asked jurors if they were asking to answer any question in a closed hearing rather than in open court. See p 8,

¹ Defense counsel said that he would submit a proposed questionnaire to the Court. 3-5-04 RP 16. A copy of that proposed questionnaire was not filed with the Court. Because counsel advocated for a much longer questionnaire than the State's proposed questionnaire, and because defense counsel did not object to the questionnaire the trial judge ultimately proposed giving to the jury the implication is that the questionnaire given to the jury is the one that the defense proposed. The petitioner has produced no evidence that would refute that implication.

juror questionnaire. Defense counsel did not articulate his reasons for agreeing to this question on the record. It is reasonable to assume that under the circumstances, given the nature of the case and the amount of pre-trial publicity that had occurred that counsel believed that option may encourage otherwise reluctant jurors to more fully disclose information bearing on their qualifications as jurors. In any event defense counsel had the opportunity to object to questioning jurors in closed hearing and did not do so. He never even suggested to the court that questioning some jurors in a closed hearing would violate his right to a public trial.

Like counsel in Momah, the defense attorney here fully participated in questioning jurors during the closed hearings. Counsel used the information he gained in those hearings to challenge some of those jurors for cause. Some of his motions were granted, and others were not. 5-27-04 RP 417-420. Of the ones that were not granted counsel was able to exercise preemptory challenges to have the juror removed from the panel. 5-26-04 RP 90-104 (juror 11), 178-182 (juror 40), 189 (juror 41); 5-27-04 RP 413-416 (juror 56); 5-28-04 RP 573-577(juror 81). Although defense counsel did not question juror 25 who was excused for hardship purposes he stated that had she not been

excused for that reason he would have challenged her for cause based on bias. 5-26-04 RP 166-171.

The petitioner argues that Momah should not control the outcome of the case. Rather he argues the Court's decision in Strode is applicable and thus entitles him to a new trial. Strode was a plurality decision. "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. Zake, 61 Wn. App. 805, 808, 812 P.2d 512 (1991) affirmed, 119 Wn.2d 563, 834 P.2d 1046 (1992). The plurality in Strode found that unlike Momah the record did not reflect either the closing the courtroom was necessary to safeguard Strode's right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 217 P.3d at 217-218. The concurrence was clear that Strode did not involve a case that had an extraordinary amount of pre-trial publicity as occurred both here and in Momah. There was nothing in the record in Strode which suggested the defense was at all concerned that questioning jurors in a closed hearing was therefore necessary to ensure his right to a fair trial. As discussed above, defense counsel in petitioner's case was so concerned about the extent of pretrial publicity that he sought to have venue

changed. He was given the opportunity to object to the questionnaire which invited jurors to request questioning in a close hearing and did not do so. The defense could have but did not object when the court directed the courtroom be closed for the six jurors who were questioned in closed hearing during individual voir dire. For those reasons the Court should find as the court in Momah did that closure was not a structural error which requires the petitioner's conviction to be reversed and grant a new trial.

B. THE PETITIONER MUST SHOW HE WAS ACTUALLY AND SUBSTANTIALLY PREJUDICED WHEN THE COURT ORDERED A BRIEF TEMPORARY COURTROOM CLOSURE DURING PORTIONS OF INDIVIDUAL VOIR DIRE. THE PETITIONER HAS NOT MET HIS BURDEN OF PROOF.

On collateral review a petitioner who asserts a constitutional error as grounds for relief must establish by a preponderance of the evidence that he was actually and substantially prejudiced by the claimed error. In re St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). Although some errors which are per se prejudicial on direct review may also be per se prejudicial on collateral review, the Court has declined to categorically equate the two situations. Id. at 329. Unless the claimed error is per se prejudicial the petitioner bears the burden to prove he was actually and substantially prejudiced. Id. at 329.

The petitioner here only briefly touches on this step in the process for obtaining relief. He argues prejudice should be presumed on collateral review because appellate counsel would have been ineffective in failing to raise the issue on direct review, citing In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). In Orange the Court considered whether appellate counsel was ineffective for failing to raise a claim that the petitioner's public trial right was violated when the trial court fully closed the courtroom during the entire voir dire proceeding. Orange acknowledged the St. Pierre court had refused to accept the argument that all constitutional errors that are per se prejudicial on direct review are also presumed prejudicial for the purposes of a personal restraint petition. Id. at 804. The Court also recognized that had the defendant established his public trial right was violated on direct review prejudice was presumed in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Id. at 814. Because the Court believed the defendant would have established a violation of his public trial right had his counsel raised the issue on direct appeal the Court found defense counsel was ineffective. Under those circumstances the appropriate remedy was remand for a new trial. Id. at 814.

Momah and Strode alter this analysis. As discussed below, even if a violation of the defendant's public trial right has been established, a new trial is not the presumptive remedy. If the defendant is not automatically entitled to a new trial, then he has not established that he has been "actually and substantially prejudiced" by appellate counsel's failure to raise the alleged error on direct appeal. In that case his petition should not be granted unless the petitioner meets his burden of proof.

Here the petitioner has not met his burden of proof. Of the six jurors who were questioned during individual voir dire in a closed hearing two of those jurors were excused for cause. 5-26-04 RP 166-171; 5-27-04 RP 420. The remaining four jurors were questioned in open court during general questioning of jurors. 6-1-04 RP 635, 640, 647, 648, see Response to Personal Restraint Petition Ex. 2, p. 26-28 (hereinafter referenced as Ex. 2) . Of those jurors only Juror 41 actually served on the panel. Ex. 2, p. 31 (Angela Clement's seated in position 3 was juror 41).

The Court has identified the purpose of the public trial provision as benefitting both the defendant and the public. The defendant is benefitted because the public is permitted to see that he is fairly treated and the presence of interested spectators keep

the defendant's triers aware of their responsibility and the importance of their function. Momah, 217 P.3d at 325, Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.E.d.2d 31 (1984). The public is benefitted by being able to judge the fairness of the proceeding itself. Those members of the public who are the defendant's families and friends are benefitted by being able to contribute their knowledge and insight to the defendant during jury selection. Orange, 152 Wn.2d at 812. In the context of a personal restraint petition the petitioner is only able to assert his personal rights guaranteed by the Constitution have been violated as grounds for relief. RCW 7.36.130. Here prejudice the petitioner must establish in order to gain relief must relate to whether the public pressure on those trying the defendant to treat the defendant fairly and take seriously their responsibility was impaired by the closure. Whether members of the public were prejudiced, either because they could not personally judge the fairness of the proceedings, or because they were not able to give input with regard to the limited amount of responses to questions during the brief closed hearings, is immaterial.

The petitioner was not prejudiced because the benefit of an open public trial to the accused has been afforded in this case. The

two jurors who were excused during individual voir dire had no role in the decision in the petitioner's case, and could therefore have had no impact on whether or not he was treated fairly during trial. The same could be said for three of the four jurors who went through general voir dire and were excused. In addition, for those jurors, as well as juror 41 who actually did serve on the panel, the petitioner did receive the benefit of an open public trial when they were all questioned generally in open court. It cannot be said that the defendant did not receive the benefit of public scrutiny when those jurors were publicly questioned about their qualifications for jurors. There is no suggestion that any of the jurors did not approach their role as jurors in the petitioner's case with anything but the utmost respect.

IV. CONCLUSION

For the forgoing reasons, and the reasons set out in the State's initial response to personal restraint petition, the State asks

the Court to deny the petition.

Respectfully submitted on December 11, 2009.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent