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NO. 66055-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

BRIAN CHAMPACO,

Petitioner.

RECEIVED
COURT OF APPEALS
DIVISION ONE
MAY 22 2013

SUPPLEMENTAL BRIEF RE: OPEN COURTS ISSUES

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUE

Whether recent decisions from the Washington Supreme Court affect the analysis of Champaco's claims that he is entitled to a new trial based on the sealing of juror questionnaires and competency reports.

B. FACTS

No additional facts are needed.

C. SUPPLEMENTAL ARGUMENT

This case was stayed pending a decision in In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012). That case has now been decided and this Court has called for supplemental briefing. Since the briefing in this case was filed, the Washington Supreme Court has also decided other cases analyzing claims that court proceedings or records should not have been sealed and this Court has asked for the parties' views on how those cases may affect Champaco's petition. See State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012) (private questioning of jurors in *voir dire*); State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012) (individual questioning of jurors in chambers); State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) (court considered in chambers a question from a deliberating jury).

For several reasons, these cases collectively support the State's earlier arguments that Champaco's petition must be dismissed.

First, trial court error, if any, was invited because Champaco clearly asked for a confidential juror questionnaire and for sealing of the competency reports. This argument is indirectly bolstered by the decisions listed above in Morris, Wise, Paumier, and Sublett, insofar as none of these cases retreats from the analysis in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), holding that a claim of error that was invited – even if not a “classic” case of invited error – will not be reviewed on appeal. For example, in State v. Wise the majority opinion stated:

Wise cannot be said to have actively participated in effecting the courtroom closure during voir dire, as occurred in Momah. 167 Wn.2d at 146. This distinction is enough to render the invited error doctrine advanced by the dissent inapplicable.

Wise, 176 Wn.2d at 15 n.8. Clearly, by proposing a confidential juror questionnaire and arguing to keep it under seal, Champaco brought about the very closure that he attacks on collateral review; this claim is barred by the invited error doctrine.¹ See State's Response to Personal Restraint Petition at 5-9. Champaco also caused the court to seal the competency

¹ Because Champaco invited error, this Court need not examine the related but logically distinct doctrines of “failure to preserve” error, RAP 2.5(a), and “waiver” of claims. See Sublett, at 123-28.

documents, meaning that his claim regarding the sealing of these documents is also barred. *See* State's Response to Personal Restraint Petition at 9-13.

Second, the recent case of State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013) shows that a trial court's sealing of juror questionnaires is generally not closure in violation of defendant's right to public trial.

The questionnaires were completed prior to *voir dire* and utilized by the attorneys as a "screening tool." This facilitated the process by helping the attorneys identify which venire members would be questioned individually in open court and what questions to ask, if any. During general and individual *voir dire*, the judge, prosecutor, and defense attorneys, including Tarhan's counsel, questioned venire members in order to determine their ability to sit as an impartial juror. At most, the questionnaires provided the attorneys and court with a framework for that questioning. In some instances, the court began by reiterating a prospective juror's questionnaire response and then asked that person to elaborate in open court. And in other instances, some jurors were not questioned at all from their written responses. Nothing suggests the questionnaires substituted actual oral *voir dire*. Rather, the answers provided during oral questioning prompted, if at all, the attorneys for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. The sealing had absolutely no effect on this process. The order was entered after the fact and after *voir dire* occurred; it did not in any way turn an open proceeding into a closed one. Importantly, everything that was required to be done in open court was done. Therefore, we hold that no closure implicating Tarhan's public trial rights occurred.

Beskurt, 176 Wn.2d at 447-48.

To prevail by way of a personal restraint petition, Champaco must meet certain burdens and overcome certain hurdles. Ultimately, he bears the heavy burden of proving either: (1) actual and substantial prejudice arising from constitutional error, or (2) non-constitutional error that inherently results in a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). He cannot sustain this burden of proof with bare allegations unsupported by citation to the record. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). If allegations are based on matters outside the existing record, he must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1006 (1992).

Champaco cannot meet this burden because he has failed to provide a transcript of *voir dire*. Appendix A (showing that *voir dire* was never transcribed). Thus, he cannot demonstrate that the questionnaires were used differently than the questionnaires in Beskurt, and in a way that would violate his constitutional rights. He is not entitled to a reference hearing on this point when a verbatim report of proceedings could have

been submitted in support of his petition. He has simply failed to meet his burden and the petition should be dismissed.²

Third, even if Champaco could establish a violation of open courts principles due to the sealing of his competency reports, he is not entitled to a new trial. At best, he would be entitled to a remand for a hearing under GR 15 to consider whether the juror questionnaires of the competency reports should be filed without redactions in the superior court file. State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009). *See also* State v. Richardson, No. 85665-6, slip op. (2013 WL 1912613) (Wash. May 9, 2013) (“... since the record before us lacks any findings of fact by the trial court or the factors applied by the trial court, a new hearing is appropriate. Accordingly, we remand this case to the trial court to conduct a new hearing to determine if continued sealing remains justified under Ishikawa and GR 15(e)(2)”; State v. DeLauro, 163 Wn. App. 290, 297, 258 P.3d 696, 700 (2011) (failure to file competency report reversed with caveat that “DeLauro may still move under GR 15 to seal or redact the document if he can satisfy the five factor balancing test set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)”).

² Even the concurrence in Beskurt would not have found a violation of constitutional rights because Beskurt did not show that he or the public were deprived access to the questionnaires. Beskurt, at 457 (Stephens, J. concurring).

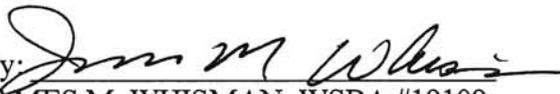
D. CONCLUSION

For the foregoing reasons, Champaco's personal restraint petition must be dismissed.

DATED this 22nd day of May, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

SRP

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SUPERIOR COURT, STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE of WASHINGTON,)	VERBATIM REPORT OF
)	PROCEEDINGS
Plaintiff,)	
)	
-vs-)	
)	Cause No. 06-1-09978-4 KNT
)	COA No. 61078-3-I
BRIAN CHAMPACO,)	
)	PRETRIAL
Defendant.)	
)	
)	

TRANSCRIPT

Of the proceedings had in the above entitled cause before the
HONORABLE MICHAEL HEAVEY, Superior Court Judge, on the 24th
day of September, 2007, reported by Joyce G. Stockman,
Certified Court Reporter, CCR No. 2652.

APPEARANCES:

FOR THE PLAINTIFF:

AMY MECKLING
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

MICHAEL MCCULLOUGH
Attorney at Law

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SUPERIOR COURT, STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE of WASHINGTON,)	VERBATIM REPORT OF
)	PROCEEDINGS
Plaintiff;)	
)	
-vs-)	
)	Cause No. 06-1-09978-4 KNT
)	COA No. 61078-3-I
BRIAN CHAMPACO,)	
)	PRETRIAL
Defendant.)'	
)	
)	

TRANSCRIPT

Of the proceedings had in the above entitled cause before the HONORABLE MICHAEL HEAVEY, Superior Court Judge, on the 25th day of September, 2007, reported by Joyce G. Stockman, Certified Court Reporter, CCR No. 2652.

APPEARANCES:

FOR THE PLAINTIFF:

AMY MECKLING
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

MICHAEL MCCULLOUGH
Attorney at Law

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THE COURT: Kathleen Swihart?

MS. MECKLING: Swihart.

(Jury selection continues, but not transcribed.)

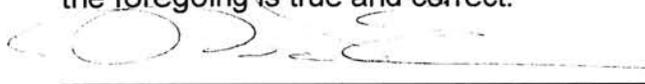
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(Whereupon, proceedings concluded.)

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jeffrey Erwin Ellis, at jeffreyerwinellis@gmail.com, the attorney for the petitioner, containing a copy of the Supplemental Brief RE: OPEN COURTS ISSUES, in IN RE PERSONAL RESTRAINT OF BRIAN CHAMPACO, Cause No. 66055-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

05/22/13

Date