

66202-3

66202-3

No. 66202-3-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RANDY WHITMAN,

Appellant.

N
SUBMITTED TO THE COURT
BY
GREGORY C. LINK
ATTORNEY FOR APPELLANT

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR.

The trial court violated the Sixth Amendment to the United States Constitution and Article I, sections 10 and §22 of the Washington Constitution by conducting pretrial proceedings in chambers.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

The right to a public trial permits a court to close proceedings to the public in limited circumstances and only where the trial court satisfies the factors set forth in State v. Bone-Club. Here the trial court conducted pretrial proceedings in chambers without engaging in an on-the-record analysis of the need for such closure, a balancing of competing interests, or entering formal findings and conclusions in a closure order. Did the trial court violate Mr. Whitman's right to a public trial?

C. STATEMENT OF THE CASE.

In October 1995, in the course of divorce proceedings from her then husband, Mr. Whitman, Catherine Jones obtained a no-contact order regarding Mr. Whitman. RP 42-43. In April 1996, despite the no-contact order, Ms. Jones and Mr. Whitman went to a party together. RP 46-47. Upon their return they became

embroiled in an argument that became physical. RP 46. Mr. Whitman was arrested and charged with a felony violation of the no-contact order. CP 58. The State also charged Mr. Whitman with felony harassment for several alleged telephone calls made in the months following the incident. Id.

Mr. Whitman apparently failed to appear for trial and the court issued a warrant. That warrant was finally served in 2009. Despite the passage of more than 14 years, and the absence of any intervening felony charges against Mr. Whitman, the State proceeded to trial in October 2011. RP.

On the first day of trial, and without any explanation for doing so, the court heard, in chambers, the State's motion to join the two offenses for trial. RP 10-14. The court granted the joinder motion over defense objection. RP 14.

A jury acquitted Mr. Whitman of the harassment charges, but convicted him of violating the no-contact order. CP 27-28.

D. ARGUMENT.

THE TRIAL COURT VIOLATED MR. WHITMAN'S
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

1. The right to a public trial requires the trial court conduct the proceedings in the public courtroom. The Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution guarantee an individual the right to a public trial. The Washington Constitution provides an additional mandate that "Justice in all cases shall be administered openly." Const. Art. I, § 10.

Proceedings may occur outside the public courtroom "in only the most unusual circumstances." State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). Before holding proceedings outside the public courtroom, the trial court must:

1. identify a compelling interest that the closure is essential to protect and show a "serious and imminent threat" to that compelling interest;
2. provide anyone present with the opportunity to object;
3. ensure that the method for curtailing open access is the least restrictive means available for protecting the threatened interests;
4. weigh the competing interests of the proponent of the closure and the public; and
5. ensure that the closure is no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); see also In re the Personal Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2005). The trial court must enter formal findings of fact and conclusions of law on these factors, which “should be as specific as possible rather than conclusory.” Orange, 152 Wn.2d at 807; accord Strode, 167 Wn.2d at 228.

If the record indicates a violation of the public-trial right, that error is presumed prejudicial. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). Thus, because it is a constitutional error which is presumptively prejudicial, it may be raised on appeal even in the absence of an objection in the trial court. State v. Lam, Wn.App. __ (Slip Op. 60015-0-I at 4-5, April 18, 2011).

2. The closure in this case was unconstitutional because no compelling interest was identified, no balancing analysis was performed, and no formal findings were entered. The public trial right applies to pretrial hearings. Easterling, 157 Wn.2d at 177-78. On facts that mirror those here, Easterling concluded the closure of a hearing on a co-defendant’s motion to sever violated Article I, section 22, as well as Article I, section 10. Id. at 178-79.¹ See

¹ While the trial court in Easterling also excluded Mr. Easterling from the hearing, the Supreme Court declined to reach the question of whether his

also, Orange, 152 Wn.2d 75 (public trial right applies to jury voir dire); Bone-Club, 128 Wn.2d at 257 (public trial right at pre-trial suppression hearing). Moreover, when a court conducts portions of the trial in chambers, it violates the public trial right. State v. Momah, 167 Wn.2d 140, 151, 217 P.3d 321 (2009).²

Here, the court heard in chambers the State's motion to join separate charges against Mr. Whitman. RP 12-14. That proceeding is subject to the public trial right. As in Easterling, the trial court never identified a compelling interest in holding a portion of the proceedings outside the courtroom. Necessarily, the court also failed to identify a serious and imminent threat to that interest. But "determination of a compelling interest is the affirmative duty of the trial court." Orange, 152 Wn.2d at 810. Nor did the trial court make findings justifying its actions.

In place of the analysis and findings required by Bone-Club, the trial court offered:

exclusion violated his right to be present. Instead, the Court's decision was premised solely upon the public trial right. 157 Wn.2d at 181-82.

² This Court's opinion in Momah rested upon the conclusion that conducting proceedings in chambers did not constitute a closure of the proceedings. State v. Momah, 141 Wn.App. 705, 712-15, 171 P.3d 1064 (2007). While the Supreme Court also affirmed the conviction, the Court never questioned the fact that the in-chambers proceedings were a closure. Rather the Court simply concluded that closure was narrowly tailored and in light of the circumstances did not require reversal. 167 Wn.2d at 145.

I sent the clerk out to the courtroom, she asked if there was anyone in the courtroom that was not a juror and nobody raised their hand and therefore there isn't anybody out there that would care to attend this hearing.

RP 10. This procedure fails to comport with Bone-Club. First, asking whether there are non-jury members present is not the same as asking whether anyone present objects to conducting the hearing outside the courtroom. Certainly there is no record of whether Mr. Whitman was asked if he objected to the procedure. Second, the court's chosen procedure does not account for persons who may have entered the courtroom after the clerk returned to chambers. There is nothing in the record to establish that person would know they were free to enter the judge's chambers to observe the hearing or to voice their objection. Finally, allowing objection to the procedure is but one of the five required considerations.

As in Strode, the trial court's failure to identify the interest at stake prevented it from satisfying the other Bone-Club factors. The court did not weigh the competing interests and did not show a serious and imminent threat to the unnamed interest. The court did not consider less-restrictive options. Finally, the court failed to

enter the “required formal findings of fact and conclusions of law relevant to the Bone-Club criteria.” Strode, 167 Wn.2d at 228.

But these steps are not optional.

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Orange, 152 Wn.2d at 806 (emphasis in original) (citing Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)).

In failing to satisfy these requirements, the trial court violated Mr. Whitman’s right to a public trial.

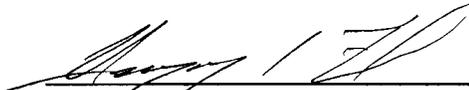
3. This Court must reverse Mr. Whitman’s conviction.

Because a violation of the right to a public trial is presumptively prejudicial, the appropriate remedy is to reverse Mr. Whitman’s conviction and remand for a new trial. Easterling, 157 Wn.2d at 181; Lam, at 8.

E. CONCLUSION

This court must reverse Mr. Whitman's conviction and remand this matter for a new trial.

Respectfully submitted this 21st day of April, 2011.



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DIVISION ONE**

STATE OF WASHINGTON,)	
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RESPONDENT,)	
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v.)	NO. 66202-3-I
)	
RANDY WHITMAN,)	
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APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 21st DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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WHATCOM COUNTY PROSECUTOR'S OFFICE
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SIGNED IN SEATTLE, WASHINGTON THIS 21st DAY OF APRIL, 2011.

X _____ *JA*

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