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COURT OF APPEALS NO. 67484-6-I

Court of Appeals
Division I

State of Washington IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re Personal Restraint Petition of

JEFFREY McKEE,

Petitioner.

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

The Honorable Douglas McBroom, Judge

PETITIONER'S REPLY TO STATE'S SUPPLEMENTAL BRIEF
ADDRESSING RECENT AUTHORITY

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A. SUPPLEMENTAL ARGUMENT IN REPLY

1. THE COURTROOM WAS CLOSED.

In explaining the jury questionnaire, the court told jurors they could have a “semi-private” question and answer session in that the lawyers and court staff would remain, but “of course nobody will be allowed in the courtroom[.]” Petitioner’s Supplemental Brief filed June 27, 2011 (PSB), Appendix N, pp. 72-73.

Several jurors confirmed the courtroom was in fact closed during individual voir dire. Juror 19 explained she requested private voir dire because she did not want to discuss her daughter’s rape “in public.” PSB, Appendix N, at 89. Juror 48 explained he requested individual voir dire because he “didn’t want this information about the family to be heard in public.” PSB, Appendix N, p. 107. Juror 71 explained he requested individual voir dire because he preferred not to discuss his sister’s rape “in open court.” PSB, Appendix N, at 115. Juror 8 – in explaining her request for a “private explanation” about her ability to be fair stated: “the more I imagine explaining this in public the less possible it seems.” PSB, Appendix N, p. 148. The court’s order and the jurors’ comments are proof positive the courtroom was closed for a large portion of voir dire in McKee’s trial.

This conclusion is also mandated by the Supreme Court's decision in State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005). On the day before jury selection began in Brightman's case, the judge sua sponte told the attorneys:

In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that. It causes a problem in terms of security.

When we move to the principal trial, anybody can come in here that wants to. It is an open courtroom.

Brightman, 155 Wn.2d at 511 (citation to record omitted).

On appeal, Brightman argued the courtroom closure during voir dire violated his public trial right. Brightman, at 509. The state did not disagree the court failed to properly consider the Bone-Club¹ factors. Rather, the state argued that before applying Bone-Club at all, the appellate court should "look beyond the plain language of the [trial] court's ruling in order to determine the nature of the closure." Brightman, at 516 (citation to state's brief omitted).

¹ State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (setting forth five requirements with which court must comply before closing the courtroom).

The Brightman court disagreed and explained the state misunderstood what it meant by “the nature of the closure” in In re Orange:²

The state relies on Orange, in which this court looked to the nature of the closure before evaluating the trial court’s compliance with the Bone-Club factors. Orange, 152 Wn.2d at 807, 100 P.3d 291. However, the Orange court defined the nature of the closure by looking *solely to the transcript of the trial court’s ruling* to determine the presumptive effect of the closure order. Id. at 807-08. The majority ultimately refused to impose upon the defendant the burden of proving that the trial court’s ruling was carried out. Id. at 813, 100 P.3d 291. Instead, “the very existence of the mandated order create[d] a strong presumption that the order was carried out in accordance with its drafting.” Id. Thus, once the plain language of the trial court’s ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed. Here, the state presents no evidence to overcome the presumption that closure in fact occurred.

Brightman, 155 Wn.2d at 516 (emphasis in original, footnote omitted).

Significantly, Orange was decided in the context of a personal restraint petition. Brightman, 155 Wn.2d at 516, n. 6. Thus, contrary to the state’s argument, whether the issue is raised on direct appeal or in a personal restraint petition, “once the plain language of the trial court’s ruling imposes a closure, the burden is

² In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

on the State to overcome the strong presumption that the courtroom was closed.” Brightman, at 516.

This Court should reject the state’s attempt to liken the facts of this case to those in State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014). There, the trial court adopted what could be characterized as a “wait and see” approach as to whether spectators would be allowed to observe. Initially, when asked by the prosecutor whether one of the victim’s family members (who was also a witness) could stay for voir dire, the court stated:

[W]e are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in a little anteroom out there.

Njonge, 181 Wn.2d at 549. Because the family member was also a witness, the court thought allowing jurors to see “that face” throughout the entire process might result in unfairness; it therefore ruled: “I am not going to allow it.” Id.

Speaking more generally, however, the court stated it would welcome as many observers as safely possible:

Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. What we are going to do to allow people to observe is check with the fire marshall ... and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow

some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.

Njonge, at 550. The court reiterated the “chance of all you being able to be here” was unlikely. Id. (emphasis added).

Jury selection began the next day and the record contained no mention about the presence or absence of spectators in the courtroom. The court excused a number of jurors for hardship. Njonge, at 550-51.

When court reconvened after lunch, the following exchange took place:

[Prosecutor]: Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. So I don't know if the Court has any problem with that. They are not witnesses. We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30. Is that okay with the Court if they are in there?

THE COURT: Actually, that seemed to be a better idea. We checked with the fire department. They wouldn't let us leave the doors open for visitors to come in. Let's move No. 30 over next to 34, and then we can have visitors sitting in the second row there.

Njonge, at 551.

On review, the Supreme Court found the record did not necessarily establish a closure:

A fair reading of the transcript does not lend itself to such certainty. In speaking to the observers about space limitations, the trial court explained that everyone was welcome to watch but that there might not be seats for everyone who wanted to observe. The court said, "Tomorrow when we have the jury selection, there will not be room for *all* of you. . . . The chance of all you being able to be here and observe are slim to none during the jury selections process." VRP (June 2, 2009) at 105-06 (emphasis added). The court mentioned that it was looking into the possibility of accommodating observers by allowing them to stand or sit in the anteroom, if the fire marshal permitted it.

This discussion does not demonstrate that *no* observers were going to be allowed in the courtroom during the first stages of voir dire. Rather, this passage of the record could easily suggest that the court sought to accommodate *additional* observers in the anteroom but was not able to do so. Neither does the later conversation with the prosecutor about allowing people to enter after some jurors were excused demonstrate that no spectators had been present during the hardship excusals. This may be one reasonable inference, but the record can equally be read to mean that additional persons were admitted as space became available.

Njonge, at 557 (emphasis in original).

As for the exclusion of the family member/witness, the Supreme Court adhered to precedent holding that the exclusion of witnesses does not implicate the public trial right, but is instead a

matter of discretion rooted in the court's courtroom management prerogative. Njonge, at 559.

Obviously, this case does not involve the exclusion of a witness. Njonge is therefore distinguishable on that basis.

But it is also distinguishable because, while the trial court in Njonge entered an order to exclude that one family member/witness, it did not issue such an order as to the general public. Rather, as the Supreme Court recognized the trial court explained it would try to accommodate as many spectators as possible, but likely would not be able to accommodate *all*.

The circumstances here are completely different. The court here did not adopt a "wait and see" approach. On the contrary, the court expressly ordered: "of course nobody will be allowed in the courtroom[.]" PSB, Appendix N, pp. 72-73. The *absence* of such a clear order in Njonge is why the Supreme Court looked to whether "it was clear that people were in fact excluded from the proceedings." Njonge, 181 Wn.2d at 556 ("The Court of Appeals properly concluded that a court need not *order* a closure to violate the public trial guarantee, but it never addressed the State's latter contention that it must be clear from the record that spectators were in fact excluded from proceedings") (emphasis in original).

Because there was an order excluding spectators in this case, the circumstances fall squarely under the ambit of Orange and Brightman. McKee has no burden to show the trial court's ruling was carried out. Brightman, 155 Wn.2d at 516; Orange, 152 Wn.2d 813. Rather, "the very existence of the mandated order create[d] a strong presumption that the order was carried out in accordance with its drafting." Orange, at 813. Here, the state presents no evidence to overcome the presumption that closure in fact occurred.

2. BECAUSE McKEE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, REVELAL IS REQUIRED UNDER ORANGE AND MORRIS.³

Contrary to the state's argument, neither In re Personal Restraint of Coggin,⁴ nor In re Personal Restraint of Speight,⁵ apply to McKee's case. In both cases, petitioners asserted their public trial rights were violated. Coggin, 182 Wn.2d at 116; Speight, 182 Wn.2d at 104. In both cases, a majority of the court held that a petitioner claiming a public trial right violation for the first time on collateral review must show actual and substantial prejudice. Coggin, 182 Wn.2d at 116 (lead opinion); Coggin, 182 Wn.2d at

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

⁴ In re Personal Restraint of Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014).

123 (Madsen, C.J., concurring); Speight, 182 Wn.2d at 107 (lead opinion); Speight, 182 Wn.2d at 108 (Madsen, C.J., concurring). Because neither Coggin nor Speight was able to show actual and substantial prejudice, their petitions were denied. Coggin, 182 Wn.2d at 116; Speight, 182 Wn.2d at 107.

Significantly, however, neither Coggin nor Speight argued ineffective assistance of appellate counsel for failing to raise the violation of their public trial right on direct appeal. In Coggin, the Supreme Court explained that this was fatal:

The general rule is when a personal restraint petitioner alleges a constitutional violation, the petitioner must establish by a preponderance of the evidence that the constitutional error worked to his actual and substantial prejudice. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). In In re Personal Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012), we recognized an exception to this general rule and held that in that case we would presume prejudice where petitioners allege a public trial right violation by way of an ineffective assistance of appellate counsel claim because “[h]ad Morris’s appellate counsel raised the issue on direct appeal, Morris would have received a new trial. ... No clearer prejudice could be established.” 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. Based on our cases, we hold no presumption applies in this context.

⁵ In re Personal Restraint of Speight, 182 Wn.2d 103, 340 P.3d 207 (2014).

Coggin, 182 Wn.2d at 119-20; see also Speight, 182 Wn.2d at 107; Morris, 176 Wn.2d at 166; Orange, 152 Wn.2d at 814.

Like Orange and Morris, McKee alleges a public trial right violation by way of an ineffective assistance of appellate counsel claim. PSB at 1, 26-29 (citing Orange, 152 Wn.2d 795); Reply Brief of Petitioner filed June 18, 2013 (RBP) at 10-11 (citing Morris, 176 Wn.2d 157). Appellate counsel was deficient because she should have known to raise the public trial right issue on appeal. The opening appellate brief in McKee's direct appeal (No. 56504-4-I) was filed in April 2006 and the case did not mandate until 2008. As the Supreme Court held in Morris, it had been well established since 2004, when Orange was decided, "both that Bone-Club applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on appeal." RBP at 10 (citing Morris, 176 Wn.2d at 167). McKee's "appellate counsel had but to look at this court's public trial jurisprudence to recognize the significance of closing a courtroom without first conducting a Bone-Club analysis." Morris, at 167. And had appellate counsel raised the issue on direct appeal, McKee "would have received a new trial. ... No clearer prejudice could be

established.” Morris, 176 Wn.2d at 166 (lead), 173-74 (Chambers, J., concurring).

This Court should reject the state’s argument – based on Coggin and Speight – that this Court should dismiss the petition because private questioning *perhaps* benefitted McKee. State’s Supplemental Brief Addressing Recent Authority on Public Trial Claims, at 7-9. Because appellate counsel performed deficiently, prejudice is presumed. The analysis of Coggin and Speight do not apply.

3. THIS COURT IS BOUND BY THE SUPREME COURT’S DECISIONS IN ORANGE AND MORRIS.

The remainder of the state’s Supplemental Brief Addressing Recent Authority on Public Trial Claims (pp. 9-31) is devoted to arguing the Supreme Court’s decisions in Orange and Morris are “incorrect and harmful” and should not be followed by this Court.

However, the principle of stare decisis – “to stand by the thing decided”—binds this Court to follow Supreme Court decisions, not to speculate that they will be overruled. A decision by the Supreme Court is binding on all lower courts in the state. 1000 Virginia Ltd. P’ship v. Vertecs Corp., 158 Wash. 2d 566, 578, 146 P.3d 423, 430 (2006), as corrected (Nov. 15, 2006) (citing Fondren

v. Klickitat County, 79 Wash.App. 850, 856, 905 P.2d 928 (1995)).

When the Court of Appeals fails to follow directly controlling authority by the Supreme Court, it errs. State v. Gore, 101 Wash.2d 481, 487, 681 P.2d 227 (1984).

Stare decisis also restrains new personnel on the Supreme Court from overruling the Court's precedents except in rare cases where time and events have proved the rule to be incorrect or harmful. State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). "Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions – a kind of amorphous creed yielding to and wielded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law." State ex rel. State Fin. Comm. v. Martin, 62 Wash.2d 645, 665–66, 384 P.2d 833 (1963), quoted in Ray, 130 Wash.2d at 677, 926 P.2d 904.

Thus, the state's argument is better directed to the Supreme Court. This Court is bound by Orange, reaffirmed in Morris.

Regardless, it does not appear the state's argument would have any traction in the Supreme Court. In Njonge, the Supreme Court rejected an "incorrect and harmful" argument made regarding a different aspect of the public trial right cases:

Not long ago, in the fall of 2012, this court held in Wise⁶ that a violation of the public trial right is reviewable for the first time on appeal. 176 Wn.2d at 16-19 & n. 11, 288 P.3d 1113. This was not an isolated holding, as the court traced state cases since Bone-Club, as well as federal precedent, and rejected an argument to overrule these cases, emphasizing that “[s]tability in the law and policy reasons demand that we maintain our rule.” Id. at 18, 288 P.3d 1126 (explaining that RAP 2.5(a) does not apply in its typical manner”). Subsequently, in State v. Beskurt, six justices did not address RAP 2.5(a) in analyzing the defendant’s public trial claim, despite a three-justice dissent that would have invoked the rule. 176 Wn.2d 441, 445-48, 293 P.3d 1159 (2013) (four justice lead opinion); id. at 456-59, 293 P.3d 1159 (Stephens, J., concurring, joined by Fairhurst, J.); id. at 449-50, 456, 293 P.3d 1159 (Madsen, C.J., dissenting). The State relies on the dissent in Beskurt and repeats the arguments that the cases that announced the presumption of prejudice for public trial violations – Bone-Club, Brightman, and Orange – are based on a pre-RAP 2.5(a) case, State v. Marsh, 126 Wash. 142, 217 P. 705 (1923). But the reasoning advanced by the Beskurt dissent gained no traction then, and we see no reason to embrace it now. We will overrule precedent only upon a showing that it is both incorrect and harmful. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The state cannot make this showing. We continue to hew to our well-reasoned and long-standing precedent and hold that a defendant’s failure to contemporaneously object to a public trial violation does not preclude appellate review under RAP 2.5(a).

Njonge, 181 Wn.2d at 555.

While this passage concerns the right to raise a public trial violation for the first time on appeal, the Court did include Orange

⁶ State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012).

(reaffirmed in Morris) in its list of “well-reasoned and long-standing precedent.” Id. The state’s “incorrect and harmful” argument should be rejected.

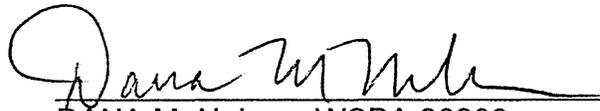
B. CONCLUSION

For the reasons stated in this Reply to the State’s Supplemental Brief Addressing Recent Authority, the Reply Brief of petitioner (filed 6/18/13) and Petitioner’s Supplemental Brief (filed 6/27/11), this Court should find McKee received ineffective assistance of appellate counsel and remand for a new trial.

Dated this 3rd day of February, 2016.

Respectfully submitted

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