

NO. 69950-4-1

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

REC'D
SEP 05 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MAURICE THROWER,

Appellant.

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

The Honorable Barbara Linde, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to a public trial.

Issue Pertaining to Assignment of Error

During jury selection, the trial court employed a procedure that prevented the public from scrutinizing the parties' peremptory challenges. Did this violate appellant's constitutional right to public trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

During the selection of Thrower's jury, after the court and counsel finished questioning prospective jurors, counsel were offered the opportunity to exercise their peremptory challenges. SRP¹ 250. The process was conducted in such a manner that members of the public could not see or hear the attorneys exercising their challenges. The court explained:

So, the process now is as follows: The parties, the attorneys, are going to make their selections known to the Court here in a few minutes. I'm going to take advantage of the time while they are doing their work to instruct you what comes next. And this

¹ "SRP" refers to the supplemental verbatim report of proceedings of jury selection, which occurred on January 3, 7, and 8, 2013.

is a way of using time efficiently, but it really, especially, applies to the 13 jurors who will hear this case.

SRP 250.

The court proceeded to give potential jurors preliminary instructions regarding the duties of a juror and a general description of what would occur at trial. SRP 250-256. Meanwhile, the attorneys apparently exercised their peremptory challenges by writing them down on a sheet of paper that was passed back and forth. SRP 257; Supp. CP ____ (sub no. 49, Peremptory Challenges).

When both sides had completed their challenges, the court excused those individuals already sitting in the jury box that had been challenged by one side or the other and filled their spots with the next several jurors who had not been challenged. SRP 257-259. At no time did the court announce which party had removed which potential jurors. Instead, the court merely filed a document containing this information. See Supp. CP ____ (sub no. 49, Peremptory Challenges).

C. ARGUMENT

THE COURT VIOLATED THROWER'S RIGHT TO A PUBLIC TRIAL.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial requirement also is for the

benefit of the accused: "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club. Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under Bone-Club, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the

closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

At Thrower's trial, the judge conducted a portion of jury selection in private without ever considering or articulating the Bone-Club factors. As discussed above, peremptory challenges were made outside the public eye. This portion of jury selection, like "for cause" challenges, constitutes a portion of "voir dire," to which public trial rights attach. State v. Wilson, 174 Wn. App. 328, 342-343, 298 P.3d 148 (2013). And to dismiss jurors during a private conference is to hold a portion of jury selection outside the public's view. State v.

Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013); see also People v. Harris, 10 Cal. App. 4th 672, 681-682, 684, 12 Cal. Rptr. 2d 758 (1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"; peremptory challenges made in chambers on paper violated public trial right even where proceedings were reported and results announced publicly), review denied, (Feb. 02, 1993).

At Thrower's trial, the public was unable to see or hear what was happening when the attorneys made peremptory challenges. This was particularly true because the judge was simultaneously providing oral instructions. While members of the public could discern, *after the fact*, which prospective jurors had been removed and by whom (generously assuming they knew to look in the court file), the public could not tell at the time the challenges were made which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying

both as protected classes); see also State v. Saintcalle, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038, at *7, *30-32, *46-47 (Aug. 1, 2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

In response, the State will likely attempt to distinguish private conferences from closures in which the public is prevented from entering the courtroom for a portion of jury selection. Physical closure of the courtroom, however, is not the only situation that violates the public trial right. For example, a closure also occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing Momah, 167 Wn.2d at 146; Strode, 167 Wn.2d at 224); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Thus, whether a closure – and hence a violation of the right to public trial – has occurred does not turn strictly on whether the courtroom has been physically closed. Members of the public are no more able to approach the attorneys and listen to an intentionally private voir dire process than they are able to enter a locked

courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same – the public is denied the opportunity to scrutinize events.

There is no indication the trial court considered the Bone-Club factors before permitting counsel to exercise peremptory challenges privately. By employing its chosen procedures, the court violated Thrower's right to public trial. Wise, 288 P.3d at 1119 ("The trial court's failure to consider and apply Bone-Club before closing part of a trial to the public is error."). Reversal is the only proper course.

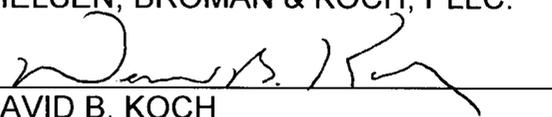
D. CONCLUSION

The procedures used to select Thrower's jury violated his right to public trial. His convictions must be reversed and the case remanded for a new trial.

DATED this 5th day of September, 2013.

Respectfully Submitted,

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DIVISION ONE**

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v.)	COA NO. 69950-4-1
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MAURICE THROWER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF SEPTEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAURICE THROWER
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COYOTE RIDGE CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF SEPTEMBER, 2013.

x *Patrick Mayovsky*

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COURT OF APPEALS
STATE OF WASHINGTON