IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DOUGLAS D. MCDONALD, Appellant.	No. 37244-4-II UNPUBLISHED OPINION

PENOYAR, C.J. — Douglas McDonald appeals from his vehicular homicide conviction, claiming a violation of the public trial right because of private questioning during jury voir dire and claiming, in his statement of additional grounds (SAG),[1] a speedy trial right violation. We reverse and remand for further proceedings.

FACTS

The State charged McDonald with one count of vehicular homicide for causing the death of his passenger, Michael Jines, while under the influence of or intoxicated by alcohol and/or drugs.[2]

Before beginning jury selection, the trial court asked the attorneys if either objected to conducting portions of the voir dire in the court's chambers:

> THE COURT: Counsel, do either of you have an objection to the jurors being allowed to step into chambers to take up questions that they may be uncomfortable with out here in the open courtroom or to deal with issues of their inability to be fair and impartial?
>
> STATE: The State has no such objection.

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[1] RAP 10.10.

[2] A violation of RCW 46.61.502, RCW 46.61.520(1)(a).

THE COURT: Defense?

DEFENSE COUNSEL: No, sir.

6 Report of Proceedings (RP) at 8. The trial court then spoke to those present in the courtroom:

> THE COURT: Do we have any members of the public that would object to the opportunity of the jurors to step back into chambers to discuss issues that they may be uncomfortable with out here in the open courtroom, or to address matters where they have indicated that they could not be otherwise fair and impartial? You're all looking at me like, what is he talking about? Well, I'll explain.
>
> I think it's Division III of the Court of Appeals out of Spokane, wrote a decision that said that to not ask people if they object, and then to do that, is to violate the open court proceedings, and as such they booted a case over there because of it. And so, we're all trying to be mindful of that particular case and give people that opportunity to object if they see fit.
>
> Again, let's go back to what it is we're trying to accomplish here this morning. What we're trying to accomplish is thirteen people, open-minded, fair, impartial, make their decision based on the evidence and the law and not on something else that may exist in the past, right?

6 RP at 8-9. Only one of the ten jurors questioned in chambers sat on the jury. Ultimately, the jury found McDonald guilty on all three alternatives charged.

ANALYSIS

I. Public Trial Right

McDonald first claims that the trial court's failure to apply the five-part *Bone-Club*[3] analysis before closing portions of voir dire violated the public trial right and compel the need for a new trial.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Similarly, article I, section 22

[3] *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

of the Washington Constitution guarantees, "In criminal prosecutions the accused shall have the right . . . to have a . . . public trial." The Washington Constitution also provides in article I, section 10 that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute; it is strictly guarded to ensure proceedings occur outside the public courtroom in only the most unusual circumstances. *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006)). "Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal." *Strode*, 167 Wn.2d at 225.

Our Supreme Court has articulated guidelines every trial court must follow before closing a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Those criteria are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 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.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In conducting voir dire, the trial court asked the venire a series of general questions. If the juror raised his hand, the court put his juror number on a list and asked him to step into chambers for private questioning. For example, the trial court asked:

> Of those persons responding, do any of you feel that that personal experience [vehicular homicide or DUI] would affect your ability to be a fair and impartial juror in this case?
> . . . [Three jurors responded affirmatively]. . . .
> Okay. What I've done with the three of you that have raised your cards is I've put a little circle around your name. And what we'll do is before the attorneys start with their general questioning, we'll step back into chambers with a microphone and take up the question in the privacy of chambers, okay. . . . So, we'll step back into chambers with the mikes and you'll be allowed to answer back there."

5 RP at 4-5. The trial court employed a similar procedure to identify potential jurors that had close friends or relatives who have had a similar experience to DUI, vehicular homicide, and vehicular assault.

We resolve this case on the issue of McDonald's right to a public trial, not the public's right to the same. We analyze McDonald's public trial rights under *Momah*[4] and *Strode*,[5] two decisions the Washington State Supreme Court issued the same day. *But see Presley v. Georgia,* ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010), and *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (2010) (*Presley* eclipses *Momah* and *Strode)*.

In *Momah*, the defendant:

> affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

167 Wn.2d at 151-52. The court affirmed *Momah*'s convictions.

[4] *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).

[5] *Strode*, 167 Wn.2d 222.

In *Strode*, the defendant merely stated that he did not object to chambers interviews of jurors. 167 Wn.2d at 229. Our Supreme Court overturned Strode's conviction and remanded to the trial court for a new trial. *Strode,* 167 Wn.2d at 231. McDonald, like Strode, merely acquiesced in the chambers interviews. In *Strode*, six justices agreed that this mere acquiescence did not waive Strode's public trial right. 167 Wn.2d at 229, 235. Under virtually identical facts, the result here is the same. We reverse McDonald's conviction and remand for further proceedings.

II. Speedy Trial Right

In his SAG, McDonald claims that the trial court violated his right to a speedy trial. As the remedy for a time-for-trial rule violation is dismissal with prejudice, we address this claim. CrR 3.3(h).

The following dates set out the relevant events:

August 8, 2007	Information Filed.
August 20, 2007	Arraignment (last possible trial start date 10/19/2007).
October 19, 2007	Court grants motion to continue. Excluded period because of counsel's unavailability. Sets last possible trial start date at 11/26/2007).
November 28, 2007	Trial court finds that prosecutor is still unavailable and continues excluded period to December 7 at which time 30 day time for trial commences.
December 10, 2007	Setting trial for 12/11/2007 and setting last possible trial start date at 1/7/2008.
December 12, 2007	Trial starts.

CrR 3.3 governs the time for trial. CrR 3.3(b)(1)(i) provides that a detained defendant must be tried within 60 days of the commencement date. CrR 3.3(e) excludes certain periods during this 60 day period. Relevant here is CrR 3.3(e)(8): "Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the

control of the court or of the parties. This exclusion also applies to the cure period of section (g)." CrR 3.3(g) allows a party five days from the end of the time for trial period to request a 14-day cure period.

Here, the trial court determined that the excluded period that began on October 19, 2007 extended until December 7, 2007, because of unavailability of counsel and the need for further discovery. *See State v. Kenyon*, 167 Wn.2d 130, 135-39, 216 P.3d 1024 (2009) (discussing unavailability of trial judge as unavoidable or unforeseen circumstance and trial court's obligation to make an adequate record to support its reasons); *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992) (deputy prosecutor's responsibly planned vacation is an unavoidable circumstance within the meaning of CrR 3.3). Here, the trial court did not abuse its discretion in extending the trial date for unavoidable circumstances. *State v. Krause*, 82 Wn. App. 688, 698, 919 P.2d 123 (1996).

Reversed and remanded for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Worswick, J.