IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Detention of:		**No. 27905-7-III**
	)	
	)	**Division Three**
	)	
	)	
DONALD T. TOWNSEND.	)	**UNPUBLISHED OPINION**
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	)	

Kulik, C.J. — Donald T. Townsend appeals from a jury verdict finding him to be a sexually violent predator (SVP). Mr. Townsend contends, and the State concedes, the trial court violated his public trial right by sealing juror questionnaires without analyzing the courtroom closure factors required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). We conclude there was no structural error or prejudice to Mr. Townsend requiring a new trial. But we remand for the trial court's consideration of the *Bone-Club* factors in sealing the juror questionnaires.

FACTS

On January 13, 2005, the State filed a petition alleging that Mr. Townsend should be committed as an SVP. At the time, Mr. Townsend was serving a sentence for

attempted second degree child rape.

At the outset of his commitment trial in 2009, Mr. Townsend moved to close the courtroom during the questioning of individual jurors about their responses on a juror questionnaire. The questionnaire asked whether the juror or someone close to the juror had experienced or been accused of sexual assault. Mr. Townsend reasoned that private questioning of individual jurors would encourage candor. After weighing the factors in *Bone-Club*, the trial court ruled that the courtroom would not be closed unless an individual juror requested to be questioned in private.

Jury selection began on February 9, 2009, and concluded on February 12. There is no indication in the record that the court closed the courtroom during individual questioning of jurors. The jury returned its verdict on February 25, finding that Mr. Townsend was an SVP.

The juror questionnaires were filed with the clerk two days later, on February 27. That same day, on its own motion, the trial court entered an order sealing 13 juror questionnaires. Citing RCW 42.56.540, the court found that examination of the questionnaires "'would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.'" Clerk's Papers (CP) at 576. The court thus found it in the

best interest of the parties that the documents be sealed. No other reasoning for sealing the juror questionnaires appears in the record.

The court entered the order of commitment on March 20, 2009. Mr. Townsend appeals. He contends the trial court's procedure in summarily sealing the juror questionnaires without considering the *Bone-Club* factors was a structural error that requires a new trial or, alternatively, a remand for reconsideration of the order to seal based upon the required factors.

ANALYSIS

Whether a trial court procedure violates the right to a public trial is a question of law we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Judicial proceedings, including the jury selection process, are presumptively open to the public. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The defendant is guaranteed a right to a public trial by both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. *Brightman*, 155 Wn.2d at 514. Article I, section 22 of the Washington Constitution states: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial." Similarly, the Sixth Amendment to the United States Constitution

provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

In addition, the public is guaranteed a right to open and accessible proceedings by article I, section 10 of the Washington Constitution. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). Article I, section 10 of the Washington Constitution states: "Justice in all cases shall be administered openly, and without unnecessary delay." These constitutional provisions assure a fair trial and foster trust in the judicial system.

The constitutional right to a public trial is not absolute, however, and may be limited "'to protect other significant and fundamental rights.'" *State v. Waldon*, 148 Wn. App. 952, 957, 202 P.3d 325 (2009) (quoting *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004)).

In *Ishikawa*, the court set the framework for determining whether a competing interest will allow the trial court to restrict public access to court proceedings. The trial court must weigh the following factors before sealing any court records or closing any portion of court proceedings:

> 1. The proponent of closure or sealing must make some showing of the need for doing so, 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.
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> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) (citing *Ishikawa*, 97 Wn.2d at 37-39).

The Supreme Court later held in *Bone-Club* that the trial court must analyze these same five factors to determine whether a competing interest will allow the trial court to restrict public access in opposition to the article I, section 22 rights of a defendant in a criminal trial. *Bone-Club*, 128 Wn.2d at 258-59. The *Bone-Club* analysis recognizes that the public's article I, section 10 open access right and the defendant's article I, section 22 public trial right "serve complementary and interdependent functions in assuring the fairness of our judicial system." *Id.* at 259.

In *Waldon*, the court held that the same analysis applies to the sealing of court documents. *Waldon*, 148 Wn. App. at 967. In *State v. Coleman*, the court held that a *Bone-Club* analysis is required before sealing juror questionnaires, which are considered court records. *State v. Coleman*, 151 Wn. App. 614, 620, 214 P.3d 158 (2009); *see State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 152, 2002-Ohio-7117, 781 N.E.2d 180 (2002) (observing that "virtually every court having occasion to address

this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness").

SVP Commitment Trial. As with other civil and criminal proceedings, case law establishes that civil commitment proceedings of SVPs under chapter 71.09 RCW are presumed open to the public. *In re Det. of Turay*, 139 Wn.2d 379, 415, 986 P.2d 790 (1999) (SVP proceedings are presumptively open; court's refusal to seal proceedings did not violate equal protection); *In re Det. of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999) (SVP commitment proceedings under chapter 71.09 RCW are presumed open to the public and closing such proceedings "must be affirmatively mandated by statute or where there is a serious and imminent threat to some important issue").

In *In re Detention of D.A.H.*, 84 Wn. App. 102, 105, 109-10, 924 P.2d 49 (1996), the court held that probable cause hearings under RCW 71.09.040 were presumptively closed to the public, based upon analogy to probable cause hearings under chapter 71.05 RCW which were presumed closed under Mental Proceedings Rule (MPR) 1.3. But in *Turay*, the Supreme Court criticized *D.A.H.* "because the Court of Appeals explicitly limited its holding in that case to *probable cause hearings* under RCW 71.09.040, and refused to extend the analysis to the actual SVP *commitment trial* under RCW 71.09.060." *Turay*, 139 Wn.2d at 414. The court also questioned the continued

validity of *D.A.H.* because it appeared to be inconsistent with Supreme Court case authority that SVP proceedings are presumed open. *Id*. at 414-15; *see Campbell*, 139 Wn.2d at 356; *Allied Daily Newspapers*, 121 Wn.2d at 211.

Turay's criticisms of *D.A.H.* were subsequently noted by the Court of Appeals in *In re Detention of D.F.F.*—a mental health involuntary civil commitment proceeding in which the court ruled MPR 1.3 unconstitutional because it presumed that mental commitment proceedings under chapter 71.05 RCW were closed to the public. *In re Det. of D.F.F.*, 144 Wn. App. 214, 226, 183 P.3d 302, *review granted*, 164 Wn.2d 1034 (2008). Relying in part on *Turay*, the court in *D.F.F.* rejected the State's argument that *D.A.H.* and MPR 1.3 presumed closure of mental commitment proceedings under chapter 71.05 RCW. *Id*. at 224-26. The *D.F.F.* court emphasized that the Supreme Court has repeatedly articulated an exacting test that trial courts must consider the *Bone-Club* factors before closing a court proceeding. *Id.* at 226.

Based upon *Turay* and *Campbell*, Mr. Townsend's SVP trial was presumptively open to the public and, based upon *Waldon* and *Coleman*, the trial court was required to weigh the *Bone-Club* factors before sealing the juror questionnaires. As the State concedes, the court erred by failing to do so.

Structural Error. Generally, the denial of the right to public trial due to improper

closure of voir dire is considered structural error for which prejudice is presumed and the remedy is a new trial. *See State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wn. App. 797, 809, 173 P.3d 948 (2007); *D.F.F.*, 144 Wn. App. at 226. But this case turns on the application of *Coleman*, where the court held that a sealing order of juror questionnaires without weighing the *Bone-Club* factors did not amount to a structural error. *Coleman*, 151 Wn. App. at 624.

In *Coleman*, the court twice noted that no meaningful rationale was presented to distinguish juror questionnaires as court records from juror questionnaires as a part of open court proceedings. *Id*. at 621, 623. The court concluded that the defendant did not experience prejudice, and his public trial right was not irreparably violated for the following reasons:

> The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on [Mr.] Coleman's public trial right.

Id. at 624. The *Coleman* court decided that the proper remedy was remand for reconsideration of the sealing order based on the *Bone-Club* factors. *Id*. at 623.

Under *Coleman*, Mr. Townsend must show some indication that the juror

questionnaires were not available for public inspection prior to the February 27 sealing order. He has not. He merely presumes, without providing any evidence, that the juror questionnaires were not available for public inspection before they were filed with the clerk. This conclusory presumption does not present a meaningful rationale to distinguish juror questionnaires as court records from juror questionnaires as a part of open court proceedings.

As the State contends, this case is materially indistinguishable from *Coleman*. Similar to *Coleman*, the questionnaires were used only for selection of the jury, which proceeded in open court. Even though the questionnaires were not formally filed with the clerk until February 27, there is nothing to indicate those questionnaires were not part of the open public proceedings during the four-day jury selection process between February 9 and February 12, or prior to their sealing *after trial* on February 27. There is nothing to indicate that the juror questionnaires were not available for public inspection during the 15 days after the jury was selected and sworn.

Thus, as in *Coleman*, the remedy here is remand for reconsideration of the juror questionnaire sealing order based on the *Bone-Club* factors because Mr. Townsend makes no showing of prejudice, and his public trial right was not irreparably violated.

Mr. Townsend finally contends that he did not waive or invite the court's error.

The State does not dispute that contention. The court sua sponte sealed the questionnaires after trial.

We conclude that there was no structural error or prejudice to Mr. Townsend. And we affirm the civil commitment order. But we remand for reconsideration of the juror questionnaire sealing order based on the required *Bone-Club* factors.

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

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Kulik, C.J.

WE CONCUR:

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Sweeney, J. Brown, J.