In re Pers. Restraint of Morris (Patrick L.)

No. 84929-3

MADSEN, C.J. (dissenting)—There are several cases presently before the court involving a criminal defendant's right to a public trial, including *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012) (plurality opinion); *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012); *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012); and *In re Personal Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012) (plurality opinion). I am troubled by many aspects of the court's jurisprudence in this area and therefore have written an extensive concurrence in *Sublett* addressing many of the issues that have been presented in numerous recent cases before our court and the Court of Appeals. I am also writing in each of the cases to highlight important points that relate to the individual cases.

The present case, like *Wise* and *Paumier*, involves limited, private questioning of a few potential jurors on sensitive subjects. The only confirmed error regarding the public trial right that occurred in *Morris* (the present case), *Wise*, and *Paumier* is that the trial courts did not engage in the five-factor inquiry that is required under article I, section 22, of the Washington State Constitution prior to closing a portion of a criminal trial. This test was set out in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and parallels

the test required under the Sixth Amendment to the United States Constitution that must be satisfied before criminal proceedings are closed. *See Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Under *Bone-Club*, inquiry must be made into whether the interest that the proponent of closure contends justifies closure is a compelling interest that overrides the defendant's right to a public trial and whether the proposed closure is essential to preserve that interest. The closure, if approved, must be the least restrictive form of available closure that will protect the threatened interest. An opportunity must be made for objections to closure. *Bone-Club*, 128 Wn.2d at 258-59.

We do not know, in these three voir dire cases presently before the court, whether the trial courts would have ordered the same closures in these cases following proper *Bone-Club* inquiries because none were made. Nonetheless, the majorities in these cases, as in other cases that have come before the court, conclude that reversal of the defendants' convictions and new trials are required because no *Bone-Club* inquiry occurred.

But with these holdings, the inquiry into whether closure was justified has been turned into the issue of whether the right to a public trial has been violated. Even when a closure would be fully justified under the *Bone-Club* inquiry, and accordingly would be a fully constitutional closure and *not* a violation of the right to a public trial, nevertheless reversal and a new trial are required because the *Bone-Club* inquiry was not made.

This approach makes little sense when a posttrial *Bone-Club* inquiry could be

made and could establish whether or not the closure met constitutional standards. As I show in my *Sublett* concurrence, many courts in other jurisdictions make such posttrial inquiries, either on the appellate record or on remand from an appellate court for entry of factual findings, or by way of a hearing and findings where the record is inadequate to resolve the issue.

Our state courts should do the same. There is no precedent or compelling constitutional principle that prevents a posttrial assessment. I do not say that the failure to conduct the *Bone-Club* analysis is not error. It is a serious error. But I believe it is senseless to turn the failure to conduct the inquiry, alone, into the most serious form of constitutional error that can occur, when a posttrial evaluation might show that no closure without adequate justification actually occurred. I have addressed this problem more extensively in my concurrence in *Sublett*, as well as in my dissents in *Wise* and *Paumier*.

Morris presents the issue in a different context than *Wise* and *Paumier*. *Morris* is here on collateral review. One would ordinarily think this means that the standards for review of personal restraint petitions would apply. But a majority of the court does not agree. Just as decisions of this court have taken the public trial right out of the normal realm of constitutional review, so has this decision turned its back on our directly applicable rules for collateral review.

I cannot agree with this approach. There is nothing about this issue that requires that we provide relief when Mr. Morris can show no actual and substantial prejudice, as he is required to show for claimed constitutional error raised for the first time on

collateral review. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). As Justice Wiggins correctly shows in his dissent, we have rejected the premise that error that is presumed prejudicial on direct appeal is also presumed prejudicial on collateral review. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992).

A majority of the court, however, concludes that this case is controlled by *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). There are significant differences, however. First, as Justice Wiggins explains, the error in *Orange* was conspicuous in the record and appellate counsel should have noticed it.

Here, in contrast, all that the record shows is that no *Bone-Club* inquiry was made. But this does not equate to a violation of the right to a public trial. Moreover, the record shows that there was a valid reason for the limited voir dire in chambers on sensitive topics and this would indicate to reasonable appellate counsel that no constitutional violation occurred. The record also shows that the defendant affirmatively approved of the procedure, even going so far as waiving his right to be present so that jurors were encouraged to be more forthcoming in their responses to sensitive questioning than they might have been if he had been present.

Appellate counsel reviewing this record could reasonably conclude that the closure was justified on grounds of the jurors' interests in privacy *plus* the defendant's interest in a fair trial decided by unbiased jurors. Closure for the purpose of obtaining full answers to sensitive questioning served both of these purposes. At the same time, appellate

counsel could well conclude that this closure for purposes of obtaining full disclosure did not contravene any of the purposes served by the right to a public trial. The proceedings were recorded and transcribed as part of the public record of this case. Thus, at all times counsel and the court were contemporaneously and continuously reminded of their responsibilities in the criminal justice system and of the need to carry out these responsibilities fully and fairly. Because no witnesses were involved at this stage, there were no questions pertaining to witnesses, encouraging their testimony, or avoiding perjury.[1] Thus, the values that underlie the right to a public trial do not suggest a public trial violation.

Accordingly, there was no deficient performance that is apparent on the appellate record as there was in *Orange*. Rather, what is obvious is a sound trial choice to close the proceedings in aid of selecting unbiased jurors, and very little likelihood that the closure was unjustified.

But even if an issue remains about the ultimate questions, whether the right to a public trial was violated or whether appellate counsel should have acted differently, there is an existing procedure for finding answers to these questions. RAP 16.11 provides that a personal restraint petition can be sent to superior court for a reference hearing to determine disputed facts. If the *Bone-Club* inquiry conducted as part of a reference

[1] There is considerable irony in the fact that a process that benefited the defendant because it promoted more forthcoming disclosure by potential jurors and so aided in jury selection is now challenged because it was not conducted in public where this benefit would not have accrued to the defendant.

hearing leads to the conclusion that the closure was justifiable, then appellate counsel could not have been ineffective in failing to pursue the matter. Certainly no prejudice would have existed.

Like courts in other jurisdictions have done, this court can remand for a reference hearing to determine whether the closure of the proceedings for a limited time for limited questioning of a few of the potential jurors on sensitive topics was a constitutionally permitted closure of the proceedings. This is a far better course to take in this case than a summary decision that reversal and a new trial are required. I address this more fully in my concurrence in *Sublett*.

In short, I disagree with the treatment of this case as if it presents the same circumstances as in *Orange*. This is not true because in *Orange* the record showed that objection had been made to the closure. Here, both defense counsel and the defendant engaged in conduct that shows they agreed to the closure so that potential jurors would be more forthcoming in their answers regarding sensitive matters. These circumstances make this a far different case from *Orange*. Moreover, the closure here was of plainly apparent benefit to Mr. Morris. That was not true in *Orange*.

Moreover, to the extent there is a question whether the closure of the proceedings violated the right to a public trial, the rules of appellate procedure provide a method for inquiring into the matter. The rules should be utilized. I dissent.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: