No. 85737-7

Stephens, J. (concurring)—I agree that Taner Tarhan has not established a violation of his public trial right under article I, section 22 of the Washington State Constitution. Nothing in the record before us demonstrates that the juror questionnaires were withheld from scrutiny by Mr. Tarhan, his counsel, or the public throughout his trial. The Court of Appeals was exactly right in observing that Mr. Tarhan's failure to prove that a closure occurred is fatal to his article I, section 22 claim, and he is not entitled to a new trial. *State v. Beskurt*, 159 Wn. App. 819, 831, 246 P.3d 580 (2011). Because this is the only remedy Mr. Tarhan seeks, our analysis should end here.

Unfortunately, the lead opinion goes on to make statements about article I, section 10 that are inconsistent with our precedent and erode the value of open court records. Article I, section 10 of the Washington Constitution promises that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." The lead opinion concludes that article I, section 10 is not implicated in this case

because no one invoked the procedures under GR 31(j) regarding juror information. Lead opinion at 9-10 ("The privacy presumption of individual juror information exists until GR 31(j) procedures are triggered and requirements are met, none of which occurred here."). This is a dubious proposition. As a constitutional mandate, article I, section 10 looms larger than a court rule. *See Rauch v. Chapman*, 16 Wash. 568, 575, 48 P. 253 (1897) (noting article I, section 10 and "provisions of the organic law are alike declared to be mandatory"). Indeed, we have recognized that court rules concerning access to court records and proceedings must be construed consistent with constitutional guaranties of openness. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 598, 243 P.3d 919 (2010) (vacating sealing order under GR 15 for failure to conduct constitutional analysis); *see also State v. Duckett*, 141 Wn. App. 797, 807-09, 173 P.3d 948 (2007) (explaining relationship between GR 31 and public trial rights).

The lead opinion finds no article I, section 10 issue because of "[t]he privacy presumption of individual juror information" under GR 31(j)." Lead opinion at 9-10. But, our constitutional analysis necessarily begins with "'the presumption of openness.'" *Serko* 170 Wn.2d at 597 (quoting *Rufer v. Abbott Labs*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005)). Under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), a court must undertake the five-part constitutional analysis before entering an order sealing records.[1] The Court of Appeals was thus correct in

[1] This is commonly referred to as the *Bone-Club* test because this court in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), adopted the factors outlined in *Ishikawa* and *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993). To be precise, *Bone-Club* addresses the public trial right

concluding that "there can be no serious dispute that the trial court in this case erred by failing to conduct a *Bone-Club* hearing before entering its sealing order under the public's article I, section 10 right to open court proceedings." *Beskurt*, 159 Wn. App. at 834.

The lead opinion attempts to avoid this conclusion by suggesting that the questionnaires at issue were not really court or trial records. Lead opinion at 9 n.8. This is pure fiction. No one has suggested the questionnaires were simply rough notes that could have been discarded after trial. The lead opinion's gratuitous suggestion that this would be an acceptable practice is troubling. More importantly, the trial court in fact *filed the questionnaires*, plainly making them part of the record of Mr. Tarhan's trial. And, it entered an order sealing the documents without conducting a *Bone-Club* (i.e., *Ishikawa*) analysis.[2]

The only question is whether the trial court's failure to conduct the five-part analysis under article I, section 10 requires granting Mr. Tarhan a new trial. It does not. As noted, Mr. Tarhan has not demonstrated a violation of his public trial right under article I, section 22; the sealing order occurred after the trial concluded.

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under article I, section 22, while *Ishikawa* concerns the broader guaranty of openness under article I, section 10. We recognized in *Bone-Club* that "[t]he section 10 guaranty of public access to proceedings and the section 22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system." 128 Wn.2d at 259. And, we have recognized that the *Bone-Club* (or *Ishikawa*) test includes both substantive and procedural requirements. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 807, 100 P.3d 291 (2004).

[2] The lead opinion also finds it significant that "only one copy of the documents was sealed." Lead opinion at 9 n.6. I have no idea why this matters. While the record before us is silent as to whether counsel's copies of the questionnaires were returned or destroyed, this does not mean the sealed questionnaires were somehow kept public.

While the absence of findings to justify a sealing order could properly result in a remand in a different case, *see Ishikawa*, 97 Wn.2d at 45-46, here Mr. Tarhan seeks a new trial, not reconsideration of the sealing order. Accordingly, there is no need to put the parties and the lower court through the paces of a new hearing. Mr. Tarhan's conviction should simply be affirmed.

AUTHOR:

Justice Debra L. Stephens

WE CONCUR:

Justice Mary E. Fairhurst