

ORIGINAL

IN THE SUPREME COURT OF OHIO

2011-1921

STATE OF OHIO

:

Plaintiff-Appellee

:

vs.

:

:

This is a Death Penalty Case

ANTHONY SOWELL

:

Defendant-Appellant

APPELLANT'S RESPONSE TO THE STATE'S SUPPLEMENTAL BRIEF

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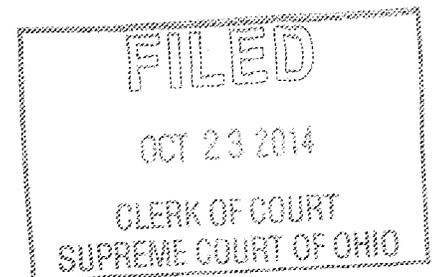


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Overview.....	1
Conclusion.....	10
Proof of Service.....	11

TABLE OF AUTHORITIES

Page

Cases

<i>Arizona Fulminante</i> , 499 U.S. 279, 309 (1991).....	2
<i>Gannett Co., Inc. v. DePasquale</i> , 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979)....	2
<i>In re Oliver</i> , 333 U.S. 257, 270 fn. 25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)	3
<i>Lefkowitz v. Cunningham</i> , 431 U.S. 801 (1977)	3
<i>Neder v. United States</i> , 527 U.S. 1, 7 (1999)	2
<i>Presley v. Georgia</i> , 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).....	5
<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44, 67, 117 S.Ct. 1114, 134 L.Ed.2d 252 (1996).....	5
<i>Simmons v. United States</i> , 390 U.S. 377, 394 (1968).....	3
<i>State v. Fisher</i> , 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222.....	2
<i>State v. Perry</i> , 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643.....	2
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L. Ed. 2d 31 (1984)	4

Constitutional Provisions

Fourth Amendment, United States Constitution	3, 4
Fifth Amendment, United States Constitution	3
Sixth Amendment, United States Constitution.....	5, 10
Fourteenth Amendments, United States Constitution	10
Ohio Constitution, Article I, Section 10	10

Overview

In its supplemental brief the State of Ohio argues that closing the courtroom had no impact on the case's outcome, and that counsel on appeal have waived the issue by not raising it until this Court directed them to do so. The State goes on to posit that, in any event, the trial court properly justified its decision to close the courtroom during Sowell's suppression hearing and individual voir dire, and that trial counsel waived any challenge to closure during voir dire by not objecting to it at the time. Mr. Sowell responds to those contentions below.

As a preliminary matter, there is no doubt that current counsel failed to note the public trial issue in its initial brief before this Court. As the state is surely aware, the trial court record in Mr. Sowell's case is, to put it lightly, voluminous. The transcript, alone, is over 13,000 pages. Additional records fill dozens of boxes. All of this material needed to be organized, reviewed, and analyzed. Only then could counsel begin to structure a brief. The brief that counsel filed was extensive, addressing numerous defects in the trial court. Yet counsel overlooked the trial court's violation of Anthony Sowell's right to a public trial. With more time to prepare, this may not have happened. But, by operation of court rule, that time was not available. Presumably, in identifying this issue and directing the parties to address its merits, this Court recognized that fact and, thereby, has prevented the issue's waiver.

The error here is structural

If the measure of a society is how it treats the least, the measure of a legal system, and that of its judiciary, is how it treats the worst. This case represents a critical test of this ideal. Ultimately, our courts recognize structural error in service to it. Structural

error recognizes a limited class of fundamental constitutional errors that “defy analysis by ‘harmless error’ standards.” See *Arizona Fulminante*, 499 U.S. 279, 309 (1991). “Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., ‘affect substantial rights’) without regard to their effect on the outcome.” *Neder v. United States*, 527 U.S. 1, 7 (1999). As the high court in *Neder* observed, such cases involve –

[A] defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.

Neder, 527 U.S. 1, 8-9 (internal citations omitted).

This Court has similarly acknowledged that structural error arises from “constitutional defects that “defy analysis by ‘harmless error’ standards” because they “affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.” *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 17; quoting *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9, quoting *Fulminante*, 499 U.S. 279 at 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302.

Here, the record is clear that the trial court attempted to remedy the prospect that pretrial publicity would taint the trial’s fairness by closing the proceedings to both the press and public. But the rights to a fair trial and a public trial are coexistent. More, a public trial is a component of a fair trial. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (public trial may cause “trial participants to

perform their duties more conscientiously,” *id.* at 383). The Court explained in *In re Oliver*

”It is for the protection of all persons accused of crime — the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial — that one rule [as to public trials] must be observed and applied to all.” Frequently quoted is the statement in 1 Cooley, *Constitutional Limitations* (8th ed. 1927) at 647: “The requirement of a public trial 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. . . .”

In re Oliver, 333 U.S. 257, 270 fn. 25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)

The Supreme Court has consistently rejected the notion that the preservation of one constitutional right may be conditioned on the substantial impairment of another. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (describing the forced surrender of one right “in order to assert another” as “intolerable”); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). Consistent that principle, in *Simmons*, the court held that a criminal defendant cannot be compelled to give up his Fifth Amendment privilege against self-incrimination in order to assert his Fourth Amendment right against illegal searches and seizures. 390 U.S. at 390-394.

In *Simmons*, the defendant moved to suppress the contents of a suitcase that he maintained was seized illegally. If the seized evidence, however, were shown to have been in his possession, it would implicate him in a crime. *Id.* at 391. Unfortunately, to establish standing for the suppression motion, Simmons needed to testify that he was the owner of the suitcase – which he did. *Id.* The court, nevertheless, denied his motion. At trial the prosecution used his testimony from the suppression hearing against him. *Id.* The Supreme Court reversed, holding that the defendant’s testimony from the

suppression hearing was inadmissible at trial. The court concluded that allowing the prosecution to use Simmons' suppression-hearing testimony in his trial, would chill the exercise of Fourth Amendment rights. Specifically, the court observed that:

It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. ... In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

Id. at 393. Accordingly, the Court resolved that it was "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

Here, as in *Simmons*, the trial court attempted to address and bolster one of Sowell's rights by violating another. But protecting Sowell's right to a fair trial at the expense of his and the public's right to a public trial is not a constitutionally permissible solution – particularly where Sowell offered a number of constitutional options that would have addressed the publicity problem. The error is structural and it requires a new trial, or, at the very least a new hearing on Sowell's motion to suppress.

The trial court failed to make the findings required to justify the courtroom closures it ordered.

The case law addressing the public trial issue makes it clear that the decision to close a courtroom to the press and/or public must be exceedingly rare and undertaken with extraordinary caution. In *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L. Ed. 2d 31 (1984), the US Supreme Court established that "the closure must be no broader than necessary to protect that interest;" and "the trial court must consider reasonable alternatives to closing the proceeding." *Id.* at 48. Underscoring this interest, the Court

went on to hold that before ordering a courtroom’s closure, the trial court must render “findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 45 (quoting *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)). In fashioning this assessment and making it mandatory, the *Waller* court adopted the test it set out in “*Press-Enterprise* and its predecessors” which required the following:

- (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced if the courtroom remains open;
- (2) The closure must be no broader than necessary to protect that interest;
- (3) The trial court must consider reasonable alternatives to closing the proceeding; and,
- (4) It must make findings adequate to support the closure.

Id. at 47, 48 (citation omitted). See also *Presley v. Georgia*, 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (noting that in *Waller*, when it resolved that a pretrial suppression hearing needed to be open to the public, it “ruled that ...’there can be little doubt that the explicit Sixth Amendment right of the accused is not less protective of a public trial than the implicit First Amendment right of the press and public.’”).

Waller’s holding necessarily required the court to include not only the result reached but also the rationale necessary to reach that result. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 117 S.Ct. 1114, 134 L.Ed.2d 252 (1996) For example, when it ruled in *Waller* that the Georgia trial court had violated petitioner’s Sixth Amendment right to a public trial, the Court scrutinized the record to assess whether it reflected there were sufficient facts presented to determine whether the closure order was constitutional. The Court found that the prosecution, in seeking the closure, “was not

specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the [evidence] might infringe them,” and, “[a]s a result, the trial court’s findings were broad and general, and did not purport to justify the closure of the entire hearing.” *Id.* Further, the trial court “did not consider alternatives to immediate closure of the entire hearing” and, consequently, “the closure was far more extensive than necessary.” *Id.* at 48-49.

In other words, *Waller* established that the defendant’s right to a public trial may only be limited where absolutely necessary, and any such closure must be narrowly drawn, applied sparingly, and factually justified on the record regardless of the situation. The state’s insistence to the contrary, the trial court’s conclusion that closure was necessary “due to the sensitive nature of the evidence and potential for suppression of evidence that, if released to the public at this time would potentially prejudice any jury pool,” is simply not sufficient. (Tr. 380-381) The court’s subsequent findings, addressing full closure during voir dire, were also insufficient insofar as they failed to first address any alternatives to full closure. Simply concluding that such a drastic remedy was “no broader than necessary to protect the privacy interests of the jurors and the defendant’s right to select an impartial jury” (Tr. 5153) is not, by itself, enough under *Waller* and *Pressley*.

We also note here that the record reflects that in the trial court, at least, the State of Ohio actually acknowledged that the court’s closure findings were insufficient. In its request for a mistrial at the end of voir dire, the State of Ohio insisted the findings the trial court made after it had fully closed the courtroom for the entire voir dire, failed to justify such an extreme measure. Specifically, the prosecution argued:

[T]he factors under *Presley* and described in the 1984 decision *Press Enterprise versus Superior Court of Riverside County California* require that any privacy concerns raised by jurors during the individual voir dire process be limited to the individual jurors and that any closure take place on an individual basis rather than on any general basis.

(Tr. 5158) If the findings the court made to close the courtroom during voir dire were insufficient, then its limited remarks at the suppression hearing most certainly were. Under the circumstances, the State is hard-pressed to take the opposite position before this Court.

Counsel did not ask the Court to close the courtroom when he moved for individually sequestered voir dire.

Well in advance of trial, Sowell's counsel submitted a written request for individual sequestered voir dire. It was granted shortly thereafter. The thinking behind that request was that jurors questioned alone would be more forthcoming about their personal beliefs than those questioned in a group. Individualized questioning also prevents prospective jurors from being influenced by the remarks of other prospective jurors. Shortly before that voir dire began, the trial court *sua sponte* announced that it had decided to "close the Witherspooning process to the press and the general public." According to the court, it had reached this decision based on the defendant's request for individually sequestered voir dire. The State of Ohio's claims notwithstanding, the defense never asked the court to close the courtroom.

A request for individually sequestered voir dire has little to do with shutting the press and/or public out of the process. Witherspooning is often conducted either in the courtroom or in chambers with single jurors. There are many ways to protect juror privacy and the defendant's right to an unbiased jury in this context short of full courtroom closure. It is not unusual for the court to protect juror privacy interests in

this context by allowing the press and barring the public, and/or allowing the press but forbidding it from naming prospective jurors or otherwise disclosing their identities. Other alternatives include permitting only a single camera in the proceeding; barring cameras altogether; limiting the number of reporters; or permitting reporters to watch the proceeding but excluding them from the room. Alternatively, as the State suggested in the trial court, closing the courtroom only where specific jurors raise their specific privacy concerns. (Tr. 5158) Such options, while restrictive, at least attempt to strike a balance between the right to a public trial and that to a fair one.

Trial counsel's failure to join the State's motion for mistrial at the conclusion of the Witherspoon process deprived Sowell of his right to the effective assistance of counsel.

After the court had finished Witherspooning the prospective jurors in the closed proceeding, the State of Ohio moved for a mistrial, noting its belief that,

Presley versus Georgia requires the Court to have addressed those issues prior to closure and have made those findings prior to closure and the legal standard here is a high one, it's one of the highest burdens placed upon government in criminal law to justify the closure of a public criminal trial, whether it be with the defendant's 6th Amendment rights at issue, or the public's 1st Amendment rights at issue.

(Tr. 5158) In that motion, the State argued that the trial court's justification for the closure, and the fact that it was offered retroactively, failed to meet the high burden required. Under the circumstances, the State asked for a mistrial. While insisting that Sowell waived nothing, trial counsel refused to join the State's motion. (Tr. 5156) That was an enormous mistake, amounting to deficient performance.

In numerous pleadings leading up to trial, counsel maintained that Mr. Sowell could not receive a fair trial in Cuyahoga County because the region had been saturated

by negative publicity about the case. Counsel maintained that the media attention drawn to the case had corrupted the pool of potential jurors and rendered it impossible to seat an impartial jury in Cuyahoga County. Based on that concern, counsel had repeatedly urged the trial court to change the case's venue or, at the very least, bring in jurors from other counties where the case had received less attention.

The trial court reserved ruling on the motion to ascertain whether, in fact, it could empanel the requisite number of jurors capable of fairly entertaining the case. To that end, the Court expanded the potential jury pool and permitted a fairly detailed questionnaire and some, albeit limited, questioning to help the parties measure the extent to which the pretrial publicity had impacted the jury pool. As we note in our original brief, it was immediately evident that virtually all of the pool had heard about the case – having read about it in the paper or seen one of the thousands of television news accounts devoted to it.

When the Witherspooning process came to an end, the court had identified a group of jurors who professed an ability to put what they knew about the case aside and fairly weigh the evidence at trial. While we maintain that the jurors ultimately selected to decide Sowell's fate were incapable of that task due to the unprecedented public attention this case garnered, the trial court nevertheless reached that conclusion. Had the court granted the mistrial, counsel would have had another opportunity to explore this important issue and thereby demonstrate the defense's longstanding claim that a fair jury could not be empaneled for Sowell in this venue.

Counsel had nothing to lose and everything to gain on Sowell's behalf by joining the motion for a mistrial. Certainly, doing so would have furthered counsel's trial

strategy. Not joining the mistrial request under the circumstances, violated Sowell's right to the effective assistance of counsel. U.S. Constitution, Sixth and Fourteenth Amendments; Ohio Constitution, Article I, Section 10.

CONCLUSION

In light of the foregoing, as well as the arguments set forth in Mr. Sowell's Supplemental and Merit Briefs, and on the record below, the propositions of law should be granted and the case remanded to the trial court for further proceedings.

Respectfully submitted,


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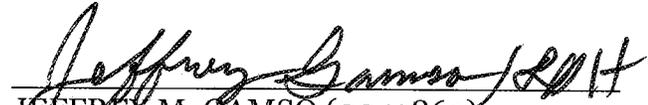

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I certify that a copy of this Appellant's Supplemental Merit Brief was hand delivered to the office of the Timothy J. McGinty, Cuyahoga County Prosecuting Attorney, marked to the attention of Katherine Mullin, Counsel of Record for Appellee, this 23rd day of October, 2014.


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