

[Cite as *State v. Woods*, 2011-Ohio-817.]

[Please see original opinion at 2011-Ohio-305.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94141 and 94142

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALMICHAEL WOODS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518148 and CR-521233

BEFORE: Kilbane, A.J., Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 24, 2011

ATTORNEY FOR APPELLANT

Jonathan N. Garver
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103-1125

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Marcus L. Wainwright
Assistant County Prosecutor
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ON RECONSIDERATION¹

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Almichael Woods (“Woods”), appeals his convictions. Finding merit to the appeal, we reverse Woods’s convictions and remand the case for a new trial.

{¶ 2} This consolidated appeal arises from two criminal cases that were consolidated for trial. In Case No. CR-521233, Woods was charged with codefendants, Dasean Jenkins (“Jenkins”) and Jeffery Grant, in a multi-count indictment resulting from

¹The original announcement of decision, *State v. Woods*, Cuyahoga App. Nos. 94141 and 94142, 2011-Ohio-305, released January 27, 2011, is hereby vacated. This opinion, issued upon reconsideration, is the court’s journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

two drive-by shootings in November 2008. Counts 1 and 11 charged him with attempted murder, Counts 2-10 and 12-16 charged him with felonious assault, Counts 17-19 charged him with improperly discharging a firearm into a habitation, Count 20 charged him with participating in a criminal gang, and Count 21 charged him with receiving stolen property.² In Case No. CR-518148, Woods was charged with carrying a concealed weapon, with a forfeiture specification attached (Count 22).

{¶ 3} The cases proceeded to a jury trial, at which he was found guilty of attempted murder (Count 1), felonious assault (Counts 2-5), improperly discharging a firearm into a habitation (Count 18), participating in criminal gang activity (Count 20), and carrying a concealed weapon (Count 22).³ Prior to trial, the State withdrew Counts 7-9, 11-14, and 17. The trial court dismissed Counts 6, 10, 15, 16, 19, and 21 pursuant to Woods's Crim.R. 29 motion.

{¶ 4} The trial court sentenced Woods to eight years in prison on Count 1 (the court merged Counts 2 and 3 with Count 1 for purposes of sentencing), eight years on each of Counts 4, 5, 18, and 20, and 18 months on Count 22. The court ordered that the

²Counts 1-19 each carried a one- and three-year firearm specification, a five-year "drive-by shooting" firearm specification, and a criminal gang activity specification. Counts 20 and 21 each carried a one- and three-year firearm specification and a five-year "drive-by shooting" firearm specification.

³The jury also found him guilty of the one- and three-year firearm specifications, the five-year "drive-by shooting" firearm specification, and the criminal gang activity specification attached to Counts 1-5 and 18, and the one- and three-year firearm specifications and the five-year "drive-by shooting" firearm specification attached to Count 20. The trial court issued a directed verdict on the forfeiture specification attached to Count 22, as it was tried to the bench.

mandatory three-year firearm specification be served consecutively to the mandatory five-year firearm specification and the mandatory one-year criminal gang specification.⁴ The court further ordered that all specifications be served prior to and consecutive with the sentence in Count 1. Lastly, the court ordered that all counts be served concurrently with each other, but consecutively to Woods's sentence in another criminal case, for an aggregate of 17 years in prison.

{¶ 5} Woods now appeals, raising twelve assignments of error for review, which shall be discussed out of order where appropriate.

ASSIGNMENT OF ERROR ONE

“The trial court denied [Woods] due process of law and violated his right to a public trial by excluding the public during the testimony of a key witness.”

{¶ 6} Woods argues that the trial court deprived him of his Sixth Amendment right to a public trial by closing the courtroom during the testimony of codefendant Jenkins. The State maintains that the trial court properly exercised its discretion in this regard because there was a concern for Jenkins's safety.

{¶ 7} The right to a public trial is a fundamental constitutional guarantee under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. Public trials ensure that the judges and prosecutors carry out their

⁴The court ordered that all one-year firearm specifications merge into one one-year specification, which was merged with the three-year firearm specification (all three-year firearm specifications were merged into one three-year specification), all five-year “drive-by shooting” specifications merge into one five-year specification, and all one-year gang specifications merge into one one-year specification.

duties responsibly, encourage witnesses to come forward, and discourage perjury. *Waller v. Georgia* (1984), 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31, citing *In re Oliver* (1948), 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed. 682. The violation of the right to a public trial is structural error [that affects

{¶ 8} the framework of trial] and not subject to harmless-error analysis.” *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶50.

{¶ 9} We note that “[t]he right to a public trial is not absolute, and in some instances must yield to other interests, such as those essential to the administration of justice. A trial judge has authority to exercise control over the proceedings and the discretion to impose control over the proceedings.” *Id.* at ¶51. Thus, we review the trial court’s decision to remove the public from a courtroom under an abuse of discretion standard of review. *Id.* at ¶58; *State v. Brown* (Nov. 25, 1998), Cuyahoga App. No. 73060.

{¶ 10} In *Waller*, the seminal case regarding the right to a public trial, the trial court closed a suppression hearing to all persons other than witnesses, court personnel, the parties, and counsel. The United States Supreme Court set forth the following four-pronged test that courts must use to determine whether closure of a courtroom is necessary:

“[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [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.” *Waller* at 48.

{¶ 11} In cases involving only the partial closure of the courtroom, the Ohio Supreme Court in *Drummond* has indicated that with respect to the first factor, only a “substantial reason” and not an “overriding interest” must be present to justify the closure of the courtroom. *Drummond* at ¶53. With this adjustment, the *Drummond* court found that the *Waller* criteria had been satisfied.

{¶ 12} In *Drummond*, the trial judge closed the courtroom to all spectators during the cross-examination of one witness and the testimony of two other witnesses. The media was permitted to remain in the courtroom during this time. Relying on federal case law, the court concluded that “when a trial judge orders a partial, instead of a total closure of a court proceeding, a ‘substantial reason’ rather than *Waller*’s ‘overriding interest’ will justify the closure.” *Drummond* at ¶53.

{¶ 13} The *Drummond* court noted that there had been a physical altercation between a spectator and courtroom deputies and that a second incident occurred in the judge’s chambers. The trial court stated that “‘the fear of retaliation expressed by various witnesses’” was also a basis for the closure. *Id.* at ¶54. The *Drummond* court concluded that the trial court had substantial reason or interest in closing the courtroom because of these issues and that the first *Waller* factor was satisfied. *Id.*

{¶ 14} As to the second factor, the *Drummond* court concluded that the closure of the courtroom during the testimony of three State witnesses was no broader than necessary. *Id.* at ¶55. The court also noted that the media remained, while the spectators vacated the courtroom. The court emphasized the fact that the media’s

presence “helped safeguard Drummond’s right to a public trial” because the witnesses’ awareness of the media minimized the risk that they would alter their testimony. *Id.*

{¶ 15} With respect to the third factor, the trial court in *Drummond* did not consider alternatives to closing the courtroom. However, the court did not find this as error because the closure was only during the testimony of three witnesses and was narrower than closing the entire trial. *Id.* at ¶57.

{¶ 16} As to the final factor of adequate findings, the *Drummond* court noted that the trial court stated there had been a physical altercation between spectators and courtroom deputies, it mentioned another incident had occurred in the judge’s chambers, and that witnesses had expressed fear of retaliation by testifying in open court. *Id.* at ¶58. The court found these reasons were adequate in light of the limited closure. It stated though that “the trial court should have made additional findings to clarify the reasons for closing the court.” *Id.*

{¶ 17} With the above in mind, we now turn to the instant case and apply the *Waller* factors. Here, the trial court ordered that everyone be removed from the courtroom during Jenkins’s testimony. Therefore, this case involves a partial closure, and the “substantial reason” rather than the “overriding interest” for the closure must be readily apparent and supported in the record. *Drummond* at ¶53. See, also, *State v. Grant*, Cuyahoga App. No. 87556, 2007-Ohio-1460, ¶15.

{¶ 18} In the instant case, the trial court conducted an evidentiary hearing on Jenkins’s testimony under Evid.R. 104. Prior to the hearing, the jury was excused and

the trial court cleared the public from the courtroom. The parties did not object to the court clearing the courtroom for the purposes of this hearing.

{¶ 19} At this hearing, Jenkins testified that he is a codefendant and that he pled guilty to several charges in exchange for his testimony. He further testified that while he was waiting in his holding cell, Woods asked him if he was going to testify today. Jenkins replied, “what did is already did.” He told Woods not to go to trial. Woods responded that he is taking it to trial because he is not guilty. Woods also told Jenkins that he does not need to testify. Jenkins testified that he did not take Woods’s comments as a threat.

{¶ 20} After the court ruled that it was going to permit Jenkins’s testimony, the parties then discussed whether the public should be allowed in the courtroom during Jenkins’s testimony. The following exchange took place:

“[STATE]: [T]he State believes that the public should not [be] allowed in the courtroom for Mr. Jenkins’s testimony. * * * [N]obody else has told us that they’ve had this type * * * of threat or they’re afraid to testify in front of these people[.]

*** ***

[WOODS’S COUNSEL]: I object to that. First of all, there’s been multiple members of the public sitting in this courtroom throughout the entire trial. The jury has had the occasion to see them throughout from voir dire on.

If they are suddenly absent from one particular witness, they are going to be able to draw some kind of conclusion that is improper and it would hurt [Woods’s] case. * * * Mr. Jenkins in his own words said [he] was not threatened and [he] wasn’t intimidated by [Woods].

**** ***

[I]t's a public courtroom and if a person wants to come in and make some kind of deal and testify in open court, the public has a right to be there and any inference that the jury draws from suddenly a cleared room is negative, it does make it seem as if there's some intimidation or threats or risk and that's simply not an issue in this case.

*** * ***

[JENKINS'S COUNSEL]: I certainly appreciate the concerns that defense counsel has expressed, but it seems like it could be dealt with in a way that still respects [Jenkins's] personal safety and the potential for repercussion to follow his testimony.

*** ***

[T]his is a young man who is going to be going to prison; he's pled to a range of sentence that requires he be incarcerated.

*** ***

[W]e have to bear in mind that there are at least certainly allegations of gang activity in this case.

*** * ***

I'm simply suggesting that there's indicia here that the Court needs to be aware of that there could be repercussions following [Jenkins's] testimony.

*** * ***

To remedy [defense counsel's] concern, the Court can simply close the courtroom for the rest of the day[.]

*** * ***

[WOODS'S COUNSEL]: Well, Judge I don't think the jury is going to believe that suddenly [the] entire courtroom just decided to go home for the day. There's going to be a negative connotation and there's a legitimate basis.

[COURT]: The Court's ruling is we're going to close the courtroom

for the duration of his testimony.”

{¶ 21} Without any further explanation, the trial court closed the courtroom during Jenkins’s testimony only. The trial court stated the reason for the closure was a concern for the safety of the witness (Jenkins) and possible intimidation. In support of the closure, Jenkins’s counsel stated that “there’s an indicia here that * * * there could be repercussions following [Jenkins’s] testimony.” An indicia, however, is a far stretch from a claim that a witness was intimidated or threatened. See *State v. Dubose*, 174 Ohio App.3d 637, 2007-Ohio-7217, 884 N.E.2d 75, ¶103. Moreover, when defense counsel asked Jenkins if he took Woods’s comments as a threat, he replied, “No. I didn’t take it as a threat.”

{¶ 22} Furthermore, unlike *Drummond*, in the instant case there was no evidence of a physical altercation or a fear of retaliation explicitly expressed by witnesses. We note that the claim of a witness’s safety, unsubstantiated by any specific threat or incident, is inherent whenever a codefendant testifies against another codefendant. See *Presley v. Georgia* (2010), _____ U.S. _____ 130 S.Ct. 721, 725, 78 U.S.L.W. 4051. If these broad concerns are sufficient to override a defendant’s constitutional right to a public trial, a court could exclude the public almost as a matter of course. *Id.* In *Presley*, the United States Supreme Court found that defendant’s Sixth Amendment right to a public trial was violated when the trial court excluded the defendant’s uncle from the voir dire of prospective jurors. *Id.* Here, the trial court closed the courtroom during the trial testimony of a witness. Therefore, based on these facts we find that the record

does not reflect a substantial reason for the closure.

{¶ 23} As to the second factor, we find that the closure of the courtroom was broader than necessary. Although the courtroom was closed for Jenkins's testimony only, it appears that the trial court excluded all spectators, including the media. Thus, the closure was far broader than necessary to protect any concerns as to Jenkins's safety and was not appropriately limited. See *Dubose* at ¶104. Therefore, the second *Waller* factor was not satisfied.

{¶ 24} With respect to the third factor, it does not appear as though the trial court considered alternatives to the closing of the courtroom. The trial court could have identified the problem spectators and only excluded them from the courtroom. The trial court also could have closed the courtroom for the rest of the day, as suggested by Jenkins's counsel. It did not. *Dubose* at ¶104. Thus, we find that the third *Waller* factor was not satisfied.

{¶ 25} As to the final *Waller* factor, we must assess whether the trial court made findings adequate to support the closure of the courtroom. In *Drummond*, the trial court made the following findings, which the Ohio Supreme Court found were adequate to support the closure:

“The Court: It's come to the attention of the Court that some of the jurors — or witnesses feel threatened by some of the spectators in the court. The Court's making the decision that until we get through the next couple of witnesses I'm going to clear the courtroom. That includes the victim's family, the defendant's family[,] and all other spectators. The Court had two incidents yesterday involving one of the — spectators showed total disrespect to the Court in chambers and gave the deputies a very hard time. I didn't hold him in contempt of

court, but just after that then another individual — there was a physical altercation between that individual who also came to watch the trial.

*** * ***

The Court: Who ultimately got charged with assault on a peace officer. So over the objection of the defendant I'm clearing the courtroom just for today only.” Id. at ¶32-34.

{¶ 26} Whereas, in the instant case, the trial court closed the courtroom to all spectators with no further questioning about Jenkins’s fears or findings on the record to support the closure. There was only an “indicia” of possible repercussions suggested by Jenkins’s counsel, rather than an explanation of Jenkins’s claimed fear. In fact, Jenkins never uttered the word “fear.” We find that the trial court’s failure to further question about Jenkins’s actual or alleged fears and the failure to make any findings on the record to adequately support closure does not satisfy the fourth prong of the *Waller* test. See *State v. Washington* (2001), 142 Ohio App.3d 268, 755 N.E.2d 422 (where this court found that the trial court violated defendant’s Sixth Amendment right to public trial and abused its discretion when it ordered closure of the courtroom during testimony of the State’s confidential informant).

{¶ 27} Regrettably, we are constrained to reverse this case, notwithstanding the overwhelming evidence of Woods’s guilt, but the right to a public trial is a “cornerstone of our democracy which should not be circumvented unless there are extreme overriding circumstances.” *Drummond* at ¶49, citing *State v. Lane* (1979), 60 Ohio St.2d 112, 397 N.E.2d 1338. And, as stated above, the violation of the right to a public trial is

structural error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself.

{¶ 28} Therefore, based on the foregoing, we find that the trial court abused its discretion when it closed the courtroom during Jenkins’s testimony. Upon retrial, if the trial court chooses again to close the courtroom during his testimony, it may do so provided it satisfies the four factors set forth in *Waller*. Id.

{¶ 29} Accordingly, the first assignment of error is sustained, and we reverse his convictions and remand this case for a new trial.

ASSIGNMENT OF ERROR THREE

“The warrantless search of [Woods’s] jail cell for evidence on the eve of [his] trial and the seizure of [his] personal papers, including confidential attorney-client communications and work product, constituted an unlawful search and seizure, a denial of the right to counsel, an outrageous governmental conduct warranting the dismissal of all charges.”

{¶ 30} In the instant case, on the day before trial the State advised the court that letters from Woods’s jail cell had come into its possession. Four days prior to trial, Cleveland police officers searched Woods’s jail cell without a search warrant. Cleveland police used “buffer officers,” who were not involved in the case, to search Woods’s jail cell. The State maintained that they only took personal letters and nothing related to attorney work product or attorney-client communications. Defense counsel claimed that the officers took his personal papers, which included attorney work product.

{¶ 31} Woods argues that this search was unreasonable and unlawful. We

recognize that the government is not required to obtain a warrant to search a defendant's jail cell under *Hudson v. Palmer* (1984), 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.E.2d 393. However, in the instant case the letters seized from Woods's jail cell were not used at trial. The record reveals that the State did not use the letters as evidence and the trial court ordered that the sheriff immediately return all of Woods's "personal papers and items that were removed from [his] jail cell as part of a law enforcement search conducted on or about Friday, August 21, 2009." This evidence was not used at trial, therefore, Woods was not prejudiced.

{¶ 32} Accordingly, the third assignment of error is overruled.

{¶ 33} In the remaining assignments of error, Woods alleges various errors at trial. However, based on our disposition of the first assignment of error, we overrule these assignments of error as moot. See App.R. 12(A)(1)(c).

{¶ 34} Accordingly, judgment is reversed and the case is remanded for a new trial.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR