

IN THE SUPREME COURT OF NORTH DAKOTA

Feb. 18, 2010

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	District Court No. 09-07-K-3316
vs.)	Supreme Court No. 2009-0079
)	
Elijah Addai,)	
)	
Defendant-Appellant.)	
)	

APPEAL FROM DISTRICT COURT, COUNTY OF CASS, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE CYNTHIA ROTHE-SEEGER, PRESIDING

PETITION FOR REHEARING

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[¶ 3] STATEMENT OF THE ISSUES

- I. Whether the trial court committed reversible error by closing the courtroom to the press and public during the trial in light of the recent U.S. Supreme Court case *Presley v. Georgia*, 175 L. Ed. 2d 675 (2010).

STATEMENT OF THE CASE

[¶ 4] Appellant appeals from a judgment of conviction from a guilty verdict of first degree murder. The trial before District Judge Cynthia Rothe-Seeger in the District Court of Cass County commenced December 1, 2008, and concluded December 11, 2008, with a jury verdict of guilty.¹ T. 920. The Jury deliberated four and one-half days before reaching a verdict.

[¶ 5] The charge was contained in a one count Information, charging that on or about August 19, 2007, Elijah Addai murdered David Delonais by stabbing him with a knife, a Class AA felony.

[¶ 6] As part of the background of this appeal, one of the participant in the altercation and whose knife contained the deceased's DNA, Semereab Tesafaye/7-Up, whose nickname is 7-Up, was never charged with a crime.

[¶ 7] On February 17, 2009, Mr. Addai was sentenced to life in prison with the possibility of parole.²

[¶ 8] A timely notice of appeal was filed and this appeal followed.

[¶9] Following appeal the North Dakota Supremem Court issued an opinion on 2/17/10 affirming the district courts rulings and the jury verdict in full.

STATEMENT OF THE FACTS

[¶ 10] The facts of the underling case are the same as detailed in the appeal.

Below are the relevant facts regarding the courtroom closure.

¹Transcript references will be noted as HT for any pre-trial hearing transcript followed by a page number, and the date of the hearing; Trial transcript references will be noted T followed by a page number.

² Substitute District Judge Douglas Herman presided at the sentencing hearing as Judge Rothe-Seeger rotated from criminal to a civil docket.

[¶ 11] During a testimonial phase of the trial, the courtroom was closed to the public. Little Mo’s lawyer, Jesse Lange was the witness and asserted that the Judgment and Commitment order in Little Mo’s case was under seal and therefore in a file marked “restricted” in the Clerk’s office. Judge Rothe-Seeger immediately cleared the courtroom of all media and the public. T 688. Only court personnel, jury, parties and their lawyers remained.

[¶ 12] After Lange’s testimony, the trial judge reopened the courtroom. T 700.

[¶ 13] The state investigated the “restricted” file and reported to the judge that the file for Little Mo should not have been sealed and restricted, indicating a Clerk’s error. T 702. The state reported that the restriction on the file had just been removed by the Clerk’s office. T 702. Based on that information, the trial judge ordered the restricted file unsealed. T 703. In addition, to try to cure the closure problem, the Court ordered a transcript prepared for the “closed courtroom session” and made it available in the Clerk’s office at some future date, since daily transcript was not being prepared.

[¶ 14] During the closed session, testimony concerning Little Mo’s conviction was provided by his lawyer. T 631. Lange reviewed the Innovis Hospital security footage that showed Little Mo tampering with evidence. T 632.

[¶15] As the Judge was deciding to close the court room on her own initiative she did not ask whether the parties objected. T. 689. The Judge asked Defense counsel, Mr. Bandborg, if he agreed with the way she was handling Little Mo’s file which Mr. Lange was testifying about, to which he replied he did not agree with the way the Court was handling Little Mo’s file, but did not have a problem with what the court was doing.

T 689. The prosecutor, Ms. Viste did voice some protest to the courtroom being locked.
T. 690.

JURISDICTIONAL STATEMENT

[¶ 16] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06 (4), and 40-18-19, and N.D.R.Crim.P. 37. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. §§ 29-28-06 (1), and 29-28-06 (2). This appeal is timely under N.D.R.App.P. 26.

[¶17] This court maintains jurisdiction under N.D.R.App.P. 40.

LAW AND ARGUMENT

[¶ 18] This petition is brought because of the United State Supreme Court issued Presley v. Georgia, 175 L. Ed. 2d 675 (2010), Jan. 19th, 2010, while this Court was deciding Mr. Addai's case. Presley is applicable to the courtroom closure.

I. The trial Court committed reversible error by closing the courtroom to the press and public without lawful cause.

[¶ 19] The Sixth Amendment requires that the trial of a criminal case be open to the public. The federal right is applicable to the states based on In re Oliver, 333 U.S. 257, 273 (1948). This case does not involve information that would compromise a secret government's agent's identity, sources or methods, where closure may be appropriate. See U.S. v. Lucas, 932 F.2d 1210, 1217 (8th Cir. 1991). Further, the closure of the courtroom was not inadvertent but was an affirmative act of the trial judge, misguided and wrong. See Gonzalez v. Quinones, 211 F.3d 735, 738 (2nd Cir. 2000).

[¶20] The first amendment, also applicable to the States also holds the right to a public trial and is “created for the benefit of the Defendant.” Presley quoting Gannett Co. v. Depasquale, 443 U.S. 368, 380 (1979).

[¶ 21] In Mr. Addai’s case, a portion of the trial was closed to the public without a factual or legal basis, violating his right to a public trial and the public’s right to a public trial. Presley v. Georgia, 175 L. Ed. 2d 675. The purposeful closure of the proceedings, without a hearing of any type, undermines the public’s confidence in the criminal justice system and undercuts the right of the accused to have an open trial with the public and media present. *See* Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984). None of the four conditions set out in Press-Enterprise I was met. Press-Enterprise I, 464 U.S. 502 at 510-11.

[¶ 22] This closure of the courtroom was problematic at the outset because it was based solely on misinformation about a restricted file that might be referred to during the testimony of lawyer/witness Jesse Lange. T 688. After the closure and exclusion of media representatives and the public, further information developed that the Clerk’s Office file was marked “restricted” when the file was determined to have been mislabeled. T 702-703.

[¶23] The Judge closed the court room on her own initiative, and made no findings regarding the closure as required by Waller v. Gerogia, 467 U.S. 39, at 48. The United States Supreme Court quotes Waller in Presley as follows:

“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudicial, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. Waller at 48.

[¶24] In the present case the court made no findings, made no investigation into the file in which it was concerned, simply ushered people out of the court room. In this Courts opinion of 2/17/10 it concludes that Defense counsel failed to object to the courtroom closure thus this Courts opinion does not address the merits of the closure itself. However it is noted in Presley, citing Pess-Enterprise I, that neither party must assert the right to an open courtroom, much less object.

[¶25] In this Court's decision, this legal safeguard is ignored. Based on Presley the Defendant respectfully asks this Court to reconsider its opinion regarding the Courtroom closure.

[¶ 26] For the accused the closure of the courtroom to the public and press, however brief and unfortunate, impacted on his guaranteed right to a speedy and public trial. Thus, Mr. Addai's right was violated.

CONCLUSION

[¶ 27] Appellant requests that this Court reverse his conviction for first degree murder based on the facts, law, and argument set out above, and order the case remanded for a new trial.

Dated this the 18 day of Feb. 2010.

_____/s/_____
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[¶ 28] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Leah Viste, pursuant to Administrative Order 14 on the 26th day of February, 2010. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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