70762-1

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No. 70762-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TOMAS AFEWORKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Assuming Mr. Afeworki waived his right to counsel, the trial court improperly punished him for doing so.

At a hearing on the morning of July 18, 2013, the trial court ordered Mr. Afeworki to represent himself. 7/18/13 RP 114-16. That afternoon, the jail returned Mr. Afeworki to court in shackles. A deputy prosecutor announced that they had done so, and would insist on future restraint, solely because he was no longer represented by counsel. 7/18/13 RP 147.

The trial court acquiesced to the jail's demands and required to Mr. Afeworki to be restrained through the reminder of trial stating "I am going to accept the representations of the jail as to the security risk level of the defendant." 7/18/13 RP 152. As set forth in Mr. Afeworki's opening brief, requiring him to be restrained at all proceedings, including during his jury trial, as a consequence of self-representation violated the Sixth Amendment.

In its response brief, the State dismisses this argument in a footnote contending there are "numerous factors supporting" restraint. Brief of Respondent at 45, n15. First, the State's contention misses the fact that the trial court never identified any of such factors. As

discussed in the opening brief and again below, the trial court never balanced any criteria in determining whether Mr. Afeworki would be restrained.

Even assuming the court had properly addressed the question of the whether Mr. Afeworki should be restrained, it did not do so **before** the State unilaterally determined to bring Mr. Afeworki to court in shackles. Thus, at best, the trial court did not analyze the propriety of restraint until after the constitutional violation had occurred.

Finally, the State's contention on appeal ignores the statements of the deputy prosecutor, that Mr. Afeworki would be restrained from that point on solely because he was representing himself. When the court asked the jail to explain why it was insisting Mr. Afeworki be restrained at all future proceedings, the deputy prosecutor bluntly answered "he has had a lawyer before." 7/18/13 RP 147.

It is plain; Mr. Afeworki was restrained at every subsequent court proceeding, including those before the jury, solely because he was representing himself. As addressed in Mr. Afeworki's prior brief, that error requires reversal.

2. By requiring Mr. Afeworki to wear a shock device throughout trial, the trial court deprived him of his right to a fair trial.

Criminal defendants have long been entitled to appear in court free from bonds and shackles absent extraordinary circumstances. U.S. Const. amends. VI, XIV; Const. art. 1, § 22; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970); *In re Personal Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *State v. Williams*, 18 Wash. 47, 50, 50 P. 580 (1897) "It is well settled that in a proceeding before a jury a criminal defendant has a constitutional right to appear free from restraints or shackles of any kind of an kind." *State v. Walker*, _ Wn. App. _ (69732-3-I, December 8, 2014) (citing *Williams*, 18 Wash. 47). It is equally clear this rule extends beyond chains and shackles as a person is "entitled to appear at trial free from **all bonds or shackles."** *Davis*, 152 Wn.2d at 693.

Restraints must be used only as a "last resort," when less restrictive alternatives are not possible. *Allen*, 397 U.S. at 344; *Davis*, 137 Wn.2d at 693.

> The trial court must base its decision to physically restrain a defendant on evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner in the courtroom.

Davis, 152 Wn.2d at 695. This determination must be based on facts in the record. *State v Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 684 (1981). Finally, the trial court and not corrections officers must make the decision of whether a defendant is or is not shackled. *Finch* 137 Wn.2d at 853.

Despite these long-settled requirements the trial court Mr. Afeworki restrained during his jury trial saying without any analysis of the need to do so. The requirement is clear that the trial judge must weigh the competing interests and articulate the basis for requiring a defendant be restrained. Here, it is equally clear the trial judge did not do so.

Yet, the State contends in its brief that the record would support a decision to require Mr. Afeworki to wear some form of restraint during trial. The relevant inquiry is not whether the trial court could have supported its decision to shackle Mr. Afeworki had it undertaken the required analysis. Instead, the issue presented here is whether the trial court actually considered any of these factors before it required Mr. Afeworki to be restrained. *See e.g., Davis*, 152 Wn.2d at 695; *Hartzog*, 96 Wn.2d at 400.

The State's brief does not point to anything in the record which demonstrates the trial court actually considered any of the factors the State identifies in its brief. The State's inability to point to such a ruling by the trial court is readily explained by the fact the trial court never actually made such a finding. The hearing on the question of restraint is devoid of any analysis by the court of Mr. Afeworki's security risk. Instead, the hearing began with the deputy prosecutor asserting that because Mr. Afeworki was representing himself he would be restrained during trial. 7/18/13 RP 147. The hearing ended with the trial explicitly stating it would defer to the jail's security assessment, "I am going to accept the representations of the jail as to the security risk level of the defendant." 7/18/13 RP 152. The sum of the trial court's ruling was:

> At this point I'm going to accept the representations of the jail as to the security risk level of the defendant. I like the idea of the band, rather than to have chains on
> I will tell you, sir, that I hardly - - I am going to say hardly because I had one defendant who admitted if he was free, he would attack. I hardly have defendants, when this issue comes up who say "oh yes, I am going to jump up and attack." It usually happens in a fit of anger. It is not something that you would plan. I know that. But I do have to address that. I believe the jail has much more expertise in assessing security risk.
> The leg band or the arm band, I am assuming that you can choose whichever it is that you want.

Obviously there is no discussion of Mr. Afeworki's history, or any discussion of escape attempts. There is no discussion of his intent to injure anyone; indeed, the court acknowledged it did not believe Mr. Afeworki planned to do anything.

The jail insisted Mr. Afeworki be restrained simply because he was representing himself. The trial court abdicated its responsibility and instead deferred entirely to the jail's wishes violating Mr. Afeworki's right to a fair trial. *Finch* 137 Wn.2d at 853. As discussed in detail in Mr. Afeworki's opening brief, that violation requires a new trial.

3. The trial court deprived Mr. Afeworki of his right to counsel.

a. *Mr. Afeworki did not ask to proceed pro se.*

The State's response brief devotes 17 pages to what the State titles the "history" of Mr. Afeworki's representation. Brief of Respondent at 13-31. Yet nowhere in that lengthy discussion does the State acknowledge that at the point at which the trial court required Mr. Afeworki to represent himself, there was no motion before the court seeking to waive his right to counsel. It does not require 17 pages to set forth the relevant history. Instead it is as follows.

The court denied Mr. Afeworki's request to proceed pro se. 7/16/13 RP 26. At no point after the trial court's ruling, did Mr. Afeworki again request to proceed pro se. Instead, as the hearing continued, defense counsel interrupted the proceedings informing the court that his client had said something which defense counsel found upsetting. Mr. Afeworki explained he had threatened to sue defense counsel. *Id.* at 34. Although it had just denied his request to proceed pro se, and Mr. Afeworki had not renewed his motion, the court announced it would require Mr. Afeworki proceed pro se if defense counsel believed he needed to withdraw. *Id. at* 38.

The following day defense counsel made a motion to withdraw. 7/17/13 RP 56. Mr. Afeworki then asked for appointment of new counsel. *Id.* at 60. The State agreed that withdrawal of defense counsel required appointment of new counsel. *Id.* at 63. The court, however, refused and instead began a colloquy to attempt to determine if Mr. Afeworki was waiving his right to counsel. *Id.* at 70-73. At the conclusion of that colloquy, the court stated it had "grave concerns" about Mr. Afeworki's competence to represent himself. *Id.* at 83. The court did not issue a ruling.

The next day, the court refused to appoint Mr. Afeworki a new attorney. 7/18/13 RP 114. The court found Mr. Afeworki knowing and intelligently waived his right to counsel. *Id.* at 115-16. The court also found Mr. Afeworki had waived his right to counsel by his actions. CP 556-58.

That is the relevant factual context of the trial court's ruling. The accuracy of the above recitation is borne out by the trial court's findings of fact regarding the withdrawal of counsel. Those findings do not include any finding that Mr. Afeworki requested to proceed pro se after his previous motion was denied on July 16, 2013. See CP 556-58. Indeed, those findings specifically provide that Mr. Afeworki "more likely than not thought that he would get appointed a new counsel." CP 558.

It is impossible to find a knowing waiver of counsel where Mr. Afeworki did not make a request to represent himself but instead asked for an attorney.

b. Mr. Afeworki did not waive his right to counsel by his conduct.

In his opening brief, Mr. Afeworki contends he was not warned that his behavior could be deemed a waiver of counsel. Instead, the court's first mention of such a concept was after defense counsel

informed the court of what he believed to be a threat. 7/16/13 RP 38. The State properly noted, that even if the court then permitted defense counsel to withdraw that did not permit the court to force Mr. Afeworki to proceed pro se. 7/17/13 RP 63. Nonetheless, the court allowed counsel to withdraw because it found he could not ethically represent Mr. Afeworki. 7/17/13 RP 69.

The State's task in response should be extraordinarily straightforward; simply cite to the portion of the record where the trial court warned Mr. Afeworki that dilatory behavior would result in the loss of the right to counsel. Importantly, and self-evidently, that warning must have preceded the behavior which the State believes to constitute the waiver. Yet nowhere in its brief does the State identify where the trial court provided such an advisement to Mr. Afeworki. Again, the State's inability to do so is readily explained by the complete absence of such an advisement by the court.

c. *Because he was denied the right to counsel at a critical stage Mr. Afeworki's conviction must be reversed.*

A complete denial of counsel at a critical stage of the proceedings requires reversal of the conviction. *United States v. Cronic,* 466 U.S. 648, 658–59, 659 n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d

657 (1984). Here, Mr. Afeworki was denied his right to counsel at a critical stage of the proceedings. That requires reversal of his conviction. *Cronic,* 466 U.S. at 658–59.

B. CONCLUSION

Based upon the arguments above and those contained in his initial briefing, this Court should reverse Mr. Afeworki's conviction.

Respectfully submitted this 29th day of December 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. TOMAS AFEWORKI, Appellant.	)))))))))	NO. 70762-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF DECEMBER, 2014.

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