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No. 69732-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VERNON MAURICE WALKER,

Appellant.

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

The Honorable Dean S. Lum

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Walker's constitutionally protected right to be free from being shackled at his sentencing hearing.

2. The court erred in finding the State had provided sufficient justification for shackling Mr. Walker at sentencing.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant has a constitutionally protected right under the United States and Washington Constitutions to appear before the court without being required to wear restraints. While the right has primarily been applied to jury trials, the right should be extended to all court proceedings. Over repeated objections, Mr. Walker was required to appear at several sentencing hearings while in shackles. In justifying the shackling, the court here relied solely on a jail employee's declaration which cataloged Mr. Walker's behavior while in jail and which urged the court to adopt a blanket policy, which the Supreme Court has ruled is a failure of a court to exercise the required discretion. Is Mr. Walker entitled to reversal of his sentence and remand for resentencing without restraints because of the violation of his right to appear free from restraint?

C. STATEMENT OF THE CASE

On June 30, 2003, Vernon Walker was initially charged with one count of first degree murder and one count of first degree assault. CP 1-2. On April 30, 2012, as part of a plea agreement, Mr. Walker pleaded guilty to one count of second degree murder and one count of second degree assault. CP 13-25.

Mr. Walker requested a sentence at the low end of the standard range based upon a diagnosis of Fetal Alcohol Spectrum Disorder (FASD). CP 42-132. At the initial sentencing hearing on October 26, 2012, Mr. Walker moved to appear before the court unshackled, noting that appearing shackled was extremely prejudicial. 10.26/2012RP 9. The court took no action on Mr. Walker's request; rather the court instructed Mr. Walker to note a motion for unshackling. 10/26/2012RP 9-10.

Mr. Walker noted the hearing and the State filed a response. CP Supp ____, Sub No. 90, 91. A hearing on the motion was held on November 9, 2012. The State filed a declaration from a member of the jail staff outlining Mr. Walker's behavior while in the jail and noting the reasons Mr. Walker was being escorted to and from jail in

restraints. CP Supp ___, Sub No. 91. The declaration made no mention of Mr. Walker's behavior while in court.

The court heard arguments regarding the shackling issue and refused to order Mr. Williams unshackled. 11/9/2012RP 10-12. Initially, the court opined that there was no authority requiring the court to unshackle a defendant at sentencing, nor requiring the court to provide any specific or articuable reasons for shackling a defendant during sentencing. CP Supp ___, Sub No. 94; 11/9/2012RP 11. Nevertheless, the court provided some rationale for shackling Mr. Walker during the sentencing hearing:

> The fact that there have been no outbursts in any court proceeding in Washington doesn't follow. One of the reasons there have been perhaps no court outbursts is because he's shackled. So I don't see that as being logically following. Now the defense has made a point that the Prosecutor's Office of Civil Division has pointed out [sic] that a significant amount of information about the Defendant's infractions and behavioral problems within the jail, but I don't believe any of this would have been brought to light unless the Defendant had filed this motion to be unshackled . . . So the Court, as I stated earlier, the Court will make the alternative finding that the Department of Adult and Juvenile Detention and the King County Corrections Officers and the State have amply justified their rationale for not having the Defendant unshackled and dressed in civilian – not dressed in civilian clothes for a sentencing hearing. The Court will deny these motions.

11/9/2012RP 11-12.

At the December 11, 2012, sentencing hearing, Mr. Walker renewed his objection to his appearing before the court in shackles and the court again overruled the objection. 12/11/2012RP 10-11. The court rejected Mr. Walker's request for a mitigated standard range sentence on the basis of FASD, and sentenced him to a standard range sentence below the high end of the standard range but above the midpoint. CP 174, 176.

D. ARGUMENT

THE COURT VIOLATED MR. WALKER'S CONSTITUTIONALLY PROTECTED RIGHT TO APPEAR AT SENTENCING WITHOUT RESTRAINTS

1. Defendants have a constitutional right to be appear in court free from shackling absent a finding of a compelling reason. It is well settled that absent some compelling reason for physical restraint, defendants must appear in court free of prison garb and shackles. *See Estelle v. Williams,* 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. Rodriguez,* 146 Wn.2d 260, 263-64, 45 P.3d 541 (2002); *State v. Elmore,* 139 Wn.2d 250, 985 P.2d 289 (1999), *cert. denied,* 531 U.S. 837 (2000); *State v. Finch,* 137 Wn.2d 792, 975 P.2d 967 (1999); *State v. Hutchinson,* 135 Wn.2d 863, 959 P.2d 1061

(1998), *cert. denied,* 525 U.S. 1157 (1999); *State v. Hartzog,* 96 Wn.2d 383, 635 P.2d 694 (1981). Article I, section 22 declares that, "In criminal prosecutions the accused shall have the right to appear and defend in person." "The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty." *State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897). Thus Washington courts have long recognized that the use of restraints may affect a criminal defendant's constitutional rights to be presumed innocent, to testify on one's own behalf, and to confer with counsel during the course of a trial. *Hartzog,* 96 Wn.2d at 398.

"[T]his court and courts of other jurisdictions have universally held that restraints should 'be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.'" *Finch,* 137 Wn.2d at 846, *quoting Hartzog,* 96 Wn.2d at 398. Trial courts must weigh on the record the reasons for restraining an accused in the courtroom, recognizing the accused's right to due process. *Hartzog,* 96 Wn.2d at 400. The trial court should allow

the use of restraints only after conducting a hearing and entering findings into the record that are sufficient to justify the use of the restraints. *State v. Damon,* 144 Wn.2d 686, 691-92, 25 P.3d 418 (2001).

The United States Supreme Court has stated that the Fifth and Fourteenth Amendments are violated when the trial court uses physical restraints visible to the jury absent a determination, in the exercise of its discretion, that restraints are justified by a state interest specific to the particular defendant on trial. *Deck v. Missouri,* 544 U.S. 622, 633-34, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2007). *Deck* involved the shackling of a defendant during the penalty phase of a capital case conducted before a jury. *Id.* at 625.

In *Deck*, besides prejudicing the defendant before the jury, the Supreme Court stated that "the use of shackles at trial 'affronts' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" 544 U.S. at 631, *citing, Allen,* 397 U.S. at 344.

> Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial

> system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

Deck, 544 U.S. at 631. In addition, use of shackles according to the Court, also infringes on the defendant's right to counsel in that it interferes with the defendant's ability to communicate with his lawyer. *Id.* at 630. *See also Spain v. Rushen,* 883 F.2d 712, 720-21 (9th Cir.1989) (restraints "may confuse and embarrass the defendant, thereby impairing his mental faculties; and they may cause him pain"), *citing cases from other circuits, cert. denied,* 495 U.S. 910 (1990).[1]

2. The right to be free from appearing in court in restraints extends to court hearings without a jury. While *Deck* involved shackling during a jury trial, courts in several states have extended the right not to be shackled to matters where a jury is not present. While Washington courts have not yet addressed this issue, courts in other states have held the right to be free of shackling applies equally to

[1] The right to be free from shackling has been extended to civil matters as well. *See, e.g., Duckett v. Godinez,* 67 F.3d 734, 748 (9th Cir.1995), *citing Tyars v. Finner,* 709 F.2d 1274, 1284-85 (9th Cir.1983) (unconstitutional to compel the subject of a civil commitment hearing to wear physical restraints at trial); *Lemons v. Skidmore,* 985 F.2d 354, 356-58 (7th Cir.1993) (impermissible to shackle plaintiff prison inmate in a civil rights action alleging excessive force by corrections officers). *Cf. Holloway v. Alexander,* 957 F.2d 529, 530 (8th Cir.1992) (constitutional to shackle plaintiff prison inmate in civil rights action challenging constitutionality of living conditions in state prison, because plaintiff's status as dangerous felon irrelevant).

defendants at trial, *and* during pretrial hearings, bench trials, and juvenile hearings.

In *People v. Boose*, the Illinois Supreme Court held that a defendant may not be shackled during a competency hearing prior to trial absent a finding of a strong necessity for doing so. 66 Ill.2d 261, 265-66, 362 N.E.2d 303, 305 (1977). The court held that shackling restricted the ability of the accused to cooperate with his attorney and to assist in his defense. *Id.*[2]

Similarly, in California, the Supreme Court in *State v. Fierro,* held that defendants cannot be shackled during the preliminary hearing absent a finding by the trial court of a manifest need for the restraints:

> Although we have not previously considered the use of restraints in a preliminary hearing, the reasoning of *Harrington* and *Duran* leave no doubt that the same principles would apply in that setting. As we have noted, the *Harrington* rule of "evident necessity" serves not merely to insulate the jury from prejudice, but to maintain the composure and dignity of the individual accused, and to preserve respect for the judicial system as a whole; these are paramount values to be preserved irrespective of whether a jury is present during the proceeding. Moreover, the unjustified use of restraints could, in a real sense, impair the ability of the defendant to communicate effectively with counsel [citation

[2] *Contra United States v. Zuber,* 118 F.3d 101, 104 (2d Cir.1997) (fear of prejudice is not an issue as a judge in a pretrial hearing presumably will not be prejudiced by seeing defendants in shackles).

> omitted], or influence witnesses at the preliminary hearing. Accordingly, we hold that, as at trial, shackling should not be employed at a preliminary hearing absent some showing of necessity for their use. Nevertheless, while the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented during trial. Therefore, a lesser showing than that required at trial is appropriate.

1 Cal.4th 173, 218, 821 P.2d 1302, 3 Cal.Rptr.2d 426 (1991).[3]

This principle was reaffirmed and extended to juvenile bench trials in *Tiffany A. v. Superior Court*, 150 Cal.App.4th 1344, 1359, 59 Cal.Rptr.3d 363 (2007) ("we conclude that any decision to shackle a minor who appears in the Juvenile Delinquency Court for a court proceeding must be based on the non-conforming conduct and behavior of that individual minor"). *Accord In re Staley*, 67 Ill.2d 33, 36, 364 N.E.2d 72, 73-74 (1977).

Mr. Walker urges this Court to find the rationale of the Illinois and California courts sound, that restraining the defendant interferes with his right to consult his attorney, but more importantly, "affronts the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Deck*, 544 U.S. at 631. In addition, this Court should also find that this rule is consistent with article I, section 22 of

[3] Both *People v. Duran*, 16 Cal.3d 282, 127 Cal.Rptr. 618, 545 P.2d 1322 (1976), and *People v. Harrington*, 42 Cal. 618 (1871), involved a defendant shackled at trial before a jury.

the Washington Constitution. *Williams*, 18 Wash. 51. Finally, this Court should rule that a defendant has a constitutionally protected right to appear at a court hearing with or without a jury unrestrained absent a finding by the court of a manifest need for the restraint.

3. The State's justifications here did not support the court's decision to have Mr. Walker remain restrained during sentencing. The court's rationale was based entirely on Mr. Walker's behavior in the jail, as stated by a jail employee. The court's failure to engage in its own determination regarding Mr. Walker's anticipated behavior *in court* was a failure of the court to exercise its discretion.

> A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record. *A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be "potentially dangerous" is a failure to exercise discretion.*

Hartzog, 96 Wn.2d 383 (emphasis added), *citing among other decisions People v. Duran, supra* (overruling three California appellate cases based on such a general policy). The Supreme Court in *Hartzog* adopted standards for trial courts to consider in exercising their discretion when faced with physical restraint decisions:

> (T)he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Hartzog, 96 Wn.2d at 400, *quoting State v. Tolley,* 290 N.C. 349, 368, 226 S.E.2d 353 (1976). In *Hartzog*, the superior court issued a blanket order that all defendants and inmate witnesses would appear in court in leg and arm restraints, and defendants would not be allowed to sit at counsel table, due to problems the court had with an assault case involving two inmates from the Walla Walla Prison. *Hartzog,* 96 Wn.2d at 387. As a result of this order, Mr. Hartzog, a prisoner at Walla Walla charged with possession of a controlled substance, was required to appear in court in shackles after being subjected to a probe search of his body. *Id.* at 378.

Here, the trial court failed to engage in the analysis laid out in *Hartzog*, instead abdicating its responsibility in favor of the jail staff's conclusion that Mr. Walker behaved poorly while in jail. As the Supreme Court so clearly stated, it is the court's responsibility to

exercise its discretion. *Hartzog,*, 96 Wn.2d at 400. The court here failed to consider any lesser alternatives, such as physical restraints that have less impact, "the use of metal detectors and other security devices." *Id.* at 401. Further, the court never asked Mr. Walker whether he would behave in court with the threat of restraint should he not.

Finally, while the declaration from the jail employee does contain information specific to Mr. Walker, it also contains a significant amount of boilerplate language similar to the kind relied upon by the trial court in *Hartzog*, where such reliance was found to be a failure to exercise discretion by the Supreme Court. *Hartzog*, 96 Wn.2d at 387 (court in *Hartzog* issued a blanket order requiring restraint of prison inmates because of the "court's belief that there is no reliable way to distinguish violent from nonviolent prisoners and that all inmates are potentially dangerous because of the nature of the prison setting itself.").

The court's reliance on the jail empoyee's proffer was a failure to exercise discretion. *Hartzog,* 96 Wn.2d at 383. The court violated Mr. Walker's right to be free from restraint.

4. The court's error in refusing to allow Mr. Walker to appear at sentencing without restraints was not a harmless error. A claim of unconstitutional shackling is subject to a harmless error analysis. *See Finch,* 137 Wn.2d at 859 (analyzing the determinative factors in a court's decision to restrain a defendant during trial). A court's order to shackle a defendant is not harmless where it has "a substantial or injurious effect or influence on the jury's verdict." *Elmore*, 139 Wn.2d at 274.

The Supreme Court has consistently stated (also in shackling cases) that constitutional errors are *presumed* prejudicial, and the State bears the burden of proving them harmless beyond a reasonable doubt. *Damon,* 144 Wn.2d at 692-93 (shackling case); *State v. Clark,* 143 Wn.2d 731, 775, 24 P.3d 1006, *cert. denied,* 534 U.S. 1000 (2001) (same); *Finch,* 137 Wn.2d at 859 (same).

Here, the trial court believed that it did not have to justify the physical restraining of Mr. Walker during sentencing. Further, the cursory rationale the court did announce was merely a reliance on the jail employee's declaration. Finally, although the court claimed to have ignored the restraints Mr. Walker wore throughout the sentencing hearings, the court placed great weight on the impulsivity of Mr.

Walker, a factor identified by the jail as a rationale for restraining Mr. Walker, as a basis for rejecting Mr. Walker's request for a mitigated standard range sentence. 12/11/2012RP 97-98, 100-01. Thus the court's error in requiring Mr. Walker to be restrained no doubt had "a substantial or injurious effect or influence" on the court's sentencing decision. *Elmore*, 139 Wn.2d at 274.

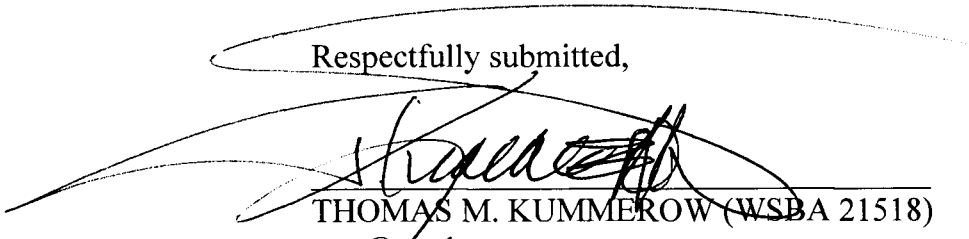
The restraint of Mr. Walker without a finding of a compelling reason violated Mr. Walker's constitutionally protected right to appear before the court without restraint. Mr. Walker is entitled to be resentenced without the restraints.

E. CONCLUSION

For the reasons stated, Mr. Walker respectfully asks this Court to reverse his sentence and remand for resentencing for the court to reconsider its decision to restrain Mr. Walker during the sentencing hearing.

DATED this 21st day of August 2013.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69732-3-I
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	)	
VERNON WALKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] VERNON WALKER 840534 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF AUGUST, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710