

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL) NO. 42430-4-II
RESTRAINT PETITION OF)
) SUPPLEMENTAL
JEROME D. PENDER) RESPONSE

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Olivia Zhou, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Petitioner, Jerome Pender, is currently in the custody of the Washington Department of Corrections serving a 300 months sentence for Attempted Murder in the First Degree, imposed in Thurston County Superior Court No. 07-1-00886-5 on July 17, 2008.

II. STATEMENT OF PROCEEDINGS

The petitioner filed its personal restraint petition on August 2, 2011. The State filed a timely response on January 30, 2012. The petitioner then filed a supplemental personal restraint petition entitled "Erratum/Correction of Inadvertently Missing Pages from Appendix C" on February 8, 2012. The State's supplemental response now

follows.

III. RESPONSE TO ISSUE RAISED

The petitioner alleges that the restraints he wore at trial affected his rights to a fair trial. In State v. Peyton, 29 Wn. App. 701, 630 P.2d 1362, review denied, 96 Wn.2d 1024 (1981), this Court held that it is not reversible error simply because jurors see a defendant wearing shackles. In this case, there is no indication that the jurors even saw the shackles that the petitioner wore at trial. In his own declaration, the petitioner admitted that the jurors could not see the restraints while the petitioner was sitting down. Additionally, the petitioner admitted that the jurors could not have seen the leg brace. The petitioner alleges that the jurors might have seen a bulge under his pants. However, the only offer that the petitioner made to support that allegation was that some of the jurors looked at him during the trial.

In the present case, the petitioner has already been convicted at trial and exhausted his appeal rights. Thus, to succeed in a personal restraint petition, he has to show prejudice. In order to show that he was prejudiced by the restraints, the petitioner has to show

that the jury's verdict was prejudiced based on the restraints that the petitioner wore. However, as seen in State v. Ollison, 68 Wn.2d 65, 411 P.2d 419, cert. denied, 385 U.S. 874, 17 L. Ed. 2d 101, 87 S. Ct. 149 (1966), beyond the defendant's bare allegation, there is no indication that the incident prejudiced the minds of the jurors against the defendant.

The petitioner requests that if reversal is not allowed, then this Court remand the case for an evidentiary hearing. "If a personal restraint petitioner presents a prima facie case of error, but the issues cannot be resolved on the existing record, the case will be transferred to superior court for a reference hearing." In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879, 123 P.3d 456 (2005). In the present case, the petitioner has not shown that a remand is warranted. The petitioner's only basis to support his belief that the jurors might have seen the bulge from the shock device worn under his pants was that some of the jurors looked at him when he stood up. However, that argument is not sufficient since it is very common and reasonable for jurors to look at all parties, including the defendant, during a trial.

IV. CONCLUSION

Based on the above arguments and the arguments as stated in the State's original response brief, the State respectfully asks this Court to deny Pender's petition for relief. If this Court finds that the trial erred in sentencing Pender to a firearm enhancement, then the State respectfully asks to remand for resentencing pursuant to a dangerous weapon enhancement.

RESPECTFULLY SUBMITTED this 21 day of March, 2012.

JON TUNHEIM
Prosecuting Attorney



OLIVIA ZHOU, WSBA #41747
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Response by the Respondent, on the date below as follows:

Electronically filed at Division II

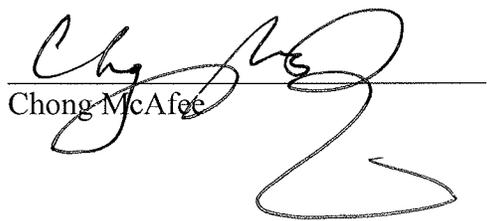
TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

JEFFREY E. ELLIS, ATTORNEY FOR APPELLANT
EMAIL: JEFFREYERWINELLIS@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of March, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

March 21, 2012 - 8:29 AM

Transmittal Letter

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Court of Appeals Case Number: 42430-4

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