

No. 42683-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Dylan Valin,

Appellant.

Clallam County Superior Court Cause No. 11-1-00048-5

The Honorable Judge George Wood

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by failing to hold a hearing prior to requiring that Mr. Valin be restrained during his jury trial.
2. The trial court erred by imposing restraints on Mr. Valin without adequate cause.
3. The trial court erred by imposing restraints on Mr. Valin without considering less restrictive alternatives.
4. Mr. Valin was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective for failing to object to the imposition of a leg brace on Mr. Valin, in the absence of an impelling necessity.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prior to requiring an accused person to attend trial in restraints, a trial judge must hold a hearing to determine the necessity of shackling the person during trial. Here, the judge did not hold a hearing to determine the need for restraints, and Mr. Valin was required to attend trial wearing a leg brace. Was Mr. Valin's conviction entered in violation of his Fourteenth Amendment right to due process?
2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably failed to object to the needless imposition of physical restraints. Was Mr. Valin denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Dylan Valin with three counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Second Degree, and one count of Rape of a Child in the Third Degree.¹ CP 23-26.

Mr. Valin exercised his right to trial, and presented an affirmative defense based on the victim misrepresenting her age. During the three-day jury trial he was fitted with a leg brace to restrict his movements; the restraint was imposed without any hearing or argument. RP (8/29/11) 3-60; RP (8/30/11) 4-18; RP (8/31/11) 18. The only reference to the brace came in the form of a directive from the when Mr. Valin took the stand: he was instructed not to walk in front of the jury so they could not see the device. RP (8/31/11) 18.

The jury did not convict him of any of the Rape of a Child in the Second Degree charges. Instead, they voted guilty on the lesser charges of Rape of a Child in the Third Degree and third-degree child molestation charges.² RP (8/31/11) 100-106. He was acquitted of the one charged

¹ Additional charges were severed. RP (8/25/11) 52.

² The convictions were inconsistent with the acquittals on the second-degree charges. If jurors accepted the affirmative defense, they should have acquitted Mr. Valin of third-degree child rape as well. However, mere inconsistency is insufficient to require reversal of a guilty verdict. *State v. Goins*, 151 Wash. 2d 728, 92 P.3d 181, 183 (2004).

count of third-degree child rape (which involved a different complaining witness). RP (8/31/11) 100-106.

After sentencing, Mr. Valin timely appealed. CP 6-10, 5.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. VALIN’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 BY ALLOWING HIM TO BE RESTRAINED AT TRIAL IN THE ABSENCE OF AN “IMPELLING NECESSITY.”

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

B. Mr. Valin was entitled to attend trial free of shackles absent some “impelling necessity” for physical restraint.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Damon*, 144 Wash.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used “unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.” *Finch*, at 842 (quoting *State v. Hartzog*, 96 Wash.2d 383, 398, 635 P.2d 694 (1981) (emphasis in original)). The accused has the right to be brought before the court “with

the appearance, dignity, and self-respect of a free and innocent man.”

Finch, at 844.

Restraints are disfavored because they undermine the presumption of innocence, unfairly prejudice the jury, restrict the defendant’s ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch*, at 845; *Hartzog*, at 399. Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch*, at 846.

The trial court must base its decision to physically restrain an accused person on evidence that s/he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly manner while in the courtroom. *Finch*, at 850. Concern that a person is “potentially dangerous” is not sufficient. *Finch*, at 852. Restraints may only be imposed based on information specific to a particular person; a general concern or a blanket policy will not pass constitutional muster. *Hartzog*, *supra*. Finally, restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives before imposing physical restraints. *Finch*, at 850.

A trial court electing to impose restraints must make findings of fact and conclusions of law that are sufficient to justify the use of the restraints. *Damon*, at 691-692. On direct appeal, improper use of

restraints is presumed to be prejudicial. *In re Davis*, 152 Wash.2d 647, 698-699, 101 P.3d 1 (2004).

C. The judge failed to hold a hearing or to consider less restrictive alternatives prior to requiring Mr. Valin to wear a leg brace at trial.

Mr. Valin appeared at trial wearing a leg brace. RP (8/31/11) 100-106. No mention was made of the reason for restraints. The court did not hold a hearing, hear evidence, or enter findings. Nothing in the record suggests that Mr. Valin posed an imminent risk of escape, that he intended to injure someone in the courtroom, or that he could not behave in an orderly manner. *Finch*, at 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch*, at 850. Finally, the record does not establish that the court took any but the most basic steps to ensure that potential jurors wouldn't see the restraints during jury selection, or that seated jurors wouldn't see the restraints during trial.

All of the concerns outlined by the *Finch* Court are implicated by the shackling that took place here. In addition to the practical impact—prejudice, restriction of ability to assist in the defense, and interference with the right to testify—the restraints here “offend the dignity of the judicial process.” *Finch*, at 845. The illegal imposition of restraints violated Mr. Valin's due process rights. *Id.*

Because the issue is raised on direct appeal, the court's improper use of restraints is presumed to be prejudicial. *In re Davis*, at 698-699. His convictions must be reversed and the case remanded with instructions to permit Mr. Valin to appear in court without restraint, absent some impelling necessity. *Id.*

II. MR. VALIN WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington

Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing

the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel provided ineffective assistance by failing to object to the imposition of restraints on Mr. Valin during his trial.

The Sixth Amendment right to the effective assistance of counsel exists in order to protect an accused person’s fundamental right to a fair trial. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). This includes the right to appear in court free from restraint. *Wrinkles v. Buss*, 537 F.3d 804, 813-815 (2008). In light of the wealth of case law prohibiting imposition of restraints without individualized justification, a failure to object “cannot be an objectively reasonable tack under prevailing norms of professional behavior.” *Id.*, at 815; *see also Roche v. Davis*, 291 F.3d 473, 483 (2002).

As noted above, Mr. Valin appeared in court with a leg brace. Nothing in the record suggests any reason why restraints were required, and the court failed to hold a *Finch* hearing. Despite this, defense counsel made no objection. Counsel’s failure to object and demand a *Finch* hearing was objectively unreasonable. *Wrinkles; Roche, supra.*

Mr. Valin was prejudiced by his attorney's deficient performance. Had counsel objected to the restraints, Mr. Valin would have received the *Finch* hearing to which he was entitled.³ Furthermore, because nothing in the record supports imposition of restraints, he would have been able to appear at trial "with the appearance, dignity, and self-respect of a free and innocent man." *Finch*, at 844. Finally, the court did not make a record establishing that jurors would be unable to sense that Mr. Valin was restrained.

A reasonable attorney would have acted to protect his client's constitutional right to appear in court free from restraint. Because defense counsel failed to object, Mr. Valin was deprived of the effective assistance of counsel. *Wrinkles; Roche*. His convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Valin's convictions must be reversed and the case remanded for a new trial.

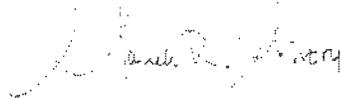
³ Of course, the obligation to hold a hearing rests with the court; it is not up to counsel to demand a hearing. *Gonzalez*, at 901.

Respectfully submitted on April 18, 2012.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 18, 2012.



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