

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 Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. Respondent’s concession requires reversal and remand for a new trial, with instructions to allow Mr. Valin to attend trial free of restraint, absent some “impelling necessity.” 1

II. Mr. Valin was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 5

CONCLUSION 5

TABLE OF AUTHORITIES

FEDERAL CASES

Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) 2

United States v. Banegas, 600 F.3d 342 (5th Cir. 2010) 2, 4

WASHINGTON STATE CASES

In re Davis, 152 Wash.2d 647, 101 P.3d 1 (2004)..... 1, 4

State v. Clark, 143 Wash. 2d 731, 24 P.3d 1006, 1029, cert. denied 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001)..... 3

State v. Damon, 144 Wash.2d 686, 25 P.3d 418 (2001)..... 1

State v. Finch, 137 Wash.2d 792, 975 P.2d 967 (1999) 1, 4

State v. Hartzog, 96 Wash.2d 383, 635 P.2d 694 (1981)..... 1

State v. Hutchinson, 135 Wash.2d 863, 959 P.2d 1061 (1998), cert. denied 525 U.S. 1157, 119 S. Ct. 1065, 143 L. Ed. 2d 69 (1999)..... 2

State v. Jaquez, 105 Wash. App. 699, 20 P.3d 1035 (2001)..... 1, 4

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 5

U.S. Const. Amend. XIV 5

ARGUMENT

I. RESPONDENT’S CONCESSION REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL, WITH INSTRUCTIONS TO ALLOW MR. VALIN TO ATTEND TRIAL FREE OF RESTRAINT, ABSENT SOME “IMPELLING NECESSITY.”

An accused person is entitled to appear at trial free from all restraints, 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 only be imposed upon a showing of impelling necessity. *Id.*, at 842. Such a showing is required not merely because of the potential for impact on jurors who observe the restraints, but also because restraints 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. *Id.*, at 845; *State v. Hartzog*, 96 Wash.2d 383, 399, 635 P.2d 694 (1981).

Respondent concedes that Mr. Valin was improperly shackled at his trial. Brief of Respondent, pp. 3-4. This requires reversal, because, on direct appeal, the improper use of restraints is presumed to be prejudicial. *In re Davis*, 152 Wash.2d 647, 698-699, 101 P.3d 1 (2004); *see also, e.g., State v. Jaquez*, 105 Wash. App. 699, 710, 20 P.3d 1035 (2001).

Respondent applies the wrong legal standard to argue that the error was harmless, erroneously asserting that “[t]he burden is on Mr. Valin to

show the shackling had a substantial or injurious effect or influence on the jury's verdict." Brief of Respondent, p. 4 (citing *State v. Hutchinson*, 135 Wash.2d 863, 959 P.2d 1061 (1998), cert. denied 525 U.S. 1157, 119 S. Ct. 1065, 143 L. Ed. 2d 69 (1999)). This is incorrect. *Hutchinson* is inapposite because the lower court in that case held a hearing on the need for shackling, and the judge made a detailed record establishing that jurors would not be able to see the restraints. *Hutchinson*.

Where no such hearing is held, the burden is on the state to prove beyond a reasonable doubt that any error was harmless:

[W]hen no reasons are given by the trial court, and it is not apparent that shackling is justified, the defendant need not demonstrate actual prejudice on appeal to make out a due process violation; rather, the burden is on the government to prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.' If the government cannot bear its burden, the conviction must be vacated and the case remanded for a new trial.

United States v. Banegas, 600 F.3d 342, 345-46 (5th Cir. 2010) (footnotes omitted) (quoting *Deck v. Missouri*, 544 U.S. 622, 635, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005)). In order to meet this burden, the government must prove beyond a reasonable doubt that the restraints could not be seen by the jury. *Banegas*, at 347.

Respondent cannot show beyond a reasonable doubt that the restraints were invisible to jurors in this case, and that the shackling error

did not contribute to the verdict. Respondent attempts to overcome this problem by arguing, without citation to the record, that the court “ensured no juror saw Mr. Valin’s leg restraint.” Brief of Respondent, p. 4.

But this bare assertion, unsupported by the record, does not establish harmlessness beyond a reasonable doubt. Even if Mr. Valin remained seated whenever the jury was present (as Respondent asserts, *see* Brief of Respondent, p. 4), nothing in the record proves that the jury members were unable to see the restraint while he was seated. The trial judge did not make a record about the layout of the courtroom, the location of counsel’s table, or the characteristics of the witness stand.¹

Nor does the record establish what steps were taken to ensure the restraints were invisible—nothing shows the use of protective skirts around both counsel tables or the use of tape to eliminate noises made by the shackles. *Cf. State v. Clark*, 143 Wash. 2d 731, 777, 24 P.3d 1006, 1029, cert. denied 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001).

The trial court’s directive—that Mr. Valin take the witness stand while jurors were out of the room—undoubtedly helped ensure that extra attention was not drawn to the leg restraint when Mr. Valin walked across

¹ Respondent’s assertions, again made without citation, that the restraint was “an unobtrusive leg band under his clothes,” that Mr. Valin “sat at the counsel table between his two attorneys,” and that the restraint was “hidden” and “not visible,” are also not supported by anything in the record. *See* Brief of Respondent, p. 6-7.

the courtroom. However, this precaution did nothing to ensure that jurors were unable to see the restraint while he was seated, either at counsel table or in the witness chair. In fact, nothing in the record shows that the restraints were invisible to jurors during the trial. *See RP, generally.*

Furthermore, Respondent fails to address Mr. Valin's additional arguments—regarding the ability to testify, the ability to assist in the defense, and the dignity of the judicial process—except in the most cursory way. Brief of Respondent, p. 6-7. Respondent's conclusory argument on these points rests on unsupported assertions made without citation to the record. Brief of Respondent, p. 6-7. Accordingly, Respondent has not established beyond a reasonable doubt that the shackling error was harmless with respect to these core concerns articulated by the *Finch* court. *Finch, at 845.*

The improper use of restraints is presumed prejudicial. *Jaquez, supra; Banegas, supra; Davis, supra.* Respondent does not show that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and the case remanded for a new trial, with instructions to allow Mr. Valin to appear in court without restraints. *Id.*

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

In light of Respondent's concession, Mr. Valin rests on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Valin's convictions must be reversed, and the case remanded with instructions to allow him to appear for trial without restraint.

Respectfully submitted on May 29, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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Aberdeen, WA 98520

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

Clallam County Prosecuting Attorney
lschrawyer@co.clallam.wa.us

I filed the Appellant's Reply 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 May 29, 2012.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY
May 29, 2012 - 7:52 AM

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