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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Paul M. Burch, Circuit Court Judge

HENRY L. GRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001127

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective assistance where counsel failed to object to Petitioner being visibly shackled during trial, where the routine use of physical restraints visible to the jury is forbidden by the Due Process Clause, since visible shackling is "inherently prejudicial?"

STATEMENT

Petitioner was indicted by a Richland County Grand Jury for murder and lynching in the first degree. App. 1419 – 1422. He was tried before the Honorable Thomas G. Cooper, Jr., and a jury from February 28 – March 2, 2012. Petitioner was tried with his codefendant, Robin Reese. App. 1. Petitioner was found guilty as indicted, and he was sentenced to serve concurrent terms of imprisonment of thirty years on each charge. App. 1158, ll. 19-25; App. 1183, ll. 11-15. On June 11, 2014, his convictions were affirmed on direct appeal. *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014).

Petitioner filed an application for post-conviction relief (PCR) on July 1, 2014. App. 1273 – 1286. The State made its return on November 19, 2014. App. 1287 - 1291. On July 10, 2017, Petitioner filed an amended PCR application. App. 1292 – 1294. A hearing was held before the Honorable Paul M. Burch on August 30, 2017. App. 1295. Anna Rawl Browder represented Petitioner. App. 1. Jessica Kinard represented the State. App. 1295. On July 1, 2019, the PCR court issued a sixty-four page order of dismissal.[1] App. 1355 – 1418. Petitioner sought a petition for writ of certiorari as to three issues. The State made its return to the petition for writ of certiorari. On June 7, 2022, this Court granted the petition for writ of certiorari as to Question 1 but denied it as to Questions 2 and 3.

This brief of petitioner follows.

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[1] Page one of the order of dismissal stated that the PCR court had before it a transcript of Petitioner's trial. App. 1355. Three pages of the transcript of Petitioner's trial are missing from undersigned counsel's copy of the trial transcript: pages 629, 725, and 1090. Undersigned counsel believes these three pages were not before the PCR court, since they were not part of the trial transcript received by Petitioner's appellate counsel on direct appeal and received by the State on direct appeal. Therefore, they were not included in the Appendix.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law *de novo*, with no deference to the PCR court. *Id.*

ARGUMENT

The PCR court erred where it found counsel provided effective assistance where counsel failed to object to Petitioner being visibly shackled during trial, where the routine use of physical restraints visible to the jury is forbidden by the Due Process Clause, since visible shackling is "inherently prejudicial."

A criminal defendant may not be physically restrained during his trial unless the trial court provides adequate justification, and the trial court did not do so here. Counsel's performance was deficient where he did not object to Petitioner's shackling and even called the jury's attention to it.

Relevant facts

Luck Campbell, April Sampson, and Nicole Simpson prosecuted this case. Petitioner was represented by Mathias Chaplin. App. 1. Petitioner was restrained with shackles around his wrists and ankles for the duration of the four-day trial, and the jury knew he was shackled. The shackles were visible and noisy. Trial counsel drew the jury's attention to the shackles in his opening statement: "[T]he end of the world sounds like . . . being forced to sit in a courtroom, shackled." App. 162, l. 17 – 163, l. 6; App. 1309, ll. 18-25; App. 1320, l. 4 – 1321, l. 3.

Nothing in the record indicated that physical restraints were necessary—Petitioner did not have a history of escape, resisting arrest, or assaulting police officers. He did not behave threateningly or aggressively in the courtroom. He was not rude or otherwise indecorous. Trial counsel did not object to the shackles on the record. Because he made no objection, no effort was made to ensure the jury was unaware of the restraints and no curative instruction was given that the jury should disregard them.

Petitioner and his sister, Robin Reese (Reese), were tried jointly for killing the decedent, Kevin Mack. App. 1; App. 392, ll. 20-22; App, 281, ll. 5-10. Shortly before his death, the decedent, who was in his thirties, approached a thirteen-year-old girl (the minor) on Valentine's Day and asked her to come home with him. App. 923, ll. 19-20; App. 922, ll. 16-17; App. 582, ll. 10-13; App. 662, ll. 20-23. A few minutes later, the decedent unwantedly grabbed the minor and when she rebuffed him, he knocked her to the ground and landed on top of her. They tussled. App. 245, l. 10 – 246, l. 21; App. 923, l. 19 – 925, l. 16.

The State alleged that a group of men including Marcellius Brooks (Brooks), who witnessed the decedent assault the minor, "bum rushed" the decedent to get him off of the minor and then the men beat and kicked the decedent. App. 582, l. 22 – 583, l. 11; App. 245, l. 10 – 248, l. 13. At least one booted man kicked the decedent in the head. App. 260, l. 21 – 261, l. 5. Brooks said he attacked the decedent after he saw the decedent "messing with" and "taking advantage of" the minor. App. 582, ll. 10-18. Another witness to this first attack said, "She was asking him to leave her alon[e], over and over and over, and [the decedent] wouldn't." App. 661, ll. 20-21. A manager at the nearby CVS pharmacy who witnessed this first attack, said the beating was "brutal" and seemed to go on "forever." App. 475, l. 8 – 477, l. 15.

Nevertheless, the decedent eventually got up and walked off, before, the State claimed, he encountered Petitioner, who was the minor's uncle. App. 279, ll. 1-15; App. 283, ll. 5-18. The State claimed this encounter precipitated a second confrontation, and it alleged that Petitioner "clipped" the decedent's feet out from under him causing him to fall and hit his head. App. 279, l. 24 – 281, l. 6. The State further claimed that Petitioner and Reese, who was the minor's mother, hit the decedent with a metal chair. App. 284, l. 15 – 287, l. 3. However, the cause of the decedent's fatal injuries was contested.

The decedent died from blunt force trauma to the head, and the State alleged the injury was consistent with a person "having their feet swept out from under them and landing on their head." App. 698, l. 1 – 699, l. 20. Although the State's forensic pathologist, Dr. Marcus, opined that the second assault on Decedent contributed to his death, Dr. Marcus admitted he could not tell which injuries were caused by the first assault and which by the second. He admitted the skull injury could have been caused by the first attack. App. 697, l. 19 – 699, l. 20; App. 705, l. 4 – 711, l. 17; App. 720, l. 8 – 721, l. 5. Although he did not testify at his trial, Petitioner would later say that he "clipped" the decedent's feet out from under him and Decedent hit the ground. Petitioner said he and his sister then "roughed him up a little bit" and left. App. 1318, ll. 1-17.

The defense argued that the first beating by Brooks and the other men was the cause of the decedent's death. The defense presented the testimony of Dr. Adel Shaker, an expert in forensic pathology, who testified that the decedent's death could have been the result of the first beating, by Brooks and his group. App. 848, ll. 8-15; App. 856, l. 15 – 863, l. 20. According to Dr. Shaker, the decedent could have walked away after the first beating during a "lucid interval" and subsequently succumbed to the fatal injuries. App. 858, ll. 6-16. Dr. Shaker opined that the decedent's injures were not consistent with falling due to having his feet swept out from under him, as the State claimed. Dr. Shaker further opined the injuries were not consistent with being beaten with a metal chair. Dr. Shaker thought the injuries were caused by punching, kicking, or stomping. App. 855, l. 6 – 862, l. 20; App. 889, ll. 2-8. Dr. Shaker opined the autopsy performed by the State's witness was not thorough. App. 864, l. 7 – 865, l. 16.

It appears the parties agreed pretrial that there would be no mention of gangs. App. 1313, l. 14 – 1314, l. 6. Nevertheless, trial counsel brought up gang affiliation during his cross-examination of one of the State's witnesses. App. 279, l. 15 – 287, l. 3; App. 321, l. 24 – 330, l.

6. The solicitor thereafter successfully argued that trial counsel had opened the door to testimony about gangs. App. 323, ll. 21 – 25; App. 828, ll. 2-13. The solicitor elicited testimony that Petitioner and Reese were affiliated with the Bloods gang.[2] App. 797, ll. 2-21; App. 825, l. 17 – 828, l. 8.

Petitioner was found guilty of murder and first-degree lynching and he was sentenced to serve concurrent thirty-year terms of imprisonment. App. 1155, l. 5 – App. 1158, ll. 17-25; App. 1183, ll. 11-15. During sentencing, the solicitor read out Petitioner's prior convictions, which included armed robbery, two counts of "PWID cocaine," and two counts of criminal domestic violence. App. 1181, ll. 10-25. After his conviction was affirmed on direct appeal, Petitioner timely sought PCR and a hearing was held. App. 1273 – 1286; App. 1295. Petitioner testified that he was shackled throughout the trial and that his shackles were visibly and audibly apparent to the jury. App. 1320, l. 4 – 1321, l. 3.

Trial counsel agreed "that it was very obvious [Petitioner] was shackled." App. 1341, ll. 13-15. Trial counsel claimed that he "challenge[d] the issue" of shackling in chambers but was "told that that was – that was required in this particular matter." App. 1337, ll. 15-25. Counsel did not say who told him that the shackles were required. Counsel believed the shackling was prejudicial to Petitioner. App. 1337, ll. 20-21. Counsel agreed he "probably should've" made an objection on the record regarding the shackles. App. 1341, ll. 1-6. Counsel said that he was *unaware* of the United States Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622 (2005), "indicating that if a defendant is shackled during trial, it must be put on the record why

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[2] Petitioner sought certiorari on the additional ground that counsel provided deficient representation where he did not object to hearsay testimony that Petitioner was a member of the Bloods gang but this Court denied certiorari as to that issue.

he is to be shackled because it is so prejudicial [] to be shackled during trial." App. 1341, ll. 7-12. "I'm not aware [of that case]." App. 1341, ll. 7-12.

The PCR court issued a lengthy order of dismissal. App. 1355 – 1418. The portion of the PCR court's order of dismissal addressing Petitioner's claim that counsel was ineffective for failing to object to Petitioner being shackled can be found at pages 1384 – 1390 of the Appendix. The order stated that it was "unnecessary" to address deficiency under *Strickland v. Washington*, 466 U.S. 668 (1984), "because [Petitioner] was not prejudiced by counsel's deficient performance." App. 1384.

The order noted that "trial counsel testified it was obvious to jurors that his client was in shackles." App. 1385. The order also noted counsel's failure to place an objection on the record and recited counsel's testimony he had objected in chambers but was told that shackling "was required." App. 1385. The PCR court therefore found that "an objection would have simply required the trial judge to place his previously-found reasons for requiring shackling in this case on the record . . ." App. 1387. The order of dismissal noted that *Deck v. Missouri*, *supra*, requires that "[e]ven if exceptional circumstances warrant the use of visible restraints the trial judge must make on-the-record findings as to the circumstances that compel their use." App. 1386. The order continued that "this [c]ourt finds that the record contains sufficient facts that support the trial judge's decision requiring [Petitioner] to be shackled during his trial," and cited Petitioner's prior convictions for armed robbery, drug offenses, and domestic violence, as well as his "possible gang affiliation." App. 1387. The order also stated that Petitioner failed to establish *Strickland* prejudice due to "overwhelming evidence of guilt" since the crime "occurred in broad daylight and in complete disregard of the presence of numerous." [sic]. App. 1386; App. 1388.

Discussion

"[N]o person should be tried while shackled and gagged except as a last resort." *Illinois v. Allen*, 397 U.S. 337, 344 (1970). "The Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. at 629. The practice of shackling is "inherently prejudicial." *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). "[S]hackling[] should be permitted only where justified by an essential state interest specific to each trial." *Id.*, 475 U.S. at 568-69. "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Deck*, 544 U.S. at 632.

"Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id.*, 544 U.S. at 630. "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Id.*, 544 U.S. at 626. "This rule has deep roots in the common law. In the 18th century, Blackstone wrote that 'it is laid down in our antient books, that, though under an indictment of the highest nature,' a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.'" *Id.* (quoting 4 W. Blackstone, Commentaries on the Laws of England 317 (1769)). *See also Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (it is generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate

allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

As seen, Petitioner was shackled at the legs and at the wrists throughout the multi-day trial. The court gave no reason for the shackles. Counsel's failure to object to Petitioner's shackling was deficient performance. It was not a strategy decision. Counsel admitted that he was unaware of the United States Supreme Court case of *Deck v. Missouri* which held shackling was forbidden absent an on-the-record explanation of its necessity in a particular case. App. 1341, ll. 7-12. Counsel did not know the applicable law and did not make an objection on the record to the shackling of Petitioner, which was visibly and audibly apparent to the jury. Counsel made no effort to ensure the shackles were not visible and audible to the jury, such as requesting padding for the shackles, or requesting that they be placed underneath Petitioner's clothes. *See Miller v. State*, 852 So.2d 904, 906 (Fla. Dist. Ct. App. 2003) (an objection by counsel would have allowed the court to fashion a procedure to reduce the prejudicial impact of the defendant's shackles).

Although counsel said he opposed the use of restraints in chambers, he admitted he should have lodged an objection on the record. An "objection" that only occurred in chambers is not a valid objection. "Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review." *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (quoting *State v. Morris,* 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991).

A criminal defendant has a constitutional right to remain free of physical restraints that are visible to the jury, "but that the right may be overcome in a particular instance by essential

state interests such as physical security, escape prevention, or courtroom decorum." *Deck*, 544 U.S. at 628. *See State v. Tucker*, 320 S.C. 206, 209–10, 464 S.E.2d 105, 107 (1995) (judge did not err in restraining defendant who had prior convictions for escape and attempted escape, had fled the state and assaulted officers, and judge ensured shackles were not visible to the jury); *State v. Heyward*, 432 S.C. 296, 324, 852 S.E.2d 452, 466 (Ct. App. 2020) (trial court erred in denying motion to remove shackles during jury selection where there was no reason why defendant should have been shackled). Here, there was no such justification.

The trial court did not make an on-the-record explanation for the restraints. The State argues on appeal that the restraints were justified by the allegations of gang involvement in the neighborhood where Decedent was killed, and by the fact that a State's witness, Marcellius Brooks, was a gang member. *See* Return to Petition for Certiorari at 16. But the record is devoid of exceptional circumstances to justify Petitioner's shackling. Petitioner did not threaten witnesses or the court. Petitioner did not have a criminal record for escape, resisting arrest, or assaulting police officers. Although Petitioner did have a prior record of armed robbery and drug-related convictions, that cannot properly account for shackling in this case since shackling would be justifiable in almost any felony case and would likely become a routine practice. Petitioner did not have a history of bench warrants or failure to appear. He did behave indecorously in court or threaten to do so.

The PCR court found Petitioner was not prejudiced due to overwhelming evidence of guilt. This was error. "To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182,

186, 480 S.E.2d 733, 735 (1997). In determining whether an applicant has proven prejudice, the strength of the State's case is one significant factor to be considered, along with the specific impact of counsel's error and other relevant considerations. *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018). The PCR court must consider the specific impact of counsel's error instead of using "overwhelming evidence of guilt" as a categorical bar that precludes a finding of prejudice. *Id.* "In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Id.*

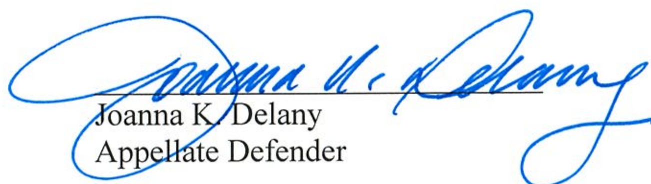
However, for the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice, "the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of a reasonable probability the factfinder would have had a reasonable doubt cannot possibly be met." *Id.*, 422 S.C. at 191, 810 S.E.2d at 845 (internal alterations and quotations removed). Here, another group of people attacked the decedent before he was assaulted by Petitioner and Reese. One of those other men kicked the decedent in the head with his booted foot. Dr. Shaker opined this earlier beating could have been what killed Decedent. The evidence was not overwhelming such that it precluded a finding of prejudice here.

Petitioner demonstrated *Strickland* prejudice because his guilt was not conclusively proven and it was undisputed the shackles were visible to the jury throughout the trial. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck*, 544 U.S. at 630 (citing *Estelle v. Williams*, 425 U.S. 501 (1976)). Identifiable prison garb "surely tends to brand [a defendant] in the eyes of the jurors with an unmistakable mark of guilt." *Estelle*, 425 U.S. at 518 (Brennan, J., dissenting). Shackling is an "unmistakable indication[] of the need to separate a defendant from the community at large." *Holbrook v.*

Flynn, 475 U.S. at 569. "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Deck*, 544 U.S. at 632. The practice of shackling is "inherently prejudicial." *Holbrook*, 475 U.S. at 568. Absent the improper shackling, there is a reasonable probability the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, this Court should reverse the decision of the PCR court and grant Petitioner a new trial.



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This 2nd day of August, 2022.