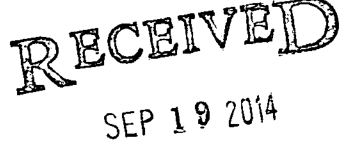
STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



Certiorari to Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-206 (S.C. Ct. App. filed 6/4/2014)
12-GS-40-00363

THE STATE,

RESPONDENT,

V.

FORREST KELLY SAMPLES,

PETITIONER

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Forrest Kelly Samples, Appellant.

Appellate Case No. 2012-212342

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-206
Submitted March 1, 2014 – Filed June 4, 2014

AFFIRMED

Appellate Defender Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following [illegible]
("Whether a defendant is restrained during trial is within the trial [court]'s

discretion."); *State v. Page*, 406 S.C. 272, 282, 750 S.E.2d 623, 628 (Ct. App. 2013) ("An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." (internal quotation marks omitted)).

AFFIRMED.[1]

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-206 (S.C. Court of Appeals filed June 4, 2014)

THE STATE,

RESPONDENT,

V.

FORREST KELLY SAMPLES,

APPELLANT.

APPELLATE CASE NO. 2012-212342

PETITION FOR REHEARING

The Appellant, Forrest Kelly Samples, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-206 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On June 4, 2014, this Court decided the case without oral argument and filed its unpublished opinion affirming the conviction of Appellant citing authority that "[w]hether a defendant is restrained during trial is within the trial [court]'s discretion."

Appellant's argument in its brief to this Court was that the Trial Court did not even use its discretion in determining whether Appellant should remain in full shackles for the trial's entirety. The Trial Court made absolutely no findings of its own in denying Appellant's motion to remove the shackles. R. 10, ll. 15-17. "When a trial judge is vested

with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred." Cel Prods., LLC v. Rozelle, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004).

The Trial Court violated Appellant's due process rights by requiring Appellant to remain restrained in full shackles visible to the jury for the entire trial where:

1. the Trial Court failed to engage in a case-by-case determination of the necessity for shackles and simply deferred to the Department of Corrections' preference that Appellant be kept in shackles; and

2. the full shackling of Appellant was not specifically justified by the circumstances.

During pre-trial motions, defense counsel for Appellant moved to have his "hands released" during the course of the trial. R. 7, l. 20 – 8, l. 3.

The State argued in response that it would prefer that the court "follow the procedures set forth by the department of corrections regarding inmates in custody." R. 8, ll. 6-8.

The following discourse occurred between the Trial Court, the solicitor, and defense counsel with regard to whether Appellant should have to remain in full shackles during the entire trial before the jury:

The Court: What is the defendant - - the defendant is being tried for escape. What is his prior record? What's the prior record?

Solicitor Pauling: Your Honor, his prior record - - he's currently in the department of corrections on a homicide or a murder charge, and our understanding is also, Your Honor, that he has had six escape attempts that were handled, I believe internally by the department of corrections. I think there was only one attempted escape listed on his rap sheet, Your Honor.

The Court:	All right. Well, I mean, what is he - - what's his present sentence?
Solicitor Pauling:	Your Honor, he's currently serving a life sentence plus additional time.
The Court:	On? On?
Solicitor Pauling:	On murder.
The Court:	Murder charge.

. . .

The Court:	. . . . And Mr. Pauling, has the department of corrections indicated what their procedure or recommendations would be?
Solicitor Pauling:	Your Honor, I believe the department has expressed to the State that they would prefer to keep him in full shackles, Your Honor, which includes leg irons, hand irons, along with attachment to his waist and belly chains, Your Honor.
The Court:	For security purposes?
Solicitor Pauling:	For security purposes. They are present, Your Honor, and - -
The Court:	I said for security.
Solicitor Pauling:	I'm sorry, Your Honor.
The Court:	For security purposes?
Solicitor Pauling:	Yes, sir.
The Court:	All right.
Defense Counsel:	If I may respond briefly, Judge.
The Court:	Sure.
Defense Counsel:	Your Honor, I'm unaware of any internal escapes. I'm only aware of the one that's on his prior record. Also, I'm unaware of any indication that he's unruly in the courtroom or anything of that nature. So I would just bring that to the Court's attention and leave it in Your Honor's discretion.

The Court:	Well, the fact that he is not dressed in civilian clothes - - I mean, if there's an issue of prejudice - - there's certainly, I think, a minimum amount of prejudice, additional prejudice. There may be prejudice because of the way he's dressed out. I respectfully deny your request. I'm going to leave him in a secure condition as recommended by the State and the department of corrections.

R. 8, l. 9 – 10, l. 17.

The Supreme Court of the United States has emphatically declared that "[t]he 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." Deck v. Missouri, 544 U.S. 622, 626 (2005); see also Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986) (observing that shackling is an "inherently prejudicial practice" that "should be permitted only where justified by an essential state interest specific to each trial"). The defendant may only be restrained in shackles in "extreme and exceptional" cases where "the safe custody of the prisoner and the peace of the tribunal imperatively demand" the use of shackles. Deck, 544 U.S. at 626-27. The "basic rule embodying notions of fundamental fairness" mandate that a trial court may not shackle a defendant as a matter of routine, but only if there is a "particular reason to do so." Id. at 627. "[N]o person should be tried while shackled . . . except as a *last resort*." Illinois v. Allen, 397 U.S. 337, 345 (1970) (emphasis added).

Accordingly, the United States Supreme Court held "the Fifth and Fourteenth Amendments prohibit the use of physical restrains 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, 544 U.S. at 629.

Judicial hostility to shackling reflects the importance of giving effect to three fundamental legal principles. "First, the criminal process presumes that the defendant is innocent until proven guilty." Visible shackling undermines the presumption of innocence and the "related fairness of the fact finding process." Id. at 630. A defendant is ordinarily entitled to be relieved of handcuffs or other unusual restraints in the presence of a jury "so as not to mark him as an obviously bad man or to suggest that the fact of his guilt is a foregone conclusion." United States v. Samuels, 431 F.2d 610, 614-15 (4th Cir. 1970).

Second, the Constitution provides the defendant with a right to counsel in order to help the accused achieve a meaningful defense. The use of physical restraints diminishes the right to counsel and interferes with the accused's ability to communicate with his attorney. Shackles can further interfere with an accused's ability to participate in his own defense, "by freely choosing whether to take the witness stand on his own behalf." Deck, 544 U.S. at 631.

Finally, trial court 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." The routine use of shackles in the presence of the jury undermines these objectives and affronts the dignity and decorum of judicial proceedings. Id. at 631-32.

There are of course cases where the "perils of shackles" are unavoidable. Id. at 632. Factors that a trial court may take into consideration are physical security, the need to restrain dangerous defendants to prevent courtroom attacks, courtroom decorum, and the risk of escape at trial. Id. at 628-29, 632. Any such determination by the trial court must be case specific; "that is to say, it should reflect the particular concerns, say, special security needs or escape risks, related to the defendant on trial." Id. at 633. If the trial court does not take account of the circumstances of the particular case, an accused's due process rights are violated by the use of visible restraints given their manifest prejudicial effect. Id. at 632.

In the pending case, the Trial Court erred in requiring Appellant to remain in full shackles, including leg irons, hand irons with attachments to his waist, and belly chains, for his entire jury trial. There is no question in this case that these physical restraints were visible to the jury, especially where even his hands were restrained.

The Trial Court did not use its discretion in determining whether Appellant should remain in full shackles for the trial's entirety and made absolutely no findings of its own in denying Appellant's motion to remove the shackles. R. 10, ll. 15-17. Rather, the Trial Court relied upon the recommendations by the State and the Department of Corrections to leave Appellant in a secure condition. R. 10, ll. 15-17. The United States Court of Appeals for the Fourth Circuit has stressed that the "discretion is that of the [trial] judge" and the trial judge may not "delegate that discretion to the Marshal." Samuel, 431 F.2d at 615.

The United State Court of Appeals for the Sixth Circuit also held that a trial court cannot simply defer to a correction officer's request:

> Although a trial court might find a correction officer's opinion highly relevant to answering the ultimate inquiry as to whether shackling is necessary in a particular case, an individualized determination under the due process clause requires more than rubber stamping that request. A correction officer's preference does not excuse the district court from conducting the appropriate inquiry.

Lakin v. Stine, 431 F.3d 959, 964 (6th Cir. 2005).

Here, the Trial Court did not state for the record the reasons why it was requiring the extraordinary measure of full shackles for the entire trial and simply deferred to the preference of the Department of Corrections. Samuel, 431 F.2d at 615.

In addition, the Trial Court did not explain in its ruling why shackles were needed - whether there was any risk to courtroom security or risk of escape during the trial – and the Trial Court did not explain why less intrusive procedures, such as restraints not visible to the jury or the use of guards, could have been used to protect courtroom security and prevent any risk of escape. See Deck, 544 U.S. at 634-35; Kennedy v. Cardwell, 487 F.2d 101, 108-09 (6th Cir. 1973) (expressing a preference for the use of plain-clothed guards to provide courtroom security instead of the highly prejudicial use of shackles); see also Allison, 397 U.S. at 345 (emphasizing shackles are a last resort measure).

Moreover, the record itself does not make clear that there were indisputably good reasons for restraining Appellant in full shackles in front of the jury. See Deck, 544 U.S. at 635. The very fact that Appellant was charged with the offense of escape cannot, alone, provide justification for the shackling. Miller v. State, 852 So.2d 904, 906 (Fla. Ct. App. 2003) ("[A]llowing the charges . . . for which [defendant] was on trial to justify the use of restraint devices is circular reasoning that offends the presumption of innocence, and [defendant's] right to a fair trial.").

The court must still consider whether there are any special security needs or escape risks related to the particular defendant while he in on trial. See Lakin, 431 F.3d at 964-65; McKenzey v. State, 225 S.E.2d 512, 514 (Ga. Ct. App. 1976) (holding even though defendant was on trial for escape, the State showed no circumstances which would dictate the use of handcuffs during the trial); State v. Borman, 529 S.W.2d 192, 195-96 (Mo. Ct. App. 1975) (determining the trial court abused its discretion in ordering defendant who was being tried for breaking jail and escaping to be kept in visible handcuffs and leg irons during trial where defendant had neither engaged in nor threatened disruptive conduct during the trial).

There is also no evidence in the record that Appellant posed a physical security risk during the trial or presented a risk of escaping from the trial. While the record shows that Appellant had a prior conviction for escape in 1992 for which he received one year suspended on probation, this remote conviction alone does not warrant the use of full shackles. R. 8, ll. 17-18; 87, ll. 23-24. See State v. Hogetvedt, 488 N.W.2d 487, 490 (Minn. Ct. App. 1992) (holding use of leg restraints visible to jury during trial violated defendant's right to a fair trial when the only evidence that defendant may have posed a threat to courtroom security was a nonviolent escape from a prison five years earlier).

The State also alleged Appellant had six attempted escapes that were handled internally by the Department of Corrections, although this claim was never substantiated and defense counsel was not aware of any such attempted escapes. R. 8, ll. 12-16; 10, ll. 5-7. In Mendoza v. State, the Texas Court of Appeals reversed the trial court's order requiring the defendant to remain restrained by shackles during the trial. The trial court, in ordering the defendant to remain physically restrained, noted that the defendant "had

attempted to escape several times in the past, and indeed, had been convicted of escape." The appellate court, however, observed that "beyond [that] statement, there [was] no factual basis contained in the record to support the use of restraints . . . ." 1 S.W.3d 829, 831 (Tex. Ct. App. 1999). The Texas Court of Appeals also recognized that "generalized concerns about the nature of defendant's prior sentences [are] insufficient to support restraint." Id.

That is the most the State provided in this case in their argument to require Appellant to remain in full shackles throughout the course of the trial – generalized concerns about his one prior escape conviction and his alleged attempted escapes which were never confirmed to have even occurred. There is absolutely no other evidence in the record supporting the Trial Court's decision to restrain Appellant for the entire trial.

There is no indication from the record that Appellant's prior escape and alleged attempted escapes were violent or that the escape for which he was on trial involved violence. The evidence offered by the State with respect to his current escape charge was that he and another inmate were working in a section of the prison that made hardwood flooring where there were hardly any guards supervising the inmates' activities. R. 63, l. 7 – 64, l. 20. At the end of the work shift, guards would clear the building by waiting until they thought it was empty and would then scream in the building, "Is the building clear?" R. 64, ll. 21-25. If there was no response, the guards would leave and lock the building. R. 64, ll. 24-25. On the day of the alleged escape, Appellant and the other inmate allegedly stayed and hid in the plant when the guards yelled "Clear." R. 65, ll. 19-24. Appellant and the other inmate then allegedly left the building and made their way over two fences. R. 65, l. 25 – 68, l. 12.

There is no indication from the record that Appellant has ever been unruly in court, has ever had courtroom outbursts, or has tried to escape while being transported to court proceedings or during court proceedings. There is no indication in the record that Appellant has ever threatened the security of the courtroom. Cf. Hellum v. Warden, 28 F.3d 903, 905, 907-09 (8th Cir. 1994) (affirming trial court's use of physical restraints, including handcuffs and leg irons, where (1) defendant had five prior attempted escapes, three which were successful, including an escape where he managed to obtain a gun while being escorted to a medical appointment despite being in full shackles and another attempted escape only days before the trial; (2) defendant had made statements that his best chance to escape would be at trial; and (3) defendant spoke of killing sheriff deputies and taking hostages during the trial); Stewart v. Corbin, 850 F.2d 492, 498 (9th Cir. 1988) (holding shackling of defendant during trial was supported by the evidence where (1) he had escaped from immediate physical custody of law enforcement, once while handcuffed; (2) he had previously physically assaulted officers in the courtroom, threatened a judge and an attorney, and tore off and took part of an exhibit; and (3) officers testified that defendant could not be controlled by a leg brace alone); Commonwealth v. Conley, 959 S.W.2d 77, 77-79 (Ky. 1998) (concluding defendant who had fled courtroom and escaped during his arraignment could be ordered to wear leg shackles during the trial); State v. Johnson, 499 S.W2d 371, 374 (Mo. 1973) (finding defendant was properly handcuffed for remainder of trial where during a court recess, defendant broke loose and escaped from the sheriff).

The visible shackling of a defendant during a jury trial is "inherently prejudicial." Deck, 544 U.S. at 635. "Thus, where a court, without adequate justification, orders the

defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained." Id. (internal citations omitted).

In this case, where the jury took a mere nineteen minutes to reach a verdict, it cannot be said beyond a reasonable doubt that the shackling of Appellant had absolutely no effect upon the jury and their guilty verdict. R. 84, l. 22 – 85, l. 7; 86, ll. 15-17. The State had the burden of proving that Appellant escaped while lawfully confined in a prison or local detention facility, and certainly, the shackles on Appellant assisted the State with their burden of proof. S.C. CODE ANN. § 24-13-410.

Based upon the foregoing arguments, the Trial Court erred in requiring Appellant to remain restrained in full shackles which were visible to the jury for the entire trial.

CONCLUSION

For the reasons set forth herein, Appellant Forrest Kelly Samples respectfully requests that the Opinion of the Court of Appeals be withdrawn, his conviction for escape be reversed, and the case remanded to the trial court for a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

This 17th day of June, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-206 (S.C. Court of Appeals filed June 4, 2014)

THE STATE,

RESPONDENT,

v.

FORREST KELLY SAMPLES,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David A. Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Forrest Kelly Samples, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of June, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 17th day of June, 2014.

____________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

-16

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Forrest Kelly Samples,

Appellant.

RETURN TO PETITION FOR REHEARING

Respondent objects to the petition for rehearing, and would argue the petition for rehearing is not in compliance with Rule 221, SCACR. Rule 221 requires a petition for rehearing to "state with particularity the points supposed to have been overlooked and misapprehended by the court." The Petition for Rehearing fails to do this. Instead, it appears that Appellant has cut and pasted the same argument from their Final Brief. Respondent reserves the right to challenge any attempt for review with the Supreme Court as being procedurally defaulted on the failure to follow Rule 221.

Respondent believes that the Court did not overlook Appellant's entire brief and therefore, the petition for rehearing should be denied. Respondent, rather than reiterating every point made in its Final Brief, would crave reference for this Court and incorporate Respondent's the Statement of Facts and Argument previously presented in the Final Brief. Respondent has full confidence that the Court understood each party's arguments in issuing

its memorandum opinion on the matter and consideration of Appellant's rehashed argument is unnecessary.

CONCLUSION

For all of the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

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Senior Assistant Attorney General

E. L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

BY:________________________
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June 26, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2012-212342

The State, Respondent,

vs.

Forrest Kelly Samples, Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 26th day of June, 2014.

Ellen R. DuBois

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The South Carolina Court of Appeals

The State, Respondent,

v.

Forrest Kelly Samples, Appellant.

Appellate Case No. 2012-212342

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AUG 25 2014

SC OFFICE OF APPELLATE DEFENSE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Few C.J.

Paul E. Short, Jr. J.

John D. Geathers J.

Columbia, South Carolina

cc: Carmen Vaughn Ganjehsani, Esquire
David A. Spencer, Esquire
Alan McCrory Wilson, Esquire

FILED
8/25/14