
COURT OF APPEALS
OF THE
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

APPELLANT,

-AGAINST-

RAYMOND CLYDE,

RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION - FOURTH DEPARTMENT

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS

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Table of Contents

Table of Contents. i

Table of Authorities. ii

Introduction. 1

Interest of *Amicus Curiae*. 1

Disclosure Statement Pursuant to Rule 500.1(f). 3

Statement of Facts and of the Case. 3

Argument

The Majority Was Correct That Reversal Was
Required Where the Trial Court Made No Findings
As to Why the Defendant Should Be Shackled and
Failed to Give Any Curative Instruction to the Jury. 5

A. The Constitutional Limitations. 5

B. New York State Court Decisions 7

C. The Nature of the Charges in this Case Magnified
the Prejudice to the Defendant. 9

D. Harmless Error Review Is Particularly Inappropriate
Where No Curative Instructions Were Given. 10

Conclusion. 12

Table of Authorities

Cases

<i>Eaddy v. People</i> , 115 Colo. 488, 174 P.2d 717 (1946).	9
<i>Holbrook v. Flynn</i> , 475 U.S. 560 (1986).	6
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970).	6
<i>Johnson v. Schmidt</i> , 83 F.3d 37 (2d Cir. 1996).	10
<i>Kennedy v. Cardwell</i> , 487 F.2d 101 (6 th Cir. 1973).	9
<i>People v. Clyde</i> , 72 A.D.3d 1538, 899 N.Y.S.2d 757 (4 th Dept. 2010).	3
<i>People v. Crimmins</i> , 36 N.Y.2d 230, 367 N.Y.S. 2d 213, 326 N.E.2d 787 (1975).	7, 8
<i>People v. Dawson</i> , 125 A.D.2d 860, 510 N.Y.S.2d 459 (3 rd Dept. 1986).	8
<i>People v. Harper</i> , 47 N.Y.2d 857, 419 N.Y.S.2d 61, 392 N.E.2d 1244 (1989).	8
<i>People v. Hart</i> , 112 A.D.2d 471, 491 N.Y.S.2d 74 (3 rd Dept. 1985).	11
<i>People v. Hilliard</i> , 73 N.Y.2d 584, 542 N.Y.S.2d 507, 540 N.E.2d 702 (1989).	11
<i>People v. Mattison</i> , 97 A.D.2d 621, 468 N.Y.S.2d 932 (3 rd Dept. 1983).	8
<i>People v. Mixon</i> , 120 A.D.2d 861, 502 N.Y.S.2d 299 (3 rd Dept. 1986).	11

<i>People v. Neu</i> , 124 A.D.2d 885, 508 N.Y.S.2d 652 (3 rd Dept. 1986).....	11
<i>People v. Rouse</i> , 79 N.Y.2d 934, 591 N.E.2d 1172 (1992).....	11
<i>People v. Vivenzio</i> , 103 A.D.2d 1044, 478 N.Y.S.2d 438 (4 th Dept. 1984).....	8
<i>United States v. Deck</i> , 544 U.S. 622 (2005).....	5, 6
Other Authorities	
ABA Standards for Criminal Justice 15-3.2(d) (3 rd ed. 1996).....	5

Introduction

This case presents an important issue of whether a fair trial can be had when the trial court orders a defendant to appear before the jury in visible shackles without articulating any reasons for that decision and without instructing the jury not to consider that fact as evidence of guilt.

For the reasons stated below, as well as those referenced in Respondent's brief to this Court, it is submitted that the answer to that question is "no," and that the Fourth Department's decision should therefore be affirmed.

Interest of Amicus Curiae

The New York State Association of Criminal Defense Lawyers (hereinafter "NYSACDL") is a nonprofit organization of approximately 600 members who practice in the field of criminal defense in the State of New York. Founded in 1986, NYSACDL is dedicated to protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar.

NYSACDL's goals are to: serve as a leader and partner in advancing humane criminal justice policy and legislation; promote the rights of

criminal defendants through the adoption of policy positions, targeted concerted action, and the submission of amicus briefs on issues of significance to the fair administration of criminal justice and the protection of civil liberties; advocate for individual and systemic accountability in the criminal justice system, with a particular emphasis on instances of judicial and prosecutorial misconduct; develop a broad, inclusive and vibrant membership of private criminal defense practitioners and public defenders throughout New York State; provide a forum for our members to exchange ideas and information, with a particular emphasis on mentoring those who are new to the profession; and, provide quality continuing legal education in the area of criminal defense.

Accordingly, NYSACDL, consistent with those missions, files this Brief *Amicus Curiae* in support of the Fourth Department's decision to vacate the conviction of an individual who was required to appear at all times before the jury in leg irons, where the trial court articulated no basis for that decision on the record and gave no instruction to the jury that restraining the defendant was not evidence of his guilt.

Disclosure Statement Pursuant to Rule 500.1(f)

The New York State Association of Criminal Defense Lawyers is a nonprofit organization and an affiliate of the National Association of Criminal Defense Lawyers, which is also a nonprofit organization.

Statement of Facts and of the Case

The facts of the case are set forth in detail in the parties' briefs to this court. In sum, as a result of an incident which occurred while Clyde was an inmate at Auburn Correctional Facility, he was charged with one count of attempted rape, two counts of assault, one count of promoting prison contraband, and one count of unlawful imprisonment. Prior to jury selection, Clyde sought to proceed *pro se* and the court granted that request. Trial commenced on December 4, 2007, and on December 7 the jury returned a verdict of guilty on all counts.¹

On direct appeal, the Fourth Department found, in relevant part, that the trial court committed reversible error by "failing to articulate a reasonable basis on the record for its determination to restrain [Clyde] in shackles during the trial." *People v. Clyde*, 72 A.D.3d 1538, 1538-39, 899 N.Y.S.2d 757, 758 (4th Dept. 2010). In so finding, the majority

¹ The attempted rape count was subsequently dismissed upon a finding that the People failed to prove a *prima facie* case.

rejected the notion that the error was subject to review for
harmlessness. *Clyde*, 72 A.D.3d at 1541, 899 N.Y.S.2d at 760 (Scudder,
P.J., dissenting) (“I conclude that, in light of the totality of the evidence,
there is no reasonable possibility that the improper shackling of
defendant contributed to his conviction and thus that the error is
harmless beyond a reasonable doubt.”)(quotations omitted).

The People’s motion for permission to appeal to this Court was
granted in June 2010.

Argument

The Majority Was Correct That Reversal Was Required Where the Trial Court Made No Findings As to Why the Defendant Should Be Shackled and Failed to Give Any Curative Instruction to the Jury

The use of restraints in criminal trials is so damaging to a defendant that the American Bar Association has opined that:

[i]f the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards for Criminal Justice 15-3.2(d) (3rd ed. 1996).

In this case, the majority correctly determined that no defendant should be caused to appear in shackles before the jury unless the trial court clearly articulates on the record the reasons why such restraints are necessary and additionally instructs the jury not to consider those restraints as evidence of guilt. As such, the Fourth Department's decision should be affirmed.

A. The Constitutional Limitations

In *United States v. Deck*, 544 U.S. 622 (2005), the United States

Supreme Court held that “the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilty phase,” unless it is justified by an essential state interest factually specific to a particular trial. *Id.* at 624. Freedom from physical restraint before a jury is a “deeply embedded” and basic element of due process. The *Deck* Court reasoned that the fact that the jury found Deck guilty of heinous crimes did not make his visible shackling during the subsequent penalty phase any less objectionable. *Id.* at 629; *see also Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986) (shackling is an “inherently prejudicial practice” which should be subject to close judicial scrutiny and “permitted only where justified by an essential state interest specific to each trial”).

In reviewing the history of “judicial hostility to shackling,” the Supreme Court recognized that “[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process.” *Deck*, 544 U.S. at 630. It also “affronts the dignity and decorum of judicial proceedings,” which should reflect “the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishments.” *Id.* at 631; *Illinois v. Allen*, 397 U.S.

337, 344 (1970) (use of shackles is “something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.”).

B. New York State Court Decisions

This Court has held that the denial of the right to a fair trial cannot be harmless error, reasoning that:

[n]ot only the individual defendant but the public at large is entitled to assurance that there shall be full observance and enforcement of the cardinal right of a defendant to a fair trial. . . . So, if in any instance, an appellate court concludes that there has been such error of a trial court . . . as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant’s conviction. The right to a fair trial is self-standing and proof of guilt, however, overwhelming, can never be permitted to negate this right.

People v. Crimmins, 36 N.Y.2d 230, 237-38, 367 N.Y.S. 2d 213, 326 N.E.2d 787 (1975). In *Crimmins*, this Court found that although the prosecutor’s comment in summation on the defendant’s failure to testify was constitutional error, it was not tantamount to the denial of the right to a fair trial where the defendant had made unsworn outbursts

before the jury and the evidence was overwhelming. Because the defendant was not deprived of the right to a fair trial, a harmless error analysis could be applied. *Id.* at 237-238.

In the intermediate appellate courts, the issue of shackling has typically arisen in the context of jurors having a brief, inadvertent glimpse of the defendant in shackles, and the courts have applied a harmless error analysis. *See People v. Dawson*, 125 A.D.2d 860, 510 N.Y.S.2d 459 (3rd Dep't 1986); *People v. Mattison*, 97 A.D.2d 621, 623, 468 N.Y.S.2d 932 (3rd Dept. 1983); *People v. Vivenzio*, 103 A.D.2d 1044, 478, N.Y.S.2d 438 (4th Dept. 1984); *see also People v. Harper*, 47 N.Y.2d 857, 419 N.Y.S.2d 61, 392 N.E.2d 1244 (1989).

The error here – where a *pro se* defendant was required to continuously appear before the jury visibly shackled and the jury was never instructed not to consider that fact as evidence of guilt – is of much greater proportion; the kind of error discussed in *Crimmins* which deprives the defendant of his self-standing right to a fair trial, and is not subject to harmless error analysis. *See People v. Hilliard*, 73 N.Y.2d 584, 586-87, 542 N.Y.S.2d 507, 540 N.E.2d 702 (1989) (“there are some errors which are so serious that they operate to deny defendant’s

fundamental right to a fair trial. In such cases the reviewing court must reverse the conviction and grant a new trial, without evaluating whether the errors contributed to the defendant's conviction.”).

C. The Nature of the Charges in this Case Magnified the Prejudice to the Defendant

The obvious prejudice to a defendant from being visibly restrained during trial is even greater where, as here, the charges involve acts of violence. The Supreme Court of the State of Colorado cogently described the importance of the “garb of innocence,” stating that:

the presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man

Eaddy v. People, 115 Colo. 488, 492, 174 P.2d 717, 718-719 (1946); *see also Kennedy v. Cardwell*, 487 F.2d 101, 111 (6th Cir. 1973) (shackling presents an “inherent prejudice to the accused when he is cast in the jury’s eyes as a dangerous, untrustworthy and pernicious individual from the very start of the trial.”)

Here, it was not just the People who were telling the jury that Clyde was a violent offender, but the court as well. By requiring Clyde to be

shackled throughout the trial, the court was implicitly telling the jury that he could not be trusted with any degree of physical freedom – even in the confined space of a courtroom in the presence of official security personnel.²

Simply stated, there can be no tolerance for a court’s failure to meticulously protect a defendant’s rights prior to making a decision which effectively offers evidence against that defendant.³ Shackling of a defendant during a trial conveys to the jury the unmistakable and unfairly prejudicial message that the court believes the defendant to be a danger – even during the trial itself.

D. Harmless Error Review Is Particularly Inappropriate Where No Curative Instructions Were Given

Not only was Clyde visibly restrained throughout the trial, but the court never even instructed the jury not to consider that fact as evidence of guilt. The lack of such an instruction is so damaging to a

² And, as discussed below, that implication was never mitigated with any curative instruction.

³ As has been recognized, “[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.” *Johnson v. Schmidt*, 83 F.3d 37, 39 (2d Cir. 1996) (citation omitted).

defense that reviewing courts have explained that “[t]he fact that a defendant fails to request such a charge is of no significance” and “the failure to give such an instruction cannot be overlooked even in the face of overwhelming evidence of guilt.” *People v. Neu*, 124 A.D.2d 885, 886, 508 N.Y.S.2d 652, 653 (3rd Dept. 1986); *see also People v. Hart*, 112 A.D.2d 471, 472, 491 N.Y.S.2d 74 (3rd Dept. 1985) (“failure to give such an instruction deprived defendant of his right to a fair trial, an error which cannot be overlooked even in the face of the overwhelming evidence of defendant’s guilt”); *People v. Mixon*, 120 A.D.2d 861, 862, 502 N.Y.S.2d 299, 300 (3rd Dept. 1986) (“defendant’s failure to request such a charge is not fatal”).

While this Court has held that a court is under no obligation to give such a charge when it is not requested (because, in certain situations, the defense may make an informed decision that such a charge would draw attention to the issue), *see People v. Rouse*, 79 N.Y.2d 934, 936, 591 N.E.2d 1172, 1174 (1992), there is absolutely no basis to presume that a *pro se* defendant would make such a tactical decision – particularly when the record provides no insight into the matter.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Court should affirm the decision of the Fourth Department.

Dated: August 17, 2011
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Respectfully submitted,

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Affirmation of Service

Marshall A. Mintz, Esq., an attorney duly admitted to practice law before the Courts of the State of New York, located at Mintz & Oppenheim LLP, 260 Madison Avenue - 18th Floor, New York, New York, affirms as follows:

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