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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., concurring, in part, and dissenting, in part:

In this proceeding, the defendant was convicted of murder and sentenced to life in prison without the possibility of parole. The majority opinion has affirmed the defendant's conviction. With respect to this aspect of the majority opinion, I concur. However, because the defendant was required to wear jail clothing during the sentencing hearing, the majority opinion has reversed the defendant's sentence and has remanded the case for a new sentencing hearing. I believe the defendant was properly sentenced, and therefore, for the reasons set out below, I respectfully dissent from the majority's decision to reverse the sentence.

***The Federal and State Constitutions Are Not Violated
Because a Defendant Is Required to Wear Jail Clothing
During the Sentencing Phase of a Prosecution***

The victim in this case was a 92-year-old woman who “had been beaten, raped—both anally and vaginally—forced to drink a caustic liquid, had her back broken, and was manually strangled” by the defendant. During the guilt phase of the bifurcated trial, the jury convicted the defendant of first degree murder and other crimes. When the penalty phase of the trial began, the defendant, for the first time, was brought into the courtroom

wearing jail clothing. The penalty phase jury, after hearing evidence for and against granting mercy, declined to grant the defendant mercy. Consequently, for the murder conviction, the defendant was sentenced by the trial court to life without mercy. The majority opinion has reversed the sentence on the grounds that the “[d]ue process afforded by the West Virginia and United States Constitutions demands that a criminal defendant may not routinely be compelled to appear in jail or prison clothing at the penalty phase of a bifurcated murder trial.” Syl. pt. 3. The majority reached this result based upon its interpretation of *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). Simply put, *Deck* has no application to this case.

The decision in *Deck* involved a defendant who was convicted by a Missouri jury of capital murder. During the penalty phase the defendant was shackled in leg irons, handcuffs and a belly chain. The jury ultimately sentenced the defendant to death. The case reached the United States Supreme Court on the issue of whether the United States Constitution prohibited the routine use of visible physical restraints during the penalty phase of a death penalty prosecution. The Court found that the Constitution did, in fact, bar routine use of visible physical restraints during the penalty phase of a capital prosecution. The Court justified its decision as follows:

The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. It also almost inevitably

affects adversely the jury's perception of the character of the defendant. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death.

Deck, 544 U.S. at 633, 125 S. Ct. at 2014, 161 L. Ed. 2d at 965 (internal citations omitted).

Deck's prohibition against routine use of visible physical restraints during a death penalty sentencing phase is clearly distinguishable from the facts of the instant case. During the death penalty sentencing phase, the jury is asked to decide whether a defendant should be executed or remain in prison for life. Obviously, if the jury sees the defendant sitting in court wearing leg irons, handcuffs and a belly chain, there is a possibility that they would conclude that the defendant is too dangerous to even be in prison. *Deck* recognized this prejudicial possibility. It therefore found that, in the absence of a justified need, a capital defendant may not be compelled to wear visible physical restraints during the sentencing phase.

In the instant case, the issue before the jury was not whether the defendant should be sentenced to death or life imprisonment. West Virginia does not have the death penalty. Instead, the jury was asked to decide whether the defendant should be sentenced to prison with, or without, the possibility of parole. Additionally, the issue in the instant case does not involve wearing leg irons, handcuffs or a belly chain. In this case the defendant complained about having to wear jail clothing in front of the sentencing jury. I am unable

to conclude that any measurable prejudice resulted from wearing jail clothing under these circumstances. Several courts have addressed this issue and have reached the same conclusion that I have reached.

For example, in *Morales v. State*, No. 08-98-00323-CR, 2000 WL 1513924 (Tex. App. Oct. 12, 2000) the defendant was convicted of aggravated sexual assault. A separate sentencing hearing was held before the jury that convicted the defendant. During the sentencing phase the defendant was required to wear jail clothing. The defendant's counsel objected to the appearance of the defendant in jail attire. The trial court overruled the objection. The jury sentenced the defendant to 10 years in prison but suspended the sentence and placed the defendant on probation. In his appeal, the defendant argued that he was prejudiced by having to wear jail attire during the sentencing phase. The appellate court disagreed as follows:

[W]e cannot find any apparent reason for presuming harm when the defendant is tried in jail-issue clothing during the punishment phase of trial. Generally, a defendant's right to a fair trial and his right to be presumed innocent are violated when he is compelled to appear before the jury in jail-issue clothing. This rationale is certainly applicable during the guilt-innocence phase, but we conclude that it is not applicable during the punishment phase. Once the defendant has been found guilty, the presumption of innocence no longer applies. Thus, Appellant's right to be presumed innocent was not violated when the trial court refused his request for a recess so that he could find civilian clothing.

Morales, 2000 WL 1513924, at *8 (internal citations omitted).

Similarly, in *People v. Bradford*, 15 Cal. 4th 1229, 65 Cal. Rptr. 2d 145, 939

P. 2d 259 (1997), a jury convicted the defendant of two capital murders. During the penalty phase the defendant wore jail attire. The trial court asked the defendant if he wanted to wear civilian clothing. The defendant stated that his clothing had been stolen, but that he had no objections to wearing jail clothing during the penalty phase. The jury sentenced the defendant to death. On appeal, the defendant argued that he was prejudiced by having to wear jail clothing during the penalty phase. The appellate court rejected the argument as follows:

As explained above, the rule that a defendant may not be compelled to attend trial in jail or prison garb is premised upon the notion that doing so might subvert the presumption that an accused is innocent until proved guilty. In the present case, defendant's guilt of both murders already had been determined at the guilt phase of the trial, and at the time defendant appeared in county jail clothing, the jury was confronted with the remaining issue of the appropriate penalty. Because the presumption of innocence already had been rebutted and defendant had been found guilty beyond a reasonable doubt, there was no reasonable possibility that the jury would base its penalty decision on the factor of defendant's attire.

Bradford, 15 Cal. 4th at 1363, 65 Cal. Rptr. 2d at 224, 939 P. 2d at 338 (citations omitted).

Furthermore, in *Duckett v. Godinez*, 67 F.3d 734 (9th Cir. 1995), a Nevada jury convicted the defendant of two murders. During the penalty phase the defendant was required to wear jail clothing and visible shackles. The penalty phase jury sentenced the defendant to life without the possibility of parole. After the judgment was affirmed on direct appeal, the defendant filed a federal habeas corpus petition. In that petition the defendant alleged that the jury may have sentenced him to life with the possibility of parole if he had not been forced to wear jail clothing and visible shackles during the penalty phase. The federal district judge rejected the argument. The United States Court of Appeals for the

Ninth Circuit found that it was error to require the defendant to wear visible shackles during the penalty phase. However, the Court of Appeals found that no error occurred by requiring the defendant to wear jail clothing. The opinion addressed the issue as follows:

It is clear that a court cannot, without violating the Due Process Clause, compel an accused to wear identifiable prison clothing during his trial. This is because the practice furthers no essential state interest, and the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment and impair the presumption of innocence, which is a basic component of a fair trial under our system of criminal justice.

The presumption of innocence, however, no longer applies in the penalty phase of a bifurcated trial. At the penalty phase, the defendant stands convicted. His condition as a prisoner is no surprise to the jury, which just found him guilty. Prison clothing cannot be considered inherently prejudicial when the jury already knows, based upon other facts, that the defendant has been deprived of his liberty.

We conclude the fact [defendant] was compelled to wear prison clothing at his sentencing hearing could not have undermined the fairness of that proceeding, because the jury already knew—based on the trial in which it had participated and the verdict it had rendered—[defendant] was a convicted murderer.

Duckett, 67 F.3d at 747 (internal quotations and citations omitted).

All courts that have addressed the issue have concluded that no prejudice results from requiring a defendant to wear jail clothing during a separate sentencing proceeding. The majority opinion makes our Court the only court the nation that believes a defendant is prejudiced by wearing jail clothing during the sentencing phase. As a result of the majority opinion, I am compelled to agree with a recent commentary which stated that “[t]his is the kind of [decision] that makes courts look silly.” Editorial, *Clothes Do Not Make*

the Man: The State Supreme Court Went Overboard in a Murder Case, Charleston Daily Mail, Nov. 27, 2006, at 4A. This observation is all the more telling considering the fact that the 92-year-old victim in this case was beaten, raped anally and vaginally, forced to drink a caustic liquid, had her back broken, and was strangled. Under this set of facts, it is totally unreasonable to conclude that the jury did not grant the defendant mercy because he was wearing jail clothing.

In view of the foregoing, I concur, in part, and dissent, in part. I am authorized to state that Justice Maynard joins me in this separate opinion.