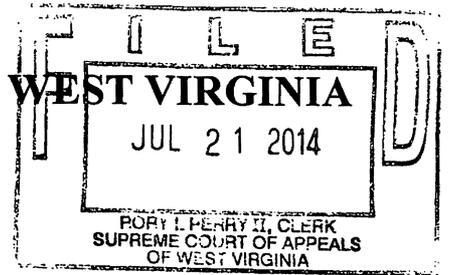


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 14-0245



**DAVID BALLARD, WARDEN, ex-rel.,
MOUNT OLIVE CORRECTIONAL CENTER**

Respondent Below, Petitioner,

VS.

PATRICK J. MECKLING,

Petitioner Below, Respondent.

Appeal from a final order
of the Circuit Court of Ohio
County (09-C-163)

RESPONSE TO PETITIONER'S APPEAL BRIEF

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III. STATEMENT OF CASE

On October 29, 2007, the Respondent in this matter, Patrick J. Meckling, went to trial in the Circuit Court of Ohio County, the Petitioner, State of West Virginia, charging him with one (1) count of abduction with intent to defile, one (1) count of malicious assault. (A.R. 20-21.)

During the morning of the trial, during *voir dire*, and following the jury being impaneled in the matter, the trial court called two (2) separate recesses, (A.R. 32, 33.) before calling a third luncheon break, whereupon the Respondent was ordered handcuffed and taken into custody in the presence of the jury; an occurrence which also came directly after the complaining witness' testimony. (A.R. 44-45.) Actually, it was during the complaining witness' testimony, while the jury was sequestered for a time, that the trial court determined that the Respondent – presumptively free, up to this moment, to roam about the courthouse, perhaps in the presence of the jury, or anywhere else for that matter – would, in fact, be taken into custody for allegedly violating the terms and conditions of bond. (A.R. 42-43.) The Respondent was to be taken into custody “during the noon – well, from now on;” however, no mention was made that such would occur in the presence of the jury. (A.R. 43.)

The Respondent's trial counsel moved for a mistrial, arguing that “when the Court ordered Mr. Meckling taken into custody and had him handcuffed in front of the jury, of course, they don't know why that happened, and that makes him look like a bad guy to them.” (A.R. 45.) The trial court disagreed, reasoning that “it could have happened no matter what, even if he was in custody before.” (A.R. 45.) The court went on to further say, “he's in custody because he violated the terms of his bond,” declaring “that could happen.” (A.R. 45.) Finding that “there's no, no other way of handling that matter,” the trial court denied Petitioner's motion for a mistrial. (A.R. 45.)

The jury returned a verdict as to counts two (2) and three (3) of the indictment, respectively, convicting the Respondent of abduction with intent to defile and battery. (A.R. 68.) Immediately thereafter, the Petitioner filed a recidivist information, charging the Respondent as being the same person as being twice convicted of a felony offense, that of uttering a forged writing and unlawful assault, (A.R. 68-69).

On December 10, 2007, the trial court sentenced the Respondent to life in prison. (A.R. 93.)

By Order entered February 3, 2014, the lower court granted the Respondent's Amended Petition for Writ of Habeas Corpus, holding that the trial court deprived the Respondent his due process rights when it ordered him shackled during the course of the trial and in the presence of the jury. (A.R. 6.) The lower court, further, reversed and vacated the Respondent's convictions and ordered a new trial in the matter. (A.R. 6.)

The Petitioner, State of West Virginia, has appealed the lower court's order, to which the Respondent submits his response in opposition to the same.

IV. SUMMARY OF ARGUMENT

The lower court correctly granted the Respondent's Amended Petition for Writ of Habeas Corpus in this matter as the trial court deprived the Respondent his due process rights, as such have been prescribed under both State and Federal Constitutions, when it ordered him shackled during the course of the trial, in the presence of the jury, and security and order did not warrant such intrusive conduct.

V. STATEMENT REGARDING ORAL ARGUMENT & DECISION

The Respondent asserts that oral argument is not required in this case. The decisional process would not be assisted by oral argument. The facts and legal arguments are argued by and presented in the briefs and appendix. This matter is appropriate for memorandum decision.

VI. ARGUMENT

1. *Res Judicata*/Collateral Estoppel

While the Respondent will concede the Petitioner's argument to the extent that the rules of *res judicata* may be applicable in a *habeas corpus* proceeding, see *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), it is the Respondent's position that such rules are inapplicable in present matter. See generally *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).

In *Gibson*, Syllabus Point 1, the Court held that "our post-conviction habeas corpus statute . . . clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to . . . [a] post-conviction habeas corpus proceeding . . ." Section 53-4A-1(a) of the West Virginia Code, which sets forth one's statutory right to *habeas corpus* relief, provides that:

Any person convicted of a crime and incarcerated under sentence of imprisonment therefore who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the constitution of the United States or the constitution of this state, or both . . . may . . . file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment . . . or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

Subsection (b) of section 53-4A-1, goes on to define whether a contention and the grounds in fact or law relied upon in support of such a contention has been finally adjudicated or waived:

[A] contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

Principles underlying *res judicata*/collateral estoppel are, clearly, contemplated in the statutory construction regarding one's right to relief through a *habeas corpus* proceeding.

In *Losh*, speaking to whether an individual seeking relief through a *habeas corpus* proceeding has been foreclosed seeking the same, the Court said “[r]ules of finality which prevent consideration of the merits of a post-conviction claim should be applied with caution.” *Losh*, 166 W.Va. at 766, at 277 S.E.2d at 610. The Court went on to say that the principles of *res judicata* will not be invoked “until the prisoner has had a full and fair opportunity with the assistance of counsel to litigate all issues at some stage of the proceedings.” *Id.* at 766-767, 277 S.E.2d at 610.

It is the Respondent's contention that (1) he was not provided a full and fair hearing on the merits of his claim that his due process rights were violated when the lower court ordered him shackled in the presence of the jury; and, in the same vein, (2) he did not have a full and fair opportunity, with and through his counsel, to litigate such issue. As a result, he was entitled to seek relief, as he did, which was ultimately granted, pursuant to this state's *habeas corpus* statute.

The record as to what occurred in the trial is pretty bare. At the conclusion of the complaining witness' testimony, the lower court declared "let's take the luncheon break, now," and, it is assumed, begins to address the jury regarding their duties and responsibilities while on break. (A.R. 44.) "Please don't discuss this case among yourselves nor permit anybody to discuss it with you. We'll see you be here at 1:00." (A.R. 44-45.) The next statement uttered is "defendant may be taken into custody," to which the deputy/bailiff, presumably following the court's direction, says "Yes, Your Honor." (A.R. 45.) Following the "Brief luncheon recess," the record indicates that there was a *brief* hearing outside the presence of the jury, which went as follows:

THE COURT: Okay, be seated, please. Mr. Lash [serving as the Respondent's counsel].

MR. LASH: Your Honor, at this time I'd like to move for a mistrial in this matter. We already had two instances with the woman stating that she believed Mr. Meckling was guilty, also the incident with the witness on the stand and then, when the Court ordered Mr. Meckling taken into custody and had him handcuffed in front of the jury, of course, they don't know why that happened, and that makes him look like a bad guy to them; it looks like the Court is ratifying that he's a bad guy by having that happen.

MR. VOGRIN: I object, I don't think there's any harm in any way.

THE COURT: It could have happened no matter what, even if he was in custody before. He's in custody because he violated the terms of his bond. Period. That could happen. There's no, no other way of handling that matter. Motion will be denied, and your exception saved. Anything else?

MR. VOGRIN: Nope.

(A.R. 45.) And that was it! That was the hearing on whether the trial court erred, as the Respondent claimed in his original petition for appeal,¹ which the Court did refuse on May 22, 2008.²

¹ It is noted, as a brief aside, that the Respondent, through his trial counsel, sought relief by way of a petition for appeal claiming merely error on the part of the trial court for having him shackled in the presence of the jury, using

Section 54-4A-3 of the West Virginia Code provides:

If it appears to . . . [the] court from . . . [the] petition, *affidavits, exhibits, records and other documentary evidence*, or any such available record . . . that there is probable cause to believe that the petitioner may be entitled to some relief, and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall forthwith grant a writ

Emphasis added. As part of the record in the matter before the Court, the Respondent filed, on September 7, 2010, *Exhibits to Petitioner's Petition for Writ of Habeas Corpus Under W.Va. Code § 53-4A-1*, which had attached, a copy of *Affidavit of Franklin W. Lash*: Franklin W. Lash having served as the trial counsel in the underlying criminal proceedings; and *Affidavit of Nathan Allen Young*: Nathan Allen Young having served as a petit juror in the underlying criminal action. (A.R. 71, 99.) This was evidence not in the record at the time of the brief hearing held following the “brief luncheon recess” during the course of the criminal trial. This is evidence which may have been considered, if the lower court had required a hearing on the Respondent’s writ.

Pursuant to what was contained within the added records, each affiant, after having sworn an oath to testify in accordance with the same, declared that the Respondent was shackled and taken into custody while in the presence of the jury during the trial. (A.R. 71-72, 99-100.) The lower court, in line with section 54-4A-3 of the West Virginia, took the appropriate action in granting the Respondent’s writ.

By way of the habeas corpus proceeding afforded the Respondent in this matter, the lower court provided him a full and fair opportunity to address the merits of his claim; and to

case law and prior rulings of the Court as a guide post; while the Respondent’s *habeas corpus* counsel challenged such an action on constitutional grounds – that there was a violation of due process rights inherent in both state and federal constitutions.

² The Respondent will address such occurrence below.

schedule a hearing regarding the same, *if the court had deemed that necessary*; and, further, provided him a full and fair opportunity, with and through counsel, to litigate such issue. *See Losh*; *see also* W. Va. Code § 54-4A-1. Emphasis added.

In line with the logic set forth above, the Respondent declares that the circuit court's first two (2) orders denying the Respondent a hearing on his *pro se* writ do not qualify "as a final adjudication on the merits," as required under the rule of collateral estoppel. These entries do nothing more than simply state that the "grounds for relief . . . asserted have been previously and finally adjudicated or waived." (A.R. 1, 3.)

With regard to the Petitioner's claim that this Court's refusal to hear his petition for appeal should serve to bar the relief sought in the underlying writ, the Respondent finds guidance in ruling set forth in *Gibson v. Dale*.

In *Gibson*, the appellant, after being convicted for the felony offense of robbery by violence, filed before the Court a petition for writ of error seeking reversal of his conviction on various constitutional grounds. A majority of the Court refused the petition. Seven (7) months later, he filed, *pro se*, a petition for writ of *habeas corpus* alleging ineffective assistance of counsel. After an evidentiary hearing on the matter, the circuit court denied the writ, from which no appeal was ever taken. Almost a year later, the appellant filed another *pro se* petition for writ of *habeas corpus*, this time, alleging the same defects which were contained in his writ of error previously before the Supreme Court of Appeals. The circuit court refused to hear the matter and summarily denied relief stating that "the contentions and grounds advanced . . . have been previously and finally adjudicated or waived." *Id.* at 684-685, 319 S.E.2d at 809-810.

The issue in *Gibson* was whether the *first* omnibus *habeas corpus* hearing, wherein all matters to be complained of should have been addressed, foreclosed the appellant raising issues,

including issues he previously advanced in his original writ of error, in a *second habeas corpus* proceeding. Emphasis added. While the Court, in light of the *Losh* decision and the standards set forth therein, determined that the appellant had not given up his ability to raise those issues, including the issues raised in his original writ of error, in the first *habeas corpus* action, there is no mention of whether the appellant was foreclosed raising issues advanced in his original writ of error because the Court refused to hear that writ. This tends to suggest that this Court's prior refusal to hear a petition for appeal does not work to prevent a prisoner, otherwise entitled as a matter of right to one (1) writ of *habeas corpus*, seeking such relief by, ostensibly, raising similar or duplicative grounds which had been raised in the original petition. *See generally Gibson*.

As noted earlier, the Respondent's counsel in this matter challenged the shackling incident on constitutional grounds, a violation of his due process rights,³ while his trial counsel, who prepared the petition for appeal, made an argument which strictly focused on the Court's prior rulings which address the same or similar issues. In terms of *Losh* issues, it could be said that the Respondent, in his *Separate Memorandum of Law in Support of Petitioner's Petition for Writ of Habeas Corpus under Code § 53-4A-1*, challenged statements and actions by the trial judge in line with that suggested ground numbered forty-three (43) in said decision. *Losh* at 769, 277 S.E.2d at 611. While these differences may seem minimal, they are differences which reflect the course of proceedings for which they apply.

The doctrines of *res judicata* and collateral estoppel are not applicable in the present matter to foreclose the Respondent seeking the relief he ultimately received by the lower court.

³ In *Shamblin v. Hey*, 163 W.Va. 396, 26 S.E.2d 435 (1979), the Court stated that, generally, "all convicted felons are entitled, as a matter of right, to one post conviction habeas corpus proceeding . . . in order to assure that no violation of their due process rights could have escaped the attention of the trial court or the Supreme Court of Appeals. *Id.* at 398, 26 S.E.2d at 437.

2. Shackling a Defendant in the Presence of a Jury

Inherent in the right to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, is the principle that the accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, rather than “on grounds of official suspicion, indictment, continued custody” or any other circumstances not proved at trial. *Taylor v. Kentucky*, 436 U.S. 478, 486, 98 S.Ct. 1930, 1935 (1978). For example, in the State of West Virginia, “a criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire,” as this would adversely affect the presumption of innocence. Syl. Pt. 2, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979); *see also Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976), *cited in McMannis*.

The United States Supreme Court has made it clear that due process permits an accused to be shackled before a jury only as a “last resort” for “disruptive, contumacious, stubbornly defiant defendants.” *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061 (1970). This Court agrees: “a criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints.” Syl. Pt. 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979). Add to that, prior to using physical restraints, the Court requires “an evidentiary hearing on the question of whether such security measures are justifiable by the circumstances of the case.” *State v. Preacher*, 167 W.Va. 540, 572, 280 S.E.2d 559, 572 (1981); *citing Brewster*.

The logic behind these rulings is rather clear:

It cannot be doubted that physical restraints on a defendant at trial may create a substantial prejudice against him. Not only may physical restraints suggest to the jury that the defendant is a dangerous and violent person, but they may also

suggest that he has engaged in past criminal acts and may lead the jury to infer that he is capable of having committed the crime for which he is being tried.

Brewster, 164 W.Va. at 180, 261 S.E.2d at 82-83. Therefore, “the trial of a defendant in physical restraints is usually considered to be *prejudicial per se*” *Preacher*, 167 W.Va. at 556, 280 S.E.2d at 571. Emphasis added. The United States Supreme Court finds exposing the jury to the accused in shackles “*inherently prejudicial.*” *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 1345 (1986). Emphasis added. In light of this fact, it should be said that the Petitioner’s argument – that there needs to be some showing on the part of the Respondent that the jury was *actually* influenced or prejudiced by the shackling incident – is without merit.

Without a justifiable reason, such as a security concern per the *Brewster* decision, and until such time as an evidentiary hearing is conducted on the precautionary measure, as required by *Preacher*, a defendant, such as one in the position of the Respondent, should not be forcibly restrained and shackled as occurred at the direction of the trial court in the matter *sub judice*.

The Respondent’s trial began on October 29, 2007, a Monday. (A.R. 15-70.) On the Thursday before the case was to be presented to the petit jury, October 25, 2007, the Petitioner moved for revocation of the Respondent’s bond, which was so granted the next day, Friday, October 26, 2007. (A.R. 43) Nevertheless, on the day of the trial, the Respondent had not yet been taken into custody. (A.R. 43.) During the morning’s proceedings on the case, the trial court called two (2) separate recesses, at which time the Respondent was, presumably, free to roam the halls of the courthouse; walk outside to, perhaps, smoke a cigarette, all well within the view of jurors, who were free to exercise similar liberties. (A.R. 32, 33.) At the conclusion of the complaining witness’ testimony, and just after the trial court called a third recess, a luncheon break for the day, the Respondent was ordered “taken into custody” while the jury was still present. (A.R. 44-45.) At this juncture, and at all times leading up to the Respondent being

shackled by the trial court, no reference was made, the record is lacking any instance which would seem, to indicate that he was, somehow, a security concern or behaving poorly to the extent that order and decorum demanded his being restrained, per the holdings of *Brewster* and *Illinois v. Allen. Id.*

The Respondent's counsel moved for mistrial. (A.R. 45.) The trial court denied the motion, suggesting that this "could have happened no matter what, even if he was in custody before." (A.R. 45.)

Had the Respondent been in custody *before* the trial proceedings of October 29, 2007, it would be arguable that, perhaps, had a juror, or jurors, seen him shackled, such might be deemed a harmless error. *See generally* Syl. Pt. 2, *State v. Linkous*, 177 W.Va. 621, 355 S.E.2d 410 (1987). The Court's decision in *Linkous*, however, cannot be said to be analogous to the present matter for the reasons just alluded to: time. *See generally Linkous.* In *Linkous*, it was held "not reversible error, nor grounds for a mistrial to proceed to try a criminal defendant with a jury panel that may have seen him in handcuffs for a brief period of time *prior* to trial." *Id.* emphasis added. Likewise, the prejudice that comes by way a mere glimpse by a potential jury of a defendant in shackles prior to trial is minimized for security concerns; that is, the necessity for physical restraints on a prisoner/defendant when "being moved from the jail to the courthouse." *Id.* Alas, that was not the case in the present matter; the conduct at issue took place in the midst, perhaps right in the middle of the trial, and the Petitioner, within the likely view of the jury, had been free to enter the building on his own accord in order to attend his trial and so move about the building on two (2) prior occasions before he was detained.

Add the fact that when Petitioner was detained, it was immediately following the testimony of the complaining witness, such an act lends itself to a conclusion, even in the most

reasonable of jurors' minds, that he is such a dangerous man, and likewise guilty of the crimes alleged, that he must be physically restrained in order to protect this woman. *See generally, Brewster*, 164 W.Va. at 180, 261 S.E.2d at 82-83. For those reasons, a mistrial should have been granted. *See id.*

The lower court, reviewing the actions of the trial court, acted properly granting the Respondent's writ of *habeas corpus*.

VII. CONCLUSIONS

For all the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Ohio County.

Respectfully Submitted,

PATRICK J. MECKLING
Respondent and Petitioner below

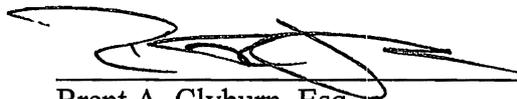
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VIII. CERTIFICATE OF SERVICE

I, Brent A. Clyburn, Esq., counsel for Patrick J. Meckling, certify that I have served the attached RESPONSE TO PETITIONER'S APPEAL BRIEF upon the State of West Virginia by forwarding a true and accurate copy thereof by United States Postal Service, postage pre-paid, to the Ohio County Prosecuting Attorney's Office, Brian A. Ghaphery, APA, 1500 Chapline Street, Room 216, Wheeling, West Virginia 26003 on the 19th day of July, 2014,



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