IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

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No. 32961

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

JEFFREY L. FINLEY,
Defendant Below, Appellant

Appeal from the Circuit Court of Cabell County
The Honorable Dan O'Hanlon, Judge
Case No. 03-F-103

AFFIRMED, IN PART,
REVERSED, IN PART, AND REMANDED

Submitted: September 6, 2006
Filed: November 16, 2006

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JUSTICE ALBRIGHT delivered the Opinion of the Court.
CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.
JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review." Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "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." Syl. Pt. 2, in part, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

3. Due 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.

4. The decision regarding whether a criminal defendant be required to wear identifiable prison or jail clothing at the penalty phase of a bifurcated murder trial is within the sound discretion of the trial court, subject to an evidentiary hearing that establishes an essential state interest which justifies imposing the requirement.

Albright, Justice:

This case involves an appeal of Jeffrey Lee Finley (hereinafter referred to as "Appellant") of his sentence of life without mercy, imposed in the Circuit Court of Cabell County by order entered on October 28, 2004, as recommended by the jury which found Appellant guilty of the offense of first-degree murder.[1] While Appellant's petition for appeal assigned six errors committed by the trial court, this Court accepted the petition on the sole issue of whether it violates due process under the West Virginia and United States Constitutions to require a criminal defendant to wear jail or prison clothing during the penalty phase[2] of a bifurcated jury trial for murder. For the reasons set forth below, we reverse the judgment and remand the case only for rehearing of the penalty phase of the trial.

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[1]Appellant was also convicted of two counts of sexual assault in the second degree during the same proceeding.

[2]In a first-degree murder trial where bifurcation has been granted by the trial court, a jury is involved in both the guilt phase and the mercy or penalty phase of the trial. During the guilt phase, the jury determines the guilt or innocence of the accused. A finding of guilt by the jury automatically results in a life sentence, so during the mercy or penalty phase the jury's only discretion is whether to grant parole eligibility by recommending mercy. W.Va. Code § 62-3-15 (1994) (Repl. Vol. 2005); *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62, 64 (1980). Although some jurisdictions, and even some opinions of this Court, refer to the mercy or penalty phase as the sentencing phase, we find it important to distinguish the segments of the trial in which the jury is involved, i.e. the guilt and penalty phases, from that portion of the criminal proceeding in which the trial court acts alone, i.e. the sentencing phase. Our discussion in this case focuses on the penalty or mercy phase of the murder trial.

I. Factual and Procedural Background

An indictment handed down by a Cabell County grand jury in May 2003 charged Appellant with one count of murder and two counts of second-degree sexual assault in the March 22, 1999, murder of Mabel Hetzer. The victim, the ninety-two year old neighbor of Appellant, was found dead in her home with her body exhibiting signs of sexual assault. The guilt phase of the jury trial on the charges began on September 20, 2004, and concluded on September 29, 2004, with the jury returning the verdict of guilty on all three charges in the indictment.

On October 12, 2004, the jury returned for the penalty phase of the trial for the sole purpose of deciding whether to recommend mercy for the life sentence resulting from their finding of guilt on the first-degree murder charge. Appellant had worn civilian clothes during the guilt phase of the bifurcated trial and moved the trial court to be permitted to do the same during the penalty phase. The motion to wear civilian clothes was denied by the trial court with the explanation that it was the practice "in Cabell County . . . that once he's been convicted, this jury already knows that he is a convict, they're the ones that convicted him, that he comes over not in a suit, but in his regular jail clothes." Consequently, Appellant appeared before the jury during the penalty phase in the standard bright orange jail uniform. No evidence was presented by the defense or prosecution during this phase of the trial, so the jury was only presented with closing arguments of the parties and

instructions before the panel began its deliberation. The jury's subsequent determination not to recommend mercy in sentencing for the murder conviction was followed by the trial court's immediate sentencing of Appellant to life imprisonment without possibility of parole.[3]

On December 17, 2005, the trial court denied Appellant's post-trial motions. Because the trial court granted a two-month extension to appeal, the criminal appeal alleging commission of various errors by the trial court was not filed in this Court until June 28, 2005. On January 9, 2006, this Court accepted the appeal for consideration of the solitary issue of whether it comports with constitutional guarantees of due process for a criminal defendant to be required to wear jail or prison clothing during the penalty phase of a bifurcated murder trial.

II. Standard of Review

The issue in this case calls on us to examine a question of constitutional dimension and as such, "[w]here the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review." Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

[3]Appellant was also sentenced to two consecutive sentences of ten to twenty-five years on each of the second-degree sexual assault convictions.

III. Discussion

Appellant argues that the lower court erred in denying his request to wear civilian clothing during the penalty phase of the trial because the jury's duties were not entirely completed until after the panel decided the question of whether to grant mercy.[4] Appellant maintains that as long as a criminal defendant remains subject to a discretionary decision from the jury, the defendant should not be compelled by the trial judge to wear prison garb as it violates the due process guarantees of both federal and state constitutions by denying the accused a fair trial. In support of this due process argument, Appellant cites the United States Supreme Court case of *Estelle v. Williams*, 425 U.S. 501 (1976), and the West Virginia case of *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), in which this Court adopted the principles announced in *Estelle*. Appellant also directs us to the recent decision of *Deck v. Missouri*, 544 U.S. 622 (2005), in which the United States Supreme Court, relying on *Estelle* and its progeny, found that a defendant's

[4]Appellant also asserted in his brief that in addition to being forced to wear bright orange jail clothing, he also was required to wear leg restraints during the penalty phase of his trial. The record does not reveal whether Appellant was wearing such restraints nor does it reflect Appellant's objection to the same. Thus, we decline to address the issue since it was not properly preserved for appeal. Syl. pt. 3, *O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991) ("'Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.'" (citation omitted)); Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.").

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appearance before a jury in visible shackles during the penalty phase of a homicide trial violates due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Responding to this argument, the State contends that once the criminal defendant in a bifurcated murder trial is found guilty by the jury, safeguards of the presumption of the defendant's innocence are no longer needed. Thus, the State concludes that what clothing a criminal defendant wears during the penalty phase of such bifurcated trial does not raise an issue of constitutional magnitude but rather is left to the sound discretion of the trial court.

It was clearly established in *Estelle v. Williams* that it is unconstitutional to compel a criminal defendant to wear prison clothing during a criminal trial when the guilt or innocence of the accused is undecided. At the outset of its discussion in *Estelle*, the Supreme Court observed that a fair trial is a fundamental constitutional right having as one of its key components the presumption of innocence. 425 U.S. at 503. Recognizing the likelihood that readily identifiable prison clothing would impair the presumption of innocence in the eyes of a jury, the Supreme Court went on to say in *Estelle* that:

> Unlike physical restraints, permitted under [*Illinois v.*] *Allen*, [397 U.S. 337 (1970),] . . . compelling an accused to wear jail clothing furthers no essential state policy. That it may be more convenient for jail administrators, a factor quite unlike the

> substantial need to impose physical restraints upon contumacious defendants, provides no justification for the practice.

425 U.S. at 505 (internal footnote omitted).

Analyzing the *Estelle* ruling, this Court in *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), noted that "*Estelle* is bottomed on the defendant's constitutionally sanctioned presumption of innocence, across which prison attire can cast a substantial shadow, since the attire communicates a condition of guilt." *Id*. at 135, 254 S.E.2d at 808. We went on to hold in syllabus point two of *McMannis* that "[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." After so finding, we examined in *McMannis* whether the constitutional principle extended to witnesses for the defense. Again relying on the pivotal issue of presumption of innocence, this Court found that a defendant has no constitutional right to have his or her witnesses appear at trial in civilian clothing because "[t]he defendant's witnesses are not cloaked in his presumption of innocence, nor do they derive such shelter independently." *Id.* Similarly, the presumption of innocence was the reason why this Court found that criminal defendants in recidivist proceedings were afforded the same constitutional protections as any similarly situated defendant and could not be compelled to wear jail clothing. *State v. Reedy*, 177 W.Va. 406, 352 S.E.2d 158 (1986).

None of these cases – *Estelle*, *McMannis* or *Reedy* – specifically discussed the appearance of a criminal defendant in the context of a bifurcated proceeding. It was not until the May 23, 2005, decision of the U.S. Supreme Court in *Deck v. Missouri*, 544 U.S. 622, that the constitutionality of the forced appearance of a criminal defendant at the guilt phase versus the penalty phase of a bifurcated capital offense trial was definitively addressed, albeit in a different factual light than the case now pending. The Supreme Court concluded in *Deck* that the United States "Constitution forbids the use of visible shackles during the [capital trial's] penalty phase, as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial." *Id*. at 624 (emphasis in original; citation omitted).

As an initial step in its analysis in *Deck*, the Supreme Court identified the following three "reasons that motivate the guilt-phase constitutional rule": (1) the presumption of innocence and the related fairness of the fact-finding process; (2) the constitutional guarantee of the right to counsel; and (3) the obligation of judges to maintain a dignified judicial process which includes the respectful treatment of defendants. 544 U.S. at 630-631.

Recognizing that the defendant's presumption of innocence is no longer an issue at the penalty phase of a capital trial, the court in *Deck* reasoned that

> [t]he appearance of the offender during the penalty phase in shackles . . . 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. . . . 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 . . . when it determines whether a defendant deserves death.

Id. at 633 (internal citations omitted). Consequently, the court found that even though the right to the presumption of innocence no longer existed at the penalty phase, the other fundamental legal principles bearing on fairness of securing a meaningful defense and maintaining dignified judicial proceedings "that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases . . . . Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death . . . . [a] decision [that] is no less important than the decision about guilt." *Id*. at 632.

Appellant asserts that the forced wearing of jail clothing is analogous to the forced shackling addressed in *Deck* because the readily identifiable orange uniforms provided residents of regional jails convey the same messages as the shackles Mr. Deck was required to wear. More specifically, Appellant maintains that the jury could not fairly decide the mercy issue when a defendant is forced to wear a jail uniform during the penalty phase since the jail clothing constantly sends the message to the jury that the person wearing the

outfit is in custody because he is a dangerous person and the mere sight of someone wearing a prison uniform implies a dangerous character.

The issue of whether criminal defendants are deprived a fair trial when they are required to wear jail or prison clothing during the penalty phase of a murder trial is a matter of first impression for this Court. As a matter of fact, our research reveals that no other court has addressed the issue since *Deck* was decided. The only case decided after *Deck* we have located which even raises the precise issue now before us is *Ochoa v. State of Oklahoma*, 136 P.3d 661 (Okla. 2006). In *Ochoa*, the Court of Criminal Appeals of Oklahoma was presented with the argument that *Deck* extended constitutional protection against compelling the wearing of prison clothes at the penalty phase of a murder trial. However, the Oklahoma appellate court, sidestepping any discussion of *Deck*, concluded that the defendant had waived his right under *Estelle v. Williams* by failing to request to wear civilian clothes.

The State directs our attention to two cases[5], decided before *Deck,* in which it was determined that compelling the wearing of prison clothes during the penalty phase of a trial did not violate due process. We do not find these cases particularly enlightening since they concur with the conclusion in *Deck*, that the presumption of innocence no longer has

[5]*Duckett v. Godinez*, 67 F.3d 734 (9th Cir. 1995); *People v. Bradford*, 939 P.2d 259 (Cal. 1997).

vitality during the penalty phase of a bifurcated trial. The other two concerns discussed by the Supreme Court in *Deck* involving a fair trial, securing a meaningful defense and maintaining dignified judicial proceedings, are not addressed in these cases.

In examining these two remaining concerns in the context of compelled appearance in jail or prison clothing during the penalty phase, we find no discernable difference in the prejudicial effect upon a jury of seeing a person in prison garb versus seeing that person in shackles in light of the decision the jury is obliged to make at this portion of the trial. At the penalty phase, the jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character – examining the defendant's past, present and future according to the evidence before it – in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom. *See Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in judgment) (at the penalty stage a jury considers the character and propensities of a defendant in order to make a "unique, individualized judgment regarding the punishment that a particular person deserves.") The jury must be as impartial in reaching this decision as it was in reaching the conviction decision. Courts bear the burden of ensuring that necessary steps be taken to maintain the dignity and neutrality of the penalty phase proceedings, like any other proceedings, in order to provide a fair trial within the constitutional guarantee of

due process. As recognized in *Deck*, elusive and unquantifiable considerations must be minimized throughout a murder trial, at both guilt and penalty phases. While the court in *Deck* decided that the compelled use of visible shackles at the penalty phase impugns the integrity of the proceedings and manifests a violation of due process because the practice essentially puts a thumb on one side of the scale, we find the same degree of unfairness results when a criminal defendant is forced to wear jail or prison clothing during the penalty phase of a bifurcated murder trial. It matters not as far as this analysis goes that the *Deck* case involved a decision regarding the death penalty because the parallel degree of punishment which may be levied for the same crime in West Virginia is life without mercy. Accordingly we hold that the due process afforded by the West Virginia and United States Constitutions[6] 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. We also adhere to the conclusion reached in *Deck* that the constitutional requirement is not absolute in that "[i]t permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns." 544 U.S. at 633. We have adopted the same view regarding the use of restraints at trial. *State v. Youngblood*, 217 W.Va. 535, 544, 618 S.E.2d 544, 553 (2005) (discussing and citing case examples). Thus we find that the decision regarding whether a criminal defendant be required to wear identifiable prison or jail clothing at the penalty phase of a bifurcated murder trial is within the sound discretion

[6]*See* W.Va. Const. Article III § 10; U.S. Const. amend. V.

of the trial court, subject to an evidentiary hearing that establishes an essential state interest which justifies imposing the requirement.

Appellant also asserts that in the event we find that the penalty phase was fatally flawed, the only proper remedy is a new trial and not simply a remand for retrial of the mercy determination. Appellant bases this assertion on the wording of West Virginia Code § 62-3-15 (1994) (Repl. Vol. 2005), that provides "if the jury find in their verdict that . . . [the accused] is guilty of murder in the first degree . . . the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole[.]". Essentially, Appellant maintains that the language used in this statute mandates that the same jury which determines the issue of guilt must also be the jury that decides the issue of mercy. While there is no question that a single jury panel generally determines both guilt and mercy matters, this Court has on a previous occasion found that where the error on appeal of a bifurcated proceeding does not affect "the finding of guilt . . . [then] it would be a waste of judicial resources to require an entirely new trial, rather than to require a limited trial on the recommendation of mercy." *State v. Doman*, 204 W.Va. 289, 292, 512 S.E.2d 211, 214 (1998). Accordingly, the judgment of the lower court finding the Appellant guilty of first-degree murder is affirmed, but the judgment regarding the jury's penalty phase recommendation is reversed. Upon remand, the court shall empanel a jury for trial of the sole issue of whether mercy is to be recommended for the sentencing of

Appellant. Since the jury would not have information regarding the guilt phase of the trial, the lower court should exercise reasonable discretion in determining how the circumstances of the commission of the crime are to be conveyed to the jury in addition to other evidentiary matters appropriate to the mercy phase that the parties may adduce.

IV. Conclusion

For the reasons discussed above, the judgment of the Circuit Court of Cabell County is reversed, and this case is remanded for retrial of the penalty phase by a jury to address the sole question of whether Appellant should receive a recommendation of mercy.

Affirmed, in part,
Reversed, in part,
and Remanded.