No. 33321 *Gary Allen Gibson v. Thomas McBride, Warden, Mount Olive Correctional Facility*

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OF WEST VIRGINIA

Benjamin, Justice, dissenting:

"A criminal defendant has no constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire." Syl. pt. 3, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979), *cert. denied*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983). Despite this well-established principle, the majority grants habeas corpus relief to Gary Allen Gibson (hereinafter "the defendant") on the basis that a number, but not all, of his incarcerated witnesses testified at trial in prison attire and shackles. In general, habeas corpus relief, such as that sought in this proceeding, is not available to correct ordinary trial error, but is reserved for addressing constitutional violations. *See*, Syl. pt. 4, *McMannis*, 163 W. Va. 129, 254 S.E.2d 805 ("A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed."); *Pethel v. McBride*, 219 W. Va. 578, 588-9, 638 S.E.2d 727, 737-8 (2006) ("The right to habeas relief is, by necessity, limited. If it were not, criminal convictions would never be final and would be subject to endless review. . . . Accordingly, habeas relief is available only where: (1) there is a denial or infringement upon a person's constitutional rights; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the legal maximum; or (4) the conviction would have been subject to

collateral attack by statute or at common-law prior to the adoption of W. Va. Code § 53-4A-1."). Recognizing that the physical appearance of these witnesses when testifying does not, standing alone, rise to a constitutional level, the majority finds that *under the facts of this case*, it impacted the defendant's constitutional right to a fair trial because the State's incarcerated witnesses were permitted to testify in civilian clothing and unshackled. However, *the facts of this case*, demonstrate that there was no violation of the defendant's constitutional right to a fair trial and that valid reasons existed for those incarcerated defense witnesses to appear and testify in prison attire and shackles.

Defendant was tried and convicted in January 1989 in the Circuit Court of Cabell County[1] for conspiracy to commit the murder of Danny Lehman.[2] Mr. Lehman's murder occurred on November 26, 1986, in the North Hall of the West Virginia State Penitentiary at Moundsville (hereinafter "Moundsville"), where the defendant was serving a life sentence. On January 1, 1986, the worst prisoner riot in the history of Moundsville occurred.[3] In March 1986, this Court issued an opinion in *Crain v. Bordenkircher*, 176

[1]Although the defendant was indicted in the Circuit Court of Marshall County, the matter was transferred to the Circuit Court of Cabell County upon a motion for a change of venue.

[2]Mr. Lehman was stabbed in his right eye, with the knife penetrating his skull bone and brain. The cause of death was "a stab wound of the brain through the right eye."

[3]This riot was started by a prison gang known as the "Avengers." The decedent was the leader of the Avengers. This riot lasted 42 hours, involved the deaths of three inmates (continued...)

W. Va. 338, 342 S.E.2d 422 (1986), finding the conditions at Moundsville unconstitutional. In November 1988, finding the conditions at Moundsville had not improved, this Court ordered the facility closed by July 1, 1991. *Crain v. Bordenkircher*, 180 W. Va. 246, 247-8, 376 S.E.2d 140, 141-2 (1988).[4] In light of the publicity surrounding the January 1986 riots and this Court's ordering that Moundsville be closed, the dangerous nature of the facility and persons incarcerated therein was undoubtedly well-known to the jurors without comment from anyone.

Of the seven defense witnesses who testified at defendant's trial, six were incarcerated at Moundsville at the time of trial. All six were serving life sentences, two of these witnesses were housed in maximum security and the remaining four were housed in the general population. These six witnesses testified wearing prison attire and shackled. The seventh defense witness, who was incarcerated at the Huttonsville Correctional Facility at the time of trial, testified wearing civilian attire with no physical restraints. In order to testify, the Moundsville inmates were required to be transported approximately 200 miles from the Moundsville facility to Cabell County. While in Cabell County, they were held in

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[3](...continued)
and seventeen people being held hostage before being released unharmed.

[4]Due to delays in construction of a new maximum security facility, this order was subsequently modified to establish a October 31, 1994, closure date. *See, Crain v. Bordenkircher*, 187 W. Va. 596, 420 S.E.2d 732 (1992); *Crain v. Bordenkircher*, 191 W. Va. 583, 447 S.E.2d 275 (1994).

an unsecure courtroom, not in a jail cell, while awaiting their turn to testify and return to Moundsville. The record does not include a motion by the defendant to have the Moundsville witnesses appear in civilian attire or unrestrained, nor does it include evidence that the defendant attempted to arrange their appearance in civilian attire with custodial authorities. A post-trial order was entered, however, on April 17, 1989, stating, in pertinent part, that "[p]rior to the presentation of evidence and testimony by the Defense, the Court ordered that witnesses for the defendant, those who were inmates transported from the Penitentiary at Moundsville, would remain bound and shackled for security reasons, to which ruling the defendant, by counsel, objects and excepts."

With respect to the disparity in appearance between the States's two incarcerated witnesses and six of the seven incarcerated defense witnesses, two things are clear. First, the jury was informed that the two State witnesses who appeared in civilian clothing and unrestrained were incarcerated at the Huttonsville Correctional Center at the time of their testimony and had been given special consideration in exchange for their testimony. Second, the judge gave a strong cautionary instruction prior to the presentation of the defense witnesses that their physical appearance was not to impact judgment of their credibility.[5]

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[5] The instruction provided:

> [l]adies and gentlemen, there will be a number of

(continued...)

This trial occurred nearly twelve years before this Court issued its decision in *State v. Allah Jamaal W.*, 209 W. Va. 1, 543 S.E.2d 282 (2000), wherein guidelines for the appearance of defense witnesses in prison attire and physical restraints were established. Nevertheless, the record herein demonstrates that, *under the facts of this case*, these guidelines were met. In *Allah Jamaal W.*, this Court stated:

> In view of *McMannis* and other authorities, we hold as follows. The issue of whether a witness for the defendant should be physically restrained or required to wear prison attire while testifying before a jury is, in general, a matter within the sound discretion of the trial judge and will not be reversed absent a showing of an abuse of that discretion. The trial judge should not permit an incarcerated defense witness to appear at trial in the distinctive attire of a prisoner. However, the burden is upon the defendant to timely move that an incarcerated witness be permitted to testify at trial in civilian clothes. If the trial judge denies the motion, the judge must set forth on the record the reasons for denying said motion. An incarcerated defense witness should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to prevent escape, provide safety, or maintain order in general. The burden is upon the defendant to timely move that an incarcerated defense witness be permitted

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[5](...continued)

> witnesses who will testify at this time, who are inmates at Moundsville. It has been my decision that they shall testify in shackles. I don't want you to be prejudiced by that or to allow the fact that they are in shackles to influence in anyway, shape, or form the manner in which you receive their testimony. It is, however, a measure I think that is proper under the circumstances and that I believe I've done for good and just cause, and I trust that given the orientation you had at the beginning that you can remove that from your mind and not allow it to influence your judgment relative to their testimony.

> to testify at trial without physical restraints. If the trial judge orders such restraint, the judge must enter into the record of the case the reasons therefor. Whenever the wearing of prison attire or physical restraint of a defense witness occurs in the presence of jurors trying the case, the judge should instruct those jurors that such attire or restraint is not to be considered in assessing the evidence and determining guilt.

Allah Jamaal W., 209 W. Va. at 6-7, 543 S.E.2d at 287-8. In the instant matter, there is no evidence that the defendant made a motion to either have the Moundsville witnesses appear in civilian attire or unrestrained, these men posed significant security risks readily apparent to the trial court, the jury and the public in general, and the judge issued the proper cautionary instruction. I do not see where the trial judge abused his discretion in permitting these witnesses to testify in prison attire and shackles. Nor do I agree that the disparity in appearance between the State's incarcerated witnesses and some of the defense incarcerated witnesses, *under the facts of this case which involved a murder in the Moundsville Penitentiary*, rises to the level of a constitutional infringement of the defendant's right to a fair trial. The jury was well aware of who *all* witnesses were and their crimes. As such, I respectfully dissent from the majority's decision to grant habeas corpus relief herein.