STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 287767

Lower Court No. 07-0165FC

-vs-

ERVINE LEE DAVENPORT

Defendant-Appellant.
_____/

KALAMAZOO COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

SUSAN M. MEINBERG (P34433)
Attorney for Defendant-Appellant
_____

MOTION TO REMAND

AFFIDAVIT AND OFFER OF PROOF

BRIEF IN SUPPORT OF MOTION TO REMAND

STATE APPELLATE DEFENDER OFFICE

BY: SUSAN M. MEINBERG (P34433)
Assistant Defender
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

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MOTION TO REMAND

NOW COMES Defendant-Appellant **ERVINE LEE DAVENPORT**, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by **SUSAN M. MEINBERG**, and respectfully moves this Honorable Court to remand the case to the trial court, stating:

1. On July 18, 2008, Mr. Davenport was convicted of murder in the first degree, following a trial in the Kalamazoo County Circuit Court, the Honorable Pamela L. Lightvoet presiding. On August 28, 2008 Defendant was sentenced to life imprisonment.

2. Mr. Davenport appealed as of right, and now brings this timely Motion to Remand pursuant to MCR 7.211(C)(1).

3. The issue which Mr. Davenport seeks to raise on remand is as follows:

I. MR. DAVENPORT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE HIS LEFT HAND WAS SHACKLED TO HIS WAIST FOR MOST OF THE TRIAL; DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO LODGE A CLEAR OBJECTION TO THE COURT'S POLICY OF SHACKLING; AT A

MINIMUM, MR. DAVENPORT IS ENTITLED TO A REMAND FOR AN EVIDENTIARY HEARING.

See Brief in Support.

4. MCR 7.211(C)(1)(a) states that a motion to remand must identify an issue sought to be reviewed on appeal and show:

> "(i) that the issue should be initially decided by the trial court; or
>
> (ii) that development of a factual record is required for appellate consideration of the issue. A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at the hearing."

5. Pursuant to MCR 7.211(C)(1)(a), Defendant has attached an Affidavit and Offer of Proof.

WHEREFORE, for the foregoing reasons, Defendant-Appellant Ervine Lee Davenport respectfully requests that this Honorable Court remand this case to the trial court for an evidentiary hearing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Susan M. Meinberg
SUSAN M. MEINBERG (P34433)
Assistant Defender
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(313) 256-9833
Smeinberg@sado.org

Date: March 26, 2009

STATE OF MICHIGAN

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Plaintiff-Appellee

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-vs-

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Defendant-Appellant.
_____/

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STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

SUSAN M. MEINBERG, being first sworn, deposes and says as follows:

1) I am the appellate attorney within the State Appellate Defender Office assigned to handle Defendant's appeal in the above-entitled cause.

2) As part of my representation in the above-entitled case, I have investigated Mr. Davenport's claim that his feet and left hand were shackled for most of the trial.

3) Mr. Davenport has demonstrated to undersigned counsel that his ability to reach for paperwork and write notes to defense counsel were hampered by having his left hand shackled at the waist, and that it was apparent to the jurors that his left hand was shackled. He also maintains that the jurors could see his shackles when they entered and exited the jury box.

4) If the within Motion to Remand is granted, appellate counsel intends to call Mr. Davenport, and the jurors to determine whether they saw or could see the shackles and/or whether it was apparent to them from Mr. Davenport's limited mobility at counsel table that Mr. Davenport had his left hand shackled at the waist.

5) The within motion to remand is brought in good faith.

FURTHER, deponent sayeth not.

Susan M. Meinberg
SUSAN M. MEINBERG

Subscribed and sworn to before me
March 26, 2009
Joanne M. Monty
Notary Public, Wayne County, Michigan
My commission expires: 9-2-2012

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I. WAS MR. DAVENPORT DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE HIS LEFT HAND WAS SHACKLED TO HIS WAIST FOR MOST OF THE TRIAL? WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO LODGE A CLEAR OBJECTION TO THE COURT'S POLICY OF SHACKLING? AT A MINIMUM, IS MR. DAVENPORT ENTITLED TO A REMAND FOR AN EVIDENTIARY HEARING?

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant ERVINE LEE DAVENPORT was convicted of first-degree murder, MCL 750.316, after a jury trial in the Kalamazoo County Circuit Court, the Honorable Pamela Lightvoet presiding. On August 25, 2008, Mr. Davenport was sentenced to life imprisonment.

The instant case involved the death of Annette White on January 12, 2007. The prosecution alleged that Mr. Davenport strangled Ms. White while they were arguing in a car, and then he dumped her body in the woods. The defense maintained that Mr. Davenport acted in self defense, after Ms. White produced a box cutter during the argument.

On the first morning of trial, Mr. Davenport was shackled at the ankles and both hands at the waist. Defense counsel lodged what can only be characterized as a "timid" objection to the shackling of her client when she asked if the handcuffs could be removed:

> "[DEFENSE COUNSEL] The other thing is I understand the Court's policy regarding the shackles. However, it's important that Mr. Davenport and I have an opportunity to communicate back and forth, and generally we use a – I use a method where he would write notes back and forth. I would ask that any handcuffs during trial be removed prior to the jury entering, giving us an opportunity to write back and forth freely." (T I, 20).

The prosecutor indicated that he had "no objection to the one writing hand being uncuffed. I think that's a procedure that's been done in the past." (T I, 20).

Without addressing the need for shackling, the trial judge ruled that Mr. Davenport's right hand could be uncuffed:

> "[THE COURT] I will allow his right hand to be uncuffed so he can write notes to his counsel. Are you right-handed, Mr. Davenport?
>
> THE DEFENDANT: Yes.

> THE COURT: Yes. And I will note that he does have cuffs around his – I think his ankles, is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And also around his waist and there is a curtain around the table so the jury won't be able to observe that." (T I, 23).

On the sixth day of trial, defense counsel indicated that Mr. Davenport wanted to testify. The trial judge indicated that he could testify from where he was seated at counsel table. However, after defense counsel lodged an objection, the trial judge agreed that Mr. Davenport's shackles could be removed while the jury was placed in the hallway, and that Mr. Davenport could take the stand to testify (T VI, 1005-1010). When the trial judge informed the sheriff's deputy and asked if he wanted to bring in additional deputies, the deputy indicated that he did not think it would be a problem. The deputy did agree to call the holding center to advise them of what they were doing (T VI, 1009-1010). After the restraints were removed, the jury was immediately recal1ed to the courtroom, and Mr. Davenport took the stand and testified (T VI, 1012-1013). When Mr. Davenport was finished testifying, the following bench conference was held about whether to place Mr. Davenport back in the shackles:

> "MR. FENTON: They want him shackled back up. Apparently he's made comments about you know, about whether deputies are wearing their vests, etcetera. He's working out a ton in the jail, and they're con – they want – they to shackle him back up. I don't know if you want the jury to go back out into hall for a minute or if you're just not gonna order it. I mean it's your call.
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> I cross-examined him basically. I said is that really necessary? He hasn't done anything in this trial and they said he's talked to people about whether or not you know, were vested up and they want him shackled.
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> MS. EIFLER: He's not done anything.

> THE COURT: Huh?
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> MS. EIFLER: He's not done anything.
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> THE COURT: Well he hasn't done anything in the trial. Are they gonna – I'm – I'm gonna go past 5:00 o'clock obviously. I just want to make sure that they're gonna have deputies here. I'll have everyone in the courtroom's gonna remain and then I'm not asking so."
>
> MR. FENTON: Okay." (T VI, 1153).

After listening to seven days of testimony, the jury convicted Mr. Davenport of first-degree murder (T VIII, 1308). On August 25, 2008, Mr. Davenport was sentenced to life imprisonment (ST 11.

Mr. Davenport timely requested appellate counsel and now brings this timely Motion to Remand.

I. MR. DAVENPORT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE HIS LEFT HAND WAS SHACKLED TO HIS WAIST FOR MOST OF THE TRIAL; DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO LODGE A CLEAR OBJECTION TO THE COURT'S POLICY OF SHACKLING; AT A MINIMUM, MR. DAVENPORT IS ENTITLED TO A REMAND FOR AN EVIDENTIARY HEARING.

Standard of Review

While a trial court has discretion to decide whether a defendant in a criminal trial should be shackled, that discretion is circumscribed. A court "cannot routinely place defendants in shackles," and, when a court decides to shackle, that decision must reflect "particular concerns" related to the particular defendant. *Deck v Missouri,* 544 US 622, 632-634 (2005).

Claims of ineffective assistance of counsel present mixed questions of law and fact. *People v LeBlanc*, 465 Mich 575, 579 (2002).

On the first morning of trial, defense counsel lodged what can only be characterized as a "timid" objection to the shackling of her client when she asked to have his hands uncuffed (T I, 20).

Discussion

On the first morning of trial, Mr. Davenport was shackled at the ankles and both hands at the waist. Defense counsel lodged what can only be characterized as a "timid" objection to the shackling of her client when she asked if the handcuffs could be removed:

> "[DEFENSE COUNSEL] The other thing is I understand the Court's policy regarding the shackles. However, it's important that Mr. Davenport and I have an opportunity to communicate back and forth, and generally we use a – I use a method where he would write notes back and forth. I would ask that any handcuffs during trial be

> removed prior to the jury entering, giving us an opportunity to write back and forth freely." (T I, 20).

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> THE COURT: And also around his waist and there is a curtain around the table so the jury won't be able to observe that." (T I, 23).

Mr. Davenport submits that he was denied his state and federal constitutional right to due process where his left hand was shackled to his waist for most of his trial. US Const, Ams V, XIV; Mich Const 1963, art 1, §17.

The Fifth and Fourteenth Amendments guarantee the right to a fair trial. US Const, Ams V, XIV; Mich Const 1963, art 1, §17; *Holbrook v Flynn*, 475 US 560, 567 (1986). Inherent in the American justice system's concept of fairness in the criminal trial process is the presumption of innocence; fairness mandates that a defendant be presumed innocent until proven guilty beyond a reasonable doubt. *In re Winship*, 397 US 358, 363 (1970). Central to this right "is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion,

indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v Flynn*, 475 US at 567, quoting *Taylor v Kentucky*, 436 US 478, 485 (1978). Both Michigan and Federal law clearly state that a criminal defendant has a right to appear before the jury without any indicia of incarceration, including both obvious physical restraints and jail clothing.

The trial court has discretion to permit restraints where necessary to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. See *Deck v Missouri*, 544 US 622 (2005); *Holbrook v Flynn*, *supra*; *Estelle v Williams*, 425 US 501 (1976); *Illinois v Allen*, 397 US 337 (1970); *Kennedy v Cardwell*, 487 F2d 101 (CA6, 1973); *People v Dunn*, 446 Mich 409, 411 (994); *People v Shaw*, 381 Mich 467 (1969); *People v Banks*, 249 Mich App 247 (2002)*; People v Dixon*, 217 Mich App 400, 404 (1996); *People v Baskin*, 145 Mich App 526 (1985). *Deck* recognizes the legitimacy of security concerns, but the concerns cannot be generalized. They must exist in the particular case, apply specifically to the defendant on trial in that case and be articulated on the record. *Deck*, 544 US at 628-629. See also *People v Dunn*, *supra*, 425.

The law forbidding routine use of visible shackles during a criminal trial "has deep roots in the common law." *Deck v Missouri*, 544 US at 626. In the 18th century, Blackstone wrote that "it is laid down in our ancient books that, though under an indictment of the highest nature," a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnotes omitted), cited with approval in *Deck*, 544 US at 626. The United States Supreme Court announced in *Illinois v Allen*, 397 US at 344 "that even to contemplate such a technique . . . arouses a feeling that no person should be tried while shackled and gagged except as a last resort."

In *Deck,* where the United States Supreme Court extended the prohibition against shackling at trial to shackling during the penalty phase of a capital murder case, the Supreme Court found the prohibition basic to due process protections, holding that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck,* 544 US at 629.

The Supreme Court outlined three fundamental legal principles central to its holding. The first is the presumption of innocence. The Supreme Court concluded that shackling undermines that presumption, as well as the related fairness of the fact-finding process. The second is the right to counsel. The Supreme Court concluded that shackling diminishes that right and may interfere with an accused's "ability to communicate" with his lawyer and with an accused's ability to participate in his own defense. The third is the need to maintain a dignified judicial process. The Supreme Court concluded that shackling constitutes an "affront" to the dignity of judicial proceedings. *Deck,* 544 US at 631.

Michigan appellate courts traditionally have relied on physical security, escape prevention and courtroom decorum to justify shackling. See, for example, *People v Dunn, supra,* 411 ["A court may order shackling of a defendant on a finding supported by record evidence that shackling is necessary to prevent escape, injury to persons in the courtroom, or to maintain order."]; *People v White,* 439 Mich 942, 943 (1992), citing *Odell v Hudspeth,* 189 F2d 300, 302 (CA 10, 1951) ["ordinarily such procedure should be permitted only to prevent the escape of the prisoner or to prevent him from injuring bystanders and officers of the court or to maintain a quiet and peaceable trial."] *Deck* recognizes the legitimacy of these same concerns, but the concerns cannot be generalized. They must exist in the particular case, apply specifically

to the defendant on trial in that case and be articulated on the record. *Deck,* 544 US at 629-630.

Here, the record is devoid of any satisfactory explanation on the first day of trial as to why Mr. Davenport was shackled at the ankles and at the waist in the first place. The first morning of trial, defense counsel lodged an objection to the shackles, and asked that Mr. Davenport be allowed to have the handcuffs removed to allow him to communicate with counsel (T I, 20).

On the sixth day of trial, defense counsel indicated that Mr. Davenport wanted to testify. The trial judge indicated that he could testify from where he was seated at counsel table. However, after defense counsel lodged an objection, the trial judge agreed that Mr. Davenport's shackles could be removed while the jury was placed in the hallway, and that Mr. Davenport could take the stand to testify (T VI, 1005-1010). When the trial judge informed the sheriff's deputy of this procedure and asked if he wanted to bring in additional deputies, the deputy indicated that he did not think it would be a problem. The deputy did agree to call the holding center to advise them of what they were doing (T VI, 1009-1010). After the restraints were removed, the jury was immediately recal1ed to the courtroom, and Mr. Davenport took the stand and testified (T VI, 1012-1013). When Mr. Davenport was finished testifying, the following bench conference was held about whether to place Mr. Davenport back in the shackles:

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>
> MR. FENTON: Okay." (T VI, 1153).

Given defense counsel's reference on the first day of trial to the trial judge's "policy regarding shackles" (T I, 20), it is apparent that the trial judge abandoned her discretion entirely.[1] Under *Deck*, the decision to shackle cannot be made on the basis of some generalized policy. In the rare case where shackling may be justified, the justification must be based on a "special need," and it must be ordered only as "a last resort." *Deck*, 544 US at 627-628.

Here, the trial judge articulated no "special need," and on the sixth day of trial she conceded that Mr. Davenport "hasn't done anything in the trial" and allowed him to remain unshackled for the rest of that day (T VI, 1153). The "special need" must be articulated on the record, and there was not even a pretense of that here. Where a defendant engages in threatening or disruptive conduct in a courtroom, the measures a court may take short of the "last resort" of shackling include warning a defendant, holding him in contempt or even removing him from the courtroom. *People v Dunn, supra* at 425.

[1] This policy was also referenced at a motion hearing held on March 17, 2008, when Mr. Davenport complained that he was not able to write notes during the motion proceeding because his hands were shackled to his waist. After the trial judge ascertained that Mr. Davenport was cuffed from the front rather than the back, the trial judge said, "Then you should be able to write, I've seen other individuals do it so." (MT 3/17/08, 3-4).

"[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.'" *Deck, supra* at 635 (citation omitted). In contrast, when a defendant is erroneously required to stand trial in shackles but the shackles are not visible to the members of the jury, it is the defendant's burden to prove that the restraints resulted in actual prejudice by affecting the outcome of the proceedings. See, e.g., *People v Robinson*, 172 Mich App 650, 654 (1988).

Mr. Davenport does not contend that jurors saw his ankle restraints behind the curtain that covered counsel table, but Mr. Davenport asserts that the shackling of his left hand at his waist was obvious to the jurors, especially when he attempted to write notes to defense counsel and when he was trying to reach for paperwork on the table. Furthermore, Mr. Davenport asserts that the jurors could see his left hand was shackled when they entered and exited the jury box. See Affidavit and Offer of Proof. The present record is inadequate to determine whether the shackles were visible to the jury, and/or whether the jurors were aware of the shackles based on Mr. Davenport's limited mobility at counsel table.

Furthermore, Mr. Davenport submits that defense counsel was ineffective when she failed to clearly object to the trial judge's shackling policy. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 665 (1984); *People v Pickens*, 446 Mich 298 (1994). If defense counsel's timid objection is deemed a failure to object and if this Court deems the proper analysis of this issue is for plain error, then defense counsel's performance was deficient and Mr. Davenport was prejudiced.

Mr. Davenport submits that he is entitled to a remand to establish a record as to whether the jurors were aware of the shackling, and whether defense counsel's timid objection constitutes ineffective assistance of counsel. See *Deck v Missouri*, 544 US at 634-635; *People v Dunn, supra*, 424-425; *People v Herndon*, 98 Mich App 668, 673 (1980); *People v Ginther*, 390 Mich 436 (1973).

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant this Motion to Remand.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Susan M. Meinberg
BY:_____

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Dated: March 26, 2009