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MAY 07 2010

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20090241

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 07 2010

State of North Dakota,

STATE OF NORTH DAKOTA

Plaintiff-Appellee,

- vs -

Billy Joe Valdez Agüero,

Defendant-Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF & *Addendum*

BENJAMIN C. PULKRABEK

Attorney for Appellant
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Mandan, North Dakota 58554
(701)663-1929
N.D. Bar Board ID No. 02908

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

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STATUTES

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OTHER AUTHORITIES

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STATEMENT OF THE ISSUES

ISSUE: **I. ISSUE 1. Should the record be amended to reflect that jurors saw Defendant/Appellant, Billy Joe Valdez Agüero in shackles in the courtroom and/or the courthouse during the trial?**

NATURE OF THE CASE

Defendant/Appellant, Billy Joe Valdez Agüero made a Motion to the North Dakota Supreme Court under Rule 10(h) of the NDR of Appellate Procedure to correct or modify the record.

The Supreme Court remanded this case back to the District Court.

The District Court had a hearing on the Motion on February 24, 2010.

The District Judge denied Mr. Agüero's Motion to Amend on March 22, 2010.

Mr. Agüero appealed the denial on March 25, 2010.

The denial is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

During the trial while in the courthouse and in the courtroom Defendant/Appellant, Billy Joe Valdez Aguero's legs were shackled. The defense attorneys in order to prevent the jury from seeing the shackles on Mr. Agueros legs built a wall of boxes around defense counsel tables. Tr. P.11, L.25, P. 12, L.1-22.

There were two seats in the jury box where Mr. Moncada's counsel Robert Martin believed jurors, could see the shackles on the Defendant. Tr. P.11, L. 3-22

During the trial in the courtroom on one occasion the jury came in early. Mr. Aguero wasn't seated and had to go as fast as he could with shackles on to his seat. Tr. P.13, L.1-22, P.16., L.11-15, P.21, L.9-25, P. 24, L.1-25, P.26, L.1.

Mr. Aguero also testified about occasions outside of the courtroom where jurors saw him during recesses in the trial Tr. , P.25, L.1-25, P.26., L.1-25, P.27., L.1-14.

ARGUMENT

ISSUE 1. Should the record be amended to reflect that jurors saw Defendant/Appellant, Billy Joe Valdez Aguero in shackles in the courtroom and/or the courthouse during the trial?

In this case Defendant/Appellant, Billy Joe Valdez Aguero was not in shackles during jury voir dire, but he was in shackles during the rest of the jury trial. According to the testimony of Mr. Aguero and attorney David D. Dusek some of the jurors were able to see Mr. Aguero in shackles during the trial while he was in the courtroom and when he was in the courthouse.

A Defendant is guaranteed the right to a fair trial, so he was entitled to have his

guilt or innocence determined solely on the evidence introduced at trial. *Holbrook v. Flynn*, 475 U.S. 560 (1986). Since the use of shackles creates a danger that the jury may form an impression that the defendant is guilty, he was entitled to be free from shackles in front of the jury. *Rhoden v. Rowland*, 172 F.3D 633 (9th Cir. 1999). This is because the North Dakota Century Code provides that a defendant is presumed innocent until proven guilty. N.D. Cent. Code § 29-21-05 (2006)

In State vs Kunze 2007 ND 143, 738 NW2d 47 page 5 [¶916].

[¶16] Courts have long recognized that criminal defendants should not be physically restrained as a routine matter because of the prejudicial effect of such restrains. See id. at 626-28 (examining the historical development of the law regarding shackling). There is “inherent prejudice to the accused when he is cast in the jury’s eyes as a dangerous, untrustworthy and pernicious individual from the very start of the trial.” Kennedy v. Cardwell, 487 F.2d 101, 111 (6th Cir. 1973). “[T]he sight of a defendant in shackles could instill in the jury a belief that the defendant is a dangerous individual who cannot be controlled, an idea that could be devastating to his defense.” Roche v. Davis, 291 F.3d 473, 482-83 (7th Cir. 2002) (internal quotation omitted). In Deck, the United States Supreme Court noted that “[v]isible shackling undermines the presumption of innocence and the related fairness of the fact finding process.” 544 U.S. at 630.

A Defendant does not have to prove actual prejudice to prove a due process violation orders that a Defendant wear shackles that can be seen by a jury Deck v. Missouri 544 US 622, 635 (2005). This means that the State must prove ‘beyond a

reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained” Deck 544 US at 635.

Rule 10(h)(1)(2) only applies to any difference that arises about whether the record truly disclose what occurred in the district court. The testimony by Mr. Aguero and his attorney David D. Dusek established that on one occasion in the courtroom some of the jurors saw Mr. Aguero in shackles. That accession should be made part of the district court record.

The occasion Mr. Aguero was seen by jurors in shackles in the courthouse should not be made part of the district court record.

CONCLUSION

For the above and foregoing reasons the fact that jurors in the courtroom saw Mr. Aguero should be made part of the record.

DATED at Mandan, North Dakota, this 6 day of May, 2010.

Benjamin C. Pulkrabek
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(701)663-1929
N.D. Bar Board ID #02908
Attorney for Defendant - Appellant

NOV 2 9 41 AM

IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

1
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3 State of North Dakota,)
4 Plaintiff,)
5 vs.)
6 Billy Joe Valdez Aguero,)
7 Defendant.)

MEMORANDUM DECISION & ORDER

BY DEBRA ABSEY, CLERK



Crim. No. 18-08-K-1676
Supreme Court No. 20090241

8 Pursuant to a December 22, 2000[sic] Order of Temporary Remand from the
9 North Dakota Supreme Court, this case returns to the trial court "for the filing
10 and consideration of a motion to correct the record".

11 On August 7, 2009, Defendant Billy Joe Valdez Aguero was sentenced following
12 his June 24, 2009 convictions of two counts of murder and two counts of
13 conspiracy to commit murder following a jury trial before this court. On
14 December 18, 2009 counsel for the Defendant filed a Motion to Modify and
15 requested that the Supreme Court remand this matter "so that a motion to
16 correct the record could be made regarding what the jurors saw and/or heard
regarding the defendant's shackles during the jury trial".

17 On January 11, 2010, counsel for Mr. Aguero filed a motion with this court
18 requesting "an Order setting a hearing to correct the record in this case so that
19 the record includes the fact that jurors during th[sic] trial were able to see and
20 did see Defendant, Billy Joe Valdez Aguero in shackles and were able to
21 hear[sic] the chains on the shackles made noise during the trial". [Docket
22 Entry 226]. Accompanying the motion was an affidavit of the Defendant
23 [Docket Entry 225]. Also filed concurrently was Defendant's Brief [Docket Entry
24 227] which states no case law or authority in support of the Defendant's
25 motion, but which does indicate that co-Defendant Joseph Daniel Moncada and
the Defendant's trial attorney, Mr. David D. Dusek, would be called as
witnesses to support his motion.

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3 Hearing was held in Grand Forks County District Court on February 24, 2010.
4 Representing the State were Grand Forks County Assistant State's Attorneys M.
5 Jason McCarthy and Meredith Larson. Mr. Aguero was personally present with
6 his appellate defense counsel, Mr. Benjamin C. Pulkrabek.

7
8 At the outset of the hearing, the State objected to the Defendant's motion by
9 asserting that it was an impermissible attempt to correct the trial record. The
10 trial court acknowledged the State's objection, but did not rule on it at that
11 time. Rather, the hearing proceeded to afford the Defendant the opportunity
12 to make a formal matter of record of what exactly he was seeking to establish
13 by supplementation. Thereafter, Mr. Dusek and Mr. Aguero testified, as did one
14 of the Grand Forks County Correctional officers charged with the security and
15 transportation of Mr. Aguero during trial. Mr. Moncada did not testify.
16 Following hearing, the court requested that the State file a brief in support of
17 its objection, and Defendant's counsel was thereafter afforded an opportunity
18 to respond.

19
20 The State filed a Brief in Opposition to Defendant's Motion to Modify [Docket
21 entry 233] and Defendant's counsel subsequently filed a Brief in Support of
22 Defendant's Motion to Modify [Docket Entry 234].

23
24 The gist of appellate defense counsel's motion is to have the trial record
25 supplemented to reflect that jurors observed his client in shackles during trial.
His request is premised on his client's testimony and that of his client's trial
attorney. However, there were no such claims made at any time during trial.
Further, after the verdicts of guilty were read into the record on June 24,
2009, Mr. Augero's counsel did not request to voir dire any of the jury
members in this regard. Finally, there was no trial juror testimony presented
on February 24th to establish that the trial court's efforts to shield shackles

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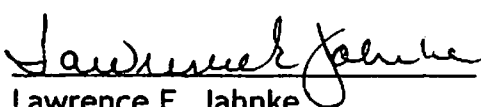
from the view of jurors during trial had not been successful, nor anything but speculation as to what the jurors "might" have heard in conjunction with those restraints.

After reviewing the hearing transcript of the February 24th motion hearing and the applicable law, the trial court agrees with the State's position that this is an impermissible attempt under Rule 10, N.D.R.App.P., to supplement a trial record with matters that were not made of record at trial itself and for which even now there is no credible evidence to substantiate.

Defendant's motion is DENIED. This matter shall be returned to the North Dakota Supreme Court so that the appellate process may continue.

Dated this 22nd day of March 2010.

BY THE COURT:


Lawrence E. Jahnke
District Judge

Xc: Mr. M. Jason McCarthy
Mr. Benjamin C. Pulkrabek

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS
DISTRICT

NORTHEAST CENTRAL JUDICIAL

STATE OF NORTH DAKOTA
Plaintiff

vs.

BILLY JOE VALDEZ AGUERO
Defendant

)
)
) NOTICE OF FILING OF
) THE NOTICE OF APPEAL
)
) CASE NO. 18-08-K-01676/004
)
)
)

TO: BENJAMIN C PULKRABEK
402 1ST ST NW
MANDAN ND 58554

INTERESTED PARTIES:

ATTY. FOR DEFENDANT : BENJAMIN C PULKRABEK
ATTY. FOR PLAINTIFF : MARK JASON MCCARTHY
CO-DEFENDENT : JOSEPH DANIEL MONCADA
DEFENDANT : BILLY JOE VALDEZ AGUERO
PLAINTIFF : STATE OF NORTH DAKOTA

Please take notice that a Notice of Appeal, a copy of which is attached hereto, was filed in the above captioned case in the office of the Clerk of District Court, Grand forks County, North Dakota on the 30th day of March, 2010.

Dated in Grand forks, North Dakota this 30th day of March, 2010.

Rebecca Absey By: *Jr*
REBECCA ABSEY
Clerk of Court

Copies mailed to: CLERK OF SUPREME COURT
BENJAMIN C PULKRABEK
MARK JASON MCCARTHY



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS
DISTRICT

NORTHEAST CENTRAL JUDICIAL

STATE OF NORTH DAKOTA
Plaintiff

)

vs.

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BILLY JOE VALDEZ AGUERO
Defendant

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) CASE NO. 18-08-K-01676/003

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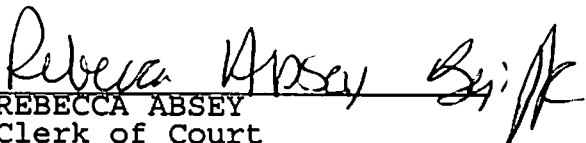
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MARK JASON MCCARTHY

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS
DISTRICT

NORTHEAST CENTRAL JUDICIAL

STATE OF NORTH DAKOTA
Plaintiff

vs.

BILLY JOE VALDEZ AGUERO
Defendant

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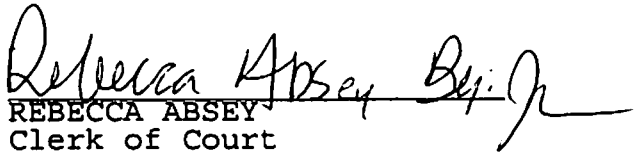
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PLAINTIFF : STATE OF NORTH DAKOTA

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Dated in Grand forks, North Dakota this 30th day of March, 2010.


REBECCA ABSEY
Clerk of Court

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BENJAMIN C PULKRABEK
MARK JASON MCCARTHY

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS
DISTRICT

NORTHEAST CENTRAL JUDICIAL

STATE OF NORTH DAKOTA
Plaintiff

vs.

BILLY JOE VALDEZ AGUERO
Defendant

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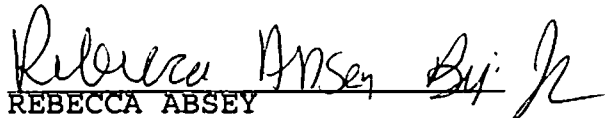
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DEFENDANT : BILLY JOE VALDEZ AGUERO
PLAINTIFF : STATE OF NORTH DAKOTA

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Dated in Grand forks, North Dakota this 30th day of March, 2010.


REBECCA ABSEY
Clerk of Court

Copies mailed to: CLERK OF SUPREME COURT
BENJAMIN C PULKRABEK
MARK JASON MCCARTHY

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS

NORTHEAST CENTRAL JUDICIAL DISTRICT

State of North Dakota,)

Case No.: 08-K-1676

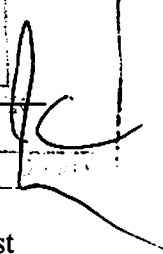
Plaintiff,)

- vs -)

Billy Joe Valdez Agüero,)

Defendant.)

FILED IN THE OFFICE OF
 CLERK OF DISTRICT COURT
 GRAND FORKS COUNTY, N. DAK. ON
AMENDED NOTICE OF APPEAL
 MAR 30 2010



TO: CLERK OF DISTRICT COURT, GRAND FORKS COUNTY COURTHOUSE, P.O. BOX 5979, GRAND FORKS, ND 58206

WHEREAS, Defendant-Appellant, Billy Joe Valdez Agüero, filed an appeal on August 19, 2009.

WHEREAS, Billy Joe Valdez Agüero filed a Motion to Modify under NDR of App. Pro 10(h) on December 18, 2009.

WHEREAS, this case was remanded to the District Court and a hearing on the Motion to Modify was heard on February 24, 2010.

WHEREAS, The District Court issued a Memorandum Decision and Order on March 22, 2010 deny Defendant, Billy Joe Valdez Agüero's Motion to Modify.

NOW THEREFORE the Defendant, Billy Joe Valdez Agüero amends his appeal to include an appeal fro the Memorandum Decision and Order of March 22, 2010 that denied his Motion to Modify.

DATED this 25 day of March, 2010.

Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID# 02908
Attorney for Appellant, Billy Joe Valdez
Aguero
402 First Street NW
Mandan, ND 58554
(701)663-1929

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing documents were served by mail on the following individuals at the following address on this 25 day of March, 2010.

Karen M. Aamodt
Court Reporter
P.O. Box 6347
Grand Forks, ND 58206-6347

Mark Jason McCarthy
Assistant State's Attorney
P.O. Box 5607
Grand Forks, ND 58206-5607

Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID# 02908

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

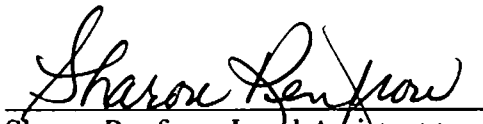
That on May 6, 2010, she served, by mail, a copy of the following:

APPELLANT'S SUPPLEMENTAL BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Jason McCarthy
Assistant State's Attorney
P.O. Box 5607
Grand Forks, ND 58206-5607

The undersigned further certifies that on May 6, 2010, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.


Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek