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SUPREME COURT
MAY 07 2010

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20090241

SUPREME COURT NO.: 20090241

State of North Dakota,

Plaintiff-Appellee,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

- VS -

MAY 07 2010

Billy Joe Valdez Agüero,

STATE OF NORTH DAKOTA

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

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<u>William v. Woodford</u>	
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The First Issue in this argument relates to Issue I in Appellants brief.

ISSUE I: Did the trial court err when it required Defendant/Appellant Aguero during the guilt phase of the trial to be shackled?

And Issue II in Appellee's brief.

ISSUE II: The use of non-visible restraints was permissible as raised by Defendant-Moncada and Defendant-Aguero.

ARGUMENT

The following language in the Interest of R.W.S., 2007 ND37, 728 NW2d 326 makes the Defendant's right to be free from physical restraints during a trial of constitutional dimensions unless this right can be overcome by essential state's interests such as physical security, escape prevention in courtroom decorum.

[¶11] The United States Supreme Court has recently stated that there is near consensus agreement that during a trial's guilt phase, "a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape preventions, or courtroom decorum." Deck v. Missouri, 544 U.S. 622, 628 (2005); see ABA Standards for Criminal Justice: Discovery and Trial by Jury 15-3.2, pp. 188-91 (3d ed. 1996).

When the clerks record and the Appellate or Appellees Appendixes are examined there is nothing in any of them to indicate that Mr. Aguero's right to be free from physical restraints was ever overcome by essential State Interests

When all of the transcripts are examined the reason why that Mr. Aguero was required to wear leg restraints can be found in the transcripts at:

1) Transcript of Motions Hearing and Pretrial Conference dated March 19, 2009, p. 20, L.16 & 17. For the record we'll grant the defendant's motion for street attire and nonvisible restraints.

2) Final Pretrial Conference dated Monday June 15, 2009, P.12, L.13 & 14. That was my understanding. Maybe there was a disconnect but there will be leg restraints.

3) T.III, P.176, L.10-16. We have bent over backwards the last couple of days. They could be hand shackles as well.. From my point of view and from what I can see of counsels bench the view of their feet is properly obstructed. So your comments are made. They will remain shackled.

None of the above transcript citations refer to any essential state interest as to why Mr. Aguero had to be shackled during the trial.

The State in its brief to support the shackling of Mr. Aguero relies on William v. Woodford 306 F3d 665. The differences between Woodford and the case now before the court is in Woodford there was a record on why the shackling was an essential state interest and that record could be reviewed. In the case now before the court there is no record to be reviewed on the essential States interest for the shackling of Mr. Aguero during the trial.

The Interest of R.W.S. makes it clear that before a Defendant can be shackled during a trial his Constitutional right to be free from shackles has to be overcome by an essential state interest. Therefore Mr. Aguero had a right to be free from shackles during

the trial because that right was never over come by an essential State interest.

Since there is no record as to why Mr. Aguero was required to be shackles during the trial, the trial judge's statements in the transcripts requiring Mr. Aguero to be shackled appear to be arbitrary and capricious.

The Second Issue in this argument relates to Issue 2 in Appellant's brief.

ISSUE II: Did the trial court err, when it allowed over Defendant/Appellant Aguero's objection, Investigator Hoffman to comment on Mr. Aguero's right to remain silent?

And Issue IV in Appellee's brief.

ISSUE IV: The District Court did not err in permitting testimony from Investigator Hoffman as raised by Defendant-Aguero.

The State claims that State v. Golden, 2009 NW 108, 776N W 29 473 justifies the admission at trial of the fact that Mr. Aguero remained silent to a question asked him by Investigator Hoffman. The problem with the states claim is the facts in Golden and the case now before the court are distinguishable. In Golden the defendant, Golden was asked to come to the police station for questioning. Mr. Golden then went voluntarily to the police station where Sergeant Murphy met him. Sargent Murphy then advised Mr. Golden that he was not under arrest, did not have to answer any questions, and was free to leave at any time. The interview was conducted in an interview room where Mr. Golden confessed to his role in the shooting.

In the case before the court, Mr. Aguero had law officers come to his parents home and take him to the East Grand Forks Police Department for an interview. At the

police department Officer Hildebrand read Mr. Aguero his Miranda rights and then the questioning began.

Mr. Aguero's factual situation differs from Mr. Golden's because Mr. Aguero didn't go to the police station voluntarily, wasn't told by the officers he was not under arrest, wasn't told by officers he didn't have to answer any questions, and wasn't told by officers he could leave at anytime. There is also a difference in what happened during the questioning in the Golden and Aguero cases. In Golden Mr. Golden during questioning admitted to his role in the shooting while in Mr. Aguero's during the questioning made no admission to the murders.

Golden at [¶11] states:

[¶11] "Custodial interrogation" under Miranda does not require an arrest, but includes circumstances in which a reasonable person would not feel free to leave and thus would feel the "restraint on freedom of movement of the degree associated with a formal arrest." Thompson v. Keohane, 516 U.S. 99, 112 (1995) (Citations omitted). The United States Supreme Court has explained that all the circumstances surrounding an interrogation must be examined to determine whether a reasonable person in that position would have thought he was "sitting in the interview room as a matter of choice, free to change his mind and go home . . .

. . ." Kaupp v. Texas, 538 U.S. 626, 632 (2003); Keohane, 516 U.S. at 112.

An examination of the custodial situation in Aguero at the police station will show that he was taken by the police from the parents home, after arriving at the police station, he was read his Miranda rights. At no time was he told he was not under arrest,

didn't have to answer any questions or that he could leave at any time. Because of Agueros custodial situation a reasonable person put in Agueros place would not feel free to leave and would feel the restraint on freedom of movement to the degree associated with a formal arrest.

The State also claims that *State v. Burns* 276 F3d 439 (8th Cir. 2002) also justifies the admission at trial of the fact that Mr. Aguerro remained silent to a question asked him by Investigator Hoffman. The facts in Burns, like the facts in *Golden* are distinguishable from the case now before the court. In Burns, Mr. Burns during post arrest interrogation questioning specifically waived his Miranda right, including his right to remain silent, and responded to post-arrest questioning regarding a scheme to obtain check fraudulently. After Burns admitted cashing checks he didn't answer a question about recruiting others to cash checks. Burns then answered some other questions and finally decided he didn't want to answer any more questions. According to Burns "In addition we have held that where the accused initially waves his or her right to remain silent and agrees to questioning but subsequently refuses to answer further questions the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused."

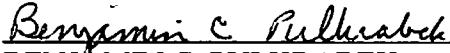
Mr. Agueros questioning by law enforcement differs from Burns because Mr. Aguerro's questioning was not during a post arrest interrogation. Also Mr. Aguerro didn't waive his Miranda rights

Mr. Aguerro believes the facts in his custodial situation includes circumstances that restrained his movement and that amounted to an arrest. The fact situation where

Mr. Aguero's remained silent to a question is not in any way similar to the fact situation in Golden and/or Burns.

Mr. Aguero's right to remain silent was a constitutional right and it was reversible error for a trial court to allow testimony about his right to remain silent.

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


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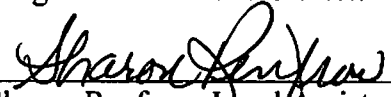
CERTIFICATE OF SERVICE BY MAIL

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 6th, 2010, she served, by mail, a copy of the following:
APPELLANT'S REPLY 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 6th, 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