

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20090241

State of North Dakota,

Plaintiff-Appellee,

- vs -

Billy Joe Valdez Agüero,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY CR. NO. 08-K-1676
THE HONORABLE LAWRENCE E. JAHNKE, PRESIDING

PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Contents i

Table of Cases ii

Statement of the Issues ¶1

Nature of the Case ¶2

Argument ¶3

Issues Presented:

 I. Did the Supreme Court overlook or misapprehend Defendant/Appellant Billy Joe Valdez Agüero’s right to remain free from shackles during a criminal trial? ¶3

 II. Did the Supreme Court overlook or misapprehend Defendant/Appellant Billy Joe Valdez Agüero’s constitutional right to remain silent? ¶3

Conclusion ¶7

Certificate of Service ¶8

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

TABLE OF CASES

State v Kunze

2007, ND 143, ¶18, ¶21 738 NW2d 472 . . . ¶4(1)(2)(3)

Doyle v Ohio

426 US 610, 619 . . . ¶6(1)

[¶1] STATEMENT OF THE ISSUES

ISSUE: **I.** Did the Supreme Court overlook or misapprehend Defendant/Appellant Billy Joe Valdez Aguero's right to remain free from shackles during a criminal trial?

ISSUE: **II.** Did the Supreme Court overlook or misapprehend Defendant/Appellant Billy Joe Valdez Aguero's constitutional right to remain silent?

[¶2] NATURE OF THE CASE

This is a petition for rehearing made from the North Dakota Supreme Court's decision on November 9, 2010 affirming the criminal judgment of the District Court which Billy Joe Valdez Agüero was found guilty.

ARGUMENT

[¶3] ISSUE 1. Did the Supreme Court overlook or misapprehend Billy Joe Valdez Agüero's right to remain free from shackles during a criminal trial?

[¶4] In this case:

(1) The trial court failed to put on the record any explanation as to why Billy Joe Valdez Agüero had to be restrained with leg shackles during the trial. According to *State v Kunze*, 2007 ND 143, ¶18, 738 NW2d 472. If visible restraints are used, the court must make case specific findings, and explain its reasons on the record justifying the use.

(2) The above ruling in Kunze applies to visible restraints therefore a defendant's request for non visible restraints can't waive his constitutional rights to visible restraints.

(3) It is reversible error when the trial court's ruling fails to explain in the record the reason for shackling Mr. Agüero and the reason for the restraints aren't readily apparent in the record. Kunze 2007 ND143 ¶ at 21.

(4) In the record the trial court gave no explanation as to why after it granted Mr. Agüero's Motion for Non visible Restraints, it decided to require Mr. Agüero to wear shackles during the trial.

(5) The trial court's statement the jury won't be looking at Mr. Agüero's feet fails to consider the fact that during a two week trial at some point each of the jurors is going to wonder why boxes have been placed around the defense table and what are these boxes preventing them from seeing.

(6) Defense counsel for co-defendant Joseph Daniel Moncada told the trial court that even with the boxes around the defense table jurors in two of the jury chairs would be able to see the shackles. The trial court never checked out or put anything in the record to dispute the fact that persons sitting in two of the jurors chairs would be able to see the shackles. The trial court's only response was you can't see the defendant's feet from where I sit.

(7) Constitutional errors allowing shackling should be corrected by granting a new trial and not by claiming such constitutional errors are and are cured by claiming there was overwhelming evidence of Mr. Aguero's guilt.

(8) The evidence of Mr. Aguero's guilt in this case was not supported by overwhelming evidence because there was testimony that other individuals could have or did kill Robert Belgarde and Damien Belgarde.

[¶5] ISSUE II. Did the Supreme Court overlook or misapprehend Billy Joe Valdez Aguero's constitutional right to remain silent?

[¶6] In this case:

(1) The State should not have been allowed to refer to Mr. Aguero remaining silence to Detective Hoffman's question. *Doyle v Ohio* 426 US 610, 619.

(2) A constitution violation of defendant's right to remain silent shouldn't be allowed during a trial and it is no excuse that the comment was only made once and was not referred to at any other time during the trial by the prosecutor.

(3) The Rules of Evidence and trial procedure have no protection for

Defendants if the State during a trial can make a comment during trial contrary on any rule so long as the comment is brief and only made once during that trial.

CONCLUSION

[¶7] If failure to use the required procedure before shackling Mr. Aguero at trial or the comment on his silence aren't enough standing alone, to grant Mr. Aguero's Petition for Rehearing the two when added together are.

DATED at Mandan, North Dakota, this 30th day of November, 2010.

/s/ Benjamin C. Pulkrabek
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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 November 30, 2010, she served, by electronic filing and e-mail, a copy of the following:

PETITION FOR REHEARING

by e-mailing a true and correct copy thereof to:

Jason McCarthy
Assistant State's Attorney
jason.mccarthy@gfcounty.com

The undersigned further certifies that on November 30, 2010, she electronically filed with the Clerk, North Dakota Supreme Court, an original of the PETITION FOR REHEARING by emailing the same containing the full text of the Petition.

/s/ Sharon Renfrow
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek