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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP2520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. BENFORD, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Both Entered in the Eau Claire County Circuit Court the Honorable John F. Manydeeds, Presiding.

REPLY BRIEF

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ARGUMENT

Mr. Benford is Entitled to a New Trial Because His Constitutional and Statutory Rights to Be Present at Trial Were Violated When the Circuit Court Erroneously Ordered Him to Wear a Stun Belt to Attend Trial.

A. Mr. Benford forged a contemporaneous objection to the use of the stun belt and the stun belt requirement prevented Mr. Benford from attending two days of trial; therefore, the circuit court was required to make findings as to the necessity of the device.

During trial, a criminal defendant, generally speaking, should not be retrained "as freedom is an 'important component of a fair and impartial trial.'" ***State v. Miller***, 2011 WI App 34, ¶4, 331 Wis. 2d 732, 797 N.W.2d 528 (citing ***Sparkman v. State***, 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965)) (quoting ***Way v. United States***, 285 F.2d 253, 254 (10th Cir. 1965)).

The use of restraints, specifically shackles, presents varied concerns not all of which involve jury-related prejudice:

> (1) Physical restraints may cause jury prejudice, reversing the presumption of innocence;
>
> (2) Shackles may impair the defendant's mental faculties;
>
> (3) Physical restraints may impede the communication between the defendant and his lawyer;

> (4) Shackles may detract from the dignity and decorum of the judicial proceedings; and
>
> (5) Physical restraints may be painful to the defendant.

State v. Russ, 2006 WI App 9, ¶22, 289 Wis. 2d 65, 709 N.W.2d 483 (Anderson, J., concurring) (quoting ***Spain v. Rushen***, 888 F.2d 712, 721 (9th Cir. 1989)).

The concerns related to non-visible stun belt devices are similar to those applicable to less technically advanced devices such as shackles. Yet electronic restraints pose unique risks and concerns of their own.

In that regard, the Eleventh Circuit Court of Appeals recognized that stun belts "pose a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles." ***United States v. Durham***, 287 F.3d 1297, 1305 (11th Cir. 2010). This is due to the constant fear a defendant faces while wearing such a device and the effect that fear has on a defendant's ability to meaningfully participate in his or her own trial. ***Id.*** at 1305-06.

Contrary to the state's view, Mr. Benford does not point to the unique concerns stun belts present or authority from other jurisdictions to advocate for the application of a higher level of scrutiny on the use of electronic restraints. (*See* State's Resp. at 19). Rather, Mr. Benford urges that the risks, the psychological impact, and the constitutional implications unique to stun belt devices capable of sending debilitating electric shocks through defendant's bodies be considered when determining whether the circuit court erroneously exercised its discretion and whether Mr. Benford voluntarily absented himself from trial.

The concerns unique to stun belt devices were not addressed in ***State v. Ziegler***, 2012 WI 73, ¶¶83-86, 342 Wis. 2d 256, 816 N.W.2d 238, and ***Ziegler*** does not otherwise control the outcome in this case. The state reads ***Ziegler*** as holding that a circuit court has no duty to inquire into the use of a non-visible restraint. (State's Resp. at 12-13). But this reading paints ***Ziegler*** with too broad of a brush and creates conflict with ***State v. Grinder***, 190 Wis. 2d 541, 527 N.W.2d 326 (1995).

In ***Ziegler***, at a pre-trial hearing, the court indicated that the defendant would wear a stun belt to "prevent any 'problems.'" ***Ziegler***, 342 Wis. 2d 256, ¶23. Trial "counsel objected, questioning whether the use of a stun belt was common practice[]" and the court indicated that the device was commonly used. ***Id.*** At trial, outside the presence of the jury, the court indicated that the defendant appeared without visible restraint and that the court believed the defendant wore a stun belt on his leg. ***Id.***, ¶24. Neither the defendant nor trial counsel lodged any complaint regarding the use of the stun belt at the time of trial. On appeal, the defendant asserted that the record was unclear as to whether the stun belt was visible to the jury or not and urged an application of ***State v. Champlain***, 2008 WI App 5, ¶2 307 Wis. 2d 232, 744 N.W.2d 889, which held, in part, that a court has a sua sponte duty to inquire into the use of a visible restraint. *See* Brief of Defendant at 23-24, ***State v. Ziegler***, 342 Wis. 2d 256 (2012) (No. 2010AP2514-CR).

Under these facts and considering the defendant's argument, the Wisconsin Supreme Court held that ***Champlain*** did not apply because the device at issue in ***Ziegler*** was not visible. ***Ziegler***, 342 Wis. 2d 256, ¶86. Put differently, what ***Ziegler*** held is that this court's holding in ***Champlain***—that trial counsel is ineffective for failing to object to the use of a

visible device and that a circuit court has a sua sponte duty to inquire into the necessity of a visible device—did not apply in Mr. Ziegler's case. *See* ***Ziegler***, 342 Wis. 2d 256, ¶86. In reaching this conclusion, the court specifically stated: "[O]nce Ziegler was wearing the stun belt, neither Ziegler nor his counsel expressed any concerns relating to the restraint." ***Id.***

As a result, the holding in ***Ziegler*** does not control the outcome in this case. Mr. Benford does not assert that the circuit court had a sua sponte duty to inquire about the need for the stun belt. Rather, because Mr. Benford lodged a contemporaneous objection at the time he was required to wear the belt, unlike past defendants in non-visible restraint cases, the court was required to address his objection. The distinction between the pre-trial objection in ***Champlain*** and Mr. Benford's objection is important because Mr. Benford clearly set forth his objection to the stun belt, explained his fear related to wearing the belt, and the reasons as to why the belt was not necessary in his case. Under the state's view of ***Ziegler***, the circuit court could have ignored Mr. Benford's objection entirely because the restraint was not visible. What ***Ziegler*** held, however, is not that a circuit court can ignore a defendant's objection to a non-visible restraint, but that the court had no sua sponte duty to inquire into the use of the non-visible restraint at the time of trial. *See* ***Ziegler***, 342 Wis. 2d 256, ¶86.

Additionally, Mr. Benford's case is distinguishable from ***Ziegler*** because unlike Mr. Ziegler, the circuit court's determination as to the use of the stun belt for Mr. Benford directly resulted in Mr. Benford's absence from trial. The constitutional implications of the circuit court's erroneous determination set Mr. Benford's case apart from the issue addressed in ***Ziegler***.

Finally, the state's reading of ***Ziegler***, that a circuit court can rely on nothing more than law enforcement policy to require the use of a non-visible restraint even when a defendant contemporaneously objects, conflicts with ***Grinder***, 190 Wis. 2d 541. In ***Grinder***, trial counsel objected to the defendant being placed in shackles during trial on the basis that the jury's view of the shackles would prejudice the defendant. ***Id.*** at 548. The court overruled the objection stating it would not interfere with law enforcement practices, but allowed skirting to be placed around both counsel tables. ***Id.*** As a result, the defendant's shackles were not visible to the jury. ***Id.*** at 553. In this *non-visible restraint case*, the Wisconsin Supreme Court held that in ordering the use of the shackles, "the circuit court in fact erroneously exercised its discretion when it relied primarily upon sheriff's department procedures, rather than considering Grinder's particular risk of violence or escape." ***Id.*** at 551. This court cannot apply ***Ziegler*** in such a way to effectively overrule a Wisconsin Supreme Court case. *See* ***Zarder v. Humana Ins. Co.,*** 2010 WI 35, ¶54, 324 Wis. 2d 325, 782 N.W.2d 682. As a result, because ***Ziegler*** is distinguishable and because of the controlling holding in ***Grinder***, this court is not bound by ***Ziegler.***

B. The circuit court erroneously exercised its discretion in ordering Mr. Benford to wear a stun belt to attend his trial.

That the circuit court held an evidentiary hearing on the necessity of the stun belt in Mr. Benford's case does answer the question of whether the circuit court erroneously exercised its discretion. Whether a circuit court's discretionary determination on the use of restraints will be upheld on appeal turns on whether "such a 'discretionary determination [was] the product of a rational mental process

by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Grinder***, 190 Wis. 2d at 550-51 (quoting ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)).

Here, the circuit court's decision to require Mr. Benford to wear a stun belt to attend his trial was unreasonable considering:

- Mr. Benford demonstrated appropriate behavior in the courtroom during his 11 pre-trial appearances, including during his preliminary hearing where he heard the testimony of two police officers. (99:1, 3, 8).

- Mr. Benford has no history of violent criminal behavior.

- Mr. Benford made no attempts to escape during the 417 days he spent in jail awaiting trial.

- The record does not contain any specific concerns related to Mr. Benford's behavior in the jail. (*See* 107:26-27)

- Mr. Benford's pre-trial letters contain no threats and do not suggest a threat of violence or escape. Rather, the letters, generally speaking, express Mr. Benford's frustration with the investigation of his case, his sincere belief that he acted in self-defense, and his concerns and reaction to instances of police brutality directed at African Americans. (*See generally* 14; 15; 19; 23)

The state asserts the circuit court made seven findings supporting the stun belt requirement. (State's Br. at 8, 16). On close examination, however, these findings do not support the use of the stun belt in this case.

First, the court's indication that the stun belt would only be used if Mr. Benford acted aggressively came in response to Mr. Benford's questions about the activation criteria after the court had required the use of the stun belt. (107:34-38). The record does not suggest that the circuit court relied on the activation criteria when ordering the use of the belt. (*See id.*).

Second, findings that Mr. Benford's "physical attributes" and the courtroom layout would create difficulty for law enforcement when responding to a violent outburst are premised on the unreasonable finding that Mr. Benford was likely to have a violent outburst.

Findings premised on the likelihood of a violent outburst are problematic because the conclusion that Mr. Benford was likely to react violently at trial is not supported by the record. The court appropriately considered the violent nature of the underlying charges; however, that a person faces charges involving violence does not alone support a stun belt requirement. *See* ***State v. Leonard***, 813 N.E.2d 50, 64 (Ohio Ct. App. 2004); ***Miller v. State***, 852 So.2d 904, 906 (Fla. Dist. Ct. App. 2003). The state attempts to distinguish ***Leonard*** and ***Miller*** by pointing to distinctions in the facts and the type of relief sought. (State's Resp. at 17). These distinctions, however, do not invalidate the recognition that the use of restraints based only on the underlying allegations presents "circular reasoning that offends the presumption of innocence . . . ." ***Miller***, 852 So.2d at 906.

Nor does the combination of the underlying allegations and Mr. Benford's pre-trial letters support the stun belt requirement. Specifically, the court found the letters "indicate a high level of defiance or a high level of potential disruption." (107:33-34). As previously stated, Mr. Benford asserts that the contents of the letters do not indicate a high level of potential disruption. Notably, Mr. Benford did not respond inappropriately when witnesses testified against him at the preliminary hearing. (*See* 99:1, 3, 8). Even if this court concludes that the letters indicate a high level of potential disruption, the probability of disruption or defiance does not necessitate the use of an electronic restraint. The letters simply do not suggest the type of violence or possibility of escape that would support the use of a restraint in the courtroom. *See* ***Grinder***, 190 Wis. 2d at 551.

As the state points out, Mr. Benford's letters demonstrate that he was under a great deal of stress as he faced serious criminal charges for the first time in his life. (*See* State's Resp. at 18). But this is understandable and not indicative of violence. As the state also recognized: "Trials are stressful and induce fear in defendants, especially when they are charged with crimes that may result in lengthy sentences." (State's Resp. at 22).

Finally, the court's conclusions that no viable alternatives to the stun belt existed and that shackles would be unduly prejudicial do not support the need for a restraint in the first instance. Moreover, these conclusions drive home Mr. Benford's assertion in his brief-in-chief that the court started with the position that the stun belt would be used based on the law enforcement policy that anyone in custody who appears for trial is required to wear a stun belt. (*See* 106:21-22). In sum, the law enforcement policy in place prevented any meaningful consideration of alternatives

because, as the bailiff repeatedly testified: the stun belt was the only viable option. (107:2, 20-23).

As a result, the circuit court erroneously exercised its discretion in ordering the stun belt considering Mr. Benford's appropriate courtroom behavior, his lack of any violent criminal history, the lack of escape attempts, the lack of indicators of violence contained in his pre-trial letters, and the lack of any specific instances of concern while Mr. Benford was in the jail.

C. Mr. Benford did not voluntarily waive his right to be present at trial due to the direct connection between his absence and the circuit court's erroneous exercise of discretion.

Mr. Benford's absence from days two and three of his trial was not voluntary because of the direct connection between the circuit court's erroneous determination that Mr. Benford be required to wear the stun belt and his absence from trial. The record does not support the state's assertion that Mr. Benford's absence on days two and three of trial was primarily related to his concerns surrounding racism and his dissatisfaction with his trial attorney. (*See* State's Resp. at 9-10, 22).

Certainly, the record indicates that Mr. Benford was dissatisfied with his attorney and that the court informed him that if he wanted to represent himself he would have to wear the stun belt. (110:4-10). Mr. Benford then indicated that he felt unqualified to represent himself and stated "I am not representing myself." (*Id.* at 9). The court stated that Mr. Benford's trial attorney would continue to represent him and asked: "Are you going to come to court and be present in person wearing a stun belt as we did yesterday?" (*Id.*). Mr. Benford responded: "No." (*Id.* at 10).

Although the exchange leading up to Mr. Benford's absence from the courtroom included his dissatisfaction with his attorney, there is no indication in the record that he absented himself from trial because he was unhappy with his trial attorney's representation. Rather, when directly asked if he would wear the stun belt to attend trial, Mr. Benford indicated he would not wear the belt and he was removed. (*Id.* at 9-10). Mr. Benford's objections to wearing the belt were set forth, at length, on the first day or trial. (*See* 106:21-22, 25; 107:4-7, 32). It does not follow that a brief exchange on the second day of trial regarding Mr. Benford's dissatisfaction with trial counsel constituted the underlying reason for Mr. Benford's absence from trial.

In addition, the state's indication that Mr. Benford interjected and was given the opportunity to confer with defense counsel during the first day of trial does not eliminate the very serious concerns of the chilling effect of a stun belt on a defendant's right to participate in his or her own defense. First, the court's observation that Mr. Benford was given a notepad to write notes to counsel gives no indication on his actual level of participation during the first day. (*See* 110:22-23). More importantly, the state ignores that even if Mr. Benford wrote notes to counsel on day one, the stun belt, as previously addressed, prevented Mr. Benford from attending days two and three of his trial.

Finally, the choice Mr. Benford faced between attending trial while wearing a stun belt or being removed from the courtroom bears no comparison to the type of "self imposed coercive elements" at play in ***Craker v. State***, 66 Wis. 2d 222, 229, 223 N.W.2d 872 (1974). (*See* State's Resp. at 21-22). In ***Craker***, the defendant argued, in part, that his plea was not voluntary "because he was subject to religious scruples and family pressure which prevailed upon

him to plead guilty." ***Id.*** at 227. The court held that these pressures constituted "self imposed coercive elements" that did not make his plea involuntary. ***Id.*** at 229.

Here, external sources contributed to Mr. Benford's fear of unfair treatment and use of the stun belt. The sources of information contributing to Mr. Benford's fear, however, are immaterial to whether he voluntarily absented himself from trial. As previously established, the circuit court's erroneous determination as to the stun belt directly resulted in Mr. Benford's absence. As ***Craker*** set forth: "When the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced . . . ." ***Id.***, 66 Wis. 2d at 229 (quoting ***Rahhal v. State***, 52 Wis. 2d 144, 151-52, 187 N.W.2d 144 (1971)). The stun belt was not Mr. Benford's choice, but that of an unreasonable alternative imposed by the circuit court. As a result, Mr. Benford's absence was not voluntary.

CONCLUSION

For the foregoing reasons, Mr. Benford respectfully requests that this court vacate his convictions and sentences and remand with directions that he receive a new trial.

Dated this 30th day of May, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,975 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of May, 2018.

Signed:

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