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2012 IL App (3d) 100406-U

Order filed April 13, 2012

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-10-0406
	)	Circuit No. 05-CF-446
LIONELL H. PRUITT,	)	Honorable James E. Shadid, Judge, Presiding.
Defendant-Appellant.	)	

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JUSTICE CARTER delivered the judgment of the court.  
Justice McDade specially concurred.  
Justice Wright concurred in part and dissented in part.

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**ORDER**

- ¶ 1 *Held:* In a case in which the defendant was kept in shackles for a third-stage postconviction hearing, the appellate court held that the defendant forfeited his argument that the circuit court should have conducted a hearing on whether to keep the defendant shackled. In addition, the appellate court held that the defendant was not entitled to a monetary credit against his \$200 deoxyribonucleic acid (DNA) analysis fee because it was compensatory, rather than punitive.
- ¶ 2 Pursuant to a negotiated plea agreement, the defendant, Lionell H. Pruitt, pled guilty to first degree murder (720 ILCS 5/9-1(a)(3) (West 2004)) and was sentenced to 47 years of

imprisonment. He was also assessed numerous monetary charges, including a \$200 deoxyribonucleic acid (DNA) analysis fee. The defendant's direct appeal was dismissed for lack of jurisdiction. The defendant filed a postconviction petition, which the circuit court denied after a third-stage hearing. On appeal, the defendant argues that: (1) he was denied a fair third-stage postconviction hearing because he was forced to wear handcuffs; and (2) he is entitled to a monetary credit against his \$200 DNA analysis fee. We affirm.

¶ 3 FACTS

¶ 4 Pursuant to a negotiated plea agreement, the defendant pled guilty to first degree murder and was sentenced to 47 years of imprisonment. Among other monetary charges, he was assessed a \$200 DNA analysis fee. His direct appeal was dismissed for lack of jurisdiction. *People v. Pruitt*, No. 3-05-0609 (2005) (minute order).

¶ 5 The defendant filed a *pro se* postconviction petition, which was later amended by appointed counsel. The circuit court dismissed the petition at the second stage of postconviction proceedings. On appeal from that dismissal, this court reversed the circuit court's decision and remanded the case for a third-stage evidentiary hearing. *People v. Pruitt*, No. 3-06-0765 (2008) (unpublished order under Supreme Court Rule 23).

¶ 6 On remand, the circuit court held a third-stage hearing on the defendant's petition. At the outset of the hearing, the following exchange took place:

"[DEFENSE COUNSEL]: Your Honor, I'm going to call my client to the stand, please. I'm wondering if the Court -- if the Court would consider for purposes of this hearing, can he be out of his cuffs --

THE COURT: I don't think --

[DEFENSE COUNSEL]: -- or not?

THE COURT: I don't think that's necessary.

[DEFENSE COUNSEL]: All right. That's fine. I'll call [the defendant] to the stand."

¶ 7 At the close of the hearing, the circuit court denied the defendant's petition. The defendant appealed.

¶ 8 ANALYSIS

¶ 9 The defendant's first argument on appeal is that he was denied a fair third-stage hearing on his postconviction petition because he was wearing handcuffs. The defendant asserts that the circuit court should have conducted a hearing pursuant to *People v. Boose*, 66 Ill. 2d 261 (1977), to determine whether the defendant should have remained shackled. In support of his argument, the defendant cites this court's decision in *People v. Rippatoe*, 408 Ill. App. 3d 1061, 1066 (2011), in which this court held that "[e]ven in a posttrial proceeding, where there is no jury, any unnecessary restraint of a defendant is impermissible because it demeans both the defendant and the judicial process." The defendant asserts that *Boose* and *Rippatoe* should be extended to cover shackling issues that arise in the postconviction context.

¶ 10 Acquiescence in the procedure adopted by the circuit court to address an issue that arose during a proceeding precludes review of that procedure on appeal. *People v. Williams*, 384 Ill. App. 3d 327, 335 (2008). In this case, after the court stated that the removal of the defendant's handcuffs was not necessary, defense counsel stated, "[a]ll right. That's fine. I'll call [the defendant] to the stand." Thus, the record indicates that defense counsel acquiesced in the court's decision to keep the defendant in handcuffs for the hearing. Accordingly, the defendant has

forfeited this issue on appeal. *Williams*, 384 Ill. App. 3d at 335.

¶ 11 Moreover, even if the issue had not been forfeited, *Rippatoe* does not support the defendant's claim for relief, as it is factually distinguishable. *Rippatoe* involved shackling during a hearing on a posttrial motion (*Rippatoe*, 408 Ill. App. 3d at 1063), while this case involved shackling during a third-stage postconviction evidentiary hearing. In addition, the shackling in *Rippatoe* occurred during a criminal proceeding, whereas the shackling in this case occurred during a postconviction proceeding, which is civil in nature (*People v. Ligon*, 239 Ill. 2d 94, 103 (2010)).<sup>1</sup>

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<sup>1</sup> In addition, while I was on the panel in *Rippatoe*, I acknowledge that, arguably, there is a question as to whether *Rippatoe* was correctly decided. In that case, we cited *Boose* and *Allen* and held that:

"Even in a posttrial proceeding, where there is no jury, any unnecessary restraint of a defendant is impermissible because it demeans both the defendant and the judicial process. *People v. Allen*, 222 Ill. 2d 340, 346 (2006). As such, it is error for a court to order or permit a defendant to be shackled at any point in a criminal proceeding unless the court has conducted a hearing in which it determines a manifest need for such restraints. *Boose*, 66 Ill. 2d at 265-66; *Allen*, 222 Ill. 2d at 367." *Rippatoe*, 408 Ill. App. 3d at 1066-67.

However, neither *Boose* nor *Allen* (our second citation to which is actually from Justice Freeman's dissent) stand for those propositions. *Boose* involved shackling before a jury (*Boose*, 66 Ill. 2d at 264-65), and *Allen* involved the wearing of a concealed stun belt during a jury trial (*Allen*, 222 Ill. 2d at 344-45)—*i.e.*, the use of restraints before guilt had been determined in either

¶ 12 The defendant's second argument on appeal is that he is entitled to a monetary credit against his \$200 DNA analysis fee. The defendant contends that the \$200 DNA analysis fee authorized by section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010) is actually a fine that is subject to the monetary credit for presentence custody contained in section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)).

¶ 13 Our supreme court has recently held that the \$200 DNA analysis fee is compensatory, rather than punitive, and is therefore "not subject to offset by the section 110-14 presentence incarceration credit." *People v. Johnson*, 2011 IL 111817, ¶ 28. Accordingly, the defendant in this case is not entitled to a monetary credit against his \$200 DNA analysis fee.

¶ 14 CONCLUSION

¶ 15 The judgment of the circuit court of Peoria County is affirmed.

¶ 16 Affirmed.

¶ 17 JUSTICE McDADE, specially concurring:

¶ 18 I concur with the majority's conclusion that the defendant has forfeited the issue of whether the trial court erred by failing to conduct a *Boose* hearing before ordering the defendant to remain handcuffed at the third-stage hearing on his postconviction petition, albeit for a different reason than offered in the decision. I also agree that the defendant is not entitled to receive credit against his \$200 DNA analysis fee. I write separately for two reasons: first, on the substantive issue, to offer a different basis than that relied on by the author for affirming the trial

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case. In *Rippatoe*, it is arguable that we extended the shackling violation rule beyond the contexts contemplated by the law in this area.

court's decision; and, second, to suggest that there are valid reasons to require a *Boose* analysis before restraining a defendant in a civil postconviction hearing.

¶ 19 Plain Error Review

¶ 20 Looking first at the trial court's refusal to allow the defendant to participate in the hearing without handcuffs, the majority concludes that the defendant has forfeited the issue of whether he was denied a fair third-stage hearing on his postconviction petition because he "acquiesced" to wearing handcuffs during this hearing. I agree with the dissent's conclusion that what happened in the courtroom was a preclusion of the defendant's opportunity to argue his request and that proceeding with the handcuffs on can hardly be fairly characterized as "acquiescence."

Nonetheless, I would find the issue forfeited because counsel neither timely objected to the denial of his request and to proceeding with his client restrained nor raised the issue in a post trial motion. Thus, this issue has not been preserved and is forfeited, and we may only consider it if the defendant can show that the court committed plain error. See *People v. Lovejoy*, 235 Ill. 2d 97 (2009).

¶ 21 Plain error is a narrow and limited exception to the rule of forfeiture. *People v. Hillier*, 237 Ill. 2d 539 (2010). Under plain error, a reviewing court may review a forfeited error where: (1) the evidence in the case was closely balanced; or (2) the error was so egregious that the defendant was denied a fair trial. *People v. Allen*, 222 Ill. 2d 340 (2006). The burden of persuasion is on the defendant under both prongs of the plain error doctrine. *People v. Naylor*, 229 Ill. 2d 584 (2008). However, before a reviewing court may determine if the plain error exception applies, we must first determine whether an error occurred at all. *People v. Sargent*, 239 Ill. 2d 166 (2010).

¶ 22 Here, the defendant relies on this court's decision in *People v. Rippatoe*, 408 Ill. App. 3d, 1061 (2011), for the proposition that the court erred when it ordered that he remain handcuffed during the third-stage hearing on his postconviction petition. *Rippatoe* concerned a hearing on a posttrial motion alleging ineffective assistance of counsel—a criminal proceeding. The instant case, however, involves a postconviction hearing, which is civil in nature. We have found no cases that show that, under the law as it stands today, a *Boose* hearing is required in civil proceedings. More importantly for plain error review, the defendant has not presented either any such law or an argument for extending the law to civil hearings. Consequently, the defendant has not shown that the court erred when it did not conduct a *Boose* hearing before ordering that he remain handcuffed at his third-stage postconviction hearing. Because the defendant has not shown error, he cannot meet his burden of proving plain error, and we must honor the procedural default of this issue. I therefore concur in the decision to affirm the trial court's decision not to remove the defendant's handcuffs.

¶ 23 Extension of *Boose* to Civil Postconviction Proceedings

¶ 24 I also write separately because I am concerned about the majority's suggestion that *Rippatoe* may have impermissibly extended the reach of *Boose* and because I believe there is a persuasive argument to be made not only for the validity of *Rippatoe* but also for applying *Boose* to civil postconviction proceedings. The majority particularly points out language from *Rippatoe* indicating that "[e]ven in posttrial proceedings, where there is no jury, any unnecessary restraint of a defendant is impermissible because it demeans both the defendant and the judicial process." *Rippatoe*, 408 Ill. App. 3d at 1066. The majority further explains that *People v. Allen*, 222 Ill. 2d 340, 346 (2006), the case cited by the *Rippatoe* court in support of the previously mentioned

proposition, actually involved the use of a stun belt during a jury trial and that *Boose*, itself, another case on which the *Rippatoe* court relied in reaching its conclusion, involved the shackling of a defendant before a jury. *Boose*, 66 Ill. 2d at 264-265. Thus, these cases involved instances of defendants who were restrained at a time when their guilt had not yet been determined. The author opines that the *Rippatoe* court may have extended the *Boose* rule beyond the context contemplated by the law.

¶ 25 I agree with the majority's observation that both *Allen* and *Boose* involved instances where the defendant was restrained at a time when his guilt had not yet been determined. I also agree that a lower court may not have authority to extend the *Boose* requirements to civil hearings. However, absent a showing of actual risk, I do not believe there is any reason for a criminal or *quasi* criminal defendant to appear at any time in any court proceeding with the trappings of incarceration. Case law discloses some instances where it has been recognized that the requirement of a *Boose* hearing extends beyond the actual trial. *Boose*, itself, was a hearing, before a jury, on the defendant's competency to stand trial. Similarly, in *Rippatoe* the defendant was presenting an argument to the court that errors at trial tainted the process and cast doubt on the validity of the guilty verdict. I would suggest that applying *Boose* in these situations is an implicit recognition that the trappings of incarceration subtly and surreptitiously press a thumb on the scale and unfairly influence the fact-finder's consideration of the defendant's claim. This impact is no less real in the civil context of a postconviction hearing where the defendant is contending that constitutional flaws in his trial warrant reconsideration of his guilt.

¶ 26 In *Boose*, the supreme court recognized that the shackling of a defendant should be avoided because it tends to prejudice the jury against the defendant, it restricts the defendant's

ability to assist in his own defense, and it offends the dignity of the judicial process. *Boose*, 66 Ill. 2d 261. Later, in *Allen*, the supreme court also stated that "even when there is no jury, any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings." *Allen*, 222 Ill. 2d at 346. In making the determination whether to restrain a defendant, the court must first hold a hearing, and it may consider the following factors: "[t]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies." *Boose*, 66 Ill. 2d at 267-68. A defendant should only be restrained if a balancing of these factors leads the court to conclude that the defendant, if left unrestrained, would pose a threat to or during the proceedings.

¶ 27 I believe that the court must conduct a *Boose* hearing, when applicable, during postconviction proceedings. Although a postconviction hearing is civil in nature, it is undeniably "of and concerning" the criminal proceeding that resulted in the defendant's conviction of the criminal offense(s) with which he/she was charged. In the postconviction context the defendant is challenging asserted constitutional flaws that he contends warrant reconsideration of his guilt as determined during his criminal trial. I would suggest that even though the proceeding itself is civil, the defendant still stands before the court essentially as a criminal. In *Allen*, the supreme

court noted that *Boose* "generally applies to the 'physical restraint' of defendants in the courtroom." *Allen*, 222 Ill. 2d at 345. Based on this language, I believe that the *Rippatoe* court properly interpreted the cases on which it relied and that its finding did not extend this area of jurisprudence into new and unwarranted territory.

¶ 28 I further acknowledge that, in a postconviction hearing, the concerns of unfairly prejudicing a jury or running afoul of the presumption of innocence do not apply. However, the other reasons against restraining a defendant, specifically, that it restricts the defendant's ability to assist in his own defense and also offends the dignity of the defendant and the judicial process, remain wholly valid concerns. There is nothing about restraining a defendant during a postconviction hearing that somehow does not offend his dignity or that of the judicial process or impact the objectivity of the court's consideration of the issues raised in the defendant's petition. Furthermore, I cannot think of any inherent quality of a postconviction proceeding that should prompt a court to conclude that, in every instance, restraining a defendant will not restrict his ability to assist in his own defense. Rather, these are determinations that must be made on a case by case basis, and thus, support extending *Boose* to this area of the law.

¶ 29 For all of these reasons, I believe that without a determination that the essentially-criminal defendant poses an actual risk, he should not appear in any court proceeding with the trappings of incarceration.

¶ 30 Although I have voiced my concerns over this area of the law, I stress that this court has not overturned *Rippatoe*, nor have we departed from it, and I believe for good reason. It remains good law to be followed by the trial courts of this district unless or until the supreme court declares it wrong.

¶ 31 JUSTICE WRIGHT, concurring in part and dissenting in part:

¶ 32 I agree with the majority's conclusion that petitioner is not entitled to monetary credit toward his \$200 DNA analysis fee. I respectfully dissent because I would remand the cause to the trial court for a retrospective *Boose* hearing. Unlike the majority, I do not agree that petitioner has forfeited this issue.

¶ 33 In this case, counsel requested the court to have petitioner's handcuffs removed before the evidentiary hearing began and before petitioner took the oath for the purpose of testifying. In response to counsel's request to remove petitioner's handcuffs, the court interrupted counsel and announced that it was not necessary to remove the handcuffs.

¶ 34 Petitioner's counsel responded to the trial court by saying, "All right. That's fine." Counsel should not be faulted for abandoning the request to remove his client's restraints, in an effort to avoid a confrontation with the judge who would be immediately thereafter deciding the merits of petitioner's postconviction petition. Due to counsel's specific request for the removal of petitioner's handcuffs, which the trial court summarily denied, I do not consider the issue forfeited.

¶ 35 I acknowledge that petitioner does not direct this court to any authority indicating that the *Boose* requirements apply in a civil proceeding. Although civil in nature, a postconviction petition raises claims of a substantial deprivation of federal or state constitutional rights stemming from a defendant's criminal conviction or sentence. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). While this case involves a civil proceeding, the civil proceeding, itself, is designed to scrutinize alleged violations of constitutional dimension resulting from a *criminal* conviction.

¶ 36 This court recently issued a decision in *People v. Rippatoe*, 408 Ill. App. 3d 1061 (2011), holding that it was error for a court to order or permit a defendant to be shackled "at any point in a criminal proceeding unless the court has conducted a hearing in which it determines a manifest need for such restraints." *People v. Rippatoe*, 408 Ill. App. 3d at 1066-67. I respectfully suggest *Rippatoe* was correctly decided and should be applied in this case because of the unique nature of a post conviction petition.

¶ 37 I do not consider the trial court's error in this case harmless. The court's failure to momentarily reflect on the petitioner's request to be unshackled detracts from the premise that the court must begin with a neutral posture toward petitioner when determining if a constitutional error occurred in this criminal proceeding. Accordingly, I would remand the cause for a retrospective hearing on the issue of whether petitioner should have been restrained in this case during his testimony and other portions of the postconviction hearing. See *People v. Rippatoe*, 408 Ill. App. 3d at 1068; *People v. Buckner*, 358 Ill. App. 3d 529, 534 (2005); *People v. Johnson*, 356 Ill. App. 3d 208, 212 (2005).

¶ 38 For these reasons, I respectfully concur in part and dissent in part.