

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (4th) 141044-U  
NOS. 4-14-1044, 4-15-0537 cons.

**FILED**  
March 3, 2017  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

|                                      |   |                  |
|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from      |
| Plaintiff-Appellee,                  | ) | Circuit Court of |
| v.                                   | ) | Champaign County |
| COREY C. LEE,                        | ) | No. 11CF1238     |
| Defendant-Appellant.                 | ) |                  |
|                                      | ) | Honorable        |
|                                      | ) | Harry E. Clem,   |
|                                      | ) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Turner concurred in the judgment.  
Justice Appleton dissented.

**ORDER**

¶ 1 *Held:* The trial court did not err in denying defendant's petition for relief pursuant to the Post-Conviction Hearing Act as he failed to establish a substantial violation of his constitutional rights.

¶ 2 On June 2, 2014, defendant, Corey C. Lee, filed a petition for relief from judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401(f) (West 2012)). Defendant argued he was denied a fair trial because the jury was not properly instructed. On September 4, 2014, the trial court dismissed this petition. Defendant appealed the dismissal, docketed appeal No. 4-14-1044.

¶ 3 On October 31, 2014, defendant filed an amended petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 7 (West 2012)) . Defendant alleged his constitutional rights were violated because he was shackled during his

trial, his trial counsel was ineffective, and his appellate counsel on direct appeal was ineffective. After a third-stage evidentiary hearing, the trial court denied defendant's amended postconviction petition. Defendant appeals, arguing the court erred in denying his postconviction petition, docketed appeal No. 4-15-0537.

¶ 4 These two appeals were consolidated for purposes of our review. We affirm the denial of defendant's section 2-1401 petition for relief from judgment in appeal No. 4-14-1044 because defendant forfeited any issues he had with regard to the trial court's decision because he failed to brief those issues. We also affirm the denial of his postconviction petition in appeal No. 4-15-0537.

¶ 5 I. BACKGROUND

¶ 6 In November 2011, a jury convicted defendant of being an armed habitual criminal. As the facts have been included in this court's earlier order (see *People v. Lee*, 2013 IL App (4th) 120079-U (Appleton, J. dissenting)), we will not repeat them here except as necessary. In January 2012, the trial court sentenced defendant to 12 years' imprisonment, with credit for 168 days served. Defendant filed a direct appeal, arguing (1) the court erred by denying his motion to suppress evidence and (2) the State could not prove his guilt without the evidence. *Lee*, 2013 IL App (4th) 120079-U, ¶¶ 2-3. We affirmed the denial of defendant's motion to suppress and his conviction. *Lee*, 2013 IL App (4th) 120079-U, ¶ 42.

¶ 7 On July 7, 2014, defendant filed a petition for postconviction relief pursuant to the Act. Defendant argued he received ineffective assistance of counsel. Defendant also alleged he was shackled during his trial without the trial court holding a hearing pursuant to *People v. Boose*, 66 Ill. 2d 261, 266, 362 N.E.2d 303, 305 (1977). The trial court found the petition

presented the gist of a constitutional claim and appointed a public defender to represent defendant.

¶ 8 On October 31, 2014, defendant filed an amended postconviction petition. Counsel again alleged the trial court erred in not conducting a *Boose* hearing before allowing defendant to be shackled during the trial. Counsel also alleged:

"Trial counsel committed ineffective assistance of counsel for failing to seeking [*sic*] a *Boose* hearing and/or to report to the trial court that a juror saw Defendant in shackles. Defendant reasserts the claims and arguments set forth in paragraph 8E and further states that he told counsel that he wanted the shackles off and to ask the judge to do so. Counsel refused to ask the judge for a *Boose* hearing. Further, during one break in the proceedings, when the jury was in the hallway, the doorway opened and one of the jurors saw Defendant standing in the courtroom with shackles on his waist. Defendant told this to counsel who refused to address the issue with the court. It fell below the standard of a reasonable attorney not to seek a *Boose* hearing initially and to not report that a juror saw Defendant in shackles. Had counsel sought a *Boose* hearing, the trial court would have had shackled [*sic*] removed from Defendant's legs. Had counsel notified the court of a juror seeing Defendant in shackles, that juror would have been replaced by an alternate and the verdict would have been different."

Defendant also argued his appellate counsel was ineffective for not raising these issues in his direct appeal. Defendant attached an affidavit to the amended petition, stating, in part:

"During the trial, I was shackled at the waist and ankles most of the trial. Before jurors came into the courtroom, deputies would remove the waist shackles but I would keep the ankle shackles on. I do not know if any jurors saw the ankle shackles but they may have. On day 2 of the trial, I was in the courtroom with waist and ankle shackles on when the door to the jury area opened up. I saw one of the jurors and that juror saw me. I asked Mr. Jackson (defendant's trial counsel) to remove the juror but he would not do so."

¶ 9 On November 5, 2014, the State filed a motion to dismiss defendant's amended petition for postconviction relief. The court granted the State's motion in part, dismissing defendant's claim the jury should have been given an instruction defining reasonable doubt. The court set an evidentiary hearing for the remaining allegations in the amended petition.

¶ 10 On February 25, 2015, the trial court held an evidentiary hearing on the amended petition. Defendant testified he was shackled during the trial. When brought into the courtroom, he had both arm and leg shackles. His leg shackles remained on during the trial. He did not ask his attorney to request the removal of the leg shackles. Defendant testified he thought the leg shackles were standard procedure. In addition, defendant also stated a juror opened a door into the courtroom during a trial recess and saw defendant. According to defendant, "The door opened up and it was a juror standing there looking me dead in the face. As I was looking at her, she was looking at me." Defendant stated he was standing and had on arm and leg shackles,

which were visible, and the juror was 10 to 15 feet from him. Defendant said he asked his trial counsel what they should do about the juror seeing him in shackles. His attorney said it was okay and did not raise any objection or ask for a mistrial. With the exception of the juror who entered the courtroom during a recess, the jurors could not see he was shackled during the trial.

¶ 11 Defendant's trial counsel, Daniel Jackson, testified defendant's restraints did not appear to interfere with defendant's ability to participate in his defense. As for the juror who entered the courtroom during a recess, Jackson testified he did not remember defendant bringing this to his attention before the trial court told the parties a juror entered the courtroom during the lunch recess and may have seen defendant in custody. According to Jackson, he would have brought the matter to the court's attention if defendant had told him but would not have requested a mistrial because defendant's continuous custody was part of their defense.

¶ 12 On June 24, 2015, the trial court issued a written order denying defendant's amended postconviction petition. After hearing the evidence presented, the court admitted it erred by allowing petitioner to be shackled during his trial without first having a *Boose* hearing to show a manifest need for the restraint. The court's order stated:

"The Court will judicially notice that a waist high opaque partition separates the public seating area in Courtroom A from the area where counsel tables, the jury box, the bench and the court staff are located. When the venire is seated in the public seating area during voir dire examination until individual jurors are called into the jury box, this partition does not allow those seated in the public seating area a rear view of the individuals seated at the counsel tables. The Court will also judicially notice that the counsel tables

in Courtroom A have substantial wooden partitions on the front and both sides which would have prevented the jurors from seeing that Defendant was wearing ankle shackles from the jury box or as they were departing to or returning from the jury room."

The court also noted defense witness Shalone Matchem testified defendant had been in continuous custody since August 3, 2011. The court ruled:

"Defendant has not established that he was prejudiced by the Court's failure to conduct a *Boose* hearing. The jurors could not view the ankle shackles from their location in the jury box. There is no indication whatsoever that Defendant was inhibited in any way in assisting his counsel during the trial by the ankle shackles. Evidence that Defendant had been in custody from the night of his arrest and continued to be in custody during the trial was an integral component of the defense trial strategy."

With regard to the juror who opened the courtroom door during a recess and may have seen defendant in shackles, the court made the following statement:

"Defendant claims that attorney Jackson rendered ineffective assistance of counsel by failing to seek a *Boose* hearing and/or to report to the trial court that a juror saw Defendant in shackles. The Court's analysis as to its failure to conduct a *Boose* [hearing] is set forth above. On the second day of trial, after the noon recess had been declared and the jurors had exited the courtroom, both counsel, Defendant, the trial judge, and the court

staff remained in the courtroom for a few moments. Before court reconvened after the recess, a court officer reported to the trial judge that after court had been declared to be in recess and the jurors had departed from the courtroom, one of the jurors, intent on retrieving her notepad, had opened the courtroom door and may have seen Defendant in shackles. The trial judge reconvened court and, outside the presence of the jurors, informed counsel, with Defendant present, what had occurred. At that time, attorney Jackson declined that trial judge's offer to have the juror who had opened the courtroom door earlier brought into the courtroom so that she could be questioned as to what she actually saw.

The trial judge preempted any opportunity that attorney Jackson would have had to bring to the Court's attention the juror who may have seen Defendant in shackles when she unexpectedly opened the courtroom door when he brought the situation to Assistance State's Attorney Harris's and attorney Jackson's attention. Defense witness Matchem had already testified that Defendant had been in continuous custody from the time of his arrest through the time of trial. Attorney Jackson's response to the trial judge's offer to have the juror questioned about what she saw when she opened the courtroom door was consistent with the defense trial strategy. Defendant has not satisfied the prejudice

component of the two component *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668, 687 \*\*\* (1984)."

The court denied defendant's amended petition.

¶ 13 Defendant appealed the trial court's decision in No. 4-15-0537. As stated earlier, case Nos. 4-14-1044 and 4-15-0537 have been consolidated for purposes of appeal.

¶ 14 II. ANALYSIS

¶ 15 While defendant appealed both the dismissal of his section 2-1401 petition for relief from judgment and the denial of his amended postconviction petition, he made no arguments in his appellate brief with regard to the dismissal of his section 2-1401 petition for relief from judgment. As a result, we affirm the dismissal of his petition in appeal No. 4-14-1044.

¶ 16 This leaves us to determine whether the trial court erred in denying defendant's amended postconviction petition after a third-stage evidentiary hearing. Our supreme court has stated:

"The Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (West 2010)) provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a *substantial* denial of his rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1(a) (West 2010). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. [Citation.] To be entitled to postconviction relief, *a defendant must establish a substantial deprivation of*



*federal or state constitutional rights* in the proceedings that produced the challenged judgment. [Citation.]" (Emphases added.) *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371.

"After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. [Citation.]" *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371.

¶ 17 Defendant's claims on appeal are interrelated. He claims his constitutional rights were violated during his trial because he was shackled without the court conducting a *Boose* hearing. He also claims his trial attorney was ineffective for allowing him to remain shackled during the trial without a *Boose* hearing and not asking for the removal of a juror who saw him in shackles during a trial recess.

¶ 18 Defendant correctly points out our supreme court has held a defendant should not be shackled during trial unless the trial court first conducts a hearing and determines a manifest need exists to restrain a defendant. *Boose*, 66 Ill. 2d at 267, 362 N.E.2d at 305. In addition, Illinois Supreme Court Rule 430 (eff. July 1, 2010) states:

"An accused shall not be placed in restraint of any form unless there is a manifest need for restraint to protect the security of the court, the proceedings, or to prevent escape. Persons charged with a criminal offense are presumed innocent until otherwise proven guilty and are entitled to participate in their defense as free persons before the jury or bench. Any deviation from this right shall be based on evidence specifically considered by the trial court on a case-by-case basis. \*\*\* Once the trial judge

becomes aware of restraints, prior to allowing the defendant to appear before the jury, he or she shall conduct a separate hearing on the record to investigate the need for such restraints."

After hearing the evidence presented at the third-stage evidentiary hearing, the court admitted it erred by allowing petitioner to be shackled during his trial without first having a *Boose* hearing. However, the Act is concerned with *substantial* violations of a defendant's constitutional rights.

¶ 19 Unnecessarily shackling a defendant at trial can become a serious issue if the restraints are visible to the jury. In *Deck v. Missouri*, 544 U.S. 622, 624 (2005), the Supreme Court was asked to decide whether a defendant's due process rights were violated when he was forced to wear restraints visible to the jury during the penalty phase of a capital case. The Court held "that the Constitution forbids the use of visible shackles during \*\*\* the guilt phase, *unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." (Emphasis in original.) *Deck*, 544 U.S. at 624. Further, according to the Court:

"where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' *Chapman v. California*, 386 U.S. 18, 24 \*\*\* (1967)." *Deck*, 544 U.S. at 635.

Relying on *Deck*, defendant argues the trial court erred in denying his postconviction petition because the State did not establish beyond a reasonable doubt the shackling error did not

contribute to the verdict obtained. We find the State did not bear this burden based on the facts in this case.

¶ 20 During the proceedings in question in *Deck*, the defendant was shackled with leg irons, handcuffs, and a belly chain. *Deck*, 544 U.S. at 625. Before and during *voir dire*, the defendant's attorney objected to his client being shackled. *Deck*, 544 U.S. at 625. The trial court overruled the objections both times, stating the defendant had already been convicted. *Deck*, 544 U.S. at 625. After the jury was selected, defense counsel again objected and moved to strike the jury panel " 'because of the fact that Mr. Deck is shackled in front of the jury and makes them think that he is \*\*\* violent today.' " *Deck*, 544 U.S. at 625. The court again overruled the objection. *Deck*, 544 U.S. at 625. The defendant was sentenced to death. *Deck*, 544 U.S. at 625.

¶ 21 The situation in this case has little similarity to the facts in *Deck*. In the case *sub judice*, defendant's restraints were not visible to the jury during his trial. The only time a juror may have seen defendant in shackles was during a lunch recess on the second day of trial. This was after a defense witness told the jury defendant had been in continuous custody since his arrest on the day in question. Further, it is arguable whether this specific encounter is eligible for postconviction review considering defendant's counsel specifically waived an opportunity to question the juror.

¶ 22 Regardless, even if the juror saw defendant in restraints during the lunch recess, this brief observation did not shift to the State the burden of establishing beyond a reasonable doubt the juror's observation did not contribute to defendant's conviction. In *Deck*, the jurors could see defendant was shackled throughout the course of the proceeding. Here, this juror knew defendant was in custody at the time of the trial, did not know he was shackled throughout the

trial, and only momentarily glimpsed defendant in shackles during the lunch recess. Thus, there was no inherent prejudice to defendant as there was in *Deck*.

¶ 23 After the Supreme Court ruled in *Deck*, our supreme court decided *People v. Allen*, 222 Ill. 2d 340, 856 N.E.2d 349 (2006), a case involving a defendant required to wear an electronic stun belt under his clothes during his trial. While recognizing *Deck* only involved visible restraints, our supreme court stated:

"[W]e find that the *Deck* Court's stated reasons which prompt due process scrutiny in visible restraint cases—the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings—may be applied with like force to stun belts which are not necessarily visible to the jury." *Allen*, 222 Ill. 2d at 346, 856 N.E.2d at 352.

Our supreme court went on to hold "the use of electronic stun belts in the courts of this state is warranted only where there has been a showing of manifest need for the restraint." *Allen*, 222 Ill. 2d at 347, 856 N.E.2d at 353. The court also held "the trial court's failure to follow the procedures set forth in *Boose* before ordering that defendant continue to wear an electronic stun belt during his trial constituted a due process violation." *Allen*, 222 Ill. 2d at 349, 856 N.E.2d at 354.

¶ 24 However, the supreme court did not treat this as an error affecting the fundamental fairness of the defendant's trial. The court noted the defendant did not even mention the electronic restraint until the end of the third day of his trial. Further, the defendant's counsel never asked for (1) an objection to be noted on the record or (2) a *Boose* hearing. *Allen*, 222 Ill. 2d at 349-50, 856 N.E.2d at 354. The court noted the defendant had forfeited any issue

with regard to the electronic stun belt. *Allen*, 222 Ill. 2d at 350, 856 N.E.2d at 355. As a result, the court looked to whether this issue should be reviewed pursuant to the plain-error doctrine. The court noted its then recent statement with regard to plain error in *People v. Herron*, 215 Ill. 2d 167, 830 N.E.2d 467 (2005).

"The plain-error doctrine, as it has developed in Illinois, allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances. First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court *may* consider a forfeited error in order to preserve the integrity of the judicial process. [Citations.] This so-called disjunctive test does not offer two divergent interpretations of plain error, but instead two different ways to ensure the same thing—namely a fair trial." (Emphasis added.) *Herron*, 215 Ill. 2d at 178-79, 830 N.E.2d at 475.

In *Allen*, the court stated it is not always plain error to shackle a defendant without a *Boose* hearing. *Allen*, 222 Ill. 2d at 351, 856 N.E.2d at 355.

¶ 25 The defendant in *Allen* argued the error should be considered under the second prong of the plain-error analysis. *Allen*, 222 Ill. 2d at 352, 856 N.E.2d at 356. The supreme court disagreed, stating:

"Here, defendant cannot, and does not, claim that the evidence presented was closely balanced. Further, he has not shown that his presumption of innocence, ability to assist his counsel, or the dignity of the proceedings was compromised. In fact, defendant wore the electronic device into the third day of his jury trial with no objection, complaint, or any apparent difficulty consulting with his counsel. Thus, we agree with the appellate court in *Nicholas* that although the failure to conduct a *Boose* hearing under these circumstances is an error, defendant's failure to object and to carry his burden of persuasion amounts to forfeiture of the error, where he cannot establish that it prevented him from obtaining a fair trial. See *Estelle v. Williams*, 425 U.S. 501, 512-13, 96 S.Ct. 1691, 1697, 48 L.Ed.2d 126, 135 (1976) (although the State cannot compel an accused to stand trial before a jury in prison clothes, the failure to make an objection to the court to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation); see also *People v. Hyche*, 77 Ill. 2d 229, 241, 396 N.E.2d 6 (1979) (rejecting the defendant's contention that his conviction should be reversed due to his appearance before the

venire in handcuffs, where he 'waived any error by failing to object')." *Allen*, 222 Ill. 2d at 353-54, 856 N.E.2d at 357.

¶ 26 While this is not a direct appeal and we are not determining whether a forfeited error should be considered under the plain-error doctrine, our supreme court's decision in *Allen* is instructive because the court made it clear shackling a defendant without a *Boose* hearing does not somehow automatically affect a defendant's presumption of innocence, ability to assist his counsel, or the dignity of the trial. Like in *Allen*, the trial court here violated defendant's due process rights by allowing him to be shackled during his trial without a *Boose* hearing. However, defendant here failed to establish a substantial violation of his constitutional rights sufficient to justify postconviction relief. At most, defendant established one juror momentarily saw him in shackles during the court's noon recess after being informed by a defense witness defendant had been in continuous custody since his arrest. Defendant failed to establish how this brief incident or the fact he had leg shackles on during the trial, which were not visible to the jury, affected the integrity of the proceedings or his ability to aid in his defense.

¶ 27 Defendant next argues the trial court erred in denying his postconviction petition claim his counsel was ineffective for failing to object to his shackling during the trial or to seek removal of the juror who may have momentarily seen him in shackles during a noon recess. To establish ineffective assistance of counsel, a defendant must establish both (1) his counsel's performance was constitutionally deficient and (2) defendant was prejudiced by that performance. *Strickland*, 466 U.S. at 687. To satisfy *Strickland's* prejudice requirement, a defendant must show a reasonable probability the result of the proceeding would have been different but for counsel's deficient performance. *Strickland*, 466 U.S. at 694.

¶ 28 Based on the record in this case, defendant failed to establish he was prejudiced by either his counsel's failure to object to defendant being shackled during the trial or his counsel's failure to ask for the removal of the juror who entered the courtroom during the noon recess. This was not a situation where defendant's shackles were visible to the jury during the trial. Further, a defense witness testified defendant had been in continuous custody since his arrest. As a result, the jury knew defendant was not a free man who could come and go at his pleasure. Further, contrary to defendant's assertions, the evidence in this case was not close. The State presented the testimony of a police officer who saw defendant with a handgun from a distance of a few feet. As a result, the trial court did not err in denying defendant's ineffective assistance of counsel claim.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated above, we affirm the trial court's decisions to dismiss defendant's section 2-1401 petition for relief from judgment and to deny defendant's amended postconviction petition. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 31 No. 4-14-1044, Affirmed.

¶ 32 No. 4-15-0537, Affirmed.



¶ 33 JUSTICE APPLETON, dissenting.

¶ 34 I respectfully dissent from the affirmance of defendant's conviction not as to the sufficiency of the evidence but, rather, as to the shackling of defendant during the trial.

Shackling may be hidden by skirting the counsel's table, but that is not the issue. Defendant is entitled to be presented as a free man until conviction. Our trial courts are amply staffed by security personnel, who provide safety to the judge, the litigants, and the witnesses. There is simply no justification to bind a defendant with shackles during the trial.