2018 IL App (5th) 150494-U

NO. 5-15-0494

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Johnson County.
	)	
v.	)	No. 14-CF-55
	)	
WILLIE L. CARTER,	)	Honorable
	)	James R. Williamson,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order affirmed where it required the defendant to remain shackled during trial given that the invited-error doctrine precluded the defendant from raising the issue on appeal.

¶ 2 The defendant, Willie Carter, was convicted in the circuit court of Johnson County on three counts of aggravated battery and was later sentenced to three concurrent terms of imprisonment, 12 years' imprisonment on the first count and 6 years' imprisonment on each of the last two counts. The defendant did not file a posttrial motion but filed a notice of appeal challenging the court's pretrial order requiring him to remain shackled during trial.

¶ 3 I. Background

¶ 4 On October 3, 2014, the defendant was charged by information with three counts of aggravated battery: count I under section 12-305(a)(3) of the Criminal Code of 2012 (720 ILCS 5/12-3.05(a)(3) (West 2014)), a Class 1 felony; and counts II and III under section 12-3.05(d)(4) (720 ILCS 5/12-3.05(d)(4) (West 2014)), each a Class 2 felony.

¶ 5 On March 26, 2015, the defendant filed a pretrial motion to prohibit the use of restraints, including handcuffs, leg irons, and shackles, during trial. Defense counsel listed the factors for the circuit court to consider, as delineated by the Illinois Supreme Court in *People v. Boose*, 66 Ill. 2d 261, 266-67 (1977), and provided a detailed argument concerning each factor. Defense counsel concluded that "the only factor against the defendant is the seriousness of the present charge." The State did not file a responsive pleading.

¶ 6 On April 15, 2015, the circuit court granted the motion without hearing. In the discussion that followed, however, defense counsel requested only that the defendant's hands be free during the bench trial. The following discussion took place:

> "THE COURT: There's a motion filed March 26 to prohibit use of restraints on defendant during trial.
> MR. DUFFY [(DEFENSE COUNSEL)]: That I do have, yes.
> THE COURT: That's granted.
> MR. DUFFY: Thank you. That one I did.
> THE COURT: That's on the hands.
> MR. DUFFY: We're not going to have a jury. The hands is all I want to be free.
> THE COURT: Where he can write and help assist in his defense. Go ahead, what else?
> MR. DUFFY: No, that was it."

¶ 7 During trial on July 28, 2015, defense counsel informed the circuit court that he "had filed a motion regarding the restraints on my client, and I would ask that those be removed. I think the court already granted that some time ago." Although the court agreed, the State raised an objection and requested the court to reconsider the removal of the restraints during the trial. The following colloquy occurred:

> "MR. NEUMANN [(ASSISTANT STATE'S ATTORNEY)]: Your Honor, I have not had an objection to the restraint issue until today. The defendant did something this morning that does cause me some concern, and I think the court should consider it in deciding whether to remove the restraints.
>
> THE COURT: What did he allegedly do?
>
> MR. NEUMANN: Officer Fox approached me shortly after the inmates were all brought and told me that Mr. Carter had leaned over to the other two inmates that I have here as witnesses and stated, let me think, I want to try to get the exact phrasing. What's the exact phrasing?
>
> OFFICER FOX: He looked at them and said, 'You, you, you know this is going to catch up with you.'
>
> MR. NEUMANN: Obviously, that causes me some concern.
>
> THE COURT: These two gentlemen here, the State witnesses?
>
> MR. NEUMANN: Yes, yes.
>
> THE COURT: What do you have to say, Mr. Duffy?
>
> MR. DUFFY [(DEFENSE COUNSEL)]: Your Honor, I asked my client about that and he claims that it did not happen and that he did not threaten anyone. And furthermore, there has never been, if we do a rule on witnesses, those two individuals are not going to be in here, And in my experience with Mr. Carter in this courtroom, I think everybody's experience with him has been nothing other than polite, calm. He has not shown any disrespect to anyone, the Court or anyone else. He claims that didn't happen, so.
>
> THE COURT: And for the record, you're Officer Fox?
>
> OFFICER FOX: Yes, sir.
>
> THE COURT: Officer Fox was speaking for the record and when Assistant State's Attorney questioned him. So your client is saying Officer Fox is sitting here, let's call it like it is, a liar.

MR. DUFFY: I'm not saying he's a liar, maybe he, I didn't ask him if he said something.

THE COURT: Your client is nodding his head like that he's saying he's lying.

THE DEFENDANT: I never said that.

MR. DUFFY: He never told me he was lying, so.

THE COURT: All right. Well, I appreciate being informed of this. First of all, we have ample security here. I am going to allow his restraints at the hands to be loosened where he can use his hands. In other words, unlocked, unshackled at the hands ***."

Next, the court ordered the defendant's leg shackles to remain on during the trial but instructed removal of the shackles on his arms because the court wanted the defendant "to write, if he needs to, take notes, assist with his defense."

¶ 8 Following a bench trial, the defendant was convicted of all three counts of aggravated battery and received concurrent sentences of 12 years' imprisonment on count I and 6 years' imprisonment on counts II and III. The defendant did not file a posttrial motion but filed a notice of appeal challenging the court's pretrial order requiring that he be restrained during trial. This appeal followed.

¶ 9 II. Analysis

¶ 10 The defendant contends that his due process rights were violated when the circuit court ordered that he remain shackled during trial without conducting a proper hearing. In response, the State argues that the defendant agreed to the imposition of restraints, thus,

he waived his right to challenge the order on appeal. Alternatively, the State argues that the issue is forfeited.[1]

¶ 11 A defendant may not be tried in shackles in either a bench trial or a jury trial absent a showing that restraints are necessary. *In re Staley*, 67 Ill. 2d 33, 38 (1977). The determination as to whether a defendant should be restrained is left to the discretion of the trial judge, who should select the type of restraint suitable in light of all of the circumstances. *People v. Boose*, 66 Ill. 2d 261, 266 (1977); *People v. Allen*, 222 Ill. 2d 340, 365 (2006). On appeal, such a decision will be reviewed for abuse of discretion. *Boose*, 66 Ill. 2d at 266; *Allen*, 222 Ill. 2d at 366. Although we give deference to factual findings, we review *de novo* legal questions regarding compliance with supreme court rules. *People v. Williams*, 344 Ill. App. 3d 334, 338 (2003).

¶ 12 In the present case, the defendant argues that the circuit court failed to conduct an Illinois Supreme Court Rule 430 (eff. July 1, 2010) "*Boose*" hearing before it ordered the defendant to remain shackled during the bench trial. In response, the State argues that the defendant invited error by agreeing to the imposition of the leg shackles. As such, "there was no error" and, regardless, the defendant waived his right to challenge the court's order on appeal. Alternatively, the State contends that the defendant forfeited review by neither objecting to the court's order nor raising the issue in a posttrial motion. Moreover, the State asserts that the defendant cannot demonstrate plain error. In reply, the defendant urges this court to address the merits of his appeal because the shackling of a defendant

[1]For clarity, we note that waiver is the intentional relinquishment of a known right, while forfeiture applies when an issue is not raised in a timely manner. See *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 26.

without first conducting a Rule 430 hearing constitutes a due process violation not subject to the ordinary forfeiture rules. In light of this, the question before this court is whether the court's July 28, 2015, modified order constitutes reversible error requiring remand. We hold that it does not.

¶ 13 Case law has indicated that physical restraints should be avoided whenever possible because they tend to prejudice the jury against the defendant, hinder the defendant's ability to assist counsel, and offend the dignity of the judicial process. *In re Staley*, 67 Ill. 2d at 36. Rule 430 states that the circuit court must conduct a separate hearing to investigate whether restraints are necessary and to allow the defendant to be heard. The court must then consider and make specific findings regarding 10 factors, commonly referred to as "the *Boose* factors."[2] These *Boose* factors are as follows:

> "(1) the seriousness of the present charge against the defendant;
>
> (2) defendant's temperament and character known to the trial court either by observation or by the testimony of witnesses;
>
> (3) defendant's age and physical attributes;
>
> (4) defendant's past criminal record and, more particularly, whether such record contains crimes of violence;
>
> (5) defendant's past escapes, attempted escapes, or evidence of any present plan to escape;

[2]The commentary to Rule 430 states that the rule codifies the holdings in *People v. Boose*, 66 Ill. 2d 261 (1977), and *People v. Allen*, 222 Ill. 2d 340 (2006). Ill. S. Ct. R. 430, Commentary (adopted Mar. 22, 2010).

(6) evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;

(7) evidence of any risk of mob violence or of attempted revenge by others;

(8) evidence of any possibility of any attempt to rescue the defendant by others;

(9) size and mood of the audience;

(10) physical security of the courtroom, including the number of entrances and exits, the number of guards necessary to provide security, and the adequacy and availability of alternative security arrangements." Ill. S. Ct. R. 430 (eff. July 1, 2010).

¶ 14 Pursuant to the affirmative acquiescence or invited-error doctrine, it is well-settled that an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error. *People v. Carter*, 208 Ill. 2d 309, 319 (2003) (citing *People v. Villarreal*, 198 Ill. 2d 209, 227-28 (2001)); *People v. Segoviano*, 189 Ill. 2d 228, 240-41 (2000); *People v. Lowe*, 153 Ill.2d 195, 199 (1992). Simply stated, "where the trial court's course of action is taken at defendant's suggestion and the defendant thereafter acquiesces in the court's expressed course of conduct, the defendant should be precluded from raising such course of conduct as error on appeal." *People v. Abston*, 263 Ill. App. 3d 665, 671 (1994) (citing *People v. Crossley*, 236 Ill. App. 3d 207, 217 (1992)).

¶ 15 Our supreme court has determined that a defendant's active participation in the direction of proceedings "goes beyond mere waiver." *Villarreal*, 198 Ill. 2d at 227. The

rationale behind this rule is that it would be manifestly unfair to allow a party a second trial upon the basis of an error that the party injected into the proceedings. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). This is sometimes referred to as an issue of estoppel. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004); *People v. Burage*, 23 Ill. 2d 280, 283 (1961); *People v. Sparks*, 314 Ill. App. 3d 268, 272 (2000); *People v. Satterfield*, 195 Ill. App. 3d 1087, 1100-01 (1990); *People v. Reed*, 51 Ill. App. 3d 479, 482 (1977). "[W]here defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack." *People v. Bowen*, 407 Ill. App. 3d 1094, 1101 (2011).

¶ 16 Even though defense counsel filed a pretrial motion to prohibit the use of all restraints during trial, defense counsel specifically stated that "[t]he hands is [*sic*] all I want to be free." In response, the circuit court confirmed its understanding that the defense counsel's request to remove restraints was to allow the defendant to write and help assist in his defense. The court then inquired whether defense counsel had argument to make regarding the other types of restraint by prompting the defense counsel to "[g]o ahead, what else?" Defense counsel responded, "No, that was it." As such, the transcript supports a finding that defense counsel acquiesced to the continued use of leg shackles, which was beyond a mere waiver, where the State had not contested their removal. As a result of the defense counsel's limited request—to remove only hand restraints—the court, after providing the defense counsel with an opportunity to make additional argument, limited its ruling to that request.

¶ 17 On appeal, the defendant complains that the circuit court should have conducted a Rule 430 hearing, rather than accept defense counsel's acquiescence to the continued use of leg shackles. As we have stated, the defendant may not ask the court to enter an order and then contend on appeal that the order was in error. *Lowe*, 153 Ill. 2d at 199 ("an accused may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error"). Likewise, the defendant is not entitled to ask this court to reverse his convictions and remand for a hearing on an order which he accepted, unequivocally and without objection, before trial.

¶ 18 Next, the defendant argues that the State's objection, on the day of trial, to the removal of the defendant's restraints resulted in a new hearing, producing a new disposition on the merits that was not in compliance with Rule 430. We disagree.

¶ 19 In requesting that the circuit court reconsider its ruling, the State indicated that its concern was based on allegations that the defendant had spoken to two of the State's witnesses, saying the following: "You, you, you know this is going to catch up with you." We note the sole issue on reconsideration was whether the defendant's hand restraints should remain in place because defense counsel had previously acquiesced to the use of leg shackles. Even though the court conducted a brief factual inquiry, which involved an unsworn statement from Officer Fox concerning the details of the defendant's alleged statement and defense counsel's response, the court allowed the defendant's restraints to be "unlocked, unshackled at the hands." Therefore, the record demonstrates that the basic terms of the April 15, 2015, order, although slightly modified, remained substantially unchanged—hands unshackled but the legs shackled. Moreover, we note that defense

counsel did not object to the court's brief factual inquiry or modified order at that time. In fact, the same basic remedy sought by defense counsel during the April 15, 2015, hearing was similar to the court's comments that it wanted the defendant "to write, if he needs to, take notes, assist with his defense." In view of this, we find the court's order, albeit slightly modified, to be consistent with defense counsel's narrow request made during the April 15, 2015, discussion.

¶ 20 Accordingly, we find that the defendant's acquiescence to the court's order invited error. As such, the defendant is estopped from asserting a position on appeal that was inconsistent with his position before trial and now raising a claim that he received an unfair trial based on an error that he induced. *Harvey*, 211 Ill. 2d at 385.

¶ 21 Although we affirm the circuit court's order, due to the defendant's invited error, we do not necessarily agree with the court's approach in addressing the issue of shackling an accused at trial. We agree with our colleagues in the Second District that "when a trial court is presented with a defendant who appears in prison attire and restraints, even for a bench trial, and even when counsel agrees to the removal of only a portion of the restraints, the best course of action is to hold a *Boose* hearing so that the reasons for the defendant's appearance and the extent of any agreement can be considered by the court and placed on the record." *People v. Harding*, 2012 IL App (2d) 101011, ¶ 22. Because we find the defendant waived review under the invited-error doctrine, we need not address the defendant's assertion that this error was preserved, as having been objected to and fully litigated in the circuit court, and decline to address the State's alternative contention that this issue was unpreserved and forfeited.

¶ 22 III. Conclusion

¶ 23 The judgment of the circuit court of Johnson County is affirmed where defense counsel invited the error raised on appeal.

¶ 24 Affirmed.