Order

Michigan Supreme Court
Lansing, Michigan

September 27, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2021-20

Amendment of Rule 6.001
and Addition of Rule 6.009
of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.001 and addition of Rule 6.009 of the Michigan Court Rules is adopted, effective January 1, 2024.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006(A) and (C)-(E), 6.009, 6.101-6.103, 6.104(A), 6.105-6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.441, 6.445, 6.450, 6.451, and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C) Juvenile Cases. MCR 6.009 and t~~T~~he rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.

(D)-(E) [Unchanged.]

[NEW] Rule 6.009 Use of Restraints on a Defendant

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds, using record evidence, that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the defendant or another person.

(2) The defendant has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the defendant presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a defendant in the courtroom must allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be restrained using fixed restraints to a wall, floor, or furniture.

(D) If the court determines restraints are needed, the court must order restraints that reflect the least restrictive means necessary to maintain the security of the courtroom. A court should consider the visibility of a given restraint and the degree to which it affects an individual's range of movement. A court may consider, but is not limited to considering, participation by video or other electronic means; the presence of court personnel, law enforcement officers, or bailiffs; or unobtrusive stun devices.

Staff Comment (ADM 2021-20): The addition of MCR 6.009 establishes a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the amendment of MCR 6.001 makes the new rule applicable to felony, misdemeanor, and automatic waiver cases.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I concur with this Court's order amending MCR 6.001 and adopting MCR 6.009. Under the new rule trial courts may order a defendant restrained any time they have record evidence to conclude it is necessary. The only circumstances under which restraining a defendant is prohibited are if a trial court has not considered whether restraining a defendant is necessary or if the trial court has done so and concluded that restraint is unnecessary. Further, the inquiry is required only in proceedings that are

before a jury or could have been before a jury. This measure is prudent, narrow, and respectful of the presumption of innocence as well as the formal dignity of the courtroom.

We need not limit our court rules to require only constitutional minimums, but clearly, the constitutional minimum is a relevant consideration. In *Deck v Missouri*, 544 US 622, 629 (2005), the United States Supreme Court discussed physical restraints that are visible to a jury because that was the factual circumstance with which the Court was presented. The Court, however, was very clear that there was a "consensus disapproving routine shackling dating back to the 19th century . . . ." *Id*. at 629. Going back to Blackstone and before, courts have observed concerns with restraints beyond just their visibility:

> Blackstone wrote that "it is laid down in our antient [sic] books, that, though under an indictment of the highest nature," a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnote omitted); see also 3 E. Coke, Institutes of the Laws of England *34 ("If felons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"). [*Id*. at 626.]

And clearly *Deck*'s holding is not limited to the presumption of innocence, because the ultimate question the Court was contemplating was the use of restraints in the sentencing phase of a death-penalty case. *Deck* noted that the presumption of innocence was only one of three "fundamental legal principles" that required the prohibition of routine restraint. *Id*. at 630. The Court also noted that restraints interfere with the right to counsel and that "judges must seek to maintain a judicial process that is a dignified process." *Id*. at 631. On that point, the Court said:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." [*Id*. (citation omitted).]

Concerns about dignity in court proceedings certainly apply to bench trials as well as jury trials.

The counterbalance to these important legal principles is the vital practical consideration of safety. Sometimes restraints are required. MCR 6.009 allows a trial court to order restraints any time the court finds they are necessary because of one of the factors set forth in MCR 6.009(A)(1) through (3). Among these factors is if "[i]nstruments of restraint are necessary to prevent physical harm to the defendant or another person." MCR 6.009(A)(1). This broadly worded consideration would seem to allow a trial court to consider any fact specific to the defendant that gives rise to the necessity of restraints.

Of note, requiring consideration of the necessity of restraints in hearings that could not be held before a jury was not discussed in this public-comment process. That requirement might pose greater logistical challenges. To the extent Justice VIVIANO points out that particular defendants might be restrained for some hearings and not others, I trust our trial courts to navigate those decisions as they see fit.

VIVIANO, J. (*dissenting*). The majority adopts a new rule that greatly limits the circumstances in which a criminal defendant can be restrained when appearing in court. It prohibits the use of restraints on a criminal defendant in any "proceeding that is or could have been before a jury" unless the court makes certain findings. Consequently, the rule applies to proceedings that take place in front of a judge without a jury. The new rule is neither constitutionally required nor practically wise. I fear it will needlessly endanger the safety of judges, court staff, attorneys, and members of the public in courtrooms across the state. I therefore dissent.

As Justice ZAHRA explained when this rule was published for comment, the federal Constitution limits the use of restraints only when those restraints are visible to a *jury*. The United States Supreme Court's decision in *Deck v Missouri*, 544 US 622, 629 (2005), held that the Constitution "prohibit[s] the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (Emphasis added.) This reflects our caselaw. Prior to *Deck*, we held there was no prejudicial error when the jury does not observe the restraints on a defendant. See *People v Dunn*, 446 Mich 409, 425 (1994) ("The record does not show, however, that any member of the jury saw or could see the leg irons, and, therefore, the record does not provide a basis for a finding that the use of leg irons deprived Dunn of a fair trial."). More recently, we have declined to apply *Deck*'s rule in situations in which the restraints were shielded from the jury's view and there was no evidence that any juror saw the restraints. *People v Arthur*, 495 Mich 861, 862 (2013).

Today, however, the majority effectively extends the rule from *Deck* to certain proceedings before a judge. Nothing in the Constitution or relevant caselaw requires this result. Indeed, in describing the history of the rule, *Deck* explained that it "was meant to protect defendants appearing at trial before a jury." *Deck*, 544 US at 626. Accordingly,

the rule was inapplicable during arraignments "or like proceedings before the judge." *Id.*[1] There is simply no basis in *Deck* or historical practice for limiting the use of restraints in nonjury proceedings.[2]

Not only is the rule constitutionally and historically ungrounded, it is also confusing and imprudent. As Justice ZAHRA observed, "the published rule would extend *Deck* even to bench trials held before the very judge who would have earlier made the decision on whether to shackle the defendant." Proposed Amendment of MCR 6.001 and Proposed Addition of MCR 6.009, 509 Mich 1214, 1216-1217 (2022) (ZAHRA, J., dissenting). More befuddling still, the rule applies only to certain proceedings in front of the judge—those that could have been held in front of a jury. As such, even if restraints during a bench trial are prohibited under the new rule, the judge could nevertheless order shackles on the defendant during all other proceedings that occur during the trial that would not take place in front of a jury. Thus, for example, if a motion is made during the bench trial, the judge could order the defendant restrained during the argument and decision on the motion.

It strains credulity to believe that the rule has any beneficial effect in these circumstances. It is not clear to me how the same judge who decides whether to shackle

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[1] Although *Deck* involved the penalty phase, the penalty was decided by a jury in *Deck* and the holding was expressly limited to such jury determinations. *Id.* at 632-633.

[2] Justice CAVANAGH notes that concerns other than the visibility of restraints help explain the historical ban on restraints. This may be true, but it ignores the ban's historical limitation to jury proceedings, where the visibility of restraints was thought to potentially harm perceptions of the defendant. While Blackstone's and Lord Coke's brief commentaries on the topic suggested a broader ban on restraints, courts quickly thereafter took the position that "their power to order the removal of shackles [w]as limited to trial" and did not extend to pretrial proceedings like arraignments. Lehr, *Brought to the Bar: The Constitutionality of Indiscriminate Shackling in Non-Jury Criminal Proceedings*, 48 N Ky L Rev 1, 6-7 (2021); see also *id*. at 7 (noting that early decisions in this country "[w]ithout exception" followed the English rule limiting the presumptive ban on shackles to trial). Part of the rationale was, as "[e]arly English jurists . . . recognized," that "restraints had the potential to skew perceptions of the criminal defendant" and "harm the public's perception of the defendant and the court." *Id*. at 4-5; see also *id*. at 8 (noting early caselaw from this country expressing the "concern[] for the effects visible restraints might have on a jury's perception of the defendant"). Thus, historically, the visibility of the restraints was a key to the development of the rule, and the presumption against restraints applied only in the jury-trial setting. *Id*. at 9 (noting in light of this history that the common-law rule has been consistent and that the Supreme Court has recognized it as a constitutional rule governing *jury* proceedings); *id*. at 37 (noting the longstanding view that nonjury proceedings are fundamentally different from jury proceedings and that restrictions on restraints should not apply).

the defendant in the first place and sees the defendant in shackles during nonjury proceedings will somehow be biased by knowing that defendant is restrained during the bench trial—as noted, the majority's enactment today applies not only to *visible* restraints but more broadly to all restraints. So even if the judge cannot see the restraints, the rule still applies. What purpose could this rule possibly serve?

The rule adopted by the majority treats our trial judges as if they are incapable of using common sense. There is, of course, no basis for the idea that trial judges are unable to set aside the fact that a defendant is restrained in order to make proper and unbiased rulings during the proceedings.[3] Indeed, it is not clear that today's rule provides a solution to any problem whatsoever. No research or even anecdotes have been put forward in support of the notion that using restraints in bench trials or similar proceedings before a judge has resulted in harm to defendants. Certainly, nothing has been offered that would justify changing the default rule from allowing restraints in these circumstances to prohibiting them unless an exception exists.

The real result of the majority's rule, then, will not be to protect defendants. Rather, the rule's true effect will be to endanger the safety of court proceedings by limiting the discretion of trial judges, who certainly understand the security needs of their courtrooms far better than the members of this Court do. The rule significantly constricts the factors that a court can consider when determining whether to order restraints. As I noted when the majority imposed a similar rule with regard to juvenile defendants, today's rule removes from the table various factors that have always been considered in this setting. See Adoption of MCR 3.906, 508 Mich cxxvii, cxxxi-cxxxii (VIVIANO, J., dissenting). The rule today allows for restraints only if they are necessary to prevent physical harm, if the defendant has a history of "disruptive courtroom behavior" that poses "a substantial risk" of physical harm, or if there is "a founded belief that the defendant presents a substantial risk of flight . . . ."

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[3] On the contrary, "[o]ur judicial system operates under a fundamental presumption that trial judges are impartial, even when presented with inadmissible or prejudicial information." *Cameron v Rewerts*, 841 F Appx 864, 866 (CA 6, 2021), citing, *inter alia*, *Harris v Rivera*, 454 US 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); see also *People v Wofford*, 196 Mich App 275, 282 (1992) ("Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel."); cf. *Mahlen Land Corp v Kurtz*, 355 Mich 340, 351 (1959) (noting that, when reviewing a trial judge's actions, the judge "stands in our eyes garbed with every presumption of fairness, and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would impeach the presumption so amply justified through the years").

This severely limits a court's discretion. A significant majority of states, historically and into the modern era, has "permitted courts to consider a range of information outside the trial, including past escape, prior convictions, the nature of the crime for which the defendant was on trial, conduct prior to trial while in prison, any prior disposition toward violence, and physical attributes of the defendant, such as his size, physical strength, and age." *Deck*, 544 US at 647-648 (Thomas, J., dissenting). *Deck* allowed courts to continue relying on all these factors and rejected the rule "that courts may consider only a defendant's conduct at the trial itself or other information demonstrating that it is a relative certainty that the defendant will engage in disruptive or threatening conduct at his trial." *Id*. at 648 (Thomas, J., dissenting); see also *id*. at 630 (opinion of the Court) (noting that judges can "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial"). As I said with regard to the use of restraints on juveniles, "I can think of no justification for limiting trial courts from full consideration of all factors bearing on the safety and security of court proceedings." Adoption of MCR 3.906, 508 Mich at cxxxii (VIVIANO, J., dissenting). I fear that the majority has enacted such a limitation today, in a much larger class of cases and with potentially tragic results.

I would have no objection to a rule that conforms to the constitutional requirements laid out in *Deck*, which our trial courts must abide by in any event. Today's rule needlessly goes much further and dangerously limits the ability of our trial judges to ensure that court proceedings are conducted safely and securely. I therefore dissent.

ZAHRA, J., joins the statement of VIVIANO, J.