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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 24, 1987
vs.	)	
WILLIAM H. BARBEE, JR.,	)	7-111 86-451
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Kossuth County (No. Cr 41035), on change of venue from Woodbury County, Richard F. Branco, Judge.

The defendant appeals from his convictions for third-degree kidnapping and first-degree robbery, contending he was denied a fair trial by extraordinary security precautions during his trial. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Peter Van Etten and Gregory Jones, Assistant Woodbury County Attorneys, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

SNELL, J.

On April 4, 1983, the appellant, William H. Barbee, Jr., was charged by trial information with kidnapping in the first degree, sexual abuse in the second degree, and robbery in the first degree. Following a September 1983 jury trial, Barbee was found guilty as charged on each count. The district court merged the sexual abuse charge with the kidnapping charge and sentenced Barbee accordingly on the kidnapping and robbery convictions. Barbee appealed and this court, in an unpublished opinion, reversed the judgment and remanded the case for a new trial due to various trial errors.

On October 9, 1985, prior to Barbee's trial on remand, the district court ordered that Barbee wear shackles on his legs during trial and that three deputy sheriffs be in the courtroom during trial, two of whom should be seated close to Barbee. This order followed by a day the testimony of Woodbury County Sheriff Russell White, who was called by the court, sua sponte, to state his opinion as to whether, and what, courtroom security was necessary. Following a February 1986 change of venue to Kossuth County, the district court reaffirmed its earlier security order and, in addition thereto, ordered that Barbee be handcuffed during trial. The handcuffs were to be chained to a belt harness. On February 13, 1986, a jury found Barbee guilty of kidnapping in the third degree, assault with intent to commit sexual abuse, and robbery in the first degree. The district court merged the assault with intent to commit sexual abuse conviction with the kidnapping conviction. See State v. Williams, 334 N.W.2d 742, 743 (Iowa 1983). Barbee was sentenced to concurrent terms not to exceed twenty-five years on the robbery conviction and not to exceed ten years on the kidnapping conviction. Barbee brings this appeal in order to remedy alleged violations of his constitutional rights. Our scope of review in this case is therefore de novo. Hackett v. State, 354 N.W.2d 247, 249 (Iowa App. 1984).

Barbee maintains the imposition of the aforementioned security measures violated his rights to due process of law under the state and federal constitutions because the district court failed both to give notice that it was considering such measures and to afford him a hearing. In addition, Barbee claims the security measures violated his state and federal constitutional rights to receive a fair trial, to be presumed innocent, to have effective assistance of counsel, and to testify on his own behalf.

The presumption of innocence which accompanies a criminal defendant includes an entitlement that the defendant be accorded with the indicia of innocence during his or her trial. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126, 130 (1976). A defendant's right to appear before the jury unfettered by physical restraints, however, is not absolute. See e.g., Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353, 359 (1970); Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983), cert. denied, 469 U.S. 820, 105 S. Ct. 91, 83 L. Ed. 2d 37 (1984). In circumstances in which compelling reasons justify the use of physical restraints, the general prohibition against such restraints must necessarily yield to the competing interests of courtroom participants in the safe conduct and orderly progress of trial. E.g., United States v. Hick, 782 F.2d 862, 867 (10th Cir.), cert. denied, ____ U.S. ____, 106 S. Ct. 2921, 91 L. Ed. 2d 549 (1986). The decision to impose appropriate means in restraining a criminal defendant lies within the informed discretion of the district court and will not be disturbed on appeal unless that discretion was clearly abused. Id.; United States v. Samuel, 431 F.2d 610, 614-15 (4th Cir. 1970), cert. denied, 401 U.S. 946, 91 S. Ct. 964, 28 L. Ed. 2d 229 (1971).

These principles recently were adopted by this state's highest court. See State v. Wilson, No. 86-781 (Iowa May 13, 1987). Barbee's claim that he is entitled to notice and hearing must fail in light of the Wilson court's statement that,

although it may be preferable to do so in some circumstances, "[a] formal hearing is not required," prior to imposing security measures. Slip op. at 22; see also Samuel, 431 F.2d at 614-15. Our inquiry is therefore narrowed to a determination of whether the district court abused its discretion by unnecessarily infringing upon the remainder of Barbee's asserted rights. The resolution of this issue depends upon whether the security measures imposed were reasonably necessary in light of such factors as the defendant's record, the crime charged, the defendant's physical condition, and other available security measures. Hack, 782 F.2d at 868; see also State v. Tolley, 290 N.C. 349, 367, 226 S.E.2d 353, 368 (1976).

Prior to imposing the security measures, the district court received testimony from Woodbury County Sheriff White as to their necessity. The propriety of receiving such testimony is beyond question. Samuel, 431 F.2d at 614; Wilson, slip op. at 21. Without testimony of this character the district court generally would be unable to exercise sound and informed discretion. See Woodwards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970), cert. denied, 401 U.S. 911, 91 S. Ct. 874, 27 L. Ed. 2d 809 (1971); see also State v. Evans, 169 N.W.2d 200, 210 (Iowa 1969). Based upon this testimony and other available information the district court made the following findings of fact:

> The defendant is a 19 year old male who is very strong and active; he is now serving a life sentence in the prison at Fort Madison on a guilty plea to a charge of kidnapping and sexual abuse among other things; he has been previously convicted of kidnapping and sexual abuse in the present case and the conviction has been overturned by the Iowa Court of Appeals and he is now standing a retrial of that case. If convicted, this could result in a second life sentence; that under these conditions the defendant has nothing to lose by attempting to escape during the trial or committing any violence during the trial; that there will probably be a knife placed in evidence and in the courtroom at certain times during the trial; that at the time of his guilty plea resulting in a life sentence the defendant made a threat upon the life of Mr. Van Etten, the Assistant Woodbury County Attorney who is prosecuting the present case; that at that time the defendant also made a threat against Judge Gaul of this

> Court and other court personnel; that the threats were that he would escape and kill those persons; that the defendant was returned to the Woodbury County Jail from prison in early July of 1985 and three days later did escape from the Woodbury County Jail; that he has since returning to the Woodbury County Jail made a threat to escape and kill the President of the United States; that he has made statements to the effect that he has nothing to lose and that he will "take out" an officer before he leaves the Woodbury County Jail; that while in the Woodbury County Jail he has been maintained in the maximum security section of the jail, which means he is behind bars with a deadlock for 23 hours of the day. He is released from the cell for one hour a day with leg irons on in the company of guards for the purpose of exercise and bathing; that the Sheriff of Woodbury County has maintained the defendant in the maximum security division of the jail in this manner because he believes the defendant is a security risk; that after being returned to the Woodbury County Jail following his escape and recapture the defendant did slash a correctional officer across the face with a ballpoint pencil; that he has not only escaped from the jail but has made threats to escape; that while in jail he has had numerous disciplinary infractions, has been abusive of personnel and destructive of property; that on previous occasions he has been unpredictable and impulsive and subject to sudden outbursts.

The supplemental security order requiring Barbee to be handcuffed during trial was based upon Barbee's participation in a penitentiary riot and hostage-taking incident while awaiting the venue change to Kossuth County. Both security orders were made part of the record, see Iowa R. App. P. 10(a), and Barbee and his counsel were given numerous opportunities to voice their objections to the security measures. This they did. In addition, the district court allowed Barbee's counsel to cross-examine Sheriff White. We think this procedure complies with that sanctioned in Wilson. Slip op. at 22; see also Hack, 782 F.2d at 867.

We recognize that the employment of security measures such as these occasionally will present concerns relating to a defendant's ability to participate fully in his or her trial and receive effective assistance of counsel. See Hack, 782 F.2d at 866-67; Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984). The record in the case at bar, however, includes a video cassette of a portion of the trial which suggests that the presence at trial of deputy sheriffs close

to Barbee did not significantly impose upon his ability to communicate with counsel. In addition, the district court judge noted on the record his observations that Barbee's handcuffs did not prevent him from taking notes during the proceedings.

We note the district court informed respective counsel that it would question the jury panel during voir dire as to whether their deliberations would be affected by the security measures. In addition, the court twice instructed the jury as follows:

> You are instructed that the fact that the defendant is restrained during trial has nothing to do with his guilt or innocence, and you shall disregard that fact during the trial and in your deliberations.

Such action by trial courts helps minimize the prejudice to the defendant. See Wilson, slip op. at 21-22; cf. Hack, 782 F.2d at 867 (defense counsel given opportunity to challenge potential jurors whose deliberations could be affected by shackled defendant).

The burden is on the State to show the necessity for physical restraints. Wilson, slip op. at 20. We believe it has successfully shouldered that burden in the present case. In light of the record presented in this appeal, we find no abuse of discretion by the district court in its decision to require the security measures it deemed appropriate under the circumstances. Accordingly, Barbee's convictions and sentence are affirmed.

AFFIRMED.