

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY PORTER,

Defendant-Appellant.

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UNPUBLISHED  
October 23, 2012

No. 298474  
Washtenaw Circuit Court  
LC No. 09-000365-FC

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

TALBOT, J (*concurring in part and dissenting in part*).

I concur in part and dissent in part. First, I respectfully disagree with the majority's opinion that the trial court found that the juror's testimony that he saw Porter shackled was not credible. At the evidentiary hearing, the court sat in the same seat as the juror did during trial and looked at Porter, who was seated in the same location as he was during trial. While the judge indicated that he could not see Porter's shackles and found "it extremely hard to understand how [the juror] could have seen shackles," he further noted that he was "not calling the juror a liar." Therefore, it is my opinion that the record demonstrates that the court's determination that Porter's shackles could not be seen by the juror was not based on the juror's credibility. Thus, it was established that Porter's shackles were seen by at least one juror.

I agree with the majority that the trial court abused its discretion when it required that Porter wear shackles without record evidence that they were necessary. I would also note that the trial court provided no justification for its decision to shackle Porter at the time that its determination was made. Rather, approximately two years later, at the evidentiary hearing, the trial court stated that its decision was based on the fact that other defendants had fled the courtroom in the past, and it was the sheriff's department's policy to shackle defendants. The court further noted that Porter "had been an absconder" and "was charged with murder." The charges against Porter, the sheriff's department policy, the actions of other defendants, and Porter's actions unrelated to this matter do not satisfy the requisite particularized reasons to warrant shackling Porter in this instance.<sup>1</sup>

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<sup>1</sup> *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009).

Additionally, I disagree with the majority's assertion that Porter was not prejudiced by his shackles being visible to the jury. I believe that this case was a clear "credibility contest" between Porter and the sole alleged eyewitness to the crime, JoAnn Caldwell. Caldwell, who admittedly went to the victim's home the night of the incident with the intent to kill him, indicated that Porter shot the victim. Porter, however, denied shooting the victim and testified that he remained in Caldwell's vehicle while she entered the victim's home. As the majority aptly notes, the juror who testified regarding Porter being shackled did not indicate that observing Porter in shackles influenced his decision, nor was the question ever asked of him. That notwithstanding, it is well-settled that "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process" by "suggest[ing] to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'"<sup>2</sup> Under the circumstances of this case, Porter was visibly shackled, testified on his own behalf, and his identification as the assailant was premised on the testimony from a single alleged eyewitness to the crime, his purported accomplice. Accordingly, Porter has demonstrated that the shackling error "seriously affected the fairness, integrity or public reputation of [the] judicial proceedings . . ."<sup>3</sup> and relief would be warranted.<sup>4</sup>

I must find, however, that the shackling error was harmless. During direct examination, defense counsel elicited testimony from Porter that he was incarcerated at the time of trial, thus negating the error.

I disagree with the majority that counsel's ineffective assistance does not warrant reversal. Defense counsel unjustifiably elicited testimony from Porter that he was incarcerated at the time of trial.<sup>5</sup> Defense counsel also impermissibly questioned Porter regarding his criminal history and confirmed that his convictions were the result of guilty pleas.<sup>6</sup> The majority asserts that because Porter "owned up" to his prior offenses but failed to in the instant case, the jury could have inferred that Porter was innocent. Defense counsel's questioning, however, did not make any suggestion in that regard. Moreover, the parties stipulated that Porter was a convicted

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<sup>2</sup> *Deck v Missouri*, 544 US 622, 630; 125 S Ct 2007; 161 L Ed 2d 953 (2005), abrogated in part on other grounds *Fry v Pliler*, 551 US 112; 127 S Ct 2321; 168 L Ed 2d 16 (2007).

<sup>3</sup> *People v Borgne*, 483 Mich 178, 197; 768 NW2d 290 (2009), quoting *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks omitted).

<sup>4</sup> I recognize that one of the victim's neighbors testified that before Caldwell's car drove away from the victim's home the night of the incident, he saw the car's passenger door close. Also, Porter testified to being seated in the passenger seat. While this mildly corroborates Caldwell's testimony, the neighbor testified that he did not see anyone enter or leave the vehicle. Moreover, only one person is acknowledged to be the true eyewitness to the victim's shooting.

<sup>5</sup> While Porter raises this issue in his Standard 4 Brief, it is not addressed by the majority.

<sup>6</sup> I would note that Porter raised both of the above challenges to defense counsel's effective assistance in a Standard 4 Brief, which was filed after the motion for remand was granted. Therefore, the challenges were not raised or addressed at the hearing conducted in accordance with *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

felon, making counsel's questions regarding Porter's criminal history entirely unnecessary. As such, counsel's actions did not constitute "sound trial strategy"<sup>7</sup> and "fell below objective standards of reasonableness."<sup>8</sup> As explained above, it was required that the jury compare Porter and Caldwell's credibility to determine Porter's culpability, and the shackling error would have constituted reversible error had counsel not elicited testimony regarding Porter's incarceration. As a result, I would find that reversal for ineffective assistance is proper because "but for counsel's error, there is a reasonable probability that the [ultimate] result of the proceedings would have been different."<sup>9</sup>

Moreover, although this issue does not appear to be before this Court at this time, contrary to the trial court's determination at the *Ginther*<sup>10</sup> hearing, I would also find that defense counsel's ineffective assistance for failing to object to Porter's shackling warrants reversal. Counsel's failure to object to Porter being unjustifiably shackled clearly "fell below objective standards of reasonableness."<sup>11</sup> Had defense counsel objected to Porter's shackling, the issue would have been preserved on appeal. Because Porter was ordered "without adequate justification" to wear shackles that were seen by a juror, the prosecution would have then had the burden of proving "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained."<sup>12</sup> Here, the record evidence does not establish beyond a reasonable doubt that the shackling error did not contribute to the verdict. Therefore, if this issue were before this Court, I believe Porter would be entitled to relief, and I would reverse and remand for a new trial.<sup>13</sup>

/s/ Michael J. Talbot

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<sup>7</sup> *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

<sup>8</sup> *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

<sup>9</sup> *Id.*

<sup>10</sup> *Ginther*, 390 Mich at 436.

<sup>11</sup> *Swain*, 288 Mich App at 643.

<sup>12</sup> *Deck*, 544 US at 635 (citation and quotations omitted).

<sup>13</sup> *Swain*, 288 Mich App at 643.