

Case Notes by Carla

Russ v. State, 709 N.W.2d 483 (Wisc. 2005)

Keywords: Handcuffing a deaf defendant; expert witnesses; interpreters testifying

This case presents a common complaint that is normally seen when the police interact with deaf people. Courts typically side with officers in a law enforcement situation and permit the handcuffing of a deaf arrestee given the need to secure the environment for the officer's safety. Here, however, a deaf man, Russ, was handcuffed in *court* during his plea and sentencing hearing. Russ claimed that the physical restraints substantially impeded his ability to communicate by sign language. However, he did not prevail on appeal because he did not present sufficiently compelling evidence to convince the court that he was actually impeded in his ability to communicate. On other facts, a challenge to the practice of cuffing deaf individuals can prevail.

On appeal, Russ alleged the trial court violated three Constitutional provisions: (1) his right to due process; (2) his right to be meaningfully present at the proceedings; and, (3) his right to the assistance of counsel. He claimed that because the court refused to remove the restraints, he was unable to communicate with his attorney and the interpreters in the courtroom. The court considered that the central issue was which party was required to prove that the defendant could not communicate with his hands shackled. The court disagreed with Russ' contention that "Jeremy Russ should have no more obligation to prove that he could not actually adequately communicate than a hearing and speaking person should have to prove that by wiring his jaws shut or gagging him, he could not adequately communicate." *Russ*, 709 N.W.2d at 485. Rather, the court held that the burden to prove the inability to communicate fell squarely on the person claiming they were compromised.

The court held that Russ failed to present proof sufficient to demonstrate that he was unable to communicate despite the cuffs. At the plea when the court was informed of the cuffs issue, the court told Russ to interrupt the proceedings if he experienced any actual problems. During the plea and sentencing, Russ did not interrupt the proceedings at all. As a result, Russ could not point the appeals court to any specific instances where the shackles impeded his ability to communicate.

Russ should have, according to the court, called the interpreters to the stand during the hearing to explain the actual difficulties he had faced communicating during the plea and at the sentencing. Russ should have called his former attorney to testify as to the difficulty he had in conferring with his cuffed client during the plea and sentencing. Russ' only proof consisted of calling an expert in sign language who testified that "generally speaking, shackles can inhibit sign language communication." *Russ*, 709 N.W.2d at 484. The expert was a deaf college instructor who explained the four sign parameters and that it would be difficult or impossible to understand some ASL signs while shackled. The court remarked that this "purely theoretical" evidence "will not do." *Id.* at 487. Russ "had the burden to show that he in fact *was* unable to communicate, not that he theoretically might have had such difficulty. The burden is on him, not the State, to prove a communication lapse. He has failed to meet his burden." *Id.* at 484. Russ needed to show that he was actually prevented from understanding if he

was to succeed on his challenges. Though the result here was not good for this deaf defendant, it does confirm that if handcuffs actually impede a deaf person's ability to participate in the proceedings and to confer with counsel, and if the deaf person presents sufficient evidence of actual inability to communicate, then the challenge can be successful.