

No. 35071-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Scott Ridgley,**

Appellant.

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Lewis County Superior Court

Cause No. 06-1-00150-2

The Honorable Judge Richard L. Brosey

**Appellant's Opening Brief**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ASSIGNMENTS OF ERROR ..... vi**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... vii**

1. Does an arresting officer’s failure to confirm the existence and validity of an arrest warrant require suppression of any statements, testimonial acts, and evidence resulting from the arrest? Assignments of Error Nos. 1-4..... vii

2. Must Mr. Ridgley’s statement, his testimonial acts, and the baggie of evidence be suppressed because the arresting officer failed to confirm the existence and validity of the arrest warrant? Assignments of Error Nos. 1-4. .... vii

3. Was Mr. Ridgley denied the effective assistance of counsel when his attorney failed to move to suppress his statements, his testimonial acts, and the baggie of methamphetamine? Assignments of Error No. 1-4..... vii

4. Did the trial court err by failing to suppress Mr. Ridgley’s statement and his testimonial acts following a CrR 3.5 hearing? Assignments of Error No. 1,2,5..... vii

5. Did the “to convict” instruction omit an essential element of the crime? Assignments of Error No. 6-10... viii

6. Does the lack of a jury finding as to the identity of the substance possessed preclude a sentence in excess of 90 days in jail? Assignments of Error Nos. 6-10..... viii

7. Was Mr. Ridgley denied his constitutional right to a jury trial when the trial court imposed a prison term above the standard range authorized by the jury's verdict?  
 Assignments of Error No. 6-10..... viii

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1**

**ARGUMENT..... 3**

**I. Mr. Ridgley's statement, his testimonial acts, and the baggie of methamphetamine should have been suppressed..... 3**

**II. Mr. Ridgley was denied the effective assistance of counsel..... 5**

A. Defense counsel should have moved to suppress evidence seized and statements made following an unlawful arrest. .... 7

B. Defense counsel's deficient performance prejudiced Mr. Ridgley because a motion to suppress would have been granted and would have terminated the prosecution..... 8

**III. Mr. Ridgley's statement should have been suppressed under CrR 3.5..... 9**

**IV. The court's "to convict" instruction omitted an essential element of Possession of Methamphetamine. .... 10**

**V. The trial court violated Mr. Ridgley's constitutional right to a jury trial in violation of *Blakely v. Washington* by imposing an aggravated sentence without a jury finding as to the identity of the substance possessed. .. 11**

**CONCLUSION ..... 13**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	9, 10
<i>Jackson v. Denno</i> , 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)...	7
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	4
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	4, 5
<i>Washington v. Recuenco</i> , ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	10

### STATE CASES

<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	5, 7
<i>State v. Bradley</i> , 141 Wn.2d 731, 10 P.3d 358 (2000) .....	5
<i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998).....	1, 2
<i>State v. Cromwell</i> , 157 Wn.2d 529, 140 P.3d 593 (2006) .....	10
<i>State v. Deryke</i> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	8
<i>State v. Doogan</i> , 82 Wn. App. 185, 917 P.2d 155 (1996) .....	6
<i>State v. Evans</i> , ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 50 (2007).....	3, 10
<i>State v. Evans</i> , 129 Wn. App. 211, 118 P.3d 419 (2005) .....	10
<i>State v. Fisher</i> , 145 Wn.2d 209, 35 P.3d 366 (2001).....	2
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004) .....	9

<i>State v. Holm</i> , 91 Wn.App. 429, 957 P.2d 1278 (1998) .....	4
<i>State v. Holmes</i> , 135 Wn. App. 588, 145 P.3d 1241 (2006).....	1
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	5, 6
<i>State v. Littlefair</i> , 129 Wn. App. 330, 119 P.3d 359 (2005).....	1
<i>State v. Lopez</i> , 107 Wn.App. 270, 27 P.3d 237 (2001).....	4
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	8
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	1, 2
<i>State v. Nall</i> , 117 Wn. App. 647, 72 P.3d 200 (2003) .....	2, 3
<i>State v. Parks</i> , ___ Wn.App. ___, ___ P.3d ___ 2006 Wash. App. LEXIS 2747 (2006).....	2
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	2, 5, 6
<i>State v. S.M.</i> , 100 Wn.App. 401, 996 P.2d 1111 (2000).....	5
<i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998) .....	5, 7
<i>State v. Schlieker</i> , 115 Wn. App. 264, 62 P.3d 520 (2003) .....	3
<i>State v. Smith</i> , 102 Wn.2d 449, 688 P.2d 146 (1984).....	2
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	8, 9
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	6
<i>State v. Walker</i> , 101 Wn. App. 1, 999 P.2d 1296 (2000).....	2, 3

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. IV .....	1
U.S. Const. Amend. VI .....	3, 4
Wash. Const. Article I, Section 22.....	4

Wash. Const. Article I, Section 7..... 1

**STATUTES**

RCW 69.50.4013 ..... 9

RCW 69.50.4014 ..... 9, 10

**OTHER AUTHORITIES**

CrR 3.5..... v, vi, 7, 8

## ASSIGNMENTS OF ERROR

1. Mr. Ridgley's constitutional right to be free of unreasonable searches and seizures under the Fourth Amendment was violated.
2. Mr. Ridgley's private affairs were disturbed without authority of law in violation of Article I, Section 7 of the Washington Constitution.
3. Mr. Ridgley's statement, his testimonial acts, and the baggie of methamphetamine should have been suppressed.
4. Mr. Ridgley was denied the effective assistance of counsel when his attorney failed to move to suppress his statement, his testimonial acts, and the baggie of methamphetamine.
5. The trial court erred by failing to suppress Mr. Ridgley's statement and his testimonial acts under CrR 3.5.
6. The "to convict" instruction for possession of a controlled substance omitted an essential element.
7. The trial court erred by giving instruction No. 6, which reads as follows:

To convict the defendant of the crime of Possession of a Controlled Substance as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 4, 2006, the defendant possessed a controlled substance; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 6, Supp. CP.

8. Mr. Ridgley was denied his constitutional right to a jury trial because the jury did not determine the identity of the substance he allegedly possessed.

9. Mr. Ridgley was denied his constitutional right to a jury determination of all facts that increased the penalty for his offenses.

10. The trial court erred by sentencing Mr. Ridgley to a prison term greater than that permitted by the jury's verdict.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Scott Ridgley was charged with Possession of a Controlled Substance. The deputy who arrested Mr. Ridgley did not confirm the existence or validity of the arrest warrant that provided the basis for the arrest. Mr. Ridgley's attorney did not move to suppress Mr. Ridgley's statement, his testimonial acts, or the evidence; nor did he argue the issue at a CrR 3.5 hearing held to determine the admissibility of any statements.

1. Does an arresting officer's failure to confirm the existence and validity of an arrest warrant require suppression of any statements, testimonial acts, and evidence resulting from the arrest?  
Assignments of Error Nos. 1-4.

2. Must Mr. Ridgley's statement, his testimonial acts, and the baggie of evidence be suppressed because the arresting officer failed to confirm the existence and validity of the arrest warrant?  
Assignments of Error Nos. 1-4.

3. Was Mr. Ridgley denied the effective assistance of counsel when his attorney failed to move to suppress his statements, his testimonial acts, and the baggie of methamphetamine?  
Assignments of Error No. 1-4.

4. Did the trial court err by failing to suppress Mr. Ridgley's statement and his testimonial acts following a CrR 3.5 hearing?  
Assignments of Error No. 1,2,5.

Although the identity of a controlled substance is an essential element of the crime, the court's "to convict" instruction omitted the identity of the substance. Nor did the court's other instructions require the jury to determine the identity of the substance possessed. The jury did not make a finding as to the identity of the substance. Despite this, the court

sentenced Mr. Ridgley to a prison term greater than the lowest standard range for Possession of a Controlled Substance.

5. Did the "to convict" instruction omit an essential element of the crime? Assignments of Error No. 6-10.

6. Does the lack of a jury finding as to the identity of the substance possessed preclude a sentence in excess of 90 days in jail? Assignments of Error Nos. 6-10.

7. Was Mr. Ridgley denied his constitutional right to a jury trial when the trial court imposed a prison term above the standard range authorized by the jury's verdict? Assignments of Error No. 6-10.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Scott Ridgley was charged with Possession of a Controlled Substance and Resisting Arrest. CP 15. The arresting officer, Deputy Weinreich, testified that he saw Mr. Ridgley getting out of a van. He recognized Mr. Ridgley and “knew that Mr. Ridgley had two outstanding warrants for his arrest.” RP (5-30-06) 14. Weinreich pulled his gun, pointed it at Mr. Ridgley, and told him that he was under arrest because of the warrants. Mr. Ridgley responded that he “didn’t have any idea” what the deputy was talking about. RP (5-30-06) 14, 27-28. Weinreich grabbed Mr. Ridgley’s wrist, and Mr. Ridgley broke away and ran. RP (5-30-06) 14.

Deputy Weinreich chased Mr. Ridgley, who eventually fell over a fence. RP (5-30-06) 15. Deputy Weinreich “had to do a tazer application on Mr. Ridgley” while he was on the ground, because “he was attempting to get up or to grab something or do something with one of his hands under his belly...” RP (5-30-06) 15. After Mr. Ridgley was handcuffed, Deputy Weinreich noticed a “white ziplock-style baggy with some type of crystal substance in it,” which turned out to contain methamphetamine. RP (5-30-06) 16; 50. When the deputy picked up the baggy, Mr. Ridgley said that it wasn’t his. RP RP (5-30-06) 34. At no time did the deputy

confirm the existence or validity of the arrest warrants. RP (5-30-06) 12-17, 21-43.

Defense counsel did not move to suppress Mr. Ridgley's statements, his testimonial acts, or the baggie of methamphetamine pursuant to CrR 3.6. At a CrR 3.5 hearing held before trial, the court held that Mr. Ridgley's statements were admissible.

At trial, the court gave the following "to convict" instruction:

To convict the defendant of the crime of Possession of a Controlled Substance as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(3) That on or about March 4, 2006, the defendant possessed a controlled substance; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 6, Supp. CP.

The jury was not asked to determine the identity of the controlled substance, and its guilty verdict was in the form of a general verdict.

Court's Instructions, Supp. CP; Verdict Form A, Supp. CP. Mr. Ridgley was sentenced to twenty-four months in prison, and he appealed. CP 4, 5.

## ARGUMENT

### **I. MR. RIDGLEY'S STATEMENT, HIS TESTIMONIAL ACTS, AND THE BAGGIE OF METHAMPHETAMINE SHOULD HAVE BEEN SUPPRESSED.**

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

A violation of Article I, Section 7 or of the Fourth Amendment may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322 at 334, 899 P.2d 1251 (1995); *State v. Holmes*, 135 Wn. App. 588 at 592, 145 P.3d 1241 (2006); *State v. Littlefair*, 129 Wn. App. 330 at 338, 119 P.3d 359 (2005); *State v. Contreras*, 92 Wn. App. 307 at 313-314, 966 P.2d 915 (1998). To meet this standard, "[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual

prejudice that makes the error ‘manifest,’ allowing appellate review.”

*McFarland*, at 334; *see also Contreras, supra*, at 313-314.

An arrest with or without a warrant must be based on more than mere suspicion. *State v. Smith*, 102 Wn.2d 449 at 453, 688 P.2d 146 (1984). In the absence of a warrant, an arrest must be based on probable cause. *State v. Reichenbach*, 153 Wn.2d 126 at 136, 101 P.3d 80 (2004). Where a warrant exists, the police must have probable cause to believe the arrestee is the person named in the warrant; in addition, the warrant itself must be based on a judicial finding of probable cause.<sup>1</sup> *Smith*, 102 Wn.2d at 453; *State v. Parks*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ 2006 Wash. App. LEXIS 2747 (2006). An invalid arrest warrant cannot provide the authority of law to justify a search or a seizure under Wash. Const. Article I, Section 7. *State v. Nall*, 117 Wn. App. 647 at 651, 72 P.3d 200 (2003); *State v. Walker*, 101 Wn. App. 1 at 5-6, 999 P.2d 1296 (2000). Any statements, testimonial acts, or evidence seized pursuant to an invalid search or seizure must be suppressed as “fruit of the poisonous tree.” *State v. Schlieker*, 115 Wn. App. 264 at 272, 62 P.3d 520 (2003). This

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<sup>1</sup> In the limited circumstances where a finding of probable cause is not required, the warrant must still be based on information that bears some indicia of reliability. *State v. Fisher*, 145 Wn.2d 209 at 232, 35 P.3d 366 (2001).

includes evidence that a defendant denies ownership of. *State v. Evans*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2007 Wash. LEXIS 50 (2007).

In this case, Deputy Weinreich testified that he knew Mr. Ridgley, and knew that he “had two outstanding warrants for his arrest...” RP (5-30-06) 14. Deputy Weinreich did not have any basis to arrest Mr. Ridgley other than the warrants. However, Deputy Weinreich did not confirm the existence or validity of the warrants before seizing Mr. Ridgley at gunpoint, chasing after him, tazing him, and handcuffing him. RP (5-30-06) 14-16, 27-28.

Because Deputy Weinreich failed to confirm the existence and validity of the arrest warrants, his seizure of Mr. Ridgley was unconstitutional under the Fourth Amendment and under Article I, Section 7. *Nall, supra; Walker, supra*. Mr. Ridgley’s statement to the officer, any testimonial acts he made during the arrest, and the baggie of methamphetamine must be suppressed as fruits of the poisonous tree. *Schlieker, supra*. His conviction for Possession of Methamphetamine must be reversed, and the case dismissed with prejudice.

**II. MR. RIDGLEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to

have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of

reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Although counsel’s performance is presumed to be adequate, the presumption is overcome if no legitimate tactic explains counsel’s conduct. *Reichenbach. supra*, at 130. Because suppression of drug evidence usually results in dismissal of possession charges, “both *Strickland* prongs will be satisfied if counsel fails to seek suppression where the record suggests that a motion likely would have succeeded.” *State v. Horton*, 136 Wn. App. 29 at 36, 146 P.3d 1227 (2006).

- A. Defense counsel should have moved to suppress evidence seized and statements made following an unlawful arrest.

Here, defense counsel’s performance fell below an objective standard of reasonableness because he failed to move to suppress evidence

critical to the State's case. The evidence should have been suppressed because Mr. Ridgley was unlawfully subjected to a custodial arrest (as set forth above). There was no possible advantage to the defendant in permitting the seized items to be admitted. Without the evidence, the State would have been unable to proceed. Because of this, there was no legitimate strategic or tactical reason involved in defense counsel's failure to request a hearing pursuant to CrR 3.6. *Reichenbach, supra; Horton, supra.*

B. Defense counsel's deficient performance prejudiced Mr. Ridgley because a motion to suppress would have been granted and would have terminated the prosecution.

To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that

[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Doogan*, 82 Wn. App. 185 at 189, 917 P.2d 155 (1996), quoting *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In this case, as outlined above, the Deputy failed to confirm the existence or validity of the warrants for Mr. Ridgley's arrest. A motion to suppress would likely have succeeded.

Because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been

different.” *Saunders*, at 578, confidence in the outcome is undermined. *In re Fleming*, at 866. The conviction must be reversed and the case remanded for a new trial. *Fleming, supra*.

**III. MR. RIDGLEY’S STATEMENT SHOULD HAVE BEEN SUPPRESSED UNDER CrR 3.5.**

Under CrR 3.5, “[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is *admissible*.” CrR 3.5(a), *emphasis added*. The court is required to inform the defendant of certain rights (CrR 3.5(b)) and to make a written record of the ruling, including its “conclusion as to whether the statement is *admissible* and the reasons therefor.” CrR 3.5(c), *emphasis added*.

Although enacted (at least in part) to implement the requirements of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the rule addresses ‘admissibility’ rather than ‘voluntariness,’ and thus is concerned with broader issues than those discussed in that case.<sup>2</sup>

Here, the trial court was charged (by CrR 3.5) with determining the admissibility of Mr. Ridgley’s statement and any testimonial acts. At the

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<sup>2</sup> In *Jackson v. Denno*, the U.S. Supreme Court held that a defendant’s statement must be evaluated for voluntariness before it can be presented to a jury.

CrR 3.5 hearing, Deputy Weinreich testified that he knew Mr. Ridgley, and knew that he “had two outstanding warrants for his arrest...” RP (5-30-06) 14. However, as noted above, he did not confirm the existence or validity of the warrants. Furthermore, the prosecution did not produce any evidence at the CrR 3.5 hearing confirming the existence or validity of the warrants. Accordingly, the trial court should have excluded Mr. Ridgley’s statement and any testimonial acts under CrR 3.5.

The conviction must be reversed, the statement and testimonial acts must be suppressed, and the possession charge dismissed.

**IV. THE COURT’S “TO CONVICT” INSTRUCTION OMITTED AN ESSENTIAL ELEMENT OF POSSESSION OF METHAMPHETAMINE.**

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).

The identity of a controlled substance is an element of a crime where it increases the punishment that can be imposed. *State v. Goodman*, 150 Wn.2d 774 at 785-786, 83 P.3d 410 (2004); *see also State v. R.L.D.*, 132 Wn. App. 699 at 708, 133 P.3d 505 (2006). The crime of possession of a controlled substance is punished differently depending on the identity (and, in the case of marijuana, quantity) of the substance possessed. RCW 69.50.4013; RCW 69.50.4014.

Here, the “to convict” instruction omitted the identity of the substance allegedly possessed by Mr. Ridgley. Supp. CP, Instruction 6. Because of this, the conviction must be reversed and the case remanded for a new trial. *Smith*, 131 Wn.2d at 263.

**V. THE TRIAL COURT VIOLATED MR. RIDGLEY’S CONSTITUTIONAL RIGHT TO A JURY TRIAL IN VIOLATION OF *BLAKELY V. WASHINGTON* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY FINDING AS TO THE IDENTITY OF THE SUBSTANCE POSSESSED.**

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to a trial by jury. U.S. Const. Amend. VI. Under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely* error is subject to harmless error analysis under the strict constitutional standard for

harmless error. *Washington v. Recuenco*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546 at 2553, 165 L. Ed. 2d 466 (2006).

Where the penalty is based on the identity of the substance possessed, the prosecution must establish the identity of the substance by proof beyond a reasonable doubt, and the jury verdict must reflect a finding on the identity of the substance. *See, e.g., State v. Evans*, 129 Wn. App. 211 at 229, 118 P.3d 419 (2005), *reversed on other grounds by State v. Evans*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2007 Wash. LEXIS 50 (2007); *overruled on other grounds by State v. Cromwell*, 157 Wn.2d 529, 140 P.3d 593 (2006).

Here, the jury did not make a finding as to the identity of the controlled substance. Supp. CP, Instruction 6 and Verdict Form A. Because of this, the court was permitted to impose only the minimum sentence available for possession of a controlled substance, which is 90 days in jail and/or a fine of up to \$1000. *See RCW 69.50.4014 and RCW 9.92.030*. The court's imposition of twenty-four months in prison was error; the sentence must be vacated and the case remanded for sentencing within the standard range. *Blakely, supra*.

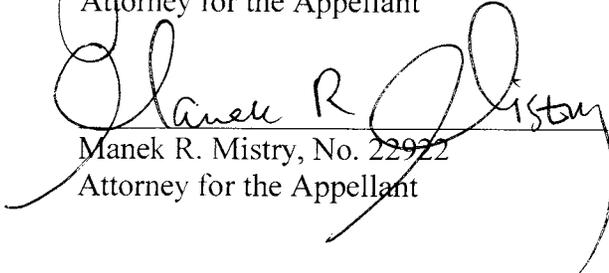
**CONCLUSION**

For the foregoing reasons, Mr. Ridgley's conviction for Possession of Methamphetamine must be reversed. His statement, any testimonial acts, and the methamphetamine must be suppressed, and the Possession charge must be dismissed. In the alternative, the conviction must be reversed and the case remanded for a new trial. If the conviction is not reversed, the case must be remanded for imposition of a sentence of 90 days or less.

Respectfully submitted on January 22, 2007.

**BACKLUND AND MISTRY**

  
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Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Scott Ridgley, DOC #263697  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

and to:

Lewis County Prosecuting Attorney  
MS: pro01  
360 NW North Street  
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 22, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 22, 2007.

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

07 JUN 23 PM 1:40  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY