

NO. 37344-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

CLERK OF COURT
JUL 12 2012
BY: *Ked*
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

AIBA NAJIB HODROJ,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Aiba Hodroj of the due process of law in entering a conviction in the absence of proof beyond a reasonable doubt of each element of the offense of possession of methamphetamine.

2. The trial court erred in failing to instruct the jury on unanimity where the State did not elect which of the two acts it relied on as the basis for possession of methamphetamine.

3. The trial court erred when it permitted Hodroj to be represented by counsel who provided ineffective assistance of counsel by stipulating to the claim that Hodroj was on community placement or community custody at the time of the commission of the current offense pursuant to RCW 9.94A.525, and by failing to move that defense witness Tim Duke appear in non-prison clothing and that he not be shackled during his testimony.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a defendant of possession of a controlled substance, the State must prove beyond a reasonable doubt the defendant actually or constructively possessed a controlled substance. An officer from the Department of Corrections [DOC] found a baggie and a glass pipe, both of which tested positive for the presence of methamphetamine, on the floor of a house near the area where Hodroj had been lying on the

floor after law enforcement entered the house. The DOC officer testified that he saw “something” in Hodroj’s hand that he was “trying to throw” and that when Hodroj stopped running, he “just dropped to the side of his body.” Report of Proceedings [RP] at 80-81. A witness who lived in the house and who was in the bedroom at the time stated that the baggie and glass pipe both belonged to him, and that they were not found near the area where the DOC officer asserted that Hodroj’s body had been. Looking at the evidence in the light most favorable to the State, could a rational trier of fact conclude beyond a reasonable doubt that Hodroj actually or constructively possessed the baggie or the glass pipe? Assignment of Error 1.

2. Did the trial court err in failing to instruct the jury on unanimity where the State did not elect which of the two acts it relied on as the basis for possession of methamphetamine? Assignment of Error 2.

3. Whether the trial court erred in permitting Hodroj to be represented by counsel who provided ineffective assistance by stipulating to the claim that he was on community placement or community custody at the time of the commission of his current offense? Assignment of Error 3.

4. Whether the trial court erred in permitting Hodroj to be

represented by counsel who provided ineffective assistance by failing to object to witness Duke appearing during his testimony while wearing prison clothing and while shackled? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Procedural history:

Aiba Najib Hodroj [Hodroj] was charged by information filed in Clark County Superior Court with one count of possession of methamphetamine, contrary to RCW 69.50.4013(1). Clerk's Papers [CP] at 1.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on January 16, 2008, the Honorable Robert L. Harris presiding.

No objections or exceptions to the court's instructions to the jury were made. RP at 119-20.

The jury returned a verdict of guilty to the charge of unlawful possession of a controlled substance. RP at 142; CP at 26. Following the verdict, defense counsel moved for a new trial, arguing that the jury saw witness Tim Duke wearing prison clothing and wearing leg shackles when he came into the courtroom to testify and that this reflected negatively on his credibility. RP at 143. The trial court did not rule on the motion, but

set it over to the sentencing hearing so that the defense could prepare a written motion. RP at 144. At the time of sentencing counsel had not filed a written motion. RP at 153. Hodroj was represented by substitute counsel Jeff Simpson, who stated that he was not informed by Hodroj's trial counsel—Antoine Tissot—about the oral motion. RP at 154. Regarding the motion, the trial court stated that it was a witness rather than the defendant who appeared in shackles and that it was not an error for a witness to appear that way during his testimony. RP at 154. The court stated that issue was preserved for appeal. RP at 154.

The court sentenced Hodroj within the standard range. RP at 155; CP at 34.

Timely notice of appeal was filed on February 5, 2008. CP at 44. This appeal follows.

2. Trial testimony:

Members of law enforcement in Vancouver, Clark County, Washington were looking for a fugitive offender named Joseph Hanson, who was wanted by the Department of Corrections. Report of Proceedings [RP] at 25, 41, 78. The DOC obtained information that Hanson was at a house located at 804 West 25th Street in Vancouver. RP at 27-28, 79. On November 14, 2007, law enforcement officers placed

the house under surveillance and determined that Hanson was in the house. RP at 25, 26. Approximately 45 minutes after the surveillance started, police initiated entry into the house. RP at 27, 28. As they approached the front door, Hanson emerged from the house and police identified themselves. RP at 29. Hanson ran back into the house and the police followed him. RP at 25, 28, 29. Detective Brian Acee of the Vancouver Police Department tackled Hanson and placed him under arrest. RP at 29, 79. There were approximately ten other people in the house, including Hodroj. RP at 30, 42. Fili Matua, an officer employed by the Department of Corrections, entered the house behind Det. Acee. RP at 79. Matua saw Hodroj in the living room, yelled Hodroj's name and told him to stop. RP at 30, 74, 79. Hodroj ran from the room into what was identified by the State as the east bedroom. RP at 31, 80. Matua stated that it appeared as though Hodroj was trying to throw something that was in his left hand into the closet. RP at 80, 81. Matua testified that when he told Hodroj to stop a second time, he immediately stopped and that "the objects that he was trying to throw from his left hand he just dropped to the side of his body." RP at 81. Hodroj complied with Matua's command to go to the floor and Matua handcuffed him. RP at 31, 32, 81, 82. After placing him in handcuffs, Matua found a

glass pipe and plastic baggie containing a white crystalline substance “to the left of where it appeared he had dropped something.” RP at 82. He stated that as he went into the bedroom, “you could tell with the furtive movements that he was making like he was about to toss somethin’, and then when I told him to stop, hand comes down, releases.” RP at 83. Matua stated that he found the plastic baggie and glass pipe in the area where Hodroj's belt buckle had been when he was on the floor. RP at 92. The baggie and glass pipe were found just outside the closet, in the bedroom area itself. RP at 92.

The white substance in the baggie [Exhibit 1] and the residue on the pipe [Exhibit 2] both tested positive for the presence of methamphetamine. RP at 67. [Exhibit 3.]

Det. Acee described the house as being like “a beehive” when the police entered, that people scattered everywhere, that it was “chaos[,]” and that the house was cluttered with garbage, soiled laundry, and furniture. RP at 51, 52.

Tim Duke lives at the house at 804 West 25th Street that police entered on November 14, 2007. RP at 103. Duke stated that he was arrested on that date for possession of methamphetamine that was located on a shelf in his bedroom. RP at 107. Duke stated that all the

methamphetamine in the room belonged to him, including the glass pipe and the baggie found by Matua after arresting Hodroj. RP at 108, 118. Duke told police at the time of his arrest that “everything in the house was mine.” RP at 109. Duke was in the bedroom when police entered that house and he saw Hodroj run into the bedroom and go into the closet. RP at 107. Duke stated that he did not know how the pipe got to its location on the floor, and that he “didn’t see anybody put it there.” RP at 111. He stated that the baggie and pipe were “[p]robably on my lap or next to me or something” when Matua entered the room. RP at 116. Duke testified that the pipe and baggie were not near Hodroj’s body when he was lying in the closet. RP at 117.

Duke was charged with possession of several bags of methamphetamine found in the house. RP at 42, 45. Two baggies were found on the bookshelf and one was found in a closet while Duke was being interviewed by police. RP at 43.

Hodroj did not testify at trial. RP at 118.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HODROJ POSSESSED METHAMPHETAMINE

- a. The State was required to prove every element of the crime beyond a reasonable doubt.**

The federal and state constitutional rights to a jury trial and due process of law require that the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art I, §§ 3, 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 368 (1970). The crucial inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found every element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Hodroj was charged with possessing methamphetamine. CP at 1. The elements of the crime are simple: the defendant must possess a controlled substance. RCW 69.50.4013; *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), *cert. denied*, 125 S.Ct. 1662 (2005).

Possession is not defined by statute. RCW 69.50.101. The trial court defined possession and explained the concept of constructive possession in Instruction 10:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over

the substance. Dominion and control need not be exclusive to establish constructive possession.

CP at 21. The instruction is consistent with Washington law. *See State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

b. The State did not prove beyond a reasonable doubt that Hodroj was in actual possession of methamphetamine.

“Actual possession means that the goods are in the personal custody of the person charged with possession.” *Callahan*, 77 Wn.2d at 29. In *Callahan* the Court reversed a possession of dangerous drugs conviction because the State did not prove beyond a reasonable doubt the defendant actually or constructively possessed drugs. When the police executed a search warrant on a houseboat, they found the defendant and another man at a desk with drug paraphernalia. *Id.* at 28. A cigar box filled with various drugs was on the floor between the two men, and other drugs were located in the kitchen and a bedroom. *Id.* The defendant said he had been staying at the houseboat for several days and had handled the drugs earlier that day. *Id.* The Court said:

Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control...

Id. at 29 (Citations omitted).

A similar result was reached by Division 1 of this Court in *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). The police executed a search warrant at Spruell's home and found Hill in the kitchen where they also discovered white powder residue and marijuana. *Id.* at 384. While the police were in another room, they heard what sounded like a plate hitting the back door and found more white powder and a plate near the door. *Id.* Relying upon *Callahan*, Division 1 found Hill's presence in the kitchen combined with his fingerprints on the plate did not establish actual possession of the drugs in Spruell's home. *Spruell*, 57 Wn.App. at 385-87. *Spruell* echoed the holding of *Callahan*, that unless the drugs were "found on the defendant" actual possession could not be established. *Spruell*, 57 Wn.App. at 386 (quoting *Callahan*, 77 Wn.2d at 29); *see also*, *State v. Cote*, 123 Wn.App. 546, 549, 96 P.3d 410 (2004) (State must show constructive possession unless defendant is "in actual possession of the contraband upon his arrest").

In this case, according to the testimony of the arresting office, the baggie and glass pipe were not found on Hodroj's person, but rather on the floor near where his belt buckle was located. RP at 92. Thus, the State did not establish actual possession. *Callahan*, 77 Wn.2d at 29.

c. The State did not prove beyond a reasonable doubt that Hodroj was in constructive possession of methamphetamine.

Constructive possession is established when “the defendant was in dominion and control of either the drugs or the premises on which the drugs were found.” *Callahan*, 77 Wn.2d at 30-31. Constructive possession need not be exclusive, but mere proximity to the drugs is not sufficient. *State v. Amezola*, 49 Wn.App. 78, 86, 741 P.2d 1024 (1987). The Court must view the totality of the circumstances in determining if the defendant has dominion and control over an item – no particular factor is determinative. *Cote*, 123 Wn.App. at 549.

There was no dispute of the fact that Hodroj did not own the house, nor was there any evidence that Hodroj was even a resident of the house. In fact, the resident of the house—Tim Duke—was present at the time of the police search and discovery of the drugs. He took ownership of the entire contents of the house, including the pipe and baggie found on the floor of the bedroom, and in fact testified that the pipe and baggie had “[p]robably” been next to him or on his lap prior to the time he got down onto the floor when the police came into the bedroom. RP at 109, 112, 116.

Cases finding constructive possession have involved control of

areas where drugs were found, like a home or a car. *See Bradshaw*, 152 Wn.2d at 530 (defendants were the operator of borrowed truck and a commercial driver of a semi-truck where controlled substances found); *State v. Collins*, 76 Wn.App. 496, 886 P.2d 243 (1995)(defendant and his personal possessions in apartment where drugs located, defendant admitted staying there 15 to 20 times in a one-month period, several people called the apartment to buy drugs from defendant while officers executing search warrant), *review denied*, 126 Wn.2d 1016 (1995); *State v. Huff*, 64 Wn.App. 641, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992), (defendant driving car where drugs found, both car and defendant smelled of methamphetamine).

In the present case the State established nothing more than Hodroj's momentary presence in the bedroom when he ran from the living room and that Matua saw him with "some thing" in his left hand, and the he saw him drop "the objects that he was trying to throw from his left hand" to the side of his body. RP at 80, 81. There was no evidence that Hodroj had any prior connection to the house or the bedroom or closet, or that he had control over any drugs in the room. Plainly the State did not establish Hodroj had dominion or control of the house, or that he had ever even been in the east bedroom until he ran in that room. *See State v.*

Knapstad, 107 Wn.2d 346, 348, 729 P.2d 48 (1986) (evidence defendant's brother resided in house where marijuana found combined with items like a credit card receipt showing defendant lived at a different address did not establish dominion and control); *Amezola*, 49 Wn.App. at 87 (facts sufficient for constructive possession where defendant resided in home and drugs not kept out of her presence).

Similarly, the State did not establish Hodroj had dominion and control of the area where the drugs were located. Again it was not his house, and there was no evidence that he had been in the east bedroom or closet before he ran into it when police came into the house. The only evidence of Hodroj's connection to the room is that he was momentarily lying on the floor of the closet when Matua told him to do so.

The evidence of possession is even less compelling than that presented in *Callahan*. Hodroj was not in actual possession of the pipe or baggie when he was arrested, nor did he have dominion and control over the objects during the time police entered the house and when he was arrested in the closet. Assuming arguendo that the items Hodroj allegedly dropped onto the floor were the pipe and baggie that were recovered by Matua, then this would constitute no more than a momentary handling of the items, which was specifically ruled as insufficient in *Callahan*. There

was no evidence presented to the jury regarding the apparent age of the pipe, whether it was warm or there was some indication it had been recently used or, conversely, whether it was cold or appeared to have been on the floor for some time.

Because Hodroj was not in physical possession of the items, and because momentary possession of it at an earlier time cannot suffice to establish actual possession under *Callahan*, the State had to establish that Hodroj was in constructive possession of the pipe. To do this, the State had to establish that Hodroj had dominion and control over the objects. Even accepting the testimony of Matua over that of Duke, the momentary handling of the objects, as alleged by Matua, is insufficient to support a conviction. The *Cote* Court found:

The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But under *Callahan* and *Spruell* this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession

123 Wn.App. at 550.

Similarly, Matua's testimony, at best, shows that Hodroj was at one point in proximity with and may have touched the bag and pipe. But even accepting that testimony, the State did not prove constructive possession. *See Callahan, Spruell, and Cote.*

d. This Court must reverse and dismiss Hodroj's conviction.

In conclusion, the evidence was insufficient to show that Hodroj either actually or constructively possessed methamphetamine. Matua, the State's key witness, was unable to testify that he saw a pipe or a baggie in Hodroj's hands—he consistently referred to what he had seen as “objects,” “some items,” or “the items.” RP at 80-81. Even assuming it was the pipe or the baggie, momentary handling of them would not be sufficient proof of actual possession. *Callahan*, 77 Wn.2d at 31; *Spruell*, 57 Wn.App. at 24. The evidence is also insufficient to establish constructive possession. There can be no argument that Hodroj had dominion and control over the area in which the drugs were found; it was Duke's house. Because there was insufficient evidence from which to find Hodroj possessed the contraband, his conviction for possession of methamphetamine must be reversed and dismissed. *Callahan*, 77 Wn.2d at 32; *Spruell*, 57 Wn.App. at 389.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON UNANIMITY AFTER THE STATE FAILED TO ELECT ONLY ONE OF THE TWO ACTS AS THE BASIS FOR THE CHARGE OF POSSESSION OF METHAMPHETAMINE.

At trial the State introduced a glass pipe and a baggie of

methamphetamine and alleged that both items were in Hodroj's possession. The court committed reversible error when it allowed the jury to convict Hodroj of possession of methamphetamine without requiring the State to elect the act it relied on for the charge, and without providing the jury with a unanimity instruction.

A unanimity instruction was not requested at trial on the possession of methamphetamine charge. A trial court's failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error and may be raised for the first time on appeal. *State v. Kiser*, 87 Wn.App. 126, 129, 940 P.2d 308 (1997), *rev. denied*, 134 Wn.2d 1002 (1998); *State v. Holland*, 77 Wn.App. 416, 424, 891 P.2d 49 (1995); RAP 2.5(a)(3).

A defendant has a federal constitutional right to a jury trial and a corresponding constitutional right that the jury be unanimous as to its verdict. U.S. Const. amend. 6; Const. art. 1, § 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1998). Thus, a person may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Where the State charges one count of criminal

conduct and presents evidence of more than criminal act, to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, or the jury must be instructed that they all must agree as to what act or acts were proved beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411; *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Here, the State neither elected the act upon which it relied, nor did the trial court instruct the jury on unanimity. The State charged Hodroj with possession of methamphetamine, but presented evidence of more than one act that could constitute the offense. Police obtained a glass pipe which contained residue that tested positive for the presence of methamphetamine and a bag containing a substance that tested positive for methamphetamine. Either of these alleged acts standing alone could constitute possession of the drug.

Despite the clear testimony identifying two separate objects that could form the basis for the possession of methamphetamine charge, the court did not provide the jury with a *Petrich* instruction.

When a trial court commits an error of constitutional magnitude, the jury's verdict will only be affirmed if the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed.

705, 87 S. Ct 824 (1967); *Kitchen* 110 Wn.2d at 409.

When the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error. The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Kitchen* 110, Wn.2d at 411.

Therefore, a *Petrich* error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime. *Kitchen*, 110 Wn.2d at 412 (quoting *State v. Loehner*, 42 Wn.App. 408, 411-12, 711 P.2d 377 (1985), *review denied*, 105 Wn.2d 1011 (1986).

A rational juror could have found that Hodroj possessed the pipe found on the floor. A rational trier of fact could have also have found that Hodroj possessed the baggie. Because a rational juror could have a reasonable doubt as to either one of the alleged instances of possession attributed to Hodroj, the error was not harmless. *Kitchen*, 110 Wn.2d at 412.

3. **HODROJ WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL'S STIPULATION THAT HE WAS ON COMMUNITY SUPERVISION OR CUSTODY AT THE TIME OF THE COMMISSION OF HIS CURRENT OFFENSE AND COUNSEL'S FAILURE TO OBJECT TO WITNESS DUKE APPEARING**

IN COURT WHILE SHACKLED AND WHILE WEARING PRISON CLOTHING

The trial court determined that Hodroj's offender score was 6, with a standard range of 12 to 24 months, where he had five prior felony convictions. RP at 148. Defense counsel apparently stipulated that Hodroj was on community custody at the time the offense. RP at 147. Counsel's stipulation that the current offense was committed while Hodroj was on community custody or placement added one point to his offender score under RCW 9.94A.525.

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. *See State v. Ford*, 137 Wn.2d 472, 579-80, 973 P.2d 452 (1999).

In addition, the defense's sole witness—Tim Duke—appeared before the jury while shackled and while wearing prison clothing. RP at 143. By failing to object to Duke's prison clothing and shackles, and by failing to require that he appear in civilian attire, defense counsel denied Hodroj his constitutional right to effective representation.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, *i.e.*, that the representation fell below an objective standard of reasonableness under

the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, *i.e.*, that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)(citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn.App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. *State v. Doogan*, 82 Wn.App. 185, 917 P.2d 155(1996)(citing *State v. Gentry*, 125 Wn.2d 570, 646 888 P.2d 1105 (1995)).

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn.App. 348, 359, 743 P.2d 270

(1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988).

Here, trial counsel apparently stipulated to the trial court's adding one point to his client's offender score for being on community supervision or custody. The prejudice here is self-evident: but for counsel's stipulation to the finding, the trial court would not have added the one point based on this record, with the result that Hodroj's offender score would have been 5.

Regarding Duke's appearance before the jury while in shackles, counsel's failure to act satisfies both requirements to show ineffective assistance. Hodroj's defense depended almost entirely upon Duke's testimony, who took responsibility for all of the drugs found in the house, and whose testimony directly contradicted that of Officer Matua. Duke's credibility before the jury was critical to the success or failure of the defense. His credibility, however, was entirely undercut by the fact that he appeared during his testimony wearing prison clothing and while shackled. RP at 143. Appellate counsel is unaware of any Washington cases directly addressing the issue of ineffective assistance of counsel where counsel fails to act on his client's behalf regarding the appearance of a witness called by the defense. The Wisconsin Court of Appeals, however, has held that the absence of a defense objection to the in-court

appearance of a defense witness in a jail uniform and shackles could constitute ineffective assistance of counsel. As required by Wisconsin law, the court remanded for a special evidentiary hearing on the issue. *State v. Tatum*, 191 Wis.2d 547, 557, 530 N.W.2d 407 (1995).

Defense counsel's failure to ensure that a defense witness does not appear in prison clothing constitutes deficient performance. Counsel was ineffective when he did not raise this issue with the court at the time of Duke's testimony. This Court therefore should reverse Hodroj's conviction.

F. CONCLUSION

Based on the above, Aiba Hodroj respectfully requests this court to reverse and dismiss his conviction of possession of methamphetamine.

DATED: September 11, 2008.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line. The signature is stylized and cursive.

PETER B. TILLER-WSBA 20835
Of Attorneys for Aiba Hodroj

COURT OF APPEALS
CLARK COUNTY
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. AIBA NAJIB HODROJ, Appellant.	COURT OF APPEALS NO. 37344-1-II CLARK COUNTY CAUSE NO. 07-1-02036-5 CERTIFICATE OF MAILING
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The undersigned attorney for the Appellant hereby certifies that one original Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Aaiba Hodroj, Appellant, and Michael Kinne, Clark County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on September 11, 2008, at the Centralia, Washington post office addressed as follows:

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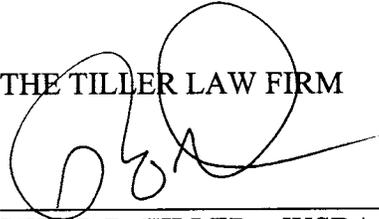
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