12-27-2012

State v. Sunday Appellant's Brief Dckt. 39169

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 39169 & 39170
	)	
v.	)	
	)	
TESHA JOWANE SUNDAY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE BRADLY S. FORD
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

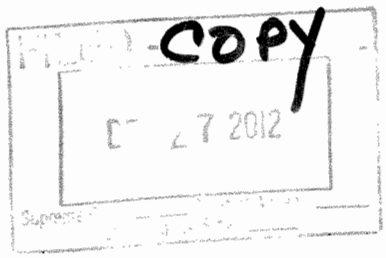
ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SPENCER J. HAHN
Deputy State Appellate Public Defender
I.S.B. #8576
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT



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STATEMENT OF THE CASE

Nature of the Case

Tesha Jowane Sunday appeals from her convictions for possession of a controlled substance (methamphetamine) and possession of drug paraphernalia following a jury trial. On appeal, Ms. Sunday asserts that the evidence was insufficient to support the jury's finding of guilt with respect to the possession of a controlled substance (methamphetamine) charge. Additionally, she asserts that the district court erred when it refused to provide requested jury instructions concerning the union of act and intent and one clarifying the meaning of the term constructive possession.

Statement of the Facts and Course of Proceedings

Ms. Sunday was charged with possession of a controlled substance (methamphetamine) (39170 R., pp.46-47) in a case that was consolidated with one involving misdemeanor charges of possession of a controlled substance (marijuana) and possession of drug paraphernalia. (39169 R., p.6.) The matter proceeded to a jury trial. (*See generally* Tr.)

Testimony at trial established that police encountered Ms. Sunday in a home during the execution of a search warrant seeking evidence concerning forged or stolen checks.[1] During a search of the master bedroom, police found several items of interest. On the bed, they found a wallet containing Ms. Sunday's identification. In a dresser

[1] The search warrant did not mention Ms. Sunday, and instead concerned a resident of the house named Paul Reid. (Tr.Vol.I, p.197, Ls.16-21.)

drawer, they found a spoon with white residue on it,[2] along with court paperwork in Ms. Sunday's name. On a camping chair in the bedroom, was a pack of "Camel 99's" cigarettes in which they found a baggie of suspected methamphetamine[3] and a glass pipe with residue.[4] And, in the bedroom closet, they found "what appeared to be marijuana on one of the shelves . . . ." (Tr.Vol.I,[5] p.125, L.18 – p.139, L.23; State's Exhibit Nos. 1, 3, and 4 (photographs of the cigarette pack).)

Detective Brockbank testified that Ms. Sunday was one of four or five people in the house when the warrant was executed, and that he learned from her that she had been staying in "the master bedroom" where she kept some of her belongings.[6] He described Ms. Sunday's demeanor during their conversation as "fairly – I would say calm." (Tr.Vol.I, p.198, L.24 – p.201, L.4.) No State witness saw Ms. Sunday anywhere but in the living room on the day the warrant was served. (*See generally* Tr.) Detective Brockbank further testified that Bethany Dinacola, who was found in the master bathroom at the time that the warrant was executed, admitted to owning "the meth pipe." Getting into or out of the master bathroom requires walking through the master bedroom. (Tr.Vol.II, p.148, L.19 – p.150, L.2.)

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[2] The residue on the spoon was tested for the presence of heroin and methamphetamine, and came back with a result of "no controlled substance detected." (Tr.Vol.II, p.154, L.15 – p.156, L.10.)

[3] Later testing established that the baggie contained methamphetamine. (Tr.Vol.II, p.83, L.7 – p.102, L.14.)

[4] Neither the pipe nor the residue was tested for the presence of controlled substances. (Tr.Vol.II, p.156, L.14 – p.157, L.19.)

[5] Four volumes of transcripts were prepared for appeal. The first, covering the first day of the jury trial, will be cited as "Tr.Vol.I." The second, covering the second day of the jury trial and a hearing on post-trial motions, will be cited as "Tr.Vol.II." The third, covering the sentencing hearing, will be cited as "Tr.Vol.III." The fourth, covering the hearing held on the motion for new trial and prepared in response to a Motion to Augment and to Suspend, will be cited as "Tr.Vol.IV."

The defense called several witnesses. The first, Paul Reid, testified that Ms. Sunday had been staying in the home, owned by his stepfather, for "just about a week or so," and that she and a man he knew as "Monkey" were staying in the master bedroom. It was his belief that the contraband located in the master bedroom belonged to Monkey. He knew Ms. Sunday to be a cigarette smoker, and testified that she smoked "Camel Crushes." When asked, on cross-examination, why he had not told anyone that Monkey was responsible for the items found in the master bedroom, he replied, "I was never asked." (Tr.Vol.II, p.123, L.3 – p.128, L.18.)

The next witness, Tyler Nourse, Ms. Sunday's son, testified that he was living in the home at the time the search warrant was executed. He said that Monkey, also known to him as Hannibal, was staying in the master bedroom and had been for three or four days, while his mother had only been staying in the master bedroom for one day. With respect to the contraband found in the master bedroom, he explained that "a girl named Beth claimed that those items were hers." Mr. Nourse further testified that he had placed his mother's wallet in the master bedroom for safekeeping after taking it out of a Chevrolet Blazer that was being used by "a lot of people there." (Tr.Vol.II, p.130, L.8 – p.134, L.22.)

Ms. Sunday requested that the district court provide the jury with two instructions. The first, Idaho Criminal Jury Instruction 305, provides, "In every crime of public offense there must exist a union or joint operation of act and [intent] [or] [criminal negligence]." ICJI 305 (brackets in original). The second was a statement that "mere proximity to contraband cannot establish constructive possession . . . ." Ultimately, the district court

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[6] Other than the wallet and driver's license found on the bed, Detective Brockbank testified that he didn't know what items in the room belonged to Ms. Sunday. (Tr.Vol.I, p.218, Ls.2-11.)

declined to give either of Ms. Sunday's requested instructions. (Tr.Vol.II, p.170, L.13 – p.176, L.25.)

Following submission of the case to the jury, it returned with verdicts of guilty on the charges of possession of a controlled substance (methamphetamine) and possession of drug paraphernalia, and not guilty on the charge of possession of a controlled substance (marijuana).[7] (Tr.Vol.II, p.217, L.11 – p.218, L.3.) On the charge of possession of a controlled substance (methamphetamine), the district court imposed a unified sentence of six years, with two and one-half fixed, suspended in favor of a six year term of probation (Tr.Vol.III, p.31, L.17 – p.32, L.23), while on the charge of possession of drug paraphernalia, the district court imposed a one hundred dollar fine. (Tr.Vol.III, p.43, Ls.16-19.) Ms. Sunday filed a Notice of Appeal timely from the entry of the judgment of conviction. (R., pp.193-97.)

[7] Defense counsel made several post-verdict motions, including an untimely motion for mistrial, a motion for judgment notwithstanding the verdict (which the district court properly treated as a Rule 29 motion), and a motion for new trial based on prosecutorial misconduct. (Tr.Vol.II, p.221, L.24 – p.223, L.9; R., pp.107-18.) The denials of the motions for mistrial and for new trial are not being appealed, and the subject of the Rule 29 motion is addressed in part I, *infra*, through a sufficiency argument.

ISSUES

1. Was the evidence sufficient to support Ms. Sunday's conviction for possession of a controlled substance (methamphetamine)?

2. Did the district court err in refusing to provide Ms. Sunday's requested jury instructions?

ARGUMENT

I.

The Evidence Was Insufficient To Support Ms. Sunday's Conviction For Possession Of A Controlled Substance (Methamphetamine)

A. Introduction

The State failed to present sufficient evidence to establish, beyond a reasonable doubt, that Ms. Sunday possessed a controlled substance (methamphetamine). Specifically, the State failed to establish that Ms. Sunday had knowledge of the presence of methamphetamine, let alone constructively possessed it, that was discovered in a closed cigarette pack found in the master bedroom of the house. As such, Ms. Sunday's conviction for possession of a controlled substance (methamphetamine) must be vacated, with the matter remanded for entry of a judgment of acquittal on the charge.

B. Standard Of Review

The standard of review for an appellate court regarding the sufficiency of the evidence to sustain a conviction was set forth in *State v. Peite*, 122 Idaho 809, 823 (Ct. App. 1992), in which the Idaho Court of Appeals noted that:

> A conviction will not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. On appeal, we construe all facts, and inferences to be drawn from those facts, in favor of upholding the jury's verdict. Where there is competent although conflicting evidence to sustain the verdict, we will not reweigh the evidence or disturb the verdict.

Id. (citations omitted). "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 586 (1996)).

C. The Evidence Was Insufficient To Support A Conviction For Possession Of A Controlled Substance (Methamphetamine)

As relevant to the possession of a controlled substance (methamphetamine) charge, the evidence adduced at trial established that a small baggie containing suspected methamphetamine[8] and a suspected methamphetamine pipe were found in a closed pack of "Camel 99's" cigarettes located on a camping chair in the master bedroom. On the bed in the same room was a purse, next to which was a wallet containing Ms. Sunday's identification. (Tr.Vol.I, p.127, L.10 – p.128, L.22; State's Exhibit Nos. 1, 3, and 4.)

Ms. Sunday was one of four or five people found in the house during the execution of the search warrant. In speaking with her, Detective Brockbank learned that she had been staying in the master bedroom where she kept some of her belongings.[9] Detective Brockbank described Ms. Sunday's demeanor during their conversation as "fairly – I would say calm." (Tr.Vol.I, p.198, L.24 – p.201, L.4.) No State witness saw Ms. Sunday anywhere but in the living room on the day the warrant was served, and there was no testimony presented that the pack of "Camel 99's" was in the master bedroom at a time when Ms. Sunday was in the bedroom. Furthermore, no testimony was presented that the pack of "Camel 99's" was tested for fingerprints or other evidence that Ms. Sunday ever exercised any control over the pack. (*See generally* Trs.) Finally, Detective Brockbank testified that Bethany Dinacola was found in the

[8] Later testing established that the baggie contained methamphetamine. (Tr.Vol.II, p.83, L.7 – p.102, L.14.)

[9] Aside from the wallet and driver's license found on the bed and the legal paperwork found in a dresser drawer, Detective Brockbank could not identify what other items in the room, if any, belonged to Ms. Sunday. (Tr.Vol.I, p.141, L.20 – p.143, L.3; p.218, Ls.2-11.)

master bathroom[10] at the time that the warrant was executed, and that she admitted to owning "the meth pipe."[11] (Tr.Vol.II, p.148, L.19 – p.149, L.22.)

Paul Reid testified that Ms. Sunday had been staying in the home, owned by his stepfather, for "just about a week or so," and that she and a man he knew as "Monkey" were staying in the master bedroom. He believed that the contraband located in the master bedroom belonged to Monkey. He knew Ms. Sunday to be a cigarette smoker, and that she smoked "Camel Crushes."[12] When asked, on cross-examination, why he had not told anyone that Monkey was responsible for the items found in the master bedroom, he replied, "I was never asked." (Tr.Vol.II, p.123, L.3 – p.128, L.18.)

Tyler Nourse, Ms. Sunday's son, testified that he was living at the home at the time the search warrant was executed. He said that Monkey, also known to him as Hannibal, was staying in the master bedroom and had been for three or four days, while his mother had only stayed in the master bedroom for one day. When asked about ownership of the contraband found in the master bedroom, he explained that "a girl named Beth claimed that those items were hers." Mr. Nourse also testified that he moved his mother's wallet from a Chevrolet Blazer to the master bedroom because the Blazer was being used by "a lot of people there," causing him to fear that it might get stolen. (Tr.Vol.II, p.130, L.8 – p.134, L.22.)

A number of Idaho cases have addressed what constitutes constructive possession of drugs or other contraband. In order to be found guilty on a constructive possession theory, the State must prove that the defendant had both knowledge of, and

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[10] The only way to enter the master bathroom is by going through the master bedroom. (Tr.Vol.II, p.149, L.20 – p.150, L.2.)

[11] The only "meth pipe" discussed at trial was the one found in the pack of "Camel 99's." (*See generally* Trs.)

control over, the contraband. *See State v. Warden*, 97 Idaho 752, 754 (1976) ("[W]here as here defendant is in non-exclusive possession of the premises upon which drugs were found there can be no legitimate inference that he knew of the drugs and had control of them in the absence of other circumstances such as incriminating statements which tend to support such inference.") (citations omitted); *State v. Garza*, 112 Idaho 776, 778 (Ct. App. 1987), ("Where, as here, the question is one of constructive possession, the state must prove that the defendant had both knowledge and control of the drugs."); *State v. Vinton*, 110 Idaho 832, 834 (Ct. App. 1986) (holding that, although the State "established the existence of cultivated marijuana and the status of the Vintons as joint owners of the property . . . [t]hat, in our view does not constitute substantial evidence to uphold the conviction of either defendant individually.").

In *State v. Burnside*, 115 Idaho 882 (Ct. App. 1989), the Court of Appeals had to determine, *inter alia*, whether there was substantial evidence to support the jury's guilty verdict on a charge of possession of psilocybin mushrooms with the intent to deliver. *Id.* at 885. The case began when the police, armed with a warrant to search Burnside's car for evidence of methamphetamine dealing, approached him and a passenger while they were eating in a restaurant.[13] During the search of the car, the police discovered both methamphetamine and psilocybin mushrooms. Burnside was charged with, and convicted of, possession of psilocybin mushrooms with intent to deliver and possession of methamphetamine.[14] *Id.* at 883.

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[12] As noted above, the contraband in this case was found in a pack of "Camel 99's," *not* a pack of "Camel Crushes." (State's Exhibit Nos. 1, 3, and 4.)

[13] Nothing in the opinion indicates that the police had ever observed the person eating with Burnside as a passenger in the vehicle.

[14] Burnside did not appeal the possession of methamphetamine conviction on sufficiency grounds. *Burnside*, 115 Idaho at 883.

The Court of Appeals noted that, in order to prove that Burnside possessed the psilocybin mushrooms, the State had to establish that he was "aware the mushrooms were in his car and that he exercised dominion or control over them." *Id.* at 885. It noted that "the jury could not infer constructive possession from the mere fact that Burnside occupied, with a passenger, the automobile in which the drugs were seized." *Id.* (citing *State v. Warden*, 97 Idaho 752 (1976)). The Court explained that, "in order to prevail, the state had to offer evidence which established that Burnside, individually, knew of the illegal drugs and that he exercised dominion over them." *Burnside*, 115 Idaho at 885.

In concluding that the State had not met its burden, the Court of Appeals analyzed the relevant facts:

> The mushrooms were discovered in a black vinyl bag in Burnside's automobile. When the police began their search of the car, Burnside told the officers that the bag was not his. At trial, Burnside's passenger, Redd, repeatedly declared that he, and not Burnside, owned the mushrooms. Evidence suggested that Burnside may have sold the mushrooms to Redd, several hours earlier, in a motel room. The mushrooms later were packaged for delivery. However, Redd claimed at trial, that he, and not Burnside, had packaged the mushrooms. When asked if he had packaged the mushrooms for Burnside, Redd stated that he could not remember.
>
> The evidence does not establish that Burnside exercised dominion and control over the mushrooms, when in the car. The state failed to rebut Redd's claim of sole ownership . . . Burnside's remark to the police, that the black bag was not his, suggests he probably knew the drugs were in his car. The motel sale also indicates Burnside's knowledge. However, neither piece of evidence establishes control. We find an absence of evidence on this element of the offense.

Id. at 885-86.

In the instant case, none of the evidence presented at trial established that Ms. Sunday physically possessed the cigarette pack in which the methamphetamine was discovered. As such, the only basis for conviction was under a theory of

constructive possession. As in *Burnside*, the controlled substance was in a location accessible to someone other than Ms. Sunday, and was concealed from view inside a closed container, for which Ms. Sunday did not admit ownership. Furthermore, a person found in a room adjacent to where the controlled substance was discovered (in a place that was only accessible by going through the master bedroom), Bethany Dinacola, acknowledged ownership of the pipe located in the cigarette pack. Finally, the State presented no evidence that the cigarette pack was in the master bedroom prior to the execution of the search warrant, let alone at a time when Ms. Sunday was present in the bedroom. Because the State failed to present any evidence that Ms. Sunday knew of the presence of the methamphetamine, let alone exercised dominion over it, it failed to establish that Ms. Sunday constructively possessed it. Accordingly, the judgment of conviction for possession of a controlled substance (methamphetamine) must be vacated, with this matter remanded for entry of a judgment of acquittal on the charge.

II.

The District Court Erred When It Refused To Provide Ms. Sunday's Requested Jury Instructions

A. Introduction

Ms. Sunday asserts that the district court erred when it refused to provide the jury with two instructions that she requested. Because both instructions properly stated the law, and the substance of the requested instructions is not contained in the instructions that were provided to the jury, she respectfully requests that this Court vacate her

convictions for possession of a controlled substance (methamphetamine)[15] and possession of drug paraphernalia and remand this matter for a new trial.

B. Standard Of Review

In determining whether a defendant's requested instruction should have been given, the appellate court "must examine the instructions that were given and the evidence that was adduced at trial." *State v. Johns*, 112 Idaho 873, 881 (1987). "[T]he refusal to give a particular requested instruction is not erroneous where the substance of the proposed instruction is covered elsewhere in the instructions given." *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 678 (1992) (citations omitted).

C. The District Court Erred When It Refused To Provide Ms. Sunday's Requested Jury Instructions

Idaho Code § 19-2132(a), in relevant part, provides:

> In charging the jury, the court must state to them all matters of law necessary for their information. Either party may present to the court any written charge and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused.

I.C. § 19-2132(a). "A defendant is entitled to an instruction on his legal theory of the case where there is some evidence in support of that theory." *State v. Evans*, 119 Idaho 383, 385 (Ct. App. 1991).

Ms. Sunday requested that the jury be given two jury instructions. The first, Idaho Criminal Jury Instruction 305, provides, "In every crime of public offense there must exist a union or joint operation of act and [intent] [or] [criminal negligence]." ICJI 305 (brackets in original). The second involved informing the jury that "mere proximity

[15] Obviously, Ms. Sunday's claim of instructional error with respect to the possession of a controlled substance (methamphetamine) charge will be moot if this Court grants her the relief requested in part I, *supra*.

to contraband cannot establish constructive possession . . . ." Ultimately, the district court declined to give either of the requested instructions. (Tr.Vol.II, p.170, L.13 – p.176, L.25.)

In refusing to give ICJI 305, the district court reasoned that the "instruction is for general intent crimes," and one of the charges in the case, possession of drug paraphernalia, "is a specific intent crime, and that I don't believe that that instruction is appropriate for that crime. And I think it would be confusing to try and – we'd have to come up with a whole series of instructions to say what that applies to." (Tr.Vol.II, p.170, Ls.13-24.)

Defense counsel objected, arguing that Idaho Code § 19-2132 required that the jury "'be instructed in all matters of law necessary for their information.'" (Tr.Vol.II, p.171, Ls.3-6 (quoting I.C. § 19-2132).) He went on to argue that the two charges of possession of a controlled substance were general intent crimes, and that it was, therefore, "appropriate to give an instruction when this is a general intent violation." (Tr.Vol.II, p.171, Ls.7-22.) In response, the district court reiterated its earlier comments, noting that because possession of drug paraphernalia was a specific intent crime, "[a]nd the annotations on this instruction in IDJI [sic] say that it should not be given in specific intent crimes . . . I think it would be confusing to the jury to give instructions as to specific intent and give this also." (Tr.Vol.II, p.171, L.23 – p.172, L.4.) Defense counsel reiterated the "necessity for this general intent" to be proven with respect to the two possession charges. (Tr.Vol.II, p.172, Ls.5-7.)

Idaho Criminal Jury Instruction 305 is based on Idaho Code § 18-114, which provides, "[i]n every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." I.C. § 18-114. The Idaho Supreme Court has

held that such an instruction "is and should be generally given." *State v. Baldwin*, 69 Idaho 459, 464 (1949). However, when a specific intent crime is charged, and the jury is properly instructed as to that charge, the failure to give such an instruction does not constitute reversible error. *Id.* at 465-66. When it comes to general intent crimes, "[t]he intent required by I.C. § 18-114 is not the intent to commit a crime but is merely the intent to knowingly perform the interdicted act or by criminal negligence the failure to perform the required act." *State v. Dolsby*, 143 Idaho 352, 355 (Ct. App. 2006) (citation omitted).

The remaining proposed instruction, "that 'mere proximity to contraband cannot establish constructive possession,'" is an accurate statement of the law in Idaho. *See Warden*, 97 Idaho at 754 ("It is further clear that in the absence of other circumstances evidence showing merely presence at the time of drug use is insufficient to support and establish conviction for the crime of possession."); *Garza*, 112 Idaho at 778 ("Mere proximity cannot establish constructive possession.") (citing *Warden*); *State v. Fairchild*, 121 Idaho 960, 968-69 (Ct. App. 1992) (finding no error in instructing the jury that, *inter alia*, "[m]ere proximity to the controlled substance cannot establish constructive possession"). Furthermore, the substance of the requested instruction was not covered elsewhere in the instructions that were given. With respect to possession, the jury was only instructed,

> A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

(Tr.Vol.II, p.181, Ls.9-15.)

That Ms. Sunday's theory of the case would have been supported by giving both requested instructions, thus establishing the prejudice she suffered from the district

court's refusal to give the instructions, can be seen from an examination of her closing argument. That argument focused on several issues, one of which was whether the State had established that Ms. Sunday knowingly possessed the items in question. Specifically, with respect to the contraband found in the bedroom, defense counsel argued, "[t]hey found a wallet in the room, so they want you to believe, based upon that, that [the contraband in the bedroom] belongs to her. That's not possession. We have no evidence of knowledge. *We have no evidence of intent.*" (Tr.Vol.II, p.200, L.21 – p.201, L.11 (emphasis added).) Defense counsel also argued that possession required more than showing mere proximity, in that the State had to establish that a person "must know of its presence and have physical control of it, or have the power and intention to control it . . . *there's nothing that says, if you're close to it, you're guilty. Mere proximity is not enough.*" (Tr.Vol.II, p.199, Ls.2-20 (emphasis added).) Additional prejudice from the refusal to give ICJI 305 can be determined from the fact that one of the offenses for which Ms. Sunday was found guilty, the only felony offense charged, was a general intent crime, along with the Idaho Supreme Court's holding that language similar to that contained in ICJI 305 "is and generally should be given," and the fact that the substance of the instruction was not covered elsewhere in the instructions.

In light of the arguments set forth above, Ms. Sunday asserts that the district court erred when it refused to provide the requested instructions. As such, her convictions for possession of a controlled substance (methamphetamine)[16] and possession of drug paraphernalia must be vacated, with this case remanded for a new trial at which the jury is properly instructed.

[16] Given the Idaho Supreme Court's reasoning in *Baldwin*, Ms. Sunday does not assert that the error in refusing to give ICJI 305 prejudiced her with respect to the specific intent crime of possession of drug paraphernalia.

CONCLUSION

For the reasons set forth herein, Ms. Sunday respectfully requests that this Court vacate her conviction for possession of a controlled substance (methamphetamine) and remand this matter for entry of a judgment of acquittal. In the alternative, due to instructional error, she respectfully requests that this Court vacate her conviction for possession of a controlled substance (methamphetamine) and remand this matter for a new trial on that charge. With respect to the charge of possession of drug paraphernalia, Ms. Sunday respectfully requests that this Court vacate her conviction and remand this matter for a new trial on that charge.

DATED this 27th day of December, 2012.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

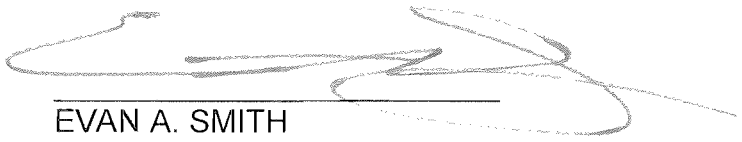
I HEREBY CERTIFY that on this 27th day of December, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TESHA JOWANE SUNDAY
6901 NOAH COURT APT 102
CALDWELL ID 83607

BRADLY S FORD
DISTRICT COURT JUDGE
E-MAILED BRIEF

MARK J MIMURA
ATTORNEY AT LAW
2176 E FRANKLIN RD STE 12
MERIDIAN ID 83642

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SJH/tmf