

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3442-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PERRY H. HOLLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Perry H. Hollis appeals from a judgment convicting him of first-degree sexual assault of a child and attempted first-degree sexual assault of a child and from an order denying his motion for a new trial on the ground that he was forced to proceed to trial wearing a Kenosha County Jail uniform. We affirm the trial court.

On the first morning of trial and before jury selection, defense counsel alerted the trial court to the fact that Hollis had been brought to trial in a jail uniform. The clothing in which Hollis was arrested was unsuitable to wear after having been stored for several months. Trial counsel stated, "I don't know what we can do about it because Mr. Hollis has no other family other than the alleged victim and the mother. So I don't know at this point what we can do about the situation." Defense counsel discounted the utility of an adjournment because there was no one who could bring Hollis any of his clothing. Defense counsel stated that it was presumptively prejudicial to have Hollis appear in jail garb at trial.

The trial court noted that proceedings had been scheduled to start at 9:00 a.m. and that at 3:00 p.m. trial counsel first raised an issue regarding the defendant's clothing for trial. The court questioned why the defendant did not have proper clothing a full six hours after the case was scheduled to begin. Defense counsel responded that he was unaware of the jail's clothing storage policy or of any responsibility on his part to ensure that his client had proper clothing and stated that "[t]here is enough things the attorneys have to get ready for without having to check into whether the jail has properly washed his clothing, and kept in a way that he can wear it."

The trial court stated that it was the responsibility of either the defendant or counsel to address the attire question and asked counsel whether he objected to the clothes Hollis was wearing. Defense counsel responded that given the condition of the clothes in which Hollis was arrested, the jail uniform was preferable. The court ruled that in the absence of another means of dressing the defendant, the case would go forward because Hollis's jail uniform was the best alternative. Hollis was convicted by a jury.

Postconviction, Hollis sought a new trial on the ground that his appearance in jail garb prevented the real controversy from being fairly and fully tried. At the postconviction motion hearing, the parties and the court agreed that the jail uniform that Hollis wore for that hearing was exactly like the one he wore at trial. Postconviction counsel presented a photograph of Hollis in the uniform taken shortly before the postconviction motion hearing began. The trial court inquired whether there were any insignia on the jail clothes. Postconviction counsel responded that jail insignia appear only on the back of the shirt. The trial court found that the clothes Hollis wore at trial consisted of a blue, loose fitting tunic shirt with a T-shirt underneath which was largely indistinguishable from clothes worn by people on the street. The court further found that the jury never saw the “Kenosha County Jail” insignia on the back of the clothes because Hollis was seated before the jury arrived and until after the jury departed and did not take the witness stand. The court also found that defense counsel had some responsibility to anticipate problems with the defendant’s attire for trial.

On appeal, Hollis argues that he was compelled to wear his jail clothing for trial because no other arrangements were made. A defendant’s right to a fair trial and the presumption of innocence is violated when a defendant is required by the court to appear at trial in identifiable prison clothing. *See Estelle v. Williams*, 425 U.S. 501, 512 (1976); *see also State v. Clifton*, 150 Wis.2d 673, 679, 443 N.W.2d 26, 28 (Ct. App. 1989). Where a defendant’s trial garb cannot be identified as jail clothing, the defendant is not prejudiced by his or her appearance in such clothing. *See id.* Here, the trial court made a factual finding at the postconviction motion hearing that the jail clothes were not so unique or emblazoned in a visible way that would cause someone to infer that the defendant was wearing jail clothing.

On this record, this finding is not clearly erroneous and it is upheld on appeal. *See State v. Altenburg*, 150 Wis.2d 663, 667, 442 N.W.2d 526, 528 (Ct. App. 1989) (trial court's findings of historical fact upheld unless clearly erroneous). We have reviewed the photograph of Hollis in the jail uniform which was made an exhibit at the postconviction motion hearing. We agree with the trial court that the clothing is nondescript and does not specifically call to mind jail clothing.

Because Hollis's argument that the real controversy was not fully and fairly tried is premised solely upon his appearance at trial in nondescript jail clothing, we need not address it further.

We note that the question of the defendant's clothing for trial could have been addressed by defense counsel prior to the day of trial. We reject the notion that defense counsel has too many things to prepare for and is unable to address such a question. Because the defendant's clothing for trial can impact upon his or her constitutional right to a fair trial and the maintenance of the presumption of innocence, trial counsel should devote some attention to this issue prior to the day of trial. *See Estelle*, 425 U.S. at 512 (decisions regarding the defendant's appearance at trial rest with the defendant and counsel).

Although it appears that defense counsel did not timely address the question of Hollis's attire for trial, we do not conclude that trial counsel was ineffective for that reason. To prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) that counsel's action constituted deficient performance; and (2) that the deficiency prejudiced the defendant's defense. *See State v. Brewer*, 195 Wis.2d 295, 300, 536 N.W.2d 406, 408 (Ct. App. 1995). Whether counsel's conduct amounted to ineffective assistance is a question of law

which we review de novo. See *State v. Smith*, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App. 1992). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. See *State v. Kuhn*, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993).

We have already upheld the trial court's finding that it was not apparent to the jury that Hollis attended trial in a jail uniform. Therefore, the absence of prejudice defeats any claim of ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

