

1986

# State of Utah v. Joseph L. Dowells : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David L. Wilkinson; attorney general; attorney for respondent.

Robert L. Froerer; Public Defender Association; attorney for appellant.

---

## Recommended Citation

Brief of Appellant, *Utah v. Dowells*, No. 8600225 (Utah Court of Appeals, 1986).

[https://digitalcommons.law.byu.edu/byu\\_ca1/298](https://digitalcommons.law.byu.edu/byu_ca1/298)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

H  
DOCUMENT  
U

IN THE COURT OF APPEALS OF THE STATE OF UTAH

0  
 TICKET NO. 8600225  
 STATE OF UTAH, :  
 Plaintiff/Respondent, :  
 vs. : Case No. 8600225-CA  
 JOSEPH L. DOWELLS, :  
 Defendant/ Appellant : No. 2

BRIEF OF APPELLANT

An appeal from a jury conviction of Appellant, in  
 the Second Judicial District Court, County of Weber,  
 State of Utah, the Honorable Judge David E. Roth presiding.

David L. Wilkinson  
 ATTORNEY GENERAL'S OFFICE  
 Attorney for the Respondent  
 236 State Capitol  
 Salt Lake City, Utah 84114

Robert L. Froerer  
 PUBLIC DEFENDER ASSOCIATION  
 Attorney for Appellant  
 205 26th St. Suite #13  
 Ogden, Utah 84401

**RECEIVED**  
 JUN 1 1987

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

STATE OF UTAH, :  
Plaintiff/Respondent, :  
vs. : Case No. 8600225-CA  
JOSEPH L. DOWELLS, :  
Defendant/ Appellant : No. 2

---

BRIEF OF APPELLANT

---

An appeal from a jury conviction of Appellant, in  
the Second Judicial District Court, County of Weber,  
State of Utah, the Honorable Judge David E. Roth presiding.

---

David L. Wilkinson  
ATTORNEY GENERAL'S OFFICE  
Attorney for the Respondent  
236 State Capitol  
Salt Lake City, Utah 84114

Robert L. Froerer  
PUBLIC DEFENDER ASSOCIATION  
Attorney for Appellant  
205 26th St. Suite #13  
Ogden, Utah 84401

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED ON APPEAL.....1  
STATEMENT OF THE CASE.....1  
STATEMENT OF THE FACTS.....2  
SUMMARY OF THE ARGUMENT.....2  
ARGUMENT.....3

THE PHOTOGRAPH LINEUP IN WHICH OFFICER ERICKSON  
IDENTIFIED THE DEFENDANT WAS IMPERMISSIBLY SUGGESTIVE SO AS  
TO TAINT THE PHOTO LINE-UP IN THAT THE DEFENDANT'S  
PHOTOGRAPH DIFFERED SUBSTANTIALLY FROM OTHER PHOTOGRAPHS IN  
THE LINE-UP.

CONCLUSION.....7

TABLE OF AUTHORITIES, CASES CITED

Simmons v. United States, 390 U.S. 377, 19 L.Ed. 2d 1247, 88  
S.Ct. 967 (1968).

STATUTORY AUTHORITY

Utah Code Annotated, Section 58-37-8(1)(A)(II), (1953) as  
ammended.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

STATE OF UTAH, :  
Plaintiff/Respondent, :  
vs. : Case No. 8600225-CA  
JOSEPH L. DOWELLS, :  
Defendant/ Appellant :

---

BRIEF OF APPELLANT

---

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The photographic lineup from which reserve police officer Ms. Tracy Erickson identified the Defendant was impermissibly suggestive, in that the Defendant's photograph was unique in being a driver's licence photograph, while all of the other photographs were mug shots.

STATEMENT OF THE CASE

This is a criminal action in which the Defendant was charged, pursuant to Section 58-37-8(1)(a)(II) Utah Code Annotated 1953 as amended, with distribution for value, of a controlled substance, to-wit heroin, a schedule I narcotic. The above charge is a second degree felony. The matter come to trial before the honorable David E. Roth, sitting with a jury, on the 24th day of July, 1986. The jury convicted Defendant of distribution of a controlled substance, and the Defendant was sentenced on the same day of the trial to serve a term of not

less than one (1), nor more than fifteen (15) years at the Utah State Prison. The Defendant appealed that conviction to this court on the 15th day of July, 1986.

#### STATEMENT OF THE FACTS

On April 7th, 1986, at 153 30th Street in Ogden, Utah, the Defendant allegedly sold two small tin foil wrappers containing heroin. Officer Tracy Erickson and a confidential informant, Gilda Franklin, approached the house located at 153 30th Street in order to make a planned purchase of heroin from a man named Clarence Bradley. (Tr. p.13, line 24). When told that Mr. Bradley was not present, but that one of the people present could sell them some heroin, officer Erickson and the confidential informant decided to leave and come back later. When the two reached the sidewalk, officer Erickson decided to attempt a buy at that time. Officer Erickson and Ms. Franklin then went back and bought some heroin from a man they believed to be Joseph Dowells.

#### SUMMARY OF THE ARGUMENT

The Defendant contends that the photographic line-up as administered by the police was impermissibly suggestive so as to cast reasonable doubt as to whether the Defendant was the person who actually sold the drugs to the police narcotics agents.

ARGUMENT

THE PHOTOGRAPH LINEUP IN WHICH OFFICER ERICKSON IDENTIFIED THE DEFENDANT WAS IMPERMISSIBLY SUGGESTIVE SO AS TO TAINT THE PHOTO LINE-UP IN THAT THE DEFENDANT'S PHOTOGRAPH DIFFERED SUBSTANTIALLY FROM OTHER PHOTOGRAPHS IN THE LINEUP.

In the cross-examination of officer Marci Vaughan, detective with the Ogden Police Department's narcotic division, Defendant's lawyer at trial, Mr. Allen brought out the fact that when Ms. Erickson was shown a photo array, the pictures included one photograph taken from a driver's license, and five others taken from police mug shots. The unique and different photograph, that taken from a driver's license, was that of the Defendant. Officer Erickson picked the unique photograph from the photo array as that representing the person from whom she had purchased the drugs. Following is the pertinent testimony of officer Vaughan during cross-examination by Mr. Allen:

Q. The photograph that was shown to Ms. Erickson, would you identify what that is?

A. This is a picture of Joseph L. Dowells.

Q. From what?

A. From the Utah driver's license.

Q. That's a copy of his driver's license, is that correct?

A. Yes.

Q. And the other photographs that were shown to Ms.

Erickson are all what type of photographs?

A. They are police photographs.

Q. Like mug shots?

A. Uh-huh.

Q. They are different than this photograph of Mr. Dowells, is that correct?

A. That's correct.

Q. Were there any other driver's license photographs shown to her?

A. Those were the only photographs shown to her.

Q. So of the six photographs, the one that was different in appearance is the one that was of the defendant, Mr. Dowells?

A. Yes.

Q. And how did you come up with this photograph to show her?

A. Because we knew his name was Joe, and Sergeant Warner was aware of several Joes. If you will look through those pictures, there is a "J" on three or four of them. And those are Joes also. And we came up with several Joes and showed the pictures to Tracy Erickson. And she indicated that that one right there was the one that she bought heroin from. In fact, it is written on the back. That is the actual photo that she looked at.

Q. And this was on April 16th?



A. The date is on the back, uh-huh.

Q. Almost ten days later?

A. Uh-huh. (Tr. p.44 line 23 through p.46 line 8).

It is clear from the above testimony that the picture from which officer Erickson identified Mr. Dowells was unique and different from the other pictures in the line-up. The fact that the photo line-up was not arranged until ten days after the purchase of the drugs adds to the prospect for misidentification or an impermissibly suggestive photo array.

The United States Supreme Court, in the case of Simmons v. United States, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), in considering the validity of convictions based upon eyewitness identification at trial following pretrial identification by photograph stated:

We hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Id. at 19 L.Ed. 2d 1253.

Furthermore, the Court in Simmons, in discussing the issue of whether a police administered photographic lineup might be administered in a way as to taint the identification procedure, stated:

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.

Clearly, officer Erickson was impermissibly influenced by the way in which the photographic line-up was administered. Because the photograph of the Defendant was different from the other photograph Ms. Erickson would have been immediately alerted to the difference. Also, the fact that "three or four" (Tr. at

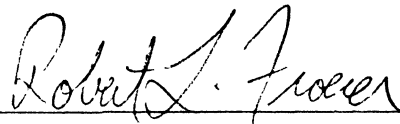
45 line 23) of the five mug shots shown to officer Erickson had the letter "J" written on them, if the "J" were in any way visible, which fact the transcript does not reveal, then the possibility for a tainted identification by photograph is increased even more.

Since officer Erickson did not know who she was buying the drugs from at the time she was making the purchase, and since she had no prior dealings with Mr. Dowells, there is a strong likelihood that officer Erickson was mistaken in her identification of Mr. Dowells. Therefore, there is reasonable doubt as to the Defendant's guilt.

CONCLUSION

Based on the foregoing arguments and a thorough review of the evidence, the Defendant respectfully requests this Court to reverse his conviction.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of May, 1987.



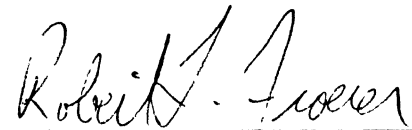
ROBERT L. FROERER

Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed 4 copies of the foregoing brief of Appellant to the Attorney General's Office, at 236 State Capitol Building, Salt Lake City, Utah 84114.

DONE this 20<sup>th</sup> day of May, 1987.

A handwritten signature in cursive script, reading "Robert L. Froerer", is written above a horizontal line.

ROBERT L. FROERER  
Attorney for Appellant

**THE PUBLIC DEFENDER ASSOCIATION, INC.**

OF WEBER COUNTY, STATE OF UTAH

205 26TH STREET, SUITE 13  
BAMBERGER SQUARE  
OGDEN, UTAH 84401

TELEPHONE  
(801) 627-3666

When Addendum Is Not Needed

Attn:

An Addendum is not included in this brief because this is not a responsive, reply, or rehearing brief, or a criminal case where jury instructions or other written orders are being challenged.

PUBLIC DEFENDER ASSOCIATION

Jolene Fason/Secretary