

2001

# Utah v. Trevor Powell : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



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.

Mark Shurtleff; Utah Attorney General; Counsel for Appellee.

Margaret P. Lindsay; Aldrich, Nelson, Weight, and Esplin; Counsel for Appellant.

---

## Recommended Citation

Brief of Appellant, *Utah v. Powell*, No. 20010995 (Utah Court of Appeals, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/3599](https://digitalcommons.law.byu.edu/byu_ca2/3599)

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.

**Paulette Stagg**  
Chief of the Court

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
JURISDICTION OF THE UTAH COURT OF APPEALS .....	1
ISSUES PRESENTED AND STANDARDS OF REVIEW .....	1
CONTROLLING STATUTORY PROVISIONS .....	2
STATEMENT OF THE CASE .....	3
A. Nature of the Case .....	3
B. Trial Court Proceedings and Disposition .....	3
STATEMENT OF RELEVANT FACTS .....	5
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	9
POINT I THE TRIAL COURT ERRED IN FAILING TO MAKE A SUFFICIENT LEGAL DETERMINATION ON THE RECORD AS TO THE CONSTITUTIONALITY OF THE EYE WITNESS IDENTIFICATION .....	9
POINT II THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THEEY EWITNESS IDENTIFICATION ON GROUNDS THAT IT WAS OBTAINED IN VIOLATION OF POWELL’S RIGHT TO DUE PROCESS .....	15
POINT III THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL DUE TO THE PROSECUTION’S FAILURE TO DISCLOSE POTENTIALLY EXCULPATORY EVIDENCE TO THE DEFENDANT .....	22
POINT IV THE CUMULATIVE EFFECT OF THE TRIAL COURT’S ERRORS REQUIRES REVERSAL OF POWELL’S CONVICTION .....	26
CONCLUSION AND PRECISE RELIEF SOUGHT .....	27
ADDENDA .....	29
Rule 12, Utah Rules of Evidence	
Motion to Suppress Eyewitness Identification	
Transcript of August 22, 2001, hearing	
Photo Lineup and Composite Sketch	

## TABLE OF AUTHORITIES

### **Statutory Provisions**

Utah Code Annotated § 76-6-302 .....	3
Utah Code Annotated § 78-2a-3(2)(j) .....	1
Utah Rules of Criminal Procedure, Rule 12 .....	9, 11, 12, 14, 26

### **Cases Cited**

<i>State v. Ashe</i> , 745 P.2d 1255 (Utah 1987) .....	2
<i>State v. Hay</i> , 859 P.2d 1 (Utah 1993) .....	2, 23
<i>State v. Labrum</i> , 925 P.2d 937 (Utah 1996) .....	11
<i>State v. Lafferty</i> , 2001 UT 19, 20 P.3d 342 .....	23, 25
<i>State v. Medina-Juarez</i> , 2001 UT 79, 34 P.3d 187 .....	26
<i>State v. Morgan</i> , 2001 UT 87, 34 P.3d 767 .....	23
<i>State v. Nelson</i> , 950 P.2d 940 (Utah App. 1997) .....	1, 10-12, 14, 16
<i>State v. Pearson</i> , 943 P.2d 1347 (Utah 1997) .....	23
<i>State v. Ramirez</i> , 817 P.2d 774 (Utah 1991) .....	9, 10, 12, 14-18, 26
<i>State v. Shabata</i> , 678 P.2d 785 (Utah 1984) .....	23-25
<i>State v. Verde</i> , 770 P.2d 116 (Utah 1989) .....	1

**IN THE UTAH COURT OF APPEALS**

---

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 20010995-CA
vs.	:	
	:	
TREVOR POWELL,	:	Priority No. 2
	:	
Defendant/Appellant.	:	
	:	

---

**JURISDICTION OF THE UTAH COURT OF APPEALS**

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(j).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether the trial court committed plain error in failing to make a sufficient legal determination on the record as to the constitutionality of the eyewitness identification. Because this issue was not directly raised in the trial court, this Court should review this issue for plain error. In reviewing an issue under a plain error standard of review this Court must determine whether the error was obvious and prejudicial. *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989). This Court reviews the underlying issue presented here for correctness: “Whether a trial court is required to make findings of fact and legally determine the reliability of an eyewitness identification before admitting such testimony is a question of law, which we review for correctness.” *State v. Nelson*, 950 P.2d 940, 943 (Utah App. 1997).

2. Whether the trial court erred in failing to suppress the eyewitness identification on grounds that it was obtained in violation of Powell's right to due process? This Court reviews the facts underlying the trial court's decision for clear error and the trial court's legal conclusions for correctness. *State v. Ashe*, 745 P.2d 1255 (Utah 1987). This issue was preserved for appeal in Powell's Motion to Suppress Eyewitness Identification (R. 30).

3. Whether the trial court erred in failing to grant a mistrial due to the failure of the prosecution to disclose potentially exculpatory evidence to the defendant prior to trial? This issue is reviewed under an abuse of discretion standard. *State v. Hay*, 859 P.2d 1, 6 (Utah 1993). This issue was orally preserved in a motion for a mistrial made during trial (R. 211 at 174-5).

4. Whether the cumulative effect of the trial court's errors require a reversal of Powell's conviction? This issue involves both questions of law and fact and this Court reviews the facts underlying the trial court's decision for clear error and the trial court's legal conclusions for correctness. *State v. Ashe*, 745 P.2d 1255 (Utah 1987).

### **CONTROLLING STATUTORY PROVISIONS**

The text of all controlling statutory and constitutional provisions is set forth in the Addenda.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Trevor Powell appeals from the judgment, sentence and commitment of the Fourth District Court after being found guilty as charged to Aggravated Robbery, a first degree felony under Utah Code Annotated § 76-6-302.

### **B. Trial Court Proceedings and Disposition**

Trevor Powell was charged by information filed in the Fourth Judicial District Court on or about May 17, 2001 with Aggravated Robbery, a first degree felony, in violation of § 76-6-302 Utah Code Annotated (R. 1).

On July 25, 2001, the Preliminary Hearing was held and Powell was bound-over for trial on the charge upon a finding of probable cause (R. 16).

On August 4, 2001, Powell filed a Motion To Suppress Eyewitness Identification, moving the court to suppress 1) the victim's identification of the defendant through photo array, 2) the victim's identification of the defendant at the preliminary hearing, and 3) the victim's identification of the defendant in any jury trial which may occur in the future (R. 30). Powell argued that the circumstances surrounding Shelton's identification of Powell are of such a nature that the identification is fatally unreliable and therefore violates Powell's constitutional rights of due process (R. 27). Shelton identified Powell from her memory of both the incident and the photo array (R. 21). The photo array depicted only Powell in dark clothing and Powell was the only individual wearing a mustache (R. 21). Shelton also originally told the police that the perpetrator was in his late 20s to early 30s, but Shelton admitted at the preliminary hearing that Powell's appearance is much younger than her original description (R. 20).

On August 10, 2001, a hearing was held regarding the motion to suppress eyewitness identification (R. 208). The court took the motion under advisement (R. 208: 21). On August 22, 2001, Powell's motion to suppress eyewitness identification was orally denied by the trial court (R. 83; 209 at 2). At trial, Powell renewed his motion to suppress and the trial court again orally denied the motion without making any additional findings (R. 211 at 167-168).

On September 6, 2001, a jury trial was held with Judge Burningham presiding (R. 211). During the trial, counsel for Powell learned that Shelton, the alleged victim, had viewed photo books in an effort to identify the assailant months before trial (R. 211 at 149). Powell motioned the trial court for a mistrial due to failure of the prosecution to provide potentially exculpatory evidence, but the court denied the motion (R. 211 at 174-5). The trial court also ordered all possible photo books that Shelton could have viewed to be sealed (R. 180; 211 at 175). The trial court also indicated that a new trial would be granted if exculpatory evidence was discovered in the photo books (R. 211 at 174). After a three and a half hour deliberation, the jury found Powell guilty of Aggravated Robbery (R. 178, 179).

On October 17, 2001, Powell was sentenced to an indeterminate term of five years to life in the Utah State Prison (R. 185). Powell was also ordered to pay \$789 in restitution (R. 184).

On October 19, 2001, the State filed Plaintiff's Notice To Court Of Material Review regarding the photo books to see whether Powell's picture was located therein (R. 188). Neither defense counsel nor State's counsel located Powell's picture among the books (R. 187).



On November 13, 2001, Powell filed a Motion For A New Trial (R. 195). Powell argued that during his trial, potential exculpatory information became known that was known by the prosecution but was not provided to the defense prior to the jury trial (R. 193). During Shelton's testimony at trial, she testified that she went to the police station the day after the incident and looked through some books containing photographs in an attempt to identify the assailant (R. 192). Shelton testified that she did not identify the assailant (R. 192). The court ordered these books to be sealed, but there had been no effort to maintain the integrity of the books at the Orem police department during the several months since the books were shown to the alleged victim (R. 191). Shelton further testified that she worked with an officer and drew a composite sketch of her assailant (R. 192). Officer Nielson did not provide the sketch to defense counsel because "the investigation had taken a different direction" and the sketch "did not look like the defendant" (R. 191-2). The State did not respond to the motion. The trial court never ruled on the motion.

On November 16, 2001, Powell filed his Notice Of Appeal (R. 197). On January 22, 2002, the case was transferred to this Court from the Utah Supreme Court (R. 203).

### **STATEMENT OF RELEVANT FACTS**

On January 8, 2001, Heidi Shelton was working at Perfect Tan in Orem, Utah (R. 211: 128). A man came into the store and walked up to the counter, pulled down his sleeve revealing a knife handle and demanded that Shelton "give me the money" (R. 211 at 132-3). Shelton testified "I opened the cash register and I just remember the sound of it but the money kept dropping off on the floor so I had to keep picking it up and put it back on the counter" (R. 211 at 134). The assailant was standing three or four feet from

Shelton during the incident, and finally grabbed the money and fled, the whole incident lasting 3 or 4 minutes (R. 211 at 135-6).

Shelton contacted the police about 20 seconds after the incident and described the assailant as having a sandy brown mustache, about 5 feet 8 inches, of average build, and 'in his late 20s to early 30s (R. 211 at 84, 131, 137, 147). Shelton also stated that he was wearing a black stocking hat that covered his hair and ears, a black nylon jacket, and blue jeans (R. 211 at 131-2). Officer Nielson testified that Shelton did say that the assailant's hair was lighter brown and scruffy looking, but Shelton testified that she could not see the assailant's hair (R. 211 at 83, 131).

Four months later, Officer Nielson called Shelton advising her they had a suspect and wanted her to view some photographs (R. 211 at 92). Shelton viewed all six photos in the lineup at the same time (R. 211 at 153). The only individual in the photo lineup that had on a black shirt and had a mustache was the individual in photo #4, Powell (R. 211 at 154). Powell was also the only individual in the photo lineup that should his shoulders, besides one other that was wearing a white shirt (R. 211 at 87-8). Shelton did not identify Powell immediately, but "went back and forth" looking at all of the photos (R. 211 at 101). After Shelton identified Powell, Officer Nielson told her "this is who we actually had in mind of who you just picked" (R. 211 at 155). In the photo lineup, it was impossible to distinguish a persons' build or height (R. 211 at 97, 156).

Both Nielson and Shelton testified that at the preliminary hearing, Powell was the only person dressed in an orange jump suit and wearing handcuffs (R. 21; 211 at 96). Although Shelton told the police that the assailant was in his late 20s or early 30s, Shelton testified that Powell does not look like he is in his late 20s or early 30s (R. 211 at 157). Shelton said that the assailant had deep set eyes, and that helped her identify

Powell, although Shelton did not make this statement to the police in her description of the assailant (R. 211 at 82, 138).

At the end of trial, the Defense discovered on cross-examination that the prosecution withheld the following potentially exculpatory information from the Defense (R. 211 at 165). The day after the robbery incident, Shelton went to the police station and looked at pictures but she was unable to identify anyone (R. 211 at 149, 150). Shelton also assisted in making a sketch or a composite drawing of the assailant by computer (R. 211 at 161, 164). Shelton testified that the composite computer drawing was “as close as I could get him to” (R. 211 at 177).

Officer Nielson thought the composite sketch was good enough to release to other law enforcement agencies (R. 211 at 186-7). But after finding another lead, Nielson testified that he did not feel that the composite drawing was relevant because “it didn’t look like [Powell] at all” (R. 211 at 187). Shelton testified that the composite drawing “helped me, actually did refresh my memory” (R. 211 at 163).

### **SUMMARY OF ARGUMENT**

Powell asserts that the trial court committed plain error in failing to make sufficient legal findings on the record as to the constitutionality of the eyewitness identification as required by Utah law. The trial court, considering all the circumstances surrounding the identification, is to specifically consider five factors to determine the reliability of eyewitness identification. The Utah Rules of Criminal Procedure specifically requires courts to make factual findings regarding pre-trial motions on the record, and Utah case law specifically requires trial courts to make factual findings on the

record concerning motions to suppress eyewitness identification that might be constitutionally unreliable. Powell asserts that the trial court made no such findings regarding Powell's motion to suppress the eyewitness identification and that this failure requires a reversal of his conviction.

Powell also asserts that the trial court erred in denying his motion to suppress the eyewitness testimony because of the suggestiveness of the photo array, the length of time between the incident and the identification, and eye witness' discrepancy regarding the description of the robber.

The trial court further erred in denying Powell's motion for a mistrial due to the potential exculpatory evidence that was withheld from the Defense. The prosecution withheld evidence that the eyewitness victim viewed photo books at the police station the day after the incident in an attempt to identify the robber and that she made a composite sketch of the assailant. This potential exculpatory evidence was prejudicial to Powell because his photo might have been in the books she viewed, but there is no way to tell because the integrity of the books was not even partially secured until after trial, almost nine months later.

Finally, if this Court decides that none of these errors are sufficient to require a reversal, Powell asserts that the cumulative effects of these errors denied him a fair trial and thus requires that his conviction be reversed.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT ERRED IN FAILING TO MAKE A SUFFICIENT LEGAL DETERMINATION ON THE RECORD AS TO THE CONSTITUTIONALITY OF THE EYE WITNESS IDENTIFICATION**

Prior to trial, Powell filed a motion to suppress eyewitness identification on August 4, 2001 (R. 30). Although the court held a hearing to consider the motion on August 10, 2001, the court did not make a ruling on the motion at that time (R. 208: 21). On August 22, 2001, the court denied the motion. Powell asserts that the court failed to state sufficient findings on the record as required by Utah law (R. 83; 209 at 2; 211 at 168). Powell asserts that this failure constitutes plain--or obvious and prejudicial--error. Utah case law and Rule 12 of the Utah Rules of Criminal Procedure require that the trial court make adequate findings in deciding pre-trial motions.

Moreover, Utah law requires that the trial court consider five factors when determining whether eyewitness testimony is constitutionally reliable. These factors were established in *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991), and are as follows:

1) The opportunity of the witness to view the actor during the event; 2) the witnesses degree of attention to the actor at the time of the event; 3) the witness's capacity to observe the event, including his or her physical and mental acuity; 4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and 5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.

Moreover, “Under *Ramirez*, the trial court must initially determine whether eyewitness testimony is constitutionally reliable before it can be admitted.” *Nelson*, 950 P.2d at 944. “The court must consider all the circumstances surrounding the identification and appraise those circumstances in light of five factors.” *Id.* The court cannot abdicate this responsibility by leaving the question to the jury. *Id.* at 943. “To assume the facts and perform the reliability on appeal would eviscerate the *Ramirez* holding requiring the trial courts, as gatekeepers, make the initial determination as to admissibility.” *Id.*

In *State v. Nelson*, 950 P.2d 940 (Utah App. 1997), the defendant was convicted of aggravated robbery mainly on the identification of a single witness. *Id.* at 942. The witness, who is Caucasian, claimed to have seen one of her assailants for about 30 seconds, describing the person as “black,” with curly hair, standing five feet six inches tall, “nicely dressed . . . not wearing shorts or anything like that,” but wearing pants and a shirt. *Id.* at 941. About 20 minutes after the incident, police presented the defendant to the witness for identification. *Id.* at 942. The defendant was “the only woman presented for identification . . . was handcuffed, surrounded by police, placed next to a patrol car, and her face illuminated by a flashlight.” *Id.* The defendant is African-American, with curly brown hair, and is five feet two inches tall. *Id.* The witness identified the defendant. *Id.*

Before trial, the defendant filed a motion to suppress the eyewitness identification as unreliable under both the Utah and Federal Constitution. *Id.* At the suppression hearing, the defendant was prepared to “proffer expert testimony regarding the reliability of eyewitness identification,” but the court denied the motion and “made no factual findings and made no legal determination as to the constitutional reliability of the eyewitness identification.” *Id.* This Court found that “the suppression hearing record

shows that the trial court did not make findings as required by Rule 12 of the Utah Rules of Criminal Procedure.” *Nelson*, 950 P.2d at 943. This Court stated, “the trial court’s failure to make any findings and failure to make any legal determination as to the constitutional admissibility of the eyewitness identification testimony was error.” *Id.* at 944. The court added, “this error was harmful because defendant was convicted primarily upon the testimony of the sole witness . . . . Thus, there is a reasonable likelihood of a more favorable result had the identification not been admitted.” *Id.* This Court vacated and remanded for a new trial. *Id.*

In a similar procedural case, *State v. Labrum*, 925 P.2d 937 (Utah 1996), the defendant’s sentence was enhanced under the “gang enhancement” statute, but the trial court failed to enter written findings of fact regarding the sentencing enhancement. *Id.* at 938-9. The Utah Supreme Court found that the trial court’s failure to enter written findings of fact regarding the “gang enhancement” provision as required by Utah Code Annotated § 76-3-203.1 was plain error. *Id.* at 941. The Court found that the judge must make “discrete, indispensable findings” because these findings “establish the legal basis that justifies imposition of the prescribed penalty.” *Id.* at 940.

As in *Nelson* and *Labrum*, Powell’s motion to suppress eyewitness identification was not properly ruled on or recorded as required by Utah case law and statutory law. This Court in *Nelson* found that trial courts must make its findings on the record to satisfy Rule 12 of the Utah Rules of Criminal Procedure regarding whether eyewitness identification testimony is constitutionally reliable before it can be admitted. *Nelson*, 950 P.2d at 943, 944. Rule 12(c) provides: “A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later

determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.”

The suppression hearing and pretrial conference records show that the trial court did not make the findings required by Rule 12 of the Utah Rules of Criminal Procedure and Utah case law, nor did the trial court consider the five pertinent factors outlined by *Ramirez* (R. 208 at 21). Although the court during trial asked the prosecution to “draft the findings and the rulings,” no such record exists (R. 211 at 168).

At the pretrial conference on August 22, 2001, the trial court denied Powell’s motion to suppress the eyewitness identification, stating:

I’m going to deny that motion. I have the original here, and all the reasons given regarding the dark shirt, there are two others, although their angles are a little different, but also are wearing dark shirts. The mustache is not that noticeable. In fact, the bottom right person looks like they’ve even taken the mustache off of him. It looks very lighter around his mouth area. The witness that testified had no hesitation when she picked out the individual. I looked at this; it does not single out any person. I had third parties look at it and I said, “Tell me, does this appear – who would you pick if you wanted to from this,” and they actually thought that the person with the long hair was the one that was more single out than the defendant. So I am going to deny the motion to suppress this.

This was the trial court’s complete statement regarding Powell’s motion to suppress the eyewitness identification. (R. 209: 2).

The trial court completely failed to enter any findings under the five *Ramirez* factors required by this Court and Utah statutory law. *See Ramirez*, 817 P.2d at 781; *Nelson*, 950 P.2d 940. *See also State v. Robertson*, 932 P.2d 1219 (Utah 1997).

Although the trial court partly addressed the fourth factor in *Ramirez* by stating “the witness that testified had no hesitation when she picked out the individual,” this identification occurred at the preliminary hearing where Powell was the only person in



the courtroom in handcuffs wearing bright orange inmate clothing and the only person sitting at the defense table with the defense attorney (R. 21).

Also, the trial court failed to consider the remaining aspects under the fourth factor: “whether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion.” The trial judge had evidence before him that the witness’s testimony was in fact not consistent. The witness initially testified that the assailant was in his late 20s to early 30s (R. 21). At the preliminary hearing, the witness admitted that Powell did not look to be in his late 20s to early 30s (R. 20). The trial court also heard evidence that the identification was the product of suggestion (R. 20-1). But the trial court failed to make any findings regarding the consistency of the witness’s identification and whether it was the product of suggestion.

The findings that the trial court made are erroneous and irrelevant. It appears the trial court relied on third parties, asking them which person in the photos appeared to be the most singled out (R. 209: 2). The fact that some third party believed that the person with long hair was the most singled out is irrelevant to Powell’s motion to suppress eyewitness identification. The critical issue regarding the photos was whether the photo lineup was suggestive to the witness, not to third parties (R. 20-1). The witness had testified that her assailant was wearing black clothes and had a mustache (R. 21). Powell was the only one in the photo lineup that had on black clothes and was wearing a mustache (R. 21). It is irrelevant that some third party considered the individual with long hair as the most singled out; the issue was whether the photo lineup was unduly suggestive to the witness, not some third party that knows nothing of the assailant.

And the limited findings the trial court did make regarding the photo lineup are erroneous. First, the court said that “two others” are wearing dark shirts besides Powell (R. 209: 2). At the preliminary hearing and at trial, the witness testified that only one individual had on black clothes (R. 207: 14; 211 at 154). Upon nearly microscopic examination, the photos show a small particle of dark clothing being worn by two other individuals, something that the eyewitness failed to notice. Second, the trial court stated, “the mustache is not that noticeable” (R. 209: 2). But the witness testified that only the defendant was wearing a mustache, and she made no mention that one individual’s mustache was recently shaved off (R. 207: 13; 211 at 154). Finally, the trial court stated, “I looked at this; it does not single out any person” (R. 209: 2). Again, the relevant issue before the trial court was whether the photo lineup was suggestive to the witness due to the witnesses prior description of the assailant and the suggestive circumstances surrounding the photo lineup; the issue was not whether the photo lineup singled out any certain individual.

The fact that the trial court did not look at all the circumstances surrounding the eyewitness identification under *Ramirez* and failed to record the findings on the record as required by Rule 12 under *Nelson* is obvious and prejudicial error. This Court should reverse and remand Powell’s conviction because Powell was convicted on the testimony of one witness, and there is a reasonable likelihood of a more favorable result had the identification not been admitted.

## **POINT II**

### **THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EYEWITNESS IDENTIFICATION ON GROUNDS THAT IT WAS OBTAINED IN VIOLATION OF POWELL'S RIGHT TO DUE PROCESS**

This issue poses a difficult problem for this Court because the trial court failed to make adequate findings, thus denying this Court of its appellate review role. Powell asserts that he was denied his constitutional right to due process because the circumstances surrounding the eyewitness identification were inherently suggestive and because the prosecution failed to introduce potentially exculpatory evidence during the preliminary hearing. The prosecution failed to produce the composite drawing that Shelton made the day after the incident, thus denying the trial court the opportunity to view this discrepancy in Shelton's testimony.

Both the United States Constitution and the Utah Constitution grant individuals the right to due process. The Utah Supreme Court has indicated that this right to due process is central to a determination as to the constitutional reliability of eyewitness identification. *State v. Ramirez*, 817 P.2d 774, 778 (Utah 1991). Moreover, "The burden of demonstrating the admissibility of the proffered evidence is on the prosecution. It must lay a foundation upon which the trial court can make any necessary preliminary factual findings and reach any necessary legal conclusions." *Ramirez*, 817 P.2d 774 (Utah 1991).

After the prosecution has fulfilled its burden, the court takes the role of judge and jury:

In determining whether an identification is reliable, the court must consider "all the circumstances" surrounding the identification and appraise those circumstances in light of five factors. Based on federal case law, and the Utah Supreme Court's decision in *State v. Long*, 721 P.2d 483, 493 (Utah 1986), the *Ramirez* court established a separate, more indepth [sic] due process analysis of

the reliability of eyewitness identifications under the Utah Constitution. In determining reliability, a court must consider these pertinent factors: 1) The opportunity of the witness to view the actor during the event; 2) the witness's degree of attention to the actor at the time of the event; 3) the witness's capacity to observe the event, including his or her physical and mental acuity; 4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and 5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.

*State v. Nelson*, 950 P.2d 940, 943 (Utah App. 1997), (citations omitted).

In *State v. Ramirez*, 817 P.2d 774 (Utah 1991), the defendant was convicted of aggravated robbery, and appealed claiming that an eyewitness identification of him was unconstitutionally suggestive and unreliable. *Id.* at 775-6. The facts of *Ramirez* are as follows: Shortly before one o'clock, three people were leaving a Pizza Hut where they were accosted and robbed by two men wearing white scarves across their faces. *Id.* at 776. One man had a pipe and hit one of the witnesses (Wilson) with it while the other assailant held them at gun point. *Id.* Both robbers fled and the witnesses contacted the police. *Id.* A short time later, an officer that had not yet heard about the robbery observed two men walking south in the same neighborhood as the incident. *Id.* Upon seeing the police car, one man fled from sight, so the officer stopped the other man. *Id.* A few minutes later, other officers arrived and when word came that a suspect had been detained, the officers with the witnesses told the witnesses that they "had found someone who matched the description of one of the robbers." *Id.* at 777. The identification showup then occurred under the following circumstances:

It was approximately one o'clock in the morning. Ramirez, a dark complexioned Apache Indian, was handcuffed to a chain link fence. He was the only suspect present and was surrounded by police officers. The police turned the headlights and spotlights from the police cars on Ramirez to provide enough light. The witnesses viewed Ramirez by looking at him from the back seat of a police car.

Of the three witnesses, only Wilson identified Ramirez as the masked man with the gun; the other two witnesses were unable to identify him as one of the robbers.

*Id.*

The Utah Supreme Court reviewed these facts and determined that the eyewitness identification was properly admitted. The Court first considered “the opportunity of the witness to view the actor during the event.” *Ramirez*, 817 P.2d at 782. The witness testified that he viewed the gunman “a minute” or longer and the distance between them was about “ten feet.” *Id.* Although the witness could not see the gunman’s face, he testified that he “could see enough to know” and that the gunman had small eyes. *Id.*

The second factor that the Court considered was the witness’s degree of attention to the gunmen. *Ramirez*, 817 P.2d at 783. The Court found that the witness “was fully aware that a robbery was taking place.” *Id.* The witness testified that he stared at the gunman, trying to get a good description. *Id.*

Regarding the third factor, the Court found that although the witness experienced a heightened degree of stress, there was nothing in the record to indicate that the witness was impaired and unable to view the gunman. *Id.*

Under the fourth factor, the Court found that the time between the event and the identification was minimal, only being 30 minutes. *Id.* The court also found discrepancies in the witness’s identification when the witness testified for the first time at trial that he had seen tattoos on the gunman. *Id.*

Under the fifth factor, the Court stated that the “blatant suggestiveness of the showup is troublesome.” *Ramirez*, 817 P.2d at 784. The witness viewed the gunman from the back seat of a police car with remarks of the police officers prior to the showup that they had apprehended someone who fit the description of one of the robbers. *Id.*

The Court in *Ramirez* concluded “having considered all the factors, we find this to be an extremely close case,” but “considering the facts in the light most favorable to the trial court’s decision . . . we cannot say that [the] testimony is legally insufficient.” *Id.*

In the case at bar, notwithstanding the fact that the trial court failed to make adequate *Ramirez* findings on the record, the circumstances surrounding Shelton’s identification of Powell are unreliable due to the inconsistency of Shelton’s identification, the suggestiveness surrounding the photo lineup, and the prosecutions failure to provide the trial court with all the exculpatory evidence.

#### **A. Spontaneity and Consistency of Shelton’s Identification**

Shelton’s description of the assailant and her identification of Powell are inconsistent and the product of suggestion. In determining whether the identification was spontaneous and remained consistent there after, or whether it was a product of suggestion, depends on consideration of the following factors:

The length of time that passed between the witness’s observation at the time of the event and the identification of the defendant . . . the witness’s exposure to opinions, descriptions, identifications or other information from other sources, instances when the witness or other eyewitness to the event failed to identify the defendant, instances when the witness or other eyewitness gave a description of the actor that is inconsistent with the defendant, and the circumstances under which the defendant was presented to the witness for identification.

*Ramirez*, 817 P.2d at 783 (citation omitted).

Unlike *Ramirez*, where only 30 minutes passed between the witness identification of the suspect, four months passed before Shelton identified Powell (R. 21). Also, Shelton initially described her assailant in the age range of his late 20s to early 30s (R. 21). But at the preliminary hearing, Shelton admitted that Powell did not look that age (R. 20).

Further, Shelton's identification at the preliminary hearing was inherently suggestive. Powell was the only person wearing handcuffs, bright orange inmate clothing, and the only person sitting with the defense attorney (R. 21). Moreover, when asked whether she was identifying Powell from her memory of the incident or from her memory of the photo array, Shelton replied she was identifying Powell from both, suggesting that Shelton had been influenced by the suggestive photo array prior to her identification of Powell in person at the preliminary hearing (R. 21).

Shelton's identification is unreliable and should have been compressed considering the length of time between the incident and the identification, Shelton's description to the police about the age of her assailant and the discrepancy in his actual age and looks, and the inherent suggestiveness at the preliminary hearing.

#### **B. Suggestiveness of Photo Lineup**

Shelton's identification of Powell in the photo lineup was the product of suggestion. About four months after the incident, Officer Nielson phoned Shelton and explained to her "that we had a suspect in mind and I would like her to look at some photos" (R. 211 at 92). The photo array included six people, and Powell was the only person wearing black clothing and the only person with a mustache (R. 28).

Nielson testified that Shelton provided a description of her assailant (R. 211 at 82). Nielson testified that Shelton stated the person was about 5 feet 8 inches and "not overweight just average in build and statute" (R. 211 at 82). Nielson testified that Shelton did not say anything about the assailant's eyes (R. 211 at 82). Nielson testified that Shelton did say that the assailant's hair was "lighter brown" and "scruffy looking," but Nielson did not include this statement in his report, even though he stated he would certainly want to make a record of that in a police report (R. 211 at 83). Nielson testified

that he typed the information into the computer that randomly selected the photo lineup (R. 211 at 84). Nielson testified that he typed in the following identifiers: white male, age 20 to 30s, brown hair, average build (R. 211 at 84, 97). Nielson testified that at the time he typed this information into the computer lineup program, "I already had the suspect in mind" (R. 211 at 84). Neilson testified that he did not type into the computer that the assailant had a mustache, although Shelton described the individual as having a mustache (R. 211 at 84). Nielson testified that if he had typed into the program "mustache" as an identifying element, then the photos would have had people with mustaches (R. 211 at 84-5). Nielson testified that the photos usually do not have a lot of clothing, only a head shot (R. 211 at 85).

Nielson testified that while looking for five other individuals to include in the photo lineup, "You don't want to make a photo lineup with exactly the same, you know, even, you know, in my training you don't want to make a photo lineup that every person is almost exactly the same to where a person can't identify. I think it is phrased as you don't want to make it that somebody who is familiar with that individual can't pick that person out of it" (R. 211 at 85). Nielson further testified that none of the individuals in the photos had a mustache except for Powell (R. 211 at 86). Nielson also testified that the photo of Powell shows his shoulders and that he is wearing a black shirt (R. 211 at 87). Nielson testified that the other photos do not show any of the other individuals' shoulders, except one that was wearing a white shirt (R. 211 at 87-8).

Nielson testified that he showed the photo lineup to Heidi Shelton and that he knew who the suspect was as did the other officer (R. 211 at 73-4, 95). Neilson testified that he did the actual speaking and told Shelton "I advised her that the suspect may or may not be in that photo lineup. . . . I asked her to look at it to see if she recognized



anybody in the photo lineup. . . . If she didn't to tell me also and not to pick somebody out" (R. 211 at 74, 95). Nelson testified that "before I show them the photo lineup I instruct them to look at the photos and if there is something there that is familiar to pick that person out, and not to pick any if they are not familiar to them" (R. 211 at 92).

Nielson testified that he told Shelter "I advised [Shelter] before I came down that we had a suspect in mind and I would like her to look at some photos" (R. 211 at 92). Nielson testified that he could not remember telling Shelton that it was just as important to clear innocent people as it was to find the guilty party (R. 211 at 84). Nielson testified that Shelton "went back and forth" looking at all the photos before she picked out Powell (R. 211 at 101).

Shelton did not immediately pick out Powell as the suspect, but "went back and forth" looking at all the photos before she picked Powell (R. 211 at 101). After she picked Powell, Officer Nielson informed her "this is who we actually had in mind" (R. 211 at 155).

Although a careful look at the photos reveals that two other individuals in the photo are wearing shirts that may be dark, Shelton testified that only one individual in the photo lineup had on a dark shirt (R. 211 at 154).

The suggestiveness of this photo array, including the fact that Shelton testified at the preliminary hearing that she could identify Powell because of both her memory and the photo array show that Shelton's identification was unreliable and should not have been admitted in trial.

**C. Prosecutions Failure to Present Exculpatory Evidence at the Preliminary Hearing**

At trial, the Defense learned for the first time that Shelton went to the police station the day after the incident and made a composite sketch of the assailant and also reviewed photo books attempting to identify her assailant, but this was unsuccessful (R. 211 at 137-8, 139, 161). This evidence shows the possibility that Shelton previously failed to identify Powell, but because Powell was not aware of this viewing, it is impossible to tell. The composite sketch clearly shows the discrepancy in Shelton's identification, but again the prosecution's failure to bring forth this evidence denied the trial court further grounds to find the identification unreliable.

Considering all of the circumstances surrounding Shelton's identification of Powell at the photo array and at the preliminary hearing, her identification is unreliable and the trial court erred in allowing the identification to be admitted at trial.

**POINT III**

**THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL  
DUE TO THE PROSECUTION'S FAILURE TO DISCLOSE POTENTIALLY  
EXCULPATORY EVIDENCE TO THE DEFENDANT**

On cross-examination, the Defense discovered that the prosecution withheld potential exculpatory evidence, namely that Shelton went to the police station the day after the incident and looked at pictures in attempt to identify her assailant (R. 211 at 149-50). Powell made a motion for a mistrial due to the potential exculpatory evidence being withheld, but the court denied the motion (R. 211 at 174-5). A mistrial should have been granted because the potentially exculpatory evidence possibly could have vindicated Powell. "On appeal from a denial of a motion for mistrial based on

prosecutorial misconduct, because the trial court is in the best position to determine an alleged error's impact on the proceedings, we will not reverse the trial court's ruling absent an abuse of discretion." *State v. Hay*, 859 P.2d 1, 7 (Utah 1993). *See also State v. Pearson*, 943 P.2d 1347, 1352 (Utah 1997). In addition, this Court "will reverse on the basis of prosecutorial misconduct only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a favorable result for the defendant." *Id.*

"Prosecutors have a duty under both the Utah and United States Constitutions to disclose material, exculpatory evidence to the defense." *State v. Lafferty*, 2001 UT 19, ¶147, 20 P.3d 342. "We hold that fundamental fairness, the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through . . . withholding evidence." *State v. Morgan*, 2001 UT 87, ¶15, 34 P.3d 767.

"Information known to police officers working on a case is charged to the prosecution since the officers are part of the prosecuting team. Neither the prosecutor nor officers working on a case may withhold exculpatory evidence or evidence valuable to a defendant." *State v. Shabata*, 678 P.2d 785, 788 (Utah 1984). "The important question here is whether defendant was prejudiced by the prosecution's failure to disclose the [evidence]. For purposes of this question, the good or bad faith of the prosecutor is irrelevant. 'If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.'" *Shabata*, 678 P.2d at 788 (citing *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 2401 (1976)).

In *State v. Shabata*, 678 P.2d 785 (Utah 1984), the defendant, convicted of second degree murder, argued that the prosecution withheld exculpatory evidence that denied him his right to a fair trial. *Id.* at 786-7. Prior to the trial, officers informed both the prosecution and defense that the state's witness "had some involvement with illicit drugs." *Id.* The defendant had filed a pretrial motion for discovery requesting "the plaintiff to inform the defendant of any and all evidence which would exonerate the defendant or which would demonstrate the defendant's innocence or be of value to the defendant in preparing for trial." *Id.* The prosecution provided no information about the witness pursuant to this request because both parties had the same general knowledge before trial. *Id.* After the trial, "police officers informed both counsel that at some time prior to trial, the witness had sold cocaine to an undercover officer and that his arrest was imminent." *Id.*

The court found that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Shabata*, 678 P.2d at 788. The court also stated, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* The court found that the nondisclosure by the police in this situation "adds nothing to defendant's case and would not have raised a reasonable doubt as to his guilt." *Id.* The court stated that the witness' testimony "came after and mainly corroborated the testimony of another prosecution witness, and there was no material variance between the testimony of these two witnesses." *Id.* Thus, the defendant's right to a fair trial was not violated. *Id.*

In this case, the police officers are clearly part of the prosecution team. *See Shabata*, 678 P.2d at 788. Officer Neilson testified that he did not turn over the evidence

to the prosecution because he believed “I didn’t feel it was relevant at the time” (R. 211 at 186). He further testified that he did not believe the composite was relevant because “it didn’t look like [Powell] at all” (R. 211 at 187). Regardless of Officer Nielson’s intentions, the prosecution failed to uphold its duty to disclose exculpatory evidence to the Defense. *See Lafferty*, 2001 UT 19, ¶147.

Unlike *Shabata*, the potential exculpatory evidence might have exonerated Powell. If the prosecution had not withheld this information, Powell could have taken measures to ensure the integrity of the books shown to Shelton. If Powell was in one of the photo books, this means that Shelton failed to identify him the day after the incident. This would certainly impact the jury and cast reasonable doubt on Shelton’s identification four months after the incident.

But Powell was unable to take any steps to ensure the integrity of the photo books. There were several pages with spaces where photos may have previously been placed but were now missing when defense counsel finally had the opportunity to view the books after trial (R. 191). Powell’s photo had in fact been taken prior to the robbery incident and it could have been in the photo books (R. 211 at 173).

Powell was convicted solely on Shelton’s testimony because the state provided no other evidence that linked Powell to the robbery. The only recourse that could have been taken to rectify this problem was a new trial as required by *Shabata* because the integrity of the photo books was not ensured creating a reasonable doubt as to Shelton’s testimony. The trial court erred in denying Powell’s motion for a mistrial

#### POINT IV

### **THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS REQUIRES REVERSAL OF POWELL'S CONVICTION**

If this Court concludes that the errors set forth *supra* do not individually warrant a reversal, Powell asserts that the cumulative effect of the errors requires a reversal of his conviction. “Under the cumulative error doctrine, we will reverse a conviction only if the cumulative effect of several errors undermine our confidence that a fair trial was had.” *State v. Medina-Juarez*, 2001 UT 79, ¶27, 34 P.3d 187.

There were numerous errors committed by the trial court which were enlarged by the prosecution withholding potential exculpatory information from the defense. First, the trial court erred by failing to make sufficient written findings on the record regarding Powell's motion to suppress eyewitness identification as required by *Ramirez* and Rule 12 of the Utah Rules of Criminal Procedure. Second, the trial court erred by denying the motion to suppress the eyewitness identification. Although the identification was obtained four months after the incident and the identifications at the photo lineup and preliminary hearing were obtained under inherently suggestive conditions, the trial court allowed the testimony. Third, the trial court erred by denying Powell's motion for a mistrial due to the prosecution withholding potentially exculpatory information from the Defense. This information included a composite sketch that looked nothing like Powell as well as the possibility that Shelton failed to identify Powell in a previous photo array. Powell was convicted solely on Shelton's eyewitness identification that occurred four months after the incident. The accumulation of the trial court's error effectively denied Powell a fair trial. The combined effect of the prosecution's withholding of evidence

and the trial court's error in admitting the eyewitness identification requires this Court to reverse and remand the trial court's conviction of Powell.

**CONCLUSION AND PRECISE RELIEF SOUGHT**

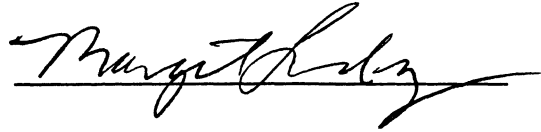
For the foregoing reasons, Powell asks that this Court reverse his conviction of aggravated robbery, a first degree felony.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of August, 2002.

  
Margaret P. Lindsay  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 30<sup>th</sup> day of August, 2002.

  
\_\_\_\_\_



## **ADDENDA**

gotiations as rendering accused's guilty plea involuntary, 10 A.L.R.4th 689.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness — state cases, 58 A.L.R.4th 1229.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of guilty plea — state cases, 6 A.L.R.4th 719.

Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 6 A.L.R.4th 384.

## Rule 12. Motions.

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall state with particularity the grounds upon which it is made and shall set forth the relief sought. It may be supported by affidavit or by evidence.

(b) Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial on the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:

(1) defenses and objections based on defects in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense, which objection shall be noticed by the court at any time during the pendency of the proceeding;

(2) motions to suppress evidence;

(3) requests for discovery where allowed;

(4) requests for severance of charges or defendants; or

(5) motions to dismiss on the ground of double jeopardy.

(c) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(d) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(e) Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(f) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(Amended effective April 1, 1998.)

**Amendment Notes.** — The 1998 amendment substituted "to suppress" for "concerning the admissibility of" in Subdivision (b)(2) and deleted "under Rule 9" from the end of Subdivision (b)(4).

**Compiler's Notes.** — Subdivision (g) of this rule, which created a good faith exception to the exclusion of evidence on the grounds of unlawful search and seizure, was expressly excluded from the 1989 adoption of this rule. Subdivision (g) [former § 77-35-12(g)] and former §§ 78-16-1 to 78-16-11 substantially comprised the Fourth Amendment Enforcement Act; that act

was declared unconstitutional in *State v. Mendoza*, 748 P.2d 181 (Utah 1987), on the basis that the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), can never apply to investigatory stops and searches. Subdivision (g), although not adopted as part of this rule, remained in effect as a statutory provision until deleted effective April 23, 1990, by L. 1990, ch. 15, § 1.

Rule 9, cited in Subdivision (b)(4), was repealed in 1990. For present provisions relating to joinder and severance, see § 77-8a-1.

RICHARD P. GALE 7054  
Attorneys for Defendant  
UTAH COUNTY PUBLIC DEFENDER ASSOCIATION  
245 North University Avenue  
Provo, Utah 84601  
Telephone: (801) 379-2570

AUG 04 4 51 PM '01  
TK

---

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY  
OF THE STATE OF UTAH

---

STATE OF UTAH,

Plaintiff,

v.

TREVOR POWELL,

Defendant.

MOTION TO SUPPRESS  
EYEWITNESS IDENTIFICATION

Case No. 011402111

JUDGE GUY R. BURNINGHAM

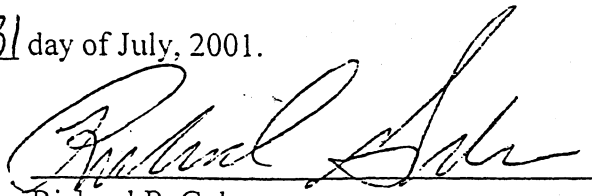
---

Comes now Trevor Powell, through Richard Gale, his attorney, and hereby moves this Court to suppress the following eyewitness identification evidence:

1. The victim's identification of the defendant through a photo array.
2. The victim's identification of the defendant at the preliminary hearing.
3. The victim's identification of the defendant in any jury trial which may occur in the future.

This motion is supported by the attached memorandum.

Respectfully submitted this 31 day of July, 2001.

  
Richard P. Gale  
Attorney for Defendant

RICHARD P. GALE 7054  
Attorneys for Defendant  
UTAH COUNTY PUBLIC DEFENDER ASSOCIATION  
245 North University Avenue  
Provo, Utah 84601  
Telephone: (801) 379-2570

---

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY  
OF THE STATE OF UTAH

---

STATE OF UTAH,

Plaintiff,

v.

TREVOR POWELL,

Defendant.

MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION TO  
SUPPRESS EYEWITNESS  
IDENTIFICATION

Case No.011402111

JUDGE GUY R. BURNINGHAM

---

FACTS

1. On January 8, 2001. Heidi Shelton was working at Perfect Tan, a tanning salon located at 826 East 800 North in Orem, Utah. (PH, p. 5.)
2. As Shelton was working she noticed a male individual who walked into the store and placed his arms on the counter where she was working. She described the individual as wearing a black stocking hat that covered his hair but not his face and a black jacket. (PH p. 6:16-24.)
3. After approaching Shelton the individual showed Shelton what she believed to be the handle of hunting knife which was hidden in the sleeve of his jacket. The individual then stated, "give me all the money." (PH 6:24-25; 7:1-6). Shelton attempted to retrieve the money from the cash register and place it on the counter. Several times Shelton dropped the money on the floor

and had to pick it up. (PH p. 7:7-12). Shelton had not had an experience such as this previously and described herself as being scared and frightened. In fact, Shelton dropped the money several times because she was nervous. (PH p. 14:18-25; 15:1-6.)

4. Shelton estimates that the entire time that elapsed from the time the individual entered the salon until the time he left was approximately two to three minutes. Shelton believes that she looked at the individual's face approximately 10 times during this two the three minute time period. (PH p. 14:12-17)

5. After the individual left with the money, Shelton called the police. Shelton described her assailant as a male in his late 20's to early 30's, 5'8" in height, average build, and having a sandy brown mustache. (PH p. 17:11-22).

6. The distinguishing characteristics that Shelton remembered the individual possessing were "eyes of that person sinking back into the person's head." and a mustache. (PH p. 13:5-18.)

7. On May 9, 2001, four months after the robbery occurred, a police officer showed Shelton a photo array. (PH p. 11:19-25.) Prior to showing Shelton the photo array, the officer told Shelton that they had a suspect in the case and he wanted her to take a look at some pictures to see if she recognized anybody. (PH p. 16:11-25.)

8. The photo array shown to Shelton by police included six people. The defendant was the only person in the photo array that was wearing black clothing. The defendant was the only person in the photo array with a mustache. (PH p. 13:22-25; 14:1-11) After reviewing the photo array Shelton picked the defendant as her assailant.

9. On July 25, 2001, two and one half months after she was shown the photo array, Shelton appeared in Fourth District Court in front of the Honorable Judge Guy R, Burningham

for defendant's Preliminary Hearing.

10. At the Preliminary Hearing Shelton was able to see the defendant in shackles walk from the jury box to the defense table. The defendant was the only person in the courtroom wearing orange jail clothing. The defendant was the only person in the courtroom wearing handcuffs. The defendant was the only person in the courtroom sitting next to the defense attorney at the defense table. At the Preliminary Hearing Shelton identified the defendant as her assailant. (PH p. 15:15-25; 16: 1-10.)

11. At the Preliminary Hearing the defendant was bound over to stand trial on the charges of Aggravated Robbery, a first degree felony.

### ARGUMENT

#### I. THE CIRCUMSTANCES SURROUNDING SHELTON'S IDENTIFICATION OF THE DEFENDANT ARE OF SUCH A NATURE THAT THE IDENTIFICATION IS FATALLY UNRELIABLE AND THEREFORE VIOLATES DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS

The Supreme Court of the United States and the Utah Supreme Court have both indicated that empirical data supports a conclusion that eyewitness identification is inherently unreliable. See United States v. Wade, 388 U.S. 218, 228 (1966) ("Identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial"; "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"; "The identification of [a] stranger is proverbially untrustworthy.") See also State v. Long, 721 P.2d 483 (Utah, 1986) ("The [scientific] literature is replete with empirical studies documenting the unreliability of eyewitness identification"; "The studies all lead inexorably to the conclusion that human

perception is inexact and that human memory is both limited and fallible.”) See also State v. Ramirez, 817 P.2d 774 (Utah 1991) (“People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness, perhaps it is precisely because jurors do not appreciate the fallibility of eyewitness testimony that they give such testimony great weight.”) The United States Supreme Court is well aware that:

The trial which might determine the accused’s fate may well [be] . . . at the pretrial confrontation, with the state aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness – ‘that’s the man.’”

United States v. Ash, 413 U.S. 300, 311 (1973)

Because of the inherent unreliability of eyewitness identification, the Utah Supreme Court “[is] concerned that law enforcement officials, in an effort to accommodate their heavy workloads, might use photo arrays as a substitute for lineups. We strongly discourage this practice. We agree with the Michigan Supreme Court that ‘a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification.’ Consequently, witnesses should be asked to examine photographs only when a proper corporeal identification is impossible . . . or difficult.” Lopez at 1111.

Furthermore, the Utah Supreme Court clearly encourages corporeal lineups over other eyewitness identifications such as “showups,” photo arrays, or other identification techniques. “We encourage law enforcement officials to consider implementation of [corporeal lineups] and to curb the use of photo arrays as much as possible.” Lopez, at 1111. See also State v. Severance, 828 P.2d 1066 (Utah 1992) (“ . . . a lineup identification is preferable over a showup

identification.”)

Even different prosecuting agencies have recognized the fallibility of eyewitness testimony. In 1999, The United States Department of Justice published *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999). This document outlines procedures which should be followed by law enforcement to ensure that identification procedures are not unduly suggestive. As an introduction to the guide former U.S. Attorney General Janet Reno stated,

“Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes . . . In developing its eyewitness evidence procedures, every jurisdiction should give careful consideration to the recommendations in this *Guide* . . .

*Eyewitness Evidence, A Guide for Law Enforcement*, U.S. Department of Justice, p. iii (1999).

In the guide’s section concerning lineups, among other factors, it is recommended that law enforcement personnel when composing a photo lineup (1) Select fillers who generally fit the witness’ description of the perpetrator (i.e. individuals with a mustache) and (2) Create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature. When conducting a lineup it is proposed (among other factors) that law enforcement personnel (1) Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties and (2) Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.

In Niel v. Biggers, 409, U.S. 188 (1972), the United States Supreme Court held that procedural due process requires five factors must be considered when assessing the reliability of out-of-court identifications: 1) The opportunity of the witness to view the criminal at the time of the crime; 2) The witnesses degree of attention; 3) The accuracy of the witness’ prior description



of the criminal; 4) The level of certainty demonstrated by the witness at the confrontation; 5) The length of time between the crime and the confrontation.

Biggers, at 199, 200.

The Utah Supreme Court adopted the factors outlined in Biggers In State v. Ramirez, 817 P.2d 774 (Utah 1991). Ramirez requires consideration of the following factors:

“(1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive remember, and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.”

Ramirez, 817 P.2d at 781 (quoting State v. Long, 721 P.2d 483 (Utah 1986)). If an eyewitness identification is unreliable pursuant to these factors, admission of the identification will deny a defendant due process. Id. at 779.

The Utah Supreme Court has also held that, when relevant, juries shall be instructed that eyewitness identifications are not necessarily reliable and that an articulated set of criteria must be considered when determining the reliability of such eyewitness identifications; Long, at 488. That such cautionary instruction must be given even if not requested by a party. Long, at 489. And that the prosecution must lay a foundation that an eyewitness identification is constitutionally reliable before it can be presented to the jury; Ramirez, at 778.

It is the responsibility of the trial court to resolve eyewitness identification issues. Application of each of the factors in the Ramirez analysis in the instant case supports the conclusion that the state should not be allowed to present the eyewitness identification testimony.

A. THE WITNESS'S OPPORTUNITY TO VIEW THE ACTOR DURING THE EVENT.

Circumstances to be considered in determining whether a witness had sufficient opportunity to view the perpetrator during the event include "the length of time the witness viewed the actor; the distance between the witness and the actor; whether the witness could view the actor's face; the lighting or lack of it; whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness's opportunity to observe the actor." Ramirez, 817 P.2d at 782.

Here, Shelton testified that as she saw an individual wearing a stocking cap come into the tanning salon. The individual stood at the counter and remained in the store for two to three minutes. Shelton believes she looked at the individual approximately ten times during this time period.

Considering these factors, it appears that Shelton did not have a sufficient opportunity to view her assailant. Although Shelton was within close range of her assailant she was more focused on retrieving the money which she kept dropping on the floor than she was focused on looking at the assailant. Thus, considering the factors set forth in Ramirez, it seems that the witness in this matter had an insufficient opportunity to view her assailant.

B. THE WITNESS'S DEGREE OF ATTENTION TO THE ACTOR AT THE TIME OF THE EVENT.

The witness's attention to the assailant at the time of the event was minimal at best. As previously noted, after her assailant made a demand for money, Shelton was attempting to retrieve the money and kept dropping the money on the floor thus had little opportunity to look at her assailant. For that reason, Shelton's degree of attention to her assailant at the time of the

incident was quite minimal.

C. THE WITNESS'S CAPACITY TO OBSERVE THE ACTOR DURING THE EVENT

In determining whether a witness had the ability to observe the assailant during the event, of particular importance is "whether the witness's capacity to observe was impaired by stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol." Ramirez, 817 P.2d at 783 (citing Long, 721 P.2d at 494 n.8).

In the present case, Shelton described herself as scared and frightened by the incident. Her fright certainly impaired her ability to observe her assailant and remain objective. Moreover, the incident occurred at approximately 9:30 in the evening after Shelton had been working several hours and would have been fatigued.

D. SPONTANEITY AND CONSISTENCY OF THE WITNESS'S IDENTIFICATION

In determining whether the identification was spontaneous and remained consistent there after, or whether it was a product of suggestion, depends on consideration of the following factors:

the length of time that passed between the witness's observation at the time of the event and the identification of the defendant, the witnesses mental capacity and state of mind at the time of the identification, the witness's exposure to opinions, descriptions, identifications or other information from other sources, instances when the witness or other eyewitnesses to the event failed to identify the defendant, instances when the witness or other eyewitnesses gave a description of the actor that is inconsistent with defendant, and the circumstances under which the defendant was presented to the witness for identification.

Ramirez. 817 P.2d at 783 (citing Long, 721 P.2d at 494 n.8).

Here, Shelton initially described her assailant as 5'8" tall, with a sandy brown mustache, and in the age range of his late 20's to early 30's. At the time she described her assailant, she did not appear to have any exposure to opinions or descriptions from other sources. Shelton did not identify the defendant as her assailant until more than 5 months had passed since the incident occurred. More importantly, the circumstances under which Shelton first identified the defendant were highly suggestive. Shelton described her assailant as wearing black clothing and having a mustache. Shelton was then shown an array of black and white photos. She was also told that the police had a suspect in the case. When Shelton was asked to identify the defendant, he was the only person in the photo array wearing black clothing and was the only person in the photo array that had a mustache. This procedure of obtaining an identification is inherently suggestive. Who else would Shelton identify as her assailant? Someone without a mustache?

Later, at the Preliminary Hearing, Shelton identified the defendant as her assailant. However, similar to her previous identification, the procedure was inherently suggestive. The defendant was the only person wearing bright orange inmate clothing, the only person in handcuffs, and the only person sitting at the defense table with a defense attorney. Moreover, when asked whether she was identifying the defendant from her memory of the incident or from her memory of the photo array, Shelton replied she was identifying the defendant from her memory of both the incident and the photo array. This suggests that Shelton had been influenced by the suggestive photo array prior to her identification of the defendant in person at the Preliminary Hearing. (PH p. 12: 13-15.)

Additionally, Shelton's description of the defendant immediately following the incident

was inconsistent with her identification in the photo array and inconsistent with her identification of the defendant in court. Immediately following the incident Shelton described her assailant as being in his late 20's to early 30's. However, defendant's appearance is much younger than Shelton's description. Shelton herself admitted at the Preliminary Hearing that the defendant did not appear to be in his late 20's or early 30's. (PH p. 17:14-25; 18:1-3.) In light of these circumstances, the identification made by Shelton is unreliable.

E. THE NATURE OF THE EVENT BEING OBSERVED AND THE  
LIKELIHOOD THAT THE WITNESS WOULD PERCEIVE,  
REMEMBER, AND RELATE IT CORRECTLY

Circumstances relevant to this final factor include "whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's." Ramirez, 817 P.2d at 781 (quoting State v. Long, 721 P.2d 483 (Utah 1986)). Shelton testified that she was scared, frightened, and nervous. She also testified that this kind of event had never happened to her before in her lifetime. Clearly, this incident was an exceptional event for Shelton.

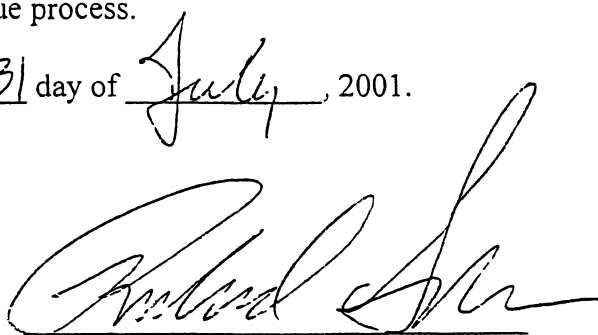
CONCLUSION

The identification of Defendant as the person accused in this matter is at issue. The State's case hinges on the uncorroborated eyewitness testimony of a single civilian witness and will serve as the linchpin of the prosecution's case in chief. Eyewitness identifications are inherently unreliable and require that a jury be instructed to consider particularized criteria when assessing the reliability of such identifications. Moreover, human perception is inexact and memory is both limited and fallible. Because Shelton's initial identification of the defendant as her assailant was so highly suggestive there is no way of guaranteeing that Shelton will identify

the defendant as her assailant based on her independent recollection or, as occurred at the preliminary hearing, she will identify the defendant as her assailant merely because he happens to be sitting in court at defense counsel table.

Shelton's identifications of the defendant as her assailant are inherently unreliable and any subsequent identifications should be suppressed. To permit the admission of Shelton's prior identifications and to allow an in-court identification given the unreliability involved in Shelton's identifications would deny the defendant due process.

RESPECTFULLY submitted this 31 day of July, 2001.

A handwritten signature in black ink, appearing to read "Richard P. Gale", written over a horizontal line.

Richard P. Gale  
Attorney for Defendant

2002 FEB -6 PM 3:40

IN THE FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,  
Plaintiff,

vs.

TREVOR POWELL,  
Defendant.

Case No. 011402111 FS

Pare-trial Conference  
Electronically Recorded on  
August 22, 2001

BEFORE: THE HONORABLE GUY BURNINGHAM  
Fourth District Court Judge

For the Plaintiff:

Curtis L. Larson  
Utah County Dpty Atty  
100 E. Center #2100  
Provo, UT 84606  
Telephone: (801)370-8026

For the Respondent:

Richard Gale  
Public Defender's Office  
245 N. Univ. Ave.  
Provo, UT 84601  
Telephone: (801)379-2750

Transcribed by: Beverly Lowe RPR/CSR/CCT

1771 SOUTH CALIFORNIA AVENUE  
PROVO, UTAH 84606  
TELEPHONE: (801)377-0027

FILED

Utah Court of Appeals

2001 10 02

Patricia Stagg  
Clerk of the Court

20010995CA

P R O C E E D I N G S

(Electronically recorded on August 22, 2001)

THE COURT: Trevor Powell. Mr. Powell is present.

This is the time for Pare-trial, and also a time for me to rule on defense motion to suppress the photo line-up.

I'm going to deny that motion. I have the original here, and all the reasons given regarding the dark shirt, there are two others, although their angles are a little different, but also are wearing dark shirts.

The mustache is not that noticeable. In fact, the bottom right person looks like they've even taken the mustache off of him. It looks very lighter around his mouth area.

The witness that testified had no hesitation when she picked out the individual. I looked at this; it does not single out any one person. I had third parties look at it and I said, "Tell me, does this appear -- who would you pick if you wanted to from this," and they actually thought that the person with the long hair was the one that was more singled out than the defendant.

So I am going to deny the motion to suppress this. Whether or not that makes any difference, we are scheduled for jury trial on September 6th at 9 a.m.

MR. GALE: Judge, I don't think that makes a difference as far as we're concerned with going forward to the jury trial. I believe that there is two other motions that are



1 pending at this point. Mr. Larson has filed a motion in limine  
2 to exclude the defendant's--

3 THE COURT: Okay, I haven't seen your response to that  
4 yet.

5 MR. GALE: And Judge, I haven't submitted a response  
6 to that yet.

7 THE COURT: So I can't rule on it until I give you a  
8 chance to be heard, right?

9 MR. GALE: Well, obviously, Judge, and I think we  
10 probably need to set up a hearing for that.

11 THE COURT: Okay. Do we want to still try to keep  
12 that trial date, don't we?

13 MR. GALE: Yes, he's filed a 120-day disposition.

14 THE COURT: So let's -- how soon can you get your  
15 response to me?

16 MR. GALE: Well, Judge, I'm going to be out of town  
17 for the rest of the week. I'm leaving just as soon as I get  
18 done here. I could probably have it to you--

19 THE COURT: You could do it by the 5th of September.

20 MR. GALE: Yes, I mean I could have it to you before  
21 the 5th, Judge--

22 THE COURT: Oh, we need to have it -- I want to hear  
23 your arguments on it so--

24 MR. GALE: Right. I could have it to you by  
25 Wednesday, the 29th of August.

1 THE COURT: Okay. You file your response by the 29th  
2 of August. What's the other motion that's pending? You said--

3 MR. GALE: Judge, the other motion is -- I filed a  
4 motion to disclose the identify of the--

5 THE COURT: Oh, yeah, and the State needs to respond  
6 to that one.

7 MR. LARSON: Judge, we haven't seen that one.

8 THE COURT: I have seen it.

9 MR. GALE: You've got a copy of that?

10 THE COURT: I've seen it. Let's see, it was filed --  
11 well, I thought I saw it.

12 COURT CLERK: (Inaudible).

13 THE COURT: It may still be. I think they just  
14 arrived. I'll ask the State to respond to that motion to  
15 disclose the identity of a confidential informant?

16 MR. GALE: Well, it's a witness, but a confidential  
17 witness that the State hasn't disclosed.

18 THE COURT: All right, you respond now so by August  
19 30th -- excuse me, August 29th to that, and then I'll hear your  
20 arguments on both on September 5th. Oh, boy. Can we add one  
21 more to that afternoon? That will make five, I think. One-  
22 thirty on September 5th.

23 MR. GALE: Judge, I don't know if you're willing to go  
24 a little later in the afternoon on that--

25 THE COURT: I already have a four-hour prelim set that

1 day, so you're going to be squoze at the front end of that.

2 MR. GALE: Okay.

3 THE COURT: If "squoze" is a word.

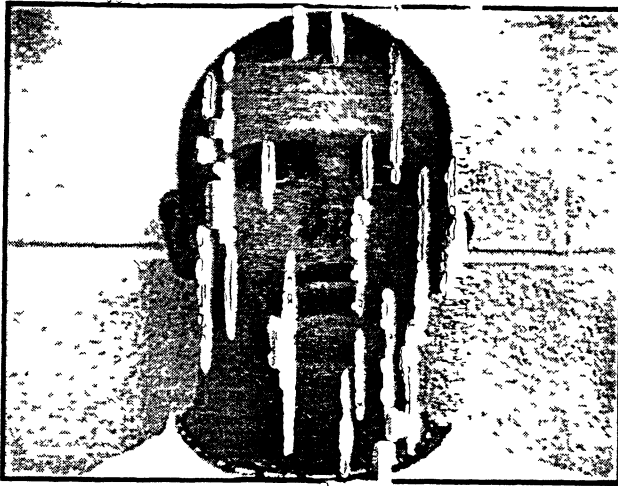
4 MR. LARSON: We can make it a word, your Honor.

5 MR. GALE: Judge, we'll need to Mr. Powell to be  
6 transported from the prison.

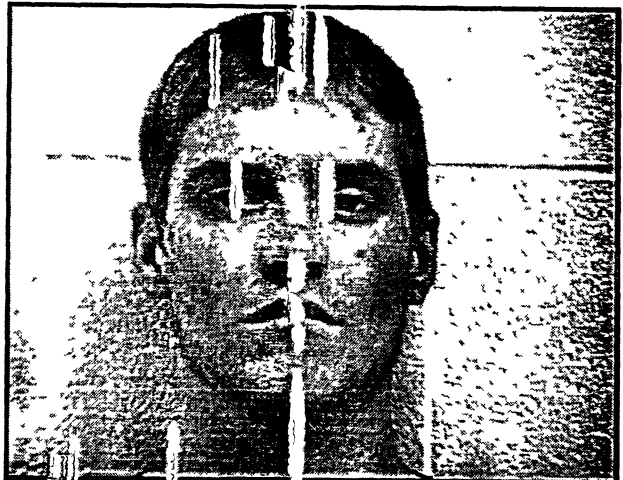
7 THE COURT: Yes, we need a transportation order for  
8 September 5th, 1:30. Thank you.

9 (Hearing concluded)

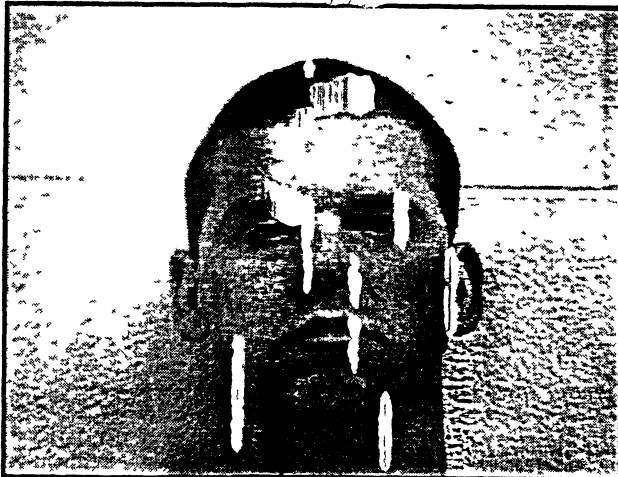
# Oregon Dept. of Public Safety



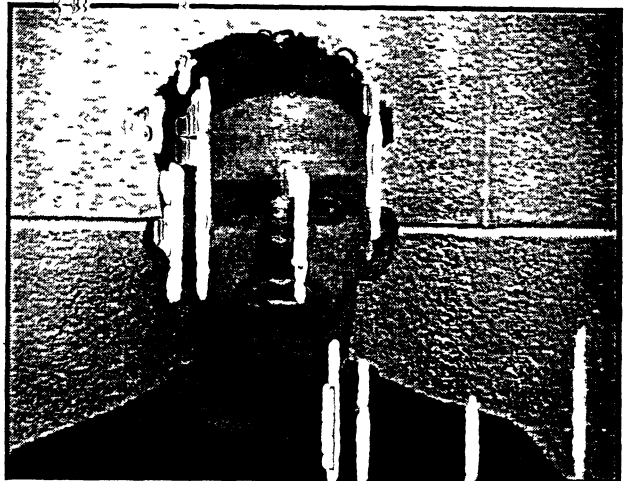
-1



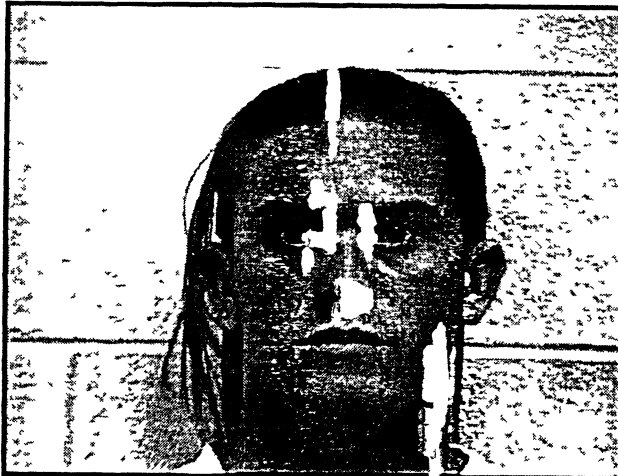
-2



-3



-4



-5

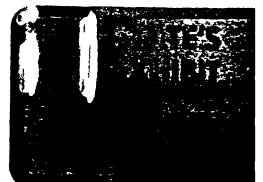


-6

OFFICER *Det Barry Nielsen - 01-00930* WITNESS \_\_\_\_\_  
NUMBER \_\_\_\_\_

DATE *5/9/01*

125839/125719 125739/113181 25704/125720



Case Number: 01-930  
Investigator: nielsen



Case Number: 01-930  
Investigator: nielsen

Notes:

Armed Robbery Suspect from Perfect Tan 826 E. 800 N.

Case #01-930

W/M 5-9 160 Sandy Blonde Hair 28-35 YOA.

Wearing a black warmup type jacket, black stocking cap and jeans.

A knife was shown to the victim and the suspect stated to give him all of the money. Suspect then fled on foot west bound.

Contact: Det. Barry T. Nielsen Orem P.D. 229-7256

