

1992

Utah v. David Simmons and Patricia Kay Simmons: Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	Case No. 920800-CA
v.	:	
DAVID SIMMONS &	:	Priority FILE ^{IC} 15
PATRICIA KAY SIMMONS,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLANT

- - - - -

APPEAL FROM THE GRANT OF DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE IN A CASE CHARGING BOTH DEFENDANTS WITH POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE WITHIN 1,000 FEET OF ANY STRUCTURE, FACILITY OR GROUNDS OF A PRESCHOOL OR CHILD CARE FACILITY, OR THAT SUCH ACT(S) WERE COMMITTED WITH A PERSON YOUNGER THAN 18 YEARS OF AGE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1), (5) (SUPP. 1992), IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX ELDER COUNTY, STATE OF UTAH, THE HONORABLE CLINT S. JUDKINS, PRESIDING.

OF APPEALS

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DOCKET NO. 920800

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June 16, 1993

FILED

JUN 17 1993

COURT OF APPEALS

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Re: State v. David Simmons and Patricia Kay Simmons,
Case No. 920800-CA

Dear Ms. Noonan:

Please be advised that since the filing of the State's opening brief in the above-referenced matter, wherein I made frequent reference to State v. Rowe, 196 Utah Adv. Rep. 14 (Utah Sept. 28, 1992) (Rowe II), I have discovered that the case has been compiled in the West Pacific Reporter and is cited at 850 P.2d 427 (Utah 1992).

Respectfully,

Kenneth A. Bronston
Assistant Attorney General

cc: Jay D. Edmonds

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	Case No. 920800-CA
v.	:	
DAVID SIMMONS &	:	Priority No. 15
PATRICIA KAY SIMMONS,	:	
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iii
JURISDICTION AND NATURE OF PROCEEDINGS.	1
STATEMENT OF THE ISSUES AND STANDARD OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS.	3
SUMMARY OF ARGUMENT	5
ARGUMENT	
POINT I THE TRIAL COURT CONCLUDED WITHOUT SUFFICIENT BASIS THAT THE WARRANT WAS SERVED "IN THE NIGHT" UNDER UTAH CODE ANN. § 77-23-5 (1990).	7
POINT II UNDER <u>ROWE II</u> THE EXCLUSIONARY RULE SHOULD BE APPLIED ONLY IN CASES WHERE PROCEDURAL ERRORS IN ISSUING WARRANTS ALSO RESULT IN FUNDAMENTAL VIOLATIONS OF THE FOURTH AMENDMENT, ARE PREJUDICIAL TO DEFENDANTS OR DEMONSTRATE BAD FAITH. IN THIS CASE THE TRIAL COURT ERRONEOUSLY CONCLUDED UNDER <u>ROWE II</u> THAT ONLY THE EXISTENCE OF VALID ARREST WARRANTS COULD SAVE EVIDENCE SEIZED PURSUANT TO A PROCEDURALLY DEFECTIVE SEARCH WARRANT FROM EXCLUSION	11
A. <u>Rowe II Compels Suppression Only Upon Proof of a Fundamental Violation of the Fourth Amendment, Prejudice or Bad Faith</u>	12
B. <u>Defendant Failed to Assume His Burden of Proof, and the Trial Court Incorrectly Applied the Law under Rowe II</u>	15
CONCLUSION.	19

ADDENDA 21

 Addendum A Constitutional Provisions, Statutes
 and Rules

 Addendum B Affidavit and Search Warrant

 Addendum C Findings and Order

 Addendum D Transcript (re Findings and Order)

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Commonwealth v. Grimshaw</u> , 595 N.E.2d 302 (Mass. 1992)	9
<u>Grant v. Hass</u> , 31 Tex. Civ. App. 688, 75 S.W. 342 (1903).	8
<u>Kuenzel v. State</u> , 577 S.2d 474 (Ala. Crim. App. 1990)	9
<u>State v. Atwood</u> , 831 P.2d 1056 (Utah App. 1992)	16
<u>State v. Bobo</u> , 803 P.2d 1268 (Utah App. 1990)	1, 7
<u>State v. Brock</u> , 653 P.2d 543 (Or. 1982)	14
<u>State v. Buck</u> , 756 P.2d 700 (Utah 1988)	15
<u>State v. Burnside</u> , 113 Idaho 65, 741 P.2d 352 (1987).	8
<u>State v. Fixel</u> , 744 P.2d 1366 (Utah 1987)	13, 18
<u>State v. Garcia</u> , 501 N.E.2d 527 (Mass. App. Ct. 1986)	15
<u>State v. Gonzalez</u> , 822 P.2d 1214 (Utah App. 1991)	2, 18
<u>State v. Jaimez</u> , [817 P.2d 822 (Utah App. 1991)	8
<u>State v. Purser</u> , 828 P.2d 515 (Utah App. 1992)	8
<u>State v. Rowe</u> , 806 P.2d 730 (Utah App. 1991), <u>rev'd on other grounds</u> , 196 Utah Adv. Rep (Utah Sept. 28, 1992)	2, 4, 12, 13, 14, 15, 16, 18
<u>State v. Singh</u> , 819 P.2d 356 (Utah App. 1991)	2, 8
<u>State v. Swapp</u> , 808 P.2d 115 (Utah App. 1991)	8
<u>United States v. Schoenheit</u> , 856 F.2d 74 (8th Cir. 1988).	14, 16
<u>United States v. Searp</u> , 586 F.2d 1117 (6th Cir. 1978)	13, 14
<u>United States v. Shelton</u> , 742 F. Supp. 1491 (D. Wyo. 1989)	14

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fed. R. Crim. P. 41	4, 9, 10
Utah Code Ann. § 58-37-8 (Supp. 1992)	1, 3

Utah Code Ann. § 77-18a-1 (Supp. 1992)	1
Utah Code Ann. § 77-23-5 (1990)	1, 6, 7, 8, 12
Utah Code Ann. § 78-2a-3 (Supp. 1992)	1
Utah Adv. Rep. 14 (Utah Sept. 28, 1992)	12

IN THE UTAH COURT OF APPEALS

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DAVID SIMMONS &	:	Priority No. 15
PATRICIA KAY SIMMONS,	:	
Defendants/Appellees.	:	

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the grant of defendants' motions to suppress evidence in a case charging both defendants with possession of a controlled substance with the intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (Supp. 1992), in the First Judicial District Court in and for Box Elder County, State of Utah, the Honorable Clint S. Judkins, presiding. This Court has jurisdiction to hear this case pursuant to Utah Code Ann. § 77-18a-1(2)(e) (Supp. 1992) and Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1992).

STATEMENT OF THE ISSUES AND

STANDARD OF REVIEW

The issues presented in this appeal are:

1. Did the trial court erroneously find that the search warrants in defendants' cases were served "in the night," as that term is used in Utah Code Ann. § 77-23-5 (1990)? Factual findings supporting a trial court's decision on a motion to suppress are subject to a clearly erroneous standard. State v. Bobo, 803 P.2d 1268, 1271-72 (Utah App. 1990). Conclusions of law arising from factual findings in a motion to suppress hearing

are subject to a correction of error standard, according no particular deference to the trial court. Ibid. In this case the trial court's determination that the warrants were served "in the night" also required a statutory interpretation of the meaning of that term as it is used in section 77-23-5. "[An appellate court will] review for correctness a trial court's statutory interpretation, according it no particular deference.'" State v. Singh, 819 P.2d 356, 359 (Utah App. 1991) (citations omitted).

2. Did the trial court erroneously conclude, under State v. Rowe, 196 Utah Adv. Rep. 14 (Utah Sept. 28, 1992) (Rowe II), that because police officers in these cases did not also possess valid arrest warrants, it was compelled to suppress evidence obtained in reliance on an invalid nighttime search warrant? A trial court's interpretation of the law is a legal conclusion. "Utah appellate courts review legal conclusions under a correction-of-error standard, granting no particular deference to the trial court." State v. Gonzalez, 822 P.2d 1214, 1217 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Determinative constitutional provisions, statutes and rules are compiled in Addendum A where not set forth in the body of this brief.

STATEMENT OF THE CASE

Defendants David Simmons and Patricia Kay Simmons were both charged with possession of a controlled substance with the intent to distribute within 1,000 feet of any structure, facility

or grounds of a preschool or child care facility, or that such act(s) were committed with a person younger than 18 years of age, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1), (5) (Supp. 1992) (R. 2).¹ Prior to trial defendants moved to suppress evidence (R. 33-37, 119-34). The trial court granted the motion (R. 83-84). Thereafter, the State petitioned for interlocutory review, which was granted by this Court (R. 86-117).

STATEMENT OF FACTS

On January 20, 1992, Officer Carl Merino of the Roy City Police Department prepared an affidavit in support of a search warrant (R. 38-41). The warrant alleged the following facts: that a reliable confidential informant (CI) who had worked with the Roy City Narcotics Strike Force for two years had made two purchases of marijuana from one Jeremy Pettingill, first on December 6, 1991, and second within the preceding twenty-four hours; that on the first occasion Pettingill told the CI that he (CI) would have to go to Willard, Utah to pick up the marijuana; that on the second occasion the CI drove Pettingill to a residence located at 195 South 200 West in Willard which Pettingill identified as the source of his marijuana purchases; and that lab tests indicated that the substance purchased by Pettingill was marijuana (R. 39-40).

The warrant also requested, because of the lateness of

¹ Record references are made only with respect to defendant Patricia Kay Simmons' file, since the contents of both records are nearly identical.

the day, no-knock nighttime authority for the search. This request was based on Officer Merino's experience that narcotics dealers were arming themselves for protection generally, though the affidavit did not state specific facts relating to this case in support of the request for either nighttime or no-knock authority (R. 40-41). Judge Baldwin issued the search warrant with the requested no-knock nighttime authority (R. 33-34, 42-23) (Affidavit and Warrant are attached at Addendum B.)

The warrant was executed at 6:30 p.m. on January 20, 1992. Defendants and the State stipulated that the sun set at 5:29 p.m. on that day (Findings and Order on Defendants' Motion to Suppress, "Order," R. 83-84, attached at Addendum C). The search yielded marijuana, various items relating to the possession and distribution of marijuana and \$800, \$500 of which was cash and firearms (Record of the preliminary hearing, R. 9).

Defendants moved to suppress the seized evidence on the ground that the affidavit lacked sufficient factual information to support a nighttime search, relying on this Court's decision on the same issue in State v. Rowe, 806 P.2d 730 (Utah App. 1991) (Rowe I), rev'd on other grounds, 196 Utah Adv. Rep (Utah Sept. 28, 1992) (Motion to Suppress and Supporting Memorandum, R. 33-57 at 34-37). The State responded, noting that "nighttime" for warrant purposes was undefined under Utah law, but that under rule 41(h), Federal Rules of Criminal Procedure, "daytime" was between 6:00 a.m. and 10:00 p.m., and further, that the affidavit contained sufficient information to support nighttime authority

(Response to Motion for Suppression, R. 58-62).²

The trial court granted defendants' motion, which was first heard on August 3, 1992 (R. 66), but continued the hearing, before a written order issued, to October 19, 1992, because of disagreement on the proposed findings and on account of the issuance of Rowe II (see R. 67-79). At neither hearing was evidence taken (see Minute Entries of August 8 and October 19, 1992, R. 66, 82). At the October 19, 1992 hearing the parties discussed whether "good faith" had been previously raised (Transcript of Suppression Hearing, R. 120-24). The trial court found that matter had not been raised and was not under consideration; rather it wished that its reaffirmation of its initial granting of suppression be specifically supported by 1) the lack of particularity required under Rowe I and 2) that Rowe II be distinguished because the executing officer did not also have valid arrest warrants (R. 131-34, attached at Addendum D). However, the trial court also specifically requested that the State appeal its ruling (R. 132). The State appeals from the resulting Order (see Permission for Petition to Appeal, R. 86-117).

SUMMARY OF ARGUMENT

POINT I

Nighttime searches are undefined in Utah law. Some jurisdictions have adopted the view that "daytime" is that period

² On appeal the State concedes that the affidavit lacked sufficient factual specificity to authorize nighttime entry under Rowe I.

between sunrise and sunset. Other jurisdictions have adopted the common law view that "daytime" is that period in which there is sufficient light to determine the features of a person, i.e., a factual determination of darkness. However, considering current lifestyles, and considering the precision afforded by following the federal rule, this Court should adopt the rule that for warrant purposes, "in the night," as provided in Utah Code Ann. § 77-23-5 (1990), should lie between the hours of 10:00 p.m. and 6:00 a.m.

In this case the trial court merely assumed that "in the night" was necessarily that period between sunset and sunrise. That unconsidered view was incorrect and necessarily compelled an erroneous factual finding that the warrant in this case had been served in the night. Even if this Court should decline to adopt the federal definition, it should nonetheless find that the trial court erred in granting suppression under Rowe II.

POINT II

Under Rowe II, the Utah Supreme Court held that suppression is not a proper remedy for a procedural violation unless the defendant can make out a fundamental violation under the fourth amendment or that s/he suffered prejudice or bad faith in the execution of the warrant. Rowe II demonstrated, by the authority it cited, that violation of section 77-23-5 is a procedural violation only and that a lack of prejudice may be demonstrated in circumstances other than those in which the

officers executing the warrant possess a valid arrest warrant.

It is defendants' burden to show that they have been deprived of their fourth amendment rights. In this case defendants failed to show they suffered a fundamental violation under the fourth amendment or that they suffered prejudice or bad faith in the execution of the warrant. Further, the trial court incorrectly restricted its legal analysis by ordering suppression merely because the executing officers in this case did not also have valid arrest warrants.

ARGUMENT

POINT I

THE TRIAL COURT CONCLUDED WITHOUT SUFFICIENT BASIS THAT THE WARRANT WAS SERVED "IN THE NIGHT" UNDER UTAH CODE ANN. § 77-23-5 (1990).

The defendants and the State stipulated that the sun set at 5:29 p.m. on January 20, 1992 and that the warrant was executed at about 6:30 p.m. (R. 83). From this fact the trial court found that the warrant was executed in the nighttime (R. 83).

Factual findings supporting a trial court's decision on a motion to suppress are subject to a clearly erroneous standard. State v. Bobo, 803 P.2d 1268, 1271-72 (Utah App. 1990).

Conclusions of law arising from factual findings in a motion to suppress hearing are subject to a correction of error standard, according no particular deference to the trial court. Ibid.

"'[An appellate court will] review for correctness a trial court's statutory interpretation, according it no particular

deference.' State v. Jaimez, [817 P.2d 822, 826] (Utah App. 1991); State v. Swapp, 808 P.2d 115, 120 (Utah App. 1991) (citations omitted)." State v. Singh, 819 P.2d 356, 359 (Utah App. 1991).

Section 77-23-5 provides, in pertinent part:

(1) The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night. An officer may request other persons to assist him in conducting the search.

Section 77-23-5 does not specifically define "in the night." The State has been unable to locate any relevant legislative history. This Court has also previously noted that it too had "not found any Utah statutes or cases defining 'nighttime.'" State v. Purser, 828 P.2d 515, 519 n.1 (Utah App. 1992).

In Purser, this Court declined to discuss, but identified, three views for determining what time is "nighttime" for warrant purposes:

The first view requires a factual determination of whether there is sufficient natural light that one can distinguish a person's features. See, e.g., State v. Burnside, 113 Idaho 65, 741 P.2d 352, 356 (1987). The second view defines nighttime according to sunrise and sunset. See, e.g., Grant v. Hass, 31 Tex. Civ. App. 688, 75 S.W. 342, 343 (1903) (daytime is thirty minutes before sunrise to thirty minutes after sunset). The last view sets forth specific

hours for execution of a search warrant without special authorization. See, e.g., Fed. R. Crim. P. 41(h) (6:00 a.m. to 10:00 p.m.).

Id. at 519 n.1.

In Kuenzel v. State, 577 S.2d 474 (Ala. Crim. App. 1990), the trial court was found to have properly denied a motion to suppress where the warrant, apparently lacking express nighttime authority, was served two minutes after sunset. There was testimony that it was still daylight when the warrant was served. The Alabama Court of Criminal Appeals, essentially adopting the first view noted in Purser, held that "[t]he weight of authority supports the conclusion that where the term 'nighttime' is not defined, the definition of 'nighttime' [is] based on a factual determination of darkness, rather than a rigid sunset-to-sunrise test," citing 26 A.L.R.3d at 975, 978 in support. Id. at 509.

However, in Commonwealth v. Grimshaw, 595 N.E.2d 302 (Mass. 1992), the court rejected the common law view that for criminal purposes "night means 'a period when the light of day had so far disappeared, that the fact of a person was not discernible by the light of the sun or twilight.'" Id. at 306 (citations omitted). Instead, the court adopted rule 41(h), Federal Rules of Criminal Procedure,³ which provides that

³ Rule 41(c), Federal Rules of Criminal Procedure, provides in pertinent part:

The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable

nighttime does not begin for warrant purposes until 10:00 p.m. Noting that no universal standard had emerged from its study of the issue, the court opined the federal rule was the one "that best protects the public from unreasonable intrusions by the police, is in keeping with current life-styles, and gives the police notice as to the precise time in all seasons when permission for a nighttime search must be requested." Id. at 307.

In this case the trial court's factual determination of "nighttime" is totally dependent on the definition it selects. There was evidently no argument on this point, but it is implicit in the trial court's findings that it assumed that "nighttime" was that period between sunset and sunrise. In complete disregard for the alternative common law view, the trial court made no factual determination of darkness or that there was insufficient light to discern defendants' faces.

As the court in Kuenzel noted, defining "daytime" as that period between sunrise and sunset appears to be a minority position. However, neither definition of "daytime" has the

cause shown, authorizes its execution at times other than daytime. . . .

Rule 41(h), Federal Rules of Criminal Procedure, provides in pertinent part:

The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m.

precision offered by the federal rule, which specifies the hours of "daytime" and clearly puts the police on notice of whether, under the circumstances, they must request nighttime authority and whether their execution of the warrant is authorized. Similarly, the federal rule puts the public on notice of those periods in which a warrant may not be served without the specialized authority required by section 77-23-5. Furthermore, as the court in Grimshaw noted, service until 10:00 p.m. is in keeping with current lifestyles and is thereby not intrinsically repulsive.

For all the reasons referenced above, this Court should interpret the phrase "in the night" as it is used in section 77-23-5 to mean the period between 10:00 p.m. and 6:00 a.m. Under that definition, the trial court erroneously found that the warrant, as a matter of fact, had been executed "in the nighttime."

POINT II

UNDER ROWE II THE EXCLUSIONARY RULE SHOULD BE APPLIED ONLY IN CASES WHERE PROCEDURAL ERRORS IN ISSUING WARRANTS ALSO RESULT IN FUNDAMENTAL VIOLATIONS OF THE FOURTH AMENDMENT, ARE PREJUDICIAL TO DEFENDANTS OR DEMONSTRATE BAD FAITH. IN THIS CASE THE TRIAL COURT ERRONEOUSLY CONCLUDED UNDER ROWE II THAT ONLY THE EXISTENCE OF VALID ARREST WARRANTS COULD SAVE EVIDENCE SEIZED PURSUANT TO A PROCEDURALLY DEFECTIVE SEARCH WARRANT FROM EXCLUSION.

If this Court declines to adopt the effective federal definition of "nighttime," i.e., from 10:00 p.m. to 6:00 a.m., but instead holds that "nighttime" is either 1) strictly defined

by that period from sunset to sunrise, or 2) that period in which the face of a person is not discernible by the light of the sun or twilight, i.e., a factual determination of darkness, then this Court should nevertheless find that the trial court erred in granting defendant's motion to suppress under State v. Rowe, 196 Utah Adv. Rep. 14 (Utah Sept. 28, 1992) (Rowe II).

A. Rowe II Compels Suppression Only
Upon Proof of a Fundamental Violation
of the Fourth Amendment, Prejudice
or Bad Faith.

In Rowe II, the Utah Supreme Court reversed this Court's holding in State v. Rowe, 806 P.2d 730 (Utah App. 1991), that a warrant supported by an affidavit lacking sufficient specific facts to authorize nighttime entry under Utah Code Ann. § 77-23-5 (1990) required suppression of evidence seized in execution of the warrant. The court stated:

"Only a 'fundamental' violation of [a rule of criminal procedure] requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards. Where the alleged violation . . . is not 'fundamental' suppression is required only where: (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision of the rule. . . .

. . . It is only where the violation also implicates fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant that exclusion may be an appropriate remedy." [Quoting

State v. Fixel, 744 P.2d 1366, 1369
(Utah 1987) (emphasis is original).]

The majority of courts that have examined the issue have determined that procedural violations in the execution of search warrants do not require suppression of the evidence seized.

Id. at 15 (citation omitted) (emphasis added). The court found the defendant had not been prejudiced where he was unable to show that the search would not have otherwise taken place or would have been less abrasive if the rule had been followed, and particularly because the police had authority for a nighttime entry pursuant to a valid arrest warrant for the owner of the residence which was the subject of the search. Id. at 16.

In support of its contention that failure to strictly conform to section 77-23-5 was only a procedural violation, Rowe II cited a number of cases. Rowe, 196 Utah Adv. Rep. at 16 n.11. Typical of those cases was United States v. Searp, 586 F.2d 1117 (6th Cir. 1978).

In Searp, the affidavit lacked "reasonable cause" to support a warrant authorizing nighttime entry under rule 41(c), Federal Rules of Criminal Procedure. However, while noting that nighttime entry may be a severe intrusion, the protection afforded by the rule was essentially prophylactic, i.e., procedural, and not intrinsically a part of the fourth amendment right to be free of unreasonable searches and seizures. Id. at 1121-24. Therefore, where there was no demonstration of prejudice or bad faith, "requiring suppression in all cases would be a remedy out of all proportion to the benefits gained"

Id. at 1123. See also State v. Brock, 653 P.2d 543, 547 (Or. 1982) (Oregon statute providing for nighttime authorization was "concerned with minimizing the heightened risks and apprehensions associated with a nighttime intrusion into the home, not with the overall protection against unjustified searches and seizures").

Rowe II also cited a number of cases supporting its view that absent a showing of prejudice procedural violations relating to the fourth amendment do not require suppression. Rowe, 196 Utah Adv. Rep. at 16 n.11. See United States v. Schoenheit, 856 F.2d 74, 77 (8th Cir. 1988) (finding that although the affidavit lacked reasonable cause to support a nighttime search, the defendant failed to demonstrate that the search would not have occurred or been less abrasive if executed before 10:00 p.m.); Searp, 586 F.2d at 1122 (search pursuant to defective nighttime warrant justified where judge knew search would take place at night and the defendant's mother knew that police intended to search the house); United States v. Shelton, 742 F. Supp. 1491, 1503 (D. Wyo. 1990) (evidence seized under nighttime warrant lacking reasonable cause held admissible where there was no evidence of prejudice, abrasive search or that searches would not have occurred even if nighttime warrants had not been promptly executed).

Rowe II also cited Utah case law affirming the view that only fundamental violations of rights compel suppression. Rowe, 196 Utah Adv. Rep. at 15-16 n. 9. In Fixel, the court refused to suppress evidence gathered by a city police officer

merely because he acted outside his statutory authority. Id. at 1368-69. In State v. Buck, 756 P.2d 700, 703 (Utah 1988), the court found that the defendant's privacy rights were not prejudicially infringed by a warrant mistakenly executed in no-knock fashion where the warrant was otherwise valid and the defendant was not at home.

In none of these cases cited in Rowe II was it required that technically invalid entries into residences be saved by the presence of a valid arrest warrant, for the obvious reason that a lack of prejudice may be demonstrated in innumerable ways. Indeed, Rowe II invokes the harmless error standard in defining a defendant's necessary showing of prejudice. Rowe, 196 Utah Adv. Rep. at 16 n.13 (citing rule 30, Utah Rules of Criminal Procedure, and State v. Verde, 770 P.2d 116, 120 (Utah 1989) (errors which are "sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings")). Thus, in State v. Garcia, 501 N.E.2d 527 (Mass. App. Ct. 1986), the court found the defendant unprejudiced by the fact that items seized in a nighttime search would also have been discovered if the search had been conducted the following day. Id. at 530.

B. Defendant Failed to Assume His Burden of Proof, and the Trial Court Incorrectly Applied the Law under Rowe II.

1. Defendant Bears the Burden of Proof to Show Fourth Amendment Violation.

"The proponent of a motion to suppress has the burden

of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.'" State v. Atwood, 831 P.2d 1056, 1058 n.1 (Utah App. 1992) (quoting State v. Marshall, 791 P.2d 880, 886 (Utah App. 1990) from Rakas v. Illinois, 439 U.S. 128, 130 n.1, 99 S. Ct. 421, 424 n.1 (1978)). "Evidence sought to be excluded is admissible . . . until the accused has established that his rights . . . have been invaded." Ibid. (citations omitted).

Rowe II explicitly stands for the proposition that a violation of section 77-23-5 is procedural only, and does not of itself constitute an infringement of fourth amendment rights unless there has been a showing of prejudice or bad faith. Therefore, in addition to showing a procedural violation related to his fourth amendment rights, defendant bears the further burden of demonstrating prejudice. Rowe, 196 Utah Adv. Rep. at 16. See also United States v. Schoenheit, 856 F.2d 74, 77 (8th Cir. 1988) (no showing of prejudice where the defendant failed to demonstrate that the search would not have occurred if the rule had been followed or been less abrasive if executed before 10:00 p.m.).

In this case the record does not show that defendants did anything more than show that the sun set at 5:29 p.m. and that the warrant was executed at about 6:30 p.m. (R. 83). Since, as argued above (Appellant's Brief at Point I), there presently exists no Utah authority defining "nighttime" under section 77-23-5, there is substantial doubt as to whether defendants even

established a technical violation of the statute. In any event, defendants never alleged that there was no justification for nighttime authorization,⁴ that there were no facts which would have justified a nighttime entry, that the entry was at all abusive in that defendants were discovered asleep, undressed or were compromised in their privacy other than as they would have in an undeniable daytime search, or, finally, that evidence was discovered which would not have been seized if the search were conducted the following day.

Further, defendants never alleged that the police acted in bad faith in either securing or in executing the warrant. In sum, defendants have failed to sustain their burden that they were deprived of their fourth amendment rights as a result of official misconduct.

2. The Trial Court Incorrectly Assumed That Without the Existence of Valid Arrest Warrants the Evidence Must be Suppressed.

In deciding defendants' motion to suppress the trial court analyzed Rowe II. It is apparent from the trial court's remarks that it was fixated by the supreme court's finding that the defendant had not suffered prejudice because the police also had a valid arrest warrant for the owner of the premises (P 131-

⁴ Defendants asserted at the suppression hearing that their motion was based on the fact that the police officers had no justification for nighttime entry (R. 130). Defendants are entirely mistaken in this assertion. The motion to suppress was directed exclusively toward the deficiency of the affidavit under Rowe I (see Motion to Suppress and Supporting Memorandum, R. 33-37).

34). The trial court's order reflects its inappropriately constrained view of the prejudice requirement discussed in Rowe II:

3. Because there is no evidence before the Court that the officers who executed the search warrant in this case had in their possession a valid warrant for the arrest of any person within the premises searched, the procedural defect in failing to include sufficient grounds for nighttime entry, and the nighttime execution of this search warrant, amounted to a fundamental violation of the Defendants' rights requiring suppression of the evidence seized pursuant to the search warrant. State v. Fixel, 744 P.2d 1366 (Utah 1987); State v. Rowe, 196 Utah Adv. Rep. 14 (Utah 1992).

(Order, R. 84).

A trial court's interpretation of the law is a legal conclusion. "Utah appellate courts review legal conclusions under a correction-of-error standard, granting no particular deference to the trial court." State v. Gonzalez, 822 P.2d 1214, 1217 (Utah App. 1991).

As noted above, Rowe II, upon which the trial court in this case so deliberately relied, identified, by citation to authority, a broad range of nonprejudicial circumstances which condoned the admission of evidence seized in violation of procedural rules or statutes (see Appellant's Brief at 11-15). None of those circumstances happened to involve the fortuitous existence of valid arrest warrants. In failing to recognize that a lack of prejudice may be demonstrated in circumstances other than those in which the officers happen to have an arrest warrant, the trial court incorrectly cut short the appropriate

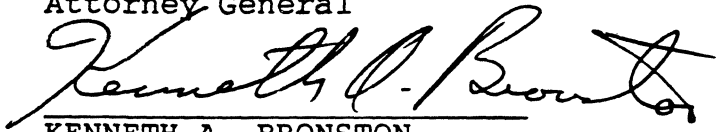
inquiry and improperly granted suppression.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court adopt the effective federal definition of "nighttime," i.e., from 10:00 p.m. to 6:00 a.m., and thereby reverse the trial court's order granting suppression. If this Court declines to adopt the federal definition, but instead holds that "nighttime" is strictly defined by that period from sunset to sunrise, then the State requests that this case be remanded for an evidentiary hearing on the issues of prejudice and bad faith, consistent with Rowe II. If this Court should hold that "nighttime" is that period in which the face of a person is not discernible by the light of the sun or twilight, then the State requests this case be remanded for the additional factual determination of whether the warrant was served in darkness, again consistent with Rowe II.

RESPECTFULLY SUBMITTED this th 14 day of June, 1993.

JAN GRAHAM
Attorney General


KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed to Jay D. Edmonds, attorney for appellees, 1660 Orchard Drive, Salt Lake City, Utah 84106, this 14th day of June, 1993.

Kenneth L. Branta

ADDENDA

ADDENDUM A

United States Constitution

AMENDMENT IV [Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah Code Ann. (Supp. 1992)

77-23-5. Time for service - Officer may request assistance.

(1) The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night. An officer may request other persons to assist him in conducting the search.

(2) The search warrant shall be served within ten days from the date of issuance. Any search warrant not executed within such time shall be void and shall be returned to the court or magistrate as not executed.

58-37-8. Prohibited acts - Penalties.

(1) Prohibited acts A - Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

. . . .

(5) Prohibited acts E - Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

ADDENDUM B

IN THE CIRCUIT COURT
WEBER COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

The undersigned being first duly sworn, deposes and says:
That the affiant has reason to believe that:

() On the person(s) of:

(X) On the premises known as: A TWO STORY DWELLING LOCATED AT APPROX. 195 SOUTH 200 WEST, WILLARD, UTAH. FIRST HOUSE NORTH OF 200 SOUTH ON THE EAST SIDE OF 200 WEST. A WHITE HOUSE WITH BROWN TRIM, FRONT DOOR ON THE WEST SIDE OF THE HOUSE, PORCH HAS GREEN ASTRO TURF, DRIVEWAY ON THE SOUTH SIDE OF THE HOUSE.

() In the vehicle(s) described as:

In the City of WILLARD County of BOX ELDER
State of Utah, there is now certain property or evidence described as:

1--MARIJUANA, a green leafy substance in dried form.

2--MATERIALS USED TO PACKAGE MARIJUANA, specifically, plastic sandwich bags.

3--MATERIALS FOR USING MARIJUANA:

a--cigarette papers, small sheets of flammable paper with adhesive on one side,

b--pipes, used to smoke marijuana,

c--roach clips, used to hold a marijuana cigarette while being smoked.

4--PERSONAL NOTES, records of narcotic transactions, listing names, dates, amounts sold.

5--FRUITS OF NARCOTIC TRANSACTIONS, U.S. Currency, cash in various denominations, STRIKE FORCE MONEY.

6--ALL HANDGUNS, RIFLES, AND OTHER WEAPONS THAT CAN PRODUCE BODILY INJURY.

and that said property or evidence:

(X) Was unlawfully acquired or is unlawfully possessed

(X) Has been used, or is possessed with the purpose of being used to commit or conceal the commission of an offense

(X) Is evidence of illegal conduct

The facts establishing the grounds for issuance of a search warrant are:

YOUR AFFIANT, CARL MERINO, HAS BEEN EMPLOYED AS A ROY CITY POLICE OFFICER FOR THE PAST TWO YEARS. PRIOR TO THAT TIME YOUR AFFIANT SPENT FIVE YEARS AS A RESERVE POLICE OFFICER FOR OGDEN CITY POLICE DEPARTMENT. YOUR AFFIANT IS CURRENTLY ASSIGNED TO THE WEBER/MORGAN NARCOTICS STRIKE FORCE AND HAS BEEN GIVEN THE RESPONSIBILITY OF INVESTIGATING NARCOTICS TRAFFICKING AND POSSESSION VIOLATIONS IN WEBER AND MORGAN COUNTIES. YOUR AFFIANT HAS ATTENDED AN 8 HOUR

AFFIDAVIT FOR SEARCH WARRANT---PAGE 2 WILLARD, UTAH

CLASS ON NARCOTICS DURING BASIC ACADEMY TRAINING, A 16 HOUR CLASS ON CRACK COCAINE, AND SEVERAL OTHER TRAINING SESSIONS ON VARIOUS ASPECTS OF DRUG INVESTIGATIONS. YOUR AFFIANT IS CURRENTLY ATTENDING THE UTAH DRUG ACADEMY AND HAS JUST FINISHED 8 HOURS OF DRUG IDENTIFICATION AND CULTIVATION OF MARIJUANA. YOUR AFFIANT HAS ASSISTED IN SEVERAL SEARCH WARRANTS INVOLVING NARCOTICS, AND HAS ASSISTED IN NUMEROUS CONTROLLED PURCHASES OF NARCOTICS. YOUR AFFIANT HAS WORKED WITH OTHER NARCOTICS AGENTS INVESTIGATING NARCOTICS DISTRIBUTION AND POSSESSION CASES. YOUR AFFIANT IS CURRENTLY INVESTIGATING A MARIJUANA POSSESSION AND DISTRIBUTION VIOLATION OCCURRING AT A RESIDENCE IN WILLARD CITY, UTAH.

CI#1 HAS WORKED WITH THE WEBER/MORGAN STRIKE FORCE VOLUNTARILY. CI#1 HAS MADE SEVERAL CONTROLLED NARCOTICS PURCHASES UNDER YOUR AFFIANTS SUPERVISION.

ON 12/6/91 CI#1 MADE A CONTROLLED PURCHASE OF 1/8 OUNCE OF MARIJUANA FROM JEREMY PETTINGILL. JEREMY TOLD CI#1 THAT HE GOT THE MARIJUANA FROM A LOCATION IN WILLARD. CI#1 WAS TO MEET JEREMY AT THE SMITH & EDWARDS STORE ON 12/6/91 TO PICK UP THE MARIJUANA, AFTER JEREMY PICKED IT UP IN WILLARD. YOUR AFFIANT WAS SUPERVISING THIS PURCHASE. AT 1659 HOURS ON 12/6/91 JEREMY APPROACHED CI#1 FROM THE NORTH AT SMITH & EDWARDS PARKING LOT AND GAVE CI#1 THE MARIJUANA THAT WAS PURCHASED.

WITHIN THE LAST 24 HOURS, CI#1 AGAIN MADE ARRANGEMENTS WITH JEREMY PETTINGILL TO PURCHASE MARIJUANA. JEREMY AGAIN STATED THAT HE WOULD GO TO WILLARD TO GET THE MARIJUANA AND STATED THAT CI#1 WOULD HAVE TO DRIVE. CI#1 DROVE JEREMY TO A RESIDENCE LOCATED ON NORTH-EAST CORNER OF 200 SOUTH 200 WEST IN WILLARD AND PURCHASED APPROXIMATELY ONE OUNCE OF MARIJUANA. CI#1 DROVE DIRECTLY TO THE RESIDENCE AND IS CERTAIN OF THE LOCATION. JEREMY TOLD CI#1 THAT THIS WAS THE SAME LOCATION THAT JEREMY OBTAINED THE MARIJUANA FROM IN THE FIRST BUY. JEREMY ALSO TOLD CI#1 THAT THIS LOCATION IS JEREMY'S SOURCE OF MARIJUANA AND THAT THERE IS MORE AT THIS SAME LOCATION. JEREMY TOLD CI#1 THAT HE HAD PURCHASED MARIJUANA AT THIS RESIDENCE ON 1-20-92 FOR HIMSELF.

Your Affiant believes that the named premises, and person should be searched for drug paraphernalia. Affiant knows from experience and training that these items are almost always found on premises where narcotic search warrants have been served. Your Affiant also knows that the suspect must keep such items on hand to test or to allow customers to use the substance being purchased.

Your Affiant believes the premises should be searched for records of narcotics sales and residency papers. Your affiant knows from past execution of numerous search warrants that suspects often keep such records to show amounts purchased, dates of purchases, who purchased, and especially drug indebtedness.

Your affiant believes that the named premises should be searched for packaging material. Suspects selling Marijuana have to package the drug from larger quantities to be sold. Further, your Affiant

AFIDAVIT FOR SEARCH WARRANT---PAGE 3 WILLARD, UTAH

believes that the premises is an ongoing operation, and these items could be on hand for the purpose of selling the substance.

Our Affiant prays for a night time service as well as no-knock service of the warrant. Your Affiant knows from experience and training that more and more narcotics dealers are arming themselves for protection against one another as well as from narcotics users. Our Affiant has been on numerous narcotic search warrants where firearms are available to suspects inside the premises. Further, our affiant believes it is safer for the officers serving the warrant as well as non-participants to the narcotic sales, if the officers have the cover of darkness as well as no-knock service.

Further grounds for issuance of a search warrant are attached hereto and incorporated herein.

See attachment(s)

Our affiant considers the information received from the confidential informant reliable because:

CI#1 HAS GIVEN YOUR AFFIANT FULL NAME, DOB, AND ADDRESS. CI#1 HAS NO KNOWN CRIMINAL CHARGE PENDING. CI#1 HAS WORKED WITH THE STRIKE FORCE FOR APPROXIMATELY TWO YEARS. CI#1 IS CURRENTLY ENROLLED IN THE UTAH POLICE ACADEMY. CI#1 HAS GIVEN INFORMATION IN THE PAST WHICH HAS BEEN USED TO MAKE CONTROLLED PURCHASES OF NARCOTICS. THE INFORMATION IS FRESH AND YOUR AFFIANT BELIEVES IT TO BE RELIABLE.

The following information corroborates the facts given by the confidential informant:

CI#1 STATED THAT THE CI WOULD PURCHASE ONE-EIGHTH OUNCE OF MARIJUANA. CI#1 WAS ABLE TO PURCHASE THE ONE-EIGHTH OUNCE OF MARIJUANA. CI#1 STATED THAT HE WOULD PURCHASE APPROXIMATELY ONE OUNCE OF MARIJUANA THROUGH JEREMY AND HIS SOURCE, AND WAS AGAIN ABLE TO MAKE THE PURCHASE OF APPROXIMATELY ONE OUNCE OF MARIJUANA. THE TEST PERFORMED ON THE FIRST ONE-EIGHTH OUNCE OF MARIJUANA PURCHASED THROUGH JEREMY CAME BACK POSITIVE FOR MARIJUANA. THIS TEST WAS CONDUCTED BY THE NORTHERN UTAH CRIMINALISTIC LAB. A FIELD TEST OF A SAMPLE OF THE ONE OUNCE OF MARIJUANA PURCHASED WITHIN THE LAST 24 HOURS SHOWED POSITIVE FOR MARIJUANA.

Wherefore the affiant prays that a search warrant be issued for the seizure of said items:

() In the daytime

(X) At any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, altered or for other good reasons as follows:

AFFIDAVIT FOR SEARCH WARRANT---PAGE 4 WILLARD, UTAH

YOUR AFFIANT BELIEVES THAT THERE IS A QUANTITY OF MARIJUANA AT THE RESIDENCE IN WILLARD, UTAH AT THIS TIME AND THAT TO DELAY WOULD AFFORD THE RESIDENTS AMPLE TIME TO SELL, DESTROY, OR MOVE THE MARIJUANA. DUE TO THE LATE HOUR OF THE DAY YOUR AFFIANT REQUESTS THAT THE WARRANT BE ISSUED FOR DAY OR NIGHT TIME SERVICE.

It is further requested that the officer executing the requested warrant not be required to give notice of his authority or purpose because:

(X) The property sought may be quickly destroyed, disposed of or secreted.

() Physical harm may result to any person if notice were given.

This danger believes to exist because:

Carl A. Merino
AFFIANT

Narcotics Agent
TITLE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20th DAY OF JAN 19 92

Paul J. [Signature]
JUDGE

IN THE CIRCUIT COURT
WEBER COUNTY, STATE OF UTAH

SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF UTAH:

Proof by affidavit under oath having been made this day before me
by: AGENT CARL MERINO I am
satisfied that there is probable cause to believe that:
() On the person(s) of:

(X) On the premises known as: A TWO STORY DWELLING LOCATED AT
APPROX. 195 SOUTH 200 WEST, WILLARD, UTAH. FIRST HOUSE NORTH OF
200 SOUTH ON THE EAST SIDE OF 200 WEST. A WHITE HOUSE WITH BROWN
TRIM, FRONT DOOR ON THE WEST SIDE OF THE HOUSE, PORCH HAS GREEN
ASTRO TURF, DRIVEWAY ON THE SOUTH SIDE OF THE HOUSE.

() In the vehicle(s) described as:

In the city of WILLARD County of BOX ELDER
State of Utah, there is not being possessed or concealed certain
property or evidence described as:

1--MARIJUANA, a green leafy substance in dried form.

2--MATERIALS USED TO PACKAGE MARIJUANA, specifically, plastic
sandwich bags.

3--MATERIALS FOR USING MARIJUANA:

— a--cigarette papers, small sheets of flammable paper with
adhesive on one side,

b--pipes, used to smoke marijuana,

c--roach clips, used to hold a marijuana cigarette while being
smoked.

4--PERSONAL NOTES, records of narcotic transactions, listing names,
dates, amounts sold.

5--FRUITS OF NARCOTIC TRANSACTIONS, U.S. Currency, cash in various
denominations, STRIKE FORCE MONEY.

6--ALL HANDGUNS, RIFLES, AND OTHER WEAPONS THAT CAN PRODUCE BODILY
INJURY.

Which property or evidence:

(X) Was unlawfully acquired or is unlawfully possessed

(X) Has been used, or is possessed with the purpose of
being used to commit or conceal the commission of an
offense

(X) Is evidence of illegal conduct

YOU ARE THEREFORE COMMANDED

() In the daytime

(X) At any time, day or night

(X) To execute without notice of authority or purpose

To make a search of the above, named or described person(s), premises and vehicle(s) for the herein above described property or evidence, and if you find the same, or any part thereof, to bring it forthwith before me at the CIRCUIT Court, County of WEBER State of Utah, or retain such property in your custody subject to the order of this court.

GIVEN UNDER MY HAND AND DATED THIS 20 DAY OF May 1992


JUDGE

ADDENDUM C

BRIGHAM DISTRICT

JAY D. EDMONDS #957
Attorney for David Simmons
1660 Orchard Drive
Salt Lake City, UT 84106
Telephone: 484-3218

OCT 30 12 21 PM '92

IN THE FIRST JUDICIAL DISTRICT COURT FOR BOX ELDER COUNTY
STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff,	:	<u>FINDINGS AND ORDER ON DEFEN-</u>
	:	<u>DANTS' MOTION TO SUPPRESS</u>
- vs -	:	
	:	Criminal Nos. 921000014
DAVID SIMMONS and	:	921000015
PATRICIA KAY SIMMONS,	:	
	:	
Defendants.	:	

The Defendants' Motion to Suppress came before the Court for hearing on August 3, 1992, and for rehearing on October 19, 1992; defendants were each present with counsel and the State was represented by Jon J. Bunderson, Box Elder County Attorney. A written Motion to Suppress evidence in these cases was previously filed and supporting Memoranda were filed by both parties. The State filed a Supplemental Memorandum herein. The parties stipulated that the search warrant in these cases was executed at 6:30 p.m. on January 20, 1992 and that the sun set at 5:29 p.m. that day. The Court, having heard the arguments and representations of counsel and having considered the Memoranda in support of and opposition to the motion, and being otherwise fully advised herein, the Court now makes the following findings:

1. That the search warrant in these cases was executed in the nighttime.

2. That the affidavit in support of the search warrant

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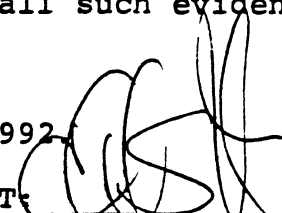
alleges no specific facts justifying a nighttime search as required by §77-23-5(1), Utah Code Ann., but rather alleges matters based upon the affiant's general knowledge and experience in drug cases.

3. Because there is no evidence before the Court that the officers who executed the search warrant in this case had in their possession a valid warrant for the arrest of any person within the premises searched, the procedural defect in failing to include sufficient grounds for nighttime entry, and the nighttime execution of this search warrant, amounted to a fundamental violation of the Defendants' rights requiring suppression of the evidence seized pursuant to the search warrant. State v. Fixel, 744 P.2d 1366 (Utah 1987); State v. Rowe, 196 Utah Adv. Rep. 14 (Utah 1992).

Based upon the foregoing findings, IT IS HEREBY ORDERED that all evidence seized pursuant to the execution of the search warrant in these cases, and the fruits of all such evidence, be, and the same are hereby suppressed.

DATED this 10 day of ^{Nov}~~October~~, 1992.

BY THE COURT:


CLINTON S. JUDKINS
First District Judge

FORM AND CONTENT APPROVED
AND COPY RECEIVED:


JON J. BUNDERSON
Box Elder County Attorney

ADDENDUM D

1 exclusionary rule is the appropriate remedy for
2 violation of the nighttime search warrant provisions
3 of section 77-23-10?" That's the issue they ruled on.
4 That's what they're referring to in the second to the
5 last paragraph that I read earlier.

6 I think it's unfortunate that they have
7 clouded it a bit by throwing in the warrant of arrest
8 provision, but that's how they framed the issue and
9 that's how they answered the issue. So I would submit
10 that what we're seeing here is simply that the
11 exclusionary rule doesn't apply to this particular
12 statutory violation.

13 THE COURT: In ruling on this, gentlemen, I
14 struggled with this. As I indicated, I've read this
15 several times since it first came out, because I knew
16 it would be pertinent to the motion before the court,
17 or at least on appeal that someone would review it.

18 I'm not really sure what Chief Justice
19 Hall is saying in this, other than, and I'm referring
20 to the bottom of page 15 and it begins with "It is of
21 particular significance that in addition to the search
22 warrant the officers carried a valid warrant for the
23 arrest." He goes on and talks about how that applied
24 to this case. Justice Durham and Justice Zimmerman
25 both concurred on that very point. Howe and Stewart

1 also thought it of particular significance that a
2 search warrant had been issued.

3 In the Simmons case, the case before this
4 court, no search warrant is issued, so what this court
5 has to do is excise that part of the Supreme Court's
6 decision and see if it applies to this case. In other
7 words, overturning Rowe. They very well may do it,
8 but I don't think they have in this case. They've
9 gone to the extent that they said if you have a search
10 warrant out there we will overturn it, or, excuse me,
11 an arrest warrant, we will overturn it. They very
12 well may overturn it if there isn't a search warrant,
13 but they didn't in this case.

14 Mr. Bunderson, I'd encourage you to appeal
15 my decision to the Court of Appeals, but at this point
16 in time, to be consistent with Rowe one, and at least
17 what I can perceive to be consistent with Rowe two,
18 I've got to deny -- I've got to grant the motion to
19 suppress based on the earlier hearing.

20 MR. BUNDERSON: So basically we're excluding the
21 evidence under the exclusionary rule?

22 THE COURT: Yes, based on Rowe one and to the
23 extent that Rowe two I don't think applies to that
24 because there was no search warrant -- excuse me, no
25 arrest warrant in this particular case.

1 MR. BUNDERSON: Okay. And the remedy you're
2 ordering, then, is exclusion of the evidence?

3 THE COURT: Supression of the evidence. I find
4 that pursuant to those rules that this is a
5 fundamental violation of the defendants' rights.

6 MR. BUNDERSON: I think that narrows it enough so
7 we can probably confuse the law even further.

8 MR. EDMONDS: What do we do now about the good
9 faith exception finding?

10 THE COURT: This court isn't considering that
11 now. That wasn't brought before the court at the
12 previous hearing.

13 MR. EDMONDS: May I suggest that the order -- the
14 proposed order that Mr. Hutchison submitted, which, by
15 the way, I drafted, just be signed by the court, with
16 the delineation?

17 THE COURT: No. I want that restructured.
18 Either you can do it or Mr. Bunderson can do it. I
19 found that the reason for the supression in this case
20 was State vs. Rowe one. The court in that case
21 specifically enunciated that you have to have
22 particularized circumstances to justify a nighttime
23 search. I think that should be reflected in the
24 order.

25 Then we can include this in it, that even

1 though Rowe two has come out, in this case the court
2 distinguishes it from Rowe two in as much as in this
3 case there was no arrest warrant.

4 | MR. EDMONDS: Okay. Thank you.

5 THE COURT: Who is going to prepare that order?

6 MR. EDMONDS: Mr. Bunderson had a problem with
7 preparing it before. I assume that problem still
8 exists so I'll have another go at it.

9 THE COURT: Very well. If you will prepare that
10 and submit it to the court. Court will be in recess.

11 THE BAILIFF: Court will be in recess.

(Concluded at 3:55 p.m.)