

1992

# Utah v. David Simmons and Patricia Kay Simmons: Reply Brief

Utah Court of Appeals

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**BRIEF**

UTAH  
DOCUMENT  
FILED

IN THE UTAH COURT OF APPEALS

10

STATE OF UTAH, 920800  
CASE NO. :

Plaintiff/Appellant, : Case No. 920800-CA

v. :

DAVID SIMMONS & : Priority No. 10  
PATRICIA KAY SIMMONS, : ~~15~~

Defendants/Appellees. :

REPLY 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.

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**FILED**

SEP 30 1993

**COURT OF APPEALS**

IN THE UTAH COURT OF APPEALS

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

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REPLY BRIEF OF APPELLANT

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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.

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES. . . . .	ii
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES . . . . .	1
ARGUMENT	
POINT I THE TRIAL COURT'S FACTUAL DETERMINATION OF "NIGHTTIME" IS NOT ULTIMATELY REVIEWED UNDER THE CLEARLY ERRONEOUS STANDARD BECAUSE IT IS EITHER BASED ON A MISINTERPRETATION OF THE LAW OR AN INTERPRETATION OF LAW WHICH IS REVIEWED FOR CORRECTNESS. . . . .	2
POINT II DEFENDANTS BOTH (1) MISSTATE THE STATE'S POSITION ON THE RELATION OF A VIOLATION OF A PROCEDURAL STATUTE TO A FUNDAMENTAL VIOLATION OF THE FOURTH AMENDMENT AND (2) THE HOLDING OF <u>ROWE II</u> . . . . .	4
CONCLUSION. . . . .	5

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Knight v. Hescoc</u> k, 404 A.2d 107 (Vt. 1979) . . . . .	2
<u>State v. Rowe</u> , 850 P.2d 427 (Utah 1992) . . . . .	4-6
<u>State v. Walker</u> , 743 P.2d 191 (Utah 1987) . . . . .	2
<u>United States v. Searp</u> , 586 F.2d 1117 (6th Cir. 1978) . . . . .	5

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. Amend. IV . . . . .	1
Utah Code Ann. § 77-23-5 (1990) . . . . .	1, 4

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following constitutional provision and statute is determinative of the issues in this case:

**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.

### ARGUMENT

#### POINT I

THE TRIAL COURT'S FACTUAL DETERMINATION OF "NIGHTTIME" IS NOT ULTIMATELY REVIEWED UNDER THE CLEARLY ERRONEOUS STANDARD BECAUSE IT IS EITHER BASED ON A MISINTERPRETATION OF THE LAW OR AN INTERPRETATION OF LAW WHICH IS REVIEWED FOR CORRECTNESS.

In response to the State's argument that the "trial court's factual determination of "nighttime" was totally dependent on the definition it selects" (Appellant's Br. at 10), defendants inappropriately focus this Court's attention on the trial court's factfinding rather than on the conclusion of law imbedded in the court's decision (Appellees' Brief at 4-6).

In State v. Walker, 743 P.2d 191 (Utah 1987), the supreme court stated:

The appellate court... does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

Id. at 193 (emphasis added) (citing 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2585 (1971)), which further states, "Insofar as a finding is derived from the application of an improper legal standard to the facts, it cannot stand").

In Knight v. Hescocck, 404 A.2d 107 (Vt. 1979) (per

curiam), the dissent summarized the law with regard to findings based on an interpretation of the law:

But the clearly erroneous standard should not be used to insulate a finding prompted by the application of an erroneous legal standard. Shull v. Daim, Kalman & Quail, Inc., 561 F.2d 152, 155 (8th Cir. 1977) (citing 9 C. Wright & A. Miller, Federal Practice & Procedure § 2585-86 (1971)). Such a situation presents a question of law correctable by this Court for mere error. See United States v. United States Gypsum Co., 333 U.S. 364, 394, 68 S. Ct. 525, 92 L.Ed. 746 (1948).

Id. at 110 (Hill, J., dissenting).

In this case also, as the State noted in its opening brief, the legality of the trial court's ruling was dependent on the definition it selected for "nighttime, and the State's entire argument is directed toward the proper legal standard for determining "nighttime" (Appellant's Br. at 10). Such a determination is essentially a question of law which is reviewed for correctness, which the State also noted in its discussion of the standard of review on this issue (Appellant's Br. at 2). Therefore, in reviewing the trial court's findings, this Court should first analyze the correctness of the definition of "nighttime" chosen by the trial court. Thereafter, depending on this Court's decision as to the correct definition implicit in the statute, the trial court's findings may be reviewed under the clearly erroneous standard.<sup>1</sup>

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<sup>1</sup> If the Court holds that nighttime is that period between sunset and sunrise, then the State would, of course, concede that the trial court's finding was not clearly erroneous, though a remand would still be necessary to determine if defendants' fundamental rights were prejudiced. Conversely, however, if the



## POINT II

DEFENDANTS BOTH (1) MISSTATE THE STATE'S POSITION ON THE RELATION OF A VIOLATION OF A PROCEDURAL STATUTE TO A FUNDAMENTAL VIOLATION OF THE FOURTH AMENDMENT AND (2) THE HOLDING OF ROWE II.

Defendants assert that the State has taken the position, based on State v. Rowe, 850 P.2d 427 (Utah 1992) (Rowe II), that the violation of Utah Code Ann. § 77-23-5 (1990), a procedural statute providing for nighttime entry, can never amount to a fundamental violation of Fourth Amendment to the United States Constitution (Appellees' Brief at 8). This assertion is a gross misstatement of the State's position.

The State's entire argument with respect to Rowe II (Appellant's Brief at Point II), is that defendants have failed to show that they have been prejudiced under the particular facts of this case. However, the State emphatically does not assert that in an appropriate case failure to obtain proper nighttime authorization, in conjunction with prejudicial circumstances, might not amount to a fundamental violation of Fourth Amendment.

Defendants also incorrectly limit the holding of Rowe II in an attempt to show that it cannot apply to this case.

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Court adopts the federal standard, wherein "nighttime" is that period between 10:00 p.m. and 6:00 a.m., then the trial court's determination would be clearly erroneous, and no further analysis is necessary. Finally, if the Court adopts the common law standard of "nighttime", which is a factual question about whether the defendants' features could be discerned under existing light, then this matter must be remanded to the trial court for that determination, which was never made, with the additional instruction that defendants show that their fundamental rights were prejudiced.

Specifically, defendant effectively argues that Rowe II held that only the existence of a valid arrest warrant, and no other circumstance, prevented a finding of no fundamental violation (Appellees' Br. at 8). Therefore, they argue, since there was no arrest warrant in this case, the nighttime entry was necessarily a fundamental violation.

It is apparent from the cases relied upon in Rowe II, as argued in the State's opening brief, that a fundamental violation may be avoided in a variety of fact situations other than those in which the police also have an arrest warrant. See United States v. Searp, 586 F.2d 1117 (6th Cir. 1978) (defendant's mother knew that house was to be searched and trial judge knew search would occur since he issued the warrant in the middle of the night). Since defendants have not shown the existence of other circumstances that would raise the procedural violation in this case to a fundamental violation, or that they were prejudiced as a result of the execution of the warrant, the trial court's granting of their motion to suppress was incorrect.

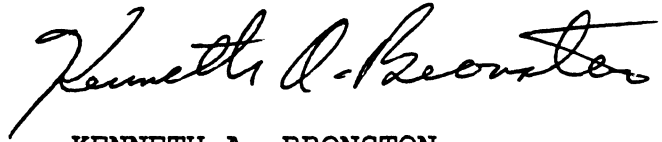
#### CONCLUSION

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 30<sup>th</sup> day of September, 1993.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Reply Brief of Appellee were mailed to Jay D. Edmonds, attorney for appellees, 1660 Orchard Drive, Salt Lake City, Utah 84106, this 30<sup>th</sup> day of September, 1993.

