

1995

# State of Utah v. Brent Thomas Silvers : Brief of Appellant

Utah Court of Appeals

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

 Part of the [Law Commons](#)

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

Robert K. Heineman; Robert L. Steele; Salt Lake Legal Defender Association; Attorney for Appellant.

Jan Graham; Attorney General.

---

## Recommended Citation

Brief of Appellant, *Utah v. Silvers*, No. 950002 (Utah Court of Appeals, 1995).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/6386](https://digitalcommons.law.byu.edu/byu_ca1/6386)

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.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. : Case No. 950002-CA  
Priority No. 2  
BRENT THOMAS SILVERS, :  
Defendant/Appellant. : Oral argument/memorandum  
opinion requested

---

**BRIEF OF APPELLANT**

Appeal from a judgment and conviction for two counts of burglary, 2<sup>nd</sup> degree felonies, in violation of Utah Code Ann. § 76-6-202 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

ROBERT K. HEINEMAN (5481)  
ROBERT L. STEELE (5546)  
**SALT LAKE LEGAL DEFENDER ASS'N**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM  
**ATTORNEY GENERAL**  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorneys for Appellee

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. : Case No. 950002-CA  
Priority No. 2  
BRENT THOMAS SILVERS, :  
Defendant/Appellant. : Oral argument/memorandum  
opinion requested

---

**BRIEF OF APPELLANT**

Appeal from a judgment and conviction for two counts of burglary, 2<sup>nd</sup> degree felonies, in violation of Utah Code Ann. § 76-6-202 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

ROBERT K. HEINEMAN (5481)  
ROBERT L. STEELE (5546)  
**SALT LAKE LEGAL DEFENDER ASS'N**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM  
**ATTORNEY GENERAL**  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorneys for Appellee

TABLE OF CONTENTS

|   | <u>page</u> |
|---|-------------|
| TABLE OF AUTHORITIES . . . . .  | ii          |
| JURISDICTIONAL STATEMENT . . . . .  | 1           |
| STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS . . . . .  | 1           |
| STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW . . . . .   | 1           |
| STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS . . . . .   | 2           |
| STATEMENT OF FACTS . . . . .  | 3           |
| SUMMARY OF THE ARGUMENT . . . . .   | 5           |
| ARGUMENT . . . . .  | 5           |
| POINT I. <u>THE TRIAL COURT ERRED BY FAILING TO SUPPRESS<br/>    OFFICER BROWN'S IDENTIFICATION AFTER THE UNRELIABLE<br/>    AND UNDULY SUGGESTIVE SHOWUP AT THE TIME OF THE<br/>    SECOND BURGLARY.</u> . . . . . | 5           |
| A. OFFICER BROWN HAD LIMITED OPPORTUNITY TO<br>OBSERVE THE SUSPECT ON FEBRUARY 15TH. . . . .  | 6           |
| B. OFFICER BROWN WAS ATTENTIVE, AND THE EVENT WAS<br>NOT ORDINARY. . . . .  | 7           |
| C. OFFICER BROWN HAD NO PHYSICAL OR MENTAL<br>IMPAIRMENT, BUT THESE FACTORS DO NOT CONTROL<br>HERE. . . . .   | 7           |
| D. OFFICER BROWN'S IDENTIFICATION WAS THE RESULT<br>OF THE SUGGESTIVE AND UNRELIABLE SHOWUP. . . . .  | 7           |
| E. HERE, WE HAVE THE BENEFIT OF THE NONSUGGESTIVE<br>PHOTO SPREAD TO SHOW THAT OFFICER BROWN WAS<br>UNABLE TO MAKE A POSITIVE IDENTIFICATION. . . . .   | 8           |
| F. THE STATE HAD NO EXIGENT CIRCUMSTANCES THAT<br>REQUIRED A SHOWUP BY OFFICER BROWN ON MARCH<br>5TH. . . . .   | 9           |
| REASONS SUPPORTING ORAL ARGUMENT/MEMORANDUM DECISION . . . . .  | 9           |
| CONCLUSION . . . . .  | 9           |
| ADDENDUM A -- Findings of Fact and Conclusions of Law   |             |

TABLE OF AUTHORITIES

CASES CITED

|  | <u>page</u> |
|--|-------------|
| <u>Archuleta v. Kerby</u> , 864 F.2d 709 (10th Cir. 1989),<br><u>cert. denied</u> , 490 U.S. 1084, 109 S.Ct. 2108,<br>104 L.Ed.2d 669 (1989) . . . . . | 1, 2        |
| <u>Neil v. Biggers</u> , 409 U.S. 188,<br>93 S.Ct. 375, 34 L.Ed.2d 401 (1972) . . . . .  | 5, 6        |
| <u>State v. Adams</u> , 830 P.2d 310 (Utah App.),<br><u>cert. denied</u> , 843 P.2d 1042 (Utah 1992) . . . . .   | 2           |
| <u>State v. Long</u> , 721 P.2d 483 (Utah 1986) . . . . .  | 6           |
| <u>State v. Mincy</u> , 838 P.2d 648 (Utah App.),<br><u>cert. denied</u> , 843 P.2d 1042 (Utah 1992) . . . . .   | 2           |
| <u>State v. Poteet</u> , 692 P.2d 760 (Utah 1984) . . . . .  | 9           |
| <u>State v. Ramirez</u> , 817 P.2d 774 (Utah 1991) . . . . .   | 1, 2, 5, 6  |
| <u>State v. Thamer</u> , 777 P.2d 432 (Utah 1989) . . . . .  | 6           |
| <u>Sumner v. Mata</u> , 455 U.S. 591,<br>102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) . . . . .   | 1           |

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

|   |   |
|---|---|
| Utah Code Ann. § 76-6-202 (1995) . . . . .            | 2 |
| Utah Code Ann. § 76-6-404 (1995) . . . . .            | 2 |
| Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994) . . . . . | 1 |
| Utah Const. art. I, § 7 . . . . .                     | 1 |

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. :  
BRENT THOMAS SILVERS, : Case No. 950002-CA  
Priority No. 2  
Defendant/Appellant. :

---

**JURISDICTIONAL STATEMENT**

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

**STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS**

Article I, section 7 of the Utah Constitution provides:

**Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

**STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

1. Whether Officer Brown's in court identification was tainted by the unreliable and unduly suggestive showup held after the officer was unable to make a positive identification from a photo spread?

**Standard of review.**

The constitutionality of an identification procedure is a mixed question of law and fact. Sumner v. Mata, 455 U.S. 591, 597, 102 S.Ct. 1303, 1306, 71 L.Ed.2d 480 (1982); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991). The trial court's conclusion that defendant's due process rights were not violated is reviewed de novo. Archuleta v. Kerby, 864 F.2d 709, 711 (10th Cir. 1989), cert. denied, 490 U.S. 1084, 109 S.Ct. 2108, 104 L.Ed.2d 669 (1989); Ramirez, 817 P.2d at 782. The factual

findings underlying the conclusion are, however, entitled to a presumption of correctness. Archuleta, 864 P.2d at 711; Ramirez, 817 P.2d at 782.

State v. Mincy, 838 P.2d 648, 657 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992). Accord State v. Adams, 830 P.2d 310, 311 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992).

Preserved below by pretrial motion to suppress, R. 32-3, and the hearing held thereon, R. 170-227 (transcript).

#### **STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS**

Brent Thomas Silvers was charged by information with two counts of burglary (§ 76-6-202, 2<sup>nd</sup> degree felonies) and two counts of theft (§ 76-6-404, class B misdemeanors). R. 7-9. Mr. Silvers filed a pretrial motion to suppress the eyewitness identification of Officer William D. Brown because the showup identification was unreliable and unduly suggestive, and tainted all subsequent identifications. R. 32-33. After hearing, R. 170-227 (transcript), the trial court denied the motion. R. 37-8 (minute entry), 126-9 (findings and conclusions, attached as addendum A).

Mr. Silvers was convicted at trial as charged. R. 117-120 (verdicts). On defense motion, the trial court dismissed the class B theft charges. R. 131-3 (motion), 155 (order). Mr. Silvers was sentenced to prison for the statutory terms of one to fifteen years (concurrent), and ordered to pay restitution and recoupment. R. 156-7. This appeal ensued.

### STATEMENT OF FACTS

Officer William D. Brown, a 23 year officer and sergeant with the Salt Lake City Police Department (R. 173, 293), and part time security officer with Little America hotel for 15 years (R. 174, 293), was working at Little America on the evening of February 15, 1994 when he noticed a "white small car that looked like a Subaru Justy parked in the loading dock area." R. 174, see also 294-5. The loading dock area is well lighted. R. 176, 295. Officer Brown then noticed a console television from one of the hotel rooms sitting on the lawn. R. 175, 295. As he made this observation, the car started to leave, and drove right in front of Officer Brown. R. 175. Officer Brown "ran to the driver's side of the vehicle and took a look at the driver" from a distance of approximately five feet. R. 176.<sup>1</sup> Officer Brown observed the suspect "[p]robably no more than five seconds." He did not see the suspect head on; he only saw a profile. R. 177.<sup>2</sup> Officer Brown also obtained the license plate number of the suspect vehicle, and reported it to the police dispatcher. R. 178.

---

<sup>1</sup>At trial, Officer Brown put the distance at fifteen feet. R. 299.

<sup>2</sup>Officer Brown's testimony on this point changed at trial: "[W]hen I looked at the television set over here and I walked back over to the car, where the car was, it started to move and it passed right in front of me as he was backing up and the guy looked right at me. I saw a profile of him. He glanced at me and then backed up and drove away." R. 299. See also R. 305, 314, 315-6.



A couple weeks later, Officer Brown was contacted by a detective and shown a photo spread. R. 178-9.<sup>3</sup> Officer Brown was unable to make a positive identification: "In my mind, I picked out an individual that looks very similar to the gentleman seated at counsel table, but I wasn't a hundred percent sure that he was the one I'd seen because I'd seen a profile of him." R. 179. The individual Officer Brown picked was in fact Mr. Silvers. R. 304-5

On March 5th, Officer Brown was on duty with the police department and heard the dispatcher broadcast a burglary in progress at the Little America. Officer Brown got on the radio, described the vehicle he had previously seen, and then proceeded to Little America "[b]ecause I wanted to see for myself if in fact it was the same vehicle, and I was on duty." R. 180. Officer Brown identified the same vehicle at the scene. R. 181. He also observed defendant sitting in the back of a police car. Officer Brown looked at defendant on his own initiative "to see if the individual seated in the police car was the same person I had seen driving the vehicle in February." R. 181. Although the scene was street-lit, Officer Brown found it necessary to use his flashlight. R. 318-9. Officer Brown identified defendant as the same individual he had seen in February. R. 182. At trial, Officer Brown made a positive in-court identification of Mr. Silvers. R. 309.

---

<sup>3</sup>In fact, the photo spread was shown to Officer Brown on March 4th, just one day prior to Mr. Silvers arrest during the second encounter on March 5th. R. 366 (testimony of Detective Gilbert D. Arenaz, who showed the photo spread to Officer Brown).

### SUMMARY OF THE ARGUMENT

Officer Brown's positive identification of Mr. Silvers was tainted by the unreliable and unduly suggestive showup conducted after he was unable to positively identify Mr. Silvers from the photo spread shown to him just the day before. Officer Brown's identification is as likely the result of seeing Mr. Silvers' photo the day before rather than based on an independent recollection of the brief glimpse of a suspect almost three weeks earlier. Presentation of evidence of Officer Brown's positive identification at the showup, as well as his positive identification in court, violated Mr. Silvers' right to due process.

### ARGUMENT

POINT I. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS OFFICER BROWN'S IDENTIFICATION AFTER THE UNRELIABLE AND UNDULY SUGGESTIVE SHOWUP AT THE TIME OF THE SECOND BURGLARY.

In State v. Ramirez, 817 P.2d 774 (Utah 1991), the Utah Supreme Court adopted an independent analytical model for evaluating the admissibility of suggestive identifications under article I, section 7 of the Utah Constitution. In so doing, the Court departed from the federal due process test, found in Neil v. Biggers, 409 U.S. 188, 198-9, 93 S.Ct. 375, 381-2, 34 L.Ed.2d 401,

410-11 (1972), that had been used in Utah. E.g. State v. Thamer, 777 P.2d 432 (Utah 1989).<sup>4</sup>

"The ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable." Ramirez, 817 P.2d at 774. In place of the factors set forth in Biggers, the Supreme Court adopted the factors set forth in State v. Long, 721 P.2d 483, 493 (Utah 1986):

(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.

The Court directed the bench and bar to the proposed instruction in Long, 721 P.2d at 494 n.8, for a finer analysis of these factors that "should be of assistance to the bench and bar in applying these factors when a challenge to the constitutionality of an identification arises." Ramirez, 817 P.2d at 781 n.2. Appellant will address the Long factors in order.

A. OFFICER BROWN HAD LIMITED OPPORTUNITY TO OBSERVE THE SUSPECT ON FEBRUARY 15TH.

---

<sup>4</sup>Because the Utah test is more stringent than the federal due process test under Biggers, appellant does not separately brief federal due process claims. See Ramirez, 817 P.2d at 780 ("the resulting reliability determination will meet or exceed in rigor the federal standard").

Officer Brown only saw the suspect briefly during the first encounter. He testified that at most the encounter lasted five seconds. The officer only saw the suspect in profile. While the area was well lit, the encounter did occur at night and the suspect was inside the vehicle. The circumstances under which the officer viewed the suspect on February 15th render an accurate and reliable identification difficult at best. This factor militates against allowing an in-court identification.

B. OFFICER BROWN WAS ATTENTIVE, AND THE EVENT WAS NOT ORDINARY.

Appellant does not dispute that Officer Brown was attentive and actively focused on making an accurate identification at the time of the February 15th encounter. The television outside the hotel room rendered the situation extraordinary and unusual. These factors favor allowing in-court identification.

C. OFFICER BROWN HAD NO PHYSICAL OR MENTAL IMPAIRMENT, BUT THESE FACTORS DO NOT CONTROL HERE.

Officer Brown had no physical or mental impairment interfering with his observation. As previously noted, however, it was nighttime, which rendered accurate perception of details of a person inside an automobile difficult. This factor is relatively neutral.

D. OFFICER BROWN'S IDENTIFICATION WAS THE RESULT OF THE SUGGESTIVE AND UNRELIABLE SHOWUP.

This factor is the most important in this case. At the time Officer Brown made his showup identification of Mr. Silvers on March 5, 1995, Mr. Silvers was arrested, handcuffed, and seated in

the back seat of a police cruiser. He was the only non-officer person present. Officer Brown had previously viewed Mr. Silvers' photograph as part of a photo spread just the day before and made a tentative identification. Officer Brown had heard the radio call announcing the burglary in progress at the Little America. Under the circumstances, he knew that the individual in the police car was the suspect. Having reviewed Mr. Silvers' photograph just the day before, it is unsurprising that he recognized him.

Officer Brown probably had a subconscious motivation at the time of the showup to solve the current and prior burglary. This motivation, while normal in any officer, was heightened by Officer Brown's employment relationship with the victim in this case. Solving the case would doubtless please his part-time employer. Under the circumstances, it cannot be said that Officer Brown's identification was the result of an intentioned recollection of the February 15 encounter, some three weeks old, rather than the far more recent viewing of Mr. Silvers' photograph in the photo spread just the day before. Testimony concerning the showup, as well as Officer Brown's in court identification, should have been suppressed.

E.    HERE, WE HAVE THE BENEFIT OF THE  
      NONSUGGESTIVE PHOTO SPREAD TO SHOW THAT  
      OFFICER BROWN WAS UNABLE TO MAKE A  
      POSITIVE IDENTIFICATION.

Unlike the normal situation where we have no indication of what the result of a non-suggestive identification procedure would have been, here he have the benefit of the prior photo spread. Officer Brown was unable to make a positive

identification. Mr. Silvers' due process rights were violated when the State was allowed to transform a tentative identification into a positive identification by means of the suggestive showup. The State should only have been allowed to introduce the results of the photo spread. No in court identification should have been allowed.

F. THE STATE HAD NO EXIGENT CIRCUMSTANCES THAT REQUIRED A SHOWUP BY OFFICER BROWN ON MARCH 5TH.

In State v. Poteet, 692 P.2d 760, 763 (Utah 1984), the Supreme Court recognized that showups are most appropriately used where exigent circumstances are present. Here, there were no exigent circumstances. If the State wanted to use Officer Brown's identification at trial, it should have held a proper lineup.

Under the totality of the circumstances, Officer Brown's identification was unreliable. Admission of this identification violated Mr. Silvers' due process rights. The trial court should have suppressed all testimony concerning the showup, as well as Officer Brown's in court identification.

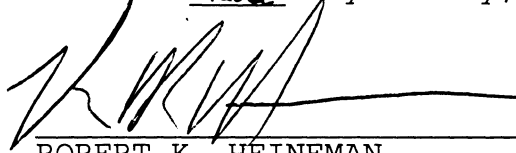
#### REASONS SUPPORTING ORAL ARGUMENT/MEMORANDUM DECISION

This is a criminal case and appellant's liberty interest is at stake.

#### CONCLUSION

For the foregoing reasons, Mr. Silvers respectfully requests that his conviction be reversed.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of May, 1995.

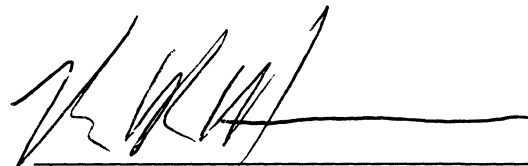


ROBERT K. HEINEMAN  
Attorney for Defendant/Appellant

ROBERT L. STEELE  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 23<sup>rd</sup> day of May, 1995.



Robert K. Heineman

DELIVERED/MAILED this \_\_\_\_\_ day of May, 1995.

\_\_\_\_\_

**ADDENDUM A**



DAVID E. YOCOM  
Salt Lake County Attorney  
JOHN N. SPIKES, Bar No. 3062  
Deputy County Attorney  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

Third Judicial District

SEP 26 1994

SALT LAKE COUNTY  
*C. Bateley*

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

---

|                       |   |                                |
|-----------------------|---|--------------------------------|
| THE STATE OF UTAH,    | ) |                                |
|                       | ) | FINDINGS OF FACT AND           |
| Plaintiff,            | ) | CONCLUSIONS OF LAW ON          |
|                       | ) | DEFENDANT'S MOTION TO SUPPRESS |
| -vs-                  | ) |                                |
|                       | ) | Case No. 941900704FS           |
| BRENT THOMAS SILVERS, | ) |                                |
|                       | ) | Hon. J. Dennis Frederick       |
| Defendant.            | ) |                                |

---

The above-entitled matter came regularly for hearing before the Honorable J. Dennis Frederick, Third District Court Judge, on August 9, 1994. The plaintiff was represented by its attorney, John N. Spikes, Deputy Salt Lake County Attorney, and the defendant was present and represented by his attorney, Robert L. Steele. The Court having heard the evidence and argument presented by the parties, now makes and enters the following:

FINDINGS OF FACT

On February 15, 1994, while working as a security guard at Little America, located at 534 South Main, Salt Lake City, Sergeant Brown, a 23-year veteran of the Salt Lake City Police Department, at approximately 7:15 to 7:30 PM, observed a white, older model Subaru parked in the loading dock driveway at Little America. The officer was aware of a history of burglaries and thefts from ground level apartments of both televisions and television remote controls.

2. Brown, at the time of seeing the Subaru, simultaneously saw a television console sitting outside a ground level apartment. The Subaru was backed up to the television. The Subaru had blacked-out windows by the use of tape and an unusual color.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Case No. 941900704FS

Page two

3. While going to inspect the circumstances, a white male driver with long, shoulder-length hair drove past the officer, leaving rapidly. The officer obtained a view of the individual within approximately five feet of a well-lighted area.

4. Approximately two weeks later, Brown saw a photo spread of individuals and selected one he thought to be the defendant, but he was not one hundred percent sure.

5. Then on March 5th of 1994, while on duty with the Salt Lake City Police Department, Officer Brown heard a radio report of a potential burglary in progress at Little America. Upon hearing that report, Brown announced over the radio a description of the Subaru he had seen on February 15, 1994, which was heard by Officer Whiting.

6. Whiting responded on March 5th, 1994, to Little America, where he observed a television moved onto the balcony of a ground-level apartment through jimmied doors and obtained a description of the suspect from the on-duty security guard.

7. Whiting saw the described vehicle parked across the street from the burglarized apartment. He checked over the radio its registration and found it was registered to the defendant. He thereafter, over the radio, obtained a description of the defendant from the driver's license information. Whiting observed the vehicle which fit the description of the suspect vehicle which he had heard over the air and he observed it was modified for hauling loads. The description that he observed on the vehicle was that previously given by Brown over the air. Whiting waited in the area and subsequently spotted the defendant at a public pay phone near the area of the burglary, looking nervous, making furtive movements and looking like he was not really talking on the phone.

8. The suspect matched the description that Whiting had obtained from the driver's license bureau. Officer Whiting approached the defendant, asked what he was doing, and asked for his name. The defendant gave a false name. The officer then asked for identification and was given the defendant's driver's license which identified him as the owner of the suspect vehicle.

00127

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Case No. 941900704FS

Page three

9. When asked if he owned the suspect car, the defendant replied yes and stated he had parked it near the station to use the pay phone. Whiting determined at that point he had probable cause to make the arrest and did so.

10. He did not Mirandize the defendant.

11. Sergeant Brown subsequently arrived at the scene and on his own volition ID'd the defendant as the same suspect in the February 15, 1994, incident. Wahlin overheard some comments of the defendant, but thought that these comments were made after the defendant was under arrest.

WHEREFORE, having herefore entered its Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The identification of the defendant by Whiting was not tainted or suggestive. Brown just relaying, as a good officer should, the information he had with regard to the previous burglary and the vehicle description, was acting in a reasonable fashion.

2. The statements made by the defendant prior to the arrest are not suppressable. The defendant responded to preliminary investigatory questions of Whiting, which Whiting was authorized to ask in attempting to determine if the defendant was connected with the crime, pursuant to 77-8-1 of the Utah Code.

3. However, any statements made by the defendant post arrest, before the defendant was Mirandized, if there are any such statements, are excludable.

4. Officer Whiting established articulable facts giving rise to reasonable suspicion to believe the defendant was the suspect and his questions of the defendant prior to the arrest were in furtherance of that effort to determine if the defendant was the owner of the described suspect vehicle pursuant to Title 77-7-15.

5. Any statements made to Detective Arnaz declining to discuss matters further are suppressed.

00128

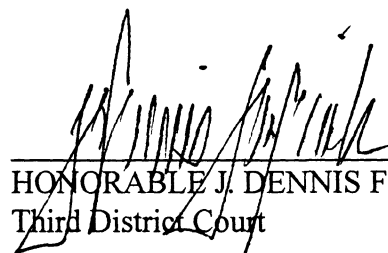
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
Case No. 941900704FS  
Page four

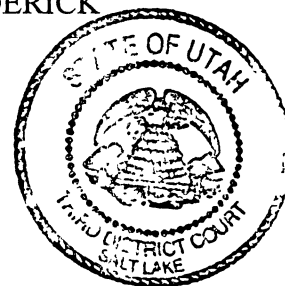
6. Any statements made by the defendant post arrest, prior to being Mirandized, are likewise excludable and to be suppressed.

7. There was nothing unduly suggestive or inappropriate about Officer Brown's identification of the defendant.

DATED this 26th day of September, 1994.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE J. DENNIS FREDERICK  
Third District Court



APPROVED AS TO FORM:

\_\_\_\_\_  
ROBERT L. STEELE  
Legal Defenders Association

#### CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the foregoing to Robert Steele, at the office of the Salt Lake Legal Defenders Association, Salt Lake City UT 84111, this \_\_\_\_\_ day of September, 1994.

00129

DAVID E. YOCOM  
Salt Lake County Attorney  
JOHN N. SPIKES, Bar No. 3062  
Deputy County Attorney  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

Third Judicial District

SEP 26 1994

SALT LAKE COUNTY  
*C. Beverley*

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

---

THE STATE OF UTAH, )

Plaintiff, )

-vs- )

BRENT THOMAS SILVERS, )

Defendant. )

---

ORDER

Case No. 941900704FS

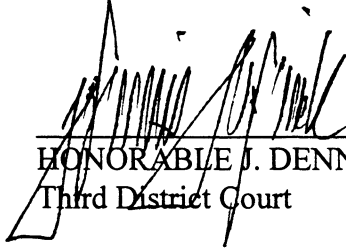
Hon. J. Dennis Frederick

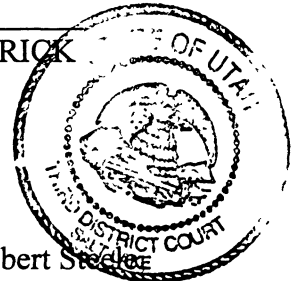
Based upon the Court's Findings of Fact and Conclusions of Law, now, therefore;

IT IS HEREBY ORDERED that the defendant's Motion to Suppress is denied.

DATED this 26th day of September, 1994.

BY THE COURT:

  
HONORABLE J. DENNIS FREDERICK  
Third District Court



CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the foregoing to Robert St...  
at the office of the Salt Lake Legal Defenders Association, Salt Lake City UT 84111, this \_\_\_\_\_  
day of September, 1994.

00130