1999

# State of Utah v. Pearl Topanotes : Reply Brief

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| PEARL TOPANOTES, | : | Case No. 990708-CA |
| Defendant/Appellant. | : | Priority No. 2 |

**REPLY BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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Defendant Pearl Topanotes has appealed the trial court's ruling on a motion to suppress evidence obtained in violation of the Fourth Amendment. The facts of the case reflect that officers were investigating the residential address of an arrested person, Glenna Thomas, when they encountered Topanotes on foot outside her home. Officers asked Topanotes for an identification card, and when she produced the requested information, they retained the card for the purpose of running a warrants check. The check revealed warrants outstanding for Topanotes's arrest. Officers arrested Topanotes and searched her incident thereto. In connection with the search, officers discovered heroin, which gave rise to the possession charge in this case.

During a hearing on the matter, Topanotes argued to the trial court that officers engaged in an unlawful level-two seizure/detention under Terry v. Ohio, 392 U.S. 1 (1968), where they retained possession of her identification card to conduct the warrants check. The level-two detention was unlawful since officers failed to identify reasonable articulable suspicion that Topanotes was engaged in criminal activity to justify the

detention. See Salt Lake City v. Ray, 2000 UT App 55, 390 Utah Adv. Rep. 3.

The trial court disagreed with Topanotes and ruled the officers engaged in a level-one *voluntary* encounter under Terry. According to the court "there was absolutely no testimony that [Topanotes] was compelled to remain" while officers retained possession of her identification card. Rather, "she remained cooperatively, because the police did not in any way restrict her freedom to leave nor did she voice any objection." (R. 98:4-5.) The trial court's analysis was incorrect. See Ray, 2000 UT App 55, ¶¶13-17.

The state agrees. The encounter escalated to an unlawful level-two detention. As the state recognizes,

> A level two detention must be supported by reasonable suspicion of criminal activity. *Id.* at ¶18. Officers Hansen and Mitchell made plain that they did not suspect defendant of solicitation or other criminal behavior when they approached to question her about Thomas, the prostitute they had just arrested, and whose identity and residence they were attempting to verify (R. 88:16, 28). Absent reasonable suspicion that defendant was herself soliciting, or otherwise involved in criminality, the detention engendered by retaining her identification during the warrants check was unjustified under *Ray*. *Id.* at ¶¶13-17. The trial court erred in concluding otherwise. *Id.*

(State's Brief of Appellee (S.B.) at 6 (citing Ray, 2000 UT App 55, ¶¶13-17).) The unlawful level-two detention tainted the subsequent arrest and search incident thereto. (Brief of Appellant.)

Notwithstanding the trial court's erroneous ruling, the state is asking this Court to affirm the trial court's order. According to the state, alternative grounds for affirmance exist: the inevitable-discovery doctrine is applicable to this case under Nix v. Williams, 467 U.S. 431 (1984), and U.S. v. Larsen, 127 F.3d 984, 987 (10th Cir. 1997), cert.

denied, 522 U.S. 1140 (1998). (S.B. at 7-11.)[1]

The state is incorrect. Its argument is unpersuasive for the following reasons: (A) The state failed to raise the issue of inevitable discovery in the trial court. Thus, the issue may not be raised for the first time on appeal (see point A., infra). (B) Also, the state failed to present any evidence in the trial court to support application of the inevitable-discovery doctrine to this case. There is no evidence that officers were engaged in, or contemplated commencing, an independent investigation that inevitably would lead to the discovery of the controlled substance. (See point B., infra).

Inasmuch as the state admits the officers violated Topanotes's rights under the Fourth Amendment, Topanotes respectfully requests the entry of an order reversing the trial court's ruling on the motion to suppress. Salt Lake City v. Ray, 2000 UT App 55, 390 Utah Adv. Rep. 3.

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1 The state acknowledges that this Court's ruling in State v. James, 1999 UT App 17, 977 P.2d 489, cert. granted, 984 P.2d 1023 (Utah 1999), precludes application of the inevitable-discovery doctrine to this case. (S.B. at 8 n.2.) Thus, Ray, 2000 UT App 55, ¶¶13-15, and James compel reversal of this matter on the grounds that the officers violated Topanotes's rights under the Fourth Amendment.

To the extent the state is asking this Court to overrule its decision in James, this Court should decline such a request for several reasons. First, it is not necessary to reach the merits of the state's claim since the evidence in this case fails to support application of the inevitable-discovery doctrine. Second, the state has misapplied the inevitable-discovery doctrine as set forth in United States Supreme Court case law. Thus, the state's claim that James should be overruled is irrelevant. Third, in State v. Ostler, 2000 UT App 28, ¶ 7, 996 P.2d 1065, 1067, this Court stated that it is "bound by the doctrine of stare decisis and cannot overrule another panel's ruling." Id. Thus, James is controlling. Pursuant to that case, the inevitable-discovery doctrine is inapplicable. That ends the analysis.

## FACTUAL AND PROCEDURAL BACKGROUND

The state does not dispute the following facts in its brief: Officers first encountered Topanotes in front of her home. The encounter began as a level-one consensual stop. During the encounter, "Sgt. Hansen identified himself as a police officer and asked defendant if she had any identification (R. 88:10). When defendant provided identification, Sgt. Hansen handed it to Officer Mitchell and asked him to call it in for a warrants check." (S.B. at 3.) "Officers Hansen and Mitchell made plain that they did not suspect defendant of solicitation or other criminal behavior when they approached to question her about Thomas, the prostitute they had just arrested, and whose identity and residence they were attempting to verify (R. 88:16, 28)." (S.B. at 6.)[2]

The facts also reflect that the warrants check took five minutes and revealed that

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2To be clear, officers did not have reasonable information or suspicions that Topanotes was involved in prostitution or any other criminal activity. Indeed, prior to the detention in this matter, officers were investigating the address of the arrested person, Glenna Thomas. (R. 88:8, 11, 13, 25.) Thomas claimed to live at a trailer address with another alleged prostitute. (R. 88:8.) When Mitchell and Hansen went to the trailer to confirm Thomas' address, no one was home. (R. 88:25.)

The officers went to the owner's home on the premises and learned that Thomas had misrepresented the matter; according to the owner of the premises, Thomas did not live at the trailer. Rather, a "short Indian girl by the name of Pearl" lived there. (R. 88:9, 25-26.) The facts support the determination that Thomas could not be trusted. She had misrepresented her residential information. Officers properly determined that Thomas's spurious allegations concerning another alleged prostitute likewise could not be trusted. (See R. 88:16, 28 (when officers encountered Topanotes, they had no reason to believe she was involved in criminal activity).) Thus, as the state acknowledges, officers lacked reasonable articulable suspicion that Topanotes was involved in criminal activity. (See S.B. at 3-4 and 6); see State v. Chapman, 921 P.2d 446, 453 (Utah 1996) (second-hand information *from officer* concerning defendant was insufficient to support further detention).

Topanotes had warrants outstanding for her arrest. Officers arrested Topanotes and searched her incident thereto. (S.B. at 3.) During the search, officers discovered heroin. The discovery gave rise to the charge for possession of a controlled substance in this case. (R. 7-8.)

At the point when Officer Hansen failed to return Topanotes's identification card to her, the matter escalated to an unlawful level-two detention/seizure. (S.B. at 4; Brief of Appellant); Ray, 2000 UT App 55, ¶17. The unlawful level-two detention in this case tainted the subsequent arrest and search incident thereto. (Brief of Appellant); Salt Lake City v. Ray, 2000 UT App 55, ¶13.

## ARGUMENT

### THE INEVITABLE-DISCOVERY DOCTRINE AS SET FORTH IN *NIX* AND *LARSEN* IS INAPPLICABLE TO THIS CASE.

The state argues for the application of the inevitable-discovery doctrine as a basis for affirming the trial court's ruling in this matter. That doctrine does not apply here.

*The Exclusionary Rule*: It is well established that when officers engage in an illegal search or seizure under the Fourth Amendment, evidence obtained in connection therewith will be suppressed pursuant to the exclusionary rule. The exclusionary rule is a remedy for a constitutional violation. See Mapp v. Ohio, 367 U.S. 643 (1961) (rule is applicable to the states through the Fourteenth Amendment). The rule compels respect for the Fourth Amendment, deters police from invading homes and interfering with an individual's personal sanctity in violation of the Fourth Amendment, and removes the

incentive to disregard the constitutional guaranty.

*The Inevitable-Discovery Doctrine:* The "inevitable-discovery" doctrine is a limited exception to the exclusionary rule. It considers, among other things, whether the illegally seized evidence would have been discovered through the use of lawful, predictable, independent investigatory procedures and whether the procedures inevitably would have resulted in the discovery of the evidence in question. Nix v. Williams, 467 U.S. 431, 444 (1984). The inevitable-discovery doctrine is not an alternative "exception" to the Fourth Amendment requirement.[3] It is a fact-intensive doctrine that applies only in limited circumstances to block application of the exclusionary rule.

The United States Supreme Court explicitly recognized the inevitable-discovery doctrine in Nix v. Williams, 467 U.S. at 431. In that case, officers believed defendant dumped a young girl's body near a road, ditch, culvert or abandoned building between two points on the map. Id. at 435. An officer in charge of searching the area began the process of marking off maps between the two points in a grid fashion, separating 200 volunteers into teams, and assigning them to search specific grid areas. Id. at 435, 448-49. Volunteers were instructed to concentrate their efforts on roadsides, culverts, ditches, and abandoned buildings. Id.

After volunteers began searching, defendant disclosed the location of the body

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3Exceptions to the *warrant* requirement include consent, plain view, incident to arrest, and "probable cause to search plus exigent circumstances." State v. Lambert, 710 P.2d 693, 698 (Kan. 1985).

during an unlawful interrogation. Id. The body was located near a roadside ditch in an area to be searched under the grid system. Id. at 449. The Nix Court ruled that discovery of the body was inevitable as supported by the officers' testimony concerning the lawful, independent investigation relating to the search for the body. Id. at 449-50. Thus, the unlawful interrogation, which actually led to the discovery, was harmless. See id.

The Nix Court applied the doctrine where the prosecutor presented specific facts in the trial court to support the determination that a lawful, predictable, independent, active investigation inevitably would have led to the discovery. As set forth below, the state here is unable to meet the Nix standard.

A. THE STATE FAILED TO RAISE THE ISSUE OF INEVITABLE-DISCOVERY IN THE COURT BELOW; IT MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The state is seeking application of the inevitable-discovery doctrine as an alternative basis for affirming the trial court's ruling on the motion to suppress. This Court has ruled that the "doctrine of affirming the trial court's ruling on other proper grounds" is applicable only if the basis is "apparent on the record." State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997) (quoting Limb v. Federated Milk Producers Ass'n, 461 P.2d 290, 293 n.2 (Utah 1969)). "If, in any way, the ground or theory urged for the first time on appeal is not *apparent* on the record, the principle of affirming on any proper ground has no application." Id.

In this case, application of the inevitable-discovery doctrine as a unique remedy to the constitutional violation is not apparent from the record. The state did not argue the

issue below or present evidence in the trial court concerning the matter. (See record in general.) Topanotes was not on notice of the possible application of such a unique remedy and she had no opportunity to cross-examine Officers Hansen or Mitchell in connection with its possible application. See Montoya. 937 P.2d at 149; see also Hayes v. Florida, 470 U.S. 811, 814 n.1 (1985) (prosecution asked Court to apply inevitable-discovery doctrine as an exception to the exclusionary rule; Court declined since exception was not presented in the lower courts); see also Wilson v. Arkansas, 514 U.S. 927, 937 n.4 (1995).

The state suggests that "[to] the extent [] there is any question on this record as to the applicability of the inevitable-discovery rule, the proper remedy is remand to allow the trial court to make that fact sensitive determination in the first instance." (S.B. at 11 n.3.) That state's suggestion is inappropriate, for the following reasons:

The state bears the burden of proof in establishing application of the inevitable-discovery doctrine. Nix, 467 U.S. at 444. In this case, the state filed papers relating to its position on the Fourth Amendment issue, participated in oral argument, and presented witnesses to testify. (R. 67-71; 88; 98.) The state has not suggested that it was denied a full and fair opportunity to present evidence that it deemed relevant to the matter.

After the evidentiary hearing, the trial court entered findings and conclusions relating to the Terry stop and search incident to arrest. The trial court made its ruling in connection with the specific facts the state chose to present. There is nothing in the record relating to the inevitable-discovery doctrine since the state chose not to present

evidence concerning the matter.

As a result of failing to elicit information concerning the inevitable-discovery doctrine, the state failed to develop a factual predicate in the trial court to justify application of the inevitable-discovery doctrine and it failed in its burden of proof. The state's failure to meet its burden is a sufficient basis for ruling that the inevitable-discovery doctrine is inapplicable. See State v. Case, 884 P.2d 1274, 1278 (Utah App. 1994) (trial court's order denying motion to suppress reversed where the state failed to present sufficient evidence to justify its position under the Fourth Amendment); State v. Hodson, 907 P.2d 1155, 1159-60 (Utah 1995) ("[On] the basis of the evidence now on the record, this search should not be upheld"; state failed to present sufficient evidence); State v. Gutierrez, 864 P.2d 894, 903 (Utah App. 1993) (based on the evidence the state elected to present in the trial court, case would not be remanded for further proceedings; the state's evidence was insufficient to uphold confession under Miranda); Barnett v. U.S., 525 A.2d 197, 200 (D.C. 1987) (where government failed to overcome its burden of proof, it would not be given second chance on remand).

Inasmuch as the state chose not to present evidence concerning the inevitable-discovery doctrine, the doctrine is inapplicable to this case. Topanotes respectfully requests that this Court reverse the trial court's ruling on the motion to suppress.

### B. THE INEVITABLE-DISCOVERY DOCTRINE IS INAPPLICABLE SINCE THE EVIDENCE FAILS TO SUPPORT THE DETERMINATION THAT OFFICERS CONTEMPLATED OR WERE ENGAGED IN AN INDEPENDENT INVESTIGATION THAT WOULD HAVE LED TO THE DISCOVERY OF THE CONTROLLED SUBSTANCE.

While the state acknowledges that it bears the burden of establishing application of the inevitable-discovery doctrine by a preponderance of the evidence (S.B. at 7), the state also seems to assert that so long as it is able to speculate as to what might have occurred "if the investigation had continued without the illegality," the doctrine may apply as an exception to the exclusionary rule. (S.B. at 7.) That is, according to the state, the prosecution is not required to present "absolute proof" of what would have "hypothetically occurred absent the illegality" to apply the doctrine. Rather, the prosecution is required only to present "evidence of predictable police routine" and an argument as to what would have "hypothetically occurred" if officers had complied with the law. (S.B. at 7.) The state's argument supplants evidence of a predictable, "independent investigation" under Nix with revisionist history. The state proposes to re-write history in this case to support its purpose.

The state's approach to the doctrine is speculative and contrary to Nix. In that case, the Court emphasized that the inevitable-discovery doctrine is not based in speculation. Nix, 467 U.S. at 444, n.5. Rather, its application relies on "demonstrated historical facts capable of ready verification or impeachment." Id.[4] That is, the government is required to present basic, primary evidence of the independent, lawful

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4 "Historical facts" are facts that are admitted and established in evidence. See Ornelas v. U.S., 517 U.S. 690, 696 (1996). They include a recital of the events and credibility determinations. The historical facts serve as a basis for the trial court's factual findings. See Thompson v. Keohane, 516 U.S. 99, 109-10 (1995). If the historical facts are lacking, the proponent has failed in its burden of proof. See State v. Arroyo, 796 P.2d 684, 687 (Utah 1990).

investigation to support application of the doctrine.

Indeed, the factual determinations in Nix were capable of verification or impeachment. There, the prosecutor presented evidence in the trial court that -- absent the unlawful conduct -- officers would have discovered the young girl's body in connection with an independent, lawful investigation. The evidence of the independent, lawful investigation consisted of the following:

> [T]he prosecution offered the testimony of Agent Ruxlow of the Iowa Bureau of Criminal Investigation. Ruxlow had organized and directed some 200 volunteers who were searching for the child's body. Tr. of Hearings on Motion to Suppress in State v. Williams, No. CR 55805, p. 34 (May 31, 1977). The searchers were instructed "to check all the roads, the ditches, any culverts .... If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted." Id., at 35. Ruxlow testified that he marked off highway maps of Poweshiek and Jasper Counties in grid fashion, divided the volunteers into teams of four to six persons, and assigned each team to search specific grid areas. Id., at 34. Ruxlow also testified that, if the search had not been suspended because of [defendant's] promised cooperation, it would have continued into Polk County, using the same grid system. Id., at 36, 39-40. Although he had previously marked off into grids only the highway maps of Poweshiek and Jasper Counties, Ruxlow had obtained a map of Polk County, which he said he would have marked off in the same manner had it been necessary for the search to continue. Id., at 39.
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> There was testimony that it would have taken an additional three to five hours to discover the body if the search had continued; the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search.

Nix, 467 U.S. at 448-449.

Likewise, in Larsen, 127 F.3d at 987, also relied upon by the state, (S.B. at 7), the court looked to the primary facts of record in the trial court to determine application of the doctrine. In that case, officers obtained a warrant allowing them to seize certain

vehicles on defendant's property. While the officers were executing the warrant, they seized numerous unauthorized items, including "bank records." Larsen, 127 F.3d at 985.

After the items were seized, a state trooper involved in executing the warrant, stopped at the local bank for personal reasons. He mentioned to the bank vice-president that he had recovered vehicles from defendant's property. The bank vice-president "became concerned because the bank had loaned money to [defendant] for a vehicle." Id. The vice-president independently pulled his records on the matter and sent them to the crime division of the FDIC. The crime division forwarded the records to Agent Crabtree of the FBI. Id.

Meanwhile, the state troopers who had executed the search warrant likewise determined to send the illegally seized "bank records" to Crabtree. Id.

Crabtree investigated the matter, "issued subpoenas and, in accordance with standard FBI procedures, began tracing [defendant's] banking activities. This led to issuance of subpoenas by a grand jury and discovery of the bank records on which [defendant's] prosecution for federal bank fraud and money laundering was based." Id.

Defendant moved to suppress all evidence on the basis that officers exceeded the scope of the warrant during the initial search and poisoned all evidence discovered thereafter. The district court agreed and determined the excessive warrants search was unlawful. However, that court and the United States Court of Appeals for the Tenth Circuit ruled that the inevitable-discovery doctrine applied and would block application of the exclusionary rule. The facts supported the determination that Crabtree would have

discovered the fraudulent transaction in connection with his independent, predictable, lawful investigation of the bank records from the vice-president. Id. at 986-87.

> We conclude the inevitable-discovery exception applies whenever an independent investigation inevitably would have led to discovery of the evidence, whether or not the investigation was ongoing at the time of the illegal police conduct.
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> * * *
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> When the challenged evidence also has an independent source or would inevitably have been discovered by independent lawful means, exclusion of the evidence "would put the police in a worse position than they would have been in absent any error or violation."

Id. at 986 (citing Nix, 467 U.S. at 443). The court in Larsen was not required to rely on revisionist history, or speculative hypothetical events to find that the inevitable-discovery doctrine applied. Rather, the facts of record established that an independent, lawful, predictable, investigation into the bank records existed.

Pursuant to Nix and Larsen, the inevitable-discovery doctrine is inapplicable to Topanotes's case as a matter of law and a matter of record. That is, the state failed to present evidence to support application of the inevitable-discovery doctrine (see point B.1.). While the state argues that the warrants check was "predictable police routine" and hypothetically could have been separated from the illegal conduct, there is no evidence to support that assertion (see point B.2.). Also, as a matter of law, the warrants check in this case was not "routine." It was unlawful, thereby supporting the determination that the "routine" check in this case could not support application of the inevitable-discovery doctrine. (See point B.3.). Topanotes addresses each subpoint below.

1. The State Failed to Present Evidence that Officers Were Involved in an Independent Investigation Relating to Topanotes.

In the lower court proceedings, officers testified to the existence of only one investigation in this matter: the investigation that resulted in the unlawful, level-two detention and arrest. There is no evidence that officers were engaged in or contemplated any other independent investigation concerning Topanotes, and there is no indication that officers contemplated or believed they inevitably would discover heroin in Topanotes's pocket if they had pursued an independent, lawful course of action. In the absence of compelling facts to support the existence of an independent, predictable, lawful investigation, the inevitable-discovery doctrine is inapplicable. See Larsen, 127 F.3d at 987; see also Nix, 467 U.S. at 448-49.

2. The State Claims that Officers Hypothetically Could Have Conducted a Warrants Check Without the Illegal Detention as a Matter of Routine Practice, and That Such a Warrants Check Would Be Sufficient to Invoke Application of the Inevitable Discovery Doctrine. The Record Fails to Support the State's Position.

The state seems to argue that the record in this case contains evidence of a lawful "predictable police routine," where officers could have conducted the warrants check without engaging in an unlawful detention. (S.B. at 8-10.) According to the state, based on the evidence of the "routine" practice, this Court may apply the inevitable-discovery doctrine to determine that police hypothetically could have discovered Topanotes's outstanding warrants without the illegality. (S.B. at 7-10.)

The state's argument is insupportable; the record does not contain evidence of a lawful "predictable police routine." Rather, it contains evidence that officers engaged in a "routine practice" that involved an unlawful level-two detention. Specifically, the

record reflects the following:

Officer Hansen encountered Topanotes outside her trailer home and requested an identification card. Topanotes produced a card and gave it to Hansen. Thereafter, Hansen handed the card to Mitchell, who walked away with the card to run the warrants check, while Topanotes remained detained. The entire unlawful procedure was "common practice" for the officers. (R. 88:22.) Furthermore, the officers did not detain Topanotes because they "suspected any criminal activity on Ms. Topanotes's part." (R. 88:16, 28.) Rather, the detention occurred "as a matter of routine" practice. (R. 88:16.)

The "routine practice" as described in this case consisted of detaining an individual for a warrants check without reasonable articulable suspicion of criminal activity. The "routine" described in the record was unlawful. Ray, 2000 UT App 55, ¶¶17, 20. There is no evidence of a lawful "predictable routine practice," to support the state's argument.

Next, the state asserts the following:

> [N]o information necessary to performing the warrants check was obtained during the course of the illegal detention in this case. Thus, the instant warrants check was not at all dependent upon the illegal detention for its successful completion – It would have been conducted with or without physical retention of defendant's identification (R. 88:16, 22, 28). It was therefore inevitable that police would discover defendant's outstanding warrants and that she would be arrested thereon.

(S.B. at 10). That is incorrect.

Contrary to the state's assertion, the "information necessary to performing the warrants check" (S.B. at 10) *was obtained* during the course of the illegal detention.

Again, as the record reflects, Hansen stopped Topanotes outside the trailer and requested the identification card. Topanotes produced a card and gave it to Hansen. Hansen reviewed the card then failed to return it; he retained possession of the card.

At the point where Hansen retained the card, the matter escalated to an unlawful level-two detention. (See S.B. at 6.) Hansen subsequently gave the identification card to Mitchell. At that point, Mitchell obtained information from the retained card and ran a warrants check. Thus, contrary to the state's assertion, Mitchell obtained the necessary information during the course of the illegal detention.

In this case, the record fails to support that the officers considered conducting the warrants check "with or without physical retention of defendant's identification" and "with or without the detention." (S.B. at 9, 10.) Indeed, the officers were never asked whether they routinely conducted warrants checks without detaining the individual, or whether they contemplated or considered running a warrants check in this case without "detention" or "physical retention of defendant's identification." Thus, the inevitable-discovery doctrine is inapplicable under the circumstances. See Nix, 467 U.S. at 444 (prosecution must establish inevitable discovery by "lawful means").

Since the state has failed to present evidence to support that officers contemplated a "routine" warrants check without an unlawful detention, the state's argument must be rejected. See State v. Arroyo, 796 P.2d 684, 687 (Utah 1990); 50 West Broadway Assoc.

v. Redevelopment Agency, 784 P.2d 1162, 1171 (Utah 1989).[5]

3. Utah Case Law Permits Officers to Conduct a Warrants Check During a Citizen Encounter as a Matter of "Routine Practice" in Connection with a Lawful Level-Two Detention, or As a Caretaking Function in Connection with the Citizen's Operation of a Vehicle. Neither Scenario Exists Here, Making a "Routine" Warrants Check During the Encounter Unlawful Under the Circumstances.

Finally, as a matter of law, the state's argument is flawed. The state's argument seems to be premised on the notion that a "warrants check" may be conducted during a level-one, pedestrian encounter as a matter of lawful, "predictable police routine" (S.B. at 4, 9-10.)

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5 Assuming arguendo officers considered running a warrants check without retaining Topanotes's card and without detaining her, it is unclear how that would have been accomplished. For example, after Hansen reviewed the identification card, if he returned it to Topanotes, who ran the warrants check? According to the facts, it was *not* Hansen. The warrants check was performed by Mitchell. Thus, under the state's hypothetical, how did Mitchell obtain the identification information from Hansen to run the check? Did he get it from Hansen? If so, did the officers have to detain Topanotes in order that Hansen could provide the identification information to Mitchell for the warrants check? That would be unlawful. See Johnson, 805 P.2d at 764 (the leap from asking a person's name and date of birth to running a warrants check severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet "inchoate and unparticularized suspicion or 'hunch'").

Also, assuming arguendo officers did not engage in an illegal detention/retention, when Officer Hansen hypothetically returned the card to Topanotes, was she free to go? If so, did she? If she left, did the officers continue with the warrants check? If so, did they find Topanotes after they completed the check, and where? Was she in her trailer or did she leave the area? If she went to the trailer, did she change her clothes? Since the hypothetical is unclear and unpredictable with respect to the facts, it does not lend itself to application of the inevitable-discovery doctrine.

The state's hypothetical facts emphasize the importance of basic evidence to support application of the inevitable-discovery doctrine. In this case, the facts of record support the determination that officers unlawfully escalated the matter and failed to identify reasonable articulable suspicion to support the detention.

In considering the law on the matter, Utah appellate courts have upheld a warrants check during a citizen encounter as a lawful, "routine" practice in connection with a level-two detention traffic stop or as a caretaking function when defendant has indicated an intent to operate a vehicle. See State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994); State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990); State v. Sepulveda, 842 P.2d 913, 917 (Utah App. 1992); State v. Patefield, 927 P.2d 655, 658 (Utah App. 1996); State v. Figueroa-Solorio, 830 P.2d 276, 280 (Utah App. 1992); State v. Chapman, 921 P.2d 446, 451-53 (Utah 1996); State v. Higgins, 884 P.2d 1242, 1244-45 (Utah 1994) (defendant offered to drive car when driver was arrested; defendant could not produce license, entitling officers to run computer/warrants check as proper caretaking function).

Those conditions do not exist here. (See S.B. at 6 (state acknowledges that level-two detention in this case was unlawful).)

Utah appellate courts also have recognized such a lawful, routine practice where officers have identified facts supporting reasonable articulable suspicion that defendant has been or is involved in criminal activity. State v. Bean, 869 P.2d 984, 985, 988 (Utah App. 1994); Bountiful City v. Maestas, 788 P.2d 1062 (Utah App. 1990); Salt Lake City v. Smoot, 921 P.2d 1003, 1006-07 (Utah App. 1996); State v. Jackson, 805 P.2d 765, 769 (Utah App. 1990) (defendant drove into a parking lot and approached officer, who followed him; because defendant had just been driving, officer requested license, which defendant claimed "had been taken;" officer had reasonable suspicion to believe defendant was driving without a valid license, and ran warrants checks).

Those conditions do not exist here. (See S.B. at 6 (state acknowledges that officers failed to identify reasonable articulable suspicion of criminal activity).)

Where officers have failed to identify reasonable articulable suspicion that defendant has committed or is about to commit a crime, as in Topanotes's case, Utah appellate courts have not been willing to justify detention for a warrants check as a matter of authority or "routine practice." See State v. Johnson, 805 P.2d 761, 764 (Utah 1991); State v. Hansen, 837 P.2d 987, 988-89 (Utah App. 1992). Thus, the state's argument is unpersuasive as a matter of law.

## CONCLUSION

For the reasons set forth herein, Topanotes respectfully requests that this Court reverse the trial judge's ruling on the motion to suppress evidence.

SUBMITTED this 14th day of July, 2000.

LINDA M. JONES
RALPH DELLAPIANA
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 14th day of July, 2000.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this __day of _____, 2000.

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