2000

The State of Utah v. Eric Jarvis Warren : Reply Brief

Utah Court of Appeals

Catherine E. Lilly; Heather Johnson; Otis Sterling III; Salt Lake Legal Defender Association; Attorney for Appellant.
Marian Decker; Assistant Attorney General; Jan Graham; Attorney General; Matthew G. Nielsen, Serena Wissler; Deputy Salt Lake County Attorneys; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ERIC JARVIS WARREN,	:	Case No. ~~20000741~~ 20000495-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. 1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding.

HEATHER JOHNSON (6934)
CATHERINE E. LILLY (7746)
OTIS STERLING III (7636)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARIAN DECKER (5688)
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ERIC JARVIS WARREN,	:	Case No. 20000744-CA Priority No. 2
Defendant/Appellant.	:	

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. 1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding.

HEATHER JOHNSON (6934)
CATHERINE E. LILLY (7746)
OTIS STERLING III (7636)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARIAN DECKER (5688)
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE STATUTES

STATE CASES

TREATISES AND OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ERIC JARVIS WARREN,	:	Case No. 20000744-CA Priority No. 2
Defendant/Appellant.	:	

SUMMARY OF THE ARGUMENTS

The State's argument that the "totality of circumstances in this case," Appellee's Br. 13, supports the reasonableness of questioning Appellant Eric Jarvis Warren ["Mr. Warren"] beyond the scope of the initial traffic stop is not supported by the record. Officer Nathan Swensen ["Officer Swensen"] testified that, although he observed an individual leaning into the passenger side door of Mr. Warren's car late at night in a downtown location, this was not part of the reason for the subsequent traffic stop. R. 130 [15-16]. "'The length and scope of the detention must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,'" State v. Hansen, 2000 UT App 353, ¶11, 410 Utah Adv. Rep. 28 (citations omitted), and in this case that circumstance was the traffic stop. Thus, Officer Swensen's questioning violated Mr. Warren's constitutional guarantees of protection against unreasonable searches and seizures.

The subsequent frisk of Mr. Warren also violated Mr. Warren's guarantees of protection against unreasonable searches and seizures because a frisk may be performed only when the police officer has a "reasonable, articulable suspicion that the suspect is armed and presently dangerous." State v. Chapman, 921 P.2d 446, 454 (Utah 1996)(citation omitted). Officer Swensen testified that he did not believe Mr. Warren was armed and the frisk was performed as a matter of routine. R. 130 [10-11, 20]. In arguing that the frisk was justified the State points out that there are general risks inherent in traffic stops and Mr. Warren's car was being impounded due to a traffic violation. Appellee's Br. 13-14. However, the authority to perform a frisk "must be narrowly drawn," Terry v. Ohio, 392 U.S. 1, 27 (1968), and the general risks inherent in traffic stops do not justify performing a frisk.

Finally, it is not necessary to remand this case for findings regarding the issue of inevitable discovery, as suggested by the State. The State already argued this issue before the trial court, relevant evidence was presented, and relevant findings of fact were made. On the basis of the record, this court may make conclusions of law regarding the inevitable discovery issue, as it did in the case of State v. Northrup, 756 P.2d 1288, 1293-94 (Utah Ct. App. 1988). Thus, a remand for

further findings on this issue is not necessary.

ARGUMENT

I. OFFICER SWENSEN'S TESTIMONY ESTABLISHES THAT THE QUESTIONING OF MR. WARREN REGARDING HIS PRESENCE IN THE AREA AND EARLIER ACTIVITIES EXCEEDED THE REASONABLE SCOPE OF THE TRAFFIC STOP AND WAS NOT NECESSARY TO EFFECTUATE THE PURPOSE OF THE STOP

The State's argument that the "totality of circumstances in this case" supports the reasonableness of the questioning, Appellee's Br. 13-14, overlooks Officer Swensen's testimony regarding the questioning. Without including that testimony in its analysis, the State points out that, before stopping Mr. Warren, Officer Swensen observed "an unidentified individual leaning into defendant's passenger side door from the curb for no apparent legitimate reason, given the deserted, non-residential downtown location, and the unusually early hour." Id. at 13. The State further argues that, based upon Officer Swensen's experience,[1] this behavior suggested that a drug or prostitution crime was afoot. Id.

However, Officer Swensen's observations were ultimately not part of his reason for stopping Mr. Warren. During the Motion to Suppress Hearing held 18 February 2000, Officer Swensen testified as follows:

---

[1] Officer Swensen testified that he had been working for the Salt Lake Police Department for almost two years and had been "working on the streets" for nearly 14 months. R. 130 [13].

Q [by defense counsel]: And it was at some point you say [Mr. Warren] signaled a lane change without - or he made a lane change without signaling?

A [by Officer Swensen]: Correct.

Q: And the reason you pulled him over was because of that?

A: Correct.

Q: Now, weren't you also pulling him over because you wanted to explore what you felt was a suspicious circumstance?

A: No.

Q: That didn't have anything to do with it?

A: Had to do with the traffic stop.

R. 130 [15-16]. When further questioned regarding his conversation with Mr. Warren, Officer Swensen testified:

Q [by defense counsel]: And again, this whole discussion about where [Mr. Warren] was, what he was doing, who this person was that he dropped off, had nothing to do with the reason you say you stopped him?

A [by Officer Swensen]: Correct.

Q: Totally unrelated?

A: Correct.

Q: Wasn't necessary to complete that stop?

A: No.

Q: Okay. Now, after having this discussion, how long would

you say the discussion took place for?

A: A minute or two.

R. 130 [18].

In light of Officer Swensen's testimony, his questioning regarding Mr. Warren's presence in the area and earlier activities was not "reasonably related in scope to the traffic violation which justified [the stop] in the first place." State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994). Additionally, the "'length and [the] scope of the detention'" was not "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. (quoting State v. Johnson, 805 P.2d 761, 763 (Utah 1991)(citation omitted)).

The State further argues that Mr. Warren's failure to produce a valid driver's license "only added to the suspicious circumstances" justifying Officer Swensen's questioning. Appellee's Br. 13. However, there is no indication that Mr. Warren's failure to produce a valid driver's license created a suspicion of anything other than that Mr. Warren was driving without a valid driver's license.[2] This is not a basis for

---

[2] It is a class C misdemeanor to drive a motor vehicle when the driver's license is denied, suspended, disqualified, or revoked. Utah Code Ann. § 53-3-227 (1998). It is a class C misdemeanor to display a canceled, denied, revoked, suspended, or disqualified driver license as a valid driver license. Utah Code Ann. § 53-3-229 (Supp. 2000)

suspecting more serious criminal activity and questioning Mr. Warren about it. "If there is investigative questioning that detains the driver beyond the scope of the initial stop, it 'must be supported by reasonable suspicion of more serious criminal activity.'" State v. Chevre, 2000 UT App 06, ¶10, 994 P.2d 1278 (quoting Lopez, 873 P.2d at 1132).

The State also indicates that "if Officer Swensen had held off the questioning until after he initiated the computer checks [regarding the status of Mr. Warren's license] and was awaiting those results, there would be *no* issue as to the propriety of the questioning." Appellee's Br. 14. So, to avoid "'elevating form over substance,'" Officer Swensen's questioning of Mr. Warren should not be found to be unreasonable. Id. (quoting State v. James, 2000 UT 80, ¶13, 405 Utah Adv. Rep. 31).[3] Although Mr.

---

[3] The State further implies that because "mere questioning" does not constitute "either a search or a seizure," Appellee's Br. 11, constitutional guarantees against unreasonable searches and seizures do not apply. For support, the State cites Florida v. Bostick, 501 U.S. 429, 434 (1991) and United States v. Shabazz, 993 F.2d 431, 435 (5th Cir. 1993).

This implication is incorrect. "'The United States Supreme Court has held that 'stopping an automobile and detaining its occupants constitute[s] a seizure' within the meaning of the Fourth Amendment, 'even though the purpose of the stop is limited and the resulting detention quite brief.'" Lopez, 873 P.2d at 1131 (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)). Accord State v. Hansen, 2000 UT App 353, ¶12, 410 Utah Adv. Rep. 28.

Warren may not have been delayed an additional length of time if the questioning had occurred while Officer Swensen was awaiting the results of the computer check, it is not only the length of the stop, but also the scope of the stop which must be "reasonably related" to the traffic violation which "`justified the interference in the first place.'" State v. Hansen, 2000 UT App 353, ¶9 (quoting State v. Patefield, 927 P.2d 655, 657 (Utah Ct. App. 1996)). Questioning Mr. Warren about his presence in the area and earlier activities went beyond the scope of investigating the original traffic violation and Mr. Warren's failure to produce a valid license.

Finally, the State argues that "even if the questioning is deemed objectively unreasonable, it was not the questioning that led to the discovery of cocaine on defendant's person -- it was the subsequent protective frisk." Appellee's Br. 14-15. The case of State v. Hansen, which this court recently decided, is directly on point. In that case the defendant was stopped for making an improper left turn and for failing to have car insurance. Id. at ¶2. After running a check and determining that the defendant had a valid driver's license and no outstanding warrants, the police officer asked the defendant if he had any "alcohol, weapons, or drugs" in his car. Id. at ¶3-4. The defendant replied that he did not have any. Id. The officer

searched the car anyway and found a homemade billy club and a marijuana pipe. Id. at ¶5. Then the officer searched the defendant and found a substance later identified as methamphetamine. Id.

The defendant was charged with illegal possession of a controlled substance, and he moved to have evidence of the methamphetamine suppressed because he had been illegally detained by the officer's questioning. Id. at ¶1, 6. His motion was denied and he was convicted. Id. In reversing his conviction, this Court concluded that the defendant "was illegally detained when Officer Huntington asked him questions that were not reasonably related in scope to the traffic violation which justified the initial seizure." Id. at ¶ 16. Thus, the questioning served as a basis for suppressing evidence of the methamphetamine. Therefore, the State's argument here that the questioning of Mr. Warren should not be a basis for suppressing evidence of the controlled substances fails.

II. THE GENERAL RISKS INHERENT IN TRAFFIC STOPS DO NOT PROVIDE OFFICER SWENSEN WITH A LEGAL BASIS FOR FRISKING MR. WARREN WHERE THE OFFICER DOES NOT BELIEVE MR. WARREN IS CARRYING A WEAPON AND FRISKS MR. WARREN AS A MATTER OF ROUTINE PRIOR TO IMPOUNDING HIS CAR FOR A TRAFFIC VIOLATION

The State's argument that Officer Swensen reasonably frisked Mr. Warren because traffic stops in general are potentially

dangerous, Appellee's Br. 15-16, and because Mr. Warren's car was being impounded due to his lack of a valid driver's license, Id., is not supportable. In making its argument, the State points out that police "are entitled to take reasonable precautionary actions to ensure their safety during the course of a traffic investigation." Appellee's Br. 16 (citation omitted). The State also indicates that, statistically, there is a "real and reasonable" concern of danger in traffic stops. Id. (citations omitted).

These arguments do not apply the proper test for reasonableness. The core test for determining whether a frisk is reasonable is a balancing test where the need to search is weighed against the personal invasion involved in the search. Terry v. Ohio, 392 U.S. 1, 21 (1968); State v. White, 856 P.2d 656, 665 (Utah Ct. App. 1993). As the United States Supreme Court explained in Terry v. Ohio, "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Terry, 392 U.S. at 24-25. Thus, to justify a frisk there must be the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used

against him." Terry, 392 U.S. at 23.

In applying the holdings of Terry v. Ohio, the Utah Supreme Court said there must be a "reasonable, articulable suspicion that the suspect is armed and presently dangerous." State v. Chapman, 921 P.2d 446, 454 (Utah 1996)(citation omitted).[4] This is because the authority to "permit a protective frisk for weapons 'must be narrowly drawn.'" White, 856 P.2d at 665 (quoting Terry, 392 U.S. at 27). Therefore, in deciding to frisk, "a police officer [must have] specific articulable facts which reasonably warrant the officer to believe that the suspect is dangerous and may gain *immediate control* of weapons, [then] the officer can search the suspect and those nearby areas where a weapon may be hidden." State v. Strickling, 844 P.2d 979, 983-84 (Utah Ct. App. 1992)(citing Michigan v. Long 463 U.S. 1032, 1049-50 (1983)).[5]

---

[4] This principal has been codified at Utah Code Ann. § 77-7-16 (1999)("A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger.")

[5] See also Ybarra v. Illinois, 444 U.S. 85, 94 (1979)("The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than a reasonable belief or suspicion directed at the person to be frisked.")

The State argues that Mr. Warren's citations to Ybarra are not persuasive because that case did not involve "the dangers inherent in a traffic stop scenario." Appellee's Br. 17. However, the circumstances of Ybarra presented even more risks to officers

Under this analysis, frisks such as the one performed on Mr. Warren by Officer Swensen are not proper. Officer Swensen testified that he did not believe Mr. Warren had a weapon, R. 130 [20], and that the reason he asked Mr. Warren to step out of the car was to sign a citation. R. 130 [10]. Officer Swensen added:

> Whenever I pull somebody out of a car, I perform a Terry frisk just to see if there's weapons. . . . Also because of the fact that with [there] being drug activity and prostitution and so on, people that are involved in that usually carry weapons. So with that in mind, also for the fact that I always do that, perform the Terry frisk when I pull somebody out of a car, that's why I did it.

R. 130 [10-11].

The State asserts that Officer Swensen's suspicion of drug or prostitution activity combined with the inherent dangers of

---

than those involved in Mr. Warren's traffic stop. In Ybarra, officers had a search warrant, issued upon probable cause, to search the tavern and the bartender for "'[h]eroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances.'" Ybarra, 444 U.S. at 88. Earlier, an informant had seen "fifteen to twenty-five tin-foil packets" similar to the packets used in a "common method of packaging heroin" on the bartender. Id. at 87-88.

Thus, in Ybarra officers faced not only the general risks of searching the tavern and bartender, but the possibility of discovering a large-scale drug operation. See Wayne R. LeFave, Search and Seizure: A Treatise On the Fourth Amendment § 9.5(a)(3rd ed. 1996)(Advising that the crime of "dealing in large quantities of narcotics" is one of violence). Therefore, Ybarra is not distinguishable simply because it did not involve a traffic stop.

traffic stops justified this action. Appellee's Br. 18. With regard to the inherent dangers of traffic stops, these are not enough to give a police officer "reason to believe that he is dealing with an armed and dangerous individual . . . ." Terry, 392 U.S. at 27. Nor do the general dangers of a traffic stop create "specific reasonable inferences," Id. that an individual is armed and dangerous. At any rate, Officer Swensen testified that he had no such suspicion in this case. R. 130 [10-11, 20].

Although the State supports its argument by citing to Pennsylvania v. Mimms, 434 U.S. 106 (1977), which describes dangers inherent in traffic stops, Appellee's Br. 16, that case is not on point. Mimms involved the balancing of a police officer's need to question an individual against the intrusion involved in asking him to step out of his car. Id. at 109-10. The legality of an invasive frisk was not involved. Id. Therefore, the State's reliance upon that case is not persuasive.

Finally, Officer Swensen's suspicion of drug or prostitution activity does not provide the justification needed for a Terry frisk. What is required is a "reasonable, articulable suspicion that the suspect is armed and presently dangerous." Chapman, 921 P.2d at 454 (citation omitted). Police officers may not perform a frisk for any other purpose, including to verify drug or prostitution activity. Commentary has even suggested that "[t]he

Terry rule should be expressly limited to investigation of serious offenses" in part to take away the temptation for police to frisk individuals as part of a "fishing expedition[] for contraband. Permitting stops for narcotics offenses presents the most obvious temptation to abuse the frisk as an occasion for searching for contraband." LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.2(c)(footnote omitted).[6] Thus, the

---

[6] The full text of the recommendation reads as follows:

The Terry rule should be expressly limited to investigation of serious offenses. Admittedly, it is not easy to articulate offense-category limitations as a matter of Fourth Amendment interpretation. It is important, nonetheless, that such limitations be developed, for the following reasons:

(1) Terry utilizes a balancing approach whereby the need to seize and search is balanced against the degree of intrusion which will result. The Court stressed that the officer acted "to protect himself and others from possible danger, and took limited steps to do so." The emphasis, therefore, was upon the need for immediate action, which simply is not present as to minor crimes.

(2) Any extraordinary grant of police authority ought to be circumscribed in such a way that meaningful review is possible and so that the public is not apprehensive about police excesses. The circumstances which might lead an officer to suspect that a person is committing such a crime as loitering, gambling or disorderly conduct "are sufficiently diverse and diffuse that their inclusion might mean a large and hard-to-review expansion of coercive authority." And it must be remembered that under a reasonable suspicion test it is inevitable that a significant number of innocent persons will be stopped. But "if persons come to understand that they are being subjected to inconvenience only in cases where most persons would find such action proper and desirable, the cost of resentment might well be reduced."

(3) Most important, as Judge Friendly emphasized, barring the

evidence seized by Officer Swensen as a result of this frisk should have been suppressed by the trial court.

III THIS CASE SHOULD NOT BE REMANDED FOR CONSIDERATION OF THE STATE'S INEVITABLE DISCOVERY ARGUMENT BECAUSE THAT ARGUMENT WAS GIVEN BELOW, RELEVANT EVIDENCE WAS PRESENTED, AND FINDINGS OF FACT REGARDING THE RELEVANT CIRCUMSTANCES WERE ISSUED BY THE TRIAL COURT

Because the State presented its inevitable discovery argument below, a remand is not necessary and conclusions of law should be drawn from the record already before this Court. The State presented its inevitable discovery argument during oral arguments on Mr. Warren's Motion to Suppress on 20 March 2000. R. 131 [12-13]. The State briefed the trial court about inevitable discovery by outlining legal arguments to the court and referring to testimony presented during the motion to suppress hearing held 18 February 2000. R. 131 [12-13]. At the motion to suppress hearing, Officer Swensen testified about events relevant to the

---

police from employing stop and frisk for such minor crimes as possession of narcotics will remove the temptation for the police to go on fishing expeditions for contraband. Permitting stops for narcotics offenses presents the most obvious temptation to abuse the frisk as an occasion for searching for contraband. There are, to be sure, a number of means for dealing with the problem of abuse of the frisk (as opposed to the stop) in regard to narcotics. . . . However, . . . it is preferable to deal with this problem by removing narcotics offenses from the scope of the stop and frisk authority altogether.

LaFave, supra, § 9.2(c)(footnote omitted).

inevitable discovery issue, including Mr. Warren's traffic stop, detainment, arrest, and the impoundment of his car. R. 129 [2-22].[7] Additionally, the record includes the Information,[8] Mr. Warren's "Motion to Suppress Evidence Seized Illegally" and supporting memorandum, and the State's asserted facts and response. R. 14-16, 43-62. Finally, the trial judge issued findings of fact relevant to the inevitable discovery issue,

---

[7] Details from Officer Swensen testimony that are relevant to the issue of inevitable discovery include:

- Officer Swensen ran a check on Mr. Warren's diver's license, and found that his license had been denied because Mr. Warren did not pay the reinstatement fees. R. 120 [7].

- Officer Swensen decided to impound Mr. Warren's vehicle because he did not have a valid driver's license. R. 120 [8].

- Officer Swensen intended to cite Mr. Warren for failure to turn, failure to signal before the turn, and driving without a driver's license. R. 120 [8-9].

- Officer Swensen had Mr. Warren step out of the car to sign the citation, and to inform him that the car would be impounded. R. 120 [20].

- Mr. Warren informed Officer Swensen that the car belonged to Mr. Warren's father. R. 120 [20].

- Officer Swensen did not intend to arrest Mr. Warren at that time, and Mr. Warren would have been free to go. R. 120 [21].

[8] The Information includes a "Probable Cause Statement" which indicates that Officer S. Wozab assisted Officer Swensen in searching Mr. Warren's vehicle, and "[u]nderneath the armrest on the front seat, the Officers located a knife, two additional pipes, filters, and a pen tube with residue." R. 16.

including the impoundment of Mr. Warren's car and arrest. R. 82-84.[9]

The State cites to State v. Topanotes, 2000 UT. App. 311, 408 Utah Adv. Rep. 8 (petition for cert. filed (No. ____)), in arguing that a remand for factual findings on the issue of inevitable discovery is proper. Appellee's Br. 19. However, in that case, the issue of inevitable discovery was raised for the first time on appeal and was not presented below.[10] Here, the

---

[9] The findings of fact relevant to the issue of inevitable discovery include:

> (6) Officer Swensen then returned to his patrol car and ran a license check on the defendant and was informed that the defendant's license was denied for reinstatement fees. Officer Swensen then re-approached the vehicle and asked the defendant to step out of the car in order to have him sign a citation for the traffic violations and because he was going to impound the vehicle due to the defendant's failure to have a valid license.
>
> (7) When the defendant stepped out of the vehicle, Officer Swensen as part of his routine performed a "Terry" frisk for weapons. During the frisk a small white plastic twist fell from beneath the defendant' s sweat shirt. Believing the twist to be a controlled substance, Officer Swensen placed the defendant under arrest. A more thorough search was then performed wherein additional controlled substances and a clear glass pipe were found on defendant's person.

R. 83-84.

[10] See Topanotes, 2000 UT App 311, ¶11 ("Because the trial court ruled that the initial detention was legal, the issue of inevitable discovery was not addressed below.") See also State v. Sampson, 808 P.2d 1100, 1111 n.19 (Utah Ct. App. 1990) (Remand

issue of inevitable discovery was argued below, R. 131 [12-14], relevant evidence was presented, R. 129 [2-22], and relevant findings of fact were issued. R. 83-84. The only rulings required now are conclusions of law, and a remand for those conclusions is not necessary because they are granted no deference on appeal.[11]

Finally, this Court has readily examined the issue of inevitable discovery where the record contains sufficient facts to review it. In State v. Northrup, 756 P.2d 1288 (Utah Ct. App. 1988), this Court found that money allegedly used in drug distribution activity was the fruit of an illegal entry by police officers, and the State did not show that the money would have been inevitably discovered. Id. at 1295. There, relevant evidence was already on record and this Court decided the issue of inevitable discovery as a matter of law. Id.

In this case, the circumstances surrounding the discovery of the controlled substances, Mr. Warren's lack of a valid driver's license, the impoundment of Mr. Warren's vehicle, and Mr.

---

proper because "[t]he State had no occasion to argue either [the `independent source doctrine' or the `inevitable discovery rule'] on appeal or below. Consequently, we are unable to determine whether either of these exceptions might apply in this case to some of the evidence which we might otherwise have to be suppressed.")

[11] State v. DeBooy, 2000 UT 32, ¶7, 996 P.2d 546; Salt Lake City v. Davidson, 2000 UT App 12, ¶8, 994 P.2d 1283; State v. Hinson, 966 P.2d 273, 275 (Utah Ct. App. 1998).

Warren's arrest are already on record and the trial court has already made findings of fact regarding these issues. Thus, this court may properly decide the issue of inevitable discovery as a matter of law, and a remand to the trial court for further findings is not required.[12]

---

[12] In his opening brief Mr. Warren argued that the discovery of the controlled substances was not inevitable because it is not clear that Mr. Warren's vehicle contained a concealed weapon and he would have been arrested on that charge. Aplt. Br. 26-31. The State asserted:

> [D]efendant waived [this challenge] when he entered his guilty plea to the cocaine charge without conditioning it on the right to challenge the validity of the concealed weapon charge. Defendant specifically conditioned his guilty plea on the right to appeal the trial court's denial of his motion to suppress . . . Therefore, absent any challenge to the sufficiency of the evidence to support the now dismissed concealed weapon charge, it is assumed at this juncture that the evidence was sufficient to support that charge.

Appellee's Br. 20 (citations omitted).

However, the State cites no authority for the novel proposition that evidence for dismissed charges is assumed to be sufficient to support the charge. Additionally, in State v. Rivera, 943 P.2d 1344 (Utah 1997), the Utah Supreme Court recognized that when a defendant enters a conditional plea of guilty, reserving in the record the right to appeal any specified pre-trial motion, the defendant "shall be allowed to withdraw the plea" if the appeal is successful. Id. at 1345 (quoting Utah R. Crim P. 11(i)). In that event, the prosecutor will have the option of offering a second plea bargain agreement, which may or may not involve the dismissal of some of the original charges. In due course, evidence may be presented at trial with regard to all charges, and there is no presumption that evidence is assumed to be sufficient for any charge.

CONCLUSION

The trial court's conclusion that Officer Swensen's questioning of Mr. Warren did not exceed the scope of the initial traffic stop in violation of Mr. Warren's constitutional guarantees of protection from unreasonable searches and seizures was erroneous. The further conclusion that the subsequent frisk did not violate these same guarantees was also erroneous. Therefore, the trial court's failure to suppress evidence on the basis of these erroneous conclusions should be reversed.

Although the State argues that this case should be remanded for further proceedings regarding the issue of inevitable discovery, a remand is not necessary. The issue of inevitable discovery was presented below and the record contains sufficient information for this Court to decide this issue as a matter of law.

RESPECTFULLY SUBMITTED this 12th day of February 2001.

HEATHER JOHNSON
Attorney for Defendant/Appellant

At any rate, Mr. Warren specifically conditioned his plea agreement on the outcome of this appeal. R. 103. The State below raised the issue of "inevitable discovery." R. 131 [13]. To argue that Mr. Warren is barred from addressing that argument frustrates his ability to appeal the denial of his motion to suppress evidence, which his plea agreement specifically allowed.

CATHERINE E. LILLY
Attorney for Defendant/Appellant

OTIS STERLING III
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 12th day of February, 2001.

HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of February, 2001.