

FILED
AUG 13, 2014
Court of Appeals
Division III
State of Washington

NO. 31691-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error. These can be summarized as follows;

Assignments of Error

1. The court erred when it denied Samalia's motion to suppress evidence that was seized and searched in violation of the Fourth Amendment and Article I, section 7 of the Washington State Constitution.
2. The trial court erred when it determined that Samalia lacked an expectation of privacy in the cell phone which was inside the car he was driving when stopped by the police.
3. The court's conclusion that Samalia voluntarily abandon the cell phone found inside the car is not supported by substantial evidence and misapprehends the law.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not err when it denied the motion to dismiss.
2. Appellant did not have an expectation of privacy in the phone located in the stolen automobile he was driving at the time of his arrest.
3. The courts conclusion that Samalia had voluntarily abandoned the cell phone was supported by the evidence and correctly states the law.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall

not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ALLEGATION ONE

First and foremost it must be made perfectly clear that other than the testimony of Appellant's female friend with whom he had a child and who had several prior convictions for possession of stolen vehicles, Ms. Telles, there is no testimony nor evidence in the record that Appellant was the owner of the phone in question, Further, there is absolutely no dispute that Appellant was the person who fled from the stolen car and that he was not apprehended at the time of the stop. Appellant did not take the stand at any time nor did he have admitted into evidence anything that would prove that the phone which was seized from inside the stolen car was in fact Appellant's phone. Counsel for both parties refer to it as Samalia's phone but the item taken from that stolen car was never proven in court by any means other than argument of counsel, to be a phone actually owned or having on the night in question been in the possession of Appellant. None of the findings or conclusions entered indicates that phone found in the stolen car belonged to Appellant.

Ms. Telles never identified the phone which was in the possession of the police as belonging to Appellant. She was specifically asked on direct regarding the person who placed the first call “[d]id he ask you who the owner of the phone was? Her answer was “no.” (RP 56) Her “identification” of the phone consisted of was to indicate that one of the officers who apprehended her called her phone with a phone and then took her phone, showed her own phone to her and from that device showed her the screen and asked her who that was. (RP 61-2) The colloquy between Appellant’s own counsel and Ms. Telles is as follows;

Q...So he actually dialed from a phone that he had in his hand?

A. Yes.

Q. And immediately, your phone rang?

A. Yes, it was the same phone.

Q. Adrian’s phone?

A. Yes.

This is never an identification of the phone found in this stolen car, the specific electronic device that was found in center console of the Ms. Nieman’s stolen vehicle as being the property of Appellant. Ms. Telles was never, at the time of her arrest or in court, shown the phone alleged to be Appellant’s, the man with whom she had a child, and asked to identify it. Appellant never took the stand to indicate that the phone that had been seized from the stolen car was his.

"Determinations of credibility are for the fact finder and are not reviewable on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Abandonment relates to whether the defendant "relinquished [his] reasonable expectation of privacy" in the property that was searched. State v. Dugas, 109 Wn App. 592, 595, 36 P.3d 577 (2001) (citing United States v. Hoey, 983 F.2d 890, 892-93 (8th Cir. 1993); United States v. Nordling, 804 F.2d 1466 (9th Cir. 1986)). If the defendant did not have a "reasonable expectation of privacy" in the property at the time of the search, the defendant's constitutional rights are not implicated if the police "retrieve and search" the property. State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

A defendant's privacy interest in property may be abandoned voluntarily or involuntarily. Involuntary abandonment occurs when property was abandoned as a result of illegal police behavior. State v Reichenbach, 153 Wn. 2d 126, 137, 101 P.3d 80 (2004);

Abandonment occurs if the circumstances show that the defendant has voluntarily relinquished his reasonable expectation of privacy in discarding the property. Reynolds, 144 Wn.2d at 288, 27 P.3d 200; State v. Dugas, 109 Wn.App. 592, 595-96, 36 P.3d 577 (2001) (adopting rule from Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

Property discarded during an encounter with the police is always considered to be voluntarily abandoned unless there was unlawful police conduct. State v. Whitaker, 58 Wn. App. 851, 856 795 P.2d 182 (1990) aff'd, 135 Wn.2d 498, 957 P.2d 681 (1998). To establish that the abandonment of the searched property was involuntary, a defendant must therefore show two elements: (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment.” Reichenbach at 135. (citing State v. Reynolds, 144 Wn.2d 282, 288, 27 P.3d 200 (2001)).

State v Reichenbach, supra, a case which is factually distinguishable from this case, provides an example of “unlawful police conduct” leading to abandonment of evidence. In that case, the court ruled the evidence should be suppressed because the officer did not have probable cause to seize the defendant. In contrast to Reichenbach is State v Young, 135 Wn.2d 498, 957 P.2d 681 (1998), where the Court held that a patrolman shining his spotlight on a person didn’t constitute a seizure and that the evidence the officer saw the Young toss behind a tree was voluntarily abandoned and could be admitted at trial.

Property is voluntarily abandoned when the defendant engages in a willful action by throwing the property aside in an effort to keep the property from the police. Reynolds, 144 Wn.2d at 286-88; *See also* State v

Nettles, 70 Wn. App. 706, 708-09, 855 P.2d 699 (1993); Whitaker, 58 Wn. App. at 853. Property is voluntarily abandoned when the defendant engages in a willful inaction by merely leaving property behind when he encounters the police. Hoey, 983 F.2d at 892-93; Nordling, 804 F.2d at 1469-70. Discarded property is deemed voluntarily abandoned in the absence of unlawful police conduct and a causal nexus between that conduct and the abandonment. State v. Young, 86 Wn. App. 194, 201, 935 P.2d 1372 (1997) (citing Whitaker, 58 Wn. App. at 856), *aff'd*, 135 Wn.2d 498, 957 P.2d 681 (1998). A suspect's subsequent reclaiming of ownership in property which had been voluntarily abandoned does not convert voluntarily-abandoned property into lost or mislaid property so as to establish a Fourth Amendment violation after the fact. United States v. Rem, 984 F.2d 806, 810-12 (7th Cir. 1993); United States v. Oswald, 783 F.2d 663, 667-68 (6th Cir. 1986); United States v. Jones, 707 F.2d 1169, 1172-73 (10th Cir. 1983); United States v. James, 534 F.3d 868 (8th Cir. 2008).

As is the case here Appellant "cannot avoid a finding of abandonment by offering nothing more than a 'self-serving, non-factual declaration that he expected privacy.'" Rem, 984 F.2d at 810 (quoting Wilson v. Health & Hosp. Corp., 620 F.2d 1201, 1213 (7th Cir. 1980)). Instead, under a totality of the circumstances test, the court determines

whether the "police officers 'were justified in concluding that the defendant had no expectation of privacy'" with regard to the abandoned item at the time that they conducted the search. Rem, 984 F.2d at 810 (quoting United States v. Rush, 890 F.2d 45, 48 (7th Cir. 1989)).

The testimony of Officer Yates was unrefuted and supports the State's position and the ruling of the trial court;

Q. (by Mr. Chen) All right. And did you recognize -- or did you see anybody inside that vehicle?

A. I did.

Q. And what did you see?

A. There was two occupants. The driver got out of the vehicle, turned and faced towards me. And that's why, obviously, I had -- my service weapon was drawn, because he jumped out of the vehicle.

Q. And did you say anything at all to him?

A. I don't remember my commands, but my commands would have been, "Get back in the vehicle, or, "Get in the vehicle." And then he failed to obey those commands.

Q. What do you mean he failed to obey those commands?

A. He didn't do what I told him to do. And then he fled eastbound on foot.

Q. And when you said he fled eastbound, was that -- did he run?

A. He ran. He ran from the vehicle eastbound and then southbound through the alley. (RP 35-6)

I chased him -- he started he started running eastbound and then southbound approximately five seconds later. Then I continued. I've worked that area for five years. I'm not going to chase a guy through there. It's -- there's -- there's too many -- too many obstacles. (RP 45)

Regarding his actions with the abandon vehicle Officer Yates testified:

Q. And what happened next?

A. Well, I then looked in the vehicle. The door was opened and I looked in the vehicle and saw a cell phone.

Q. Okay. Where did you see a cell phone in the vehicle?

A. In the center console of the vehicle.

Q. Was in on top of the center console?

A. Yeah, it was. It was – I could see if (sic) from outside the vehicle.

Q. All right. And did you obtain a search warrant at all.

A. No, I did not.

Q. And what did you do with the cell one that was located in the center console of the vehicle.

A. I looked in the context and – the contacts, I'm sorry, and found a hone number and—

Q And –

A. --called it, trying to see who the – who it belonged to. (RP 38)

...

Cross examination

Q. The paragraph, last paragraph, or second to the last paragraph from the bottom indicates: "I found a cell phone."

A. Yes, in the center console of the vehicle.

Q. ... When you say the center console, is this an open console? A closed console?

A. I don't recall.

...

Q. You had to manipulate the phone?

A. I had to turn the phone – I either had to turn the phone on or push the Contact button, yes.

...

Q. Okay. So you went to the Contacts on the cell phone for what purpose?

A. To see who the phone belonged to.

Q. Why were you trying to see who the phone belonged to?

A. It's a curiosity of me, to try –

Q. Well, the truth is you were trying to figure out who – the identity of the person what ran from you, right?

A. I was trying to identify who the phone was, is what I was trying to do.

Q. And you were hope –okay, and you were hoping that the person that ran was also the person who owned the phone?

A. Well –

Q. Is that fair?

A. Yeah, fair enough.

Q. .You never believed that the cell phone belonged to Ms. Neiman, the owner of the Blazer, correct?

A. No. I – I—no, I couldn't recall either way. I'm not going to say I could or I – I didn't. (RP 48-9)

...

Q. ...So the purpose of it was, again, to try and get the identity of the person that ran from you ?

A. Correct. Well, not that ran from me. To identify the person who owned the phone.

...

A. If that's the victim, then that's the victim; if that's the suspect, than that's the suspect, so –

No matter what defense counsel tried to do the answer from the Officer Yates was the same. He did not have some preconceived notion of whom the owner of the phone was, suspect or victim, the purpose of his action was to determine who the owner was.

It is the States position that Appellant cannot meet the test set forth in State v. Evans, 159 Wn.2d 402, 408-10, 150 P.3d 105 (2007);

A. Did Evans have an expectation of privacy in the briefcase prior to its seizure?

To establish that he had a reasonable expectation of privacy in the contents of the briefcase, Evans must satisfy a two fold test: (1) Did he "exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?" and (2) "[d]oes society recognize that expectation as reasonable?" State v. Kealey, 80 Wash. App. 162, 168, 907 P.2d 319 (1995). Evans satisfies both parts of this test. Although the burden is on the defendant to establish a subjective expectation of privacy, he easily meets that burden. He kept the briefcase in his truck, it was closed and locked, and he objected to its seizure. Compare State v. Hepton, 113 Wash. App. 673, 680, 54 P.3d 233 (2002)

(leaving garbage at an abandoned house did not show a subjective expectation of privacy). Evans satisfies the second part of the test because society recognizes a general expectation of privacy in briefcases. *See Kealey*, 80 Wash. App. at 170, 907 P.2d 319 ("Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.") (citing *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979)).

B. Did Evans relinquish or abandon his expectation of privacy?

The status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned. That is so because courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area. *See, e.g., Dugas*, 109 Wn.App. at 596, 36 P.3d 577 (holding defendant did not voluntarily abandon his jacket by placing it on the hood of his car after being arrested). The opposite generally holds true if the search is conducted in an area where the defendant does not have a privacy interest. *See, e.g., Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (seizure of a jacket containing contraband found underneath vehicle stopped for traffic infraction was reasonable after defendant denied ownership); *State v. Young*, 86 Wn. App. 194, 935 P.2d 1372 (1997) (seizure of drugs thrown in bushes by defendant prior to his arrest was proper because it amounted to abandonment), *aff'd*, 135 Wn.2d 498, 957 P.2d 681 (1998). When considering the effect of a denial of ownership, Washington courts have only directly addressed the latter scenario when a defendant has no privacy interest in the searched area. Evans, however, falls into the former.

In a factually similar case the court in *People v. Daggs*, 34 Cal.Rptr.3d 649, 133 Cal.App.4th 361(2005) ruled that the cell phone that was left by Daggs at the scene of a crime he had committed was legally

seized. It was uncertain at the time of the seizure of the phone who the owner was, however the clerk who was in the store at the time of the robbery indicted they did not see it prior to the crime and no person claimed the phone or came to retrieve that phone. The court in Daggs addressed this question of law as follows;

It is well established that a search and seizure of abandoned property is not unlawful because no one has a reasonable expectation of privacy in property that has been abandoned. The question whether property is abandoned is an issue of fact, and the court's finding must be upheld if supported by substantial evidence. (People v. Ayala (2000) 24 Cal.4th 243, 279 [99 Cal.Rptr.2d 532].) Defendant asserts that, in this case, the substantial evidence standard does not apply because he raises only an issue of law, based upon what he asserts were undisputed facts. He argues that the undisputed fact that he accidentally left his cell phone at Walgreen's, and would have reclaimed it had he not feared arrest, compels the legal conclusion that he did not voluntarily discard the phone, and therefore he did not abandon it, but merely "lost it." It is unnecessary to resolve defendant's contention that he is entitled to de novo review because we would reach the same conclusion under either standard: Defendant abandoned the cell phone when he left it unattended in a public place of business, at the scene of a crime, fled, and made no attempt to reclaim it.

It is, of course, well established that property is abandoned when a defendant voluntarily discards it in the face of police observation, or imminent lawful detention or arrest, to avoid incrimination. Thus, for example, in People v. Brown (1990) 216 Cal.App.3d 1442 [265 Cal.Rptr. 552] (Brown), the court held "defendant's act of dropping the bag before making a last-ditch effort to evade the police supports the trial court's finding that defendant indeed abandoned the paper bag and lost any reasonable expectation of privacy in its contents." (Id. at p. 1451.) Defendant contends, however, that since it was undisputed

that he accidentally dropped the phone at Walgreen's, the court could not find that he intentionally or voluntarily discarded it. Defendant's testimony, assuming it were credited, would support an inference that at the moment he first dropped the phone he did not subjectively intend to discard it. Nonetheless, his own testimony also unequivocally established that as soon as he realized he had left the phone behind, he made a conscious and deliberate decision not to reclaim his phone, and never did. He therefore voluntarily abandoned it.

In any event, the intent to abandon is determined by objective factors, not the defendant's subjective intent. " 'Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. [Citations.] Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.' " (Brown, supra, 216 Cal.App.3d at p. 1451, italics added; see also In re Baraka H. (1992) 6 Cal.App.4th 1039, 1048 [8 Cal.Rptr.2d 221]; United States v. Jones (10th Cir. 1983) 707 F.2d 1169, 1172.) Bria informed the officers who found the phone at the scene that he had not seen the cell phone in that area prior to his confrontation with the robber. No one else at the scene claimed the phone, nor did anyone assert a claim to it in the week after the robbery. It was inferable that the telephone belonged to, or had been in his possession of, the robber who had fled the scene, thereby evincing his intent not to reclaim it. Therefore, when the police seized the phone, and certainly by the time Detective Moran finally performed the challenged search, these circumstances were all objective indications that defendant had discarded the phone, and would not reclaim it.

Defendant nonetheless argues that his failure to make any attempt to reclaim the phone should not be considered as a factor indicating abandonment because he testified he would have attempted to reclaim it, were it not for his fear that doing so would incriminate him. Although we have found no California case directly addressing such a novel argument, a nearly identical contention was squarely

rejected in a well-reasoned federal decision, United States v. Oswald (6th Cir. 1986) 783 F.2d 663 (Oswald). In that case, Oswald was carrying a suitcase packed with illegal drugs in the locked trunk of his car. While on the road, he had the misfortune to experience car problems that caused the car to burst into flames. Knowing he would be, as he put it, “dead” if associated with the burning car and suitcase, the defendant made no attempt to notify the police or fire department about the burning car, or to put the fire out himself. Instead, he flagged down a passing motorist, and fled the scene. He did later try to find where the car had been towed, but made no direct attempt to claim it, or the suitcase, because of the obviously incriminating circumstances. Like defendant, Oswald argued he did not abandon the suitcase because he did not voluntarily leave the car, or the suitcase, or fail to reclaim the suitcase once the fire was extinguished, but rather did so under the compulsion of fear of certain arrest. The court responded: “[A] guilty conscience cannot create an expectation of privacy that would not otherwise exist. Where an ordinary person could fairly be said to have abandoned his privacy interests by failing to come forward, a reasonable expectation of privacy cannot be thought to have been retained solely by virtue of the fact that the person happens to be guilty of a crime. . . . [¶] That Oswald may have entertained a feeble hope of regaining possession of the cocaine is hardly enough to vitiate the finding of abandonment.” (Id. at p. 667.) For the same reasons, we hold here that irrespective of his subjective reasons, the failure of defendant to attempt to retrieve the phone is an objective circumstance indicating that it had been abandoned.

Defendant also incorrectly asserts that a finding that he abandoned the phone is inconsistent with his testimony that he wanted the phone back, and did not mean to give it up. Abandonment may be found even when the defendant does not intend “to permanently relinquish control over the object.” (In re Baraka H., supra, 6 Cal.App.4th at p. 1048.) This is so because abandonment is not defined strictly in terms of property rights. Instead, ““what is abandoned is not necessarily the defendant’s property, but his reasonable

expectation of privacy therein.” ’ [Citation.] If the defendant has so treated the object as to relinquish a reasonable expectation of privacy, it does not matter whether formal property rights have also been relinquished.” (Ibid.) Applying this standard in *Baraka H.*, the court held that the defendant did not have an objectively reasonable expectation of privacy in a crumpled paper bag containing marijuana that he left on a sidewalk while he solicited buyers. By placing the crumpled bag beyond his reach in a public place, the bag appeared to be discarded. The court held that his secret intention to assert his right to the bag, should a passerby come upon it, was not, under these circumstances, objectively reasonable. (Id. at pp. 1046-1047.) Similarly, here, defendant’s testimony that he did not intend to drop the phone, and wanted it back, is immaterial where the objective circumstances were that he left his phone unattended in a public place, fled the scene, and made no attempt to retrieve it. “[A]n important consideration in evaluating a privacy interest is whether a person has taken normal precautions to maintain his or her privacy.” (*People v. Shepherd* (1994) 23 Cal.App.4th 825, 828-829 [28 Cal.Rptr.2d 458] (*Shepherd*)). Leaving an item unattended in a public place evidences a “relinquishment of any reasonable expectation of privacy and security in regard to it.” (*United States v. Alewelt* (7th Cir. 1976) 532 F.2d 1165, 1167; see *U.S. v. Thomas* (D.C.Cir. 1989) 864 F.2d 843, 846-847 [defendant had no expectation of privacy in gym bag he left on floor of public hallway in apartment complex despite his intent to retrieve it at a later time]; *People v. Ayala*, supra, 24 Cal.4th at p. 279 [defendant who left containers at the automobile body shop while there as an invitee had no expectation of privacy in the premises, and abandoned them].) Defendant did not take normal precautions to maintain his privacy when he left his cell phone at Walgreen’s, a business open to the public, and did not return to retrieve it. (Footnotes omitted.)

While cases were not cited regarding standing the discussion between the parties and the court discussed Samalia’s standing. While

not specifically addressed in the trial court this court should address whether Appellant had standing to challenge this search. This can be considered on appeal State v. Grundy, 25 Wn. App. 411, 415-16, 607 P.2d 1235 (1980), review denied, 95 Wn.2d 1008 (1981) “although the State may not raise the issue of a defendant's standing where it is an appellant, it may raise the issue for the first time on appeal as a respondent because the appellate court has a duty to affirm on any ground supported by the record, even if it is not the ground relied on by the trial court.”

As indicated in State v. Gresham, 173 Wn.2d 405,419, 269 P.3d 207 (2012) “We may affirm the trial court on any correct ground, Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986)” Which stated, " [A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.”; This court may affirm a lower court's ruling on any grounds adequately supported in the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

This case is very similar to State v. Zakel, 119 Wn.2d 563, 568-9, 834 P.2d 1046 (1992). In Zakel the offender was charged with possession of a stolen vehicle. The Washington State Supreme Court stating “We now affirm his convictions, but on the more narrow ground that the

automatic standing issue is not raised by the facts in this case.” So too in this case there was no automatic standing for Appellant to challenge the search of this vehicle. As stated in Zakel;

The plurality in Simpson stated that a defendant has automatic standing to challenge a search or seizure if:

(1) the offense with which he is charged involves possession as an "essential" element of the offense; and (2) the defendant

was in possession of the contraband at the time of the contested search or seizure.

Simpson, 95 Wn.2d at 181. This 2-part test for automatic standing is consistent with the federal test for automatic standing prior to the United States Supreme Court's abandonment of the doctrine. Ultimately, the plurality in Simpson found that the defendant had met the requirements for automatic standing, and could, as a result, invoke all the privacy interests an individual properly in possession of the truck could assert.

Simpson, 95 Wn.2d at 182.

Zakel undeniably meets the first requirement of the automatic standing test. Possession is an essential element of the offense of possession of stolen property in the first degree. See RCW 9A.56.140(1), 150(1); Simpson, 95 Wn.2d at 181.

Unlike the defendant in Simpson, however, Zakel has not met the possession requirement for automatic standing. In Simpson the police saw the defendant drive up to his house in the truck, park it, get out of it, and lock it, before they arrested him. Simpson, 95 Wn.2d at 172. In addition, the court noted:

Respondent also had possession of the property at the time of the search. When the search took place, the locked truck was located directly outside respondent's house where he had left it, and the key to the truck was being held for the respondent by the police. Thus, respondent had the requisite relationship to the seized property

at the time when the contested search took place.

Simpson, 95 Wn.2d at 181 (citing 3 W. *LaFave, Search and Seizure* SS 11.3, at 590 (2d ed. 1978);, 411 U.S. 223, 228-29, 36 L. Ed. 2d 208, 93 S. Ct. 1565 (1973)). (Footnotes omitted.)

There were written findings and conclusions entered in this case, however this court may also look to the oral rulings of the court if it were to find the trial court's written findings incomplete or inadequate; this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wn.2d 1004, 959 P.2d 127 (1998).

This court should also note that a motor vehicle may be lawfully impounded in certain specific circumstances: (1) as evidence of a crime, if the officer has probable cause to believe that it was stolen or used in the commission of a felony, State v. Houser, 95 Wn.2d 761, at 149-50, 622 P.2d 1218 (1980); (2) as part of the police "community caretaking function," if the removal of the vehicle is necessary (in that it is abandoned, or impedes traffic, or poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents), and neither the defendant nor his spouse or friends are available to move the vehicle, Houser, at 150-52; State v. Hardman, 17 Wn. App. 910, 567 P.2d 238 (1977), review denied, 89 Wn.2d 1020 (1978); State v. Bales, 15

Wn. App. 834, 552 P.2d 688 (1976), review denied, 89 Wn.2d 1003 (1977); and (3) as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the legislature has specifically authorized impoundment. See State v. Singleton, 9 Wn. App. 327,332-33, 511 P.2d 1396 (1973); 2 W. LaFave, § 7.4(a).

Under Simpson, the impoundment was lawful pursuant to RCW 46.55.113 because the vehicle was stolen.

Commissioner Wasson of this court denied the State's Motion on the Merits citing the recently decided case Riley v. California 134 S. Ct. 2473, *; 189 L. Ed. 2d 430, **; 2014 U.S. LEXIS 4497, ***; 82 U.S.L.W. 4558. The Commissioner acknowledged that the State's theory has been that this phone was abandon by someone, Appellant never on the record indicated that this phone was his. This court rule;

In light of the United States Supreme Court's recent opinion in Riley v. California, Nos. 13-132 and 13-212, filed on June 25, 2014, this Court cannot say that well-settled law controls the outcome of this appeal such that affirmance on the merits is appropriate. See RAP 18.14. In so ruling, this Court is aware that the State here relies upon the Mr. Samalia's alleged abandonment of the phone, a fact that was not present in Riley. Nevertheless, whether Riley is applicable to these facts, or whether Riley is distinguishable, is a question that a panel of judges should decide. (Commissioner's ruling at 2)

To that end Respondent has reviewed Riley and it is Respondent's position that while Riley is factually distinguishable The Court also clearly indicated in Riley that the actions of the officer in Samalia's case were correct.

The first two paragraphs of the opinion in Riley v. California 134 S. Ct. 2473, *; 189 L. Ed. 2d 430, **; 2014 U.S. LEXIS 4497, ***; 82 U.S.L.W. 4558 set it apart and distinguish it from Samalia's case;

In No. 13-132, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, [**434] the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal affirmed.

In No. 13-212, respondent Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone [***2] from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm

and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions.

The State will not repeat the facts set forth above this court need only remember that when the car that Samalia was found driving was confirmed to be stolen and subsequently pulled over Mr. Samalia fled the scene, he ran from the officer, ignored commands to stop and or stay and was never taken into custody at the scene of the stop. The phone in question here was abandon within a car that was not owned by Samalia, a car that the stopping officer had earlier taken the report of it being stolen from the true owner, a female and definitely not the person observed by the stopping officer who fled and ignored the commands to halt. Samalia never in the trial court nor in this court indicated how this abandon phone was his. He has never admitted ownership and there was no other evidence admitted that this was his phone other than when it was called by another phone a number was shown. There are few more perfect definitions of “abandon” than when a person runs away from an item, never comes back to retrieve it and never makes a direct statement nor admits evidence that this device, object, phone was in fact his phone. Here Samalia would have the trial court and this court assume that it was

his phone that was found in the car he fled from. While a defendant has the right to remain silent and the right to have the State prove each and every element of a crime he too must demonstrate some basis to claim the right to an object before he can claim a right to dispute its seizure and search by the police. That is not present here. The only information that is in the record that even addressed the possible ownership of the phone is when the defendant's ex-girlfriend says "yes" when asked if the phone the officer had was "Adrian's phone." a noteworthy achievement in this digital world were literally millions of the same type of phone are sold (RP 62) and a statement from his counsel stating that it is "Mr. Samalia's own cell phone." A statement that is not factual, it is argument. (RP 68)

As the court trial court states;

But, again, I'm still left with Mr. Samalia, or somebody later identified as Mr. Samalia, was driving a stolen car. The officer responded to a stolen car alert. He called, Dispatch confirmed that the vehicle was stole. Pulled the vehicle over. And the issue is in -- to a certain extent, is did Mr. Samalia abandon or discard that property in response to police conduct? And I think he clearly did. He fled the vehicle when the vehicle was stopped by the officer, and in response to the officer's commands to stop and or to get out of the vehicle, he fled. The question is was the conduct by Officer Yates illegal? And I don't think it is.

The fact that the car was stolen has some meaning, and maybe it's more of a commonsense meaning, I don't know. If the car – if he had -- Mr. Samalia if he had had leaped out of the car and – and the phone had dropped to the

ground next to it, you know, he -- is that an abandonment? Where he abandoned it, I'm not sure is exactly very important. It's kind of like a backpack, I suppose, in a way.

I think it's -- the -- the phone was abandoned...

Riley goes through a rigorous analysis in this the “digital” age.

The most noticeable is that the court did not diminish an officer’s ability to search items, including cellular phones if the search fits one of the previously expressed exceptions;

The search incident to arrest trilogy concludes with Gant, which analyzed searches of an arrestee’s vehicle. Gant, like Robinson, recognized that the Chimel concerns for officer safety and evidence preservation underlie the search incident [***20] to arrest exception. See 556 U. S., at 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485. As a result, the Court concluded that Chimel could authorize police to search a vehicle “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” 556 U. S., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485. Gant added, however, an independent exception for a warrantless search of a vehicle’s passenger compartment “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Ibid.* (quoting Thornton v. United States, 541 U. S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (SCALIA, J., concurring in judgment)). That exception stems not from Chimel, the Court explained, but from “circumstances unique to the vehicle context.” 556 U. S., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485. (Id at 2485)

...
Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which

it is needed for the promotion of legitimate governmental interests.” Wyoming v. Houghton, 526 U. S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999). Such a balancing of interests supported the search incident to arrest exception in Robinson, and a mechanical application of Robinson might well support the warrantless searches at issue here. But while Robinson’s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest [**442] side, Robinson concluded that the two risks identified in Chimel—harm to officers and destruction [***22] of evidence—are present in all custodial [*2485] arrests. There are no comparable risks when the search is of digital data. In addition, Robinson regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in Robinson.

We therefore decline to extend Robinson to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search. (Id at 2485-6)

We first consider each Chimel concern in turn. In doing so, we do not overlook Robinson’s admonition that searches of a person incident to arrest, “while based upon the need to disarm and to discover evidence,” are reasonable regardless of “the probability in a particular arrest situation that weapons or evidence would in fact be found.” 414 U. S., at 235, 94 S. Ct. 467, 38 L. Ed. 2d 427. Rather than requiring the “case-by-case adjudication” that Robinson rejected, *ibid.*, we ask instead whether application of the search incident to arrest doctrine to [***23] this particular category of effects would “untether the rule from the justifications underlying the Chimel exception,” Gant, *supra*, at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485. See also Knowles v. Iowa, 525 U. S. 113, 119, 119 S. Ct. 484, 142

L. Ed. 2d 492 (1998) (declining to extend Robinson to the issuance of citations, “a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all”).
(Id at 2486)

...

To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances. See, e.g., Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-299 (1967) (“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.”).
(Id at 2487)

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is “an important working part of our machinery of government,” not merely “an inconvenience to be somehow ‘weighed’ against the claims of police efficiency.” Coolidge v. New Hampshire, 403 U. S. 443, 481, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Recent technological advances similar to those discussed here [***48] have, in addition, made the process of obtaining a warrant itself more efficient. See McNeely, 569 U. S., at ___, 133 S. Ct. 1552; 1573, 185 L. Ed. 2d 696, 720); *id.*, at ___ (ROBERTS, C. J., concurring in part and dissenting in part) (133 S. Ct. 1552; 1573, 185 L. Ed. 2d 696, 720) (describing jurisdiction where “police officers can e-mail warrant requests to judges’ iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes”).

[*2494] Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-

specific exceptions may still justify a warrantless search of a particular phone. “One well-recognized exception applies when ‘“the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’” Kentucky v. King, 563 U. S., at ___, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865, 874) (quoting Mincey v. Arizona, 437 U. S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)). **Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.** 563 U. S., at [**452] ___, 131 S. Ct. 1849, 179 L. Ed. 2d 865.
(Id at 2493-4)

Here the officer was literally in “hot pursuit” of the fleeing suspect and was attempting to determine who that fleeing suspect was.

...

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child’s location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. See Reply Brief in No. 13-132, at 8-9; Brief for Respondent in No. 13-212, at 30, 41. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case. See McNeely, *supra*, at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (slip op., at 6). [***50] (Id at 2495)
(Footnotes omitted.) (Underline and/or bold emphasis mine.)

The trial court took into consideration the specific facts of this case and ruled that Samalia had abandoned the phone. Riley is factually distinguishable from this case, however the analysis set forth in Riley supports the actions of the trial court and the position of the State throughout this case, this was abandon property and therefore there was not right to privacy that could or was violated by the actions of the officer at the scene.

IV. CONCLUSION

The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 13th day of August 2014,

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on August 13, 2014, emailed a copy, by agreement of the parties, of the Respondent's Brief to Nancy P. Collins at wapofficemail@washapp.org and deposited a copy in the United States mail on this date to;

Adrian Samalia DOC# 365791
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of August, 2014 at Spokane, Washington,

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