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NO. 51068-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOHN SUPPAH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding, “Dismissal of a criminal case is only a remedy if there has been egregious misconduct or gross mismanagement. The court finds there has been no misconduct by the State in this case. The court further finds that here has been no gross mismanagement of the case by the State.” CP 289 (Finding of Fact on Motion to Dismiss VI).

2. The court erred in finding that defense counsel’s need for additional time to review the cell phone orders and records “was not a result of misconduct or mismanagement by the State.” CP 289 (Finding of Fact on Motion to Dismiss VIII).

3. The court erred in finding that “the defendant did not identify any prejudice that resulted from the timing of the discovery of the trap and trace documents, especially given the number of trial continuances in this case that had nothing to do with the cell phone documents.” CP 289 (Finding of Fact on Motion to Dismiss IX).

4. The court erred in denying appellant’s CrR 8.3(b) motion to dismiss.

5. The court erred in denying appellant’s motion to suppress evidence found as a result of an invalid trap and trace search.

Issues pertaining to assignments of error

1. Where the State's failure to provide discovery in a timely manner placed appellant in the position of choosing between his rights to a speedy trial and to effective assistance of counsel, did the court err in denying appellant's motion to dismiss?

2. Where the Superior Court failed to comply with statutory requirements in issuing a trap and trace order, and use of the trap and trace device invaded appellant's private affairs, must the fruits of the unlawful search be suppressed?

B. STATEMENT OF THE CASE

1. The investigation

At around 1:15 a.m. on December 19, 2015, Preston Stafford was shot in the abdomen while leaning into the back passenger area of a car. 6RP<sup>1</sup> 284; 7RP 467, 469. Witnesses had seen three people in the car that left the scene after Stafford was shot. 11RP 1326. When police responded to a 911 call, Stafford told them he did not know the shooter, but it was a black man driving a silver Jetta. 6RP 308, 310; 13RP 1587.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in eighteen volumes, designated as follows: 1RP—5/5/17; 2RP—5/12/17 and 5/16/17; 3RP—6/15/17, 7/14/17 and 8/8/17; 4RP—8/15/17; 5RP—8/16/17; 6RP—8/21/17; 7RP—8-22-17; 8RP—8/23/17; 9RP—8/24/17; 10RP—8/28/17; 11RP—8/30/17; 12RP—8/31/17; 13RP—9/1/17; 14RP—9/5/17; 15RP—9/6/17; 16RP—9/8/17; and 17RP—10/13/17; and 18RP—8/13/18.

Stafford died of his injuries, and police began a homicide investigation. 7RP 467; 11RP 1308. Stafford had told police he was waiting for someone named Nadine when he was shot. 6RP 311. An officer looked at Stafford's Facebook page and found a Nadine in his list of friends. 6RP 295. Police looked through Stafford's phone and discovered he had been exchanging Facebook messages with Nadine Lezard, including a message saying she was there in the car, which was sent around the time of the shooting. 10RP 1092; 11RP 1314. Based on this information, Lezard became the suspect in the shooting. 11RP 1224, 1314.

Police obtained a trap and trace warrant for phones associated with Lezard in an attempt to locate her. 11RP 1222. On December 21, 2015, they received information from Sprint that one of the phones was in the general vicinity of the Muckleshoot Casino. 11RP 1222-23. A team of officers went to the Muckleshoot to search for Lezard and arrest her for second degree murder. 11RP 1224. Law enforcement had come across the name John Suppah as an associate of Lezard's. 11RP 1332. They had no information tying him to the homicide investigation, but since he had outstanding warrants, they planned to arrest him as well if they found him with Lezard. 11RP 1224-25, 1334.

Both Lezard and Suppah were located at the Muckleshoot and placed under arrest. 11RP 1229. Police searched Suppah and found a black Samsung phone and a blue Nokia phone, which Suppah said belonged to his girlfriend. 11RP 1281, 1286. They also found keys to a silver Honda discovered in the parking lot, which had been reported stolen four days earlier. 11RP 1214, 1229-30, 1282.

Lezard gave a statement to police, naming Suppah as the shooter. 12RP 1500. Even though Stafford had said the shooter was a black man, and Suppah is not a black man, Suppah became the focus of the police investigation. 12RP 1500-01; 13RP 1587, 1593.

In addition, police continued to look for a third person they believed was involved in the shooting. 12RP 1502. Lezard had said she and Suppah went to the Muckleshoot Casino after the shooting. Police obtained documentation from the casino security office identifying Thomas Watts as someone who was present at the time Lezard described, and they determined they needed to talk to him. 13RP 1526-28. Watts was arrested on January 22, 2016. 9RP 927.

Both Lezard and Watts entered cooperation agreements with the State. 8RP 597; 9RP 938. Under the terms of Lezard's cooperation agreement, she pled guilty to second degree murder, with a sentence range of 216-316 months. 8RP 597, 625. She was released from custody the

day she signed her plea agreement, and, after testifying against Suppah, she would be allowed to withdraw her plea and be sentenced to time served for rendering criminal assistance. 8RP 624; 9RP 804.

Lezard testified she started dating Suppah in September 2015, and he eventually moved in with her. 8RP 601, 604. She spent most of her time with Suppah, and she used methamphetamine the entire time she knew him. 8RP 617, 621.

Lezard and Suppah met Stafford at a casino in October 2015, and after that she communicated with him over Facebook Messenger. 8RP 631-32. She knew that Suppah and Stafford engaged in some transactions, and Stafford owed Suppah some money. 8RP 649. Lezard denied having an intimate relationship with Stafford, although she claimed that one time Suppah thought Stafford touched her leg and he was upset about it. 8RP 650-52.

According to Lezard, she owned a blue Nokia phone, but Suppah was the primary user. 8RP 637. She got another phone in early December, and Suppah controlled the Nokia after that, but Lezard continued to use the phone occasionally. 8RP 637, 647.

Lezard testified that Suppah had access to her Facebook account, and he monitored her communications. 8RP 647-48. At trial the prosecutor showed Lezard a series of Facebook messages between her

account and Stafford's on the day of the shooting in which Stafford was asking for a ride. 8RP 660-61. Lezard claimed that Suppah sent all but the last message, which she sent. 8RP 661-62.

Suppah and Lezard met Watts around December 15, 2015, and they were with him on and off for a couple of days. 8RP 619.

Lezard testified that she was present when Stafford was shot. 8RP 656. She said she, Watts and Suppah left Watts's motel room around 11:30, heading to a casino to look for Watts's car, which had been stolen. Suppah said he needed to make a stop in Tacoma. 8RP 664-65. Lezard said she fell asleep while Suppah was driving, and she believed Watts slept too. 8RP 676. When she woke up, they were stopped on the side of a road in Tacoma. Suppah asked for the phone so he could text Stafford, saying they were going to pick him up. 8RP 677, 681-82. In the side view mirror Lezard saw Stafford approach the car. 8RP 682-83. Suppah then handed Watts some ear plugs and told Lezard he did not have any for her. 8RP 683. Stafford opened the rear passenger door and leaned into the car, and Suppah shot him. 8RP 684-85. Watts shut the door as they drove off. 8RP 685.

They drove to the Muckleshoot Casino and went inside. 8RP 688. Lezard and Watts were separated from Suppah for about an hour, but they did not talk about calling the police or running from Suppah. 8RP 689.

After about two hours, the three of them left the casino together, and Suppah and Lezard dropped Watts off at his motel. Later, while Suppah was sleeping, Lezard did an internet search on the blue Nokia to look for news about Stafford and learned that he had died. 8RP 692-94. When she told Suppah, they made a plan to get her out of town because of her Facebook involvement with Stafford. 8RP 695. Lezard sent a message to Stafford's Facebook saying she was sorry they missed each other, to make it seem like she was not there at the time of the shooting. 8RP 697. Suppah shut down Lezard's email and Facebook accounts and changed the number on her phone. 8RP 696.

Lezard testified that the day before they were arrested, she and Suppah went to a friend's house, where he traded the gun for drugs. 8RP 703. She claimed she was in the room at the time of the trade, but she did not see it happen. 8RP 704.

Lezard was gambling at the Muckleshoot Casino when she was arrested. 7RP 705. She was told she was being charged with second degree murder, and she agreed to talk to police. She told police that Suppah had shot Stafford. 8RP 707-08. She left Watts' name out of her story at the time, however, and she omitted any mention of what happened to the gun. 8RP 708; 9RP 786.

Watts was arrested on January 22, 2016, and he remained in jail for six months. 9RP 927. He was charged with first degree rendering criminal assistance with accessory to murder. 9RP 934-35. He was also offered a cooperation agreement under which he pled guilty and was released from custody. 9RP 938. If the plea deal was revoked, Watts would go back to jail for six to 12 months. 9RP 966.

Watts testified that he met Suppah and Lezard either the day before or the day of the shooting. 9RP 869, 871. Watts's car had been stolen, and Suppah was going to help him find it. Watts had information that it might be at the Emerald Queen Casino, and the three of them headed there, with Suppah driving, between 10:30 and 11:00 p.m. 9RP 885-89. Watts fell asleep in the back seat of the car on the way, and when he woke up they were stopped at a convenience store. Watts said that Suppah told him he needed to go up the road and pick up some money from somebody. 9RP 891. As they left the parking lot Lezard was sending messages on her phone while Suppah was driving. 9RP 895. After the car stopped again, someone opened the rear passenger door and leaned into the car. Suppah drew a gun and shot the man. 9RP 896-97. Watts admitted that his memory of events was far from clear, since he was using methamphetamine heavily at the time. 9RP 872, 948-50, 960-63, 969.

David Legge, who was incarcerated on forgery and identity theft charges, contacted law enforcement in October 2016, saying he had information about Suppah's case. 12RP 1419, 1428. He testified at trial that the night before Suppah was arrested, he arranged for Suppah to trade jewelry and a pistol for drugs, cash, and another pistol with a mutual friend. 12RP 1431-32. Suppah never told him anything about the gun he was trading, and although Legge said he was in the room during the transfer, he did not see it happen. 12RP 1435-36. The person who allegedly made the transfer did not testify. Although police raided his house, they never located any gun connected to Suppah or to Stafford's death. 13RP 1582-83.

Suppah's friend Andrew Johnson remembered spending the evening of December 18 to the early morning of December 19, 2015, with Suppah. 14RP 1616-17. The day was significant to him because he had an accident at work which caused a significant amount of damage, and he was fired. 14RP 1617. Johnson testified that he met Suppah at the Emerald Queen Casino and they drove around a bit before visiting a friend at a Motel 6. 14RP 1618. Suppah left the motel when Lezard picked him up around 1:45 a.m. 14RP 1621, 1662. When Johnson learned that Suppah was in jail, he called Suppah, and they talked about the fact that

the shooting occurred on the evening they spent together. 14RP 1622, 1654.

2. Suppah moved to dismiss the charges.

On December 22, 2015, Suppah was charged with murder, drive-by shooting, and unlawful possession of a firearm. CP 1-2. His original counsel filed a demand for discovery on December 29, 2015, requesting the prosecution to provide, among other things,

3. A copy of all applications, affidavits, declarations and statements in support of search warrants issued in this case.
4. A copy of all executed and unexecuted search warrants issued in the investigation of the above referenced case.

CP 14. Substitute trial counsel was appointed in October 2016. CP 20. At that time, no information regarding the order authorizing the search for the phones associated with Lezard had been provided in the discovery materials. CP 5.

When trial counsel interviewed the arresting officer in April 2017, the officer indicated he believed a “ping” was involved in locating Lezard and Suppah, but he did not have any details about that process because he was not the lead detective. CP 5-6. Trial counsel followed up on this information with the prosecution, and the prosecution obtained an order unsealing the applications and warrants issued during the investigation.

CP 28. These materials were provided to the defense on April 28, 2017.

CP 6.

The new materials included court ordered authorization of various electronic searches for telephones associated with the investigation of Stafford's death. The warrant indicated that the Tacoma Police Department was engaged in investigation of second degree murder; there was probable cause to arrest Lezard for that crime; there was probable cause to believe the location of a phone connected with Lezard would lead to locating her and evidence of the crime; and the police department was seeking to use a pen register and trap and trace to locate the phone. CP 34-35.

The court found that information likely to be found by use of a pen register and trap and trace was relevant to the ongoing investigation of Lezard. CP 35. The warrant therefore authorized law enforcement, pursuant to RCW 9.73.260, to use a pen register to register the numbers dialed from the subject phone. CP 36. In addition, the warrant authorized law enforcement

to install a trap and trace device to register calls placed to [the subject telephone number], the date, time and length of those calls; and to trace and identify the telephone numbers, location of, and subscriber of record to all telephones used to place calls to [the subject telephone number], without respect to geographic limitations....

CP 36. Further, in the event that the location coordinates received through the trap and trace were insufficient to locate the phone, the warrant authorized use of a cell site simulator. CP 38.

After receiving these previously undisclosed materials, trial counsel interviewed the detective who operated the cell site simulator for Tacoma Police. He learned for the first time that, in addition to the trap and trace, the cell site simulator had been deployed, although it locked onto the phone after Lezard and Suppah were in custody. CP 6, 77. He also learned that there had been no determination that the trap and trace was unsuccessful in locating Lezard before the cell site simulator was deployed. CP 7, 82-83.

On May 16, 2017, the day before the case was set for trial, Suppah filed a motion, memorandum, and declaration of counsel seeking to dismiss the charges or in the alternative asking for a continuance. CP 3-108. Counsel informed the court he was not prepared for trial because he had received 400 pages of new discovery in the past three to four weeks, due to the State's mismanagement of the case. He argued that the State's lengthy delay in turning over material information regarding the authorized cell phone searches, which had been requested over 16 months earlier, prejudiced the defense, because it forced Suppah to choose between waiving speedy trial and proceeding to trial with counsel who

was unprepared to address a critical issue. 2RP 28. Counsel argued that if the court declined to dismiss the charges based on the State's misconduct, a continuance was necessary. 2RP 29. The State agreed that a continuance was necessary, and the court ordered a continuance. 2RP 30-32.

The court heard argument on the motion to dismiss on June 15, 2017. Defense counsel argued that he would have been prepared for trial on May 17, 2017, but for the State's late disclosure of search warrants authorizing the trap and trace and contingently authorizing the cell site simulator. 3RP 4-5. Dismissal was required because the State's mismanagement forced Suppah into a Hobson's choice. 3RP 6.

The State responded that original defense counsel had filed a "generic discovery request" pursuant to which 1930 pages of discovery had been provided. The only thing the defense claimed was untimely was the warrant authorizing the trap and trace. 3RP 9-10. But that warrant was sealed, and no one knew it existed for some time. Eventually it was located, a court order was obtained unsealing it, and it was provided to defense counsel. 3RP 13-14. The State argued there was no government misconduct, or if there was it did not materially affect Suppah's right to a fair trial. 3RP 16.

Defense counsel argued that it did not matter whether the prosecutor's office knew of the warrants, because information in the hands of law enforcement is imputed to the State. It is the prosecutor's duty to learn of the warrants and provide them to the defense in a timely manner, which was not done in this case. 3RP 19. The State's delay forced Suppah to waive speedy trial and seek a continuance, and that constitutes prejudice. 3RP 20-21.

The court ruled there was no evil or dishonest conduct on the part of the State, and as soon as the prosecutor's office learned of the warrant, it was requested and turned over to the defense. Even if there was mismanagement, there was no showing that Suppah's right to a fair trial was prejudiced. It denied the motion to dismiss. 3RP 25-28; CP 287-90.

3. Suppah moved to suppress evidence obtained as a result of the invalid warrant.

The cell phone for which law enforcement obtained the trap and trace warrant was located in Suppah's pocket when he was arrested. 11RP 1281. The State presented evidence at trial that Suppah used that phone as his own, and its theory was that Suppah had been the one sending messages to Stafford using that phone. 8RP 637, 661-62.

Prior to trial Suppah moved to suppress evidence found on his person when he was arrested, and all evidence stemming from that

evidence, on the grounds that the warrant authorizing the trap and trace was invalid and that the cell site simulator was used in violation of the terms of the warrant. CP 135-49.

The defense asked for an evidentiary hearing on the motion to suppress, arguing that testimony was needed to determine when the cell site simulator was activated and whether there had been a determination that the trap and trace was unsuccessful prior to its use. 4RP 51-52. The Court declined to hear testimony, stating the understanding was that the cell site simulator was turned on at some point, and there was no communication between the apprehension team and the cell site simulator operator that the trap and trace was unsuccessful. 4RP 60.

Counsel argued the warrant authorizing the trap and trace was deficient because it failed to specify the geographic limits of the order as required by statute. Moreover, the warrant authorized use of the cell site simulator only if the trap and trace was unsuccessful. Since the trap and trace was successful, use of the cell site simulator violated the warrant. 4RP 64-65. Counsel argued that even if Suppah was already in custody at the time the cell site simulator was deployed, the exclusionary rule should apply to deter unlawful police activity. 4RP 65-67. The court's failure to fashion a remedy would give law enforcement carte blanche to use cell

site simulators in violation of warrants, court orders, and statutes. 4RP 68-69.

The State questioned whether Suppah had standing to challenge the warrant, since he did not own the phone that was the subject of the warrant. 4RP 72. It argued in any event that Suppah and Lezard were located in the casino based on information from the trap and trace, Suppah was apprehended on warrants, and the cell site simulator did not result in any information used by law enforcement. 4RP 74-77.

The court found there was no doubt the cell site simulator was used and connected with a phone in Suppah's possession, but that use did not result in the arrests. 4RP 90; CP 566. For the purposes of ruling on Suppah's motion the court conceded that Suppah had standing. 4RP 91; CP 568. It found that law enforcement went to the Muckleshoot Casino based on information obtained from the trap and trace. They told the cell site simulator operator that they were going to the casino, but the apprehension team located Suppah and Lezard before the simulator was used. Therefore the cell site simulator was not a factor in the arrests. 4RP 91-92; CP 565-68. The court acknowledged that there was no geographic limitation in the warrant as required by statute, but it concluded that error did not render the warrant invalid, given the nature of the crime in this case. 4RP 93-94; CP 567. The court denied Suppah's motion to suppress.

C. ARGUMENT

1. THE CONVICTIONS SHOULD BE REVERSED AND THE CHARGES DISMISSED BECAUSE GOVERNMENT MISMANAGEMENT PREJUDICED SUPPAH'S RIGHT TO A FAIR TRIAL.

The trial court may dismiss a criminal prosecution under CrR 8.3(b), which provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b). A court's decision under CrR 8.3(b) is reviewed for abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

For dismissal under this rule, the defendant must show (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009).

As to the first requirement, the government misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Michielli*, 132 Wn.2d at 239-40, (quoting *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). As to the second requirement, a defendant demonstrates prejudice by showing the mismanagement adversely affected his right to a speedy trial or his right to be represented

by counsel who is adequately prepared. *Michielli*, 132 Wn.2d at 240; *see also State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976) (dismissal appropriate where State impeded defense counsel's ability to investigate alibi witnesses, because defense has a "right to make a full investigation of the facts and law applicable to the case" prior to trial). When the State's mismanagement prevents counsel from being adequately prepared, it violates the defendant's rights under the Sixth and Fourteenth Amendments and article I, sections 3 and 22. *Burri*, 87 Wn.2d at 180; *State v. Martinez*, 121 Wn. App. 21, 34-35, 86 P.3d 1210 (2004); U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 3, 22.

While dismissal is an extraordinary remedy, courts have ruled that dismissal is appropriate when the State's failure to comply with discovery rules and orders compromises the defendant's right to a fair trial. *See Brooks*, 149 Wn. App. at 390-91; *Martinez*, 121 Wn. App. at 34-35; *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990).

In *Sherman*, the defendant was charged with stealing money from her employer. The omnibus order required the State to provide the defendant IRS records no later than two weeks prior to trial, but the State failed to comply with that order. *Sherman*, 59 Wn. App. at 765-66. The State also filed an amended information after the scheduled trial date and attempted to expand the witness list on the day of trial. The trial court

dismissed the charges, concluding the defendant's due process rights had been violated. *Id.* at 766. The Court of Appeals affirmed, holding that the State's failure to produce the IRS records in a timely manner, in itself, was sufficient to warrant dismissal. *Id.* at 768. The State protested that it made good-faith attempts to procure the records more quickly, but they were not in its control. *Id.* at 768-69. The Court rejected the argument because the records were in the control of the complaining witness. *Id.* at 769. Mismanagement effectively deprived defendant of her constitutional right to effective assistance of counsel, because it compromised defense counsel's ability to adequately prepare for trial. *Id.* at 770-72.

Here, as in *Sherman*, the State's failure to comply with its discovery obligations compromised Suppah's right to a fair trial, and the motion to dismiss should have been granted.

The prosecutor's duty to provide discovery is set forth in CrR 4.7. Under CrR 4.7(c)(1), "the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding... [s]pecified searches and seizures[.]"

Within a week of charges being filed in December 2015, the defense filed a demand for discovery specifying that "all applications, affidavits, declarations and statements in support of search warrants issued in this case" and "all executed and unexecuted search warrants issued in

the investigation of the above referenced case” were being requested. CP 14. Yet the State failed to respond. At the time Suppah’s trial counsel took over the defense in October 2016, no information regarding the trap and trace warrants had been provided. CP 5. Not until trial counsel learned from the arresting officer in April 2017 that the trap and trace had been used did the State take action to unseal the applications and orders issued during the investigation. CP 5-6, 28. As a result of this delay, several hundred pages of new discovery were provided to the defense just three weeks prior to the scheduled trial date. These new materials required further investigation, interviews, motions, and briefing, which could not be accomplished in time for counsel to be prepared for trial. 2RP 28.

The court below found that there had been some mismanagement of discovery, and that the State could have actively pursued the trap and trace documents prior to trial counsel’s request. CP 288. It stated, however, that dismissal is permitted only if there has been “egregious misconduct or gross mismanagement.” CP 289. It found that the State had not committed misconduct or gross mismanagement and therefore denied the motion to dismiss. *Id.*

As noted above, however, Washington courts have long recognized that mismanagement justifying dismissal “need not be of an evil or

dishonest nature; simple mismanagement is sufficient.” *Michielli*, 132 Wn.2d at 239-40; *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980); *Brooks*, 149 Wn. App. at 384; *Sherman*, 59 Wn. App. at 767. Once the defense establishes, as it did here, that the prosecution has mismanaged the case, the question for the court is whether that action prejudiced the defendant’s right to a fair trial. *See Brooks*, 149 Wn. App. at 384. “Such prejudice includes the right to a speedy trial and the ‘right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.’” *Id.* (quoting *Michielli*, 132 Wn.2d at 240).

The trial court also found there was no “specific formal request for the pen trap and trace documents relating to the cell phones”, although it acknowledged that the original demand for discovery requested all search warrants. CP 288. Given the order sealing all documents relating to the trap and trace while the investigation was pending, it was not possible for the demand for discovery to be any more specific. While the defense did not know of the specific warrants, it is inconceivable that the prosecution did not know about them when the charges were filed, as the trap and trace played a key role in the arrest of the suspects in the case.

The criminal discovery rules are “designed to enhance the search for the truth.” *State v. Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54 (2007).

The purpose of discovery rules is to “to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process...” *Id.* at 434 (quoting *State v Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). Courts should apply the discovery rules to “insure a fair trial to all concerned, neither according to one party an unfair advantage, nor placing the other at a disadvantage.” *Id.* at 433 (quoting *State v. Boehme*, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967)). Holding that the defense demand for discovery was required to be any more specific than it was would be to give the State an unfair advantage, place the defense at a disadvantage, and defeat the purpose of the rules.

As the trial court found, the prosecutor mismanaged the case by not pursuing these documents and providing them to the defense in response to the initial demand for discovery. CP 288. The prosecutor’s suggestion that the State should be excused for its mismanagement, because even though it did not provide the requested orders it had provided lots of other discovery, is ludicrous. *See* 3RP 9-10. The State’s failure to procure requested information, which delays fulfillment of its discovery obligation, can prejudice the defense so as to warrant dismissal. *See Brooks*, 149 Wn. App. at 385-86 (prosecutor made no attempt to work with sheriff’s office to obtain requested materials in sheriff’s possession);

*Sherman*, 59 Wn. App. at 768-69 (State's failure to procure IRS records from complaining witness was sufficient ground for dismissal).

The prosecutor's mismanagement in this case prejudiced Suppah's right to a fair trial by forcing him to either waive his right to a speedy trial or proceed with counsel who was unprepared to address the issues presented by the trap and trace warrants. Courts have long recognized that effective assistance of counsel and access to evidence are crucial elements of due process and the right to a fair trial. *Boyd*, 160 Wn.2d at 434. The right to effective assistance of counsel includes a reasonable investigation by defense counsel. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)). Thus, CrR 4.7(h)(4) requires that evidence must be disclosed in time to permit its beneficial use. *Id.* at 435.

The State cannot, by its unexcused conduct, force a defendant to choose between his speedy trial rights and his right to effective assistance of counsel who has had the opportunity to adequately prepare. *Brooks*, 149 Wn. App. at 387. The delayed discovery in this case created the need for additional interviews, research, briefing, and argument, and trial counsel was not prepared to proceed to trial as scheduled. 2RP 28. It would be ineffective assistance of counsel to proceed to trial without

pursuing a motion to suppress based on the information learned after the warrants were finally disclosed.

The trial court's findings suggest that because previous continuances were sought by the defense, Suppah was not prejudiced by a further trial continuance. CP 289. The court found good cause for the prior continuances. That does not mean Suppah forfeits his right to a speedy trial. It simply means there was a good reason for the previous delays. The only reason for the final delay, when Suppah moved to dismiss or in the alternative for a continuance, was the State's failure to provide discovery when it was requested or any time in the next 16 months, which would have permitted defense counsel to be prepared for trial.

The purpose of CrR 8.3(b) is to ensure that person charged with a crime is treated fairly. *State v. Whitney*, 96 Wn.2d 578, 637 P.2d 956 (1981); *State v. Koerber*, 85 Wn. App. 1, 5, 931 P.2d 904 (1996). When government mismanagement interferes with the defendant's ability to prepare and present his case, he is not treated fairly. Because the State's failure to disclose the trap and trace documents in a timely fashion put Suppah in the position of having to choose between his rights to effective assistance of counsel and a speedy trial, the trial court should have granted his motion to dismiss.

2. THE ORDER AUTHORIZING USE OF THE TRAP AND TRACE DEVICE WAS INVALID, AND ALL EVIDENCE OBTAINED AS A RESULT OF THE UNLAWFUL SEARCH MUST BE SUPPRESSED.

Both the state and federal constitutions protect individuals against unreasonable searches and seizures. Wash. Const. art. I, § 7; U.S. Const. amend IV. It is well established that article I, section 7 provides greater protection than the Fourth Amendment, protecting citizens from governmental intrusion into their private affairs without authority of law. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). The authority of law required by article I, section 7 is a valid warrant, unless the State shows that the search or seizure falls within one of the narrow exceptions to the warrant requirement. *Id.* at 868-69.

Use of a cell phone is a private affair, and intrusion into the contents or data it supplies must be done under authority of law. *Hinton*, 179 Wn.2d at 871-74. The Privacy Act protects against violations of privacy interests in cell phone contents and data by setting forth the circumstances under which a court may authorize the use of pen registers, trap and trace devices, and cell site simulators. RCW 9.73.260.

Under that statute, if the court finds there is probable cause to believe use of the devices will lead to evidence relevant to an ongoing criminal investigation, the court can issue an order authorizing use. RCW

9.73.260(4). The order must specify the identity of the person in whose name the telephone line is listed, if known, as well as the identity of the person who is the subject of the investigation. RCW 9.73.260(4)(a), (b). In addition, in the case of a trap and trace device, the court must specify “the geographic limits of the trap and trace order[.]” RCW 9.73.240(4)(c)(i).

In this case, at the application of the Tacoma Police Department, the Superior Court issued orders authorizing use of a trap and trace device to locate telephones associated with the investigation of Stafford’s death. The orders further provided that if the trap and trace search was unsuccessful in locating the subject phones, a cell site simulator could be used. CP 34-75. The orders identified Lezard as the suspect in the crime and the person believed to be using the phones. CP 35, 57, 63. Use of the trap and trace led to a phone in Suppah’s possession, however, and the State presented evidence that Suppah controlled and used the phone almost exclusively, although he said when he was arrested that it was his girlfriend’s phone. 8RP 637, 647; 11RP 1222-23, 1281, 1286.

A defendant can have a privacy interest in an item he does not own, if the item is lawfully in his possession and control. *State v. Zakel*, 119 Wn.2d 563, 571, 834 P.2d 1046 (1992); *State v. Hamilton*, 179 Wn. App. 870, 883, 320 P.3d 142 (2014) (defendant had privacy interest in

purse she said she did not own due to exercise of possession and control). Where the State relied on evidence that Suppah regularly used the phone, changed the settings on the phone, entered contacts in the phone, and was in possession of the phone, it cannot legitimately dispute that Suppah had a privacy interest in the phone. RP 654, 657-59; *see Hamilton*, 179 Wn. App. at 884. Use of the trap and trace device therefore constituted an intrusion into Suppah's private affairs.

Because the order did not comply with the mandatory requirements of the statute, however, it did not supply the authority of law necessary to justify that intrusion. Under the terms of the statute authorizing trap and trace orders, "[t]he order shall specify ... the geographic limits of the trap and trace order[.]" The statute contains no exceptions to this requirement. RCW 9.73.260(4)(c)(i). As the trial court found, "None of the trap and trace orders obtained by the police in this case have any geographic boundaries within the orders." CP 564.

Nonetheless, the court concluded that the police lawfully obtained information pursuant to the trap and trace order for the cell phone found in Suppah's possession. CP 567. It concluded that absence of geographic boundaries in the trap and trace orders was not fatal to the validity of the orders because police were investigating a homicide for which the court would likely have authorized a nationwide order, and use of the trap and

trace device “led to a location within a short distance from the city of Tacoma and Pierce County.” CP 567.

A fact learned as a result of the unlawful order cannot be used to justify the order. *See State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Moreover, unless one of the “jealously guarded and carefully drawn exceptions to the warrant requirement” applies, the authority of law required by article I, section 7 is a valid warrant. *Hinton*, 179 Wn.2d at 868-69. There is no exception for a warrant which could have been valid had the issuing court complied with statutory requirements.

Because article I, section 7 protects an individual’s right to privacy with no express limitations, Washington’s exclusionary rule is nearly categorical. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). Washington courts have recognized that the “right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *Afana*, 169 Wn.2d at 180 (quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). Thus, if police disturb a person’s private affairs without authority of law, the fruits of such violation must be suppressed. *Id.*

The trap and trace order issued in this case was invalid because it did not comply with the mandatory statutory requirements for issuance of such orders. Suppah’s private affairs were invaded without authority of

law when the invalid trap and trace order was executed, and this privacy interest is not diminished by the supposition that the court could have issued a valid order. The trap and trace identified the general location of the phone in Suppah's possession and control, and neither the phone nor Suppah would have been located without the use of the trap and trace device. All fruits of that unlawful invasion of Suppah's private affairs must therefore be suppressed, including the phones and keys found on his person and the evidence discovered in the car to which those keys led. Suppah's convictions must be reversed and the case remanded for suppression of this unlawfully obtained evidence.

D. CONCLUSION

Suppah's right to a fair trial was prejudiced by the State's mismanagement of the case, and the charges should be dismissed. In addition, evidence discovered as a result of the invalid trap and trace search must be suppressed.

DATED September 24, 2018.

Respectfully submitted,



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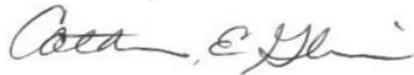
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Today I caused to be mailed copies of the Brief of Appellant in  
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I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Manchester, WA  
September 24, 2018

**GLINSKI LAW FIRM PLLC**

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