FILED
DEC 17, 2013
Court of Appeals
Division III
State of Washington

No. 91532-6

NO. 31691-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 2

E. ARGUMENT 6

A police officer's intrusion into the contents of Mr. Samalia's cell phone without a warrant violates the Fourth Amendment and article I, section 7 6

1. The contents of cell phones are private and protected from warrantless searches by police 6

2. Mr. Samalia did not voluntarily abandon his privacy interest in his telephone when he allegedly fled from the police 10

3. Article I, section 7 requires a warrant to search a private affair, such as a cell phone, without regard to the Fourth Amendment-based framework of voluntary abandonment 13

4. The fruits of the unconstitutional search of Mr. Samalia's cell phone must be suppressed 16

F. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Lewis v. Dept. of Licensing, 157 Wn.2d 446, 139 P.3d 1078 (2006) 8

Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988) 6

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) 4

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) 9, 10, 14, 15

State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) 6-7, 14, 16

State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996) 8

State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002) 16

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) 7, 14

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007) 11, 13

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 8, 10, 15

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009) 7

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 6, 7

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) 8, 10

State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007) 9, 14

State v. Meneese, 174 Wn.2d 937, 282 P.3d 83 (2012) 13

State v. Reynolds, 144 Wn.2d 282, 291 27 P.3d 200 (2001) 12

State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012) 15

State v. Townsend, 147 Wn.2d 666, 57 P.3d 675 (2002)..... 8

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008)). 14

Washington Court of Appeals Decisions

State v. Dugas, 109 Wn.App. 592, 36 P.3d 577 (2001) 12, 13

State v. Kealey, 80 Wn.App. 162, 165,, 907 P.2d 319 (1995),..... 11

United States Supreme Court Decisions

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)..... 16

United States Constitution

Fourth Amendment..... 1, 2, 6, 7, 13, 14

Washington Constitution

Article I, section 7 ..... 2, 7, 13, 14, 15, 16

A. SUMMARY OF ARGUMENT.

A person's cell phone contains a host of private information about its owner, including places the person has gone and people the person has telephoned. Without a warrant, a police officer searched the contents of Adrian Samalia's cell phone and telephoned several people listed as his contacts in order to obtain information about the phone's owner because he suspected the person who owned the phone had committed a crime. The warrantless intrusion into Mr. Samalia's cell phone invaded his private affairs without authority of law and the improperly gathered information should have been suppressed.

B. ASSIGNMENTS OF ERROR.

1. The trial court erroneously denied Mr. Samalia's motion to suppress property that was seized and searched in violation of the Fourth Amendment and article I, section 7 of the Washington Constitution.

2. The trial court erred by concluding Mr. Samalia lacked an expectation of privacy in a cell phone that was inside the car he was driving when stopped by police. CP 30 (Conclusion of Law 3, attached as Appendix A).

3. The court's conclusion that Mr. Samalia voluntarily abandoned the cell phone found inside the car is not supported by substantial evidence and misapprehends the law. CP 31 (Conclusion of Law 4).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Under the Fourth Amendment, a person voluntarily abandons property when she has no reasonable expectation of privacy in it and such property may be searched without a warrant. Mr. Samalia fled from a pursuing police officer and left his cell phone in a car that had been reported stolen. Did Mr. Samalia voluntarily abandon his privacy interest in his cell phone when he ran from the police and left his phone in the car he was driving?

2. Article I, section 7 protects a person's private affairs from intrusion without authority of law and does not depend on evolving societal expectations of privacy. A cell phone contains private information. Is the content of a cell phone a private affair for which a warrant must be obtained before it is searched by the police?

D. STATEMENT OF THE CASE.

On November 26, 2011, Officer Ryan Yates spoke to Shawna Neimann, who reported that her car had been stolen. RP 31, 32, 41. As

Officer Yates was driving his patrol car on December 4, 2011, his license plate reader alerted to a stolen car, which happened to be Ms. Neimann's. RP 33-34.

Officer Yates followed the car and turned on his emergency lights to signal the car to stop. RP 34. The driver stepped out of the car and Officer Yates drew his gun and told the driver to get back into the car. RP 35. The driver fled on foot. RP 35-36. A woman in the car also ran but another police officer stopped her a few minutes later. RP 36. Officer Yates chased the driver but did not catch him. RP 45-46.

Officer Yates searched through the car for evidence without obtaining a search warrant. RP 37-38, 47. While searching the car, he found a cell phone in the center console. RP 46; CP 29. He could not remember if he opened the console when searching the car or the console was open. RP 47.[1]

Officer Yates began looking through the phone's contents for information about the person who owned it. RP 48. He "scrolled through" the list of personal contacts and attempted several phone calls

to the contacts the phone's owner listed by name. RP 38, 48. "[E]ventually someone answered" the phone and Officer Yates spoke to Deylene Telles. RP 38, 49.

Officer Yates pretended he was from out of town. RP 59. He told Ms. Telles he found this phone at a local bar named Hoops and he wanted help returning it. RP 56, 59. Ms. Telles is Mr. Samalia's former girlfriend and they have a child together. RP 57, 58. Ms. Telles admitted that she wanted to "snoop in the phone," so she agreed to meet the caller. RP 38, 57.

When Ms. Telles walked to the agreed location, she was met by several police officers who asked her what she was doing. RP 61. She told them she was walking. RP 60-61. The officers arrested Ms. Telles and claimed she was trespassing on private property although Ms. Telles said she was on the sidewalk. RP 61. Another officer had taken the phone Officer Yates found and he used it to call Ms. Telles's phone. CP 29; RP 61. When Ms. Telles's phone rang, the officers saw Mr.

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[1] Because Officer Yates did not know whether he opened the console, the trial court refused to find that the console was open before Officer Yates entered and searched the car. RP 46-47, 75-76; CP 29 (Finding of Fact 3). The State bears the burden of proving contested facts at a suppression hearing. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Samalia's picture, name, and phone number on the screen of Ms. Telles's phone. RP 61.

The officers took Ms. Telles's phone and asked her about the person who was pictured. RP 61. They brought Ms. Telles to an old probation office near the police station and questioned her about Mr. Samalia, pressing her for information about who he hung out with and claiming he had been involved in a robbery. RP 62. Ms. Telles did not know where Mr. Samalia was and after one hour, they let her go to walk home without citing her for trespassing. RP 62.

Mr. Samalia was charged with one count possession of stolen motor vehicle under RCW 9A.56.068 and RCW 9A.56.140(1). CP 3.

The court initially denied Mr. Samalia's motion to suppress the evidence derived from the search of his cell phone without an evidentiary hearing. RP 17. Mr. Samalia waived his right to a jury trial and Officer Yates testified about the events leading to Mr. Samalia's arrest. *See* RP 40-52. Ms. Telles testified about her detention. RP 61-63. The court agreed to consider the testimony from the bench trial as part of Mr. Samalia's motion to reconsider the suppression motion, but again denied the motion. RP 28, RP, 73, 74; CP 30-31. The court ruled that Mr. Samalia knowingly possessed a stolen vehicle and that he

knew it was a stolen vehicle because he fled the vehicle when the police arrived. CP 31; RP 78. He received a standard range sentence. CP 19.

E. ARGUMENT.

A police officer's intrusion into the contents of Mr. Samalia's cell phone without a warrant violates the Fourth Amendment and article I, section 7

1. *The contents of cell phones are private and protected from warrantless searches by police*

The State bears "a heavy burden" of proving that a warrantless search falls within one of the few "jealously and carefully drawn" exceptions to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996).[2] When violations of both the federal and Washington constitutions are alleged, courts "will first independently interpret and apply the Washington Constitution," in part because "consideration of the United States Constitution first would be premature." *Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988).

Article I, section 7 "is a jealous protector of privacy." *State v. Buelna Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). Both the

Fourth Amendment[3] and Article I, section 7[4] protect individuals from intrusions into their privacy, but Article I, section 7 "demands a different approach than does the Fourth Amendment." *State v. Harrington*, 167 Wn.2d 656, 670, 222 P.3d 92 (2009); *see State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (Fourth Amendment is "qualitatively different" from Article I, section 7).

> [W]here the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law."

Buelna Valdez, 167 Wn.2d at 772. Article I, section 7 does not rest on the reasonableness of the search. *Eisfeldt,* 163 Wn.2d at 634. The state constitution "requires a warrant before any search, *reasonable or not.*" Id. (emphasis added).

The Washington Constitution protects an individual from any

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[2] The narrowly drawn exceptions to the warrant requirement of article I, section 7 are consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *Hendrickson***Error! Bookmark not defined.**, 129 Wn.2d at 71.

[3] The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[4] Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

intrusion into a "private affair." Washington has a long history and tradition of strict legislative protection of telephonic and other electronic communications in this state. *State v. Gunwall*, 106 Wn.2d 54, 66, 720 P.2d 808 (1986*); see also Lewis v. Dept. of Licensing*, 157 Wn.2d 446, 465-67, 139 P.3d 1078 (2006) (police officer violate privacy act by failing to inform arrestee that conversation is recorded); *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002) (recognizing Washington's privacy act as one of most restrictive in nation); *State v. Clark*, 129 Wn.2d 211, 222, 916 P.2d 384 (1996) (detailing historical protections for electronic communications).

In *Gunwall*, police obtained records of completed long distance calls and numbers dialed from the defendant's telephone, without a warrant. 106 Wn.2d at 68. The Supreme Court held this intruded upon Ms. Gunwall's private affairs due to the private nature of a person's telephone communications, including the numbers dialed, even without listening to the content of the calls. *Id.*

In *State v. Jackson*, 150 Wn.2d 251, 261-62, 76 P.3d 217 (2003), the court held warrantless tracking of a car by a global positioning satellite (GPS) violated article I, section 7, even though travel in a car necessarily occurs in public. *Id.* at 261-62. The court

reasoned that vehicles "are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life." *Id.* at 262. It is this exposure of the details of a person's private life that GPS tracking provides which requires a warrant. *Id.*

Private affairs protected under article I, section 7 also include the contents of a person's garbage placed on the curb. *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). Trash contains personal effects such as "business records, bills, correspondence, magazines, tax records, and other telltale refuse that can reveal much about a person's activities, associations, and beliefs." *Id.* at 578. This information remains constitutionally protected even when exposed to the public by being put into a trash can and placed on the curb for collection. *Id.* at 581. Similarly, a hotel registry reveals intimate and discrete details because the names listed in the registry could provide information about other people in the room, "personal activities," and "business associations." *Jorden*, 160 Wn.2d. at 129.

A cell phone contains not only information about who a person has or regularly calls, like the telephone logs and pen register at issue in

Gunwall, but they also can record information akin to a GPS tracking device at issue in *Jackson* or other intimate associations and records as in *Boland* and *Jorden*. By scrolling through a contact list or numbers dialed the police may "acquire an enormous amount of personal information about the citizen." *Jackson*, 150 Wn.2d at 264. The information is both historically protected and involves intimate details of a person's life. *Id.* Mr. Samalia had a privacy interest in the information stored in his cell phone and was entitled to hold it safe from warrantless governmental trespass.

2. *Mr. Samalia did not voluntarily abandon his privacy interest in his telephone when he allegedly fled from the police*

The trial court concluded that "because the driver ran from the vehicle, he voluntarily abandoned the cell phone located in the vehicle." CP 31; RP 46. It also ruled that Mr. Samalia lacked any privacy interest in his cell phone once he left the car containing it because he did not own the car. CP 30. However, the court misconstrued the legal requirements of voluntary abandonment and the nature of the privacy interest in the private information stored in a person's cell phone.

If property has been voluntarily abandoned, police may search it without a warrant. *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007). In *Evans*, the defendant denied he owned a briefcase that was in his truck. *Id.* at 405-06. Yet even though he said the briefcase was not his, the Supreme Court ruled that his actions did not constitute "voluntary abandonment" because he maintained a reasonable expectation of privacy in the briefcase. *Id.* at 413. He kept the briefcase closed and objected to it being searched. *Id.* Briefcases generally store private information. *Id.* at 409. The *Evans* Court concluded that the defendant did not voluntarily abandon the briefcase even when disavowing ownership. *Id.* at 413.

In *State v. Kealey,* 80 Wn.App. 162, 165, 168-69, 907 P.2d 319 (1995), the court held that a defendant did not relinquish her expectation of privacy when she left her purse in a department store and a store clerk rifled through it, finding drugs and calling the police. The court reasoned that a purse a traditional repository of private affects, it was "zipped shut and closed to public viewing," and it was mislaid, not purposefully left for others to take and use. *Id.* at 168–69.

Similarly, in *Dugas*, the defendant took off his jacket while being questioned by police and put it on the hood of his car. *State v.*

Dugas, 109 Wn.App. 592, 595, 36 P.3d 577 (2001). When the police arrested him, they took him from the scene without Mr. Dugas making any effort to take his jacket with him or give it to someone else. Another officer searched it and found drugs in the pocket. The *Dugas* Court found the defendant did not relinquish his reasonable expectation of privacy in his jacket because he never denied it was his, even though he left the scene without asking for it. *Id.*; *cf. State v. Reynolds*, 144 Wn.2d 282, 284-85, 291 27 P.3d 200 (2001) (by taking a coat out of a car, putting it on the ground underneath the car and denying ownership, defendant voluntarily abandoned it).

When looking at the totality of the circumstances, Mr. Samalia did not voluntarily abandon his expectation of privacy in his cell phone. He did not throw it away, deny ownership, or intentionally move it to a public place. He stepped out of the car, and once he realized the officer was stopping him at gunpoint, he ran away. RP 35-36. The phone was still inside the car but there was no evidence he purposefully left it with the understanding others would be free to explore its contents at will. The phone was secured in the console. RP 47. He did not put his phone outside of the car and deny ownership, like the defendant in *Reynolds* who sought to disassociate himself from jacket he put under the car.

Reynolds, 144 Wn.2d at 284-85. Mr. Samalia's actions were more like the defendant in *Dugas* where the court held the jacket was not abandoned even though it was left outside of the vehicle and the defendant did not specifically ask the police to give his jacket to anyone for safekeeping. *Dugas*, 109 Wn. App. at 596. The phone was inadvertently left behind, not left in an effort to deny ownership and Mr. Samalia did not abandon his privacy interest in its contents.

3. *Article I, section 7 requires a warrant to search a private affair, such as a cell phone, without regard to the Fourth Amendment-based framework of voluntary abandonment.*

The voluntary abandonment test used in *Evans*, *Dugas* and the cases on which they rely is rooted in the Fourth Amendment. This test asks whether the owner had a reasonable expectation of privacy in the property. 159 Wn. at 409. These cases do not separately consider whether article I, section 7 requires a different inquiry, even while mentioning the broader protections afforded under article I, section 7. *See Evans*, 159 Wn.2d at 412; *Dugas*, 109 Wn.2d at 595-96.

It is well-established that article I, section 7 is broader than the Fourth Amendment and uses a different analytical framework. *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Article I, section 7 requires a two-part analysis: (1) whether state action constituted a

disturbance of private affairs and (2) whether the intrusion was justified by authority of law. *Buelna Valdez,* 167 Wn.2d at 772 (quoting *York v. Wahkiakum Sch. Dist. No. 200,* 163 Wn.2d 297, 306, 178 P.3d 995 (2008)).

"Under Const. art. 1, § 7, the focus is whether the 'private affairs' of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable." *Boland*, 115 Wn.2d at 580. The Fourth Amendment protects a person's from "unreasonable" searches while "article I, section 7 prohibits any disturbance of an individual's private affairs 'without authority of law.'" *Buelna Valdez*, 167 Wn.2d at 772; *see State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (Fourth Amendment is "qualitatively different" from Article I, section 7); *State v. Jorden*, 160 Wn.2d 121, 136, 156 P.3d 893 (2007) (after decades of review, "now well-established" that court should "engage in independent state constitutional analysis" when facing claimed violation of article I, section 7). Article I, section 7 does not rest on the reasonableness of the search. *Eisfeldt*, 163 Wn.2d at 634. The state constitution "requires a warrant before any search, *reasonable or not*." *Id.* (emphasis added).

The location of the search "is indeterminitive" when the issue is whether the State unreasonably intruded into an individual's private affairs. *Boland*, 115 Wn.2d at 580. There is no "automobile exception" allotting a reduced expectation of privacy in cars under article I, section 7. *State v. Snapp*, 174 Wn.2d 177, 191-92, 275 P.3d 289 (2012). The State bears the burden of proving an exception to the warrant requirement. *Id.* at 188.

Mr. Samalia's cell phone contains an array of private information that is protected by article I, section 7 from governmental trespass without a warrant. Because his phone is a private affair and he did not consent to its search, article I, section 7 requires authority of law, such as a warrant. Officer Yates did not have a warrant when he looked through private information stored on Mr. Samalia's cell phone. He read through the list of contacts and dialed numbers from Mr. Samalia's phone based on people Mr. Samalia had contacted. Examining who Mr. Samalia knew and called from his cell phone is no different from looking at the history of phone numbers dialed at issue in *Gunwall*. The police did not have authority of law to invade the private affairs contained in the cell phone.

4. *The fruits of the unconstitutional search of Mr. Samalia's cell phone must be suppressed.*

Because the search violated Article I, section 7 and the Fourth Amendment, "[t]he evidence gathered during that search is therefore inadmissible." *Buelna Valdez*, 167 Wn.2d at 778; *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means."); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.").

Without evidence derived from the cell phone, Officer Yates would not have evidence indicating Mr. Samalia was the driver of the car. Officer Yates did not recognize Mr. Samalia and had no other information connecting Mr. Samalia to the car. By invading Mr. Samalia's private affairs, searching the contents of his cell phone for private information about people he knew and had called, and using that information in his investigation, Officer Yates violated Mr. Samalia's right to be free from invasion into his private affairs absent

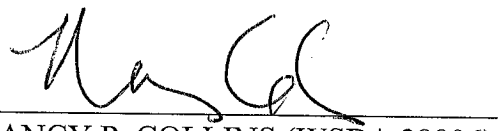
authority of law. The improperly obtained fruits of the unlawful search should have been suppressed.

F. CONCLUSION.

The improperly obtained evidence should be suppressed and Mr. Samalia's conviction reversed due to the reliance on unconstitutionally obtained evidence.

DATED this 17th day of December 2013.

Respectfully submitted,



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APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. Adrian Samalia DOB 8/3/1989 Defendant.	NO. 11-1-01793-7 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: 3.6 MOTION & Stipulated Bench Trial

THIS MATTER having come on before the above entitled Court on March 29, 2013 and May 7, 2013. Present were Samuel Chen, Deputy Prosecuting Attorney, the Defendant Adrian Samalia present and represented by attorney, Greg Scott. The state presented testimony from Yakima Police Officer Ryan Yates and the defense presented testimony from Deylenne Telles, the mother of the defendant's child. The defendant stipulated to the stolen vehicle report from the owner of the vehicle, Shauna Niemann. The Court, having considered

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the testimony of the witnesses, the evidence and arguments of counsel, now enters the following:

FINDINGS OF FACT

I.

On November 26, 2011, Yakima Police Officer Ryan Yates responded to a call regarding a stolen vehicle. He took a stolen vehicle report from Shauna Niemann who reported that her green Chevy Blazer with license plate 566VMK was stolen.

II.

On December 4, 2011, Officer Ryan Yates was driving westbound on West Lincoln Avenue at North 16th Avenue when his vehicle license plate reader indicated that he had passed a stolen vehicle. When the officer turned around, Washington License plate number 566VMK was in the turn lane and stopped at the traffic light. Officer Yates confirmed that the vehicle was stolen through radio. He then followed the vehicle as it was turning northbound on North 16th Avenue and then Eastbound on McKinley Avenue. The vehicle then stopped in the 1500 block of McKinley Avenue. The driver then got out of the vehicle and faced towards the officer. He would not obey the officer's commands and then began running eastbound, then southbound through yards. Off. Yates was

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not able to locate the driver

III.

The officer returned to the stolen vehicle and began to search it. He found a cell phone in the center console of the vehicle. On cross-examination, the officer testified that he was not sure if the phone was on top of the center console or inside the console when he saw it. It is undisputed that Officer Yates did not have a warrant to search the vehicle or the contents of the cell phone. Not knowing who the phone belonged to, he called some phone numbers listed in the contacts section of the cell phone. He spoke to Ms. Deylene Telles. Officer Yates spoke with Ms. Telles and told her that he had found the phone and wanted to return it to its owner. She agreed to meet him on the corner of North 11th Avenue and Yakima Avenue.

IV.

Yakima Police Sgt. Henne then contacted Ms. Telles at North 11th Avenue and immediately arrested her. At some point, Officer Yates must have given Sgt Henne the cell phone seized form the vehicle. Sgt. Henne seized her cell phone and called it from the phone recovered earlier by Officer Yates. When her phone rang, it displayed the name and photo of Adrian Samalia. That

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information was forwarded to Officer Yates. When Officer Yates looked at Samalia's photo in the Spillman database, he recognized Samalia as the driver of the stolen vehicle.

Based upon the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction over the parties and the subject matter herein.

II.

The officer had probable cause to contact the vehicle because his plate reader indicated that the vehicle was stolen and he confirmed via radio that it was indeed stolen.

III.

Because the vehicle was confirmed stolen, the driver of the vehicle did not have an expectation of privacy in the cell phone inside that vehicle.

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IV.

The officer contacted the vehicle. The driver did not heed the officer's commands and ran from the vehicle and the scene. The officer's contact with the vehicle and the driver was lawful. Because the driver ran from the vehicle, he voluntarily abandoned the cell phone located in the vehicle.

V.

Because there was no reasonable expectation of privacy, the subsequent search of the cell phone was lawful and the search was an exception to the warrant requirement.

VI.

The defendant's suppression motion is denied.

VII.

Because the defendant ran from the confirmed stolen vehicle when confronted by Officer Yates, the court finds beyond a reasonable doubt that the defendant knowingly possessed a stolen vehicle and further, that he knew it

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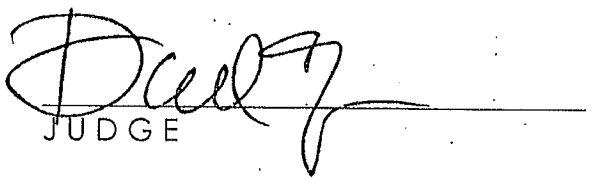
was stolen at the time he possessed it.

DATED: May 24, 2013.

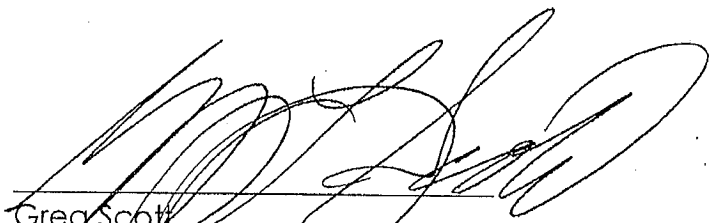


JUDGE

Presented by:

SAMUEL CHEN
Deputy Prosecuting Attorney
Washington State Bar Number 26738

Approved as to form, copy received:



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

STATE OF WASHINGTON, Respondent, v. ADRIAN SAMALIA, Appellant.	)))))))))	NO. 31691-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID TREFRY [TrefryLaw@WeGoWireless.com] YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] ADRIAN SAMALIA 365791 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 1899 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2013.

x_____

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