No. 91532-6

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OCTOBER 10, 2014
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Division III
State of Washington

NO. 31691-2-III

IN 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 REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

The warrantless cell phone search conducted to find evidence of a crime violated the Fourth Amendment and article I, section 7 1

1. The prosecution used information obtained from the cell phone to convict Mr. Samalia 1

2. It violates article I, section 7 and the Fourth Amendment to search a person's cell phone without a warrant 2

3. Mr. Samalia's private affairs were violated 4

4. The possibility of an inventory search is not a valid basis to affirm the lawfulness of the police conduct 7

B. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007) 6

State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) 2

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999) 7

State v. Reynolds, 144 Wn.2d 282, 291 27 P.3d 200 (2001) 6, 7

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226, 1233 (2009) 8

Washington Court of Appeals Decisions

State v. Dugas, 109 Wn.App. 592, 36 P.3d 577 (2001) 6

State v. Green, 177 Wn. App. 332, 312 P.3d 669 (2013) 8

State v. Kealey, 80 Wn.App. 162, 165,, 907 P.2d 319 (1995), ... 6

United States Supreme Court Decisions

Riley v. California, _ U.S. _, 134 S.Ct. 2473 (2014) 2, 3

Federal Court Decisions

United States v. Hoey, 983 F.2d 892 (8th Cir. 1993) 5

United States v. Nordling, 804 F.2d 1466 (9th Cir. 1986) 5

United States v. Payton, 573 F.3d 859 (9th Cir. 2009) 3

United States Constitution

Fourth Amendment 1, 2, 3, 4

Washington Constitution

Article I, section 7 ..... 2, 3, 7

A. ARGUMENT.

The warrantless cell phone search conducted to find evidence of a crime violated the Fourth Amendment and article I, section 7

1. *The prosecution used information obtained from the cell phone to convict Mr. Samalia.*

The prosecution puzzlingly insists the State did not prove the cell phone belonged to Mr. Samalia, because it wants to downplay the effect of the police search of the cell phone on the outcome of the case. This argument should be disregarded.

There is no question that Officer Ryan Yates saw someone driving a stolen car, did not know who the driver was, and the driver fled before the officer could identify him. RP 34-35.Then the officer used the information he obtained from the cell phone to find out who the phone belonged to. RP 47-48. He would not have known who owned the phone without searching its contents, looking for contacts, and making calls on the phone. RP 48-49. Absent this information, he would not have been able to identify Mr. Samalia as the person who was driving the stolen car. *Id.* Consequently, the officer's warrantless cell phone search yielded information critical to the case and otherwise unavailable.

2. *It violates article I, section 7 and the Fourth Amendment to search a person's cell phone without a warrant.*

After Mr. Samalia filed his Opening Brief, the Washington and United States Supreme Courts have definitively declared a person's privacy interest in the contents of his cell phone to be protected from warrantless searches and seizures. In *Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2494, 189 L.Ed 430 (2014), the Supreme Court unanimously agreed that because modern cell phones are essentially "minicomputers" capable of storing an enormous amount of information about "the privacies of life," they cannot be searched without a warrant. U.S. Const. amend. 4.

"It is well-established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections." *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). In *Hinton*, decided before *Riley*, the Washington Supreme Court held that the contents of text messages are protected private affairs under article I, section 7, even those sent to someone else and read by the police on the recipient's phone. 179 Wn.2d at 869-70. Washington has a long history of protecting personal and sensitive information

conveyed over telephones, favoring individual privacy by restricting the police from access to such information. *Id*. at 871-72, 874.

The State's Response Brief does not mention *Hinton*, or article I, section 7, and presents no argument addressing the "qualitatively different" protections afforded under article I, section 7. *Hinton*, 179 Wn.2d at 868). It never addresses why Fourth Amendment analysis defines the parameters of the police authority to search private property under article I, section 7.

It tries to distinguish *Riley* because the search of Mr. Riley's phone occurred after he was arrested. However, *Riley* stands for the unmistakable proposition that cell phones are capable of storing immense amounts of private information, including tracking a person's location over long periods of times, collecting any personal contacts, and holding thousands of photographs with dates, locations, and descriptions. *Riley*, 134 S.Ct. at 2489-90. Consequently, searches of digital information "involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers." *United States v. Payton*, 573 F.3d 859, 861 (9th Cir. 2009).

The police had no warrant to search Mr. Samalia's cell phone. They could have obtained a warrant telephonically, but did not do so.

See, e.g., *State v. Schultz*, 170 Wn.2d 746, 752, 248 P.3d 484 (2011) ("Officer Hill sought and received a search warrant by telephone."). The police were not permitted to rifle through this closed container holding a vast array of private information without a warrant.

3. *Mr. Samalia's private affairs were violated.*

Relying exclusively on cases construing the Fourth Amendment, the prosecution asserts that Mr. Samalia had no "expectation of privacy" in his phone when he fled from police.

First, the State misrepresents Mr. Samalia's actions – and these actions are necessary to assessing his purported "abandonement" of his privacy interest in his phone. While Officer Yates followed the car and planned to stop it because it was reported stolen, the officer did not "pull over" the car as the State asserts. Rather, the driver stopped and parked the car *sua sponte* while the officer was nearby, waiting for back-up. RP 35; Resp. Brief at 20. After the driver parked the car, he stepped out of the car and was met by Officer Yates, who had his gun drawn. RP 35. Officer Yates immediately ordered the driver to get back inside the car. *Id.* But having already gotten out of the car and seeing an officer pointing a gun at him, the driver turned and fled. *Id.* at 35-36.

When he ran, he left his cell phone behind inside the center console of the car. The officer then used the phone to get information from it. The trial court found that the State did not prove the cell phone was in plain view, and rather may have been inside the center console of the car.

Second, the State's brief contains excessively long block quotes from other cases that are largely beside the point to claim Mr. Samalia abandoned his privacy interest in his phone. It cites *United States v. Hoey*, 983 F.2d 892 (8th Cir. 1993), but in that case, the defendant was a renter who owed several months' rent and told his landlord he was moving out. He had a moving sale. Later, the landlord called the police when he found the apartment had been left in disarray. The police found a great deal of drug paraphernalia. The court concluded Mr. Hoey did not have a reasonable expectation of privacy in what he left behind. Hoey's analysis is based on a far different circumstance of deliberately leaving property behind, as a conscious choice, to show abandonment. *See United States v. Nordling*, 804 F.2d 1466, 1470 (9th Cir. 1986) ("While everyone who leaves luggage on an airplane cannot be said to have abandoned it, Nordling deliberately chose to leave the bag behind when requested by officers to leave the plane," and denied

ownership, thus abandoning it). When Mr. Samalia was surprised by a police officer pulling a gun and he fled, he made no deliberate choice to abandon the trove of private, personal information available on his cell phone.

In abandonment cases, one dispositive question is whether a defendant tried to hide his ownership in property as opposed to failing to ask for it or forgetting it. *See e.g.*, *State v. Dugas,* 109 Wn.App. 592, 595, 36 P.3d 577 (2001) (property not abandoned even though defendant never tried to retrieve jacket during or after arrest, where he did not intentionally distance self from jacket to hide it); *State v. Kealey,* 80 Wn.App. 162, 165, 168-69, 907 P.2d 319 (1995) (mislaid purse not purposefully left behind in store and therefore defendant did not relinquish her expectation of privacy); *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).

Only by affirmative conduct does a person abandon her privacy interest. It requires "act and intent." *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007). Mr. Samalia is accused of fleeing from a car without remembering to take his cell phone. He did not toss it into the

bushes. He left it in the car, in the console. CP 29. Given the wealth of private information contained in the phone, it is hard to believe that he wanted to abandon it. Unlike the jacket in *Reynolds*, the cell phone did not contain drugs that would prompt Mr. Samalia to divorce himself from it. Instead, it contained private information which no person would want revealed to the government without permission or a warrant, which the State did not have.

A cell phone is a readily recognizable personal effect that is protected from search without a warrant. *See State v. Parker,* 139 Wn.2d 486, 498–500, 987 P.2d 73 (1999). Mr. Samalia did not intentionally abandon it voluntarily in order to distance himself from his phone and because his privacy interest remained, the State needed a warrant to search its contents.

4. *The possibility of an inventory search is not a valid basis to affirm the lawfulness of the police conduct.*

The State nonsensically asserts that this Court should uphold the search based on an argument not raised below, that an inventory search could have occurred had the officer impounded the car. This claim is nonsensical. Inevitable discovery does not apply under article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226, 1233

(2009). The court may not speculate about what the police might have done in other circumstances. *Id*. Furthermore, an inventory search may not be conducted for investigatory reasons and does not entitle the police to rummage through containers for investigatory purposes. *State v. Green*, 177 Wn. App. 332, 342-43, 312 P.3d 669 (2013). Impounding the car would not give the police authority to search a cell phone without a warrant. *Id*.

B. CONCLUSION.

For the foregoing reasons and those set forth in Appellant's Opening Brief, the information obtained from the illegal cell phone search should be suppressed and the case remanded for further proceedings.

DATED this 10th day of October 2014.

Respectfully submitted,

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DIVISION THREE

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Respondent,	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY 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] JAMES HAGARTY 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
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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2013.

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