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NO. 91532-6

THE SUPREME COURT OF  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Appellant.

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RESPONSE TO PETITION FOR REVIEW  
BY YAKIMA COUNTY

---

David B. Trefry WSBA #16050  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH A. BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

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## A. INTRODUCTION

Petitioner/Appellant Samalia was found guilty by a jury on May 7, 2013 of Possession of a Stolen Motor Vehicle. He was sentenced under Yakima County cause number, 11-1-01793-7 on May 21, 2013.

Samalia appealed his conviction the decision in that appeal was filed on March 5, 2015. Nava challenged the search of a cell phone that was abandon inside of the car he had stolen he was driving and from which he also abandon and fled from, after he was stopped by the police.

The Court of Appeals Division III held that the trial court did not abuse its discretion when it denied the motion to suppress the abandon phone, ruling;

Because the cell phone was abandoned, used in pursuit of the fleeing suspect, and not directly used to identify Mr. Samalia, we hold the trial court did not err in denying suppression of his later identification from a police database. Accordingly, we affirm. (Slip opinion at 1)

The State also raised the issues of standing, ownership of this phone and the State's right to impound stolen vehicles/property. The the Court of Appeals did not review these issues based on its ruling that was dispositive on other grounds.

## B. ISSUE PRESENTED BY PETITION

Mr. Samalia has petitioned this court requesting review of the decision of the Court of Appeals. Petitioner alleges;

1. The court erred by ruling that a person loses a privacy interest in a phone that is abandon in a stolen car from which they flee after being pulled over driving said stolen car and ordered at gun point to stay with the vehicle. Samalia requests this court follow the dissents opinion.
2. The court erred when it ruled that under the Fourth Amendment this phone was abandon, review should be granted to determine if Article I, section 7 of the Washington State Constitution requires a different analysis.

#### ANSWER TO ISSUES PRESENTED BY PETITION

1. This request for review of the Court of Appeals decision does not meet the requirements of RAP 13.4. The Court of Appeals was correct when it determined that the trial court properly denied the motion to suppress. This decision is the very definition of stare decisis and therefore need not be reviewed.
2. The Court of Appeals correctly applied the Fourth Amendment there is no need to further analyze this issue under Article I, section 7.

#### C. STATEMENT OF THE CASE

This issue now before this court came before the trial court on three occasions. The first time, on March 29, 2013, the trial court heard this issue during a CrR 3.6 hearing without any live testimony from officers or other witnesses. RP 4-20. The court ruled;

THE COURT: And I guess I would also -- because Evans cites --they say, even in the head note, a comment about curbside garbage, and uses that, I would suggest, as a segue for a discussion about the enhanced protections one has under our State Constitution

versus the Federal Constitution. And in that particular case, it was State versus Boland at 115 Wn.2d 571. And there, the – the garbage can was the defendant's, was not somebody else's garbage can. It was his own garbage can. And, I guess, to that extent, had this been Mr. Samalia's car, I would -- certainly, we'd have a different outcome. But the fact is is that I believe the – the item, regardless of its nature, was abandoned, and was properly examined, so Motion to Suppress is denied.

...

I will commit to the phone, because that, I've got in front of me. I don't know how anybody could assert any expectation of privacy, really, other than the owner of the car.

...

THE COURT: I mean, any more than you could if it was laying on the street.

So Motion to Suppress denied. RP 17-19

Subsequently the trial court heard the case again as a bench trial and a motion for reconsideration of the CrR 3.6 hearing. (RP 26-79) At the end of the bench trial Samalia's counsel requested the court reconsider the previous denial of the motion to suppress.

THE COURT:...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 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, the fact that there was -- Ms. Telles was engaged in some conversation with law enforcement that led to Mr. Samalia's discovery, and perhaps unbeknownst to her, is not particularly significant. I don't think she's charged in this, is she?

MR. CHEN: No.

THE COURT: So I don't see that that is -- that's significant. I-- I -- I do know that this is a hot-button issue, and I can tell you we it was the topic of a session at a judicial conference. But I think the decision I made was correct, that this was an abandoned item and the officer -- the -- is looking at it, that is an exception to the -- exception to the warrant requirement and was appropriate.  
RP 73-4

And finally at the end of the bench trial at the time the court was determining the defendant's guilt;

THE COURT: All right. Can I see that report?

All right. Well, the testimony from Officer Yates was that he had contact with Shawna Neiman and took the report of a stolen motor vehicle from her. He also indicated it was quite unusual that, having taken that report, he would also be the one in his vehicle to receive a hit on his onboard camera or license plate reader.

There is -- Exhibit D is the Yakima Police Department multipurpose signature form, indicating that the vehicle had been stolen. The license was 566VMK. That's the same license of the vehicle that was stopped by Officer Yates on December 4, 2011.

Mr. Samalia was identified by Officer Yates in -- as the driver of the vehicle owned by Shawna Neiman. She's

indicated it was stolen. There was no testimony offered that would suggest that he had any right to possess that vehicle.

Consequently, I would find that he knowingly possessed a stolen motor vehicle and that it was withheld from Shawna Neiman. I think that's sufficient, unless somebody wants to argue about that.

...  
THE COURT: Yes, there is. He knowingly possessed the vehicle. It was a stolen motor vehicle, as has been previously described. Did he know that it was stolen? I think circumstantial evidence would suggest that, yes, he did. He was in possession of it, having -- of the stolen vehicle. He had no right to it. He fled the vehicle when police encountered him, which would suggest, again, that he had no right to possession of the vehicle. RP 77-9

In addition the Court of Appeals set forth the facts in its decision, the State will also rely on that statement and shall address specific areas of the facts in the argument s section below.

#### D. ARGUMENT

##### 1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review;

This case does not 1) Conflict with any decision by this court, the claim by Samalia that the Court of Appeals ruling is incorrect is unfounded.; 2) This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court. The issue of pricy rights to abandon property has been ruled on previously as indicated by the cases cited by the Court of Appeals. 3) The ruling of the Court of

Appeals does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years regarding abandon property and a criminal right to privacy in that item.

Samalia has not demonstrated that he has met his burden demonstrating that one of the reasons set forth in RAP 13.4 has been met. This court should not grant review.

**FIRST BASIS FOR REVIEW.**

The content of cell phones are private and protected from warrantless searches by police.

The opinion issued by the Court of Appeals in no manner or means diminished a person's expectation of privacy in their cell phone or any other device for that matter. What this opinion did was reaffirm that no matter what the item is if an individual abandon's property they lose certain rights in that property. As the Court of Appeals indicates that findings of fact and conclusions of law entered in the trial court were not challenged and therefore on review they were and are verities. State v. O'Neill, 148 Wn.2d 564, 571 62 P.3d 489 (2003). (Slip opinion at 1)

Petitioner addresses phones and GPS and the ability of an electronic device to store vast amounts of information and personal data in this first section of the petition, what they do not address in this section

and mischaracterize in the second section is the issue that was pivotal in the Court of Appeals decision, abandonment.

No one is disputing that article I, section 7 provides protection for the citizens of this State nor is there any dispute that this article has been interpreted to allow our citizens greater protections, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009); State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009).

Nothing in the opinion issued by the Court of Appeals conflicts with any of the cases cited by Samalia in this portion of his petition.

None of the cases cited by Samalia in this section devote one single word to the privacy rights when a person steals a car, is pulled over by the police driving that stolen car, exits the car against the orders of the stopping officer who orders the occupant to stay in the car, with his weapon drawn, then the driver flees the scene abandoning the car, the passenger in the car and, the contents of that car. State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986); Lewis v. State Dept. of Licensing, 157 Wn.2d 446, 139 P.3d 1078 (2006); State v. Townsend, 147 Wn.2d 666, 57 P.3d 384 (1996)(Court upheld search of email and client to client messages – Defendant impliedly consented to recording); State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112

(1990); Riley v. California, \_ U.S. \_, 134 S.Ct. 2473, 189 L.Ed. 430  
(2014): United States v. Payton, 573 F.3d 859, (9<sup>th</sup> Cir 2009) (Search of home computer invalid because the search warrant was issued for controlled substances and related material, not for computer - child pornography was found on that computer by officers who manipulated the computer while in the home of Payton.), or United States v. Schesso, 730 F.3d 1040, (9<sup>th</sup> Cir. 2013) (Seizure of home computer for child pornography upheld)

Petitioner states that the flight is “alleged” that is absurd, it is a fact, a verity on appeal. (Petition at 11) The State is at a complete loss as to how Petitioner can in good faith argue that the facts are not the facts. Samalia did not challenge the findings, they are the facts of this case no matter how many times he uses the word “alleged.”

#### Finding II;

On December 4, 2011, Officer Ryan Yates was driving westbound on West Lincoln Avenue at North 16<sup>th</sup> 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 16<sup>th</sup> 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 not able to locate the driver. (Appendix A)

Once again “The facts are derived mainly from the trial court's unchallenged CrR 3.6 findings of fact that are, therefore, verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571,62 P.3d 489 (2003).” Slip opinion at 1

**SECOND BASIS FOR REVIEW.**

Substantial public interest favors review of the divided Court of Appeals opinion based on the ubiquity of cell phone possession and the breadth of personal information contained.

With all due respect to Judge Siddoway the dissent ignores the fact that Samalia did not “leave” this phone behind at the “scene of a crime.” He ran from the scene, a public street abandoning the stolen car after being ordered by an officer to remain in the stolen car, the officer was not able to apprehend him after giving chase. No matter how many time Samalia repeats that this case is about the phone and the content of the phone that will still not make the facts different what they actually are and what those factual verities are, stolen car, abandon property.

The “ubiquitous” nature of a phone nor the ability of those devices does not vest it with the properties needed to comply with RAP 13.4. Nor does it, once again, surmount the fact that this device was abandon as Samalia ran from the stolen car containing the phone.

This court should not consider that argument that the officers should have merely applied for a telephonic search warrant pursuant to State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011) This was never raised in any court or in any briefing previously. Just as with a matter presented to this court after review has been accepted so to raising an issue for the first time in a petition for review should not be allowed. State v. Buchanan, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999) “The court generally will not consider issues which are not set forth in the petition for review, RAP 13.7(b), nor arguments raised for the first time on appeal. See, e.g., Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).”

Even if this court were to consider this newly raised issue, the claim that the officers could have or should have applied for a search warrant is specious.

They were in pursuit of a fleeing felon and now for the first time Samalia indicated they should have stop the ongoing investigation, a literal hot pursuit, to find a judge that will authorize the search of the car and this phone. As this court is well aware there are specific exceptions to the search warrant requirement, exigent circumstances include: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; (5) mobility or destruction of the evidence.’ ”

State v. Tibbles, 169 Wash.2d 364, 370, 236 P.3d 885 (2010) (quoting State v. Counts, 99 Wash.2d 54, 60, 659 P.2d 1087 (1983)).

### **THIRD BASIS FOR REVIEW.**

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

As stated, numerous times, above there is no dispute that Samalia ran when ordered to remain in the stolen car, the officer positively identified Samalia as the man who exited the driver's side door of the stolen vehicle and ran when ordered to remain in the car. The State is at a total loss to think of a factual scenario that would more simply and clearly evidence "abandonment" than running away from something and never returning. As the Court stated;

The question is whether the defendant relinquished his reasonable expectation of privacy by discarding the property. Evans, 159 Wn.2d at 408. The defendant bears the burden of showing he had an actual, subjective expectation of privacy and that his expectation was objectively reasonable. Evans, 159 Wn.2d at 409.

A critical factor in determining whether abandonment has occurred is the status of the area where the searched item was located. State v. Hamilton, 179 Wn. App. 870, 885, 320 P.3d 142 (2014). "Generally, no abandonment will be found if the searched item is in an area where the defendant has a privacy interest." Id. Here, the search area was an unattended stolen vehicle that Mr. Samalia had been driving and had fled from when a police officer approached and directed him to return to the vehicle. A suspect's hasty flight under these circumstances is sufficient evidence of an intent to abandon the vehicle. See United States v. Tate, 821 F.2d 1328, 1330 (8th Cir.1987) (suspect who fled unlocked

vehicle parked on public road abandoned expectation of privacy); *see also* Kurtz v. People, 494 P.2d 97, 103 (Colo. 1972), *overruled on other grounds by* People v. Howard, 599 P.2d 899 (Colo. 1979) (items seized from vehicle were admissible based on the abandonment of the vehicle, the flight of the accused from the scene on foot, and the fact the accused remained at large at the time of the search). Thus, the status of the area searched shows abandonment. We conclude, Mr. Samalia did not have a privacy interest in the searched area.

Samalia has endlessly addressed the law regarding this type of device and yet he never meets the burden of showing this was his phone or that he had a privacy interest in the location of the device or the device itself.

The State presented facts and argument in its opening brief demonstrating that there was nothing in the record before the trial court to prove the claim that this phone was Samalia's. The Court of Appeals did not address that additional argument because it found the stolen car and the phone were abandon, the court found the abandonment was clear and the court did not need to address the other theories posited by the State.

Samalia requests that this court analyze this case using Article I, section 7 of our state constitution. The Court of Appeals addresses this section of the Washington State constitution at the very beginning of the opinion, it does not just ignore the different standard for the Fourth Amendment and article I, section 7. Slip opinion 3-5, Also a review of

the cases relied upon by the majority opinion reveals that the two primary cases, State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) and State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001) address both the Fourth Amendment and Article I, section 7;

It is undisputed that the search of Evans's truck and the seizure of the briefcase found within it was warrantless. Warrantless searches and seizures may be permitted within the confines of "a few specifically established and well-delineated exceptions" to the warrant requirements of the fourth amendment to the United States Constitution and Washington Constitution article I, section 7. State v. Chrisman, 100 Wash.2d 814, 817, 676 P.2d 419 (1984) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967)). The exceptions are ""jealously and carefully drawn"" and the "burden rests with the State to prove the presence of one." State v. Hendrickson, 129 Wash.2d 61, 72, 71, 917 P.2d 563 (1996) (quoting State v. Bradley, 105 Wash.2d 898, 902, 719 P.2d 546 (1986) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971))).

One of the exceptions to the warrant requirement is for voluntarily abandoned property. State v. Reynolds, 144 Wash.2d 282, 287, 27 P.3d 200 (2001). As we explained in Reynolds, "Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution." *Id.*

Emphasis mine. (Evans at 407-08, footnotes omitted.)

#### E. CONCLUSION

Samalia's claims do not meet the requirements of RAP 13.4. The actions of the trial court and the Court of Appeals well-reasoned decision should not be disturbed.

Respectfully submitted this 13<sup>th</sup> day of May 2015,  
s/ David B. Trefry

David B. Trefry WSBA 16050  
Deputy Prosecuting Attorney  
Attorney for Yakima County  
P.O. Box 4846, Spokane, WA 99220  
Telephone: (509) 534-3505  
Fax: (509) 535-3505  
David.Trefry@co.yakima.wa.us

# APPENDIX A

## 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 16<sup>th</sup> 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 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 from 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 information was forwarded to Officer Yates. When Officer Yates looked at Somalia's photo in the Spillman database, he recognized Somalia as the driver of the stolen vehicle.

Certificate of Service

I, David B. Trefry, hereby certify that on this date I emailed a copy of this Response to Petition for Review, by agreement of the parties to Nancy P. Collins at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

Dated at Spokane, WA this 13<sup>th</sup> day of May, 2015,

s/ David B. Trefry

David B. Trefry WSBA 16050  
Senior Deputy Prosecuting Attorney  
Attorney for Yakima County  
P.O. Box 4846, Spokane, WA 99220  
Telephone: (509) 534-3505  
Fax: (509) 535-3505  
[David.TrefryLaw@co.yakima.wa.us](mailto:David.TrefryLaw@co.yakima.wa.us)

## OFFICE RECEPTIONIST, CLERK

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Please find attached the State's response to Appellant's Petition for Review.

David B. Trefry  
Senior Deputy Prosecuting Attorney  
Appellate Division  
Yakima County Prosecutors Office  
P.O. Box 4846  
Spokane, WA 99220  
(509) 534-3505  
FAX: (509) 534-3505  
[David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)