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Court of Appeals  
Division I  
State of Washington

NO. 72714-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JOHNSON,

Appellant.

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

The Honorable Ellen J. Fair, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence based on a new search warrant after the evidence was previously suppressed at a CrR 3.6 hearing because the original warrant was unconstitutional.

2. The trial court erred in denying a CrR 8.3(b) motion to suppress evidence for government mismanagement.

Issues Pertaining to Assignments of Error

The State executed a search warrant on appellant's cell phone several months before trial. The trial court suppressed the cell phone evidence at a timely noted CrR 3.6 hearing because the warrant affidavit failed to establish a sufficient nexus between the crime and the cell phone. Based on facts already known when the original warrant issued, the State then submitted a second warrant affidavit to establish the missing nexus. The court then admitted the cell phone evidence based on the State's second warrant and second search of the phone.

1. Does collateral estoppel bar admission of evidence based on the State's execution of a second search warrant after the evidence is suppressed at a CrR 3.6 hearing because the original warrant was invalid?

2. Does it constitute government mismanagement requiring suppression of evidence under CrR 8.3(b) when the prosecution reviewed a

search warrant well before trial and then sought to execute a second warrant during trial after the original warrant was judicially invalidated?

B. STATEMENT OF THE CASE

The State charged Jeremiah Johnson with one count of residential burglary and named William Dixon as a codefendant. The State alleged that on January 14, 2014, Johnson entered and remained unlawfully in Joanne Sherman's home in Stanwood, Washington, with intent to commit theft. CP 106. Dixon pleaded guilty, but Johnson proceeded to trial. 5RP 185.<sup>1</sup>

1. Substantive Facts

On January 14th around 11:55 a.m., Ashley Halligan heard a loud muffler in her driveway and saw a white low-rider truck with a tonneau cover over the truck bed. 4RP 39-40, 50. She could not see how many people were in the truck because of its tinted windows. 4RP 50. A young man, who turned out to be Dixon, knocked on her door, and asked if she was selling a television on Craigslist. 4RP 46-49. Halligan told him she was not and asked him to leave. 4RP 49. About an hour later, Halligan saw the same white truck up the road and called 911. 4RP 55-56.

Deputy Daniel Eakin received the 911 dispatch and located the truck around 1:30 p.m. 4RP 92-95, 101. He followed it down a cul-de-sac, at

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – September 19, 2014; 2RP – September 26, 2014 (labeled Volume 1); 3RP – September 26, 2014; 4RP – September 29, 2014; 5RP – September 30, 2014; 6RP – October 2, 2014; 7RP – October 22, 2014.

which point Dixon stopped the truck, got out, and approached Eakin's patrol car. 4RP 97-100. Dixon stopped on Eakin's orders. 4RP 100-01. A passenger, who was later identified as Johnson, then stepped out of the truck. 4RP 104. Eakin instructed Johnson to get back in the truck, and Johnson complied. 4RP 104, 118.

Eakin asked Dixon if he lived in the area. 4RP 105. Dixon said he did not, but was visiting his friend, John. 4RP 105. Eakin asked John's last name, to which Dixon again responded "John." 4RP 105-06. When Eakin asked if Dixon's friend was really named "John John," Eakin said Dixon "just started at me as if I'd asked him a trick question." 4RP 106. Dixon then admitted to Eakin he did not know anyone who lived there, but told Eakin that because he was scared. 5RP 106-07.

Deputy Scott Berg subsequently arrived where Dixon and Johnson were stopped. 4RP 107-08. Berg discovered Dixon's license was suspended, he placed Dixon under arrest. 4RP 125. Dixon told Berg he and Johnson were looking for someone selling a television off Craigslist for \$200. 4RP 127-28. Berg searched Dixon's wallet and found only \$1 inside. 4RP 127-28. Berg also observed a blanket hanging out the side of the truck bed. 5RP 128. He lifted the tonneau cover 12 to 18 inches and saw two to three flat screen televisions inside. 5RP 139.

Sherman returned to her home around 2:30 p.m. and discovered her back door had been pried open. 4RP 73. She found several televisions missing, along with a laptop, jewelry, old coins, two watches, and several expired credit cards. 4RP 67-69, 81-82. She called 911. 4RP 82-84.

Detective Glenn DeWitt arrived at the scene around 2:45 p.m. 5RP 217-19. He spoke with Johnson, who told DeWitt that he and Dixon were looking to buy a television from his brother's friend named John. 5RP 222. Johnson gave DeWitt the phone number for his brother, Andy, and DeWitt called the number. 5RP 222. Dixon then indicated he wanted to speak with DeWitt again. 5RP 224. After speaking with Dixon, DeWitt ordered Burg to arrest Johnson for residential burglary. 5RP 224-25.

Once arrested, Johnson again told DeWitt that he and Dixon were trying to buy a television from Andy's friend John. 5RP 226. Johnson said he had text messages on his phone to prove it, but he was unable to enter his cell phone password while handcuffed. 5RP 226-27. DeWitt seized Johnson's cell phone and placed it in evidence. 5RP 227-28. Both DeWitt and Eakin said Johnson cooperated the entire time and answered their questions. 4RP 118; 5RP 246.

While in Berg's patrol car, Dixon swallowed methamphetamine and heroin in his possession. 5RP 143-44, 203. At the station, Dixon became very ill, and began throwing up violently and hallucinating. 5RP 143-44,

202. Paramedics responded. 5RP 143-44, 202. Despite his condition, police took Dixon's written statement. 5RP 141-42, 191.

2. Procedural Facts

Police later executed a search warrant on Dixon's truck. 5RP 232. The search warrant affidavit relied in part on Berg's initial search of the truck bed. Supp. CP \_\_ (Sub. No. 32, State's Response to Defendant's CrR 3.6 Motion to Suppress). Inside they found three televisions, a pry bar, and a backpack containing jewelry, watches, old credit cards, and a wallet. 5RP 237-39. Defense counsel moved to suppress this evidence based on Berg's initial unlawful search. CP 95-101. The court denied the motion and admitted the evidence, concluding Johnson had no standing to challenge the search of Dixon's vehicle. 2RP 5-6.

Police also executed a search warrant on Johnson's seized cell phone. CP 76-91. Before trial, defense counsel moved to suppress all evidence found on the cell phone because the warrant affidavit stated no nexus between the crime and the cell phone. CP 76-82; 2RP 6. At a timely noted CrR 3.6 hearing, the trial court agreed and suppressed the evidence. 2RP 9-10; Supp. CP \_\_ (Sub. No. 21, Agreed Omnibus Order CrR 4.5). Although the State's suppression memo alleged a sufficient nexus regarding Johnson's cell phone use at the scene, this information was not included in the warrant affidavit. 2RP 9-10.

The State informed the court it would submit a new warrant affidavit that included those facts. 2RP 10-11. Defense counsel objected, arguing the State was collaterally estopped from executing a second warrant after losing at the CrR 3.6 hearing. 2RP 10-11; 3RP 3-4; 4RP 3-4; CP 70-73. Counsel further pointed out the prosecution reviewed the original affidavit in June and could have corrected it long before the suppression hearing. 3RP 3-4.

The trial court later admitted the cell phone evidence based on the State's second warrant affidavit and second search of the cell phone. 4RP 4-6. The court reasoned, "I don't think there is any legal impediment to the Court reviewing the warrant and seeing whether or not the Court feels that there's probable cause." 4RP 5. The court further believed there was no issue of "surprise to the defense if a new warrant is issued." 4RP 6.

Several items of evidence from Johnson's cell phone were then introduced at trial. First was a text message Johnson sent at 10:44 p.m. on January 13 to a contact named "Street Bike Will" with a phone number associated with Dixon's phone. 6RP 315-18. It said: "What's up should we hit this lick after work I got some plates to put on my jeep." Ex. 63; 6RP 318. DeWitt testified he associates the term "lick" with a robbery or burglary. 6RP 328. Then, in the early morning hours of January 14, Johnson's call log showed several calls back and forth with Street Bike Will. 6RP 318-20; Ex. 63. At 6:24 a.m., Johnson texted his contact named Andy,

“You got anyone that’s [sic] needs to be robbed?” 6RP 321; Ex. 63. The State relied heavily on these text messages in closing argument, arguing they demonstrated Johnson’s “true intentions.” 6RP 340-43. The State even asserted Johnson was guilty based only on his first text to Dixon, even if he never entered Sherman’s house. 6RP 347.

The State also introduced evidence from the cell phone that Johnson texted Andy at 2:36 p.m. on January 14 saying, “We’re looking for my buddy [J]ohn’s house,” to which Andy replied, “Alright,” and then, “I’ll find out how to get u here.” 6RP 321-22; Ex. 63. The State argued the timing of these messages—after Dixon and Johnson were pulled over—demonstrated they were manufactured to mislead the police. 6RP 345-46.

Johnson’s written statement to police was read into the record at trial pursuant to Johnson’s stipulation:

I, Jeremiah Johnson, drove Will’s truck from Mukilteo where I left home. We came to Stanwood/Warm Beach to see my brother and his friend, John. I haven’t seen my brother for a long time. I think Will was . . . buying a TV from John. So since we have horrible service, we drove forever, getting lost, asking several people if they knew John or if this was his home, because all we knew was it was a big driveway. Obviously, between phone service and not knowing where Warm Beach was, we drove until I got service and Will followed me in the truck for a few feet.

Then I got back in the car and an officer pulled up and pulled us over. So I had no time to take the steering wheel again, because the officer pulled us over.

4RP 129-30; CP 92-94.

Dixon also testified at trial. 5RP 184-86. He explained he and Johnson were driving around that day hoping to break into someone's home and steal items because Dixon had recently been robbed and needed money. 5RP 189-90. Dixon said he pried open Sherman's back door with a pry bar. 5RP 192. But Dixon testified inconsistently as to Johnson's role, first saying that Johnson was inside assisting him, then that Dixon did all the work, and finally that Johnson "didn't want to be there" and it was all Dixon's idea. 5RP 193. On cross-examination, Dixon insisted the burglary was his idea and he tricked Johnson into it. 5RP 205-06.

Dixon testified he and Johnson then drove to Everett and sold one of the stolen televisions. 5RP 194-95. He said they drove back to Sherman's house, though, because Johnson left his keys inside. 5RP 194-96. Dixon said Johnson came out of Sherman's home the second time with a backpack. 5RP 197. They were then pulled over by the police. 5RP 197-98.

The State introduced Dixon's written statement to police, in which he said the burglary was Johnson's idea. 5RP 193-94; Ex. 7A. Dixon testified, though, that he blamed Johnson in his written statement because DeWitt lied and told him Johnson turned against him and confessed. 5RP 205-07. He agreed he did not blame Johnson because it was the truth, but because he was mad. 5RP 207. Dixon further explained his memory of the day was a

“big blur” because he had been awake for 11 days prior, high on methamphetamine and heroin. 5RP 200, 208. He said he wrote his confession while he was hallucinating and in “[p]anic mode.” 5RP 201-03.

The jury found Johnson guilty as charged. CP 27. The trial court sentenced Johnson to eight months confinement based on his offender score of one. CP 18. Johnson timely appealed. CP 1.

C. ARGUMENT

1. COLLATERAL ESTOPPEL BARS ADMISSION OF THE CELL PHONE EVIDENCE BASED ON A SECOND SEARCH WARRANT AFTER THE EVIDENCE WAS ALREADY SUPPRESSED AT A CrR 3.6 HEARING.

A search warrant may only issue upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” Id. Accordingly, the warrant must establish a nexus between criminal activity and the item seized, as well as a nexus between the item to be seized and the place to be searched. Id. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” Id. at 147.

Collateral estoppel applies in criminal cases. State v. Harrison, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). It “precludes the same parties from relitigating issues actually raised and resolved.” Id. The doctrine also “serves to prevent inconvenience or harassment of parties.” Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel is not to be applied with a hypertechnical approach, but with “realism and rationality.” Harrison, 148 Wn.2d at 561 (quoting Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)).

For collateral estoppel to apply, four criteria must be met: (1) the issue in the prior adjudication is identical; (2) the prior adjudication is a final judgment on the merits; (3) the party against whom the doctrine is asserted was the party to or in privity with a party to the prior adjudication; and (4) barring relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. State v. Polo, 169 Wn. App. 750, 763-64, 282 P.3d 1116 (2012). The party asserting collateral estoppel bears the burden of proof. Id. Whether collateral estoppel bars relitigation of an issue is reviewed de novo. Christensen, 152 Wn.2d at 305. When applied here, these criteria show the State’s relitigation of the suppression issue was barred by collateral estoppel.

The first criterion is satisfied. The legal issue was identical: whether the cell phone evidence should be suppressed because the State’s search

warrant did not allege a sufficient nexus between the crime and the cell phone. See State v. Longo, \_\_\_ Wn. App. \_\_\_, 343 P.3d 378, 380 (2015). In Longo, the issue was whether the superior court properly applied collateral estoppel in a criminal case after evidence was suppressed in a related civil forfeiture proceeding. Id. at 379. This court concluded “the legal issue was the same in both proceedings: whether the evidence should be suppressed, because there was insufficient probable cause to support the search warrant.” Id. at 380. The same is true here.

The factual issue was also identical because the second warrant affidavit alleged facts already known to the State at the time of the original warrant. Below the State cited State v. Seager, 571 N.W.2d 204 (Iowa 1997), to argue otherwise. Supp. CP \_\_\_ (Sub. No. 37, State’s Memorandum Re Issuance of Warrant). But Seager is distinguishable.

Seager was suspected of two 1978 murders. Seager, 571 N.W.2d at 206. In 1979, police executed a search warrant at his home and seized a .22 caliber Mossberg rifle. Id. Following the search, the State learned several additional facts incriminating Seager. Id. The rifle and ballistics testing were subsequently suppressed, however, because the warrant was invalid. Id. at 207. Seager’s charges were dismissed without prejudice. Id. Then, in 1993, the State executed a second search warrant of the rifle and conducted new ballistics tests. Id. Seager was again charged for the two 1978 murders.

Id. He moved to suppress the rifle and test results, arguing collateral estoppel barred the State from relitigating the suppression issue. Id.

The Iowa Supreme Court held collateral estoppel did not require suppression, because “resolution of this latter issue hinges on many facts that were not known by the authorities when they obtained and executed the 1979 warrant.” Id. at 209. Thus, the court concluded, the suppression hearings did not involve identical facts and issues. Id.

By contrast, the State’s second warrant in Johnson’s case did not hinge on newly gathered facts. Specifically, Johnson used his cell phone at the scene to contact his brother, and told DeWitt to look on his phone for text messages between him and his brother. 5RP 222-27. All this was known to police from the time of Johnson’s arrest and could have been included in the original warrant, unlike Seager. The first requirement is therefore met.

Second, a final judgment on the merits includes any prior adjudication of an issue “that is determined to be sufficiently firm to be accorded conclusive effect.” Cunningham v. State, 61 Wn. App. 562, 567, 811 P.2d 225 (1991) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)). Though the final judgment rule is applied rigidly in the context of res judicata, it is less stringent with collateral estoppel and “will typically arise from a definitive order in the previous proceedings.” 14A Karl B. Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35:34 (2d ed. 2009).

Factors to consider include: (1) whether the prior decision was adequately deliberated, (2) whether the decision was firm, rather than tentative, (3) whether the parties were fully heard, (4) whether the court supported its decision with a reasoned opinion, and (5) whether the decision is appealable. Cunningham, 61 Wn. App. at 567.

With the exception of appealability, the four factors for determining finality are met here. Both the State and the defense had an opportunity to provide written and oral argument on the suppression issue. The court's decision to suppress the evidence was firm rather than tentative because the warrant was unconstitutional. 2RP 9-10. The court also gave its reasoning for suppression: the warrant lacked a sufficient nexus between the crime and the cell phone. 2RP 9-10. When the State asked to submit a second warrant, the court declined "to give an advisory opinion on whether or not it's appropriate to do that. I just ruled on the motion that's before me." 2RP 12. This demonstrates the court's decision at the CrR 3.6 hearing was final. Cf. State v. Mannhalt, 68 Wn. App. 757, 761-64, 845 P.2d 1023 (1992) (barring relitigation of pretrial suppression issues after Manhalt's conviction was vacated because his attorney's conflict of interest tainted trial).

The test for appealability from a suppression order is "if the trial court expressly finds that the practical effect of the order is to terminate the case." RAP 2.2(b)(2). The suppression order here did not terminate the

case, and so was not appealable as a matter of right. 3RP 7. Significantly, however, finality for collateral estoppel is not the same as finality for determining appealability. Cunningham, 61 Wn. App. at 566. “[S]uch a rigorous finality requirement does not implement the purposes of collateral estoppel: to protect prevailing parties from relitigating issues already decided in their favor, and to promote judicial economy.” Id. Thus, the fact that the suppression order was not appealable as a matter of right does not control the issue of finality. Instead this Court must focus on the other four factors described above, all of which demonstrate the second criterion for collateral estoppel is met here.

The third prong is easily satisfied: both the State and Johnson were parties to the original CrR 3.6 hearing, and were likewise both parties to the subsequent admission of the cell phone evidence based on the newly executed search warrant. The same prosecutor reviewed the original search warrant and represented the State at the suppression hearing. CP 88; 2RP 2.

Lastly, application of collateral estoppel is not unjust when the party against whom it is enforced “had an unencumbered, full and fair opportunity to litigate his claim in a neutral forum.” Rains v. State, 100 Wn.2d 660, 666, 674 P.2d 165 (1983); accord Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 265, 956 P.2d 312 (1998) (noting a full and fair opportunity to litigate is the focus of the fourth prong). Here the State had a full and fair

opportunity to (1) review the original search warrant to ensure it passed constitutional muster and (2) litigate the suppression issue at the CrR 3.6 hearing.

The search warrant was filed, approved, and executed on June 24, 2014. CP 84-91. The warrant affidavit stated it was reviewed by the prosecuting attorney in Johnson's case. CP 88. The State thus had an opportunity to review the search warrant before it was submitted to the neutral and detached magistrate. Furthermore, prosecutors owe a duty to accused persons to see that their constitutional rights are not violated. State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). The prosecutor therefore had a duty to protect Johnson from an unlawful search based on the invalid warrant.

The omnibus hearing was then held on August 22, 2014, at which time the CrR 3.6 hearing was set for September 19, and subsequently rescheduled for September 26. Supp. CP \_\_ (Sub. No. 21); 1RP 2. On September 22, defense counsel filed a written motion to suppress the cell phone evidence, arguing the warrant affidavit did not describe any nexus between the alleged crime and the cell phone. CP 76-82. The State responded in writing on September 25. Supp. CP \_\_ (Sub. No. 31, State's Response to Defendant's CrR 3.6 Motion to Suppress Cellular Telephone Evidence). The trial court then held a CrR 3.6 hearing on September 26, and

allowed argument from both sides. 2RP 6-9; 4RP 2-4. This demonstrates both parties had a full and fair opportunity to litigate the validity of the warrant.

The State may argue justice is better served by allowing it to correct the invalid search warrant, even when all the facts are already known. But such a rule would allow the State to submit and execute multiple successive warrants, no matter how close to trial. This becomes particularly problematic when the search is of an individual's home or car, and subsequent searches may reveal additional incriminating evidence. Such a rule would disincentivize the State to initially present a correct and accurate warrant because it could then treat a CrR 3.6 hearing as meaningless dry run to test the warrant's validity. This is unjust to the accused, whose constitutional right to be free from unlawful searches is imperiled if collateral estoppel does not apply.

Introduction of the cell phone evidence was barred by collateral estoppel. This Court should accordingly reverse Johnson's conviction and remand for a new trial with instructions to suppress the cell phone evidence. See Christensen, 152 Wn.2d at 321.

In response, the State may claim error in admitting the cell phone evidence was not prejudicial. Because the original warrant was unconstitutional, the State bears the burden of showing the error was

harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State cannot meet its burden here.

Even if this Court applies the nonconstitutional harmless error standard, the State still does not prevail. This requires the court to determine whether, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). The cell phone evidence was highly prejudicial, particularly the text messages. Johnson's text to Dixon, "What's up should we hit this lick after work," suggested the burglary was Johnson's idea. Ex. 63; 6RP 318. Johnson's text to Andy, "You got anyone that's [sic] needs to be robbed," further demonstrated Johnson's involvement in planning the burglary. 6RP 321; Ex. 63. The State repeatedly emphasized these text messages during closing argument. 6RP 340-43, 347.

The text messages were also prejudicial because of Dixon's inconsistent testimony. Dixon's written statement said Johnson initiated the burglary, but Dixon contradicted this at trial. 5RP 193-94; Ex. 7A. Dixon testified that the burglary was his idea and he initially blamed Johnson because he was mad at him. 5RP 193, 205-07. Given Dixon's testimony, a rational juror could doubt the State's case. But the cell phone evidence significantly undercut Dixon's trial testimony. Thus, there is a reasonable

probability that the cell phone evidence materially affected the outcome of Johnson's trial. The error was not harmless and requires reversal.

2. THE CELL PHONE EVIDENCE SHOULD HAVE BEEN SUPPRESSED UNDER CrR 8.3(b) FOR GOVERNMENT MISMANAGEMENT.

In the alternative, the trial court erred by refusing to suppress the cell phone evidence under CrR 8.3(b) for government mismanagement. Once the State submitted a second warrant affidavit, defense counsel moved to dismiss under CrR 8.3(b) for government mismanagement, or alternatively, to suppress the cell phone evidence. CP 72-73; 5RP 253-56. The trial court denied the motion. 5RP 257-60. This was error.

CrR 8.3(b) 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." Denial of a CrR 8.3(b) motion to dismiss is reviewed for abuse of discretion. State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868 (2000).

To support dismissal under CrR 8.3(b), there first must be arbitrary action or governmental misconduct. Garza, 99 Wn. App. at 295. This "need not be evil or dishonest; simple mismanagement is enough." Id. Second, the arbitrary action or misconduct must prejudice the accused's right to a fair trial. Id. Dismissal is an "extraordinary remedy," to be used as a "last

resort.” State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). An intermediate remedy such as suppression of evidence is appropriate when it isolates the prejudice. Garza, 99 Wn. App. at 295; State v. Marks, 114 Wn.2d 724, 730-32, 790 P.2d 138 (1990).

In State v. Sherman, this court affirmed the trial court’s finding of misconduct. 59 Wn. App. 763, 772, 801 P.2d 274 (1990). There, the State failed to produce Internal Revenue Service (IRS) records of the complaining witness by the court-imposed deadline. Id. at 765-66. Although the records were not in the State’s possession, they were available to the State’s chief witness, who failed to find them in his files. Id. at 768-69. The State neither followed up to ensure the records would be available for trial, nor requested them from the IRS until long after the deadline. Id. The State further waited until after the trial date to seek reconsideration of the omnibus order obligating it to produce the records. Id. This mismanagement compromised defense counsel’s ability to adequately prepare for trial. Id. at 771-72.

Conversely, the supreme court held in State v. Blackwell that a prosecutor’s failure to produce personnel records did not amount to misconduct. 120 Wn.2d 822, 832, 845 P.2d 1017 (1993). There, the trial court ordered the State to produce the service records and personnel files of two police officers. Id. at 825. The State objected because it did not have access to or control over the documents. Id. The court held the prosecutor

acted reasonably: he attempted to obtain the records, advised both the court and defense counsel of his efforts, and suggested that the court issue a subpoena duces tecum. Id. Thus, “[t]here was no showing of ‘game playing,’ mismanagement, or other governmental misconduct on the part of the State that prejudiced the defense.” Id. at 832.

“Fairness to the defendant underlies the purpose of CrR 8.3(b).” City of Kent v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011) (quoting State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (1996)). Here, the prosecutor reviewed the warrant affidavit in June 2014 and the omnibus hearing was held on August 22, 2014. CP 88; Supp. CP \_\_ (Sub. No. 21). The CrR 3.6 hearing was not held until September 26. 2RP 6. The prosecutor had multiple opportunities to review and correct the warrant before the suppression hearing. But he failed to do so, instead submitting a new affidavit and executing a new search warrant during trial, only after the original warrant was ruled invalid and the evidence suppressed. There is no indication this delay was intentional, but as case law recognizes, simple mismanagement is sufficient to suppress evidence under CrR 8.3(b).

This delay prejudiced Johnson. On September 26, the day trial was scheduled to begin, the State requested a two-week continuance to execute the second warrant. 3RP 2-3. But Johnson’s counsel was unavailable for trial in October and Johnson’s speedy trial deadline expired on October 26.

3RP 4. Johnson was therefore forced to choose between his right to a speedy trial and his right to be represented by counsel who had sufficient opportunity to prepare a defense. See Sherman, 59 Wn. App. at 769-70 (holding the State's mismanagement prejudices the accused's right to a fair trial when the accused is forced to make this Hobson's choice); see also Wilson, 149 Wn.2d at 13 (“[T]o force a defendant to choose between the right to a speedy trial and the right to adequately prepared counsel because an interview has not occurred by the speedy trial expiration does materially affect a defendant's right to a fair trial such that prejudice results.”).

This Court should reverse Johnson's conviction for government mismanagement and remand for a new trial with instructions to suppress the cell phone evidence.

D. CONCLUSION

For the above stated reasons, this Court should reverse Johnson's conviction and remand for a new trial with instructions to suppress the cell phone evidence.

DATED this 29<sup>th</sup> day of May, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'M. Swift', written over a horizontal line.

MARY T. SWIFT  
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Attorneys for Appellant

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

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STATE OF WASHINGTON/DSHS	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72714-1-I
	)	
JEREMIAH JOHNSON,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF MAY, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEREMIAH JOHNSON  
NO. 775260  
SNOHOMISH COUNTY JAIL  
3025 OAKES AVENUE  
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF MAY, 2015.

x Patrick Mayovsky