

Court of Appeals No. 40488-5-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

DWAYNE CLARK,

Defendant/Appellant.

BY  _____
DEPUTY

STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 09-1-03473-9
The Honorable John A. McCarthy, Presiding Judge**

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I. ASSIGNMENTS OF ERROR

1. The State presented insufficient admissible evidence to convict Mr. Clark of any crime relating to A.P.
2. Mr. Clark received ineffective assistance of counsel where his trial counsel failed to move to suppress the evidence discovered pursuant to the search of Mr. Clark's cell phone.

II. ISSUES PRESENTED

1. Did the State present sufficient admissible evidence to convict Mr. Clark of any crime related to A.P. where all evidence identifying Mr. Clark as the man who kidnapped and assaulted A.P. was derived from an unlawful search and, therefore, was inadmissible? (Assignment of Error No. 1)
2. May Mr. Clark challenge the lawfulness of the search of his cell phone for the first time on appeal? (Assignment of Error No. 1)
3. Was the warrantless search of the contents of Mr. Clark's cell phone lawful? (Assignment of Error No. 1)
4. Was the evidence derived from the search of Mr. Clark's cell phone linking Mr. Clark to the kidnapping and assault of A.P., including A.P.'s in court identification of Mr. Clark, properly admissible at trial where it was derived from the search of Mr. Clark's cell phone? (Assignment of Error No. 1)
5. Was it effective assistance of counsel for Mr. Clark's trial counsel to fail to move to suppress the evidence derived from the search of Mr. Clark's cell phone? (Assignment of Error No. 2)

II. STATEMENT OF THE CASE

Factual and Procedural Background

On May 16, 2007, A.P. was walking to the library alone in Spanaway. RP 55-56.¹ While A.P. was walking, a man in a burgundy pickup truck pulled up and began talking to A.P. about joining the Army. RP 56-59. The man asked A.P. to come to the man's truck so the man could show A.P. paperwork about joining the Army. RP 59. When A.P. and the man got to the man's truck, the man shoved A.P. into the front passenger seat of the truck and closed the door. RP 59-60. The door was locked and the door handle would not open the door. RP 60. A.P. tried to unlock the door but there was no lever to unlock the door. RP 60.

The man got into the driver's seat of the truck and started to drive. RP 61. The man began taking pictures of A.P. with his cell phone, saying that it was to make sure that A.P. was fit enough for the military. RP 61. At one point, the man put the phone down and asked A.P. to remove his pants. RP 62. A.P. took his pants off because he was scared. RP 62. The man fondled A.P.'s penis and testicles above A.P.'s underwear. RP 62-63. A.P. didn't try to stop the man because he was scared. RP 63. A.P. also told the man that it was okay. RP 63.

¹ A.P. was a minor at the time of the alleged incident and at the time of trial. Therefore, he will be referred to by his initials. No disrespect is intended.

At some point, the man asked A.P. to take off his underwear and touched A.P.'s privates. RP 63-64. The man asked A.P. to masturbate so A.P. did. RP 64. The man told A.P. that he wanted to see A.P. ejaculate and A.P. masturbated until he ejaculated. RP 64-65. The man gave A.P. a piece of paper with a name and a phone number on it and said that he would pay A.P. more if A.P. worked on his stomach. RP 65.

After having A.P. masturbate, the man continued to drive and asked A.P., "Where is the best place we can do this at?" RP 65-66. A.P. wasn't sure what the man meant since the man had not talked about sex. RP 66. A.P. told the man to go to Spanaway Lake Park since the park was less than 1/2 block from A.P.'s house and A.P. was very familiar with the area. RP 66.

Once at the park, the man parked the truck, said something like, "I have to get ready for this," and went into a Porta-Potty. RP 67. After the man left the truck, A.P. was able to roll the window down and get out of the truck. RP 67. As he left the truck, A.P. took the man's cell phone and the piece of paper. RP 68.

A.P. ran home through the pond. RP 68-69. When he got home, A.P. told his brothers what had happened and one brother called A.P.'s father, Wade O'Hara, and told him what happened. RP 69-70. Mr. O'Hara came home and A.P. told him what had happened. RP 69. RP

70. Mr. O'Hara called the police and the police responded to A.P.'s home. RP 70. A.P. spoke to the officers and gave them the piece of paper and the cell phone he had taken from the truck. RP 70.

Pierce County Sheriff's Deputy Vickie Kimbriel responded to A.P.'s home. RP 106-107. Deputy Kimbriel turned the cell phone on and went through the contacts stored on the phone to determine the identity of the owner of the phone. RP 111. Deputy Kimbriel located a contact labeled "Mom." RP 111. The phone number was a Louisiana number. RP 113. Deputy Kimbriel called the number and a woman answered and identified herself as Claudette Clark. RP 113-114. Ms. Clark said she was the mother of Dwayne Clark. RP 114-115.

In mid-May, 2007, Pierce County Sheriff's Detective Timothy Donlin was referred to A.P.'s case to perform follow-up investigation. RP 118-120. Detective Donlin reviewed the police reports associated with A.P.'s case and determined that a suspect named Dwayne Clark had been identified. RP 121. Detective Donlin also learned that Mr. Clark had filed a police report asserting that his cell phone and credit cards had been stolen from his truck at Spanaway Lake Park. RP 121.

Detective Donlin contacted the Department of Licensing and obtained a photograph of Mr. Clark and seven other individuals in order to make a photomontage. RP 122. Detective Donlin showed the photos to A.P. and A.P. identified Mr. Clark's photo as the photo of the

man who had abducted A.P. RP 72, 123-129.

Detective Donlin attempted to contact Mr. Clark. RP 130. Detective Donlin obtained an address and telephone number for Mr. Clark from a report of vehicle theft filed by Mr. Clark with the DMV. RP 130-131. Detective Donlin went to the address listed on the report and called the phone number given on the report and neither were correct for Mr. Clark. RP 130-132. Detective Donlin was unable to contact Mr. Clark. RP 133.

On July 22, 2009, G.H. was swimming at American Lake with his friends. RP 263.² One of G.H.'s friends, Nate, lived two blocks away from the lake. RP 266. G.H.'s friends left the park, but G.H. stayed to swim some more. RP 266. While diving off the dock, G.H. hit his knee hard on the side of the dock. RP 267. G.H. collected his stuff from a fence by the dock and began walking to Nate's apartment. RP 268.

While G.H. was walking, a man driving a maroon four-door truck approached him. RP 268-269. The man asked G.H. if he needed a ride. RP 270. G.H. responded that he didn't need a ride. RP 271. The man in the truck responded by pulling the truck to the side of the road, pulling out a knife, and telling G.H. that, if G.H. didn't get in the

² Although G.H. was 18 at the time of trial, in an abundance of caution, G.H. will be referred to by his initials, as he was in the information. No disrespect is intended.

truck, the man would make G.H. get in the truck. RP 273. The man's tone was angry but calm, and G.H. got into the front passenger door of the truck. RP 275. The man locked the doors after G.H. got in the truck and began driving. RP 276-277.

G.H. told the man to turn towards Nate's apartment, but the man turned the opposite direction. RP 278. G.H. told the man he was going the wrong way but the man replied that he was going in the right direction. RP 278-279. The man turned onto a side street, pulled to the side of the road, and put the truck in park. RP 279. The man then reached towards G.H.'s belt line near his crotch. RP 280. G.H. pushed the man's hand away, said "Don't touch me," and tried to open the door. RP 280. The man reached towards G.H. again and G.H. found that the door would not open. RP 281. The man undid G.H.'s belt and top button, but when the man reached for the zipper, G.H. punched the man in the jaw and forced the door open. RP 281.

G.H. fell out of the truck and ran towards Nate's apartment at the Union Crest Apartments. RP 283. The man drove the truck away from G.H. RP 285.

When G.H. got to Nate's house, he told Nate to call the police. RP 286. Nate called the police, and the police responded to the apartment. RP 286-287.

Nate spoke with Lakewood Police Officer Daniel Tenney. RP

190-193, 287. G.H. told Officer Tenney what had happened, and provided a description of the man who had abducted him. RP 194, 199, 287. While G.H. was talking to Officer Tenney, G.H. pointed out a man who was walking down the street and identified him as the man who had abducted G.H. RP 199-201, 290.

Officer Tenney asked for a second unit and Officer Mike McGettigan responded and detained the man. RP 205.

Upon responding to the scene and observing a man matching the description provided, Officer McGettigan pulled his vehicle behind the man and ordered the man to stop. RP 242-247. The man turned around and said, "Why are you stopping me? I'm just a hard working citizen who has done nothing wrong." RP 247.

G.H. agreed to go with Officer Tenney to determine if the man detained by Officer McGettigan was, in fact, the man who had abducted G.H. RP 205-206. G.H. positively identified the man as the man who had abducted him. RP 206. After G.H. identified the man as the man who had abducted him, Officer McGettigan took the man into custody. RP 207, 250-251.

Officer McGettigan asked the man for identification and the man provided identification identifying him as Dwayne Clark. RP 251. Mr. Clark said he didn't live in the area but was there to get a haircut. RP 251. Once Officer McGettigan had handcuffed Mr. Clark and put him

in the back of his patrol car, Officer McGettigan advised Mr. Clark what the booking charges would be. RP 253-254. Mr. Clark responded, "Are you talking about that guy that was in my truck?" RP 254.

G.H. also identified a truck parked nearby as the truck the man had been driving. RP 207-208. The truck was a maroon Ford crew cab truck with Louisiana plates. RP 208, 293. The truck was parked next to Bell's Barber Shop. RP 254-255.

No knives were found on Mr. Clark's person or in his truck. RP 179, 255.

On July 23, 2009, Mr. Clark was charged with first degree kidnapping, third degree child molestation, indecent liberties, and second degree assault. CP 1-2.

On January 11, 2010, the charges were amended to two counts of first degree kidnapping, third degree child molestation, indecent liberties, and second degree assault. CP 13-16.

Jury trial began on January 26, 2010. RP 54.

At trial, both A.P. and G.H. identified Mr. Clark as the man who had abducted them. RP 56, 270, 291.

The jury found Mr. Clark guilty of two counts of first degree kidnapping with a sexual motivation, guilty of child molestation in the third degree, guilty of indecent liberties, and not guilty of assault in the

second degree. RP 402-403, CP 64-71.

Notice of Appeal was filed on March 19, 2010. CP 126.

IV. ARGUMENT

A. THE STATE PRESENTED INSUFFICIENT ADMISSIBLE EVIDENCE TO CONVICT MR. CLARK OF ANY CRIME RELATED TO A.P.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture.

State v. Carter, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). If there is insufficient evidence to prove an element, reversal is required and retrial is ‘unequivocally prohibited.’ *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Prior to Deputy Kimbriel’s search of the cell phone, the only information known to police regarding the identity of the man who kidnapped and assaulted A.P. was A.P.’s description of the man. RP 75. All evidence identifying Mr. Clark as the man who kidnapped and assaulted A.P. derived from the warrantless search of Mr. Clark’s cell phone by Deputy Kimbriel. Deputy Kimbriel turned the phone on, found a contact labeled “Mom,” called the phone number for “Mom,” obtained the identity of the lady who answered the telephone, and learned from the lady that her son was named Dwayne Clark. RP 111-115. Using the name Dwayne Clark as obtained from the woman called by Deputy Kimbriel, Detective Donlin obtained a photograph of Mr. Clark from the Department of Licensing and showed that photograph to A.P. who identified Mr. Clark as the man who had abducted him. RP 118-129.

For the reasons stated below, the search of Mr. Clark’s cell phone was unlawful, and all evidence discovered pursuant to the search and derived from the search, including A.P.’s photomontage and in-

court identifications of Mr. Clark, was inadmissible.

- a. *Under RAP 2.5(a)(3), Mr. Clark may challenge the warrantless search of his cell phone for the first time on appeal.*

It is anticipated that the State will argue that Mr. Clark cannot challenge the search of his cell phone for the first time on appeal since his trial counsel failed to challenge the search in the trial court, thereby waiving Mr. Clark's right to challenge the search. The State's argument fails.

Under RAP 2.5(a)(3), an appellant may raise for the first time on appeal a claim of manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

“Whether RAP 2.5(a)(3) applies is based on a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is ‘manifest.’” *State v. Ridgley*, 141 Wn.App. 771, 779, 174 P.3d 105 (2007) (internal quotation marks omitted) (*quoting State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007)).

Understanding that an issue involving an unlawful search is one of manifest constitutional error, courts have addressed such issues for the first time on review. *See, e.g., State v. Littlefair*, 129 Wn.App. 330, 338, 119 P.3d 359 (2005) (appellant did not waive error based on bad search warrant because it involved constitutional issue); *State v. Contreras*, 92 Wn.App. 307, 314, 966 P.2d 915 (1998) (where adequate

record exists, appellate court can review suppression issue, even in absence of motion or trial court ruling thereon).

- i. The warrantless search of Mr. Clark's cell phone was an error of constitutional magnitude.

Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the fourth amendment to the United States Constitution. *See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996).

“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]” *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

A warrantless search of constitutionally-protected areas is presumed unreasonable absent proof that one of the few well-established exceptions to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

“The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” *Ladson*, 138

Wn.2d at 350, 979 P.2d 833 (1999) (emphasis added) (*citing City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

As will be discussed further below, Mr. Clark had an Article 1, § 7 and a Fourth Amendment privacy interest in the contents of his cell phone. Thus, the warrantless search of the contents of his cell phone was presumptively unreasonable under both Article 1, § 7 and the Fourth Amendment. Accordingly, the issue of whether or not the evidence discovered during and pursuant to the search of his phone was admissible at his trial is one of constitutional magnitude.

- ii. The obtainment and introduction of evidence derived from the warrantless search of Mr. Clark's cell phone was a "manifest" constitutional error.

“An error is manifest when it has practical and identifiable consequences in the trial of the case.” *Ridgley*, 141 Wn.App. at 779, 174 P.3d 105 (*quoting State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)); *see also McFarland*, 127 Wn.2d at 333, 899 P.2d 1251 (“The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights.”) When a claim of constitutional error for failure to suppress evidence is raised for the first time on appeal because no motion to suppress was made at the trial court, the party raising the issue must show that the trial court would have likely granted the suppression

motion had it been made. *McFarland*, 127 Wn.2d at 333-34, 899 P.2d 1251.

Here, the practical and identifiable consequences of the warrantless search of Mr. Clark's phone was the identification of Mr. Clark as the man who kidnapped A.P. Without the cell phone search, the police would never have found the contact labeled "Mom." Without contacting Mr. Clark's mother, the police would never have learned Mr. Clark's name. Without Mr. Clark's name, the police would never have obtained Mr. Clark's photograph from the Department of Licensing. Without the photograph from the Department of Licensing, A.P. would never have identified Mr. Clark as his assailant.

As will be discussed further below, the police search of Mr. Clark's cell phone was a warrantless search which violated both the Fourth Amendment and Article 1, § 7, and, had Mr. Clark's trial counsel brought a motion to suppress the fruits of the search, such a motion would likely have been granted by the trial court.

Thus, the warrantless search of Mr. Clark's cell phone and the obtainment of the evidence derived from that search was a manifest constitutional error which can be raised for the first time on appeal under RAP 2.5(a)(3).

- b. *The warrantless search of Mr. Clark's cell phone was unlawful under both the Fourth Amendment and Article 1, § 7.*

The right to be free from searches by government agents is deeply rooted into our nation's history and law, and it is enshrined in our state and national constitutions. The United States Constitution prohibits unreasonable searches and seizures; our state constitution goes further and requires actual authority of law before the State may disturb the individual's private affairs. U.S. CONST. amend. IV; CONST. art. I, § 7; *see also State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007); *State v. Boland*, 115 Wn.2d 571, 577-78, 800 P.2d 1112 (1990); *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Generally, **officers of the State must obtain a warrant before intruding into the private affairs of others, and we presume that warrantless searches violate both constitutions.** That presumption can be rebutted if the State shows a search fell within certain "narrowly and jealousy drawn exceptions to the warrant requirement." *State v. Stroud*, 106 Wn.2d 144, 147, 720 P.2d 436 (1986); *see also State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002) (*citing State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

Our state constitution goes beyond the Fourth Amendment's prohibition on "unreasonable" searches and seizures. However, reasonableness does have a role to play in defining the constitutional term "private affairs" in article I, section 7. We do not exclude evidence that was in open or plain view. *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). Consent and certain exigent circumstances may also justify a warrantless search and seizure. Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 *Seattle U.L.Rev.* 467, 633, 650 (2005); *see also State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

But we jealously guard these exceptions lest they swallow what our constitution enshrines. *Cf. State v. O'Neill*, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003) (*citing Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 *YALE L. & POL'Y REV.* 381 (2001) (*comparing Washington's*

narrower search incident to arrest exception to its federal counterpart)). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (quoting *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958)). **If the evidence was seized without authority of law, it is not admissible in court. We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power.**

State v. Day, 161 Wn.2d 889, 893-894, 168 P.3d 1265 (2007) (emphasis added).

Evidence obtained directly or indirectly through exploitation of an unconstitutional police action must be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint. *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Deputy Kimbriel testified that she turned Mr. Clark's cell phone on and searched through the contacts list in an effort to determine the owner of the phone. RP 111. Thus, it is incontrovertible that the police searched Mr. Clark's phone. However, at the time the police searched the contents of Mr. Clark's cell phone, the police had not obtained a warrant to search the phone and no exigent circumstances existed which would permit a warrantless search of the cell phone. Therefore, the search of the contents of Mr. Clark's cell phone was presumptively impermissible and all evidence discovered during the search and

derived from the search should have been suppressed and was inadmissible in court.

In addition to the contents of the cell phone, A.P.'s identification of Mr. Clark as the man who had kidnapped him, both during the photo montage and during trial, were inadmissible as the tainted fruits of the warrantless search. If the search of the cell phone had never occurred, the police would never have connected Mr. Clark to any of the events surrounding A.P., and A.P. would never have been called to identify Mr. Clark in court as the man who had kidnapped him.

c. *The police could not lawfully search the contents of Mr. Clark's cell phone to determine the identity of the owner of the cell phone.*

It is anticipated that the State will rely on *State v. Kealey*, 80 Wn.App. 162, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021, 919 P.2d 599 (1996) to argue that the police could lawfully search Mr. Clark's cell phone in order to determine the owner of the cell phone. The State's argument fails.

In *Kealey*, Kealey accidentally left her purse behind after trying on shoes in a department store. A store clerk opened the purse and smelled marijuana, then closed it and tossed it into a corner. *Kealey*, 80 Wn.App. at 165, 907 P.2d 319. The defendant returned to the shoe department and looked for the purse until closing time, to no avail. Not wanting the customer to know that she had discovered marijuana inside,

the clerk denied having seen the purse. The next morning, shoe department managers found the purse, opened it, and discovered not only marijuana but methamphetamine powder. They called the police, explaining that a woman shopper had left the purse behind. *Kealey*, 80 Wn.App. at 165-66, 907 P.2d 319. The police unzipped it without obtaining a warrant, simply intending to determine its owner. They found Kealey's identification and ultimately arrested her for possessing the drugs.

Because Kealey's appellate counsel had failed to brief the issue under Article 1, § 7, the *Kealey* court limited its analysis to the lawfulness of the search under the Fourth Amendment. *Kealey*, 80 Wn.App. at 176-177, 907 P.2d 319. Analyzing the issues under the Fourth Amendment, the *Kealey* court held: (1) The defendant had a reasonable expectation of privacy in her purse, which was lost or mislaid property, as opposed to abandoned; (2) but the police may search lost or mislaid property for identification without first obtaining a warrant, principally because a person's reasonable expectation of privacy is "diminished to the extent that the finder may examine and search the lost property to determine its owner." *Kealey*, 80 Wn.App. at 173, 907 P.2d 319.

The *Kealey* court further held,

The police had a right, if not an obligation, to search the

purse for identification for the purpose of returning the purse. We hold that searching lost or mislaid property for identification is an exception that makes reasonable a warrantless search. The coexistence of investigatory and administrative motives does not invalidate the lawful search for identification. Thus, the police officers did not lose their right to search the purse for identification when they learned the purse contained drugs. Our holding is supported by the fact that Kealey's reasonable expectation of privacy in her misplaced purse is diminished to the extent that a finder would search for identification.

Kealey, 80 Wn.App. at 174-175, 907 P.2d 319.

Kealey is distinguishable and does not control this case.

First, *Kealey* is factually distinguishable. Unlike Kealey's purse, Mr. Clark's cell phone was not an item of property which had been accidentally mislaid. Mr. Clark's cell phone was intentionally stolen by A.P. as A.P. left Mr. Clark's truck for purposes of determining Mr. Clark's identity. Unlike the police in *Kealey*, the police in this case were not searching Mr. Clark's cell phone in order to return it to its owner, but were searching the cell phone solely to determine Mr. Clark's identity to arrest him for crimes related to A.P. Unlike *Kealey*, there was no "coexistence of investigatory and administrative motives" on the part of the police in this case. The motives of the police were purely investigatory. Under these circumstances, a warrant was required to search the contents of Mr. Clark's cell phone.

Second, *Kealey* was decided under the "reasonable search"

analysis of the Fourth Amendment, not under the “authority of law” analysis required by Article 1, § 7. This is of critical importance:

Article I, section 7 of the state constitution provides: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Thus, where 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.” **This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. This creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....”** The privacy protections of Article I, section 7 are more extensive than those provided under the Fourth Amendment.

State v. Valdez, 167 Wn.2d 761, 771-772, 224 P.3d 751 (2009) (emphasis added).

Due to the more extensive privacy protections offered by Article 1, § 7, had the *Kealey* court reached the Article 1, § 7 analysis, it would have held the warrantless search in that case unconstitutional under Article 1, § 7.

In determining whether Article 1, § 7 provides greater protection than the Fourth Amendment, a two part analysis is engaged in:

First, [it] must [be] determine[d] whether the state action constitutes a disturbance of one’s private affairs.... Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The “authority of law” required by article I, section 7 is satisfied by a valid warrant, limited

to a few jealously guarded exceptions.

Valdez, 167 Wn.2d at 772, 224 P.3d 751.

Counsel for Mr. Clark was unable to find a Washington case addressing whether or not the contents of a cell phone, such as digital photos, digital videos, and the contact list, constitute “private affairs” under Article 1, § 7. However, other courts have found a reasonable expectation of privacy exists if an individual has control over the electronically stored information. *United States v. Chan*, 830 F.Supp. 531, 534 (N.D.Cal.1993) (expectation of privacy in electronic repository for personal data is analogous to a personal address book or other repository for such information). These types of files have been found to have the same protections afforded closed containers. *See United States v. Barth*, 26 F.Supp.2d 929, 936 (W.D.Tex.1998) (the protection afforded to computer files and hard drives are not well-defined, but the protection of these is similar to the protection afforded closed containers and closed personal effects).

Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision differs from the Fourth Amendment in that article I, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” **Accordingly, while article I, section 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, protects “those privacy interests which citizens of this state**

have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”

State v. Parker, 139 Wn.2d 486, 493-494, 987 P.2d 73 (1999) (internal citations omitted) (emphasis added).

“In determining whether a certain interest is a private affair deserving article I, section 7 protection, a central consideration is the nature of the information sought—that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person’s life.” *State v. Jordan*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007).

Here, the contents of Mr. Clark’s cell phone, including digital photographs, digital videos, and the contact list stored in the phone constitute “private affairs” protected by Article 1, § 7. Washington residents use their cell phones to capture videos, images, and to store personal contact information. Such data could very well be “intimate or discrete details” of a person’s life, or even data that is incriminating or embarrassing to the person photographed or the person taking the photograph. Accordingly, Washington citizens have held, and should be entitled to hold, the contents of their cell phones safe from governmental trespass without a warrant.

Thus, *Kealey* does not authorize a search in this case. Not only is *Kealey* factually distinguishable, but *Kealey* is contrary to the Article

1, § 7 privacy rights of Washington citizens. The warrantless search of Mr. Clark's cell was both unreasonable under the Fourth Amendment and unlawful under Article 1, § 7. Any argument by the State that the police could search the cell phone without a warrant to determine the owner of the cell phone fails.

d. Without the fruits of the unlawful warrantless search of the cell phone, the State presented insufficient evidence to convict Mr. Clark of any crime associated with A.P.

As stated above, all evidence linking Mr. Clark to the events surrounding A.P. was derived from the warrantless search of Mr. Clark's cell phone. Therefore, all this evidence was inadmissible. Accordingly, the State had insufficient evidence to establish that Mr. Clark was the man who had abducted A.P. Thus, even viewing the evidence in the light most favorable to the State, the State presented insufficient admissible evidence to convict Mr. Clark of any crime relating to A.P. since the jury would have had no admissible evidence from which to draw the inference that Mr. Clark committed any of the crimes relating to A.P.

B. IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR MR. CLARK'S TRIAL COUNSEL TO FAIL TO MOVE TO SUPPRESS THE EVIDENCE DERIVED FROM THE SEARCH OF MR. CLARK'S CELL PHONE.

Article 1, § 22 of the Washington State Constitution guarantees

a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”)

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993)).

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when

evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

The remedy for ineffective assistance of counsel is remand for a new trial. See *State v. Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

As stated above, when a claim of constitutional error for failure to suppress evidence is raised for the first time on appeal because no motion to suppress was made at the trial court, the party raising the issue must show that the trial court would have likely granted the suppression motion had it been made. *McFarland*, 127 Wn.2d at 333-34, 899 P.2d 1251.

- a. *It was not objectively reasonable, nor was it legitimate trial strategy, to fail to move to suppress the evidence derived from the warrantless search of Mr. Clark's cell phone.*

As stated above, all evidence linking Mr. Clark to any of the crimes associated with A.P. was derived from the warrantless and unlawful search of Mr. Clark's cell phone. Absent this evidence, A.P. would never have viewed Mr. Clark's driver's license photograph and

identified Mr. Clark as the man who had kidnapped A.P. Further, since Mr. Clark would not have been associated with the crimes involving A.P., A.P. would not have been called to identify Mr. Clark during his trial.

Given that all evidence linking Mr. Clark to the crimes involving A.P. was derived from the unlawful and warrantless search of Mr. Clark's cell phone, it was not legitimate trial strategy nor was it objectively reasonable for Mr. Clark's trial counsel to fail to move to suppress the fruits of that search.

b. Mr. Clark was prejudiced by his trial counsel's failure to move to suppress the evidence derived from the search of Mr. Clark's cell phone.

As stated above, had the evidence derived from Mr. Clark's cell phone been suppressed, there would have been insufficient evidence to convict Mr. Clark of any crime relating to A.P. Mr. Clark was prejudiced by his trial counsel's failure to move to suppress the evidence in that Mr. Clark was convicted of kidnapping and molesting A.P.

c. Had a motion to suppress the evidence derived from the cell phone been made, the trial court would likely have granted the motion.

As argued above, the warrantless search of Mr. Clark's cell phone was unreasonable under the Fourth Amendment and violated Article 1, § 7's mandate that all searched be performed with authority

of law. Accordingly, had such a motion been brought, the motion would likely have been granted for the reasons stated above.

Given that the warrantless search of Mr. Clark's cell phone was clearly unconstitutional under both the State and Federal constitutions, and given that all evidence linking Mr. Clark to any of the crimes related to A.P. was derived from the unlawful search of the cell phone, the failure of Mr. Clark's trial counsel to move to suppress the fruits of the unlawful cell phone search was ineffective assistance of counsel.

VI. CONCLUSION

The warrantless search of Mr. Clark's cell phone violated both the Fourth Amendment and Article 1, § 7. Accordingly, all evidence discovered during the search of the phone and all evidence derived from the search of the phone, including A.P.'s identification of Mr. Clark as the man who kidnaped him, was inadmissible at trial as the tainted fruits of an unlawful search. Without this evidence, the State presented insufficient evidence to convict Mr. Clark of any crime related to A.P.

Further, the failure of Mr. Clark's trial counsel to move to suppress this evidence constitutes ineffective assistance of counsel.

This court should vacate Mr. Clark's convictions for all crimes related to A.P. and remand for dismissal of the charges with prejudice and for resentencing. Alternatively, this court should vacate Mr.

Clark's convictions and remand for a new trial.

DATED this 6th day of September, 2010.

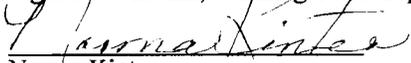
Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sheri Arnold".

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on September 8, 2010, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Dwayne Clark, DOC # 337943, Washington State Penitentiary, 1313 North 13th Avenue, Walla-Walla, Washington 99362 of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on September 8, 2010.


Norma Kinter

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