

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Nov 12, 2015, 2:28 pm  
BY RONALD R. CARPENTER  
CLERK

E

NO. 91532-6

RECEIVED BY E-MAIL

bjh

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA

---

SUPPLEMENTAL BRIEF OF RESPONDENT  
BY YAKIMA COUNTY

---

David B. Trefry WSBA #16050  
Deputy Prosecuting Attorney  
Yakima County Prosecutors Office  
P.O. Box 4846  
Spokane, WA 99220

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

 ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES .....	ii
A. INTRODUCTION .....	1
B. ISSUE PRESENTED BY PETITION .....	2
ANSWER TO ISSUES PRESENTED BY PETITION.....	2
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT .....	2
E. CONCLUSION .....	6

TABLE OF AUTHORITIES

PAGE

**Cases**

Hansen v. Friend, 118 Wn.2d 476, 824 P.2d 483 (1992) ..... 4

State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001).....6

State v. Buchanan, 138 Wn.2d 186, 978 P.2d 1070 (1999)..... 4

State v. Counts, 99 Wash.2d 54, 659 P.2d 1087 (1983) ..... 5

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007) ..... 5

State v. Reynolds, 144 Wn.2d 282, 27 P.3d 200 (2001)..... 5

State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011)..... 4

State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).....6

State v. Tibbles, 169 Wash.2d 364, 236 P.3d 885 (2010) ..... 5

**Federal Case**

Riley v. California, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2473,  
189 L.Ed. 430 (2014) ..... 2, 6

**Additional Authority**

Article 1, section 7 ..... 5

**Rules and Statutes**

RAP 13.4 .....2

RAP 13.7(b) ..... 4

A. INTRODUCTION

Mr. 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. He appealed his conviction and the decision, the Court of Appeals upheld the conviction, the opinion was filed on March 5, 2015. Petitioner challenged the search of a cell phone that was abandon inside of the stolen car he was driving at the time of the stop, which he also abandon and fled from.

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 raised the issues of standing, ownership of this phone and the State's right to impound stolen vehicles/property in the Court of Appeals however the Court of Appeals did not review the issue based on those theories.

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 trail 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

The fact of this case have been adequately set forth in the briefing of the parties as well as the decision of the Court of Appeals. The State shall not set forth additional facts in this supplemental document.

D. ARGUMENT

The State has stated steadfastly throughout the pendency of this appeal that the true issue is not that which was addressed in Riley v.

California, \_ U.S. \_, 134 S.Ct. 2473, 189 L.Ed. 430 (2014). The issue is that of abandonment and the rights that a person retains in property that was voluntarily abandon.

Throughout this case Mr. Samalia has minimized the facts regarding his action which led to the seizure of the phone and stressed the law regarding search and seizure of the now ubiquitous cell. There is no doubt nor dispute that these devices have the capacity to carry an enormous amount of information, the Court in Riley acknowledged that capacity, a decision from which the State cannot object.

Throughout this appeal Samalia has conditioned the facts with terms such as he “allegedly” fled. Relegated to the back of his argument are the most critical facts, that Mr. Samalia was observed driving the stolen car, a car that was confirmed stolen, and the officer then followed the stolen car. Next Samalia, not some third party, physically abandon that stolen car after orders by the office to the contrary and ran from the scene. These fact seem to have taken backseat to the drumbeat of the hot button issue, that of search of this miniaturized computer that was left, literally in the middle of a crime scene. This was literally hot pursuit, this was actual and constructive abandonment. This officer did not run to this car and decide to violate search and seizure by looking briefly at this phone, a phone whose ownership at that time was completely unknown.

As the State previously indicated the claims regarding the application for a telephonic search warrant are being raised for the first time in this court. State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011). This theory was never raised nor briefed in the trial court nor in the Court of Appeals. The law is clear that when a theory presented to this court after review has been accepted will not be allowed, so too should raising an issue for the first time in a petition for review 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)." The idea that an officer who is literally in the middle of the pursuit of a fleeing felon will pick up his cellphone and call a judge and over that call be able to articulate probable cause to allow the search of this phone is ludicrous. There are specific exceptions to the search warrant requirement that have been allowed for years, decades based on factual situations such as those before this court. 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)).

The State does not dispute Samalia's statement that the facts of this case must be analyzed under Article I, section 7 of our state constitution. The Court of Appeals did just that, Slip opinion 3-5. Two of the cases relied upon by the majority, 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.)

There are few cases where the facts clearly support the need for an officer pursue a fleeing felon to be allowed the use of instantly retrievable

information. In this case that information could only have come from using one of the jealously guarded exceptions set forth above. No matter how Samalia qualifies his actions he abandon the car the phone and fled.

The claim that a telephonic search warrant could have been obtained ignores the fact that at the point this phone was found in the stolen car it is doubtful that the officer would have had sufficient evidence to establish probable cause to search that device. A search warrant may issue solely upon a finding of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists when the affidavit in support of the warrant contains facts and circumstances from which a reasonable person could infer that criminal activity is probably occurring, and that evidence of such activity can be found at the place to be searched. Id. Probable cause requires (1) a nexus between criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be searched. Id. The burden of proof to show lack of probable cause is on the defendant moving for suppression. State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001).

#### E. CONCLUSION

The decision of the Court of Appeals was well reasoned and based upon our State constitution. The State has not and does not dispute that the standard regarding the search of a cellphone has now evolved to what

is set forth in Riley. This court must not be drawn into Samalia's argument regarding the search of this specific type of device but must instead address the real issue, were the actions of the Petitioner such that the abandonment of the phone in the stolen car terminates his rights in that device as well as the fact that the actions of the officer were done while in hot pursuit of a fleeing felon.

The actions of the trial court and the Court of Appeals should not be disturbed.

Respectfully submitted this 12<sup>th</sup> day of November 2015.

s/ David B. Trefry  
DAVID B. TREFRY, WSBA #16050  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington  
P.O. Box 4846, Spokane WA 99220  
Telephone: (509) 534-3505  
Fax: (509) 534-3505  
David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry, state that on November 12, 2015, by agreement of the parties, I emailed a copy of the State's Supplemental Brief to: Ms. Nancy Collins at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org), Douglas Klunder at [klunder@comcast.net](mailto:klunder@comcast.net), Nancy Talner at [talner@aclu-wa.org](mailto:talner@aclu-wa.org) and to Arnold Jin, [arnold@jinweislaw.com](mailto:arnold@jinweislaw.com)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of November, 2015 at Spokane, Washington.

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

## OFFICE RECEPTIONIST, CLERK

---

**To:** David Trefry; Nancy Collins; Doug Klunder; talner@aclu-wa.org; arnold@jinweislaw.com  
**Subject:** RE: State v. Samalia 91532-6

Received on 11-12-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** David Trefry [mailto:David.Trefry@co.yakima.wa.us]  
**Sent:** Thursday, November 12, 2015 2:28 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Nancy Collins <nancy@washapp.org>; Doug Klunder <klunder@aclu-wa.org>; talner@aclu-wa.org; arnold@jinweislaw.com  
**Subject:** State v. Samalia 91532-6

Please find attached the States Supplemental Brief in this case.

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)