

NO. 32398-6-III

FILED
Mar 09, 2015
Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON,

RESPONDENT,

v.

WILMER SANTIAGO GUERRERO,

APPELLANT.

BRIEF OF RESPONDENT

**GARTH DANO
PROSECUTING ATTORNEY**

**By: Kevin J. McCrae, WSBA #43087
Deputy Prosecuting Attorney
Attorney for Respondent**

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ER 1032

RAP 2.5(a)(3)2

I. ASSIGNMENTS OF ERROR

Did the introduction of a copy of Wilmer Guerrero's driving abstract violate the confrontation clause?

ISSUES RELATING TO THE ASSIGNMENTS OF ERROR

- A. Should the court review a confrontation clause issue when there was no confrontation clause objection in the court below?
- B. Is a driver's abstract a testimonial document?

II. STATEMENT OF THE CASE

Richard Letteer, a Department of Licensing (DOL) custodian of records, testified regarding Wilmer Guerrero's driving status. RP 181-97. During his testimony Mr. Letteer authenticated, and the State admitted, four exhibits: Mr. Guerrero's driving abstract, a document showing Guerrero's address changes on file with DOL, a copy of Guerrero's driver's license and a notice of revocation mailed to Guerrero (State's supplemental designation of clerk's papers SCP) as exhibits 3, 8, 9 and 10. These were all admitted as business records. None of the records were created or maintained in anticipation of this litigation. There was no affidavit offered or admitted stating that Guerrero was suspended on 29 October 2013 of the type discussed in *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). During trial there were hearsay objections to the abstract, but no confrontation clause objections. RP 185.

III. ANALYSIS

A. Because there was no confrontation clause objection below the appellate court should not review this issue.

While trial defense counsel objected to the driving abstract and other documents on hearsay grounds, he failed to object on confrontation clause grounds. Parties are required to object on specific grounds to preserve review on those grounds. ER 103. An exception is found in RAP 2.5(a)(3) for manifest constitutional errors. However, the confrontation clause is an exception to RAP 2.5(a)(3). In order to preserve a confrontation clause challenge a party must object in the trial court. *State v. Berniard*, 182 Wn. App. 106, 124, 327 P.3d 1290 (2014). Because the defendant failed to raise the confrontation clause issue in the court below, the appellate court should not review it now.

B. Standard of review

An alleged violation of the confrontation clause is reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

C. Appellant misreads Jasper; there was no confrontation clause violation.

The Supreme Court, in *Jasper*, 174 Wn.2d at 115, held that certificates summarizing the driving record abstract and stating that the drivers were suspended on a certain day were testimonial, and their

creators had to testify. “[T]he State introduced into evidence an affidavit from a legal custodian of driving records. The affidavit states, “After a diligent search, our official record indicates that the status on February 14, 2005, was: “... Suspended in the third degree.” *Id* at 101. *Jasper* did not hold, and could not hold, that the driving abstract itself was testimonial. A document is testimonial if it is prepared for the purposes of litigation. The purpose of a driving record is to “keep a database of the drivers in Washington, so that they can compile the records for suspension, any type of violations and for traffic safety.” RP 183. In other words, not for the purposes of litigation. In this case there was no certification of the type in *Jasper*. Instead the person who authenticated and interpreted the record, the custodian of record Richard Letteer, testified, thus satisfying the confrontation clause. It is not necessary the Mr. Letteer be the person who pulled the record from the database; that is not testimonial, and fits within the business record and government documents exceptions to the hearsay rules.

Even if it could be argued that a person could reasonably predict that a driving record may someday be used at a trial, a document it still not testimonial if it is prepared in the normal course of business before the events that give rise to trial. In *State v. Fedorov*, 183 Wn. App. 736, 747, 335 P.3d 971 (2014), the defendant challenge the lack of testimony from

the technician who prepared the simulator solution for a BAC machine.

The court rejected that argument, holding:

Trooper Stumph's calibration report and simulator solution record were not testimonial statements. They were not made to establish facts at Fedorov's trial. Instead, the calibration report served as a record that the machine correctly computed figures and printed them out during annual quality assurance procedures performed in September 2011. This testing occurred months before the night in January 2012 when Fedorov was arrested. Likewise, the simulator solution record showed that the simulator solution used in this machine had been replaced in November 2011. The objective circumstances show the calibration report and simulator solution record were not originally made to establish facts at Fedorov's trial.

A driving abstract is similar. Both a calibration record and a driving abstract are maintained by the respective agencies as a matter of course. Both are created at or near the time of the events giving rise to the record, not stimulated by the fact a trial is about to occur. Both could reasonably be foreseen to be used in some litigation someday, but the author of the document has no idea in whose trial they might be used, or when that might occur, or if that will occur. The author of the record is not a witness against the defendant.

However, the testimony that the defendant was suspended on such and such a day, derived from the business record, is testimonial, and was duly testified to at trial. It was certificates making that statement that the

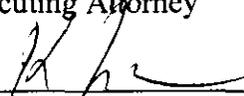
court rejected in *Jasper*. "[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions". *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S. Ct. 2527; 174 L. Ed. 2d 314 (2009). A driving abstract is none of those things. It exists before trial, is created near the time of the events it reflects and is not prepared for trial. RP 183.

IV. CONCLUSION

State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012) is not applicable to the documents introduced in this case. There was no confrontation clause objection or violation. The court should not review this issue. If it does it should find no confrontation clause violation occurred. The conclusion drawn from the non-testimonial documents, that Wilmer Guerrero was suspended on the relevant day, was properly testified to in open court and subject to confrontation. The trial court should be affirmed.

DATED: March 9, 2015

Respectfully submitted:
GARTH DANO,
Prosecuting Attorney


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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32398-6-III
)	
vs.)	
)	
WILMER SANTIAGO GUERRERO,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the Andrea Burkhart, Attorney for Appellant, receipt confirmed, pursuant to the parties' agreement:

Andrea Burkhart
Burkhart & Burkhart, PLLC
Andrea@BurkhartandBurkhart.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Wilmer Santiago Guerrero
PO Box 451
14264 Crook Loop SW
Royal City WA 99357

Dated: March 9, 2015.



Kaye Burns