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DIVISION ONE
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STATE OF WASHINGTON,
Respondent,
v.
KYLE KRONICH,
Appellant.

BRIEF OF AMICUS CURIAE OF WASHINGTON DEFENDER
ASSOCIATION, WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS

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I. Identity and Interest of Amici

A. Washington Defender Association

The Washington Defender Association (WDA) is a not for profit membership agency that represents over 800 public defenders and assigned counsel throughout Washington.

Members of WDA have been representing indigent people since WDA's inception seventeen years ago.

A large majority of people charged with driving while license suspended (DWLS) are represented by public defenders. This is especially true of defendants charged with third degree driving while license suspended who often have their licenses suspended because they cannot afford to pay their traffic tickets. RCW 46.20.342(c).

B. Washington Association of Criminal Defense Lawyers

Washington Association of Criminal Defense Lawyers (WACDL) consists of over 700 attorneys who practice criminal defense law in Washington. WACDL is a nonprofit corporation, with 501(c)(3) tax-exempt status. As stated in its bylaws, WACDL "was formed to improve the quality and administration of justice" and:

1. To protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights;
2. To improve the professional status of all lawyers and to encourage cooperation between lawyers engaged in the furtherance of our objectives through publications, education, and mutual assistance; and
3. To engage in all activities on a local, state and national level that will advance the purposes for which this organization is formed in order to promote justice and the common good of the citizens of the United States.

WACDL representatives frequently testify at Washington House and Senate committee hearings on proposed legislation affecting criminal defendants, prisoners, and the public at large. WACDL has been granted leave to file numerous amicus briefs in the Washington courts. Because the decision in this case could affect many clients of WACDL members, the WACDL amicus committee has approved the filing of this brief.

II. Issue Presented for Review

Whether a records custodian's written certification, stating conclusions about a defendant's legal status based on the absence of certain public records, amounts to a testimonial statement

triggering the defendant's right to confront and cross-examine the custodian under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

III. Statement of the Case

Kyle Kronich was charged with driving under the influence and driving while his license was suspended (DWLS) in the third degree. To convict Mr. Kronich of DWLS, the State must prove that on the date of his arrest, Mr. Kronich was driving a vehicle while his license was suspended by the Department of Licensing. RCW 46.20.342.

To prove this element at trial, the State submitted a declaration from Trina Truong, an employee of the Department of Licensing (DOL). Within her declaration, Ms. Truong stated that she had "diligently" searched DOL's records and from this search believes that on the day Mr. Kronich was arrested he "[h]ad not reinstated his/her driving privilege. Was suspended/revoked." The jury convicted Mr. Kronich of driving under the influence (DUI) and third degree DWLS.

IV. Summary of Argument

The trial court erroneously admitted Ms. Truong's declaration. While Crawford held business records are not testimonial, it did not comment on a certificate of non-existence of business records. Such a declaration is testimonial under even the narrowest definition. Additionally, Ms. Truong's declaration exceeded the scope of a certificate of non-existence of business records and was testimonial because she conclusively stated an element of DWLS was met. Finally, the definition of testimonial is different than that of a firmly rooted hearsay exception, and the Court of Appeals erred in using traditional hearsay rules to define a testimonial statement.

V. Argument

A. A certificate of non-existence of records is testimonial.

As the honorable Rebecca M. Baker correctly reasoned in her dissent in the Court of Appeals, a certificate of non-existence of public records is testimonial, unlike a business record. She noted there is a difference between the ministerial act of certifying an accurate copy of an original and a records custodian testifying that

she knew what records to search for, searched for them diligently and found none:

The certification of the absence of a record begins with a search that is both diligent and knowledgeable and ends with the testimonial statement. The testimonial statement outlines the actions of the records seeker: that he or she knew for what record to search, knew how to find it in the records or database, searched for it diligently, and found no such record.

State v. Kronich, 131 Wn.App. 537, 551, 128 P.3d 119 (2006)

(Baker dissenting). Some courts have historically required the live testimony of a records custodian in order to admit the fact of non-existence of a public record. See United States v. Rich, 580 F.2d 929, 937-38 (9th Cir. 1978) (assuming testimony of records custodian is necessary foundation for admission of absence of entries in business records); United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976) (assuming “[t]here must be at least some first-hand testimony regarding the records or production of the log or journal in which the entry is absent”).

Under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the rule that a records custodian must actually testify to the absence of business records, rather than submit a declaration that the records she searched for do not

exist, is a constitutional imperative. While the Crawford court indicated business records are not testimonial and, therefore, admission of business records in a criminal trial does not violate the Sixth Amendment, it did not directly address certificates relating to the non-existence of business records. The Crawford court did, however, offer three possible definitions of testimonial statements. Certificates of non-existence of business records fall under even the narrowest of these definitions:

extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.

Crawford, 541 U.S. at 51-52 (internal ellipsis omitted).

A certification of non-existence of business records is an extra judicial statement contained in formalized material and is testimonial. It is akin to an affidavit. An affidavit is “[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.” Black’s Law Dictionary, 8th Edition. A certification of non-existence of business records contains a declaration by a records custodian that she searched for specific records and found none. It is a “declaration of facts written down and sworn to by the declarant,” like an affidavit.

Under the rules of evidence a certificate of non-existence of business records is testimonial by definition. A certificate of non-existence of business records must state, as Ms. Truong's did, that the records custodian performed a diligent search and found no records of the type for which she searched, or it must be in accordance with Evidence Rule 902. ER 803(a)(10)¹. Evidence Rule 902 calls for certification of "data compilations." In the case of the absence of records, the records custodian must certify that she made a search and found no records of the type for which she searched. Kronich, 131 Wn.App. at 553 (Baker dissenting). A certification of non-existence of public record, therefore, requires testimony. The records custodian does not merely provide records kept in the ordinary course of business, as she does with a

¹ Evidence Rule 803 reads:
Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, **evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.**

Washington Evidence Rule 803 (emphasis added).

business record. Compare ER 803(a)(10); ER 803(a)(6),(8). She testifies as to actions she took and facts relevant to a criminal trial.

B. The declaration of Ms. Truong exceeds a statement of non-existence of public records.

Assuming arguendo that a certificate of non-existence of public records is admissible under Crawford, the declaration of Ms. Truong went beyond such a certificate and was testimonial. The United States Supreme Court clarified to some extent the definition of testimonial in Davis v. Washington, ____ U.S. ____, 126 S.Ct. 2266, 165 L.Ed. 2d 224 (2006). While the court in that case primarily addressed statements that were the result of interrogation by law enforcement officers, it noted such statements were not the only ones that are testimonial.

The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. Raleigh's Case, 2 How. St. Tr. 1, 27 (1603).)

Davis, 126 S.Ct. at 2274, n 1. Even though it was volunteered testimony, Ms. Truong's declaration was still testimony, similar to a letter stating the defendant committed one of the elements of

DWLS. Ms. Truong did not simply state that there was no record of Mr. Kronich reinstating his license. She affirmatively stated he had not reinstated his license and his license was “suspended/revoked.” There is a difference. Here the custodian testified through her declaration as to one of the elements of the crime of DWLS—that the defendant’s license was in fact suspended or revoked.

The State relies on United States v. Cervantes-Flores, 421 F.3d 825 (2005), which is distinguishable from the case at bar. In that case the district court admitted a certificate of non-existence of record (CNR) by a records custodian at the Immigration and Naturalization Service (INS) which stated there was no record of the defendant being granted permission to enter the United States after deportation. The records custodian in Cervantes-Flores did not submit a declaration that conclusively stated an element of the crime at issue was met.

In Cervantes-Flores, the law required the Government to prove that the attorney general had not “expressly consented” to Mr. Cervantes-Flores reapplying for admission to the United States prior to his “reembarkation at a place outside the United States or his application for admission from a foreign contiguous territory.” Cervantes-Flores, 421 F.3d at 830-31. The INS records custodian

did not submit a declaration stating the defendant had not received such permission, and the jury was free to interpret the CNR. By contrast, Ms. Truong submitted a declaration stating that Mr. Kronich's license was in fact "suspended/revoked." She stated conclusively that an element of DWLS was met.

Additionally, the United States Supreme Court has warned against production of testimony by government officers:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Crawford, 541 U.S. at 56, n. 7.

Ms. Truong's declaration contains the type of testimony the United States Supreme Court has warned the confrontation clause prohibits. It was prepared "with an eye toward trial" because it was created specifically for trial. The certificate of non-existence of

business records was also prepared by an employee of the department of Licensing (DOL), a government officer.²

Crawford provides those accused of crimes with the right to cross-examine a witness who makes a testimonial statement against them.

To be sure the [Confrontation] Clause's ultimate goal is to ensure the reliability of evidence, but it is a procedural rather than substantive guarantee. It commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Crawford, 541 U.S. at 61. Here, Mr. Kronich had the right to cross-examine Ms. Truong regarding her conclusion that he had not reinstated his license and that his license was "suspended/revoked," even if the court deems those conclusions obvious from her statement concerning the lack of records.

² See Davis, 126 S.Ct. at 2274, n 2 ("If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.")

C. Crawford requires courts to define testimonial differently than a firmly rooted hearsay exception.

To define testimonial the same way courts have historically defined a firmly rooted hearsay exception would read Crawford out of existence, a result the United States Supreme Court can not have intended. The Crawford court noted it was reconsidering the test previously applied to determine whether out of court statements were admissible. See Crawford, 541 U.S. at 42 (court was reconsidering whether a statement can be admitted if it “falls within a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness’”).

In Crawford the United States Supreme Court noted the difference between a testimonial statement and one that falls within a hearsay exception several times. See, e.g., Crawford, 541 U.S. at 51 (“[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices”); Id. at 61 (“[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the

vagaries of the rules of evidence, much less to amorphous notions of ‘reliability’”); Id. at 68 (where testimonial evidence is at issue, it is inconsistent with the Framers’ intentions to allow states flexibility in their development of hearsay law).

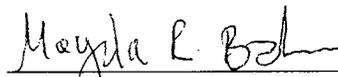
In the case at bar the Court of Appeals used traditional hearsay rules to define a testimonial statement. Kronich, 131 Wn.App. at 546. This is contrary to the intent the United States Supreme Court manifested when it decided Crawford. This Court should reverse the Court of Appeals decision and hold Ms. Truong’s declaration was testimonial.

VII. CONCLUSION

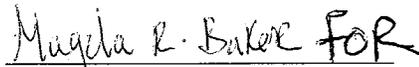
Contrary to Crawford and Davis, the trial court allowed a records custodian from DOL to testify by affidavit that the State had proved an element of the crime of DWLS without giving Mr. Kronich the right to cross examine that DOL employee. This Court should reverse the court of appeals’ decision and hold that Ms. Truong’s declaration violated Mr. Kronich’s right to confrontation.

DATED this 18th day of September, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

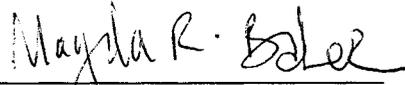
I certify under penalty of perjury under the laws of the State of Washington that on September 18, 2006, I placed in the U.S. mail postage prepaid a copy of the Brief of Amicus Curiae of the Washington Defender Association and the Washington Association of Criminal Defense Lawyers and the Joint Motion for Leave to File Amicus Brief in this matter to:

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