

RECEIVED

MAY 08 2006

In the Office of the Clerk of Court
Washington Court of Appeals, Division Three

By _____

No. 23427-4-III

FILED
MAY 19 2006

CLERK OF SUPREME COURT
STATE OF WASHINGTON

78428-1

78428-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KYLE KRONICH,

Petitioner.

RECEIVED
COURT OF APPEALS
DIVISION ONE
MAY - 3 2006

MEMORANDUM OF *AMICI CURIAE* WASHINGTON DEFENDER
ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

MAGDA R. BAKER
810 3rd Avenue, Suite 200
Seattle, WA 98104
(206) 623-4321

2006 MAY - 3 PM 1:55

Attorney for *Amici Curiae*
Washington Defender Association

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI 1

ISSUE TO BE ADDRESSED BY AMICI..... 1

STATEMENT OF THE CASE 2

ARGUMENT 2

 1. THE PETITION INVOLVES AN IMPORTANT
 CONSTITUTIONAL QUESTION AND AN ISSUE OF
 SUBSTANTIAL PUBLIC INTEREST THAT
 SHOULD BE DETERMINED BY THIS COURT. 2

 a. Numerous Cases Will Be Affected by the
 Published Court of Appeals Decision 2

 b. To Ensure Statewide Consistency, This Court
 Should Address Crawford's Application to DOL
 Employee Declarations. 4

 2. COURTS NATIONWIDE ARE SPLIT ON THE ISSUE
 OF WHETHER DECLARATIONS BY GOVERNMENT
 EMPLOYEES ARE TESTIMONIAL..... 6

 3. CRAWFORD AND THE SIXTH AMENDMENT MAY
 POSE INCONVENIENT BURDENS ON THE STATE,
 BUT THAT IS NOT A VALID REASON TO IGNORE
 THEM IN DWLS CASES..... 7

CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004)..... 4, 10
State v. Watson, 155 Wn. 2d 574, 122 P.3d 903 (2005).....3,
5

Washington Court of Appeals Cases

State v. Kronich, 131 Wn.App. 537, 128 P.3d 119 (2006). 2, 5, 9, 10
State v. N.M.K., 129 Wn. App. 155, 161, 118 P.3d 368
(2005), review pending, No. 77719-5 6
State v. Smith, 122 Wn. App. 699, 94 P.3d 1014 (2004),
reversed on other grounds, 155 Wn.2d 496, 120 P.3d 599
(2005) 5

United States Supreme Court cases

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.
177 (2004)Passim

Other Cases

People v. Pacer, ____ N.E.2d ____, 2006 NY Slip Op 02291,
2006 N.Y. Lexis 571 (N.Y. Ct. App. March 28, 2006) 7, 8
People v. Schreck, 107 P.3d 1048, 1060-61 (Colo.App.
2005) 7

Statutes

RCW 46.20.342(c) 1

Court Rules

RAP 13.4(b) 3, 6, 11

IDENTITY AND INTEREST OF AMICI

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).

ISSUE TO BE ADDRESSED BY AMICI

Whether the State's use of an ex parte declaration from an employee at the Department of Licensing as evidence of a necessary element for driving while license suspended violated Mr. Kronich's Sixth Amendment right to confront the State's witnesses against him.

STATEMENT OF THE CASE

Kyle Kronich was charged with driving with his license suspended in the third degree. At trial the state submitted a declaration from an employee of the Department of Licensing (DOL). Within the declaration the employee stated she had searched Department of Licensing records and believed that on the day he was arrested, Mr. Kronich “[h]ad not reinstated his/her driving privilege. Was suspended/revoked.” A jury convicted Mr. Kronich of third degree driving while license suspended.

In a published opinion Division Three of the Court of Appeals affirmed. The Court held there was no confrontation violation when the State used the non-testifying DOL employee’s declaration to prove the suspension element of the crime. State v. Kronich, 131 Wn.App. 537, 128 P.3d 119 (2006).

ARGUMENT

1. THE PETITION INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT.

- a. Numerous Cases Will Be Affected by the Published Court of Appeals Decision.

A legal question “involves an issue of substantial public interest that should be determined by the Supreme Court” under RAP 13.4(b)(4) if it has the potential to affect a large number of cases. State v. Watson, 155 Wn. 2d 574, 577, 122 P.3d 903 (2005). This court found Watson presented a “prime example of an issue of substantial public interest” because it had the potential to affect not only the parties involved but also “every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was at issue.” The published decision in Kronich has the potential to affect many more cases than did Watson.

As this court has recognized, DWLS cases comprise a very large portion of pending misdemeanor cases. Every year the Department of licensing suspends the licenses of thousands of Washington citizens.

[The Department of Licensing] notes it issued 386,144 notices of suspension in 1999, 401,471 in 2000 and 391,265 in 2001 based on information it received from the courts.

Redmond v. Moore, 151 Wn.2d 664, 674, 91 P.3d 875 (2004).

While not all citizens whose licenses are suspended are later charged with DWLS, many are.

DWLS cases comprise up to 40% of the caseload in courts of limited jurisdiction.¹ Warrants for DWLS also “constitute a significant part of the number of outstanding warrants.” Id. Approximately 35% of outstanding warrants are for driving while license suspended.² People convicted of DWLS in all degrees fill approximately 5% of jail beds statewide.³ As this Court recognized in State v. Watson, supra, review is appropriate when a published Court of Appeals decision affects so many cases.

b. To Ensure Statewide Consistency, This Court Should Address Crawford's⁴ Application to DOL Employee Declarations.

While Division Three has now ruled Crawford does not apply to DOL Employee declarations in DWLS cases, the other Divisions have not. State v. Kronich, 131 Wn.App. 537, 128 P.3d 119 (2006).⁵ DWLS cases are charged in every county on a regular

¹ Courts of Limited Jurisdiction Delivery of Services Workgroup Report; http://www.courts.wa.gov/programs_orgs/pos_bja/?fa=pos_bja.wgReport&fileID=wgReport-03, last accessed April 17, 2006.

² Warrants and DWLS;
http://www.courts.wa.gov/programs_orgs/pos_bja/wg_clj_20030731_pp.pdf

³ Warrant Resolution Work Group minutes;
http://www.courts.wa.gov/committee/?fa=committee.display&item_id=230&committee_id=95, last accessed April 17, 2006.

⁴ 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

⁵ Division One had addressed the issue in State v. Smith, but this Court granted review and reversed on other grounds. Division One's Crawford analysis therefore is no longer good law. State v. Smith, 122 Wn. App. 699, 704, 94 P.3d 1014 (2004), reversed on other grounds, 155 Wn.2d 496, 120 P.3d 599 (2005).

basis and the question is likely to arise in all divisions. The interests of justice require that all of Washington's courts, as required by the United States Supreme Court in Crawford, protect the Sixth Amendment confrontation rights of all persons charged with DWLS.

Division Three's decision in Kronich relied on Division One's discussion of a related issue in State v. N.M.K., 129 Wn. App. 155, 161, 118 P.3d 368 (2005), review pending, No. 77719-5 (set for consideration May 31, 2006). The petition for review in N.M.K. presents two issues. The first is a search and seizure question, arguably unrelated to the Crawford claim. The Crawford claim arose from the admission of a DOL declaration asserting that N.M.K. lacked a license to drive. The facts, however, showed: (1) N.M.K. was only 15 years old at the time he drove unlawfully, and (2) he admitted to the officers that he had no license to drive. In light of those facts, it is curious that Division One used N.M.K. as a vehicle to decide the important Crawford constitutional claim, given the harmlessness of the error.

In contrast, the Crawford error is not harmless in Mr. Kronich's case. For all these reasons, review of this important constitutional question is appropriate now. RAP 13.4(b)(3), (4).

2. COURTS NATIONWIDE ARE SPLIT ON THE ISSUE OF WHETHER DECLARATIONS BY GOVERNMENT EMPLOYEES ARE TESTIMONIAL.

As counsel for petitioner points out, courts nationwide are split as to whether government certificates such as department of licensing documents are testimonial under Crawford. Many States have found the admission of such records violates Crawford. See, e.g., People v. Pacer, ___ N.E.2d ___, 2006 NY Slip Op 02291, 2006 N.Y. Lexis 571 (N.Y. Ct. App. March 28, 2006). Others have found similar documents are not testimonial and, therefore, their admission does not violate Crawford. See, e.g., People v. Schreck, 107 P.3d 1048, 1060-61 (Colo.App. 2005) (affidavits used to establish chain of custody for documents not testimonial).

New York's highest court, recently held a trial court violated Crawford by admitting an affidavit prepared by an employee of the New York Department of Motor Vehicles describing that agency's revocation procedures and stating the agency had satisfied them. People v. Pacer, supra. The court reasoned the employee of the Department of Motor Vehicles was not a neutral officer and her assertion that the Department had carried out the normal mailing procedures in the defendant's case was an accusation of an

element of the crime. Additionally, the State presented no live witness who testified to the element, so the accused had no chance to conduct cross examination as to that element.

Here, the affiant's sworn statement—that she had information causing her to believe the Department actually mailed notice of revocation to the defendant—was crucial to the People's case. Faced with evidence of this type, defendants have no means of challenging the people's proof on a critical element. Without an opportunity to cross examine the affiant, defendant had no chance to inquire about the *basis* of the affiant's "information and belief" that the Department mailed the notice In short, the lack of a live witness to confront eliminated defendant's opportunity to contest a decisive piece of evidence against him. This is exactly the evil the Confrontation Clause was designed to prevent.

Pacer, 2006 NY Lexis at 12-13.

While the New York Court of Appeals analysis is persuasive, some other courts have refused to apply Crawford to government declarations. This Court should accept review and resolve the issue in Washington.

3. CRAWFORD AND THE SIXTH AMENDMENT MAY POSE INCONVENIENT BURDENS ON THE STATE, BUT THAT IS NOT A VALID REASON TO IGNORE THEM IN DWLS CASES.

As Counsel for appellant noted in the petition for review, logistical difficulties are not a valid reason to circumvent the Sixth Amendment. The Court of Appeals reasoned that to require the

defendant be able to cross-examine an employee from DOL would “require numerous additional witnesses without any apparent gain to the truth seeking process.” Kronich, 131 Wn.App. at 547 (quoting Crawford, 541 U.S. at 76 (Renquist, C.J. concurring)). However, the presence of the person attesting to the defendant’s licensing status would in fact be a gain “to the truth seeking process.”

As the dissent below pointed out, the Department of Licensing employee who submitted a document made a “factual (even conclusory) statement” when she stated Mr. Kronich “[h]ad not reinstated his/her driving privilege. Was suspended/revoked.” Kronich, 131 Wn.App. at 550, 554 (Baker, J. dissenting).

The statement that Mr. Kronich “[w]as suspend/revoked” is a legal conclusion. Without due process of law there is no valid suspension or revocation. Redmond v. Moore, 131 Wn.2d 664, 91 P.3d 875 (2004). Due process requires both notice and an opportunity for a meaningful hearing. Id. In making the statement that Mr. Kronich was suspended or revoked in a document prepared solely for the prosecution of Mr. Kronich, the DOL employee was making a finding that DOL had complied with due process. Because the statement required a legal conclusion, it was

not merely factual. As the Supreme Court ruled in Crawford, a testimonial statement requires the presence of the declarant so the defendant can exercise his Sixth Amendment right to confrontation. By allowing a conclusory statement into evidence without requiring the presence of the declarant, the trial court violated Crawford. The presence of the DOL employee who wrote the declaration saying Mr. Kronich's license was suspended would have provided a "gain to the truth seeking process." This Court should grant review.

CONCLUSION

For the foregoing reasons, amici respectfully request the Court to accept Mr. Kronich's petition for review. It meets the criteria of RAP 13.4(b) (3) and (4) because the constitutional question is both important and a matter of substantial public interest that should be decided by the Washington Supreme Court.

Respectfully submitted this 3rd day of May,
2006.

By Magda Baker
Magda Baker #30655

Attorney for *Amici Curiae*
Washington Defender Association