

No. 234274

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

Respondent,

v.

KYLE KEITH KRONICH,

Petitioner.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

A. MOTION TO STRIKE PORTIONS OF RESPONDENT'S BRIEF	1
B. ARGUMENT & AUTHORITY	2
1. The trial court erred in denying Mr. Kronich's motion to suppress because the State failed to meet its burden of showing Mr. Kronich waived his right to contact an attorney.	2
2. The Superior Court erred when it found that despite the State's violation of Mr. Kronich's right to attorney, Mr. Kronich failed to show prejudice.....	5
3. The Superior Court erred in holding the State's use of ex parte declarations from the Department of Licensing did not violate Mr. Kronich's Sixth Amendment right to confront witnesses.....	7
C. CONCLUSION	11

TABLE OF AUTHORITIES

Federal Cases

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, (2004)	7, 8
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State Cases

<i>State v. Chapman</i> , 98 Wn. App. 888, 991 P.2d 126 (2000).....	10
<i>State v. Kindsvogel</i> , 149 Wn.2d 477, 480-81, 69 P.3d 870 (2003).....	1
<i>State v. Kirkpatrick</i> , 89 Wn. App. 407, 416, 948 P.2d 882 (1997).....	4
<i>State v. Lorenz</i> , 152 Wn.2d 22, 36, 93 P.3d 133 (2004)	2
<i>State v. Monson</i> , 113 Wn.2d 833, 839, 784 P.2d 485 (1989)	8, 9, 10
<i>State v. Templeton</i> , 148 Wn.2d 193, 211-12, 218, 59 P.3d 632 (2002)	5, 6
<i>Steel v. Johnson</i> , 9 Wn.2d 347, 115 P.2d 145 (1941)	9

State Statutes

RCW 5.44.040	10
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A. MOTION TO STRIKE PORTIONS OF RESPONDENT'S BRIEF

Mr. Kronich moves this court to strike those portions of the State's brief that seek affirmative relief from the decision of the Superior Court. The Superior Court concluded that the trial court erred in placing the burden of proof on Mr. Kronich to show a waiver of counsel under CrRLJ 3.1. In seeking discretionary review, Mr. Kronich did not assign error to this conclusion. Nor did the State cross-appeal or assign error to this conclusion. See RAP 10.3(b).

Nevertheless, the State attempts to seek affirmative relief by arguing in its brief on appeal that the Superior Court erred in holding the rule was violated. (See Respondent's Brief, p. 5-7) Because the State did not cross-appeal the Superior Court's decision or assign error to this conclusion, it is precluded from seeking affirmative relief in its appellate brief. *State v. Kindsvogel*, 149 Wn.2d 477, 480-81, 69 P.3d 870 (2003).

B. ARGUMENT & AUTHORITY

1. The trial court erred in denying Mr. Kronich's motion to suppress because the State failed to meet its burden of showing Mr. Kronich waived his right to contact an attorney.

In the event this court considers the State's argument for relief, the Superior Court did not err in concluding that the trial court improperly shifted the burden of proving a valid waiver of counsel to Mr. Kronich. At his motion to suppress, Mr. Kronich presented evidence, through the certified police report, that he had made an unambiguous request for an attorney after being arrested. The trial court found that Mr. Kronich requested an attorney. (CP 30) The State has never disputed this fact or assigned error to the finding that Mr. Kronich requested an attorney. Consequently, this finding of fact is a verity on appeal. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

The police report also contains an ambiguous note, "did not want to call." The trial court acknowledged this ambiguity and asked the State about it. (CP 22-23) The State erroneously responded that it was "the burden of the moving party to show by preponderance the fact that he was denied counsel and in this case, the trooper or deputy states 'did not want to call.' There is no

allegation by [Mr. Kronich] that it was the deputy that didn't want to call in this matter..." (CP 23) Based upon this assumption, the State did not produce any evidence to show a valid waiver. The trial court accepted the State's argument on the burden of proof. Because Mr. Kronich presented no evidence to the contrary, the trial court assumed there was a valid waiver. The trial court erred in making this assumption and placing the burden of proving an invalid waiver on Mr. Kronich.

When a person is arrested, they must be advised as soon as practicable of the right to an attorney. CrRLJ 3.1(c)(1). When a lawyer is requested, the suspect "shall be provided with access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communications with a lawyer." CrRLJ 3.1(c)(2).

Once a defendant requests an attorney, the burden is on the State to show compliance with the rule or a valid waiver. The court rule makes clear that once an unequivocal request is made, the State must show "reasonable efforts to contact an attorney, why such efforts could not have been made, or a valid waiver by [the

defendant] before the 'earliest opportunity' arose." *State v. Kirkpatrick*, 89 Wn. App. 407, 416, 948 P.2d 882 (1997).

The State does not address its burden of proof in its brief, or attempt to distinguish *Kirkpatrick*. Nor does the State contend that it attempted to meet its requirements under the rule. Instead, the State contends, without citation to any authority, that the rule "does not require the court find a knowing and intelligent waiver before compliance with the rule is found." (Respondent's Brief, p. 6-7.)

Contrary to the State's assertion however, *Kirkpatrick* held that the State must show it complied with the rule or the defendant made a knowing, intelligent and voluntary waiver. "[B]ecause of the mandatory language of CrR 3.1(c)(2), an accused's waiver of the rule requires more than the State's noncompliance with the rule; it requires an accused's 'knowing, intelligent and voluntary' conduct." *Id.* at 415.

Finally, the State asserted that the rule only requires the State to provide a meaningful opportunity for contact; it does not require the State to actually put the defendant in touch with an attorney. (Respondent's Brief, p. 7) While this is true, in this case the State made no attempt to show it complied with the rule. When

an attorney is requested, the State must show either compliance with the rule or a valid waiver. Here the State has shown neither.

The Superior Court did not err when it found the trial court improperly placed the burden of proving an invalid waiver on Mr. Kronich. Once he established an unequivocal request for an attorney, the State had the burden to bring forth evidence showing it complied with the rule or the defendant gave a valid waiver. Here, the State did neither. Consequently, the State failed to meet its burden of proof and the trial court should have presumed a rule violation.

2. The Superior Court erred when it found that despite the State's violation of Mr. Kronich's right to attorney, Mr. Kronich failed to show prejudice.

As Mr. Kronich noted in his appellate brief, the right to counsel under CrRLJ 3.1 requires more of the State than the Fifth or Sixth Amendment right to counsel. *State v. Templeton*, 148 Wn.2d 193, 211-12, 218, 59 P.3d 632 (2002). The purpose behind the rule, especially in DUI cases where the evidence is transitory, is to put the defendant in touch with an attorney and allow the defendant an opportunity to make intelligent choices about

gathering evidence. *Id.* at 212. Prejudice occurs when the State interferes with the access to counsel.

In *Templeton*, the Supreme Court determined prejudice by considering whether the defendants would have contacted an attorney had the State not violated the rule. *Id.* at 220-21. Since none of the defendants asked for an attorney when they were eventually advised of their rights, the Court reasoned that the defendants had failed to show prejudice. *Id.*

Mr. Kronich meets the test of prejudice set forth in *Templeton* because he did request an attorney. Contrary to the State's argument, he does not need to come forward at a later time and give speculative testimony about what he may have done had he been given access to an attorney. Such testimony would be of little value to the court in deciding prejudice. Instead, prejudice should be assumed when a defendant is denied access to an attorney after requesting one. Otherwise, the defendant is left in an impossible position and the requirements of the rule are rendered impotent.

Because Mr. Kronich requested an attorney, but was not provided meaningful access to one, his refusal to provide a breath sample should have been suppressed. As Mr. Kronich notes in his

appellate brief, the other evidence of intoxication was marginal, and evidence of Mr. Kronich's refusal likely changed the outcome of the trial.

3. The Superior Court erred in holding the State's use of ex parte declarations from the Department of Licensing did not violate Mr. Kronich's Sixth Amendment right to confront witnesses.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, (2004), the United States Supreme Court held that ex parte testimonial evidence is not admissible unless the witness is truly unavailable and there has been a prior opportunity for cross examination. *Id.*, 124 S. Ct. at 1374.

The right to confrontation is a constitutional right. The constitution trumps the evidence rules. In other words, the rules of evidence do not apply until and unless the evidence passes the constitutional test. If the evidence does not violate the right to confrontation, then, and only then, does the court consider whether the evidence comes in under a rule-based hearsay exception such as the public records or business records exception. *Id.* at 1367.

As *Crawford* notes, in most cases evidence introduced as a business record will not be affected by the confrontation right because business records, by definition, are not testimonial. *Id.* at

1366. In the same sense, public records are generally not testimonial because public records cannot contain “conclusions involving the exercise of judgment or discretion or the expression of opinion.” *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989) (quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)). Although the *Crawford* Court noted the business record exception was a firmly rooted hearsay exception, it also pointed out that there is scant evidence that this exception has been invoked to allow testimonial evidence against an accused in a criminal trial. *Crawford*, 124 S. Ct. at 1367.

In this case, the declaration contains testimonial evidence in the form of opinions and conclusions. Most significantly, the declarant gives an opinion that Mr. Kronich’s “was suspended/revoked.”¹ This conclusion can only be reached by applying the facts to the law. The declarant is giving her opinion of the record, she is not certifying a copy of the records so the jury can reach its own conclusion. Nor is the State providing the driving

¹ The State incorrectly argues that the cover letter in *Monson* was “identical” to the declaration used in Mr. Kronich’s case. But the cover letter in *Monson* did not include the opinion that the defendant “was suspended/revoked” as the declaration in this case does. *Monson*, 113 Wn.2d at 835-36. Moreover, in *Monson*, the jury was also given a copy of the defendant’s driving record, which at least gave them the opportunity to disagree with DOL. Here, the jury was given no such choice.

record to the jury. Instead, the only evidence of Mr. Kronich's driving record is the State's opinion of that record.

The State misconstrues the argument and *Crawford*, and contends that this case "challenges the public records hearsay exception." (Respondent's Brief, p. 10) Mr. Kronich is not challenging the public records hearsay exception. He is arguing that the State cannot label ex parte testimonial evidence as a "public record" and invoked the hearsay exception to allow testimonial evidence against an accused in a criminal trial.

The State relies heavily on *Monson* to argue this issue has already been decided. Careful review of *Monson* however, does not support the State's position. Significantly, the documents before the *Monson* court were different and the Court was NOT deciding whether the certified copy of defendant's driving record (CCDR) contained impermissible conclusions involving the exercise of judgment or discretion or the expression of opinion. *Monson*, 113 Wn.2d at 839. The Court noted that a public record containing such opinions is not admissible under *Steel v. Johnson*, 9 Wn.2d 347, 115 P.2d 145 (1941). *Id.*

Monson did decide that introduction of the CCDR as a public record did not violate the defendant's right to confrontation. But

only if the requirements of *Steel* and RCW 5.44.040 were met. *Monson*, 113 Wn.2d at 845. Since the Court assumed without deciding that the CCDR met the requirements of *Steel*, it upheld the admission of the CCDR.

In *State v. Chapman*, 98 Wn. App. 888, 991 P.2d 126 (2000), this Court was asked to decide if a copy of a driving record and order of revocation met the requirements of *Steel* and were admissible without further foundation. The Court held that these two documents did not contain opinions or conclusions requiring the exercise of discretion. *Id.* at 891. The Court did not consider a DOL declaration similar to what was presented in Mr. Kronich's case.

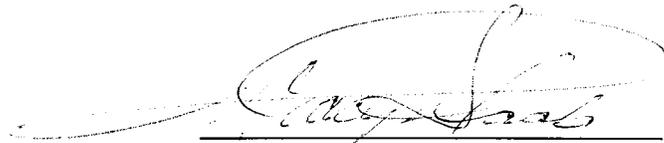
The limitation of *Monson's* holding comes full circle under *Crawford*. Under *Crawford*, public records are not admissible if they contain testimonial evidence. Under *Monson*, public records are not admissible if they contain conclusory opinions. In this case, the DOL declaration contains conclusory opinions that are testimonial. Therefore, the declaration is excluded by both the Sixth Amendment and the public records exception.

C. CONCLUSION

The State was allowed to obtain convictions through the use of tainted evidence. The evidence of Mr. Kronich's refusal was introduced despite his request for an attorney. And the State was allowed to convict Mr. Kronich of driving with a suspended license through the use of ex parte testimonial evidence.

Mr. Kronich respectfully asks that these convictions be dismissed.

Respectfully submitted, April 29, 2005.

A handwritten signature in black ink, appearing to read "Tracy Staab", written over a horizontal line.

Tracy Staab, WSBA #23321
Attorney for Petitioner