

No. 234274

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

Respondent,

v.

KYLE KEITH KRONICH,

Petitioner.

BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. On RALJ Appeal, the Superior Court held that the trial court erred in placing the burden of proof on Mr. Kronich to show a waiver of counsel under CrRLJ 3.1. Nevertheless, the Superior Court went on to hold that the error was harmless because Mr. Kronich had failed to establish prejudice. Mr. Kronich assigns error to that portion of the Superior Court's Order on RALJ Appeal finding the trial court's error to be harmless.

2. Mr. Kronich assigns error to that portion of the Superior Court's Order on RALJ Appeal which held that the introduction of a declaration from Department of Licensing containing an opinion on the status of Mr. Kronich's driver's license, did not violate Mr. Kronich's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, (2004).

Issues Pertaining to Assignments of Error

1. Did the Superior Court err when it found the State's failure to provide Mr. Kronich with access to counsel during a DUI arrest to be harmless despite Mr. Kronich's unequivocal request for an attorney? (Assignment of Error 1.)

2. Did the Superior Court err in holding that 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? (Assignment of Error 2.)

B. STATEMENT OF THE CASE

Kyle Kronich was charged with driving under the influence and driving while his license was suspended in the third degree. At trial, Deputy Sheriff Jeff Jenkins testified that he was behind Mr. Kronich's van at a train crossing on November 15, 2000. (CP 41-45) While waiting for the train to pass, Deputy Jenkins ran the plates on Mr. Kronich's van through the Sheriff's radio, which advised that the registered owner, Kyle Kronich, was suspended in the third degree. (CP 42-44) Based upon this information, Deputy Jenkins turned on his emergency lights. (CP 46) The van crossed the train tracks and continued south for approximately one block,

turning left into what was later determined to be Mr. Kronich's driveway. (CP 46) There was no allegation by Deputy Jenkins of bad driving or traffic infractions. (CP 69-70)

Deputy Jenkins testified that Mr. Kronich seemed lethargic, but was able to comply with Deputy Jenkins's demand that he place his hands on top of his head. Deputy Jenkins then approached and testified that he smelled a strong odor of intoxicants, but arrested Mr. Kronich for driving with a suspended license. (CP 48) Upon searching the van, Deputy Jenkins found several empty beer cans, but could not tell how long the cans had been there. (CP 50, 72)

Deputy Jenkins also testified that Mr. Kronich did not have problems understanding him or responding appropriately to his requests, and he did not stumble, wobble, stagger or sway. (CP 75, 78) However, upon redirect Deputy Jenkins was allowed to read straight from his report that he "checked" certain boxes, including poor coordination, bloodshot eyes, strong and obvious odor of intoxicants and obvious impairment. (CP 84-86)

After searching the vehicle, Deputy Jenkins asked Mr. Kronich if he would submit to field sobriety tests. Deputy Jenkins did not indicate what Mr. Kronich's answer to this question was, but he did testify that no tests were conducted. At that point, Deputy

Jenkins advised Mr. Kronich he was also under arrest for driving under the influence. (CP 54)

At the police station, Deputy Jenkins testified that he read Mr. Kronich his implied consent warnings and asked Mr. Kronich to submit a blood alcohol test, to which Mr. Kronich declined. (CP 55-56) In sum, the evidence of intoxication was blood shot, watery eyes, strong odor of intoxicants and lethargic demeanor. (CP 87)

2. Procedure

Before trial, Mr. Kronich filed a motion to suppress his refusal to submit a breath test, contending he was denied access to counsel as provided in CrRLJ 3.1. In support of this motion, Mr. Kronich filed a copy of the police report, which indicated that Mr. Kronich requested an attorney, but was not provided with access to one. Within the "Attorney's Name" box, the officer made the ambiguous notation: "Did not want to call." The report does not identify whether it was the officer or Mr. Kronich that did not want to call, or the circumstances surrounding this comment. (See Ex. 1)

At hearing on this motion, the State incorrectly argued that Mr. Kronich bore the burden of clarifying the ambiguity created by the officer's report. As such, the State did not call the officer to testify. Although acknowledging the ambiguity, the trial court

accepted the State's argument that Mr. Kronich bore the burden of proof and denied Mr. Kronich's motion.

At trial, the State submitted a declaration from Trina Truong, claiming to be the custodian of record for the Department of Licensing (DOL). Within this declaration, Ms. Truong states that she "diligently" searched DOL's records and believes that on the day Mr. Kronich was arrested he "[h]ad not reinstated his/her driving privilege. Was suspended/revoked." (Ex. 2) This was the only evidence of Mr. Kronich's driving status introduced by the State.

A jury convicted Mr. Kronich of driving under the influence (DUI) and third degree driving with a suspended license (DWLS). Mr. Kronich appealed to Superior Court. The Superior Court, Honorable Robert A. Austin, held that the trial court had applied the wrong standard when considering the motion to suppress in that the State bore the burden of showing a valid waiver after an unequivocal request for an attorney. Nevertheless, the Superior Court held that Mr. Kronich had failed to show prejudice because the evidence at trial "focused on the defendant's level of intoxication, the officer's opinion of his level of intoxication, and the lack of confusion on the part of the defendant." (CP 98-99)

The Superior Court also denied Mr. Kronich's appeal on the State's use of ex parte declarations to convict him of DWLS. The Superior Court held that "these records are public records and are kept in the regular course of business by the Department of Licensing, the admission of such records are not precluded by the *Crawford* decision." (CP 99)

C. ARGUMENT

1. Did the Superior Court err when it found the State's failure to provide Mr. Kronich with access to counsel during a DUI arrest to be harmless despite Mr. Kronich's unequivocal request for an attorney?

Due to the transitory nature of evidence in a DUI charge, our Supreme Court has recognized that "the right to counsel under CrRLJ 3.1 is essential to the effective preparation of defense against the charge of DUI." *State v. Templeton*, 148 Wn.2d 193, 212, 59 P.3d 632 (2002)(citing *State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980) and *City of Tacoma v. Heater*, 67 Wn.2d 733, 409 P.2d 867 (1966)). Access to counsel at the preliminary stage of a DUI investigation gives a suspect the opportunity to make an informed decision on "whether to submit to the BAC breath test, arrange for alternative testing, and present other

exculpatory evidence such as video and disinterested third party witnesses.” *Templeton*, 148 Wn.2d at 212.

The rule provides that when a person is arrested, he must be advised as soon as practicable of his right to contact a lawyer. 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 communication with a lawyer.” CrRLJ 3.1(c)(2).

The rule creates a right to counsel above and beyond that granted by either the Fifth or Sixth Amendment right to counsel. *Templeton*, 148 Wn.2d at 211-12, 218. Whereas *Miranda*¹ warnings are intended to inform a person of his right to an attorney, this rule is intended to provide an accused with a meaningful opportunity to contact an attorney. *State v. Kirkpatrick*, 89 Wn. App. 407, 415, 948 P.2d 882 (1997) (quoting AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 7.1 cmt. d at 62 (Approved Draft, 1968)).

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

When a suspect makes an unequivocal request for an attorney, the Fifth Amendment right to counsel under *Miranda* requires police to stop questioning unless and until the suspect subsequently waives his rights by initiating communication. *Kirkpatrick*, 89 Wn. App. at 413. But ending interrogation upon a request for counsel is not enough to meet the requirements of the rule. *Id.* at 415. Instead, the rule requires police to take affirmative steps to put the suspect in contact with an attorney. *Id.* at 414. If the police fail to take this affirmative action, a subsequent waiver of *Miranda* rights will not constitute a waiver of the right to counsel under the rule. *Id.* at 414-15. Instead, once an unequivocal request for an attorney has been 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.” *Id.* at 416.

Kirkpatrick makes it clear that the burden of proving a valid waiver is on the State. In this case, the Superior Court properly found that the State had failed to meet its burden of showing a knowing, intelligent and voluntary waiver because the record indicated an unequivocal request for an attorney without a clear explanation as to why access to counsel was denied.

Unfortunately, the Superior Court then went on to find that despite the State's error, and despite Mr. Kronich's unequivocal request for an attorney, Mr. Kronich had not shown prejudice. The Superior Court's decision on prejudice conflicts with *Templeton*, 148 Wn.2d 193.

In *Templeton*, the Supreme Court found a rule violation because the suspects were not immediately advised of their right to an attorney. After finding a violation of the rule, the Court turned its attention to the issue of prejudice. *Templeton* noted that because this right to counsel is rule-based and not constitutional, a court must apply a "reasonable probabilities" standard and determine if the outcome of the trial would have been materially affected had the error not occurred. *Id.* at 220. In *Templeton*, the court found the defendants had failed to show prejudice because none of the defendants had requested counsel even after they were finally advised of their right. *Id.* at 220-21. As such, there was no evidence that had they been immediately advised of their right to counsel, they would have requested counsel. *Id.*

Here, unlike *Templeton*, the violation occurs because Mr. Kronich was not provided with access to counsel after he unequivocally requested counsel. Prejudice is shown because the

violation effectively denied Mr. Kronich the benefits associated with access to counsel under the rule. As *Templeton* notes, the rule was created so that a suspect can be provided with access to counsel “in order that the suspect may determine whether to submit to the BAC breath test, arrange for alternative testing, and present other exculpatory evidence such as video and disinterested third party witnesses.” *Templeton*, 148 Wn.2d. at 212.

The Superior Court in this case applied the wrong standard. Instead of looking to the exculpatory evidence Mr. Kronich was denied, the court focused on the evidence the State was able to produce: “the evidence at trial focused on the defendant’s level of intoxication, the officer’s opinion of his level of intoxication and the lack of confusion on the part of the defendant.” In essence, the Superior Court sitting in its appellate capacity, was weighing the credibility of the evidence and deciding that Mr. Kronich’s refusal did not play a big part in the jury’s decision. From this reasoning, the Superior Court decided that even if the refusal had been properly suppressed, the outcome of the trial would not have changed.

The Superior Court’s conclusion defeats the purpose of the rule. The rule is intended to give a suspect access to counsel at a

critical stage in the investigation so that *exculpatory evidence may be gathered*. Presumably, the police are not in favor of gathering exculpatory evidence. If the police can keep Mr. Kronich and other defendants from gathering exculpatory evidence with minimum risk to their own evidence, there is no incentive to follow the rule.

Despite Mr. Kronich's unequivocal request to speak to an attorney before providing a breath sample, he was not provided access to one. At the motion to suppress his subsequent refusal, the State failed to introduce any evidence because it believed it had no burden. Under these circumstances, the right to an attorney under CrRLJ 3.1 means nothing if the State's evidence is allowed despite the violation.

2. Did the Superior Court err in holding that 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?

To convict Mr. Kronich of third degree driving with a suspended license, the State submitted an ex parte declaration from a records custodian at Department of Licensing (DOL), certifying that she made a "diligent search of the computer files," and her review leads her to believe that on the alleged violation

date Mr. Kronich “[h]ad not reinstated his/her driving privilege. Was suspended/revoked.” The use of this declaration by the State violated Mr. Kronich’s Sixth Amendment right to confrontation.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, (2004), the United States Supreme Court clarified that the use of ex parte testimonial evidence by the government violates a criminal defendant’s right to confrontation unless the declarant is truly unavailable and has been subject to prior cross examination by the defendant. *Id.*, 124 S. Ct. at 1374. In this case, it is undisputed that the declaration was submitted ex parte and that Mr. Kronich was not provided an opportunity to cross-examine the witness. Consequently, the only issue in deciding whether *Crawford* applies, is determining whether the declaration provided by DOL and submitted by the State constitutes “testimonial” evidence.

The declaration submitted in this case by an employee of DOL constitutes testimonial evidence. While the *Crawford* court declined to provide an inclusive list of what constitutes testimonial evidence, the Court recognized that the historical definition of “testimony” includes “[a] solemn *declaration* or affirmation made for the purpose of establishing or proving some facts.” *Crawford*, 124

S. Ct. at 1364 (*quoting* 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis added)). Other examples of evidence falling within the “core class” of testimonial statements include “extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 1364 (*quoting in part White v. Illinois*, 502 U.S. 346, 365 (1992)).

Under RCW 9A.72.085, DOL’s declaration, signed under penalty of perjury, is the functional equivalent of an affidavit. Nevertheless, upon the State’s urging, the Superior Court below held that the DOL declaration was admissible as a business or public record. In support, the State points out that *Crawford* does not apply to non-testimonial evidence such as business records. *Crawford*, 124 S. Ct. at 1367. The State seizes upon this language to argue that the DOL declaration is a public record, similar to a business record, and admissible under *Crawford*.

However, as the *Crawford* court made clear: if the evidence is testimonial, its ex parte use is prohibited by the Sixth Amendment

notwithstanding any evidence rules to the contrary. *Id.* at 1367 n.

7. The mere fact that the State labels a document as a business or public record does not guarantee its admissibility. Instead, if the so-called business or public record contains testimonial evidence, then its *ex parte* use is prohibited by the Sixth Amendment. If the record is not testimonial, then and only then, is its admissibility governed by the rules of evidence. *Crawford*, 124 S. Ct. at 1367.

Here, the declaration by DOL falls within numerous examples of evidence identified as testimonial by the *Crawford* Court. It is a formal declaration, equivalent to an affidavit, prepared by a government agent under circumstances that would lead the declarant to believe her statement would be available for use at a later trial and given to the prosecutor specifically for that purpose.

Contrary to the State's characterization, *Crawford* does not hold that business and public records are always admissible. Instead, *Crawford* notes that in most instances the confrontation right will not affect the admissibility of business records because business records by their nature are not testimonial. *Crawford*, 124 S. Ct. at 1366. This is true because the business records exception specifically excludes documents created for litigation. *Owens v. Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956). Instead, business

records are simply “[a] record of an act, condition or event. . . made in the regular course of business” RCW 5.45.020. In other words, business records, in their true sense, are created for the purpose of promoting business, and are not testimonial because the record is not made under circumstances that would lead a reasonable declarant to believe the record would be available in a later trial. *Id.* at 1364.

Public records in their true sense are likewise non-testimonial. Public records include “[c]opies of all records and documents on record or on file in the offices of. . . this state...” RCW 5.44.040. In order to be admissible, the records “must contain facts and not 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)).

In *Monson*, our Supreme Court upheld the admission of a certified copy of a driver’s record (“CCDR”) as a public document. *Id.* at 839. The exhibit allowed in *Monson* is different than the exhibit introduced in this case. In *Monson*, the exhibit was a copy of the driver’s record. In this case, the exhibit is another person’s conclusory opinion of Mr. Kronich’s driving record, created after the

declarant exercised judgment and discretion. The DOL declaration is not “a record or document on file” with DOL, but rather a document created at the request of the prosecutor for the sole purpose of establishing a necessary element of the crime at trial. Thus, even under *Monson*, the DOL declaration used in this case would not be admissible under the public records exception.

Instead of being simply a copy of a public record, the DOL declaration submitted by the State in this case is precisely the type of evidence prohibited by the Sixth Amendment. As the *Crawford* court noted, the “[i]nvolvement 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.” *Crawford*, 124 S. Ct. at 1367 n. 7.

Under *Crawford*, the test for admitting ex parte evidence is no longer whether the evidence is otherwise reliable under a firmly established hearsay exception. Instead, the test is whether the evidence is testimonial. The business and public records exception will survive, but only to the extent that such records contain nontestimonial evidence.

Mr. Kronich was convicted of a crime without ever confronting the witness testifying against him. His conviction for driving with a suspended license was obtained by the State in violation of the Sixth Amendment and must be reversed.

D. CONCLUSION

Mr. Kronich's motion to suppress his refusal to take a BAC test should be granted and this matter remanded for trial. Mr. Kronich made an unequivocal request for an attorney, and the State failed to meet its burden of showing a knowing, intelligent and voluntary waiver of the right to counsel.

In addition, Mr. Kronich's conviction for driving with a suspended license was obtained in violation of his Sixth Amendment right to confrontation and should be remanded for a new trial.

Respectfully submitted, January 31, 2005.

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

Tracy Staab, WSBA #23321
Attorney for Petitioner

Appendix to
Petitioner's
Appellate
Brief

WASHINGTON STATE PATROL
DUI ARREST REPORT

CASE/EVIDENCE NUMBER
00-336364

SUBJECT'S NAME (LAST, FIRST, MI) **KRONICH, Kyle Keith** SEX M F DATE OF BIRTH **11-16-63** DATE / TIME OF ARREST **11-15-00, 025700H**

DUI INTERVIEW

DO YOU HAVE ANYTHING IN YOUR MOUTH? YES NO MOUTH CHECKED? YES NO TIME? **2326** ANY FOREIGN SUBSTANCES FOUND? YES NO EXPLAIN: **no**

1. DO YOU HAVE ANY PHYSICAL DEFECTS? EXPLAIN: YES NO

2. DO YOU LIMP? YES NO

3. ARE YOU SICK / INJURED? EXPLAIN: YES NO

4. UNDER CARE OF A DOCTOR OR DENTIST? YES NO

5. ARE YOU DIABETIC / EPILEPTIC? YES NO

6. DO YOU TAKE INSURTY? YES NO 7. HAVE YOU TAKEN ANY MEDICINES / DRUGS IN THE PAST 24 HRS? YES NO

7A. PRESCRIPTION YES NO

7B. NON-PRESCRIPTION YES NO

7C. LAST DOSE 7D. QUANTITY

7E. COCAINE? YES NO MARIJUANA? YES NO OTHER

8. DO YOU HAVE IMPAIRED VISION? YES NO 8A. DO YOU WEAR CORRECTIVE LENSES? YES NO

8B. WERE YOU WEARING THEM WHEN YOU WERE STOPPED / BEFORE COLLISION? YES NO

9. DID YOU WORK TODAY? YES NO 10. TIME YOU GOT OFF WORK?

11. HOURS OF SLEEP LAST NIGHT? 12. WERE YOU DRIVING THE VEHICLE? YES NO

13. ANYTHING MECHANICALLY WRONG WITH THE VEHICLE? YES NO

14. HAVE YOU BEEN INJURED OR INVOLVED IN ANY COLLISION(S) IN THE PAST 24 HOURS? YES NO

15. HAVE YOU HAD ANY ALCOHOL TO DRINK SINCE BEING STOPPED / THE COLLISION? YES NO

15A. WHAT? 15B. HOW MUCH? 16. TIME COLLISION OCCURRED

17. WHERE WERE YOU GOING BEFORE STOPPED / THE COLLISION?

18. WITHOUT LOOKING, WHAT TIME DO YOU THINK IT IS? (ACTUAL TIME)

19. WHAT STREET / HIGHWAY WERE YOU ON? 20. DIRECTION OF TRAVEL

21. STARTED FROM? 22. TIME STARTED?

23. DAY OF THE WEEK? Mon Tues Wed Thurs Fri Sat Sun

24. WHAT CITY / COUNTY ARE YOU IN NOW? 25. WHAT IS THE DATE?

26. HAVE YOU BEEN DRINKING ALCOHOLIC BEVERAGES? YES NO 26A. WHAT HAVE YOU BEEN DRINKING?

26B. HOW MUCH? 26C. WHEN DID YOU START?

27. WHO HAVE YOU BEEN DRINKING WITH? 28. WHERE WERE YOU DRINKING?

29. TIME OF LAST DRINK? 30. DO YOU BELIEVE YOUR ABILITY TO DRIVE WAS AFFECTED BY YOUR ALCOHOL AND / OR DRUG USAGE?

DESCRIPTIONS

1. ATTITUDE COOPERATIVE MOOD SWINGS ARGUMENTATIVE CRYING LAUGHING OTHER:

2. COORDINATION GOOD FAIR POOR FUMBLER FOR DRIVER'S LICENSE OTHER:

3. CLOTHES ORDERLY SOILED - EXPLAIN OTHER - EXPLAIN SHOES (Describe) **PAINT ON OVERS**

4. EYES NORMAL WATERY SLEEPY BLOODSHOT PUPILS DILATED PUPILS CONSTRICTED

5. FACIAL COLOR NORMAL FLUSHED PALE OTHER

6. ODOR OF INTOXICANTS ON BREATH NONE FAINT MEDIUM STRONG OBVIOUS OTHER

7. SPEECH GOOD FAIR REPETITIVE FAST SLURRED

8. OFFICER'S OPINION (of subject's impairment due to use of alcohol/drugs) SLIGHT OBVIOUS EXTREME

9. SUBJECT'S NATIVE LANGUAGE ENGLISH OTHER

9A. SUBJECT APPEARED TO UNDERSTAND INSTRUCTIONS YES NO

9B. INTERPRETER REQUESTED? YES NO

10. ATTORNEY REQUESTED? YES NO

10A. ATTORNEY CONTACTED? YES UNABLE TIME: **Did not want to call**

ATTORNEY'S NAME: **Did not want to call**

ATTORNEY'S PHONE NO.:

11. PBT READING **N/A** 12. PASSENGERS' NAME(S) ADDRESS(ES) AND PHONE NO.(S) **N/A**

I was certified to operate the BAC DATAMASTER PBT on the date of this test.

I observed the subject during the entire observation period.

During that time, the subject did not vomit, eat, drink, smoke, or place any foreign substance in his/her mouth.

On the date, time and location of this arrest, I had authority to arrest pursuant to my agency's jurisdiction or a mutual aid agreement.

Exhibit 1



STATE OF WASHINGTON
DEPARTMENT OF LICENSING
P. O. Box 9030, Olympia, WA 98507-9030

December 19, 2000

tnt

Having been appointed by the Director of Licensing as legal custodian of driving records of the State of Washington, I certify that such records are official, and are maintained in the office of the Department of Licensing, Olympia, Washington. I certify that all information contained in this certificate pertains to the driving record of:

Lic. #: KRONIKK376PW
Name: KRONICH, KYLE KEITH
1708 N PARK BASEMENT
SPOKANE, WA 99212

Birthdate: October 16, 1963
Eyes: HAZ Sex: M
Hgt: 5 ft 10 in Wgt: 175 lbs
License Issued: September 29, 1987
License Expires: October 16, 1989

I certify under penalty of perjury that the attached document(s) herein is/are a true and accurate copy of the document(s) in the official record of the above named driver. I further certify that after a diligent search of the computer files the said official record indicates on November 15, 2000, the following statements apply to the status of the above named person:

Had not reinstated his/her driving privilege. Was suspended/revoked.

Trina Truong
Custodian of Records
Place: Olympia, Washington
Date: December 19, 2000



Exhibit 2