

NO. 34833-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SINE TVEIT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Ken Williams, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION TWO
NO. 34833-1-II
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TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR	1
Issue Pertaining to Assignment of Error.....	1
B. STATEMENT OF THE CASE.....	1
1. Procedural Facts.....	1
2. Substantive Facts	3
C. ARGUMENT	5
THE ADMISSION OF THE DEPARTMENT OF LICENSING LETTER VIOLATED TVIET’S SIXTH AMENDMENT RIGHT TO CONFRONTATION.....	5
1. The DOL letter falls within the core class of testimonial evidence recognized under <i>Crawford</i>	6
2. The DOL letter was not admissible as a business or public record.	8
D. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Owens v. Seattle,
49 Wn.2d 187, 299 P.2d 560 (1956)..... 9

State v. Chapman,
98 Wn. App. 888, 991 P.2d 126 (2000)..... 10

State v. Davis,
154 Wn.2d 291, 111 P.3d 844 (2005)..... 11

State v. Kronich,
131 Wn. App. 537, 128 P.3d 119,
review granted, 157 Wash.2d 1008 (2006)..... 6, 8, 10

State v. Monson,
113 Wn.2d 833, 784 P.2d 485 (1989)..... 10

State v. N.M.K.,
129 Wn. App. 155, 163, 118 P.3d 368 (2005),
review granted,
State v. Kirkpatrick,
157 Wn.2d 1001 (2006)..... 6, 8, 9

FEDERAL CASES

Crawford v. Washington,
541 U.S. 36, 124 S. Ct. 1354,
158 L. Ed. 2d 177 (2004)..... 3, 5-8, 10

U.S. v. Cervantes-Flores,
421 F.3d 825 (9th Cir. 2005) 9

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

U.S. v. Gonzalez-Lopez,
___ U.S. ___, 126 S. Ct. 2557,
165 L. Ed. 2d 409 (2006) 11

U.S. v. Rueda-Rivera,
396 F.3d 678 (5th Cir. 2005) 9

RULES, STATUTES AND OTHERS

ER 902(d)..... 9

RCW 46.20.342(1)(a) 2

RCW 46.61.502(1)(b) 2

RCW 5.44.040 9

RCW 5.45.020 9

RCW 7.21.010 2

RCW 7.21.040(1)(2)(a)(b)(5) 2

RCW 9A.56.075 2

RCW 9A.72.085 7

RCW 9A.76.170(1)(3)(c)..... 2

U.S. Const. amend. 6 1, 5, 8, 10-12

A. ASSIGNMENT OF ERROR

The trial court erred in admitting a copy of a certified letter from the Washington State Department of Licensing in violation of the Confrontation Clause of the Sixth Amendment.

Issue Pertaining to Assignment of Error

Appellant was charged, among other things, with first degree driving while license suspended. Did the trial court's admission of the Department of Licensing letter violate Appellant's Sixth Amendment right to confront witnesses where the letter was prepared ex parte for the sole purpose of proving an essential element of the crime, contained conclusory opinions regarding Appellant's driving status, and Appellant was not provided an opportunity to cross-examine the DOL employee who prepared the letter?

B. STATEMENT OF THE CASE

1. Procedural Facts

Sine Tveit was charged by second amended information, filed March 21, 2006, with taking a motor vehicle without owner's permission (Count I); first degree driving while license suspended (DWLS) (Count II); driving under the influence (Count III); contempt of court (Count IV);

and bail jumping (Count V).¹ CP 55-56; RCW 9A.56.075; RCW 46.20.342(1)(a); RCW 46.61.502(1)(b); RCW 7.21.010, 7.21.040(1)(2)(a)(b)(5); RCW 9A.76.170(1)(3)(c).

Tveit brought several pre-trial motions, including a motion in limine to exclude a certified letter from Denise Bausch, Custodian of Records for the Department of Licensing (DOL), attached to a certified copy of Tveit's driver's record (CCDR). CP at 72. To convict Tveit of DWLS, the state was required to prove that on the date of her arrest, Tveit was driving a vehicle while her license was suspended or revoked by the DOL. RCW 46.20.342. Bausch's declaration stated that she performed a "diligent search" of DOL records and, based on those records, she believed that on the day of Tveit's arrest, Tveit "*[h]ad not reinstated his/her driving privilege. Was suspended/revoked in the first degree.*" Supp. Ex. #2 (emphasis added).² The letter further opined that Tveit was "*not eligible to reinstate his/her driving privilege*" on the date of arrest. Supp. Ex. #2 (emphasis added).

¹ The bail jumping count was severed for trial purposes due to a potential conflict with Tveit's trial counsel. RP (April 21, 2006) 5-6. The verbatim report of proceedings are referred to by date in this brief.

² The certified letter was state's Exhibit 2 at trial and has been designated as Supp. Ex. #2 on appeal. A copy of the letter is attached to this brief as an appendix for the court's reference.

In her motion in limine, Tveit argued that the certified letter contained testimonial hearsay statements that were inadmissible under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). CP 72. The court admitted both the certified letter and the CCDR. RP (Jan. 9, 2006) 18; RP (March 22, 2006) 77.

On March 23, 2006, a jury found Tveit guilty as charged on Counts I-IV. CP 18-19. The court imposed a standard range sentence. CP 11. This appeal timely follows. CP 5.

2. Substantive Facts

On September 4, 2005, at around noon, Jefferson County Sheriff's Deputy Gordon Tamura received a dispatch regarding a female driving a truck heading eastbound on Highway 101 in the Diamond Point area. RP (March 22, 2006) 46. When Deputy Tamura caught up to the truck, a brown Ford pick-up, and pulled over, he and another officer observed a female, Tviet, standing outside the driver's side door of the truck. RP (March 22, 2006) 54-55, 102. A male also was standing near the truck. RP (March 22, 2006) 55. As the officers stepped out of their vehicles, Tveit began running. RP (March 22, 2006) 55. They gave chase and ordered her to the ground. RP (March 22, 2006) 57.

According to Deputy Tamura, Tveit's clothing and hair were in "disarray[]" and she had a "prevalent" odor of alcohol about her. RP

(March 22, 2006) 57-58. Additionally, her speech was slurred and her eyes were “red, bloodshot, [and] watery.” RP (March 22, 2006) 59. Deputy Tamura did not give Tveit any field sobriety tests (FSTs) and could not recall whether he offered her a Breathalyzer examination. RP (March 22, 2006) 62, 100.

After Deputy Tamura placed Tveit in his vehicle, Larry Bennett, the owner of the Ford truck arrived at the scene. RP (March 22, 2006) 63. Deputy Tamura overheard Tveit asking Bennett “to not file” a police report. RP (March 22, 2006) 64. Deputy Tamura admitted that he had not seen Tveit driving the truck. RP (March 22, 2006) 101.

Bennett testified at trial that he owned the Ford pick-up truck located at the scene and that he had not given anyone permission to drive it. RP (March 22, 2006) 106. He further testified that the truck was not equipped with an ignition interlock device.³ RP (March 22, 2006) 106.

Tveit’s daughter, Crystal Brown, also testified at trial. RP (March 22, 2006) 108-109. Brown stated that she called police when she observed someone driving Bennett’s truck on the day in question, but that she had not seen who actually was driving the vehicle. RP (March 22, 2006) 110-11. Tveit did not testify.

³ A previous judgment and sentence had ordered Tveit to drive only a motor vehicle equipped with a functioning ignition interlock device. RP (March 22, 2006) 79; the alleged violation of this order was the basis for the contempt charge against her. CP 56.

C. ARGUMENT

THE ADMISSION OF THE DEPARTMENT OF LICENSING
LETTER VIOLATED TVIET'S SIXTH AMENDMENT RIGHT
TO CONFRONTATION.

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” In *Crawford*, the U.S. Supreme Court clarified that this Amendment commands “not that 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. To that end, the Court held that the use of ex parte testimonial evidence by the government in criminal trials violates a defendant’s right to confrontation unless (1) the government has established the witness’s unavailability and (2) the defendant has had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 59.

In this case, there is no question that the DOL letter was created and submitted ex parte, and there was no showing that the declarant, Bausch, was unavailable for trial. Nor was Tveit provided with an opportunity to cross-examine Bausch. Thus, the central issue before this court is whether Bausch’s declaration constitutes “testimonial” evidence. If it does, it is categorically prohibited by the Confrontation Clause. *Crawford*, 541 U.S. at 51.

Divisions I and III of this court have previously upheld, under *Crawford*, the admission of a certified DOL letter similar to the one at issue in this case. See *State v. N.M.K.*, 129 Wn. App. 155, 163, 118 P.3d 368 (2005), review granted, *State v. Kirkpatrick*, 157 Wn.2d 1001 (2006); *State v. Kronich*, 131 Wn. App. 537, 546-47, 128 P.3d 119, review granted, 157 Wash.2d 1008 (2006). Because the Washington State Supreme Court has granted review of these cases, Tveit raises this issue to preserve her right to potential relief, and she urges this court to find that the admission of the DOL letter violated *Crawford*.

To establish that Tveit drove without a license, the state presented Bausch's declaration that, after searching DOL records, she believed Tveit "[h]ad not reinstated his/her driving privilege"; "[w]as suspended/revoked in the first degree"; and "was not eligible to reinstate his/her driving privilege" on the date of arrest. Supp. Ex. #2. This declaration, while ostensibly the cover sheet for authentication of the CCDR, contained ex parte opinions and conclusions tantamount to testimony against Tveit.

1. The DOL letter falls within the core class of testimonial evidence recognized under *Crawford*.

The *Crawford* Court defined "testimony" as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting Webster, *An American Dictionary of*

the English Language (1828)). Under this definition, an accuser who “makes a formal statement to government officers bears testimony.” *Crawford*, 541 U.S. at 51.

Although the *Crawford* Court did not comprehensively define “testimonial,” it acknowledged the existence of a “core class” of testimonial statements: “*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; “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.” *Crawford*, 541 U.S. at 51-52 (internal citations omitted).

Under any of these formulations, Bausch’s declaration contained testimonial statements. Because the letter was certified under penalty of perjury, it is tantamount to an affidavit under Washington law.⁴ And it

⁴ RCW 9A.72.085 provides: “Whenever . . . any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person’s sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement,

was prepared not only with a reasonable expectation that it would be used prosecutorially, but for the sole purpose of proving an essential element of the alleged crime, i.e., that Tveit drove with a suspended or revoked license. Likewise, the declaration contains extrajudicial statements in a formalized testimonial document. Absent a showing that Bausch was unavailable to testify at trial and that Tveit had an opportunity to cross-examine Bausch, the letter's admission violated Tveit's Sixth Amendment right to confront witnesses against her.

2. The DOL letter was not admissible as a business or public record.

In both *N.M.K.* and *Kronich*, Divisions I and III found that, although the Confrontation Clause generally prohibits the use of ex parte government statements, DOL letters similar to the letter at bar fall under the public records hearsay exception, which parallels the business record exception. *N.M.K.*, 129 Wn. App. at 163⁵; *Kronich*, 131 Wn. App. at 546-47. Because *Crawford* states that business records are non-testimonial, the *N.M.K.* and *Kronich* Courts found that the letters were non-testimonial as well. *Crawford*, 541 U.S. at 56; *N.M.K.*, 129 Wn. App. at 163; *Kronich*,

declaration, verification, or certificate, which: (1) Recites that it is certified or declared by the person to be true under penalty of perjury; (2) Is subscribed by the person; (3) States the date and place of its execution; and (4) States that it is so certified or declared under the laws of the state of Washington.”

⁵ The court in *N.M.K.* held that the DOL letter in that case fell under the absence of a public record hearsay exception. *N.M.K.*, 129 Wn. App. at 163.

131 Wn. App. at 546-47. *See also U.S. v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005); *U.S. v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005).

This reasoning is in error and should be rejected. The DOL letter here clearly is not a business record. A business record is 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. Bausch’s letter is not a record that the DOL maintains in the normal course of its business -- it was a document prepared in anticipation of trial to prove that Tveit drove with a suspended or revoked license.⁶ *See Owens v. Seattle*, 49 Wn.2d 187, 194, 299 P.2d 560 (1956) (documents prepared specially for trial are not made in the ‘regular course of business’).

Nor is the letter a public record. 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 general, such public documents are admissible as long as they are certified under the official seals of the officers who have custody of them. RCW 5.44.040. A public record certified in this manner is self-authenticated. ER 902(d); *N.M.K.*, 129 Wn. App. at 161. But not all certified public documents are admissible under the public

⁶ The letter is dated December 7, 2005, approximately 3 months after Tveit was arrested for DWLS. Supp. Ex. #2.

records hearsay exception. To be admissible as a public record, a document must contain facts “rather than *conclusions* that involve judgment, discretion or the *expression of opinion*.” *State v. Chapman*, 98 Wn. App. 888, 891, 991 P.2d 126 (2000) (citing *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989)) (emphasis added).

While the CCDR itself may well constitute a public record, the DOL letter does not. The letter goes beyond mere authentication of the CCDR and conveys Bausch’s conclusory opinions based on her perception of Tveit’s driving record, i.e., that Tveit’s driving privilege “[h]ad not [been] reinstated” and “[w]as suspended/revoked”. Supp. Ex. #2. Moreover, the letter offers no foundation for Bausch’s opinions. As astutely noted by the dissent in *Kronich*:

How does this DOL employee conclude that the ‘privilege has “not [been] reinstated”? *How* does she conclude that the privilege is still “suspended/revoked”? Whatever actions and thought processes leading up to this statement, it is a testimonial statement. ... The statement tells us what the records mean, and what the witness concludes from them, not whether there *are* records or what, if any, records there are--or are not. The statement is therefore testimonial, it, therefore, implicates the Sixth Amendment confrontation clause under *Crawford*.

Kronich, 131 Wn. App. at 555 (Baker, J., *concurring in part and dissenting in part*).

The DOL letter should be viewed for what it is: testimonial hearsay prepared by a government employee for the purpose of establishing an essential element of DWLS. Tveit was not afforded an opportunity to cross-examine Bausch regarding her opinions. The admission of the letter violated her right of confrontation. While requiring the records custodian to testify regarding her opinions may pose an inconvenience to the state, Tveit's constitutional right must be given preference and her DWLS conviction must be reversed.

Finally, reversal is required in this case regardless of whether a violation of the Confrontation Clause is subject to harmless error analysis or is structural error. *See U.S. v. Gonzalez-Lopez*, ___ U.S. ___, 126 S. Ct. 2557, 2564-65, 165 L. Ed. 2d 409 (2006) (holding that a violation of the Sixth Amendment right to counsel of choice is structural error, requiring automatic reversal). Under a harmless error analysis, the state must prove that the constitutional violation was harmless beyond a reasonable doubt. In making this determination, the court considers whether "the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt." *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005). Here, Bausch's declaration provided the only evidence that Tveit's license was suspended or revoked on the date she was arrested. Consequently, the admission of the DOL letter was not harmless.

D. CONCLUSION

The trial court erred in admitting the DOL letter in violation of Tveit's Sixth Amendment right to confront witnesses against her. The only independent prima facie evidence of Tveit's driving status on the record is Bausch's letter; once properly excluded, the evidence is insufficient to support her conviction of DWLS. This court should reverse and dismiss the conviction.

DATED this 30th day of November, 2006.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANELISE E. ELDRED

WSBA No. 35207

Office ID No. 91051

Attorneys for Appellant

Appendix



STATE OF WASHINGTON
DEPARTMENT OF LICENSING

P. O. Box 9030 • Olympia, Washington 98507-9030

December 7, 2005

dcb

The attached document(s) is/are a true and accurate copy of the document(s) maintained in the office of the Department of Licensing, Olympia, Washington. All information contained in this report pertains to the driving record of:

Lic. #: TVEITSL354J5
Name: TVEIT, SINE LAUREE
1512 OLD BLYN HWY
SEQUIM WA 98382

Birthdate: April 25, 1965
Eyes: GRN Sex: F
Hgt: 4 ft 11 in Wgt: 103 lbs
License Issued: December 1, 1989
License Expires: April 25, 1992

After a diligent search of the computer files, the official record indicates on September 4, 2005, the following statements apply to the status of the above named person:

Had not reinstated his/her driving privilege. Was suspended/revoked in the first degree. Subject was not eligible to reinstate his/her driving privilege on the above date of arrest.
Had not been issued a valid Washington license.

Attachments: (if any)

Order of revocation, hearing request and return receipt July 9, 2003

Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington, I certify under penalty of perjury that such records are official, and are maintained in the office of the Department of Licensing, Olympia, Washington.

Denise C. Bausch
Custodian of Records
Place: Olympia, Washington
Date: December 07, 2005



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 34833-1-II
)	
SINE TVEIT,)	
)	
Appellant.)	

FILED
COURT OF APPEALS
NOV 30 2006
PM 1:11
CLALLAM COUNTY
BY [Signature]

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF NOVEMBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] LAUREN ERICKSON
CLALLAM COUNTY PROSECUTOR'S OFFICE
223 E. 4TH STREET
SUITE 11
PORT ANGELES, WA 98362

- [X] SINE TVEIT
CLALLAM COUNTY JAIL
223 E. 4TH STREET
BOX 20
PORT ANGELES, WA 98362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER, 2006.

x *P. Mayovsky*