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NO. 54767-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

N.K.,

Appellant.

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

The Honorable Leroy McCullough, Judge

2007 MAR 21 PM 4:52
A

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of Article 1, § 7 of the Washington constitution, the trial court erred when it admitted certain prearrest statements that N.K. made to a police officer.

2. The trial court erred when it entered its "Conclusions of Law" regarding its ruling on the CrR 3.5 pretrial motion to admit certain pretrial statements obtained from N.K. by a police officer.

3. In violation of the Confrontation Clause of the Sixth Amendment, the trial court erred at the fact-finding hearing when it admitted a certified copy of the Department of Licensing driving record for appellant N.K.¹

4. The trial court erred when it entered its Finding of Fact #4 for the Fact-finding Hearing, which stated, "The Respondent did not have a motor vehicle operator's license at the time [of the charged offenses]."

5. The trial court erred when it entered its Conclusion of Law #2 for the Fact-finding Hearing, which stated, "The State has proven the following elements of No Valid Operator's License, as charged, beyond a reasonable doubt . . . That the respondent did operate a motor vehicle upon a highway without a valid Washington State driver's license."

¹ N.K. was born on August 28, 1988. CP 1.

6. The trial court erred when it entered a disposition order on Count II, No Valid Operator's License.

Issues Pertaining to Assignments of Error.

1. Where a police officer investigating a reckless driving incident had no independent reason to investigate the passenger of an automobile, but asked the passenger to exit the car and then questioned the passenger, must evidence obtained as a result of this unconstitutional seizure be suppressed? (Assignments of Error #1, #2, #4 and #5.)

2. Under Crawford v. Washington,² the state may not introduce testimonial statements of a non-testifying witness unless (1) the state has established the witness's unavailability and (2) the defendant had a prior opportunity to cross-examine the witness. Although the state failed to introduce evidence fulfilling each of these requirements, it was permitted to use the statement of a non-testifying witness at the juvenile fact-finding hearing. Did this procedure violate N.K.'s Confrontation Clause rights? (Assignment of Error #3.)

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

B. STATEMENT OF THE CASE

1. Procedural History

On December 23, 2003, appellant N.K. was charged with Count I, Operating a Motor Vehicle with No Valid Operator's License and Count II, Reckless Driving based upon an incident that occurred on September 8, 2003. CP 1-2. The court conducted fact-finding hearings on the allegations on June 29, July 9, and July 16, 2004. CP 14, 1RP 1, 17, 79.³ The court found that N.K. had committed both offenses and imposed six months of community supervision, together with 21 hours of community service at the disposition hearing. CP 8-9; 1RP 113. This timely appeal followed. CP 22.

2. Substantive Facts

a. CrR 3.5 Hearing

Officer Osterdahl responded to a report of reckless driving in a residential neighborhood in Enumclaw. 1RP 45. During a subsequent area check, he saw the suspect car, a Honda, parked in a McDonald's lot about four blocks away from the reported incident. Id. Osterdahl parked behind the Honda, but purportedly in such a way that he did not block the car's

³ The record of proceedings is designated as follows: 1RP (3 volumes sequentially numbered) - Fact-finding and Disposition Hearings, June 29, July 9, and July 16, 2004; 2RP - State's Motion to Continue, June 25, 2004.

egress from the parking lot. At the time, four young men were nearby: two were standing outside the car, N.K. was seated in the front passenger seat, and the fourth young man was sitting in the back seat. 1RP 45-46, 49. Osterdahl asked the two inside the car to get out, and said it was "possible" that he then patted down each of the four associated with the Honda. 1RP 47, 50. Osterdahl thought it "very possible" that, for his safety, he had all four stand in front of him while he spoke to them. 1RP 50.

Osterdahl asked each of the four for their names and dates of birth, and they all complied. Osterdahl said that they were not under arrest, and that he had not put any of them in handcuffs. Nor had the officer ordered them to place their hands on the Honda in an arrest-like pose. 1RP 46-47. Osterdahl did not read N.K. his Miranda⁴ rights before questioning him. 1RP 48. It also does not appear that Osterdahl told each of the four that they were free to leave at any time.

N.K. asserted pretrial that his statements to Osterdahl should be suppressed because they were not preceded by a valid waiver of his Miranda rights, which was required because a reasonable person would not have felt free to depart from the encounter with Osterdahl. 1RP 55-56. The court

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

denied the motion, reasoning that there was no custodial interrogation. 1RP

57-58. The court subsequently entered the following findings:

1. FACTS

On September 8, 2003, Officer Osterdahl contacted the Respondent, who was sitting in the passenger seat of a Honda in the parking lot of a McDonald's in Enumclaw, Washington. The Officer parked his patrol car behind the Honda, but did not block its exit to the front. The officer asked the Respondent to exit the car, and asked his name and birthdate, and inquired about an incident at Jewell Street. The Respondent provided his name and birthdate, *admitted driving on Jewell Street, and admitted that he did not have a driver's license.*⁵

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S [sic] STATEMENTS:

The Statements the respondent made to Officer Osterdahl are admissible in the State's case-in-chief. These statements are admissible because Miranda was not applicable: the respondent was not in custody and the questions did not amount to interrogation.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

CP 18 (emphasis added).

⁵ Although the italicized final two clauses of this sentence are not supported by evidence introduced during the CrR 3.5 hearing, these facts were subsequently presented during the fact-finding hearing. 1RP 58-59. N.K. does not challenge these findings in this appeal.

b. Confrontation Clause Evidence

In order to prove that N.K. drove without a license, the state sought admission of a document from the Department of Licensing, a Certified Copy of his Driver's Record (CCDR), which indicated that the Department could not locate any record for N.K.'s name and date of birth. 1RP 72; Supp. CP ____, Ex. #2 (Certified Copy of Driving Record). N.K. objected to the admission of the document as inadmissible hearsay. In its argument to the contrary, the state relied upon State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989), which held that a CCDR was admissible under pertinent hearsay exceptions and did not violate the Confrontation Clause. 1RP 72-74. The court admitted the CCDR. 1RP 75.

c. Fact-Finding

Rodger Miller testified that he lives on Jewell Street in a residential neighborhood in Enumclaw, Washington. On September 8, 2003, he saw someone drive above the speed limit in a black Honda down his street, and then across his neighbor's front lawn. The Honda drove down Jewell Street towards Rocky Johnson's house. Miller lost sight of the Honda, but five minutes later, it came back around the corner. Miller identified N.K. as the person who was driving the Honda the first time Miller saw the car.

The second time Miller saw the Honda, N.K. was in the front passenger seat. 1RP 21-23, 27-29, 32-33.

Johnson testified that he also lived on Jewell Street and that on September 8, 2003, he saw a black Honda speed by his house. He yelled at the car to slow down, and walked towards it. The car stopped momentarily, and Johnson saw that N.K. was driving. 1RP 5-8. Johnson had seen N.K. before in the neighborhood. 1RP 14. Johnson -- but not Miller -- later followed the police to McDonald's and identified N.K. as the driver. 1RP 9, 60, 65.

While in the McDonald's parking lot, and in response to Osterdahl's questions, N.K. stated his full name, date of birth, admitted that he did not have a driver's license and that he had been driving the Honda on Jewell Street. 1RP 59.

The court found that N.K. had committed both offenses, and entered the following pertinent findings of fact and conclusions of law:

I. FINDINGS OF FACT

. . . 4. The Respondent did not have a motor vehicle operator's license at the time [of the charged offenses].

. . . 8. The Respondent admitted to Officer Osterdahl that his name was Nathan Kirkpatrick, that his date of birth was August 28, 1988, that he did not have an operator's license, and that he was driving on Jewell Street . . .

II. CONCLUSIONS OF LAW

. . . 2. The State has proven the following elements of No Valid Operator's License, as charged, beyond a reasonable doubt . . . That the respondent did operate a motor vehicle upon a highway without a valid Washington State driver's license.

CP 15.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ADMITTED N.K.'s CUSTODIAL STATEMENTS AT THE FACT-FINDING HEARING, BECAUSE HE WAS ILLEGALLY SEIZED BEFORE BEING QUESTIONED BY OFFICER OSTERDAHL.

Article 1, § 7 of the Washington State Constitution requires that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." To determine whether a warrantless officer-citizen encounter constitutes a seizure -- that is, an unconstitutional intrusion on the citizen's private affairs -- a court will review whether

considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.

State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). However, car "passengers are unconstitutionally detained when an officer requests identification 'unless other circumstances give the police independent cause to question [them].'" Id., quoting State v. Larson, 93 Wn.2d 638, 642, 611

P.2d 771 (1980). This rule persists because "a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene as does a pedestrian." 151 Wn.2d at 697. If a passenger is seized improperly, "evidence obtained as a result . . . must be suppressed." 151 Wn.2d at 699.

Where the passenger is a juvenile, a court's analysis of whether the juvenile believed he was free to leave necessarily becomes more complex. For example, in the context of determining whether a juvenile validly waives his Miranda rights, Washington courts consider "a number of factors including the age, intelligence and experience of the juvenile." State v. Prater, 77 Wn.2d 526, 534, 463 P.2d 640 (1970).

Here, Osterdahl was investigating a reckless driving incident and by the time he encountered the Honda, two young men were standing outside the car. N.K. was in the front passenger seat. The trial court did not consider the age, intelligence or experience of N.K. when making its determination of whether N.K. had been seized, possibly because *the state never put any of this information in the record*. However, even without information about N.K.'s age, intelligence and experience, it is clear that Osterdahl had no valid basis for suspecting N.K. at the time he encountered him.

The record is devoid of any information that caused Osterdahl to suspect that N.K., an obvious Honda passenger, was the likely suspect rather than either of the two young men standing outside the car. Instead, Osterdahl failed to state any reason for asking both passengers to get out of the Honda and questioning them. Under Rankin analysis, Osterdahl seized N.K., who would not reasonably have felt free to leave at that time. As this seizure was an improper interference with the juvenile's private affairs, all of N.K.'s statements in response to Osterdahl's questions following the seizure must be suppressed.⁶ 151 Wn.2d at 699.

2. ADMISSON OF THE CERTIFIED COPY OF N.K.'S DRIVING RECORD VIOLATED HIS SIXTH AMENDMENT CONFRONTATION RIGHTS.

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 v. Washington, the Court held that testimonial statements may not be introduced against the defendant unless (1) the Government has established the witness's unavailability *and* (2) the defendant has had a prior opportunity to cross-examine the witness. 541 U.S. 36, 124 S. Ct. 1354,

⁶ Osterdahl's questions were designed to elicit incriminating responses, as they were not restricted to names and addresses: Osterdahl asked each young man's birth date as well.

1365, 1369, 158 L. Ed. 2d 177 (2004). In so holding, the Court rejected the Confrontation Clause analysis set forth in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), stating that "the unpardonable vice" of the Roberts Court's reliability analysis is "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 124 S. Ct. at 1371.⁷ Crawford controls this case.

Here, the state utterly failed to establish witness unavailability before admitting the CCDR.⁸ The deputy prosecutor never asked any questions about the availability of any Department of Licensing records custodian to present testimony at the fact-finding hearings. Similarly, there was no evidence that the records custodian had been cross-examined on the driving record issue before the hearing. Thus, the admission of the CCDR violated N.K.'s Confrontation Clause rights.

The state's counterargument on appeal may mirror its argument below, and rely upon State v. Monson, 113 Wn.2d 833, 784 P.2d 485

⁷ Roberts held that hearsay is admissible only when a witness is unavailable, and the hearsay bears adequate "indicia of reliability." 448 U.S. at 66.

⁸ Crawford was decided more than a month before the fact-finding commenced on June 29, 2004.

(1989). However, such reliance would be misplaced because Monson is no longer valid law. Monson relied upon Ohio v. Roberts analysis.

In Monson, the Court squarely addressed the issue of whether admission of an individual's CCDR at trial violated the Confrontation Clause. 113 Wn.2d at 839. Finding that the Confrontation Clause is not violated when a CCDR is admitted into evidence, the Court noted:

Roberts did not later establish a rule that unavailability must be shown in each instance for hearsay to be admissible. Instead, in Roberts, 448 U.S. at 66, 100 S. Ct. at 2539, the court said that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause *normally* requires a showing that he is unavailable." (Italics ours.) That this is not an absolute requirement is shown by the Court's decision in United States v. Inadi, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986), where the Court held that the confrontation clause does not require a showing of unavailability as a condition to admission of out-of-court statements of a nontestifying coconspirator, when the statements otherwise satisfy Fed.R.Evid. 801(d)(2)(E).

113 Wn.2d at 842. As indicated above, the Supreme Court rejected this analysis in Crawford. Monson is no longer good law. Furthermore, this constitutional error is not harmless.

At the fact-finding hearing, the state presented two pieces of evidence that established N.K. had no driver's license. The first was the CCDR, which should be excluded. The second was N.K.'s own statement. However, the court cannot consider a confession unless independent prima

facie evidence of the corpus delicti of the crime exists in the record. See State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). Because no independent prima facie evidence of N.K.'s driving status exists separate from his statements to Osterdahl, admission of the CCDR was harmful error. The disposition must be reversed and dismissed.

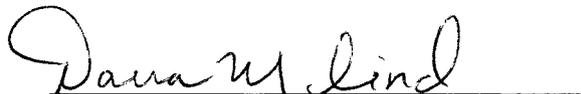
D. CONCLUSION

For the above reasons, N.K. respectfully requests this court to reverse his adjudication for No Valid Operator's License, because there is insufficient evidence to support it once the CCDR is properly excluded.

DATED this 21st day of March, 2005.

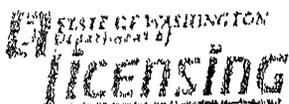
Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DANA M. LIND, WSBA No. 28239
Office ID No. 91051

Attorneys for Appellant



038053734 - Trial 4/27
REQUEST FOR CADR/CCDR

Driver License No. None DOB 8-28-88

Driver's Name Nathan M. Kirkpatrick

Issue Date 9-8-03

Type of Request:

- Certified Copy of Driving Record Packet (CCDR)
- Certified Abstract of Driving Record (CADR)
- No Valid Operator's License Certification
- Failure to Respond Certification
- Other (please specify request)

Date Sent 3/30/04

Date Returned By DOL _____

Requesting Trooper/Officer/Sheriff/Prosecutor/Court (indicate name and agency):
Prosecutor Meghan Moore/Kline

Return to address indicated below:
TO: KING COUNTY PROSECUTOR'S OFFICE
Juvenile Court
1211 East Alder
Seattle, Washington 98122

PLEASE RETURN ORIGINAL AND COPY TO:
DEPARTMENT OF LICENSING
PO BOX 9030
Olympia WA 98507-9030

CS 100-620 (REV) FOR CADR/CCDR 07/9/01

#03-8-05073-4
Nathan Michael Kirkpatrick

STATE EXHIBIT —
#2 Admitted
FILED
KING COUNTY, WASHINGTON
JUL 9 - 2004
SUPERIOR COURT CLERK
BY JOVELITA V. AVILA
DEPUTY



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

April 5, 2004

tb

Having been appointed by the Director of Licensing as legal custodian of driving records in 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:

License No: ?

Name: KIRKPATRICK, NATHAN M

Birthdate: August 28, 1988

I further certify under penalty of perjury that after a diligent search of computer files there is no document or other evidence in said official record to indicate that on September 8, 2003 the Department of Licensing had issued a valid license to the above-named person.

Travis Boling
Custodian of Records
Place: Olympia, Washington
Date: April 05, 2004

