

54767-4

54767-4

TWJ  
5-19-05

77719-5

NO. 54767-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,  
Respondent,  
v.  
NATHAN KIRKPATRICK,  
Appellant.

FILED  
COURT OF APPEALS  
DIV. #1  
2005 MAY 18 PM 4:07

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE LEROY McCULLOUGH

**BRIEF OF RESPONDENT**

NORM MALENG  
King County Prosecuting Attorney

CARLA B. CARLSTROM  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

## TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	4
1. KIRKPATRICK'S STATEMENTS TO THE OFFICER WERE NOT THE RESULT OF CUSTODIAL INTERROGATION AND <u>MIRANDA</u> WARNINGS WERE NOT REQUIRED .....	4
a. CrR 3.5 Hearing. ....	4
b. The Statements Were Properly Admitted .....	6
2. THE CERTIFIED COPY OF THE DRIVING RECORD WAS PROPERLY ADMITTED. ....	9
a. The DOL Letter Was Properly Admitted As A Public Record. ....	9
b. The DOL Letter Was Non-Testimonial And Admissible Under <u>Crawford</u> . ....	12
D. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,  
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 1, 2, 9, 12-15

Miranda v. Arizona, 384 U.S. 436,  
86 S. Ct. 1602, 16 L. Ed.2 d 694 (1966)..... 1, 4-8

United States v. Rueda-Rivera, 396 F.3d 678  
(5<sup>th</sup> Cir. 2005), ..... 13, 16

Washington State:

State v. Calvin Smith, No. 75928-6 ..... 9

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

State v. France, 121 Wn. App. 394,  
88 P.3d 1003 (2004)..... 6

State v. Hines, 87 Wn. App. 98,  
941 P.2d 9 (1997)..... 11

State v. Huynh, 49 Wn. App. 192,  
742 P.2d 160(1987)..... 6

State v. Larson, 93 Wn.2d 638,  
611 P.2d 771 (1980)..... 8

State v. Monson, 53 Wn. App. 854,  
771 P.2d 359 (1989)..... 10, 13

State v. Rankin, 151 Wn.2d 689,  
92 P.3d 202 (2004)..... 8

State v. Smith, 122 Wn. App. 699,  
94 P.3d 1014 (2004)..... 10, 11, 13

<u>State v. Sosa</u> , 59 Wn. App. 678, 800 P.2d 839 (1990).....	11
<u>State v. Templeton</u> , 148 Wn.2d 193, 59 P.3d 632 (2002).....	6
<u>State v. Walton</u> , 67 Wn. App. 127, 834 P.2d 624 (1992).....	7
 <u>Other Jurisdictions:</u>	
<u>People v. Saffold</u> , 26 Cal.Rptr.3d 190 (2005).....	14
<u>People v. Shreck</u> , 107 P.3d 1048 (Col. Ct. App., 2004).....	15
<u>State v. Carter</u> , _____ P.3d _____, 2005 WL 767164 (Mont. 2005).....	15
<u>State v. Dedman</u> , 102 P.3d 628 (N.M., 2004) .....	14

Statutes

Washington State:

RCW 5.44.040.....	9
RCW 5.45.020.....	13

Rules and Regulations

Washington State:

CrR 3.5.....	4, 5
ER 803 .....	3, 9, 12

**A. ISSUES PRESENTED**

1. Miranda<sup>1</sup> warnings are required prior to custodial interrogation. An individual is not in custody unless he is detained to the degree associated with formal arrest. At the time Ofc. Osterdahl questioned Kirkpatrick, Osterdahl was still investigating the crime and Kirkpatrick was neither handcuffed nor arrested. Further, during the questioning, Kirkpatrick was free to leave. Were Kirkpatrick's admissions properly admitted when he was not advised of his Miranda rights prior to questioning?

2. A public document is admissible at trial as an exception to the hearsay rule if it contains facts, and not conclusions requiring the exercise of judgment. Crawford v. Washington<sup>2</sup> prohibits the admission of testimonial hearsay without the benefit of cross-examination. A certified letter from the Department of Licensing stating that no driver's license had been issued for Kirkpatrick was admitted into evidence at trial. When that letter expressed no opinions but merely summarized Kirkpatrick's driving status and was similar to a business record

---

<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

<sup>2</sup> Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

considered non-testimonial by the Crawford court, was the letter properly admitted?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The respondent, Nathan Kirkpatrick, was charged with one count of No Valid Operator's License and one count of Reckless Driving. CP 1-2. After a fact-finding hearing, he was convicted as charged. CP 5, 14-16. He received no confinement time and six months of community supervision. CP 8-13.

**2. SUBSTANTIVE FACTS**

On September 8, 2003, Rocky Johnson, a resident of Jewell Street in Enumclaw, observed Kirkpatrick speeding along the street in a black Honda. 2RP 6, 8.<sup>3</sup> Kirkpatrick momentarily stopped the car when Johnson yelled at him, but drove off before Johnson could approach the car. 2RP 8. Around the same time, another resident, Roger Miller, also observed the black Honda speeding along Jewell Street and driving across a lawn and sidewalk. 2RP 21-23, 27.

---

<sup>3</sup> The verbatim report of proceedings consists of two volumes referred to as follows: "1RP" (June 25, 2004); "2RP" (June 21, 2004; July 9, 2004; and July 16, 2004).

Police responded to Jewell Street and interviewed Johnson and Miller. 2RP 45, 67. Ofc. Osterdahl of the Enumclaw Police Department then located the black Honda parked at a nearby McDonald's. 2RP 45. Kirkpatrick was sitting in the front passenger seat. 2RP 45. Osterdahl questioned Kirkpatrick and Kirkpatrick admitted to driving the car on Jewell Street and to having no driver's license. 2RP 59. Johnson was brought to the McDonald's where he identified Kirkpatrick as the driver of the Honda. 2RP 60.

At trial, Johnson and Miller both identified Kirkpatrick as the driver of the Honda. 2RP 8, 29. During trial, the State admitted Ex. 2, a certification from the Department of Licensing, indicating that there was no record of a driver's license for Kirkpatrick. 2RP 75-76. The defense objected to Ex. 2 as hearsay but the objection was overruled. 2RP 14, 70, 75. Ex. 2 was admitted under ER 803(a)(10), absence of public record. 2RP 75. Kirkpatrick did not testify at trial.

**C. ARGUMENT**

**1. KIRKPATRICK'S STATEMENTS TO THE OFFICER WERE NOT THE RESULT OF CUSTODIAL INTERROGATION AND MIRANDA WARNINGS WERE NOT REQUIRED.**

Kirkpatrick argues that his admissions to Ofc. Osterdahl should have been suppressed because he was not advised of his Miranda rights prior to the questioning. This argument should be rejected. Miranda warnings are only required for *custodial* interrogations. Because Kirkpatrick was not in custody to a degree associated with formal arrest and, in fact, was free to leave, Miranda warnings were not required and his statements were properly admitted.

**a. CrR 3.5 Hearing.**

A CrR 3.5 hearing was held during the juvenile court fact-finding hearing. 2RP 45. Ofc. Osterdahl testified that when he located the black Honda in the McDonald's parking lot, he pulled his patrol car in behind the Honda; however, the patrol car did not block the Honda from being able to exit the lot. 2RP 45, 49. Kirkpatrick was seated in the front passenger seat. 2RP 45.

Another young man was in the rear of the car and two other young men were standing outside of the car. 2RP 45.

Ofc. Osterdahl asked all four men to get out of the car and requested they provide their names and birthdates to him. 2RP 46. None of the men were taken into custody, handcuffed, or placed under arrest as Osterdahl questioned them. 2RP 47. Osterdahl testified at trial that if the men had wanted to leave, he would not have stopped them. 2RP 51. Osterdahl testified that he may have patted down the men for officer safety but he could not recall. 2RP 47. Osterdahl did not advise Kirkpatrick of his Miranda rights prior to asking him questions. 2RP 48. In response to questioning, Kirkpatrick acknowledged driving the Honda on Jewell Street and admitted he did not have a driver's license. 2RP 59.

Kirkpatrick did not testify at the CrR 3.5 hearing. 2RP 54. The judge ruled that Kirkpatrick's statements to Osterdahl were admissible. 2RP 57-58; CP 17-18. The judge noted that they were not the product of custodial interrogation since Kirkpatrick was not in custody to a degree associated with formal arrest and, therefore, Miranda warnings were not required. 2RP 57-58; CP 17-18.

**b. The Statements Were Properly Admitted.**

Miranda warnings are only required prior to *custodial* interrogation. State v. Templeton, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). In determining whether an individual is in custody, the “question is not whether a person actually believed he was free to leave, but whether such a person would believe he was in police custody of the degree associated with formal arrest.” State v. France, 121 Wn. App. 394, 399, 88 P.3d 1003 (2004). An investigative encounter with a suspect based on reasonable suspicion not amounting to probable cause does not require Miranda warnings. State v. France, 121 Wn. App. at 399; see also State v. Huynh, 49 Wn. App. 192, 201, 742 P.2d 160(1987).

In State v. Huynh, supra, the police were told by an arson victim that Huynh had set the fire. The police then went to Huynh’s home to question him. The police testified that when they went to question Huynh they did not intend to arrest him and, in fact, did not arrest him. Huynh argued that the statements he made to the police should have been excluded because he was not advised of his Miranda rights. This Court upheld the admission of Huynh’s statements, holding that the officers were still investigating and

Huynh's freedom was not curtailed to a degree associated with formal arrest. 49 Wn. App. at 193, 201-02.

In State v. Walton, 67 Wn. App. 127, 834 P.2d 624 (1992), police received a complaint about a juvenile party at an apartment building. An officer responded to the scene and contacted the juvenile defendant, Walton. The officer could smell alcohol on Walton's breath and immediately asked for identification. The identification indicated Walton was 17 years old. The officer then asked Walton if he had been drinking and Walton admitted to consuming "half a beer." Walton argued his statements should be suppressed because he had not been advised of his Miranda rights prior to talking to the officer. This Court upheld the admissibility of the statements because Walton was not in custody. This Court noted that "[t]he fact that a suspect is 'not free to leave' during the course of a *Terry* stop does not make the stop comparable to a formal arrest for purposes of *Miranda*." 67 Wn. App. at 128-30.

In the present case, Kirkpatrick was not in custody at the time Ofc. Osterdahl questioned him and, therefore, Miranda was not required. At the time Osterdahl approached Kirkpatrick, he was sitting in a car in a parking lot. Osterdahl detained Kirkpatrick and the other three men to investigate the reckless driving incident.

Osterdahl acknowledged in his testimony that he could not have prevented any of the young men from leaving if they had wanted to since Osterdahl did not have probable cause to make an arrest. At no time during questioning was Kirkpatrick handcuffed, arrested or told he could not leave. Because Kirkpatrick was not in custody to a degree associated with formal arrest and Osterdahl was merely making an investigative stop, Miranda warnings were not required prior to the questioning.

In his brief, Kirkpatrick cites State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004) and State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980) as authority for his position that the statements should have been suppressed. These cases are not on point. Rankin and Larson are Fourth Amendment cases addressing searches done as a result of an illegal seizure. The issue in the present case involves the Fifth Amendment: whether Kirkpatrick's right to self-incrimination was violated by the absence of Miranda warnings. There was no search in this case and, thus, Rankin and Larson are unhelpful.

Because Kirkpatrick was not in custody at the time he was questioned by Osterdahl, his statements were properly admitted.

**2. THE CERTIFIED COPY OF THE DRIVING RECORD WAS PROPERLY ADMITTED.**

Kirkpatrick argues that the admission of the certified statement from the Department of Licensing (“DOL letter”) stating that no license had been issued for Kirkpatrick violated his right to confrontation as established in Crawford v. Washington. This argument should be rejected. The DOL letter was properly admitted as a public record and is not a testimonial statement prohibited by Crawford.<sup>4</sup>

**a. The DOL Letter Was Properly Admitted As A Public Record.**

Copies of public records and documents certified under the seal of state or federal officials having custody of them “shall be admitted in evidence in the courts of this state.” RCW 5.44.040; ER 803(a)(8). Evidence of the absence of a public record, through a certification that a diligent search failed to disclose that record, is also admissible. ER 803(a)(10). A public document is admissible if 1) the record is prepared by a public official, 2) it contains facts and not conclusions involving the exercise of judgment, discretion or

---

<sup>4</sup> This same issue is currently before the Washington Supreme Court in State v. Calvin Smith, No. 75928-6. Oral argument is scheduled for June 23, 2005.

opinion, 3) the subject matter relates to facts which are of a public nature, retained for the public benefit and, 4) the record is retained under express statutory authority. State v. Monson, 53 Wn. App. 854, 771 P.2d 359 (1989) (emphasis added).

A driving record is a “classic example” of a public record kept pursuant to statute, for the benefit of the public. State v. Chapman, 98 Wn. App. 888, 991 P.2d 126 (2000). A defendant’s driving record contains neither expressions of opinion, nor conclusions requiring the exercise of discretion. Chapman, 98 Wn. App. at 891. In Monson, the court noted that the public records exception to the hearsay rule is based upon the presumed reliability of regularly kept records, and the sound assumption that a public official will properly perform his duties. Monson, 53 Wn. App. at 859. In State v. Smith, 122 Wn. App. 699, 704-05, 94 P.3d 1014 (2004),<sup>5</sup> this Court recently held that a certified statement from the Department of Licensing, similar to the DOL letter admitted in this case, was admissible as a public record and contained only neutral facts. This Court noted in Smith that the “custodian of records did not

---

<sup>5</sup> See note 4. This case has been accepted for review by the Supreme Court.

express her opinion about Smith's guilt. . . . Rather, she simply communicated his driving status as reflected in DOL's computer records." Smith, 122 Wn. App. at 705.

The very nature of public records is such that cross-examination serves little or no purpose. State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997):

A number of reasons underlie the business or public records exception to the hearsay rule. Many public or business records and documents are the products of daily routine government and business transactions. Cross-examination, therefore, serves little or no purpose. It is also unrealistic to expect that those who generate these records, or record custodians, would recall the details of a particular transaction or event. And, frequently, the mere fact that they are kept is an indication of their genuineness.

Hines, 87 Wn. App. at 101. Because records custodians are unlikely to recall the details of the transaction or event, cross-examination is of little value in insuring the reliability of the document. State v. Sosa, 59 Wn. App. 678, 800 P.2d 839 (1990).

In the present case, the DOL letter was properly admitted as a public record. Like the document at issue in Smith, it did not express an opinion but rather communicated Kirkpatrick's driving status: that he currently had no driver's license. Exhibit 2 was properly admitted at trial.

**b. The DOL Letter Was Non-Testimonial And Admissible Under Crawford.**

In Crawford v. Washington, the United States Supreme Court held that ex parte statements from a non-testifying witness offered to prove the truth of the matter asserted were inadmissible under the Confrontation Clause if the statements were “testimonial.” Crawford, 124 S. Ct. at 1374. Although the Supreme Court declined to give a full definition of “testimonial” statements, it stated that “whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Id. The Court also gave two examples of “statements that by their nature were not testimonial” – business records and statements in furtherance of a conspiracy. Id. at 1367; see also id. at 1378 (Rehnquist, C.J. concurring in judgment) (noting that “the Court’s analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records.”). A record of an act, condition or event kept in the regular course of business is admissible as a business record. ER 803(a)(6).

Driving records kept and maintained by the Department of Licensing are public records, and are admissible as evidence.

RCW 5.45.020; Monson, Smith, supra. Public records, like business records, “by their nature,” are not testimonial.

Moreover, since Crawford, records similar to the one at issue here have been held to be non-testimonial. In United States v. Rueda-Rivera, 396 F.3d 678 (5<sup>th</sup> Cir. 2005), the defendant was convicted of reentering the United States after deportation. The court held that a Certificate of Non-Existence of Record (CNR) was properly admitted into evidence to establish that the government had not consented to the defendant’s presence in the country. The CNR was a document created by a records custodian at the Immigration and Naturalization Service stating that “after a diligent search no evidence [was] found to exist in the records of the Immigration and Naturalization Service of the granting of permission for admission into the United States after deportation . . . .” Rueda-Rivera, 396 F.3d at 679. The records custodian did not testify at trial. The court concluded that the contents of the defendant’s immigration file were business records and, therefore, not testimonial. Id. at 680. The CNR was also admissible because it “does not fall into the specific categories of testimonial statements referred to in Crawford.” Id.

Likewise, in People v. Saffold, 26 Cal.Rptr.3d 190 (2005), the defendant was convicted of violating a domestic relations restraining order. Saffold argued that the admission of the proof of service, showing he had been served with the restraining order, was a violation of Crawford because the deputy serving the order did not testify. Saffold, 26 Cal.Rptr.3d at 192. In upholding its admissibility, the appellate court stated that in creating the proof of service the deputy who served the order was not making a statement to government officials or against the defendant but was merely acting in the “routine performance of his duties” and that the proof of service was not testimonial. Id. at 193.

Even some records which are less routine than driving records have been admitted. In State v. Dedman, 102 P.3d 628 (N.M. 2004), the Supreme Court of New Mexico held that the report showing the defendant’s blood alcohol level was non-testimonial. The court explained that “[a]lthough the report is prepared for trial, the process is routine, non-adversarial, and made to ensure an accurate measurement.” Dedman, 102 P.3d at 636. Additionally, “a blood alcohol report is very different from the other examples of testimonial hearsay evidence: “prior testimony at a preliminary

hearing, before a grand jury, or at a former trial; and . . . police interrogations.” Id.

In State v. Carter, \_\_\_\_ P.3d \_\_\_\_, 2005 WL 767164 (Mont. 2005), certification reports for a breath analysis instrument were held to be non-testimonial in a DUI trial. Specifically, the court noted that “such certification reports are not substantive evidence of a particular offense, but rather are foundational evidence necessary for the admission of substantive evidence” and therefore live testimony is not required. Carter, 2005 at \*7. The court stated, however, that if “in a given case, the defendant’s pretrial investigation reveals that the reports are in error or are otherwise subject to attack, the defendant is always free to subpoena the authors for purposes of testifying at a hearing . . . .” Id.

In People v. Shreck, 107 P.3d 1048 (Col. Ct. App. 2004), the documents at issue were affidavits from court clerks and attached documents showing the defendant’s prior convictions. The court held the conviction records to be public records and stated that because “public records are analogous to business records, public records should not be considered ‘testimonial’ statements for purposes of applying *Crawford*.” Shreck, 107 P.3d at 1060. The court also held that the affidavits accompanying the records were

admissible because they were provided “solely to verify the chain of custody and authenticity of the underlying documentary evidence.”

Id.

The DOL letter admitted in the present case is analogous to the evidence admitted in the above-cited cases. Perhaps it most closely resembles the CNR in Rueda-Rivera. Like the CNR, the DOL letter was compiled by a records custodian after thorough review of the defendant’s records. Like the CNR, the DOL letter also states a fact that is at issue in trial. And, like the CNR, the fact stated by the DOL records custodian is not one that involved judgment or discretion but rather is a summary of Kirkpatrick’s driving status (or Rueda-Rivera’s immigration status). Although the DOL letter was prepared for the purpose of trial, that does not in-and-of-itself make the letter testimonial. The letter would be testimonial only if the purpose was to assert that Kirkpatrick was guilty of driving with no valid operator’s license. But, the DOL records custodian was merely summarizing the records, or absence of records, of Kirkpatrick, which are kept to monitor the status of his privilege to drive. The DOL letter was properly admitted.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Kirkpatrick's conviction for No Valid Operator's License.

DATED this 18<sup>th</sup> day of May, 2005.

Respectfully submitted,

NORM MALENG  
King County Prosecuting Attorney

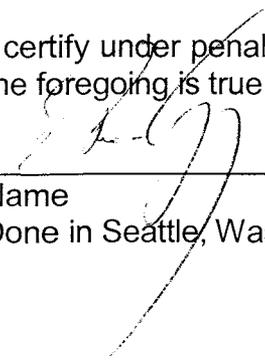
By: Carla B. Carlstrom

CARLA B. CARLSTROM, WSBA #27521  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. NATHAN KIRKPATRICK, Cause No. 54767-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

05/18/05  
Date

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I  
2005 MAY 18 PM 4:07