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**SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

vs.

KYLE KEITH KRONICH, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF PARTIES

The State of Washington is the Respondent. Kyle K. Kronich is the Petitioner herein, and the defendant below.

B. DECISION BELOW

Petitioner asks this Court to grant discretionary review of the decision in *State v. Kronich*, 131 Wn. App. 537, 128 P.3d 119 (2006).

C. PETITIONER'S ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying Mr. Kronich's suppression motion to exclude evidence of his refusal to perform the breath test on the grounds he was denied access to counsel.

2. Whether Mr. Kronich was denied his Sixth Amendment confrontation rights under *Crawford* when the court allowed admission of a DOL record custodian's certification regarding the status of Mr. Kronich's driving privilege.

D. COUNTER STATEMENT OF THE CASE

Facts regarding the right to counsel argument.

The defendant refused the breath test. Before trial, he filed a motion to suppress his refusal to submit a breath test, alleging he was denied access to counsel - in that he had not waived counsel. RP 6, lines 9-19. Defendant provided no testimony or affidavit to that effect, but brought the motion based solely upon page two of the seven-page police

report submitted along with his memorandum of authorities. Defense counsel conceded that the defendant had been properly Mirandized, (RP 2, lines 20-23), and that he invoked his right to remain silent.¹ Defense counsel argued that because “Box 10” of the arrest report indicated that defendant had originally requested an attorney, his later statement that he did not want to call one could not be construed as a valid waiver of his rights under CrRLJ 3.1. RP 6, lines 9-19.

The trial court denied the defendant’s motion to suppress the defendant’s refusal of the breath test, holding that after being properly advised of his Miranda warnings and after requesting counsel, the defendant subsequently decided that he didn’t want to talk with an attorney:

The only conclusion that I can come up here with reasonably under these facts is that after requesting counsel that for some reason Mr. Kronich decided that he didn’t want to call anybody and can he do that? Certainly. Can he waive his right to access to counsel? Yes. Can he make the decision on his own to take the test or not take the test? The answer is correct. All the State has to do or the law enforcement agency has to do is help provide access and we don’t even get down to the name or the telephone number because the defendant for some reason changed his decision which he can do. . . .

RP 17, lines 10-17.

¹ No Fifth Amendment issue was involved as no questions were asked or sought to be introduced against the defendant.

Facts regarding Driving While License Suspended Count.

Prior to the admission at trial of the documentary evidence, Deputy Jenkins testified he had ran the plate of the vehicle prior to the stop and was informed by sheriff's radio that the registered owner was Kyle Kronich and that his Washington's driver's license was suspended. CP 42-44. *This evidence was introduced without objection from the defendant. Id.*

Additionally, Exhibits 1 and 2, (Order of Revocation and Certificate of Non-reinstatement) were introduced without any objection to the now belated claim that the second exhibit contained "opinions." CP 60.

E. ARGUMENT

I. The trial court did not err in its evidentiary ruling admitting the defendant's refusal to take a breath test.

Standard of review.

RALJ 9.1 governed the superior court's review of the district court's decision, and governs this Court's review as well. See RALJ 9.1; *State v. Ford*, 110 Wash. 2d 827, 829, 755 P.2d 806 (1988). Under RALJ 9.1, this court reviews the trial court's decision for errors of law.

This court reviews the district court's factual findings to determine whether they are supported by substantial evidence. RALJ 9.1(b). The reviewing court shall accept those factual determinations supported by substantial evidence in the record which were expressly made by the court

of limited jurisdiction, or that may reasonably be inferred from the judgment of the court of limited jurisdiction.

Review should not be accepted. In an *ipse dixit* manner, Petitioner claims the Appellate Court's decision conflicts with this Court's decision in *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002). See RAP 13.4(b) (1).

Because "[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly," the *Templeton* Court required that a defendant claiming a violation of CrRLJ 3.1 must establish 1) the court rule was violated and, 2) that within reasonable probabilities the error materially affected the outcome of the trial. *Templeton*, 148 Wn.2d at 220-221. In the instant case the petitioner establishes neither.

1) The rule was not violated.

CrRLJ 3.1(c) states:

(1) When a person has been arrested he or she shall as soon as practicable be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided 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.

The trial court found that the rule had been complied with. The trial court held that after being properly advised of his Miranda warnings and after requesting counsel, the defendant decided that he no longer wanted to talk with an attorney:

The only conclusion that I can come up here with reasonably under these facts is that after requesting counsel that for some reason Mr. Kronich decided that he didn't want to call anybody and can he do that? Certainly. Can he waive his right to access to counsel? Yes. Can he make the decision on his own to take the test or not take the test? The answer is correct. All the State has to do or the law enforcement agency has to do is help provide access and we don't even get down to the name or the telephone number because the defendant for some reason changed his decision which he can do. . . .

RP 17, lines 10-17

The record below supports the finding of rule compliance. Indeed, the rule is designed to provide a meaningful *opportunity* to contact a lawyer. *State v. Kirkpatrick*, 89 Wash. App. 407, 413, 948 P.2d 882 (1997), *review denied*, 135 Wash. 2d 1012, 960 P.2d 938 (1998). The defendant was provided with that opportunity, but made his own decision not to call.

2) Prejudice prong

Assuming arguendo the rule was violated, the petitioner fails totally to establish any prejudice. He did not allege that he would have taken the breath test and not refused that test had he known what he is deemed to know after discussing the case with his court appointed counsel in the months preceding the suppression motion. Nor did he allege in the trial court that he would have arranged for alternative testing or that there was exculpatory evidence available or in existence. Counsel for petitioner merely speculates, without any factual basis or support from the record, that there was exculpatory evidence available.

The petitioner has established neither a violation of CrRLJ 3.1, nor probable prejudice as required by *Templeton*.

II. Records from the Department of Licensing are public records and therefore remain admissible in the wake of *Crawford v. Washington*.

Records from the Department of Licensing are public records, and remain admissible in the wake of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

It has been a settled issue in the State of Washington that records kept by the Department of Licensing fall under the “official records” hearsay exception. *State v. Monson* 113 Wn.2d 833, 784 P.2d 485 (1989); *State v. Chapman*, 98 Wn. App. 888, 991 P.2d 126 (2000); ER 803(a)(8).

In *Monson*, this Court held that records from the Department of Licensing are admissible under the public records hearsay exception to prove that a defendant was driving while their license was revoked. *Monson*, 113 Wn.2d at 849-50.

In *Chapman*, the Court rejected the same arguments made here by Petitioner Kronich. Addressing Chapman’s argument that the certificate of non-reinstatement, (Exhibit 2A), contained opinions, the Court stated, “[a] driving record is ‘a classic example of a public record kept pursuant to statute, for the benefit of the public and available for public inspection,’ ” and that the exhibit “contains neither expressions of opinion nor conclusions requiring the exercise of discretion.” *Chapman*, 98 Wn. App. at 891, quoting and citing *Monson*, 53 Wn. App. at 858 (internal citations omitted).

Petitioner contends, *sub silencio*, that *Monson* and *Chapman* are overruled in the wake of *Crawford*. Fortunately, the *Crawford* decision offers more guidance in regards to public records than it does regarding other areas of hearsay law. In the course of its historical review of the Confrontation Clause and hearsay law, the Supreme Court remarks:

Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records[.]

Crawford, 158 L.Ed.2d at 195.

The distinction between a business record and a public record is slight, and it is a reasonable inference to make that since business records remain admissible, then so do public records. Justice Rehnquist bolsters this inference in his concurring opinion:

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process.

Crawford, 158 L.Ed.2d at 208 (citation omitted).

The distinction between the admissibility of hearsay statements elicited under the pressures of police interrogation and the admissibility of a public record, kept for the public good, and containing purely factual information, is easy to draw. This distinction was drawn by this Court in the pre-*Crawford* case *Monson*. The appellate court in the instant case also found the distinction to be evident. It considered the "similarity between business records and public records and the *Crawford* reasoning," as well as ER 803(a)(10), when it found that these public records should not be considered "testimonial" and were properly admitted. *Kronich*, 131 Wn. App. at 546-47.

Opinion evidence and waiver

The Petitioner belatedly alleges the introduction of Exhibit 2 violated his Sixth Amendment right to confrontation.² That exhibit contains the factual statement that the defendant “[h]ad not reinstated his/her driving privilege. Was suspended/revoked.”³ Petitioner argues this statement constitutes “‘testimonial’ evidence”⁴ because it is an “*opinion* of that (Mr. Kronich’s) record.”⁵ If the complained of document contains “opinions,” an objection on that basis should have been addressed to the trial court under the law extant pre-*Crawford*. Without such objection, the issue was waived.

To be admissible, a public document must (1) contain facts rather than conclusions that involve judgment, discretion or the expression of opinion; (2) relate to facts that are of a public nature; (3) be retained for public benefit; and (4) be authorized by statute. *Monson*, 113 Wn.2d at 836-37 (citing *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)); C.N.H., 90 Wn. App. at 949-50. Defendant in the instant case made no contemporaneous foundational objection that the document contained conclusions that involve judgment, discretion or the expression of opinion.

² Petition, p. 10 and 11.

³ Petition, p. 10.

⁴ Petition, p. 11

⁵ Petition p. 10 (emphasis added).

In fact, the defendant's attorney stated "no objection, your Honor" when the document was offered into evidence. CP at 60.⁶

Without informing the trial court of specific reasons for the objection to the admission of Exhibit 2, the defendant has preserved nothing for appeal on this issue. See ER 103.⁷

Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); and see ER 103 *supra* (fn. 7). Indeed, an appellate court reviews objections to evidence only on the *same ground* asserted at trial. *State v. Stevens*, 58 Wn. App. 478, 485-86, 794 P.2d 38, *review denied*, 115

⁶ Indeed, prior to the admission at trial of the documentary evidence, Deputy Jenkins testified he had ran the plate of the vehicle prior to the stop and was informed by sheriff's radio that the registered owner was Kyle Kronich and that his Washington's driver's license was suspended. CP 42-44. *This evidence also was introduced without objection from the defendant. Id.*

⁷ ER 103 states:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of the objection, if the specific ground was not apparent from the context;

Wn.2d 1025, 802 P.2d 128 (1990) (emphasis added). Because no proper foundation objection was raised in the trial court, and because pre-*Crawford* law required an objection to be made to the contents of a public document if such documents contained “opinions,” this issue is not preserved for review. Compare *Chapman*, 98 Wn. App. 888, at 890 paragraph 2, (2000) (defendant properly objected thereby preserving the issue for appeal); and *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004) (trial court properly excluded the property tax assessment valuing the property at \$120,900, as hearsay, stating: “Although public records are a statutory exception to the hearsay rule, the record cannot be based on ‘conclusions involving the exercise of judgment or discretion or the expression of [an] opinion.’ *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941); RCW 5.44.040.”

As a last point, it is notable that this Court, in *State v. Gaddy*, 152 Wn.2d 64; 93 P.3d 872 (Decided July 8, 2004), upheld the admissibility of DOL records, post *Crawford*. Moreover, the *Gaddy* Court upheld the presumptive reliability of driving records. In doing so, this Court noted that DOL is not a police agency, is the agency required to regulate driver’s licenses, is responsible for administering and recommending the improvement of the motor vehicle laws of this state relating to driver records, is responsible for performing the function of suspending and

revoking driver's licenses, is mandated to maintain current and accurate information regarding suspension or revocation of driver's licenses, and that there are "strict standards in place regarding DOL's authorization to suspend a person's driver's license and how it reinstates driving privileges when it is appropriate to do so." 152 Wn.2d at 71-73.

Exhibit 2 in this case simply is a public record of this Department carrying out its legislatively mandated functions.

F. CONCLUSION

Crawford does not overrule or directly implicate *Monson*, or *Chapman*. Records from the Department of Licensing remain admissible under the public records hearsay exception. Petitioner has not established a basis for review. Review should be denied.

Respectfully submitted this ____ day of April 2006.

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