

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 03, 2016, 4:01 pm
BY RONALD R. CARPENTER
CLERK

E

bjh

No. 91669-I

RECEIVED BY E-MAIL

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NAKIA L. OTTON,

Petitioner.

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

PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE

SARAH M. HROBSKY
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

 ORIGINAL

TABLE OF CONTENTS

A. ARGUMENT 1

The four factors promulgated by this Court for admission of a sworn out-of-court statement are unsupported by the plain language of ER 801(d)(1)(i), which limits admission of such statements to those given at a “trial, hearing, or other proceeding,” and should be abandoned. 1

1. *Admission of an out-of-court statement as substantive evidence based on a judicial determination of reliability is contrary to the plain language of ER 801(d)(1)(i) and incorrect. 1*

2. *Admission of an out-of-court statement as substantive evidence based on a judicial determination of reliability is harmful. 6*

B. CONCLUSION 8

TABLE OF AUTHORITIES

United States Supreme Court Decisions

California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489
(1970) 5-6

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d
177 (2004) 3, 6

Washington Supreme Court Decisions

deElche v. Jacobson, 95 Wn.2d 237, 622 P.2d 835 (1980) 8

Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917) 8

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) 2

State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982) *passim*

Washington Court of Appeals Decisions

State v. Nelson, 74 Wn. App. 380, 874 P.2d 170 (1994) 7

State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003) 7

State v. Thach, 126 Wn. App. 297, 106 P.3d 782 (2005) 7

Rules and Statutes

Cal.Evid.Code § 770 5

Cal.Evid.Code § 1235 5

ER 801(d) *passim*

Fed.R.Evid. 801(d) 1, 4

Fed.R.Evid. 807 2

RCW 9A.72.085 5

Other Authorities

Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(D)(1)(A) to Protect Domestic Violence Victims in A Post-Crawford World*, 27 Pace L. Rev. 199 (2007) 3-4

Nadel, Annotation, *Use or admissibility of prior inconsistent statements of witnesses as substantive evidence of facts to which they relate in criminal case – modern state cases*, 30 A.L.R. 4th (originally published in 1984) 4

Robert H. Aronson, *The Law of Evidence in Washington*, (4th ed. 2011) . 6

United States v. Dietrich, 854 F.2d 1056 (7th Cir. 1988) 2

A. ARGUMENT

The four factors promulgated by this Court for admission of a sworn out-of-court statement are unsupported by the plain language of ER 801(d)(1)(i), which limits admission of such statements to those given at a “trial, hearing, or other proceeding,” and should be abandoned.

1. *Admission of an out-of-court statement as substantive evidence based on a judicial determination of reliability is contrary to the plain language of ER 801(d)(1)(i) and incorrect.*

ER 801(d)(1) was enacted into law effective 1979. The state Task Force on ER 801(d)(1) explained the rule “clarifies the law by detailing the circumstances under which the statements are admissible and conforms state law to federal practice.” The Comment continued, “The rule would not ... necessarily admit statements made in pretrial affidavits. The rule applies *only* to statements given in a trial, hearing, proceedings, or deposition. Although the meaning of “proceeding” is not yet clear, it has been observed that the words of limitation were designed in part to prevent the admission of affidavits given by a coerced or misinformed witness.” Task Force Comment (citations omitted) (emphasis added).

ER 801(d)(1)(i) was taken verbatim from Federal Rule of Evidence (Fed.R.Evid.) 801(d)(1)(A), which was enacted into law

effective 1975.¹ *State v. Smith*, 97 Wn.2d 856, 859, 651 P.2d 207 (1982). When a state rule mirrors a federal rule, federal interpretation of the identical rule can be persuasive although not necessarily binding. *State v. Copeland*, 130 Wn.2d 244, 258, 922 P.2d 1304 (1996). The Advisory Committee on the federal rule provided, “The rule requires ... as a general safeguard, that the declarant actually testify as a witness, and it then enumerates *three situations* in which the statement is excepted from the category of hearsay.” Advisory Committee Note (emphasis added). The identical federal rule has been specifically interpreted to exclude statements to police during an investigation. *United States v. Dietrich*, 854 F.2d 1056, 1061 (7th Cir. 1988) (and cases cited therein).

¹ The federal rules also include a catch-all provision that was specifically rejected in Washington. Fed.R.Evid. 807 provides:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
- and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

In *Smith*, this Court recognized that a sworn statement to an investigating officer is *not* given at a “trial, hearing, or other proceeding,” as required by ER 801(d)(1)(i), but nonetheless ruled such a statement may be admitted as substantive evidence if it satisfied the purpose of determining probable cause “under the totality of circumstances,” with “reliability the key.” 97 Wn.2d at 862-63. Thus, this Court added “*Smith* affidavits” to the three situations specifically enumerated by the rule in which an out-of-court statement may be admitted as substantive evidence. when (1) the statement was made voluntarily, (2) there were minimal guarantees of truthfulness, (3) the statement was taken as a standard procedure in one of four methods for ascertaining probable cause, and (4) the witness was subject to cross-examination when giving a subsequent inconsistent statement. *Id.* at 861-63.

“Reliability is an amorphous, if not entirely subjective, concept.” *Crawford v. Washington*, 541 U.S. 36, 63, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Amicus characterizes Mr. Otton’s citation to *Crawford* as alleging a Confrontation Clause violation. Br. of Amicus Curiae at 3-5. But Mr. Otton does not contend he was denied his right to confrontation. The concerns about “reliability” raised in *Crawford* transcend the context of confrontation and apply equally to the sworn out-of-court statement at issue here.

Amicus never argues the plain language of the rule actually encompasses a “*Smith* affidavit.” Instead, Amicus argues adhering to the plain language of ER 801(d)(1)(i) would “effectively eviscerate” the State’s ability to convict alleged perpetrators of domestic violence. Br. of Amicus Curiae at 15-16. However, the final wording of the identical federal rule was the result of a carefully and thoughtfully negotiated compromise between the federal House and Senate conference committees, which should not be disregarded so as to obtain convictions.²

In support of its concerns regarding prosecution of domestic violence offense, Amicus cites Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in A Post-Crawford World*, 27 Pace L. Rev. 199 (2007). However, the author recognized the federal rule as written *excludes* sworn out-of-court statements to investigating officers and urged *amending* the federal rule and corresponding state rules by adopting a proposed broader version that was rejected by Congress, so as to facilitate prosecution of alleged domestic violence perpetrators. *Id.* at 211.³

²For a thorough review of the legislative history of Fed.R.Evid. 801(d)(1)(A), including congressional testimony, see Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in A Post-Crawford World*, 27 Pace L. Rev. 199, 211-225 (2007).

³ For a compilation of current pertinent state rules and case law, see Andrea F. Nadel, Annotation, *Use or admissibility of prior inconsistent statements of witnesses as substantive evidence of facts to which they relate in criminal case – modern state cases*, 30 A.L.R. 4th (originally published in 1984).

Amicus cites RCW 9A.72.085, which sets out standards for subscribing to an unsworn statement. Br. of Amicus Curiae at 11-12. This adds nothing to the question of whether an unsworn “*Smith* affidavit” should be added to the three situations enumerated in ER 801(d)(1)(i) that are excluded from the definition of hearsay.

Amicus repeatedly refers to a broader statutory rule adopted in California⁴ that does not include the limiting phrase “trial, hearing, or other proceeding.” Br. of Amicus Curiae at 7-8, 12, 14. In *California v. Green*, the Court considered whether the California rule violated the Confrontation Clause, by authorizing admission of out-of-court statements that had not been subject to cross-examination without consideration of “reliability.” 399 U.S. 149, 155, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). The Court specifically noted it was not deciding whether the California

⁴ Cal.Evid.Code § 1235 provides:

Inconsistent statements.

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

Cal.Evid.Code § 770 provides:

Evidence of inconsistent statement of witness; exclusion; exceptions.

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action.

rule was preferable to the more common rule excluding all out-of-court statements as substantive evidence. *Id.* In addition, the Court recognized rules of evidence may restrict the admission of out-of court statements, even when the Confrontation Clause does not. 399 U.S. at 166-67.

The fact that the California statutory rule withstood a Confrontation Clause challenge does not mean this Court's interpretation of Washington's rule "cannot be an 'incorrect' interpretation," as contended by Amicus. Br. of Amicus Curiae at 18. The state Judicial Council Task Force reviewed both the federal rules and rules from other states, presumably including the broader California which was adopted eleven years prior to adoption of the Washington Rules of Evidence. Robert H. Aronson, *The Law of Evidence in Washington* xxxv (4th ed. 2011). Because Washington's rule is based on the federal rule and not on the California rule, the constitutionality of the California rule is irrelevant to the issue presented here.

2. *Admission of an out-of-court statement as substantive evidence based on a judicial determination of reliability is harmful.*

As demonstrated by the cases cited in *Crawford*, a judicial determination of reliability is inherently subjective and, therefore, detrimental to the public interest. ER 801(d)(1)(i), on the other hand, sets forth objective criteria and forums for admission, which can only benefit

the public, parties, and the courts by promoting consistency, predictability, and respect for the legal system.

Based on *Smith*, several courts have applied the four factors to further expand the situations in which a statement is excepted from hearsay. See *State v. Thach*, 126 Wn. App. 297, 308-09, 106 P.3d 782 (2005) (statement written partly by declarant and partly by officer while declarant was in an ambulance receiving medical care); *State v. Nieto*, 119 Wn. App. 157, 161-64, 79 P.3d 473 (2003) (statement written by declarant at police station following an investigative interview); *State v. Nelson*, 74 Wn. App. 380, 386-91, 874 P.2d 170 (1994) (officer's written statement summarizing the "substance" of conversation with declarant that declarant signed before a notary). Each of these cases, however, considered only whether the statement satisfied the four *Smith* factors, and not whether the statement was given at a "trial, hearing, or other proceeding," as required by ER 801(d)(1)(i).

Here, admission of Ms. Dugan's statement was an even further expansion of situations in which a statement is excepted from hearsay; she wrote the statement at 4:28 a.m. on her kitchen counter in the presence of an officer. The expansion of situations based on a judicial determination of reliability, rather than based on the language of ER 801(d)(1)(i), is inherently subjective, unpredictable, and harmful.

B. CONCLUSION

As this Court has noted, “Reluctant as we are to depart from former decisions, we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle.” *deElche v. Jacobson*, 95 Wn.2d 237, 247, 622 P.2d 835 (1980), quoting *Schramm v. Steele*, 97 Wash. 309, 318, 166 P. 634 (1917). The four factors to determine the “reliability” and admission of a “*Smith* affidavit” are unsupported by the plain language of ER 801(d)(1)(i). For the foregoing reasons, as well as the reasons set forth in the briefing below and to this Court, this Court should reject Amicus’s arguments for interpreting Washington’s rule as if it mirrored the significantly broader California rule, abandon the “reliability” test of *Smith* as incorrect and harmful, and adhere to the plain language of ER 801(d)(1)(i).

DATED this 3rd day of February 2016.

Respectfully submitted,

s/ Sarah M. Hrobsky

Sarah M. Hrobsky (12352)
Washington Appellate Project (91052)
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 91669-1
 v.)
)
 NAKIA OTTON,)
)
 Appellant.)

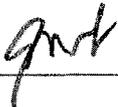
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID PHELAN, DPA () U.S. MAIL
 [appeals@co.cowlitz.wa.us] () HAND DELIVERY
 COWLITZ COUNTY PROSECUTOR'S OFFICE (X) E-MAIL
 312 SW 1ST AVENUE
 KELSO, WA 98626-1799

[X] GRETCHEN VERHOEF () U.S. MAIL
 [SCPAappeals@spokanecounty.org] () HAND DELIVERY
 SPOKANE COUNTY PROSECUTOR'S OFFICE (X) E-MAIL
 1100 W. MALLON AVENUE
 SPOKANE, WA 99260

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF FEBRUARY, 2016.

X _____ 

Washington Appellate Project
 701 Melbourne Tower
 1511 Third Avenue
 Seattle, Washington 98101
 Phone (206) 587-2711
 Fax (206) 587-2710

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Subject: RE: FILING IN SC 91669-1/PET. NAKIA OTTON/ANSWER TO AMICUS BRIEF

Received 2-3-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Wednesday, February 03, 2016 4:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: appeals@co.cowlitz.wa.us; SCPA Appeals <SCPAAppeals@spokanecounty.org>; Sally Hrobsky <sally@washapp.org>
Subject: FILING IN SC 91669-1/PET. NAKIA OTTON/ANSWER TO AMICUS BRIEF

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Answer to Brief of Amicus Curiae

Sarah M. Hrobsky - WSBA #12352
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: sally@washapp.org

By
Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.