IN THE COURT OF APPEALS OF IOWA

No. 1-548 / 10-1392
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELVIN REDMOND,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

The defendant contends the admission of documentary evidence of previous criminal convictions violated the Confrontation Clause. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas and Jessica Tucker, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Elvin Redmond appeals the district court's finding of his habitual offender status, contending the admission of documentary evidence of his previous criminal convictions violated the Confrontation Clause. We conclude the exhibits were non-testimonial and therefore their admission did not violate the Confrontation Clause.

I. Background Facts and Proceedings.

After a jury trial, Elvin Redmond was convicted of attempted murder, first-degree burglary, willful injury, domestic abuse assault with intent to inflict serious injury, first-degree harassment, operating while intoxicated, possession of a controlled substance (crack cocaine), and criminal mischief. Redmond waived his right to have a jury determine whether he was an habitual offender. In the subsequent bifurcated bench trial, the district court considered whether Redmond was an habitual offender. Redmond stipulated to one prior Polk County felony conviction. The State then offered documentary exhibits described as follows:

> State's Exhibit 1 is a two-page document consisting of the first-page, an affidavit and certification signed by William Key, Clerk of Court in Shelby County, as well as [Judge Chris Craft]. Page 2 is a judgment sheet for Tennessee Case Number 99-05374, an indictment and judgment for Forgery from 1999, a felony conviction from Shelby County, Tennessee.
>
> State's Exhibit 2 consists of seven separate documents. State's Number 2 is a one-page affidavit and certification signed by William Key, Clerk of Shelby County, as well as a judge certifying the following six convictions from Shelby County, Tennessee.
>
> State's 2A is an indictment, jury oath and judgment sheet, three pages, for Tennessee Case Number 90-08992, a felony conviction for Robbery.
>
> State's 2B, Tennessee Case number 90-08993, includes the indictment, jury oath and judgment sheet for a Robbery conviction in 1990.

> State's Exhibit 2C, contains the indictment, jury oath and judgment sheet for Tennessee Case Number 90-08994, the Robbery conviction.
>
> State's 2D regards Tennessee Case Number 99-05376, which includes the indictment, . . . two jury oath sheets and a judgment sheet for a felony conviction of Unlawful Possession of a Controlled Substance with Intent.
>
> State's Exhibit 2E, is a four-page document containing the indictment, two jury oaths and judgment sheet for Tennessee Case Number 00-13173, which is Unlawful Possession of a Controlled Substance With Intent. And I apologize, Your Honor, that appears to be a misdemeanor conviction.
>
> State's Exhibit 2F is in regards to Tennessee Case Number 01-09992 and includes the indictment, jury oath and conviction sheet for a Failure to Appear from 2000 in Shelby County, Tennessee.

The defendant objected, in part, arguing the admission of these public records from Tennessee violated his right to confrontation.

The district court ruled the proffered exhibits were

> affidavits of certification and certified copies of records of prior convictions and related documents from the office of the Clerk of Court of Shelby County, Tennessee regarding one Elvin Redmond. These are self-authenticating documents pursuant to Iowa Rule of Evidence 5.902(4). They are admissible under the public records exception to the hearsay rule of Iowa Rule of Evidence 5.803(8). It is not necessary to call a witness from the Shelby County Tennessee Clerk's Office to lay further foundation for the admission of these documents. These exhibits carry sufficient guarantees of trustworthiness. They are relevant to the issue of habitual offender. Thus, defendant's objections of hearsay, relevance, competence, authentication and foundation are overruled.
>
> The certified records of the Shelby County Tennessee Clerk of Court were prepared by judges of the court and court employees performing ministerial tasks in a governmental setting prior to the current prosecution and pursuant to a statutory mandate. The accompanying affidavits and certifications that these documents are true and accurate copies of records in the clerk's office are a routine function of the court and not the result of inquisitional methods.
>
> Therefore, the Court concludes the admission of State's Exhibits 1, 2, 2A, 2B, 2C, 2D, 2E and 2F do not violate the defendant's right to confront and cross-examine witnesses against him under the Confrontation Clause of the Sixth Amendment of the

> United States Constitution or of the Iowa Constitution. These exhibits are non-testimonial.

The district court concluded the State had proved beyond a reasonable doubt the defendant was the same Elvin Redmond convicted of four felonies in Tennessee "based on various factors of identification, including his name, social security number, date of birth, racial and gender demographics and signature as they appear" in the proffered exhibits and that he is an habitual offender under Iowa Code section 902.8 (2009).[1] Redmond did not contest the identifying facts. The court sentenced Redmond pursuant to section 902.9(3) ("An habitual offender shall be confined for no more than fifteen years.").

Redmond now appeals, raising as his sole contention that the court erred in ruling admission of the exhibits did not violate his state and federal constitutional rights to confrontation.

II. Scope and Standard of Review.

We review issues concerning a defendant's constitutional right to confront witnesses against him de novo. *State v. Schaer*, 757 N.W.2d 630, 633 (Iowa 2008).

III. 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." U.S. Const. amend. VI. The Supreme Court has held that only

[1] Iowa Code section 902.8 provides:

> An habitual offender is any person convicted of a class "C" or a class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States. An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of the person's conviction. A person sentenced as an habitual offender shall not be eligible for parole until the person has served the minimum sentence of confinement of three years.

> "testimonial statements" of the sort that "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause" are subject to the constraints of this constitutional provision. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 237 (2006). If a hearsay statement made by a declarant who does not appear at trial is testimonial, evidence of that statement is not admissible under the Confrontation Clause unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. *Crawford* [*v. Washington*, 541 U.S. 36, 59–60, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004)]; *accord State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007). Thus, as we have recently noted, "the fighting Confrontation Clause issue with respect to admission of hearsay is whether the underlying statements should be considered 'testimonial' or 'nontestimonial.'" *State v. Shipley,* 757 N.W.2d 228, 235 (Iowa 2008). The State bears the burden of proving by a preponderance of the evidence that a challenged hearsay statement is nontestimonial. *Bentley*, 739 N.W.2d at 298.

Schaer, 757 N.W.2d at 635.

Redmond analogizes the exhibits here to the affidavit of a lab analyst declaring a tested substance was cocaine, the admission of which was found to have violated the defendant's confrontation rights in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, ___, 129 S. Ct. 2527, 2531–32, 174 L. Ed. 2d 314, 320–22 (2009); *see also Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2717, ___ L. Ed. 2d ___, ___ (2011) (finding a forensic report "created solely for an 'evidentiary purpose'" and "made in aid of a police investigation" is testimonial). The State counters that the records of Tennessee judgments admitted here were more akin to the certified abstract of a defendant's driving records found to be non-testimonial in *Shipley*, 757 N.W.2d at 236–38. We find the State has the better argument.

The United States Supreme Court has stated:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the

> hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Melendez-Diaz, 557 U.S. at ___, 129 S. Ct. at 2539–40, 174 L. Ed. 2d at 329. Our supreme court has determined the state's abstract of a defendant's driving record and the certification of its authenticity are not testimonial. *See Shipley*, 757 N.W.2d at 237. In *Shipley*, the court noted it was facing two distinct confrontation issues: (1) whether the underlying public record (the department of transportation record that Shipley's license was revoked at the time of his arrest) could be admitted without a live witness testifying and being subject to cross-examination; and (2) whether statements made by the custodian of records in authenticating the underlying driving record (the certification of the record's genuineness) could be admitted without the custodian's testimony. *See id*. at 234–35.

With regard to the first, the court noted a number of post-*Crawford* courts had determined that driving records and other governmental documents were not "'testimonial' and as a result, such information may be admitted without violating the Sixth Amendment." *Id*. at 237. The court also observed the driving record was created prior to the events leading to the criminal prosecution. *Id.*

> Shipley's driving record would exist even if there had been no subsequent criminal prosecution. The government functionaries that entered the data establishing Shipley's driving record cannot be considered witnesses against him when no prosecution existed at the time of data entry. They were simply government workers with no axe to grind who performed their routine, ministerial tasks in a nonadversarial setting pursuant to a statutory mandate.
>
> Shipley's driving record was thus created under conditions far removed from the inquisitorial investigative function—the primary evil that *Crawford* was designed to avoid.

Id.

As to the second issue, even though the certification did not exist prior to the request from a prosecutor and "a reasonable person receiving the request from a public prosecutor would likely understand that the certification and underlying record would likely be offered in a criminal trial," the *Shipley* court found that authentication of a previously existing public record for purposes of trial, the two factors noted in *Crawford*, were not dispositive. *Id.* at 238.

> The purpose of the certification in this case is simply to confirm that a copy of a record is a true and accurate copy of a document that exists in a government data bank. The purpose of offering the certification is not to avoid cross-examination or to advance an inquisition, but only to allow the admission of an underlying record that was prepared in a nonadversarial setting prior to the institution of the criminal proceeding. Unlike in *Caulfield* and other "authentication" cases involving forensic analysis after the commission of the alleged crime, the custodian of records in this case is certifying the authenticity of a copy of a preexisting document. *In this setting, the custodian of records cannot be said to be an adverse witness providing testimony against the accused in any meaningful sense.*

Id. at 238–39 (citations omitted). Consequently, the court concluded "a Confrontation Clause violation does not occur when the prosecution offers an admissible driving record with a certificate of authenticity made by the custodian of records in the routine course of business." *Id.* at 239.

One of the cases cited in *Shipley* is *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005), *cert. denied* 547 U.S. 1114 (2006), in which the court found records related to prior convictions were not testimonial. The *Weiland* court explained:

> Here, the documents contained in the "penitentiary packet" incorporate two layers of hearsay, and, correspondingly, two potential Confrontation Clause problems: 1) the records

> themselves, and 2) the statements of Greene and the Secretary of State of the State of Oklahoma providing the foundation to establish their authenticity. With respect to the first layer, the records of conviction and the information contained therein, the fingerprints, and the photograph, it is undisputed that public records, such as judgments, are not themselves testimonial in nature and that these records do not fall within the prohibition established by the Supreme Court in *Crawford*, 541 U.S. at 56, 124 S. Ct. 1354, [158 L. Ed. 2d at 195].
>
> With respect to the second layer, the certifications by Greene and the Secretary of State of the State of Oklahoma, we encounter a novel question. . . . Greene's certification and that of the Secretary of State are "affidavits" prepared for the purposes of litigation that might be argued to invoke the protections of the Confrontation Clause. *Nevertheless, we conclude that a routine certification by the custodian of a domestic public record, such as that provided by Greene, and a routine attestation to authority and signature, such as that provided by the Secretary of State in this case, are not testimonial in nature.* [Citation omitted.] Not only are such certifications a "routine cataloguing of an unambiguous factual matter," *United States v. Bahena–Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005), but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge "without any apparent gain in the truth-seeking process." *Crawford*, 541 U.S. at 76, 124 S. Ct. 1354, [158 L. Ed. 2d at 208] (Rehnquist, C.J., concurring in the judgment). We decline to so extend *Crawford*, or to interpret it to apply so broadly.

420 F.3d at 1076–77 (emphasis added) (footnote omitted); *see also United States v. Causevic*, 636 F.3d 998, 1002 (8th Cir. 2011) ("We agree with the *Weiland* court that criminal judgments may be admitted to show the defendant has a prior conviction without violating the Confrontation Clause.").

Other jurisdictions that have addressed the issue of criminal history documentation have come to similar conclusions. *See Commonwealth v. Weeks*, 927 N.E.2d 1023, 1027–29 (Mass. Ct. App. 2010) (holding that admission in evidence of certified copies of docket sheets of defendant's prior convictions did not violate defendant's Sixth Amendment right to confrontation

because such records are not testimonial; footnote 4 contains a compilation of unpublished cases finding documentation such as certified records of convictions are not testimonial); *Grey v. State*, 299 S.W.3d 902, 909 (Tex. Ct. App. 2009) (finding it is "the intended or anticipated use of a statement that determines whether the statement is testimonial" and holding "the challenged criminal history summary, not having been made in anticipation of prosecutorial use, was not testimonial, and the admission of the summary in evidence did not violate appellant's constitutional confrontation right"). *Cf. United States v. Smith*, 640 F.3d 358, 362–63 (D.C. Ct. App. 2011) (finding a confrontation violation where the prosecution attempted to prove defendant had a prior felony conviction by introducing letters from a court clerk; letters stated that "it appears from an examination of the records on file in this office" that defendant had been convicted of a felony and emphasizing that under *Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2539, 174 L. Ed. 2d at 329, a "clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here:" provide an evidentiary interpretation of the substance or effect of the existing records).

We find no meaningful distinction between the certified abstract of driving record found admissible in *Shipley* and the certified records of convictions admitted here. First, as to the underlying public record of conviction, documents establishing Redmond's Tennessee felony convictions would exist even if there had been no subsequent criminal prosecution. The government functionaries that entered the data establishing Redmond's criminal record cannot be considered witnesses against him when no prosecution existed at the time of

data entry. "They were simply government workers with no axe to grind who performed their routine, ministerial tasks in a nonadversarial setting pursuant to a statutory mandate." *Shipley*, 757 N.W.2d at 237.

The second level, the statements made by the custodian of records in authenticating the underlying records, are perhaps "affidavits" prepared for the purposes of litigation. *See White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 747, 116 L. Ed. 2d 848, 865 (1992) (Thomas, J., concurring in part) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."). But, we agree with the reasoning enunciated in *Weiland*, 420 F.3d at 1076, that a routine certification by the custodian of a domestic public record and a routine attestation to authority and signature are not testimonial in nature. This reasoning is enunciated by our supreme court as well. *See Shipley*, 757 N.W.2d at 239 (noting that the custodian of records is certifying the authenticity of a copy of a preexisting document and is not "an adverse witness providing testimony against the accused in any meaningful sense").

We disagree with Redmond that the Supreme Court's opinion in *Melendez-Diaz* requires a second look at Shipley. Although the Court found that a laboratory analysis of seized contraband, prepared after the arrest and for purpose of proving the nature of a substance, was testimonial, it did not extend that finding to the "traditionally admissible" clerk's certificate authenticating an official record. *Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2538, 174 L. Ed. 2d at 328.

IV. Conclusion.

The criminal history documentation presented by the State in this case was not created for the purposes of trial.[2] The certifications of authenticity were of preexisting documents and not like documents of forensic analysis conducted after the commission of the alleged crime. We conclude the exhibits were not testimonial, and the admission of the records did not violate the Confrontation Clause.

AFFIRMED.

[2] We note Iowa Code "[c]hapter 22 and chapter 692 were amended to make clear that criminal history data *are* public records." *Judicial Branch v. Iowa Dist. Ct.*, ___ N.W.2d ___, ___ (Iowa 2011). "Criminal history data" is defined in Iowa Code section 692.1(5) as, "[A]ny or all of the following information maintained by the department [of public safety] or division in a manual or automated data storage system and individually identified": "[a]rrest data"; "[c]onviction data"; "[d]isposition data"; "[c]orrectional data"; "[a]djudication data"; and "[c]ustody data." Iowa Code chapter 692 provides regulations on the compilation and dissemination of criminal history data. *See State v. Bessenecker*, 404 N.W.2d 134, 135 (Iowa 1987). Section 692.2 authorizes the dissemination of criminal history data to a criminal justice agency.