IN THE COURT OF APPEALS OF IOWA

No. 2-399 / 11-1278
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY EUGENE WIXOM,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John M. Wright, Judge.

A defendant contends the district court violated his constitutional right to confront witnesses when the court admitted a certified copy of his driving record without the live testimony of the document preparer; he also contends the court abused its discretion in refusing to suspend his fifteen-year prison sentence for possession of methamphetamine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Schaefer, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Following a vehicle and foot chase, a Burlington police officer apprehended Terry Wixom for driving while barred. A search of Wixom yielded methamphetamine.

A jury found Wixom guilty of possession of methamphetamine. *See* Iowa Code § 124.401(5) (2009). Wixom subsequently admitted to two prior convictions for possession of a controlled substance, making him a habitual offender. *See id.* § 902.8 (setting forth minimum sentence for habitual offenders). The jury also found Wixom guilty of eluding a police officer and driving while barred. *See id.* §§ 321.279, .555, .560, .561.

The district court sentenced Wixom to a prison term not exceeding fifteen years on the possession charge and a term not exceeding two years on the driving while barred charge, to be served concurrently with the fifteen-year sentence. Finally, the court sentenced Wixom to one year in a county jail on the eluding charge, with that sentence suspended.

On appeal, Wixom contends the district court violated his constitutional right to confront witnesses when the court admitted a certified copy of his driving record without the live testimony of the document preparer. He also contends the court abused its discretion in refusing to suspend his fifteen-year prison sentence for possession of methamphetamine.

I. Confrontation Clause

The district court admitted the certified copy of Wixom's driving record over Wixom's objection that it violated his constitutional right of confrontation. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy

the right . . . to be confronted with the witness against him."); Iowa Const. art. I, § 10. The court relied on *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008). There, the Iowa Supreme Court identified two Confrontation Clause issues:

> The first issue is whether the underlying public record—an abstract of Shipley's driving record—may be admitted without a live witness testifying and being subjected to cross-examination. For purposes of this question, the out-of-court statement offered into evidence is that the records of the IDOT show that Shipley was driving while revoked at the time of his arrest. The second question is whether statements made by the custodian of records in authenticating the underlying driving record may be admitted without the custodian's testimony. For purposes of this issue, the out-of-court statement offered into evidence is the certification of the record's genuineness.

Shipley, 757 N.W.2d at 234–35. Analyzing the state constitution's confrontation clause in the same manner as the United States Constitution's Confrontation Clause, the court held the driving record and the out-of-court certification were admissible without the testimony of a live witness. *Id.* at 237–38. The court reasoned that the driving record was created prior to the events leading to Shipley's prosecution and the government employees who entered the underlying data could not be considered witnesses against him. *Id.* at 237. In the court's words, "They were simply government workers with no axe to grind who performed their routine, ministerial tasks in a non-adversarial setting pursuant to a statutory mandate." *Id*. Similarly, with respect to the certification, the court reasoned that "[t]he 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." *Id.* at 239.

We agree with the district court that *Shipley* is controlling. Here, as there, the driving record and certification were not created in an adversarial setting. They were admissible without live testimony.

Nonetheless, we will briefly address Wixom's contention that the appellate courts should revisit *Shipley* in light of a post-*Shipley* opinion. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). In *Melendez-Diaz*, the trial court admitted three "certificates of analysis" of seized substances over a defense objection that the Confrontation Clause required the analysts to testify in person. 129 S. Ct. at 2531. The United States Supreme Court reversed, holding

> the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. at 2540.

That holding does not require a different conclusion in this case. The driving record and certification were not prepared specifically for use at Wixom's trial and were not "testimony against petitioner." Indeed, it is noteworthy that the Court in *Melendez-Diaz* specifically stated that "[a] clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record." *Id.* at 2539. In light of this language, *Shipley* still governs the result.[1]

We affirm the admission of Wixom's certified driving record.

II. Sentencing Decision

Wixom next takes issue with the district court's imposition of a fifteen-year prison sentence on the methamphetamine possession count. He contends the

[1] That is what our court concluded in *State v. Redmond*, No. 10-1392, 2011 WL 3115845, at *6 (Iowa Ct. App. July 27, 2011).

sentence "is excessive" and the district court should have suspended it. *See* Iowa Code § 124.401(5) ("Any sentence imposed may be suspended.").

Where a sentence lies within the statutory limits, the sentence is set aside only if the court abused its discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). We discern no abuse of discretion in the court's decision.

Before committing Wixom to the Iowa Department of Corrections for a prison term not exceeding fifteen years, the district court considered the comments of counsel and of Wixom, Wixom's "history of criminal convictions," his "drug abuse problem," his decision to use methamphetamine while awaiting sentencing on a methamphetamine conviction, and his inability to control his "hunger for that methamphetamine while on the outside." The court considered community resources available for rehabilitation, noted that Wixom failed to avail himself of treatment outside the prison system, and determined that the Department of Corrections could provide substance abuse treatment "behind the walls," subject to Wixom's willing participation. The court concluded that "for all the reasons that I've stated here on the record today, suspending your sentence is not something that's going to be appropriate based on what I think your prospects are for the future." We find no reason to quarrel with any aspect of this thorough sentencing decision. We affirm Wixom's sentence for possession of methamphetamine (third offense) as a habitual offender.

AFFIRMED.