DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2009

RANDY L. WASHINGTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-597

[June 3, 2009]

STEVENSON, J.

Randy Washington was tried by jury and convicted of acting as an unlicensed contractor during a state of emergency. At trial, to establish that Washington was not licensed as a contractor, the State introduced a "certificate of non-licensure" prepared by the State of Florida Licensing Division, Construction Industry Licensing Board. Defense counsel objected to the document's introduction, arguing that it was hearsay and violated the Sixth Amendment and the principles set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court overruled defense counsel's objection and that ruling is the subject of the instant appeal. We affirm.

Prior to *Crawford*, whether the admission of hearsay violated a defendant's Sixth Amendment right to confront the witnesses against him was controlled by *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which held that the Sixth Amendment did not bar admission of hearsay if the statement bore "adequate indicia of reliability," i.e., if the statement fell within a firmly-rooted hearsay exception or there was "a showing of particularized guarantees of trustworthiness." In *Crawford*, the Supreme Court receded from *Roberts* where the evidence at issue is a testimonial statement, holding that "[w]here *testimonial statements* are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68–69 (emphasis added). Following *Crawford*, the introduction of out-of-court testimonial statements violates the Sixth Amendment, regardless of any rule of evidence, unless the declarant is unavailable and the defendant has a prior meaningful opportunity to cross examine the

witness. *Id.*

Crawford was concerned only with testimonial statements. The *Crawford* court expressly stated that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law" and to "exempt[] such statements from Confrontation Clause scrutiny altogether." *Id.* at 68. The *Crawford* Court held that "at a minimum" "testimonial statements" included "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" and police interrogations, but left for another day "any effort to spell out a comprehensive definition of 'testimonial.'" *Id.*

Following *Crawford*, the issue facing the courts has been defining which hearsay statements are testimonial and which are not. In its opinion, the *Crawford* Court noted that, generally, business records were not, "by their nature," testimonial with Chief Justice Rehnquist writing in his concurrence that "[t]o hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Id.* at 76 (Rehnquist, C.J., concurring). Consistent with *Crawford*'s dictates, Florida courts have held that certain documents admissible as business or public records are testimonial and some are not. In *Johnson v. State*, 929 So. 2d 4 (Fla. 2d DCA 2005), *aff'd*, 982 So. 2d 672 (Fla. 2008), the State sought to admit, pursuant to the business records exception, an FDLE lab report, reflecting that the substances possessed by the defendant were marijuana and cocaine. The report was prepared by law enforcement pursuant to a police investigation and was admitted to establish an element of the crime. Under these circumstances, the Second District held that the document was testimonial, reasoning that while "technically, an FDLE lab report is a record kept in the regular course of business . . . , it is intended to bear witness against an accused." *Id.* at 7. In affirming, the Florida Supreme Court reiterated that there is "a distinction between records that are prepared as a routine part of a business's operation and records that are prepared and kept at the request of law enforcement agencies and for the purpose of criminal prosecution." 982 So. 2d at 677–78.

In *Sproule v. State*, 927 So. 2d 46 (Fla. 4th DCA 2006), this court held that the introduction of a defendant's driving record, pursuant to the public records exception to the hearsay rule, is not a violation of the Sixth Amendment or the principles in *Crawford* as this type of record is not testimonial. In *Card v. State*, 927 So. 2d 200 (Fla. 5th DCA 2006), our sister court concurred in this conclusion, adding that "[a] driving record properly authenticated by the DHSMV does not seem to us to be

testimonial because it is not accusatory and does not describe specific criminal wrongdoing of the defendant," "[r]ather, it merely represents the objective result of a public records search." *Id.* at 203. The court went on to explain that driving records are kept *for* the benefit of the public, not prepared solely for trial, and contain "neither expressions of opinion nor conclusions requiring the exercise of discretion." *Id.*

Florida Statutes Chapter 489 clearly contemplates the maintenance of records of certification and registration by the Construction Industry Licensing Board. The certification of non-licensure is firmly rooted as an exception to the hearsay rule within the purview of the Florida Evidence Code. *See* § 90.803(10), Fla. Stat. (2008) (absence of public record or entry); § 90.902, Fla. Stat. (2008) (self-authentication). We believe that the records at issue which certify the non-existence of a matter in the public records are also non-testimonial under *Crawford*. We see no functional difference between a public record which attests to an entry and one which attests to the absence of an entry. Although we find no case directly on point from Florida, the overwhelming weight of the authority which we have found outside of this jurisdiction supports our conclusion. *See United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005) (certificate of non-existence of record (CNR) created by records custodian at the Immigration and Naturalization Service non-testimonial); *United States v. Burgos*, 539 F.3d 641 (7th Cir. 2008) (warrant of deportation and certificate of non-existence of public record non-testimonial); *United States v. Urqhart*, 469 F.3d 745 (8th Cir. 2006) (certificate of non-existence of public record non-testimonial); *United States v. Norwood*, 555 F.3d 1061 (9th Cir. 2009) (certificate from Washington Department of Employment Security of no record that Norwood received taxable wages for period in question non-testimonial); *United States v. Cervantes-Flores*, 421 F.3d 825, 834 (9th Cir. 2005) (certificate attesting to absence of immigration record non testimonial); *Millard v. United States,* 967 A.2d 155 (D.C. 2009) (certificate of no record for license to carry pistol and no record of registered firearm not testimonial); *Michels v. Commonwealth*, 624 S.E.2d 675 (Va. Ct. App. 2006) (certified document from Delaware Secretary of State indicating no records for registration of trust company non-testimonial); *State v. Kirkpatrick*, 161 P.3d 990 (Wash. 2007) (en banc) (introduction of a certified letter from the Department of Licensing attesting that no driver's license had been issued non testimonial).

The certificate of non-licensure involved in the case before us is more akin to the driving records in *Sproule* and *Card* and the certifications reflecting the absence of record entries in the plethora of cases cited above than to the FDLE lab report in *Johnson*. Here, the certificate is not

accusatory—as a general matter, not possessing a contractor's license is not a crime—and the certificate simply reflects the objective result of a public records search. Although the certificate of non-licensure may be prepared upon request for use at trial, the underlying records which the certificate represents already exist and are maintained for the benefit of the public. We thus affirm the trial court's decision admitting the certificate and we affirm Washington's conviction.

Affirmed.

WARNER and DAMOORGIAN, JJ., concur.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Catalina M. Avalos, Judge; L.T. Case No. 06-20920 CF10A.

Carey Haughwout, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and August A. Bonavita, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.