IN THE COURT OF APPEALS OF IOWA

No. 3-571 / 11-1685
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN MICHAEL KENNEDY,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Michael G. Dieterich, District Associate Judge.

Brian Kennedy challenges his conviction for driving while revoked based on Confrontation Clause objections. **AFFIRMED.**

Richard A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers and Justin Stonerook, Assistant County Attorneys, for appellee.

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

TABOR, J.

Brian Kennedy appeals his conviction for driving while revoked, contending the State violated his constitutional right to confrontation by offering into evidence a certified abstract of his driving record and attached official notices, affidavits of mailing, and certificates of bulk mailing. Kennedy acknowledges *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008) rejected a Confrontation Clause challenge to the admission of a defendant's driving record, but contends two subsequent decisions by the United States Supreme Court uproot our supreme court's analysis. He also urges the additional mailing and notice documents require a different approach.

Because *Shipley* is still good law after *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), it controls the outcome here. As for the remaining documents, we find Kennedy failed to preserve error on that separate claim.

I. Background Facts and Proceedings

According to the police report accompanying the minutes of testimony, on November 30, 2010, at 6:05 a.m., Deputy Eric Staub was sitting in the bank parking lot when he saw Brian Kennedy driving north down Main Street in Danville, Iowa. Because Deputy Staub knew Kennedy's license was revoked for operating while intoxicated, he pulled Kennedy over. After speaking with Kennedy, Deputy Staub issued a citation for driving while revoked. Since Kennedy was on his way to work, Deputy Staub elected not to arrest him but

advised him to obtain a work permit, warning a repeat offense would likely result in his arrest.

On December 30, 2010, the State filed a trial information charging Kennedy with driving while revoked, in violation of Iowa Code section 321J.21 (2009).[1] The information included a notice of the State's intent to enter into evidence a copy of Kennedy's certified driving record from the Iowa Department of Transportation (DOT) and any other state.

During a July 19, 2011 hearing, the district court considered Kennedy's motion in limine contesting the State's introduction of a certified abstract of his driving record into evidence. The abstract contained the following certification:

> Pursuant to Iowa Code § 321.10, I, Kim Snook, Director of Office of Driver Services, Iowa Department of Transportation, do hereby certify that I am the custodian of the records held by the Office of Driver Services, that this is a true and accurate copy of an official record currently in the custody of said office, and that I have been authorized by the Director of the Iowa Department of Transportation to so certify.
>
> In witness whereof, I have caused my signature and the seal of the Department to be set upon this document, at Ankeny, Iowa this date:
>
> 12/9/2010

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[1] Section 321J.21 reads:

> 1. A person whose driver's license or nonresident operating privilege has been suspended, denied, revoked, or barred due to a violation of this chapter and who drives a motor vehicle while the license or privilege is suspended, denied, revoked, or barred commits a serious misdemeanor. In addition to any other penalties, the punishment imposed for a violation of this subsection shall include assessment of a fine of one thousand dollars.
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> 2. In addition to the fine, the department, upon receiving the record of the conviction of a person under this section upon a charge of driving a motor vehicle while the license of the person was suspended, denied, revoked, or barred shall extend the period of suspension, denial, revocation, or bar for an additional like period, and the department shall not issue a new license during the additional period.

Attached to the abstract the State included three sets of the following documents: (1) an official notice signed by Snook; (2) a certificate of bulk mailing; and (3) an affidavit of mailing signed by Kathy McLear, manager of the DOT Office of Driver Services. Snook stamp-signed each page of the attachments on December 10, 2010—the date she generated the certified abstract.

The district court told Kennedy at the close of the hearing he was going to follow the *Shipley* decision. The court denied Kennedy's limine motion in a written ruling entered the following day.

On August 23, 2011, the court held a stipulated bench trial, considering the minutes of evidence, including Deputy Staub's report, and the certified abstract of Kennedy's driving record with three sets of official notices, certificates of bulk mailing, and affidavits of mailing. The district court found Kennedy guilty of driving while revoked. On September 30, 2011, the court sentenced Kennedy to sixty days in the county jail, with all but two days suspended; a mandatory minimum $1000 fine plus surcharge and court costs; and twenty-four months informal probation.

Kennedy appealed, requesting our supreme court retain this case to revisit *Shipley* in light of *Melendez-Diaz* and *Bullcoming*. Our supreme court declined, transferring the case to us.

II. Standard of Review

We review de novo claims brought under the Confrontation Clause. *State v. Rainsong*, 807 N.W.2d 283, 286 (Iowa 2011). Under de novo review, we

independently evaluate the totality of the circumstances as they appear on the entire record. *State v. Lowe*, 812 N.W.2d 554, 566 (Iowa 2012).

III. Analysis

Kennedy contends the State's proof his license was revoked constituted testimonial evidence, the admission of which violated his right to confrontation secured by the Sixth Amendment to the United States Constitution[2] and article I, section 10 of the Iowa Constitution.[3] Because Kennedy does not contend the state provision should be interpreted differently than its federal counterpart, we construe them identically. *See Shipley*, 757 N.W.2d at 235.

Since the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006), the key question for confrontation purposes is whether the disputed statements are testimonial or nontestimonial. Testimonial statements may be admitted in subsequent proceedings only if the declarant is unavailable to testify and the defendant had a prior chance to cross-examine. *Crawford*, 541 U.S. at 53–54.

Crawford did not define testimonial in a comprehensive way. *Id*. at 68. But *Crawford* and *Davis* did offer some guidance for determining if out-of-court statements were testimonial, which our supreme court examined in *Shipley*, 757 N.W.2d at 235–37. *Shipley* observed that testimonial statements include the functional equivalent of in-court testimony, formalized expressions such as

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[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

[3] "In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right . . . to be confronted with the witnesses against him . . . ." Iowa Const. art. 1, § 10.

confessions or depositions, and statements made when a witness might reasonably expect them to be used at trial. 757 N.W.2d at 236-37.

Like Kennedy, Shipley challenged the admission into evidence of a certified abstract of his driving record, without a live witness, to prove an element of his driving-while-revoked offense. *Id.* at 230. Our supreme court found the abstract of his driving record was nontestimonial, reasoning:

> Shipley's driving record was created *prior* to the events leading up to his criminal prosecution. As a result, 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.

Id. at 237 (omitting internal citations).

The *Shipley* court next addressed whether the out-of-court certification of authenticity violated the Confrontation Clause. *Id.* The court noted the certification did not exist before the prosecution began and that a reasonable person who received a request from a prosecutor would understand the likelihood the record would be submitted in a criminal trial. *Id.* The court explained why, despite those testimonial attributes, the certificate was admissible:

> 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.

Id. at 238–39.

The *Shipley* court distinguished these record custodians from forensic analysts called to perform testing in preparation for a prosecution:

> Unlike . . . "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 239.

It was significant to the *Shipley* court that these custodians certified driving records for all who requested them, not only government officials—moving the statements away from an inquisitorial purpose. The court ultimately held that admission into evidence of a driving record with a certificate of authenticity prepared by the records custodian in the routine course of business did not violate the Confrontation Clause. *Id.*

A. Is the *Shipley* holding still viable?

Kennedy argues *Shipley* should be revisited in light of *Melendez-Diaz* and *Bullcoming*. A brief examination of those cases reveals there is no need to take a second look at *Shipley*.

In *Melendez-Diaz*, the United States Supreme Court held that sworn statements by a forensic laboratory analyst that a tested substance was cocaine constituted testimonial evidence. 557 U.S. at 310 (expressing "little doubt" that documents at issue fell within the "core class of testimonial statements" described in *Crawford*). The *Melendez-Diaz* court stressed the documents were "plainly affidavits: declarations of facts written down and sworn to by the

declarant before an officer authorized to administer oaths." *Id*. And the sole purpose of the affidavits was to establish "prima facie evidence of the composition, quality, and the net weight of the analyzed substance" in the criminal case. *Id.* at 310–11.

Melendez-Diaz distinguished the forensic report—prepared for criminal trials—from other business and official records. *Id.* at 319–22, 324 ("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."). The Court distanced the forensics test from a clerk's affidavit authenticating or providing a copy of a record, where the clerk did not "*create* a record for the sole purpose of providing evidence against a defendant." *Id.* at 323.

In *Bullcoming v. New Mexico,* the Court extended its *Melendez-Diaz* holding, determining the analyst who conducts a laboratory test—not merely a colleague knowledgeable about the testing procedures—must be available for cross-examination to satisfy the confrontation requirement. 131 S. Ct. at 2716 ("[Q]uestioning one witness about another's testimonial statements [does not] provide[ ] a fair enough opportunity for cross-examination."). The Court deemed the blood-alcohol report to be testimonial because it was created solely for evidentiary purposes and to assist in a law enforcement investigation. *Id.* at 2727.

Kennedy asks our supreme court to reconsider *Shipley*, alleging its foundational principles were eroded by *Melendez-Diaz* and *Bullcoming.* Reconsideration is not required given the distinct nature of the forensic evidence at issue in those cases. In both *Melendez-Diaz* and *Bullcoming*, the lab reports were testimonial because analysts prepared them specifically for use in the prosecution. As discussed in *Shipley*, the same cannot be said for the certification of preexisting driving records. *See Shipley*, 757 N.W.2d at 238–39 (distinguishing between authentication in forensic analysis after the crime and certification of preexisting documents).

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 and were admissible without live testimony.

B. Did Kennedy Preserve his Separate Claim Concerning the Attached Affidavits of Mailing, Certificates of Bulk Mailing, and Official Notices?

Kennedy also attacks the admissibility of the supporting affidavits and certificates of mailing attached to the certified abstract of his driving record. Kennedy points out *Shipley* left open the question whether such documents would be considered testimonial. *See* 757 N.W.2d at 237 n.2 (noting task was not to determine testimonial nature of "an attestation that certain procedures have been followed with respect to a record").

The State challenges Kennedy's preservation of this issue for appeal—contending he offered only fleeting, general references to those documents

during oral argument on his motion in limine and did not inform the trial court that they required a separate legal analysis.

We often refer to the "fundamental doctrine of appellate review" requiring issues be both raised and decided by the district court before they can be considered by our court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). To preserve error on an issue, a litigant must raise a challenge at the earliest possible point, opposing counsel must have notice of the challenge and an opportunity to be heard, and the trial court must have an opportunity to consider and rule on the issue. *State v. Opperman*, 826 N.W.2d 131, 133 (Iowa Ct. App. 2012).

At the pretrial hearing, Kennedy mentioned the attachments at the end of his lengthy oral argument: "they are in lieu of someone saying yes, we sent notice; yes, they got notice; here's where we sent it; here's our certified mailing." He did not ask the court to consider their testimonial nature separately from the certified abstract. His passing reference did not satisfy the objectives of error preservation. The State did not respond to the argument, nor did the district court rule on it. *See Meier*, 641 N.W.2d at 540 (reasoning "the record must at least reveal the court was aware of the claim or issue and litigated it"). Without the issue being argued or decided at trial, we decline to reach it on appeal.

AFFIRMED.