

12-6-2011

State v. Kramer Appellant's Reply Brief Dckt. 38786

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff/Respondent,

Supreme Court No. 38786

District Court No. CR-2010-21212

v.

MICHAEL IAN KRAMER,

Defendant/Appellants

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho,
in and for the County of Kootenai

Honorable Benjamin Simpson, District Judge, Presiding

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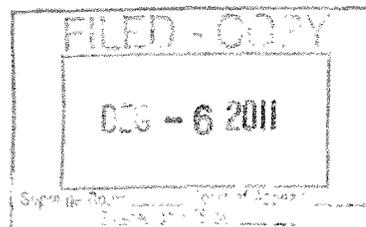


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I. ARGUMENT

A. THE TRIAL COURT DID ABUSE ITS DISCRETION IN FAILING TO EXCLUDE THE BREATH TEST.

Idaho Code 18-8004 addresses the proof required to prove a driving under the influence case. The government may prove the charge based upon various testing procedures but all require proof that the tests were performed by a laboratory or by methods approved or certified by the Idaho State Police. I.C. 18-8004 (4) The government may use these tests to establish a person is under the influence of alcohol, drugs, or any other intoxicating substance. I.C. 18-8004

The defense in this case filed a demand for discovery on March 18, 2009. In that demand disclosure of documents and experts that the state intended to use to lay a foundation for the breath test. (3/12/10 "Tr" Vol. I p. 4-5) A demand included the disclosure of all experts, basis of expert testimony pursuant to IRE 705, and all analysis performed with testing procedures, and reagents and solvents used in testing procedures. (3/12/10 "Tr" Vol. I p. 4-5) Prejudice arises from the inability to address questions about the breath test by bringing expert witnesses to challenge the breath test accuracy. (3/12/10 "Tr" Vol. I, p. 11)

The defense objected to the use of the breath test because the prosecution failed under IRE 702, 703, and 704 to disclose any discovery related to the breath test and failed to disclose any experts or certificates. (3/12/10 "Tr" Vol. I, p. 6 L. 4-20) The defense clarified that the motion was three-fold to exclude breath test for the failure to timely provide

discovery, the prejudice is the inability to now bring an expert on the breath machine, and the denial of the right of confrontation under the Sixth Amendment. (3/12/10 "Tr" Vol. I p. 15)

The defense argued that the forensic scientist David Lacock prepared the simulator solution was required to establish the target value .081 and .073 to .089 of ethyl alcohol per 210 liters of vapor. (3/12/10 "Tr" Vol. I, p. 21) Further, that Mr. Powell was the technician that needed to be called as technician to testify the breath machine is properly certified. (3/12/10 "Tr" Vol. I, p. 22) These people are all needed to testify that the breath test was completed as required by 18-8004 (4). (3/12/10 "Tr" Vol. I, p. 23, L. 1-7) Trooper Lind testified he did not check the simulator solution lot number on the breath test. The operator is not required to check the simulator lot number for the breath test. (3/12/10 "Tr" Vol. I, p. 131)

The government is required pursuant to I.C. 18-8004 (4) "Analysis of blood, urine, or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho State Police or by a laboratory approved by the Idaho State Police under the provisions of approval and certification standards set by that department, or by any other method approved by the Idaho State Police." The certificates are used to establish subsection (4) of I.C. 18-8004 which is part of the proof of driving under the influence. The certificates admitted in this case are included as documents in the clerk's papers 110-116.

"The inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving

his constitutionally guaranteed fair trial. *State v. Byington*, 132 Idaho at 592, 977 P.2d at 206; *State v. Smoot*, 99 Idaho 855, 858-59, 590 P.2d 1001, 1004-05 (1978); *State v. Pacheco*, 134 Idaho 367, 370, P.3d 752, 755 (Ct. App. 2000) This ordinarily requires that the complaining party demonstrate that the late disclosure hampered his ability to meet the evidence at trial. *State v. Miller*, 133 Idaho 454, 456-57, 988 P.2d 680, 682-83 (1999) In this trial the lack of experts hampered the defense in addressing issues in the conduct of the breath test. The trooper testified he has no knowledge of how often the breath machine is calibrated. The trooper testified he could not testify that the breath machine was certified for the location where it was located. (3/12/10 "Tr" Vol. I, p. 123) The troopers inability to address issues on the proper operation of the breath equipment under I.C. 18-8004 (4) demonstrates the prejudice to the defendant by the untimely disclosure to the defendant of the certificates used. ("R" Vol. I, p. 110-116)

B. THE CONFRONTATION CLAUSE IS VIOLATED BECAUSE I.C. 18-8004 (4) REQUIRES AN ALCOHOL TEST PERFORMED BY SPECIFIC PROCEDURES SET FORTH IN THE DRIVING UNDER THE INFLUENCE STATUTE.

The government's response argues that the certificates admitted in this case are not testimonial. I.C. 18-8004 (4) requires: "Analysis of blood, urine, or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho State Police or by a laboratory approved by the Idaho State Police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho State Police. Notwithstanding any other provision of law or rule of

court, the results of any test for alcohol concentration and records relating to calibration, approval, certification, or quality control performed by a laboratory operated or approved by the Idaho State Police or by any other method approved by the Idaho State Police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish reliability of the testing procedure for examination.”

The statute I.C. 18-8004 (4) requires that the prosecution demonstrate that the testing procedures be performed by procedures approved and certification standards approved by the Idaho State Police. Although the government must prove the procedures and certification standards they are not required to “produce” a witness to establish the reliability of the testing procedure for examination. The requirements of 18-8004 (4) must be proven pursuant to I.C. 18-8004 (4) the confrontation clause requires that the defendant be allowed to challenge this by confrontation of witnesses.

The United State Supreme Court has made it very clear “in all criminal prosecutions.....the right....to be confronted with the witnesses against him.” *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 36, 158 L.Ed.2d 177 (2004) The United States Supreme Court has further clarified the requirements of the Sixth Amendment Confrontation Clause in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ 129 S. Ct. 2527, 174 L.Ed.3d 314 (2009) The U.S. Supreme Court held that analyst certificates showing the results of forensic analysis on seized substances were inadmissible absent testimony from the lab technician. In *Melendez-Diaz* the court held that certificates that affidavits or declarations “are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” *Melendez-Diaz v.*

Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 174 L.Ed.2d 314 (2009) citing *Davis v. Washington*, 547 U.S. 813, 830 (2006) The affidavits in *Diaz* were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Washington v. Crawford*, 541 U.S. 36, 52 (2004) The court in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009) held “analyst” affidavits were testimonial statements, and the analyst’s were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analyst’s were unable to testify at trial and that petitioner had an opportunity to cross-examine them, petitioner was entitled to “be confronted with” the analyst at trial. Citing *Crawford*, supra at 54

More recently the United States Supreme Court in *Bullcoming v. New Mexico*, 564 U.S. ___ (2011) has addressed the question of the admission of scientific tests and the requirements of testimony of lab technicians. The court held that a technicians report “is undoubtedly an ‘affirmation made for the purpose of establishing or proving some fact’ in a criminal proceeding.” Citing *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ In *Bullcoming v. New Mexico* the court held that in a Driving While Intoxicated case a forensic laboratory report certifying that *Bullcoming*’s blood alcohol concentration violated Mr. Bullcoming’s right of confrontation. Mr. Bullcoming was charged with aggravated driving under the influence pursuant to *N.M. Stat. Ann.* § 66-8-108 (2004). A blood test was taken after his arrest at a local hospital. The sample was sent to the New Mexico Department of Health, Scientific Laboratory Division (SLD). A certificate of analyst was prepared that indicated that sample was 0.21 grams

her hundred milliliters. *Bullcoming v. New Mexico*, 564 U.S. ____ (2011) Slip Opinion 09-10876, p. 4 of 19 June 23, 2011.

The state sought to admit the test results by calling another technician that worked at the same laboratory. The state maintained that the tech who prepared the report was nothing but a mere scrivener and the record was a “business record”. *Bullcoming v. New Mexico*, 564 U.S. ____ (2011) Slip Opinion 09-10876, p. 5 of 19 June 23, 2011

The U.S. Supreme Court granted certiorari and held: “As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.” The court held that because the testimony of one person was admitted through another the Sixth Amendment Confrontation Clause was violated. *Bullcoming v. New Mexico*, 564 U.S. ____ (2011) Slip Opinion 09-10876, p. 6 of 19 June 23, 2011

Here in a criminal prosecution the very issue before the jury is what was the alcohol level? The case involving Mr. Kramer involved a number of questions regarding the breath machine and the conduct of the breath test. The issue of the calibration of the machine and what simulator solution was installed in the machine. (3/12/10 “Tr” Vol. I, p. 119-121/“Tr” Vol. I, p. 131-133) All of these issues could not be adequately addressed without the opportunity to cross-examine the witnesses that appeared through the certificates admitted in exhibit 2. (3/12/10 “Tr” Vol. I, p. 131-133)(“R” Vol. I, p. 110-116) Absent the right to confront the states analyst there can be no effective method to challenge their assertions made by “certificate”. The only effective

remedy is remand for a trial where these witnesses can be cross-examined regarding their analysis and the certification of the breath machine.

The State of Idaho in Idaho Code 18-8004 (4) allows: “Notwithstanding any other provision of law or rule of the court, the results of any test for alcohol concentration and records relating to calibration, approval, certification, or quality control performed by a laboratory operated or approved by the Idaho State Police or by any other method approved by the state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.” In the case of Mr. Kramer the trial judge relied upon this statute to admit the certificates (3/12/10 “Tr” Vol. 1, p. 133) and the government prepared the certificates in anticipation of trial. The government uses these certificates to avoid the confrontation clause of the Sixth Amendment relying on I.C. 18-8004 (4) as the basis to use the certificates. The certificates are used to show compliance with I.C. 18-8004 (4) procedures established by Idaho State Police. When these certificates are prepared in anticipation of trial they are then testimonial. *Bullcoming v. New Mexico*, 564 U.S. ___ (2011) Slip Opinion 09-10876 June 23, 2011 (slip opinion p. 2 of 19) citing *Melendez-Diaz*, 557 U.S. at 116 P p. 10-11

II. CONCLUSION

The trial court committed reversible error by allowing the “certificates” which were prepared in anticipation of trial to replace live testimony. The certificates denied the defendant the opportunity to question and cross-examine witnesses about the solution that was in the machine and the importance of the solution. The certificates denied the defendant the opportunity to

question the witness about the certification of the machine for the location where the machine was located. The right of confrontation is important when the state's case relies on the breath test to establish the blood level, a critical element of the state's case. The defendant respectfully request reversal with remand for a new trial with the witnesses brought to trial for proper cross-examination.

Respectfully submitted this 1 day of December, 2011



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