

2006 N.Y. LEXIS 571, \*; 2006 NY Slip Op 2291, \*\*

**[\*\*1]** The People &c., Appellant, v Stephen M. **Pacer**, Respondent.

No. 45

COURT OF APPEALS OF NEW YORK

2006 N.Y. LEXIS 571; 2006 NY Slip Op 2291

**March** 28, 2006, Decided

**NOTICE:** **[\*1]** THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

**DISPOSITION:** Order affirmed.

**CORE TERMS:** notice, motor vehicle, revocation, revoked, license, aggravated, unlicensed, driving, mailing, testimonial, affiant, reason to know, admissible, mailed, certificate, driver's, immigration, deportation, business record, non-testimonial, cross-examine, sworn, influence of alcohol, hearsay, prior testimony, public record, third degree, mens rea, inadmissible, referenced

**COUNSEL:** Jennifer Hagan, for appellant.

John E. Tyo, for respondent.

New York State Association of Criminal Defense Lawyers et al., amici curiae.

**JUDGES:** Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

**OPINIONBY:** ROSENBLATT

**OPINION:**

ROSENBLATT, J.:

The appeal before us presents a Confrontation Clause issue under *Crawford v Washington* (541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 [2004]). Defendant was charged with aggravated unlicensed operation **[\*\*2]** of a motor vehicle in the first degree (Vehicle & Traffic Law § 511 [3] [a]) and related offenses. At trial, to prove that defendant knew his driving privileges had been revoked and was thus guilty of an aggravated offense, the prosecution introduced an affidavit prepared by a Department of Motor Vehicles official in 2003 describing the agency's revocation and mailing procedures, and averring that on information and belief they were satisfied. The

Appellate Division correctly ruled that, under *Crawford*, the trial court should [\*2] not have admitted the affidavit.

I.

In 1987, as a teenager lacking a driver's license, defendant pleaded guilty in Wyoming County to driving under the influence of alcohol. He paid a fine and the Commissioner of Motor Vehicles revoked his "privilege of operating a motor vehicle in New York." Shortly thereafter, defendant moved to Georgia, where he successfully obtained a driver's license. On July 19, 2003, 16 years after the conviction, defendant drove in Ontario County, New York, after drinking heavily. He crashed his car, fled the scene and falsely told police that his car had been stolen. The revocation of his New York State driving privileges, however, remained in force.

The People charged defendant with aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle & Traffic Law § 511 [3] [a]), two counts of operating a motor vehicle while under the influence of alcohol (Vehicle & Traffic Law § 1192 [2] and [3]), falsely reporting an incident in the third degree (Penal Law § 240.50 [3]) and leaving the scene of an incident without reporting (Vehicle & Traffic Law § 600.1 [a] [\*3] ). After a County Court trial in which defendant testified that he had not known that his New York State driving privileges had been revoked, a jury found him guilty on all counts.

The Appellate Division modified the judgment, reversed the conviction for aggravated unlicensed operation, ordered a new trial on that count and sustained the remaining counts (21 A.D.3d 192, 796 N.Y.S.2d 787 [2005]). The court held that the affidavit introduced by the People to prove defendant's knowledge that his license had been revoked violated his constitutional right to confront the witnesses against him. The court also held that County Court erred by refusing to charge the lesser offense of unlicensed operation of a motor vehicle (Vehicle & Traffic Law § 509.1). A Judge of this Court granted the People leave to appeal. We affirm.

II.

The felony offense of first-degree aggravated unlicensed operation has a mens rea element. To be convicted, a defendant must know or have reason to know that his driving privileges have been revoked, suspended or otherwise withdrawn by the Commissioner of Motor [\*3] Vehicles n1. Defendants who drive without a license but do not know (or have reason to know) that [\*4] their driving privileges have been terminated commit a misdemeanor (Vehicle & Traffic Law § 509 [1]).

- - - - - Footnotes - - - - -

n1 VTL § 511 [3] provides "(a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the first degree when such person: "(i) commits the offense of aggravated unlicensed operation of a motor vehicle in the second degree as provided in subparagraph (ii), (iii) or (iv) of paragraph (a) of subdivision two of this section and is operating a motor vehicle while under the influence of alcohol or a drug in violation of subdivision one, two, three, four or five of

section eleven hundred ninety-two of this chapter...." The referenced subparagraphs of § 511 (2) refer to license revocations or suspensions due to alcohol-related driving offenses. The mens rea element derives from the basic definition of aggravated unlicensed driving found in § 511 (1) (a): "A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle issued by the commissioner is suspended, revoked or otherwise withdrawn by the commissioner."

----- End Footnotes----- **[\*5]**

Here, defendant testified he never learned that his New York State driving privileges had been revoked. The defense argued that his move to Georgia around the same time as the 1987 proceedings may have prevented notice from reaching him. As their sole proof that defendant knew or had reason to know that his privileges were revoked, the People introduced an August 13, 2003 document titled "Affidavit of Regularity/ Proof of Mailing" from a Department of Motor Vehicles official, purporting to explain the Department's ordinary mailing procedures for revocation notices. The affidavit contained a statement, on the official's "information and belief," that the ordinary procedures described in the affidavit had been followed in defendant's case.  
n2 **[\*\*4]**

----- Footnotes-----

n2 The affidavit was prepared under the statutory authorization in Vehicle and Traffic Law § 214, which provides: "The production of a copy of a notice or order issued by the department, together with an electronically -- generated record of entry of such order or notice upon the appropriate driver's license or registration file of the department and an affidavit by an employee designated by the commissioner as having responsibility for the issuance of such order or notice issued by the department setting forth the procedure for the issuance and the mailing of such notice or order shall be presumptive evidence that such notice of suspension, revocation or order was produced and mailed in accordance with such procedures. The foregoing procedure shall not preclude the use of an affidavit of service by mail, a certificate of mailing or proof of certified or registered mail as proof of mailing of any such order or notice."

----- End Footnotes----- **[\*6]**

Defendant did not object to admission of the underlying certificate of revocation. He did, however, object on Sixth Amendment grounds to the admission of the affidavit  
n3. County Court overruled the objection.

----- Footnotes-----

n3 The Sixth Amendment guarantees criminal defendants the right to be "confronted with the witnesses against [them]." This right is binding on the States through the Federal Constitution's Fourteenth Amendment (*see Pointer v Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 [1965]). Defendant here has neither preserved nor argued any claim based on our State Constitution.

- - - - - End Footnotes- - - - -

The People concede that the affidavit is a sworn document prepared by a government official specifically for use by the prosecution at trial. The People further concede that defendant never had a chance to cross-examine the affiant and that the prosecution produced no evidence that the affiant was unavailable to testify. They argue that the affidavit was admissible as a business record or public record, and thus **[\*7]** outside the scope of the Confrontation Clause.

We begin our analysis with the Supreme Court's discussion of the Confrontation Clause in *Crawford v Washington* (541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 [2004]). There, the Court held that "testimonial" statements not previously subjected to cross-examination are inadmissible against a criminal defendant. The Court did not fully spell out what is "testimonial," but offered some guidance. It referred to "various formulations" of the "core class of 'testimonial' statements", including:

" 'ex parte in-court testimony or its functional equivalent that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' ... 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [and] 'statements that were made under circumstances which **[\*5]** would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' "

(*Crawford*, 541 U.S. at 51-52 **[\*8]** [citations omitted].)

Although *Crawford* repeatedly describes affidavits as typically being testimonial, not all affidavits are inadmissible. The *Crawford* Court concluded that business records would not have been considered testimonial at the time the Confrontation Clause was adopted (541 U.S. at 56).

Claiming that the challenged affidavit is not "accusatory," the People argue that the affidavit is more like an ordinary business record or public record than a testimonial statement. To make their point, they cite 18th-century English cases showing that hearsay from accusers -- like hearsay from direct victims of crime or other witnesses -- was barred under English common law. It does not follow, however, that the challenged affidavit is admissible as non-accusatory hearsay.

For one thing, and contrary to the People's suggestion, the government agent who swore out the affidavit is not a "neutral" officer. The official's assertion of her "information and belief" that the ordinary mailing procedures were carried out in defendant's case is a direct accusation of an essential element of the crime, that defendant knew or should have known of the revocation n4. **[\*9]** Moreover, because the People presented no other evidence to satisfy this element, the affiant is the closest the People come to having a "witness" to prove that defendant knew or should have known of the revocation.

- - - - - Footnotes - - - - -

n4 The accusatory sentence avers "that upon information and belief, the orders referenced [pertaining to this defendant] were processed, distributed and/or mailed from this department in the manner and form described in the regular course of the New York State Department of Motor Vehicles' daily business." We note that the "manner and form" of mailing procedures described in the earlier sections of the affidavit are written in the present tense and that the affidavit was sworn to on August 13, 2003. The defense has not challenged the affidavit's relevance to procedures as they were in 1987, when defendant's revocation notice would have been mailed, and we presume for purposes of this appeal that the affidavit may be interpreted as implying that the procedures have not changed.

- - - - - End Footnotes- - - - -

The People also **[\*10]** cite cases in which Federal Courts of Appeals have held that other types of affidavits are not testimonial. These decisions, however, are distinguishable from the case before us. **[\*\*6]**

In *United States v Cervantes-Flores* (421 F.3d 825 [9th Cir 2005]), the Ninth Circuit ruled that an affidavit from an immigration officer certifying the *absence* of a record in the immigration agency's files was admissible as non-testimonial under *Crawford*. The court reasoned that the record itself, if present, would have been admissible as one maintained in the ordinary course of agency business; its absence was similarly admissible. Here, in contrast, the challenged affidavit does not merely assert that the Department had a certificate showing that defendant's license had been revoked. It goes well beyond that, and alleges that the agency took a specific action against defendant based on that revocation -- namely, mailing the notice. Similarly, in *United States v Rueda-Rivera* (396 F.3d 678 [5th Cir 2005]), the Fifth Circuit held that a certificate of non-existence of an immigration record was admissible as a non-testimonial business record, even though **[\*11]** the certificate was sworn and created by a government agent for use at trial. Contrastingly, the challenged affidavit in the case before us was introduced to establish that the agency actually mailed out notice to defendant in 1987; it did not merely reveal the ongoing presence or absence of an agency record.

In *United States v Cantellano* (430 F.3d 1142 [11th Cir 2005]), the Government

sought to prove that the defendant had re-entered the country after being deported. This required proof that he had actually left the country after the original deportation. An immigration enforcement agent submitted a "warrant of deportation" attesting that he saw Cantellano leave the United States. The court admitted the warrant without testimony from the agent. The 11th Circuit held the sworn declaration non-testimonial, and hence admissible under *Crawford*, because it was not prepared specifically for the prosecution, but rather was a contemporaneous document recorded as part of the routine duties of border agents who see deportees leave the country. Here, however, the challenged affidavit was admittedly prepared at the People's request for use at trial.

*United States v Bahena-Cardenas* (411 F.3d 1067, 1074 [\*12] [9th Cir 2004]) also concerns a deportation warrant prepared at the time of deportation and admitted at the defendant's later trial for re-entry. Because it was prepared as part of the immigration agent's routine duties and not in preparation for trial, the document differs from the affidavit before us.

Here, the affiant's sworn statement -- that she had information causing her to believe that the Department actually mailed notice of revocation to defendant -- was crucial to the People's case n5. Faced with evidence of this type, defendants have no means of challenging [\*7] the People's proof on a critical element. Without an opportunity to cross-examine the affiant, defendant had no chance to inquire about the *basis* for the affiant's "information and belief" that the Department mailed the notice. Defendant had no chance to inquire whether the Department sometimes makes mistakes in mailing revocation notices; whether there were other drivers in the Department's database with the same name as defendant to whom the Department might have mailed the notice; to what address the affiant believed, based on her information, the Department had mailed the notice; whether the notice [\*13] might have been returned undelivered; or whether the affiant could testify reliably about procedures as they existed 16 years in the past. In short, the lack of a live witness to confront eliminated defendant's opportunity to contest a decisive piece of evidence against him. This is exactly the evil the Confrontation Clause was designed to prevent.

- - - - - Footnotes - - - - -

n5 The People also argue that even if defendant lacked "knowledge" that his privileges had been revoked, he at least had "reason to know" of the revocation because it was an automatic consequence of his original 1987 conviction. The People presented no evidence of the specifics of that conviction and no record of the trial court's explanation of the conviction's direct consequences (if any). Indeed, the record lacks even an exact description of what statute defendant violated. On this record, we see nothing to support the People's inference that defendant had "reason to know" of the license revocation.

- - - - - End Footnotes- - - - -

The Appellate Division further held that County Court erred [\*14] by failing to

charge unlicensed operation of a motor vehicle (Vehicle and Traffic Law § 509 [1]) as a lesser included offense of aggravated unlicensed operation. The People argue that the only reasonable view of the evidence is that defendant committed either the aggravated offense or nothing. We disagree. Defendant admitted on the stand that he had no New York State driver's license when he committed the underlying acts in this case but contended that he did not know his New York State driving privileges had been revoked. On this point of credibility, a reasonable juror could have found that defendant drove without a license yet lacked knowledge or a reason to know that his New York license had been revoked. Therefore, the lesser charge should have been given to the jury when defendant requested it.

Accordingly, the order of the Appellate Division should be affirmed.

Order affirmed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

Decided March 28, 2006

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