IN THE
SUPREME COURT OF MISSOURI

STATE EX REL. SHARONDA TANKINS	)	
	)	
RELATOR,	)	
v.	)	**No. SC95370**
	)	
THE HONORABLE THOMAS FRAWLEY	)	
	)	
RESPONDENT.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI FROM
THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

RELATOR'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Ms. Tankins incorporates by reference the jurisdictional statement contained in her Relator's Brief as though fully set forth within.[1]

STATEMENT OF FACTS

Ms. Tankins incorporates by reference the statement of facts contained in her Relator's Brief as though fully set forth within.

[1] Relator Sharonda Tankins ("Ms. Tankins") will cite to the record as follows: Exhibits, "(Ex.)"; Transcript of the Revocation Hearing, "(Tr.)"; Court's Order Revoking Probation, "(Ord.)"; Petitioner's Petition for Writ of Mandamus and Suggestions in Support, "(Pet.)"; Respondent's Answer to Relator's Petition for Writ of Prohibition, "(Ans.)"; Relator's Brief, "(Rel.)"; and Respondent's Brief , "(Resp.)." All statutory references are to RSMo 2000 unless otherwise stated.

ARGUMENT I[2]

I. Respondent's reliance on *United States v. Boyd*, 792 F.3d 916 (8th Cir. 2015), is misplaced.

Respondent relies on *United States v. Boyd*, 792 F.3d 916 (8th Cir. 2015), for the proposition that, because Ms. Tankins was allowed to confront and cross-examine Lakeisha Thomas, a witness who had no personal knowledge of Ms. Tankins' alleged probation violations, Ms. Tankins received the due process mandated by the United States Supreme Court. (Resp. 11-12). Respondent's reliance is misplaced.

First of all, *Boyd* is a case from the Eighth Circuit and is, at best, persuasive, and not mandatory, authority. *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995) ("This Court is not bound to follow Circuit decisions but may consider them in undertaking its independent assessment of a case."). Secondly, the sections Respondent referred to in *Boyd* are merely *dicta*. (Resp. 11-12). The court in *Boyd* reversed the defendant's probation revocation on the grounds that the lower court had erroneously held that the defendant had committed a burglary. *Boyd*, 792 F.3d at 921. The entire discussion of confrontation is unnecessary to the holding. *Id.* at 920.

Even the *dicta* in *Boyd* is distinguishable from this case. *Id.* In *Boyd*, "the government [did] offer an explanation for Officer Sims's absence – she had retired from

[2] Ms. Tankins is not waiving any argument put forth in her original brief due to its non-inclusion in this brief. Further argument is unnecessary at this stage on any argument included in the original brief but absent from this one.

the probation office." *Id*. The court also believed that Officer Sims was located "a couple of hundred miles away" at the time of the probation violation hearing. *Id.* at 917. In *Boyd*, these factors combined to show good cause why confrontation of the defendant's actual probation officer was not required. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (stating that, at a minimum, a defendant at a probation revocation hearing is entitled to "[t]he right to confront and cross-examine adverse witnesses (*unless the hearing officer specifically finds good cause for not allowing confrontation*)[.]") (emphasis added).

In this case, Respondent did not make any such finding of good cause. (Ex. 1-39). Based on the record before him, he could not. (Ex. 1-39). The State offered no excuse why it did not call to the stand anyone with personal knowledge of Ms. Tankins' alleged probation violations. (Tr. 1-29). The Eighth Circuit in *Boyd* was reluctant to find good cause without further inquiry: "While the court should have inquired further about Officer Sims's present residence, whereabouts, and availability to testify, we cannot say the court abused its discretion when it allowed Officer Hudson to testify in substitution of Officer Sims." *Id.* at 820. If the lower court in *Boyd* should have inquired further, then Respondent, who knew absolutely no information about the present residence, whereabouts, and availability to testify of a witness with personal knowledge of Ms. Tankins' alleged probation violations, needed to inquire further. (Tr. 1-29).

Respondent's claim that Ms. Tankins received the confrontation required by the Constitution has no support in Missouri law. Ms. Tankins is entitled either to cross-

examination and confrontation of adverse witnesses or to a finding of good cause why confrontation should not be allowed. She got neither.

By admitting the reports into evidence and allowing the State to elicit testimony about their contents, Respondent deprived Ms. Tankins of her right to due process of law and to confront and cross-examine adverse witnesses in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

II. Crawford v. Washington, 541 U.S. 36 (2004) applies to probation revocation hearings.

Respondent argues that *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny do not apply to probation revocation hearings.[3] A probation violation hearing is not a criminal prosecution. *Morrissey*, 408 U.S. at 489; *Gagnon*, 411 U.S. at 782. "[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* That does not mean, however, that evidence that would not be admissible in an adversary criminal

[3] At least, it appears that Respondent is arguing as such. Respondent never actually mentions *Crawford*, even though it formed the major foundation of Ms. Tankins' argument. (Resp. 1-25). Respondent does cite cases that expand on the meaning of *Crawford* and that Ms. Tankins used in support of her *Crawford* argument, so it appears that Respondent is replying to that argument. (Resp. 13).

trial is automatically admissible in a probation revocation hearing. Defendants at probation revocations are still entitled to certain due process rights. *Id.*

One of those rights is the right to "confront **and** cross-examine adverse witnesses[.]" *Id.* (emphasis added). By using the word "and," the Supreme Court clearly intended for this right to include more than just cross-examination. *Morrissey* states that defendants in parole revocation proceedings have the right to confront adverse witnesses. 408 U.S. at 489. *Gagnon* grants that right to defendants in probation violation proceedings. 411 U.S. at 782.

The question, then, is what it means to have the right to confront adverse witnesses. The United States Supreme Court explored this question at length in *Crawford*, 541 U.S. at 42-55. The Supreme Court's conclusion was that the right to confront adverse witnesses is the right to exclude the admission of out-of-court statements if they are testimonial, the declarant is unavailable, and the defendant had no prior opportunity to cross-examine the declarant.[4] *Id.* at 54.

[4] To be clear, there are two reasons why *Crawford*'s definition of the right to confrontation should apply in this case. The first is that *Crawford* should apply not just to criminal cases, but to all cases with criminal penalties, including probation revocation cases. The second is that *Crawford* defines the phrase "right to confront adverse witnesses" and therefore is applicable in any case that requires that phrase to be defined. The instant case fits both.

Under *Morrissey* and *Gagnon*, defendants in a probation revocation proceeding unquestionably have the right to confront adverse witnesses. 408 U.S. at 489; 411 U.S. at 782. Under *Crawford*, the right to confrontation means that testimonial out-of-court statements are inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 54. Taking all three cases together, testimonial out-of-court statements are inadmissible against a defendant in a probation revocation hearing unless the declarant is unavailable and the defendant had a previous opportunity to cross examine the declarant. 408 U.S. at 489; 411 U.S. at 782; 541 U.S. at 54.

In this case, Respondent does not argue that the probation violation reports, and all testimony derived therefrom, are not testimonial. (Resp. 1-25). The reports plainly are testimonial. *See* (Rel. Argument I). They are also plainly out-of-court statements. In addition, since Ms. Thomas's testimony was based entirely on those reports, her in-court testimony is a mere recitation of out-of-court statements. Respondent never found on the record that the writer(s) of the reports were unavailable. (Tr. 1-29). There is no evidence on the record, apart from the State's failure to call to the stand the writer(s) of the reports, that such person(s) were unavailable. (Tr. 1-29). No one is contending that Ms. Tankins had a previous opportunity to cross-examine the writer(s) of the reports. (Resp. 1-25). The record does not reflect any such opportunity. (Ex. 1-39). Therefore, these reports and the testimony derived therefrom are inadmissible.

By admitting the reports into evidence and allowing the State to elicit testimony about their contents, Respondent deprived Ms. Tankins of her right to due process of law

and to confront and cross-examine adverse witnesses in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

III. Respondent's arguments are against public policy.

Respondent seems to make two arguments against this point. (Resp. 12, 15-16). First, Respondent seems to be arguing that the Supreme Court, in the same breath that it granted defendants the right to confront and cross-examine adverse witnesses, also abrogated those rights almost into nothingness. (Resp. 12, 15-16). It is true that a probation revocation hearing is "a narrow inquiry" and that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489. It is also true that "the full panoply of rights due a defendant in [a criminal proceeding] does not apply to parole [or probation] revocations." *Id.* at 480; *Gagnon*, 411 U.S. at 782.

From this, we see that the bundle of rights a defendant has at a probation revocation hearing is not exactly coextensive with the bundle of rights held at a criminal trial. The probationer has a smaller bundle. Respondent argues that the probationer's bundle is tiny almost to the point of nonexistence. Respondent's interpretation of the United States Supreme Court cases is clearly wrong.

First, the fact that a probationer has a smaller set of rights at a probation revocation hearing than a criminal defendant at a trial does not mean that the probationer's right to confrontation is any less than the criminal defendant's. The right to

confront adverse witnesses is a specific right with a specific meaning. *Crawford*, 541 U.S. 42-55. Respondent has cited no case which suggests that meaning of the words "confront […] adverse witnesses" changes based on the type of case it applies to. *Morrissey*, 408 U.S. at 489. Nor would such a proposition make sense. The definitions of these words do not vary whether they are invoked in a criminal or civil context. The Supreme Court clearly did not intend to limit the right to confrontation itself.

Instead, the Supreme Court limited the situations in which the right to confrontation is applicable. *Id.* The Supreme Court actually set up two alternative bundles of rights regarding confrontation and cross-examination. A defendant in a probation revocation hearing has either (a) (1) the right to confront adverse witnesses, and (2) the right to cross-examine adverse witnesses; or (b) the right to a specific finding of good case for not allowing confrontation, and (2) the right to cross-examine adverse witnesses. *Id.* That option for a specific finding of good cause is the limitation on the right to confront adverse witnesses that the Supreme Court explicitly provided. *Id.*

In this case, there was no finding of good cause that Ms. Tankins should not have been permitted to confront a probation officer with firsthand knowledge of the alleged violations and/or the author(s) of the reports. (Ex. 1-39). Nor was there any evidence of such. (Tr. 1-29). The State did not even attempt to make an excuse on the record why it did not call someone with firsthand knowledge of the alleged violations. (Tr. 1-29).

Since Respondent denied Ms. Tankins the opportunity to confront someone with firsthand knowledge of the alleged violations and failed to make a finding of good cause

why she should be denied confrontation, Respondent violated Ms. Tankins' right to due process.

Respondent's second argument why defendants in a probation revocation hearing should not be allowed to confront adverse witnesses despite the United States Supreme Court saying that they should is absurd and wholly unsupported by the record.

Respondent argues that "[i]t is not uncommon for probationers to report to officers outside of the jurisdiction in which they were found guilty, and to report to multiple officers during their time on probation." (Resp. 15). There is nothing on the record to suggest this is true. (Ex. 1-39). Even if it is true, there is nothing on the record to suggest that Ms. Tankins reported to any probation officers outside the jurisdiction in which she was found guilty. (Ex. 1-39). There is also nothing on the record to suggest that Ms. Tankins reported to multiple probation officers during the time period in which she was alleged to have committed the violations. (Ex. 1-39). Even if Respondent's argument is factually correct, it is irrelevant in this case.

Respondent then argues that, because a probationer's probation officers may be scattered around the state, no probationer, and specifically Ms. Tankins, should have the right to confront someone with firsthand knowledge of his or her alleged violations. Respondent has completely ignored the possibility of a judge finding good cause in a specific case as to why confrontation should not be allowed. If it were true in a specific case that a person with firsthand knowledge of the alleged violations were somewhere far away from the proceeding, then that could serve as the basis for a finding of good cause why confrontation should not be allowed. *See Boyd*, 792 F.3d at 917.

Further, Respondent's argument will lead to absurd results. Respondent argues that the fact that Ms. Tankins got to confront and cross examine someone who had read the probation violation reports satisfied *Morrissey*'s and *Gagnon*'s due process requirements. (Resp. 11). Taken to its logical conclusion, this argument is clearly untenable. If it were to be accepted, then there would be nothing stopping the State from contacting probation officers the day before the revocation hearing and asking them to switch clients, so that at the hearing the only person to testify would be someone with no firsthand knowledge. By this argument, there is no principled reason to even require a probation officer to testify. Anyone who has read the reports, from a homeless person to the prosecutor himself or herself could testify about the contents of the reports, if Respondent's argument was to be accepted. This is clearly an absurd result and would constitute a gross miscarriage of justice.

By admitting the reports into evidence and allowing the State to elicit testimony about their contents, Respondent deprived Ms. Tankins of her right to due process of law and to confront and cross-examine adverse witnesses in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

IV. The reports and Ms. Thomas's testimony derived from them are inadmissible hearsay.

Respondent does not argue that Ms. Thomas was a "custodian" under RSMo § 490.680. (Resp. 1-25). Respondent argues only that Ms. Thomas was a "qualified

witness." (Resp. 13-15). However, the evidence at trial showed that she was not. Respondent also never made a factual finding on the record that she was. (Ex. 1-39).

In order to serve as the basis for the admission of a business record, a qualified witness must testify as to the record's "identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event[.]" § 490.680. Ms. Thomas did not do so. (Tr. 1-29).

Ms. Thomas did testify as to the identities of the reports. (Tr. 9-10; 11-12; 12-13). She did not testify as to the mode of any of the reports' preparations. (Tr. 1-29). Respondent argues that Ms. Thomas testified that she herself had prepared such reports in other cases. (Resp. 15). This argument is misdirection. Reports can be prepared any number of different ways. Some are appropriate and reliable. Some are not. There was no testimony on the record as to how these reports in particular were prepared. (Tr. 1-29). Section 490.680 requires evidence of how the specific reports in question were prepared, not how other, similar reports might be prepared by other people. § 490.680.

Ms. Thomas also did not testify that the first or second reports (dated October 17, 2013 and November 26, 2013) were prepared in the normal or regular course of business. (Tr. 1-29). Section 490.680 unambiguously requires such testimony. Section 490.680 does not require evidence that other, similar reports are prepared in the normal or regular course of business, but requires that the actual reports being offered into evidence are. § 490.680 Further, Ms. Thomas actually testified that all three reports were prepared long after the events described therein. *See* (Rel. 31 n9). This is yet another way in which the evidence on the record did not support a finding of admissibility under § 490.680. Section

490.680 does not apply here. These reports were hearsay without exception and should not have been admitted.

By admitting the reports into evidence and allowing the State to elicit testimony about their contents, Respondent deprived Ms. Tankins of her right to due process of law and to confront and cross-examine adverse witnesses in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

Conclusion

The court erred in admitting the probation reports into evidence and allowing Ms. Thomas to testify as to their contents. Meaningful confrontation was impossible because Ms. Thomas had no independent personal knowledge of the alleged violations and there was no finding that good cause justified such limited opportunity for confrontation. The evidence was hearsay (within hearsay) with no exception. The error prejudiced Ms. Tankins in that, but for the court's erroneous admission of this evidence, there is a reasonable probability that the result of the hearing would have been different and that Ms. Tankins' probation would not have been revoked. The court's error deprived Ms. Tankins of her rights to due process of law and to confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

ARGUMENT III

I. The State may not call a witness for the sole purpose of having that witness invoke his or her Fifth Amendment privilege.

Respondent does not deny that Ms. Tankins was called to testify solely so that she would invoke her Fifth Amendment privilege against self-incrimination. (Resp. 1-25). "All allegations of the petition and the alternative writ properly pleaded and not denied by respondent in his return are admitted to be true." *State ex rel. Aubuchon v. Jones*, 389 S.W.2d 854, 856 (Mo. App. St.L. D. 1965). Ms. Tankins properly pleaded that the State's sole purpose for calling her to testify was so that she would invoke her privilege against self-incrimination. (Pet. 14) ("There was no purpose in calling relator to the Stand other than to have her assert Fifth Amendment privilege."). The State has never argued or averred otherwise. (Ans. 1-13); (Resp. 1-25). This Court must deem it admitted that the State's sole purpose in calling Ms. Tankins to testify was to have her invoke her Fifth Amendment privilege against self-incrimination.

Since the State's sole purpose in calling Ms. Tankins to testify was so that she would invoke her Fifth Amendment privilege against self-incrimination, Respondent should not have compelled Ms. Tankins to testify over her objection. *State v. Sidebottom*, 753 S.W.2d 915, 922 (Mo. banc 1988) ("Therefore, it would be improper to require a witness to take the stand solely for the purpose of invoking his privilege against self-incrimination.").

Respondent erred and abused his discretion in compelling Ms. Tankins to take the stand to invoke her Fifth Amendment privilege against self-incrimination and in drawing

a negative inference therefrom. This error prejudiced Ms. Tankins. Respondent deprived Ms. Tankins of her right to due process of law and privilege against self-incrimination in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 19 of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

II. Respondent's arguments are against public policy.

Policy concerns also militate against accepting Respondent's arguments. If the State's arguments are accepted, in any probation revocation hearing, the court could compel the probationer to take the stand and could ask the probationer about his or her violations. Then, the probationer would have three options: admit the violations, deny the violations, or invoke his or her Fifth Amendment privilege.

If the petitioner admits the violations, the court will likely revoke the probation.

If the petitioner invokes his or her Fifth Amendment privilege and refuses to testify, the court will likely draw a negative inference therefrom and revoke the probation.

If the petitioner denies the violations, the court can simply find the probationer not credible, as often happens, and revoke the probation.

In any case, the State would not have to call any probation officer, police officer, drug test technician, or any other witness with firsthand knowledge of the alleged violations to testify. To allow this to be done is plainly absurd. However, because there is no statutory right to appeal from a probation revocation in Missouri, the only way such a

proceeding may be reviewed is through the use of an extraordinary writ. Thus, many, if not most, probationers who saw their probation revoked without even an adverse witness testifying at the hearing would never receive relief.

Respondent erred and abused his discretion in compelling Ms. Tankins to take the stand to invoke her Fifth Amendment privilege against self-incrimination and in drawing a negative inference therefrom. This error prejudiced Ms. Tankins. Respondent deprived Ms. Tankins of her right to due process of law and privilege against self-incrimination in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 19 of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

CONCLUSION

WHEREFORE, based on her arguments in Point I, II, and II of her original brief and Points I and III of her Reply Brief, Relator Sharonda Tankins requests that this Court issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 333(e), I hereby certify that on Tuesday, April 26, 2016, a true and correct copy of the foregoing was e-filed with this Court and sent to Christopher Faerber, attorney for Respondent, via the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 4,128 words.

Respectfully submitted,
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