

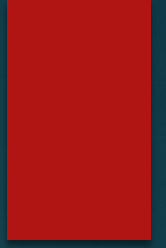
State v. Sweidan



**State v. Abdul Sweidan, 13 Wn. App. 2d 53, 461
P.3d 378 (2020)**

**Pre-pandemic Internet video testimony case.
Argued in December 2019 (in the Before
Times). Came out in April 2020.**


**It's made it to appellate briefing in Florida!
Amieva v. State of Florida (and law review
articles discussing COVID implications –
Boston College - 62 BCLRESUP I.-1).**



The stone and steel of criminal statutes can afford to bow on occasion in order to promote justice. A skyscraper that cannot bend with the wind eventually collapses.

John Wycliffe, Jan Hus, Martin Luther, Thomas More, Galileo Galilei, Anne Hutchinson, Roger Williams, Thomas Paine, John Brown, Harriet Tubman, Saad Zaghloul, Susan B. Anthony, Emily Davison, Emmeline Pankhurst, Dorothy Day, Mohandas Gandhi, Evelyn Thomas Butts, Martin Luther King, Jr., Nelson Mandela, John Lewis, Joseph McNeil, Steven Biko, Muhammed Ali, Russell Means, Andrei Sakharov, Aleksandr Solzhenitsyn, Larry Kramer, Lech Walesa, Vaclav Havel, Liu Xiaobo, the anonymous rebel in Tiananmen Square, and the Estonian singers, along with innumerable lesser known or anonymous dissidents constructively influenced history with civil disobedience. One might draw an inference from this appeal's facts that someday history will add George Taylor and scores of his coconspirators to the roll call of honorable lawbreakers who precipitated political transformation. In resolving this appeal, this court must only draw reasonable inferences from the facts before it, and I cannot predict or discern if such an inference is reasonable. I pray, however, for the sake of my grandchildren and great-grandchildren, that the inference becomes a reality.

State ex rel. Haskell v. Spokane Cty. Dist. Court, 13 Wn. App. 2d 573, 623-24, 465 P.3d 343 (2020) (Fearing, J., dissenting).



[W]e hold that the trial court failed to adequately conduct a hearing and explain its ruling when authorizing video conference testimony. From experience, we recognize the difficulty encountered by superior courts when confronting unique questions of law during the course of a trial with the lack of time and resources to study the questions. Because we find any constitutional error to be harmless, we would otherwise not discuss the underlying merits of Abdul Sweidan's challenge to the video testimony, **but we do so in this instance to provide guidance for trial courts asked to permit remote testimony in criminal prosecutions.**



State also relies on CR 43(a)(1):

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. **For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.**




Haddad's declaration:

I live in Michigan and I am the sole in home care-giver for my senior seriously ill mother who is suffering from serious medical conditions that require continuous medical care and I have to be available by her side at all times attending to her medical and other needs. My mother suffers from esophageal cancer and serious heart disease and has recently undergone an open heart surgery. This makes it impossible for me to travel and leave my mother, to whom I am the sole care provider and support.


Doctor's note attached!

Neither signed under penalty of perjury, as court observes, twice.



We view this case as analogous to Washington, Chambers, Rock, and Jones. Like the court rules and state statutes in those cases, the trial court's ruling deprived Cayetano-Jaimes of relevant, material evidence vital to his defense. As in Jones, Camacho's testimony is not “marginally relevant evidence that a court should balance against the State's interest in excluding the evidence.” Camacho's testimony, if believed, provided a complete defense to the charged crime. Therefore, “it is evidence of extremely high probative value; it is [the defendant's] entire defense.

State v. Cayetano-Jaimes, 190 Wn. App. 286, 300, 359 P.3d 919 (2015).

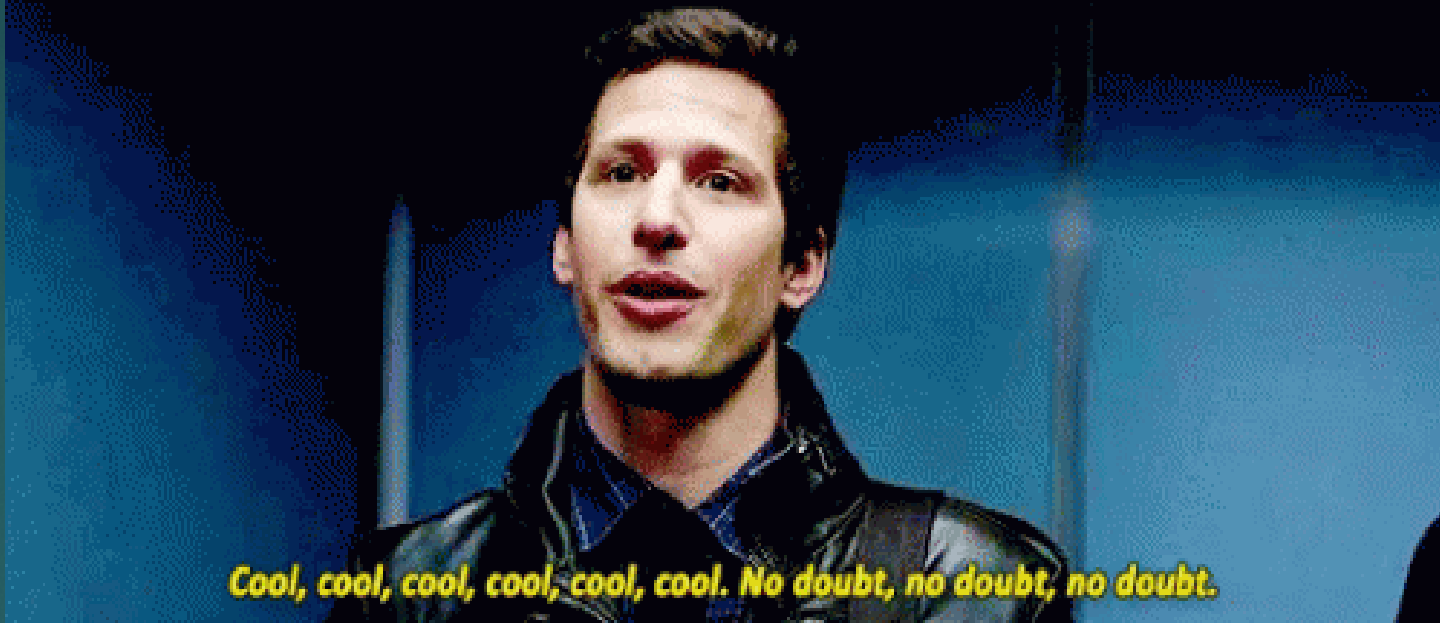


“Based on a review of the testimony anticipated from Ms. Haddad and after balancing the concerns of the confrontation clause and the right of the parties to cross-examine the witness in court, Skype is an effective way for the witness to testify.” (Trial court as summarized by the COA).


The trial court did not enter any findings. . . .

Effective. Cool. Cool cool cool.






Cool, cool, cool, cool, cool, cool. No doubt, no doubt, no doubt.



The trial court must render a case-specific finding that (1) excusing the presence of the witness *necessarily* furthers an important public policy, and (2) the procedure otherwise assures the reliability of the testimony.

Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).



Court declines to tell us what the standard or review is. Very coy! This is not the last time the court will be coy.

So what satisfies prong 1, *necessarily* furthers *important public policy interest*? (Court separates those italicized concepts.)

- Don't need a legislative declaration of public policy according to Sweidan. (Tried to argue this, rejected.)
- But "important public policy" is narrowly defined / so is necessary.
- Witness probably needs to be essential to State's case.
- Serious illness is probably enough.
- So is location outside the US, under certain circumstances.
- Witness's mother's serious illness might be enough – but we don't know here because record is inadequate.

Sweidan court (in context of necessity) states:

The letters of Maisa Haddad and the mother's physician beg the question of whether another caregiver could have cared for the mother in the absence of Haddad for three days. We also wonder if the mother would have recovered in the near future or if the mother was terminally ill and would have died in the near future such that the court could have postponed trial for Haddad to later appear in Washington State.



Does not satisfy prong 1:

- Out of state witness
- Temporary disability like pregnancy
- Desire for efficiency

- In-person testimony poses risk of contracting serious illness. Hmmm.



Carter – as discussed in Sweidan – regarding temporary situations:

In United States v. Carter, 907 F.3d 1199 (9th Cir. 2018), the Ninth Circuit Court of Appeals overruled the district court when that court failed to look for alternatives to an adult witness's testifying remotely. The State charged Laron Carter with fourteen counts of trafficking and prostituting seven minor girls. One victim witness stated she could not travel to the trial due to her late pregnancy. The Ninth Circuit overturned the district court's decision to permit the remote testimony of this witness, while reasoning that pregnancy is a temporary disability and therefore alternatives existed to ensure the witness faced Carter in person. These alternatives included granting a continuance or severing the counts involving the witness.

Tension between speedy trial and confrontation?

Prong 2: Assures reliability of the testimony

- Court (specifically Judge Fearing) sort of poo-pooed this at oral argument and in the opinion – **but don't let it go.**
- Need to make a record of the details (Bordeaux case)
- Recent Justice Gonzalez SCOWA case
- *Now* we all know how f***ed up prolonged Zoom interactions are in a way we did not at that December 2019 oral argument!
- Is this, in fact, worse than Craig and Foster? – There at least, defense counsel is in the room with the witness!


As stated in Sweidan:

Assuming the trial court allows video conference testimony, this court assesses whether other components of the confrontation clause were left intact, including “oath, cross-examination, and observation of demeanor by the trier of fact” to determine if testimony is reliable. Maryland v. Craig, 497 U.S. at 837. These components ensure the reliability of testimony in the absence of physical presence.

Maisa Haddad testified under oath, the defense cross-examined her, and, according to the State, the jury could observe Haddad’s demeanor. Abdul Sweidan does not argue to the contrary. The State also highlights that it never asked Haddad to identify Abdul Sweidan. Therefore, we hold the reliability of the evidence was assured.

But!!! In re M.B., 195 Wn.2d 859, 871, 467 P.3d 969 (July 23, 2020)

Because N.B. was not transported from prison for the trial, he had to testify over the phone and not in person, unlike the State's key witnesses. **Therefore, the trial court was not able to evaluate his demeanor and credibility in the same way it could evaluate that of the State's witnesses. Courts have long recognized the significance of in-person testimony.** William Blackstone observed centuries ago that "[by] examination of witnesses viva voce, in the presence of all mankind, ... and this [method] only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness." Whitesides v. State, Dep't of Pub. Safety, Div. of Motor Vehicles, 20 P.3d 1130, 1136 (Alaska 2001) (alterations in original) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *373). Because we recognize that a fact finder who observes a witness in person is better able to judge their credibility, we give deference to many trial court determinations, including parental termination decisions. See id.; In re Parental Rights to K.M.M., 186 Wn.2d 466, 477, 379 P.3d 75 (2016). Recognizing that the "potential for empathy and nuanced understanding is much greater in person-to-person communications," the Supreme Court of Alaska has concluded drivers are entitled to an in-person hearing, as opposed to a telephonic one, before license revocations if the driver's credibility is material. Whitesides, 20 P.3d at 1137, 1132. In so holding, the court concluded phone communication compromises an individual's ability to convey they are telling the truth. Id. at 1137, 1132.



Issue 5: Must the trial court enter findings of fact when granting a request for video conference testimony?

Answer 5: Because of the lack of a formal assignment of error from Abdul Sweidan and because we find any error to be harmless, we do not resolve the question. Without issuing a ruling, we encourage trial courts to enter findings.

Abdul Sweidan emphasizes that the trial court entered no findings identifying the important state public policy on which the court relied or the need for video conference testimony to support the policy. He impliedly assigns error to the lack of findings. Nevertheless, because of the lack of a formal assignment of error and because of the lack of briefing directly on point, we decline to decide whether findings are essential. RAP 10.3(a)(4); Valente v. Bailey, 74 Wn.2d 857, 858, 447 P.2d 589 (1968).