IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MICHELLE BOWERS,

Respondent.

Case No.SC09-1971

ON PETITION FOR REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

AMENDED MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The facts of the case can be summarized as follows:

> During a DUI investigation, officer #1 stopped the vehicle. After the stop, officer #2 assisted in the DUI investigation. The officers communicated about the stop during their investigation. Only officer #2 testified at the suppression hearing. The contested issue was the validity of the stop.

Officer Suskovich saw Respondent run a red light and pull into the center of an intersection. (R:89-90) Officer Suskovich initiated the traffic stop and contacted Officer Tracy to begin DUI procedures. (R:93-95) Once Officer Tracy arrived, Officer Suskovich informed him about the events surrounding the stop. (R:90) Officer Tracy led the DUI investigation. (R:90)

Respondent was charged with possession of marijuana, possession of paraphernalia and DUI. (R:68) At the motion to suppress hearing, Respondent raised a hearsay objection to Officer Tracy's testimony regarding the stop. (R:82,84) The State argued that the fellow officer rule permitted such testimony. (R:83) The trial court allowed Officer Tracy to testify. (R:87) During legal argument, the trial court asked the State if there was any medical reason that Officer Suskovich was not in court. (R:118) When the State presented no adequate response, the trial court suppressed the evidence. (R:118)

On appeal, the circuit court reversed. (R:61) The circuit

court analogized the case to Ferrer v. State, 785 So. 2d 709 (Fla. 4th DCA 2001) and concluded that the fellow officer rule authorized hearsay statements of officers at suppression hearings. (R:63) The court found the fellow officer rule permitted Officer Tracy to testify about Officer Suskovich's statements. (R:64)

On July 2, 2008, Respondent filed a petition for writ of certiorari to the Second District Court of Appeal. (R:1) The Second District granted the writ, finding, Ferrer was wrongly decided. Bowers v. State, 34 Fla. L. Weekly D2384, D2385 (Fla. 2d DCA Nov. 18, 2009). The court held that Ferrer had incorrectly used the fellow officer rule to circumvent hearsay rules of evidence. Id. at D2385. The court stated that the fellow officer rule could not be used with communication occurring after the stop. Id. The Second District certified conflict with the Fourth District in Ferrer. Id.

The jurisdictional brief was filed in this Court on November 3, 2009. The State filed a motion to stay the mandate, and the Second District denied the motion. (R:259) On November 30, 2009, this Court reviewed the denial of the motion and granted the stay. On the same day, this Court accepted jurisdiction on the certified conflict.

SUMMARY OF THE ARGUMENT

The Second District, in Bowers v. State, 34 Fla. L. Weekly D2384 (Fla. 2d DCA Nov. 18, 2009), and the Fourth District, in Ferrer v. State, 785 So. 2d 709 (Fla. 4th DCA 2001), furnished this Court with identical factual scenarios that resulted in dramatically opposing legal holdings. Both cases involved a stop for a traffic citation with one officer; the other officer arrived to perform a DUI investigation. Only the DUI officer testified at the suppression hearing. The Second District determined the facts were not suitable for fellow officer rule and hearsay could not be admitted into evidence at suppression hearings. Bowers, 34 Fla. L. Weekly at D2385. The Fourth District stated that fellow officer rule was pertinent and held that hearsay can be admitted into evidence. Ferrer, 785 So. 2d at 711-12. The Fourth District's opinion produced a thorough analysis on case law involving fellow officer rule, the interplay between the Florida evidence code and suppression hearings and the role of the confrontation clause in pretrial hearings. The conclusions reached by the Fourth District were well-reasoned. This Court should adopt the legal reasoning of the Fourth District and hold that an officer can testify to the events surrounding a stop even though he was not the officer who actually made the stop.

ARGUMENT

ISSUE

WHETHER THE FELLOW OFFICER RULE AUTHORIZES AN OFFICER, WHO DID NOT PARTICIPATE IN THE STOP BUT LATER ARRIVED ON THE SCENE, TO TESTIFY AT A SUPPRESSION HEARING REGARDING THE EVENTS SURROUNDING THE STOP.

In Bowers v. State, 34 Fla. L. Weekly D2384, D2385 (Fla. 2d DCA Nov. 18, 2009), the Second District found the application of the fellow officer rule inappropriate and stated that the DUI officer could not testify to events surrounding the stop. In Ferrer v. State, 785 So. 2d 709, 711 (Fla. 4th DCA 2001), the Fourth District permitted the DUI officer to testify about the stop because the fellow officer rule imputed the other officer's knowledge onto him. The Second District erred by narrowly applying the fellow officer rule and creating a heightened evidentiary standard in suppression hearings. In contrast, the Fourth District's opinion developed a thorough analysis of the fellow officer rule, hearsay and the confrontation clause. Hearsay rules and the confrontation clause are proper for trial, not for pretrial suppression hearings. The Fourth District was correct in Ferrer: the fellow officer rule allows one officer to testify about a stop although he was not present. This Court should approve Ferrer.

Reasonable suspicion or probable cause determinations are reviewed de novo. Ornelas v. United States, 517 U.S. 690, 699

(1996). Appellate courts interpret facts and evidence in a light most favorable to the trial court's findings. Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002). Probable cause exists when "the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." Dixon v. State, 343 So. 2d 1345, 1348 (Fla. 2d DCA 1977) (citing Benefield v. State, 160 So. 2d 706, 708 (Fla. 1964)). To establish reasonable suspicion, an officer must provide "a well-founded, articulable suspicion that the person stopped has committed, is committing or is about to commit a crime." Travers v. State, 739 So. 2d 1262, 1263 (Fla. 2d DCA 1999). Courts must review the totality of the circumstances. United States v. Sokolow, 490 U.S. 1, 8 (1989); Beck v. Ohio, 379 U.S. 89, 91 (1964).

The fellow officer rule, or collective knowledge doctrine, derives from two United States Supreme Court cases, Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971) and United States v. Hensley, 469 U.S. 221 (1985). In Whiteley, an arrest warrant was issued, a radio bulletin announced and a neighboring department performed the arrest. 401 U.S. at 563. The Court found no error in the arrest itself. Id. at 568. The police were entitled to act on the bulletin and could aid in the

execution of the warrant. Id. The error was at the inception of the warrant: it should have never been issued. Id. at 564-65. In Hensley, a wanted flyer was distributed, and a neighboring department stopped Hensley. 469 U.S. at 223-24. If the agency issuing the flyer had reasonable suspicion, the stop was valid to ascertain if Hensley had an outstanding warrant. Id. at 232. The neighboring department was not required to have personal knowledge of Hensley's actions before the stop. Id. at 231.

The fellow officer rule concerns officers working together on a case. Johnson v. State, 660 So. 2d 648, 658 (Fla. 1995). Under this rule, one officer imputes his knowledge to another to develop probable cause. State v. Boatman, 901 So. 2d 222, 224 (Fla. 2d DCA 2005). The rule involves arrests and searches. State v. Peterson, 739 So. 2d 561, 567 (Fla. 1999). "Florida courts have tended to frame this doctrine in very sweeping terms." Johnson, 660 So. 2d at 658. The fellow officer rule has routinely covered two specific factual patterns:

> [1)] an arresting officer with no personal knowledge of any facts establishing probable cause nevertheless is directed to make the arrest by other officers who do have probable cause... [and 2)] the arresting officer possesses personal knowledge that, standing alone, is insufficient to establish probable cause but when shared with the knowledge of other officers collectively meets the requirement.

Id. at 658. Respondent's factual scenario falls into the second pattern. There is no requirement that the two officers exchanging information impart magical probable cause words or present a factual scenario. Dewberry v. State, 905 So. 2d 963, 968 (Fla. 5th DCA 2005).

One operation of fellow officer rule is to search warrants. State v. Elkhill, 715 So. 2d 327 (Fla. 2d DCA 1998). An officer who writes a probable cause affidavit is not required to have personal knowledge of all information in the affidavit. Id. at 328. Instead, an affidavit can be based on hearsay from a fellow officer. Id.

Another operation of fellow officer rule is in the suspension of driver's licenses. Dep't. of Highway Safety & Motor Vehicles v. Porter, 791 So. 2d 32 (Fla. 2d DCA 2001). In Porter, a case similar to Respondent's, Officer Cox stopped Porter for traffic violations. Id. at 33. Officer Watson conducted field sobriety tests and completed the arrest affidavit. Id. The fellow officer rule was employed by the Second District to support Officer Cox's comments used in Officer Watson's affidavit. Id. at 35. "We have already pointed out that the fellow officer rule was properly invoked simply because Deputy Cox had information, i.e., that Porter had been driving his vehicle, which Deputy Watson put together with his own observations of Porter's inebriated state." Id.

Likewise, in Dep't. of Highway Safety & Motor Vehicles v. Currier, 824 So. 2d 966, 968-69 (Fla. 1st DCA 2002), the arrest report and the officer's testimony included statements and observations from another officer. The fellow officer rule cultivated probable cause by gathering information from another officer. Id. at 968.

The classic example of fellow officer rule occurs when more than one officer is participating in an investigation. Ferrer v. State, 785 So. 2d 709 (Fla. 4th DCA 2001), the conflict case in this proceeding, is directly on point. In Ferrer, Officer Claremont stopped the defendant for an expired tag, and Deputy Vila was dispatched to conduct DUI procedures. Id. at 710. The Fourth District concluded that the fellow officer rule would impute Officer Claremont's knowledge to Deputy Vila to develop probable cause. Id. at 711. The court also found that fellow officer rule testimony at suppression hearings did not conflict with hearsay rules or the confrontation clause; thus, Deputy Vila could testify to Officer Claremont's comments from the investigation. Id. at 711-12.

Petitioner's case follows the same classic example of fellow officer rule. Officer Suskovich performed a traffic stop. Bowers, 34 Fla. L. Weekly at D2384. Officer Tracy conducted the DUI procedures. Id. The Second District held that the fellow officer rule would not permit Officer

Suskovich's knowledge to pass to Officer Tracy because there was no investigative chain; only Officer Suskovich had personal knowledge of the stop. Id. at D2385. The Second District devised that the investigative chain extended to the arrest, which involved Officer Tracy, but the stop only involved Officer Suskovich. Id. The court pronounced there was no hearsay exception that authorized Officer Tracy to testify to communication between him and Officer Suskovich. Id.

The Second District erred in its decision in two ways: 1) failing to understand the underpinnings of the fellow officer rule and 2) declining to follow longstanding precedent allowing hearsay at suppression hearings. In contrast, the Fourth District, in Ferrer, presented a well-reasoned opinion by: 1) correctly utilizing the fellow officer rule, 2) providing an understanding of the evidence code and hearsay and 3) analyzing the confrontation clause. This Court should follow the Fourth District's rationale.

First, the Second District incorrectly found that the DUI investigation had to be split into a smaller series of events for application of the fellow officer rule: first the stop, then the DUI. Such an application fails to recognize how police communication operates and places an unnecessary hindrance on the fellow officer rule. The fellow officer rule "recognizes the need for law enforcement officers to seek the assistance of

other officers in a variety of situations." Peterson, 739 So. 2d at 567 (citing People v. Lopez, 465 N.Y.S.2d 998 (N.Y. App. Div. 1983). The type of technicality placed by the Second District is "an unreasonable hindrance to the furtherance of police investigations." Peterson, 739 So. 2d at 567.

Officer Suskovich and Officer Tracy were conducting a DUI investigation. During their investigation, they discussed Officer Suskovich's stop of Respondent. Officer Tracy's testimony regarding this conversation was appropriate based on fellow officer rule. By preventing fellow officer communication after the stop, the Second District thwarts law enforcement from efficiently and effectively performing their duty. The Fourth District, in Ferrer, recognized that such arbitrary distinctions were obstructive to the goals of the fellow officer rule. The Fourth District did not place unreasonable barriers to fellow officer rule communication. Instead, the Fourth District supported the officer's attempt to seek assistance.

The fellow officer rule yields a reasonable balance between a defendant's right to probable cause before arrest, an officer's right to seek assistance and a court's right to hear the totality of the circumstances. The fellow officer rule encompasses all three of those principles into one rule. The factual scenario in Ferrer and Respondent's case produces a balance between those three principles. Thus, this is an

appropriate factual scenario for utilization of the fellow officer rule.

Second, the Second District improperly concluded that hearsay is not appropriate at motion to suppress hearings. The Second District reasoned that there was no hearsay exception in the evidence code and that the Fourth District, in Ferrer, erroneously cited to federal cases interpreting a federal evidentiary rule. Bowers, 34 Fla. L. Weekly at D2385. The Second District assumed the evidence code pertains to all court hearings unless the code stated otherwise. In fact, judicial decisions, statutes and rules create the bedrock for the use of the evidence code at different court proceedings. In re Fla. Evidence Code, 372 So. 2d 1369 (Fla. 1979). The evidence code acknowledges that evidence standards existed before its codification; thus, the code only applies to the same proceedings to which the law of evidence applied prior to 1976. § 90.103, Fla. Stat. Professor Charles Ehrhardt provides examples, in his treatise, of proceedings that do not use the evidence code, including preliminary hearings and hearings to suppress physical evidence. Ehrhardt, Florida Evidence, § 103.1 (2007 ed.).

Hearsay evidence was authorized at motion to suppress hearings long before 1976. See United States v. Matlock, 415 U.S. 164, 172-75 (1974) (noting the longstanding principle that

exclusionary rules of evidence are not appropriate at suppression hearings); Whitley v. State, 349 So. 2d 840, 841 (Fla. 2d DCA 1977) (citing to previous caselaw for the proposition that hearsay statements from confidential informants should have been entered into evidence at a probable cause suppression hearing). In Lara v. State, this Court expressly admitted hearsay at a suppression hearing regarding third party consent to search. 464 So. 2d 1173, 1178 (Fla. 1985). The use of hearsay in suppression hearings has been reiterated throughout Florida case law. See J.D. v. State, 920 So. 2d 117, 118 (Fla. 4th DCA 2006) (finding the trial court incorrectly sustained an objection to hearsay at a motion to suppress hearing); Harris v. State, 826 So. 2d 340, 341 (Fla. 2d DCA 2002) (affirming the denial of a postconviction claim because hearsay is admissible at suppression hearings); State v. Cortez, 705 So. 2d 676, 679 (Fla. 3d DCA 1998) (contrasting evidence rules at suppression hearings, where hearsay is allowed, and at trials, were hearsay is not allowed). The Fourth District correctly demonstrated that hearsay is permitted at suppression hearings. The Second District was mistaken when it stated that there must be an express rule of evidence or be an enumerated exception to the hearsay rule.

The Second District was also mistaken in its analysis of section 90.105(1), Florida Statutes. The Second District found

that the exclusion of the line, "[i]n making its determination it is not bound by the rules of evidence except those with respect to privileges[,]" from the Florida Evidence Code completely changed the code from the Federal rules. As Ehrhardt explains,

> Federal Rule 104(a) is similar, but contains a sentence which was omitted from section 90.105(1): "In making its determination it is not bound by the rules of evidence except those with respect to privileges." Despite the absence of this provision from the Evidence Code, Florida Appellate decision have properly held that the omission of this sentence does not negate the inherent ability of the trial judge to disregard the rules of evidence in determining preliminary questions of admissibility.

Ehrhardt, supra, § 105.1. A motion to suppress hearing is a preliminary question of admissibility of evidence. To establish if law enforcement had probable cause, the trial court needs access to all facts and circumstances known to the officer at the time of the arrest, search, stop, frisk, etc. Many of those facts can only be communicated to the court through hearsay, for example, with an unknown citizen informant. Those hearsay facts are essential to probable cause decisions. The Fourth District correctly looked to federal cases regarding admissibility of evidence because both the federal rules and the Florida code accommodate relaxed evidence rules during admissibility judgments. The Second District has mistakenly narrowed the

applicability of the Florida evidence code.

Third, in Ferrer, the Fourth District's analysis recognized that the confrontation clause does not concern motion to suppress hearings.[1] The Ferrer opinion was filed before Crawford v. Washington, 541 U.S. 36 (2004) changed the landscape for a defendant's right of confrontation. Yet almost every court that has ruled on the issue post-Crawford has ascertained that the confrontation clause still does not involve pretrial hearings. See United States v. Morgan, 505 F.3d 332 (5th Cir. 2007); People v. Felder, 129 P.3d 1072 (Colo. Ct. App. 2005); Gresham v. Edwards, 644 S.E.2d 122 (Ga. 2007); State v. Watkins, 190 P.3d 266 (Kan. Ct. App. 2007); State v. Harris, 998 So. 2d 55 (La. 2008); Commonwealth v. Colon, 2006 WL 300609 (Mass. App. Ct. Feb. 8, 2006); State v. Daly, 775 N.W.2d 47 (Neb. 2009); Sheriff v. Witzenburg, 145 P.3d 1002 (Nev. 2006); State v. Rivera, 192 P.3d 1213 (N.M. 2008); People v. Brink, 818 N.Y.S.2d 374 (N.Y. App. 2006); State v. Woinarowicz, 720 N.W.2d 635 (N.D. 2006); Vanmeter v. State, 165 S.W.3d 68 (Tex. App. 2005); State

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[1] The Second District's opinion in Bowers did not address the confrontation clause. Hearsay was the objection at the hearing, and the confrontation clause was first raised in Respondent's reply brief at the Second District. At oral argument, the State objected because it had no opportunity to adequately brief the issue (although it did provide supplemental authority). Respondent discussed the issue during rebuttal argument. The State includes this paragraph on confrontation clause because the issue was discussed in Ferrer and because Respondent has previously raised the issue.

v. Timmerman, 218 P.3d 590 (Utah 2009). But see Curry v. State, 228 S.W.3d 292 (Tex. App. 2007) (performing Crawford analysis and allowing evidence to be admitted at pretrial hearing). The right to confrontation can only be exercised at trial, not pretrial hearings. Watkins, 190 P.3d at 270-71. Florida courts have made similar findings. See Russell v. State, 982 So. 2d 642 (Fla. 2008) (holding that the right to confront does not apply to probation revocation hearings); Box v. State, 993 So. 2d 135 (Fla. 5th DCA 2008) (holding that the confrontation clause does not apply to restitution hearings); Goodwin v. Johnson, 957 So. 2d 39 (Fla. 1st DCA 2007) (holding that the right of confrontation does not extend to hearings on pretrial release). The opinion in Ferrer, finding the confrontation clause does not affect suppression hearings, is still good law post-Crawford.

The Second District's opinion, in Bowers, was wrongly decided. The Second District attempted to create a heightened evidentiary standard in suppression hearings, akin to trials. In fact, suppression hearings have relaxed evidentiary rules. The hearsay rules do not apply; neither does the confrontation clause. By stripping away many of the flawed conclusions used in Bowers, this Court is simply left with one officer who testified to communications from another during a DUI investigation - classic fellow officer rule. The trial court's

role is to determine whether the testifying officer can establish reasonable suspicion for the stop, including hearsay testimony. Officer Tracy presented testimony of reasonable suspicion for the stop performed by Officer Suskovich.

CONCLUSION

Petitioner respectfully requests this Court disapprove of the Second District's opinion in Bowers and approve of the Fourth District's opinion in Ferrer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Christopher Cosden, Esq., The Wilbur Smith Law Firm, Post Office Drawer 8, Fort Myers, Florida 33902, this ___ day of February, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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