IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. Case No. SC09-1971

MICHELLE BOWERS,
Respondent.
_____/

On Appeal from the Second District Court of Appeal

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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Preface

The instant Respondent, Michelle Kay Bowers, was the Defendant in the trial court, the County Court in Lee County. She was the Appellee in the Circuit Court in the Twentieth Circuit after the county court granted her motion to suppress evidence. She was then the Petitioner in the Second District Court, which granted her petition for a writ of certiorari to the circuit court. To avoid confusion, Ms. Bowers will be referred to in this brief as the Defendant or by name. The instant Petitioner will be referred to as the State of Florida or the State.

Statement of the Case and Facts

On 28 March 2007, Officer Suskovich[1] of the Cape Coral Police Department stopped a vehicle driven by the Defendant. Officer Tracy[1] of the Cape Coral Police arrived later at the scene of the stop. Based on evidence obtained following the stop, the Defendant was arrested for driving under the influence. Contraband was discovered in a search incident to her arrest. The Defendant was charged, in the county court, under two case numbers on a single information, with driving under the influence (case number 07-CT-502578), and possession of marijuana (not more than twenty grams) and possession of paraphernalia (case number 07-MM-021917). R.068-69. The cases were subsequently consolidated. R.071. No

[1] The spellings of the names of the officers in this brief are the phonetic spellings which appeared in the transcript of the proceedings in the trial court. R.080-119.

warrant for the arrest or search of the Defendant was ever alleged to exist in connection with this case.

The Defendant filed a motion to suppress the results of the stop because the "warrantless traffic stop and subsequent warrantless search in the instant case was executed in violation of the right to be secure against unreasonable searches and seizures as guaranteed to the Defendant by the Fourth Amendment to the United States Constitution and Article I, § 12, Florida Constitution" R.073. The County Court in Lee County (Sturgis, J.) heard the motion on 10 July 2007. R.080-119.

Officer Suskovich, who actually made the traffic stop, failed to appear at the hearing on the motion to suppress. R.084, lines 5-12. The prosecutor advised the court that Officer Suskovich was under subpoena. R.082, line 10. The prosecutor offered an excuse for Officer Suskovich's failure to appear: "He's asleep. He's on nights." R.082, lines 21-22. The court responded: "The fact that he was on midnight last night is of no consequence because they don't issue subpoenas based on whether or not a guy's on midnights." R.083, lines 18-21. The State did not move to continue the hearing or to enforce its subpoena.

The State elected to proceed with only the testimony of Officer Tracy, who was not the officer who stopped the Defendant and was not present when she was stopped. The Defendant objected to his hearsay testimony. R.084, lines 10-23. The objection was overruled. R.087, lines 8-9. On direct examination Officer

Tracy testified in relevant part, over objection, to the following:

> [Officer Suskovich] told me that [the Defendant] went through a red light at Pelican and Cape Coral Parkway westbound, that she attempted to stop and slid into the – about the center of the intersection... and backed up.

R.090, lines 3-9.

On cross examination Officer Tracy testified:

> Q. [by Mr. Viacava, defense counsel] Sir, you didn't witness any of this that you just described as far as the red light that we're talking about?
>
> A. [Officer Tracy] Visually, no. (Inaudible), sir.
>
> Q. Okay. You didn't see her driving the car through the red light?
>
> A. No, sir.
>
> Q. And basically you're just relying on one statement that Officer Suskovich (phonetic) told you?
>
> A. Yes, sir.
>
> Q. When you arrived on the scene, the car was already pulled over and Officer Suskovich (phonetic) was already initiating his traffic stop and doing his investigation, correct?
>
> A. Yes, sir.
>
> Q. So your entire information is solely based on what Officer Suskovich (phonetic) told you?
>
> A. Yes, sir.

R.093, lines 3 - 22.

The court asked "[t]he car was already stopped? So you – you got no independent opportunity to watch her drive?" Officer Tracy replied "Correct, sir." R.093, line 23 - R.094, line 1. Officer Tracy did not relate where Officer Suskovich was, how he saw whatever he may have seen, or if he relied in part or entirely on information provided by another officer or some other person.

The Defendant also testified. R.099-106. She was uncertain how far she had gone into the intersection. R.104, line 14 - R.105, line 8. She repeatedly stated that she was not certain exactly where she stopped. R.099, line 25; R.100, line 5; R.100, lines 21-22; R.101, lines 10-13; R.102, lines 16-20; R.104, lines 18-19; R.104, line 24 - R.105, line 4. In response to a question from the court, she stated that she did not know where her front tires were when she stopped. R.101, line 23 - R.102, line 3.

Conclusions by the Trial Court

After argument by counsel, the county court held as follows, with an interruption by the prosecutor:

> The problem I'm having is that... the stopping officer... is not here to give me his – his sense about it whether it was a – far enough into the intersection to interfere with traffic, what the traffic conditions specifically were, were any other vehicles affected by what he did. Why did he feel that was significant enough to pull him over – pull her over as opposed to just let it go. That's what I don't have by his not being here.
>
> His testimony can be considered and he's a fellow officer

> and he made the stop but those are the kind of things that I – I'm unable to get the answer to. And there is no specific statute that I'm aware of that says you simply cross the line you're guilty of an infraction.
>
> In the best light to the State, which is the way I should perceive it, yes, the car is not supposed to go into the intersection. Just like you're not supposed to cross over a line, but people cross over a line one time and straighten out their driving and have no further difficulty and therefore the officer, you know, overlooks it. (Inaudible).
>
> MS. LEWIS [prosecutor]: Well, you have a combination of things here from her own testimony, Your Honor. You have her approaching a light at forty miles an hour, slamming on brakes, so you have a slam, a skid, probably tires like you said slide into the intersection and then reversing out of that intersection.
>
> THE COURT: I – I would hold that as indicating that she was in it and recognized she needed to back up. I would hold that against her, the fact that she actually backed up, I would hold in her favor. That she had to do it, against her, but that she did do it, no, that's favorable that she had enough sense and wits about her to make sure that her car would not impede any other traffic in the intersection.
> ....
>
> THE COURT: Alright. Then I'm going to suppress the evidence.

R.116, line 10 - R.118, line 3; R.118, lines 16-17. The trial court granted the Defendant's motion to suppress the results of the traffic stop. R.066; R.118, lines 16-17.

Proceedings in the Circuit Court

The convoluted procedural history of the State's appeal to the circuit court is explained in detail in the record on appeal. R.020-22. Finally the circuit court reversed the order of the trial court granting the Defendant's motion to suppress the results of the stop. R.061-064. The circuit court relied on the "fellow officer rule, which is sometimes referred to as the collective knowledge doctrine, [which] is premised on the theory that the collective knowledge of police investigating a crime is imputed to each member of the investigation." R.063. The circuit court cited Dewberry v. State, 905 So. 2d 963, 967 (Fla. 5th DCA 2005), and Ferrer v. State, 785 So. 2d 709, 711 (Fla. 4th DCA 2001). The circuit court held that Ferrer is analogous to the case at bar. R.063.

Proceedings in the District Court

The Defendant then petitioned the Second District Court of Appeal for a writ of certiorari to the circuit court. R.001-149. The district court granted the Defendant's petition for writ of certiorari, and remanded the case for the circuit court to affirm the order of the county court. R.261-268. The district court opinion has been published: Bowers v. State, 23 So. 2d 767 (Fla. 2d DCA 2009) (hereinafter "Bowers").

The Second District Court held that in Ferrer v. State, the Fourth District Court misapplied the fellow officer rule. R.266, 267 (Bowers at 770, 771). The district court reasoned that the "fellow officer rule is not a rule of evidence. It does

not change the rules of evidence. And, it is not one of the enumerated exceptions to the hearsay rule." R.265 (Bowers at 770). Therefore the court "grant[ed] certiorari relief on the basis that Ferrer misapplied the fellow officer rule and should be rejected." R.267 (Bowers at 771). The district court remanded the case with direction that the circuit was to affirm the county court's order. R.262 (Bowers at 768).

The district court certified conflict with Ferrer v. State. R.268 (Bowers at 771). This Court accepted jurisdiction and ordered briefing on the merits.

SUMMARY OF THE ARGUMENT

In the county court, the State had the burden to show by clear and convincing evidence that the warrantless seizure, i.e. the traffic stop, of the Defendant was lawful. The county court was unable to conclude that the Defendant had violated the law by stopping "far enough into the intersection to interfere with traffic, what the traffic conditions specifically were, were any other vehicles affected by what [s]he did." R.116, lines 13-17. The county court had before it the hearsay statement of Officer Suskovich as repeated by Officer Tracy. Based on that testimony, the county court concluded that the evidence was not sufficient to meet the burden required of the State and granted the Defendant's motion to suppress. R.118, lines 16-17; R.066.

The circuit court improperly reweighed the evidence and substituted its own judgment regarding the facts. "A reviewing court is not entitled to reweigh the evidence, but, only to determine whether the trial court's finding had the support of competent, substantial evidence. To do otherwise is to depart from the essential requirements of law." State v. Burke, 531 So. 2d 416, 418 (Fla. 4th DCA 1988).

Apparently the circuit court believed that it could do that "[b]ased upon Ferrer and similar cases...." R.064. That conclusion was error. The circuit court improperly applied the fellow officer rule to allow one officer to testify to the hearsay statements of another officer. That hearsay testimony should not have been admitted to evidence at all, but even if it were admissible, the hearsay testimony had been rejected by the county court as insufficient to meet the State's burden of proof. Nevertheless the circuit court relied upon it to reweigh the evidence and reach a different conclusion of fact.

The District court correctly held that the circuit court improperly applied the fellow officer rule, as did the Ferrer court:

> The issue raised in Bowers' motion to suppress was not whether there was probable cause for Officer Tracy to conduct a DUI investigation and make an arrest but rather whether there was probable cause for Officer Suskovich to stop Bowers. At that point of the traffic stop, ***there was no "investigative chain" during which collective knowledge was imputed to Officer Suskovich to provide probable cause for the traffic stop***. Officer Suskovich was the sole officer with any knowledge leading up to and culminating in the traffic stop. ***Officer Suskovich did not rely on any knowledge or***

> ***information possessed by Officer Tracy or any other officer to establish probable cause to stop Bowers***. The fact that Officer Tracy was called to the scene after the stop was completed for the purpose of performing a separate DUI investigation does not make him a fellow officer for purposes of determining whether there was probable cause to support the traffic stop.

R.266 (Bowers at 770)(emphasis added).

The testimony of Officer Tracy repeating what Officer Suskovich told him should not have been admitted in this case because it is simply hearsay. Officer Tracy testified that Officer Suskovich told him why he had stopped the vehicle driven by the Defendant. R.090, lines 3-6. That testimony by Officer Tracy was "offered in evidence to prove the truth of the matter asserted" at the hearing on the motion to suppress. § 90.801(1)(c) Fla. Stat. (2006). Therefore it was hearsay.

No exception to the hearsay rule exists in Florida statutory or decisional law which would allow admission of Officer Tracy's testimony repeating what Officer Suskovich told him about his reason for stopping the Defendant.

ARGUMENT

WHETHER THE FELLOW OFFICER RULE WOULD ALLOW AN OFFICER, WHO DID NOT PARTICIPATE IN A TRAFFIC STOP BUT ARRIVED ON THE SCENE LATER, TO TESTIFY REGARDING THE BASIS FOR THAT STOP AT A HEARING ON A MOTION TO SUPPRESS THE RESULTS OF THE STOP. (RESTATED.)

The Fourth Amendment applies to all seizures of persons, including seizures that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721, 726-28 (1969); Terry v. Ohio, 392 U.S. 1, 16 (1968)("whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person"). The Fourth Amendment prohibition "against unreasonable searches and seizures" requires that a seizure be reasonable. Terry at 19-28.

The constitutional requirements for searches and seizures are the same. See U.S. Constitution, Amend. IV; Art. I, § 12, Fla. Const. The constitutional prohibition against unreasonable searches and seizures "protects these equally important interests in precisely the same manner." Horton v. California, 496 U.S. 128, 143 (1990), citing Arizona v. Hicks, 480 U.S. 321, 327-28 (1987)("[a]lthough the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, neither the one nor the other is of inferior worth or necessarily requires only lesser protection").

"The stopping of an automobile by a law enforcement officer constitutes a seizure and detention within the meaning of the Fourth Amendment to the United States Constitution." State v. Diaz, 850 So. 2d 435, 437 (Fla. 2003), citing Delaware v. Prouse, 440 U.S. 648, 653 (1979); Ellis v. State, 935 So. 2d 29, 31 (Fla. 2d DCA 2006). Therefore the Defendant was seized within the meaning of the Fourth Amendment when her vehicle was stopped.

In the instant case, the alleged basis of the stop of the vehicle driven by the Defendant was a civil traffic violation. "As a general matter, the decision to stop an automobile is reasonable where the police have ***probable cause*** to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996) (emphasis added), citing Prouse at 659 and Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977). Therefore the necessary predicate for the stop of the vehicle driven by the Defendant is a showing of probable cause for that seizure.

Absent a warrant, the State has the burden to show by clear and convincing evidence that a seizure or search was legal. See Palmer v. State, 753 So. 2d 679, 680 (Fla. 2d DCA 2000)("once the defendant establishes that the search was conducted without a warrant, the burden shifts to the State to produce clear and convincing evidence that the warrantless search was legal"); see also Hilton v. State, 961 So. 2d 284, 296 (Fla. 2007); Irons v. State, 498 So. 2d 958, 959 (Fla. 2d DCA 1986); State v. Lyons, 293 So. 2d 391, 393 (Fla. 2d DCA 1974).

In the instant case the State argued that Officer Suskovich had probable cause to stop the Defendant's vehicle. That argument was based solely on the testimony of Officer Tracy, who was not present at the time of the stop. R.093, line 3 - R.094, line 1. Officer Suskovich, who made the stop, did not appear at the hearing on the Defendant's Motion to Suppress. R.084, lines 5-12. Officer Tracy testified only about what Officer Suskovich told him about the predicate for the stop. R.089, line 18 - R.090, line 11; R.093, line 3 - R.094, line 1. The Defendant also testified. R.099-106.

The county court allowed that hearsay testimony of Officer Tracy over objection. R.084, lines 10-23. Nevertheless the county court held that the State had not met its burden to show that Officer Suskovich had probable cause for the stop and suppressed the challenged evidence and granted the Defendant's motion to suppress the results of the stop. R.066; R.118, lines 16-17.

At a motion to suppress evidence before a trial court, the trial judge is the sole arbiter of the credibility and weight of the evidence presented. "Findings on the credibility of evidence by a lower court are not overturned if supported by competent, substantial evidence." Zakrzewski v. State, 866 So. 2d 688, 696 (Fla. 2003), quoting Roberts v. State, 840 So. 2d 962, 973 (Fla. 2002). If there is any competent substantial evidence to support the trial court's ruling it must be sustained irrespective of the reviewing court's opinion as to its appropriateness.

See Helman v. Seaboard Coastline R.R. Co., 349 So. 2d 1187, 1189 (Fla. 1977); State v. Burke, 531 So. 2d 416, 418 (Fla. 4th DCA 1988).

It is the province of the trial judge to make determinations concerning the credibility of the witnesses and the weight of the evidence. See State v. Stephens, 441 So. 2d 171, 171 (Fla. 3d DCA 1983); Roth v. State, 359 So. 2d 881, 882 (Fla. 3d DCA 1978); Delorenzo v. State, 921 So. 2d 873, 876 (Fla. 4th DCA 2006)(the "trial court is vested with the authority to determine the credibility of the witnesses and the weight of the evidence in ruling on a motion to suppress"). A trial judge's ruling on a motion to suppress is clothed with a presumption of correctness with regard to determinations of historical fact. See Fitzpatrick v. State, 900 So. 2d 495, 513 (Fla. 2005). A judge acting as fact-finder is not required to believe the testimony of police officers in a suppression hearing, even when that is the only evidence presented. Just as a jury may disbelieve evidence presented by the state even if it is uncontradicted, so too the judge may disbelieve evidence offered in a suppression hearing. See State v. Paul, 638 So. 2d 537 (Fla. 5th DCA 1994), rev. denied, 654 So. 2d 131 (Fla. 1995).

The State appealed to the circuit court. R.121. The circuit court reversed, holding that the hearsay testimony by Officer Tracy was properly admitted. R.061-064. To reverse the order of the county court, the circuit court also improperly reweighed the evidence. R.064.

The Second District Court reversed the circuit court, holding that "Officer Tracy's testimony as to what Officer Suskovich told him about Bowers' driving was hearsay and as such was not admissible to prove that Officer Suskovich witnessed Bowers' violating a traffic law." R.264; Bowers at 769. The district court expressly did not reach the issue of whether the circuit court properly reweighed the evidence: "Our quashal of the circuit court's opinion on the admissibility issue of Officer Tracy's testimony renders moot the arguments on the issue of reweighing the evidence." Id.

Admissibility of Hearsay at Hearing on Motions to Suppress

This Court is now called upon to address the question of what circumstances would allow a trial court to admit hearsay testimony and other evidence at a hearing on a motion to suppress. The well established statutory and decisional law of Florida would allow certain limited hearsay to be admitted to evidence. However no general exception to the hearsay rule appears in Florida statutory or decisional law for hearings on motions to suppress evidence.

The statutory exceptions to the hearsay rule would allow admissibility of hearsay where the proper predicate has been laid. See §§ 90.803 and 90.804 Fla. Stat. (2006). However, as the Second District Court observed in the instant case, the fellow officer rule is not a hearsay exception: "The fellow officer rule is not a rule of evidence. It does not change the rules of evidence. And, it is not one of the

enumerated exceptions to the hearsay rule." R.265; Bowers at 770. An officer in the field may need to act immediately based upon what he or she is told by a fellow officer. However that does not and should not allow an officer to testify to the hearsay statements of a fellow officer at a hearing or trial weeks or months after the emergency is over. The public policy reasons to exclude such hearsay are explained infra.

In the instant case, the State relies in part on Lara v. State, 464 So. 2d 1173 (Fla. 1985), and State v. Cortez, 705 So. 2d 676 (Fla. 3rd DCA 1998), review dismissed, 731 So. 2d 1267 (Fla. 1991), for the proposition that any and all hearsay evidence is admissible at an evidentiary hearing on a motion to suppress. See Amended Initial Brief at 12. However a review of the opinions in Cortez and Lara demonstrates that such a broad reading of those opinions is not supported by anything therein.

In Lara, this Court examined the result of a hearing on a motion to suppress the result of a search where the person who allegedly consented to the search did not testify. The facts in Lara are relatively straightforward. A "Miami police officer was dispatched to meet Francisco Rizo at an apartment where Rizo had discovered the body of his girlfriend, Grisel Fumero. Rizo let the officer into the apartment and directed him to the kitchen where Fumero was lying face-down on the floor in a pool of blood." Id. at 1175. Another dead body was found elsewhere

in the apartment. Id.

Lara was the defendant in the ensuing murder case. He asserted that Rizo did not have the authority to admit the police into the apartment and that, assuming Rizo did have the required authority, the consent was improperly proven by inadmissible hearsay evidence. Id. at 1177. Rizo's testimony was not available because he "became a fugitive and was not available at trial." Id. at 1175. This Court rejected both arguments. Id. at 1177.

This Court held that the hearsay evidence establishing consent was properly admitted at the suppression hearing, even though the person who gave the consent was unavailable. Id. This Court reasoned that evidence presented during the suppression hearing established that Rizo lived in and had joint control of the searched apartment and that he was authorized to give valid consent to the search of the apartment. Id. at 1177.

This Court also held that the hearsay evidence establishing Rizo's consent was properly admitted at the suppression hearing, even though Rizo was unavailable for cross-examination. Id. The Court reasoned that "an affidavit for a search warrant may be based on hearsay information.... In addition, we note that the United States Supreme Court in Jones[v. United States, 362 U.S. 257, 270 (1960),] found that 'an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay....' We find no

error in the admission of the hearsay evidence in this cause." Lara at 1177.

That conclusion in Lara is hardly surprising. The law is well settled that a probable cause determination by a law enforcement officer can be based in part on hearsay. "It has long been recognized that hearsay is admissible in determining the existence of probable cause.... [A] finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial." Evans v. Seagraves, 922 So. 2d 318, 324-25 (Fla. 1st DCA 2006)(citations omitted). An officer can testify at a hearing before a court about the basis for his determination of probable cause where such testimony is relevant. If the basis of a probable cause determination were a statement of a third party, that statement might be admissible as a non-hearsay use of the statement, that is the statement may be admissible because it was uttered, not for its truth. However such out-of-court statements would not be admissible outside of the context of establishing a basis for an officer's determination regarding probable cause.

In any event this Court's comments regarding hearsay in Lara are best taken as obiter dictum. In Lara this Court opined that "'an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay....' We find no error in the admission of the hearsay evidence in this cause." Lara at 1177. In the next paragraph, this Court held:

> Further, without regard to the consensual nature of the entry, we hold that the search of both apartments was justified under the exigent circumstances exception to the

> warrant requirement. We find that the exigent circumstance exception applies when police are called to the scene of a homicide and that it allows an immediate warrantless search of the area to determine the number and condition of the victims or survivors, to see if the killer is still on the premises, and to preserve the crime scene.

Lara at 1177-78. Based on that strong ruling, the Court's determination about admissibility of the hearsay statement by Rizo was obiter dictum because it was not necessary for the holding. It was not an essential or material element of the ruling in the case by this Court that the officer's entry into the apartment was justified under the exigent circumstances exception to the warrant requirement.

To the extent that it may not be dictum, the rule in Lara has no application in the instant case for two reasons. No evidence exists to suggest that the probable cause determination by Officer Suskovich (who did not testify) was based on any information supplied by anyone else. In addition, Officer Tracy (who did testify) had no part at all in the probable cause determination in the instant case. The testimony by Officer Tracy about what Officer Suskovich told him is pure and simple hearsay because it was intended to prove the truth of the matter asserted, the factual basis for the seizure of the Defendant. That testimony was not within any statutory or common law exception to the hearsay rule.

In State v. Cortez a neighbor of the victim observed Cortez and a companion (the defendants) back a car into an enclosed carport at the victim's residence while

the victim was at work. The neighbor did not recognize the defendants and called the police. When the defendants saw that the neighbor was watching, they departed. A few minutes later, an officer arrived and interviewed the neighbor. Upon looking in the carport, he found pry marks on the door leading from the carport into the house. The officer sent a "BOLO" (be on lookout) announcement regarding a possible burglary, including a description of the car and a general description of the occupants. Cortez at 677.

The defendants ran out of gas a few blocks away. A different officer noticed the defendants' car alongside the road and observed that the defendants appeared to match the description in the BOLO. Cortez at 677. The second officer contacted the officer who was the author of the BOLO. That officer brought the neighbor to the roadside location. The neighbor identified the car as being the one he had seen. The defendants were arrested for loitering and prowling, and were eventually charged with burglary and criminal mischief. Id.

The defendants moved to suppress their confessions, claiming that the arrest for loitering and prowling was illegal, and that there was neither probable cause nor a founded suspicion to justify their detention on the charge of burglary. The trial court granted the motion and the State appealed. Id. at 677-78.

In the district court the defendants argued that the officers were not entitled to make a warrantless arrest for the misdemeanor offense of loitering and prowling

because the misdemeanor was not committed in the officers' presence. Id. at 678. The officer relied instead on a report by a citizen witness. Section 901.15(1), Florida Statutes, authorizes the warrantless arrest of a person who "has committed a felony or misdemeanor... in the presence of the officer." If the officer did not observe the misdemeanor, then § 901.15 in general does not authorize the officer to make a warrantless arrest. Id. at 679. However the district court held that the officers' testimony about what the neighbor and victim said was properly admitted to evidence. Id. The district court reasoned that "a prosecution for loitering and prowling can be based on citizen witnesses even if the arresting officer did not observe the defendant commit the offense." Id. Therefore the officers could properly testify about what the neighbor and the victim had said.

However the treatment of the statements of the neighbor and victim in Cortez is obiter dictum because the issue of admissibility of that hearsay had not been preserved for appeal. The court held that "the officers' testimony about what the neighbor and victim said came in (quite properly) without objection." Id. at 679. That holding is dictum because, absent an objection, the issue was not preserved for appeal. Therefore the Cortez court was not addressing an issue presented by the case. Such dictum has no value as precedent.[2]

[2] See, e.g., Williams v. Davis, 974 So. 2d 1065, 1066 (Fla. 2007)(Wells, J. concurring): "Since that is not an issue presented by this case, answering the rephrased certified question is the very essence of obiter dictum. See Bunn v. Bunn, 311 So.2d 387, 389 (Fla. 4th DCA 1975) ('[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law

To the extent that the opinion in Cortez might not be dictum and would have value as a precedent, it is reasonable that where an officer's statement regarding probable cause for an arrest is relevant, the officer should be allowed to state the facts upon which he based his determination of probable cause, including information given the officer by another officer. In that circumstance what the other officer said could have independent evidentiary significance. In effect, the arresting officer's use of the statement would be a non-hearsay use because the fact that the statement was made would support the officer's subjective conclusion regarding probable cause.

The Cortez court neither examined nor ruled upon the general admissibility of hearsay in a hearing on a motion to suppress evidence. The Cortez court cited Lara v. State for the proposition that hearsay is admissible at an evidentiary hearing on a motion to suppress evidence. Cortez at 687. That gratuitous and expansive reading of the opinion in Lara is not justified by anything therein.

In addition to Cortez and Lara, the State relied on Whitley v. State, 349 So. 2d 840 (Fla. 2d DCA 1977), "for the proposition that hearsay statements from confidential informants should have been entered into evidence at a probable cause suppression hearing". Amended Initial Brief at 12. In Whitley objections to several questions propounded to one of the officers concerning what certain

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not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple.'). Such dictum does not function as precedent. See Continental Assur. Co.

confidential informants had told him were sustained on the basis of hearsay in the trial court. Id. at 841. The district court held: "Since this was a hearing on a motion to suppress and the issue was whether the police had a well-founded suspicion of criminal activity the questions were proper and [the officer] should have been permitted to answer." Id. That rule has no application here because no third party statement (by a confidential informant or anyone else) was apparently involved in the instant case. In Whitley both of the officers involved in the probable cause determination appeared and testified. The State failed to proffer what the officer would have said about what the confidential informant told him, so the issue was not preserved, but the court held that there was no evidence that such testimony might have been relevant to the issue in that case. Id.

The State also relied on J.D. v. State, 920 So. 2d 117 (Fla. 4th DCA 2007), which involved a search of a student at a high school. See Amended Initial Brief at 12. Another student, who was one of "particular students who informed school officials of illegal activity occurring on the campus" informed an assistant principal that J.D. was involved in illegal activity. Id. at 118. Based on the tip, a "School Security Officer" went to J.D.'s classroom and asked her to accompany him to the office. Once in the office, the officer asked J.D. if she had anything illegal, and J.D. readily admitted that she did. She gave the officer five baggies of marijuana. J.D. was arrested and charged with possession of marijuana. Id.

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v. Carroll, 485 So.2d 406, 408 (Fla.1986)."

The issue presented on appeal was "which test should be applied to justify a detention of a student for investigation of criminal conduct." Id. at 119. The district court held that "[w]hen school authorities receive information, whether verified or not, involving illegal activities occurring on their campus, calling the suspect student out of class to investigate the report is a reasonable and minimal step in that investigation." Id. at 122. The court reasoned that a student's freedom to walk away is already so limited in school that the additional imposition of calling a student out of a class is "reasonable and minimal" Id.

The district court also held that the trial court erroneously sustained a hearsay objection to the contents of the tip, "even though hearsay evidence is admissible in suppression hearings." In support the district court cited Lara and Cortez. Id. at 118. That was dictum because "[w]hile the testimony in this case may not have established that the school official had reasonable suspicion to search J.D., no search occurred, because the student voluntarily gave the drugs to the school official." In effect the J.D. court held that the Fourth Amendment had limited or no application to the facts presented in that case.

The State also relied on Harris v. State, 826 So. 2d 340 (Fla. 2d DCA 2002), for the proposition that "hearsay is admissible at suppression hearings". Amended Initial Brief at 12. The entire treatment of that issue by the Harris court was the following:

> Harris's first claim was that his trial counsel was

> ineffective for failing to object to hearsay testimony at a suppression hearing. The trial court denied the motion on the grounds that although hearsay testimony occurred in the suppression hearing, the admission of it could not have affected the outcome of the trial. We disagree with the reason for the ruling. However, because hearsay testimony is admissible in a suppression hearing, the denial of this claim is affirmed. See Lara v. State, 464 So.2d 1173 (Fla.1985).

826 So. 2d at 341. Absent any mention in the report of the case of what the hearsay may have been, or why it was offered, or by whom, or for what purpose, it is impossible to conclude anything about the "rule" in Harris.

The opinions regarding admissibility of hearsay at hearings in motions to suppress in Lara, Cortez, Whitley, and J.D., to the extent that they are not dicta, can be easily formulated into a single rule: Otherwise reliable hearsay may be admissible at a hearing on a motion to suppress evidence to the extent that such hearsay was relied upon by an officer to formulate probable cause for a seizure or a search. That rubric is entirely consistent with the rule in Jones v. United States and Evans v. Seagraves, and with the rule that hearsay can be sufficient to support issuance of a search warrant, if the hearsay satisfies the test in Illinois v. Gates, 462 U.S. 213, 238-39 (1983)[3]. See State v. Peterson, 739 So. 2d 561, 564 (Fla. 1999); State v. Butler, 655 So. 2d 1123, 1128-30 (Fla. 1995).

[3] "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the

Here that rule has no application because no evidence exists to show what Officer Suskovich relied on to formulate probable cause for the seizure of the Defendant. Nothing in the record suggests that Officer Suskovich relied upon any information from a fellow officer, or from anyone else, to support probable cause.

The Florida Evidence Code

The State argued that the "Second District Court assumed the evidence code applies to all court hearings unless the code stated otherwise." Amended Initial Brief at 11. Therein the Second District Court is correct. The code provides: "Unless otherwise provided by statute, this code applies to the same proceedings that the general law of evidence applied to before the effective date of this code." § 90.103(1) Fla. Stat. (2006). The evidence code also applies "to criminal proceedings related to crimes committed after the effective date of this code...." § 90.103(2) Fla. Stat. (2006). The evidence code was effective July 1, 1979, and applies to "criminal proceedings related to crimes committed on or after July 1, 1979". In re Florida Evidence Code, 376 So. 2d 1161, 1162 (Fla. 1979).

The State then argued: "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." Amended Initial Brief at 11, citing Charles Ehrhardt, Florida Evidence § 103.1 (2007 ed.) In

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magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed."

fact Professor Ehrhardt does provide such examples, but hearings on motions to suppress evidence are not among them:

> Judicial decisions, statutes, and rules of court have all spoken to different proceedings in which the strict rules of evidence, and therefore the Code, are inapplicable. Among these proceedings are grand jury proceedings, extradition proceedings, preliminary hearings in criminal cases, proceedings involving sentencing, and the granting or revoking of probation, the issuance of arrest and search warrants, bail proceedings, habitual offender proceedings, hearings to determine whether capital punishment is imposed, arbitrations pursuant to chapter 682 of the Florida Statutes, and bar disciplinary proceedings. Although the strict evidentiary rules do not apply in these cases, most of the proceedings have some limitations on what evidence is admissible. In certain proceedings, the ability of the court to make a factual finding based solely upon hearsay is limited; for example, a finding in a restitution hearing or in a Jimmy Ryce hearing cannot be based solely upon hearsay.

Charles Ehrhardt, Florida Evidence § 103.1 (2007 ed.)(footnotes omitted). In a footnote Professor Ehrhardt addressed issuance of warrants:

> Arrest and search warrants are issued upon a complaint and affidavit showing probable cause. The nature of the proceedings makes the application of strict rules of evidence inappropriate. See Lara v. State, 464 So. 2d 1173, 1177 (Fla. 1985) (hearsay statements admissible during hearing to suppress physical evidence); Fla.R.Crim.P. 3.121; West's F.S.A. Ch. 901, 933.

Charles Ehrhardt, Florida Evidence § 103.1 n.8 (2007 ed.) (The text in the 2009 edition is identical.) Professor Ehrhardt's nine word summary of this Court's

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Gates at 238-39, quoting Jones v. United States at 271.

opinion in Lara is poorly taken, as explained supra. That part of the Lara opinion is dictum, but even if it were not, it has no application to the instant case because (1) no evidence exists to suggest that the probable cause determination by Officer Suskovich (who did not testify) was based on any information supplied by anyone else, and (2) Officer Tracy (who did testify) had no part at all in that probable cause determination in the instant case.

Nothing in Professor Ehrhardt's treatise, or anywhere else, would suggest that the general law of evidence did not apply to hearings on motions to suppress evidence before the effective date of the evidence code. The State cited no such authority, perhaps because none exists. The State cited Whitley v. State, a pre-code case decided in 1977, "for the proposition that hearsay statements from confidential informants should have been entered into evidence at a probable cause suppression hearing". Amended Initial Brief at 12. Thus the State acknowledges that the general law of evidence had application at hearings on motions to suppress evidence prior to the effective date of the evidence code. Whether or not the challenged statements would have been admissible under the pre-code law of evidence is moot. As explained supra, both before and after the code became effective, hearsay could be admissible on a motion to suppress to the extent that is was relied on by an officer as the basis for probable cause for a search or seizure.

In any event, Professor Ehrhardt's treatise is not the law of Florida.

Professor Ehrhardt's opinion may be persuasive where it is well reasoned (it almost always is) but the relevant law is composed of the Florida Statutes and the published appellate opinions of Florida courts. The State's extensive reliance on Professor Ehrhardt's opinion suggests a lack of support in the law of Florida for the State's assertions regarding the admissibility of hearsay.

The State then argued that the rule in Ferrer should control the instant case because, presumably in Ferrer, 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 application of the Florida evidence code." Amended Initial Brief at 13-14.

The State cited no authority in support of that argument, again perhaps because none exists. The text of Chapter 90 of the Florida Statutes contains no mention of relaxed rules at hearings on motions to suppress evidence. Section 90.104(2) provides: "In cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." In most circumstances a court must hear the substance of challenged evidence to decide whether it is to be admitted or not, but nothing in that statute would allow any and all otherwise inadmissible evidence to be admitted at a hearing on a motion to suppress

evidence.

Of course certain hearsay is admissible at hearings on motions to suppress evidence, just as certain hearsay is admissible at other judicial proceedings. See §§ 90.801, 90.802, 90.803, 90.804. In the cases discussed supra, Florida courts have held that certain limited hearsay is admissible for certain limited purposes. However no case contains anything approaching a rule that any and all hearsay is admissible at hearings on motions to suppress evidence. In Cortez, the court held that "the trial court proceeding was an evidentiary hearing on a motion to suppress evidence. Hearsay is admissible in such a proceeding...", citing Lara. 705 So. 2d at 679. Taken completely out of context, that quotation could be taken to mean that all hearsay is admissible at such hearings. However, as discussed supra, it is clear from the context that the Cortez court was addressing statements by a victim and another witness to officers that the officers used to determine probable cause.

As discussed supra, that quotation from Cortez is dictum because the issue of admissibility of that hearsay had not been preserved for appeal. Cortez at 679. The comment in Lara, 464 So. 2d 1177, which was improperly cited by the Cortez court as precedent, is also dictum as discussed supra.

Arguably the Second District Court did not narrow but broadened "the applicability of the Florida evidence code" in this case. See Amended Initial Brief at 13-14. The district court held: "The fellow officer rule is not a rule of evidence.

It does not change the rules of evidence. And, it is not one of the enumerated exceptions to the hearsay rule." R.265 (Bowers at 770). The Second District Court simply applied the rules of evidence to the hearsay statements that the State sought to introduce (and was allowed to introduce) into evidence in the trial court. Even after the State was allowed to (improperly) admit that hearsay to evidence, the State was unable to carry its burden of showing that the traffic stop in the instant case was proper. R.066; R. 118, lines 16-17

Actually there is no need for this Court to address application of the evidence code. Prior to adoption of the evidence code, as after, courts allowed hearsay that was the basis for the formulation of probable cause for a search or seizure. See, e.g., Treverrow v. State, 194 So. 2d 250 (Fla. 1967).

Here, however, Officer Tracy did not testify at all about the details of what Officer Suskovich may or may not have seen. Officer Tracy did not relate where Officer Suskovich was, how he saw whatever he may have seen, or if he relied on information provided by another.

To determine the existence of reasonable suspicion or probable cause, a court should look at the information known to the officer at the time of the seizure or the search. The court should then inquire whether the suspicion was based on facts known to the officer at that time, and whether the suspicion was reasonable. The facts known to the officer might in some circumstances include statements by

third parties, i.e. hearsay. In effect such third party statements would be for non-hearsay use. Such third party statements would be relevant because the officer considered the words which were spoken because he heard them, but not for the truth of the matters asserted therein. Here the record is silent as to what Officer Suskovich knew, and when or how he knew it.

Officer Suskovich's statements to Officer Tracy were subsequently used to prove the truth of the matters asserted in his statements. Whether before or after the adoption of the evidence code, Officer Tracy's testimony about what Officer Suskovich told him was inadmissible hearsay.

The Need for Evidence

The State then sought to argue that the federal rules of evidence support the proposition that "[t]o 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 of an unknown citizen informant." Amended Initial Brief at 13.

The State cited no authority in support of that argument beyond a quotation from Florida Evidence at § 105.1. Therein Professor Ehrhardt suggests that trial courts have an "inherent ability... to disregard the rules of evidence in determining preliminary questions of admissibility." The State cited no Florida law in support

of that proposition. In a footnote[4] (which was omitted from the quotation in the State's Amended Initial Brief), Professor Ehrhardt cited three cases: Romani v. State, 528 So. 2d 15 (Fla. 3rd DCA 1988), decision approved in part, quashed in part, 542 So. 2d 984 (Fla. 1989); McAlevy v. State, 947 So. 2d 525, 530 (Fla. 4th DCA 2007); and Kirkpatrick v. Wolford, 704 So. 2d 708 (Fla. 5th DCA 1998).

The Romani court considered admissibility of statements by coconspirators in a murder case. The district court discussed the law addressing the coconspirator hearsay exception. Romani at 18-19. The district court seemed convinced that it was necessary to consider the coconspirator statements to determine their admissibility. The district court cited Bourjaily v. United States, 483 U.S. 171, 181 (1987), and United States v. Matlock, 415 U.S. 164, 175 (1974), and concluded: "In the instant case, the trial judge recognized his discretion to accept coconspirator statements subject to determining the elements of section 90.803(18)(e) had been established."

This Court did not agree:

> The district court held that the trial judge could consider the coconspirator hearsay statements in determining the out-of-court declarant's participation in the conspiracy. 528 So.2d at 21. The court made this determination based upon Bourjaily v. United States, 483 U.S. 171... (1987), which held that a court, in making preliminary

[4] Charles Ehrhardt, Florida Evidence § 105.1 n.10 (2009 ed.) The State did not indicate what edition of the treatise was the source of the quotation on page 13 of the Amended Initial Brief, but used the signal "supra". On page 11 of the Amended Initial Brief the State cited the 2007 edition. In the same footnote in the 2007 edition, Professor Ehrhardt cited Romani, Kirkpatrick, and two other civil cases.

> factual determinations, may examine the hearsay statements sought to be admitted. In Bourjaily the Supreme Court explained that out-of-court statements are only presumed unreliable and that the presumption may be rebutted. "[A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence." 107 S.Ct. at 2781. Moreover, Federal Rule of Evidence 104(a) provides that in determining preliminary questions concerning admissibility, the court "is not bound by the rules of evidence except those with respect to privilege."
>
> ***We decline to adopt the federal approach laid out in Bourjaily and approved by the district court in Romani. There is no counterpart to rule 104(a) in the Florida Evidence Code. To the contrary, the Florida Code provides for a jury instruction that each member's participation in the conspiracy must be proved by independent evidence.*** § 90.803(18)(e). In accordance with the statute and prior Florida case law, we have required that a court rely upon independent evidence to prove a conspiracy, and each member's participation in it, before admitting coconspirator hearsay statements. Nelson v. State, 490 So.2d 32 (Fla.1986); Briklod v. State, 365 So.2d 1023 (Fla.1978); Damon v. State, 289 So.2d 720 (Fla.1973). See also State v. Edwards[, 536 So. 2d 288 (Fla. 1st DCA 1988)]. We are apprehensive that adopting the Bourjaily rule would frequently lead to the admission of statements which are not reliable. ***Our present rule of disallowing the statement itself in determining its admissibility helps assure that a defendant is convicted only on credible evidence.*** Hence, we adhere to the established rule.

Romani v. State, 542 So. 2d 984, 985-86 (Fla. 1989)(footnote omitted, emphasis added). The case against admission of the hearsay statements in the instant case is stronger. If coconspirator statements, as in Romani, were to meet the statutory

criteria, they might be admitted at trial. See § 90.803(18) Fla. Stat. (2006). In the instant case there is no exception to the hearsay rule that would allow admission of Officer Suskovich's statements to Officer Tracy at the trial of this case.

In McAlevy v. State, the State sought to issue a subpoena for medical records of a defendant in a criminal case. 547 So. 2d at 527, 529. The court held that no showing of probable cause was necessary to issue such a subpoena. Id. at 530. To issue such a subpoena over objection, all that is necessary is to "demonstrate that a patient's confidential hospital records are relevant to a criminal investigation before the issuance of an investigative subpoena." Id. at 529-30. "The concept of relevancy is broader in the discovery context than in the trial context." Id. at 530. Therefore the burden of proof is less than required for a search warrant. Id. To make the necessary showing of "a nexus" the district court held that the county court "could rely upon the state's argument and the probable cause affidavit." Id. The rule in McAlvey does nothing to address the issue (and the State's far greater burden) in the instant case.

The opinion in Kirkpatrick v. Wolford addressed a different issue entirely. There the court was concerned with determination of authoritativeness of certain technical literature for cross-examination purposes. 704 So. 2d at 709-10.

Other Policy Considerations

Hearsay, including the hearsay testimony presented by Officer Tracy, is

presumptively unreliable. See Hadden v State, 690 So. 2d 573, 578 (Fla. 1997)("[a]s a rule, hearsay evidence is considered not sufficiently reliable to be admissible, and its admission is predicated on a showing of reliability by reason of something other than the hearsay itself"). Here the hearsay statement of Officer Suskovich as repeated by Officer Tracy was not sufficiently convincing for the trial court to find that the State carried its burden to find that the traffic stop passed Fourth Amendment muster. R.066; R.118, lines 16-17.

Rightly or wrongly, Officer Suskovich was entirely responsible for the stop of the Defendant. Officer Tracy arrived later and made no contribution to the stop by Officer Suskovich. R.093, lines 3-22. From the hearsay presented, it is impossible to determine where Officer Suskovich, the original declarant, was when he claimed to have seen the Defendant, how the vehicle driven by the Defendant came to his attention, or exactly what he observed the Defendant do. It is impossible to test the original declarant's ability to observe and recall. It is impossible to discern fron the evidence in the record on appeal whether the original declarant saw the Defendant violate some law, or whether he repeated what some third person told him. Even if Officer Tracy's testimony were absolutely reliable, it is impossible to test whether the original declarant provided reliable information to him. The facts in the instant case present a textbook example of why hearsay is presumed to be unreliable.

The Fellow Officer Rule

The necessary probable cause (or reasonable suspicion) to support a seizure or a search can be based on the personal observation of the officer who makes the seizure or conducts the search. Two other means exist to establish probable cause (or reasonable suspicion): (1) information in the possession of officers with whom the arresting officer is in communication, and (2) hearsay used in an affidavit for a search or arrest warrant. Neither has application in the instant case.

In its opinion on the appeal by the State, the circuit court relied on the "fellow officer rule, which is sometimes referred to as the collective knowledge doctrine, [which] is premised on the theory that the collective knowledge of police investigating a crime is imputed to each member of the investigation." R.063. The circuit court cited Dewberry v. State at 967and Ferrer v. State at 711. The circuit court held that Ferrer is analogous to the case at bar. R.063.

The circuit court erred both factually and in application of the law when it invoked the fellow officer rule, and Dewberry and Ferrer. The fellow officer rule functions to impute the knowledge of one officer to another officer for the purpose of establishing probable cause for a seizure when the officers are in communication. Here the record on appeal shows no evidence of any such communication.

The Second District Court held that "Ferrer was wrongly decided because it

misapplies the fellow officer rule to circumvent the hearsay rule of evidence." R.264 (Bowers at 769). "Ferrer misapplied the fellow officer rule and should be rejected." R.267 (Bowers at 771). The district court reasoned that the "fellow officer rule is not a rule of evidence. It does not change the rules of evidence. And, it is not one of the enumerated exceptions to the hearsay rule." R.265 (Bowers at 770).

The fellow officer rule would allow an officer who makes an arrest or conducts a search to rely, in certain circumstances, upon information received by that officer from another officer[5] to establish probable cause. In State v. Boatman, 901 So. 2d 222 (Fla. 2d DCA 2005), the Second District Court explicitly applied the fellow officer rule to misdemeanor arrests:

> The "fellow officer rule" operates to impute the knowledge of one officer in the chain of investigation to another.... In the context of a felony, ***the fellow officer rule allows the information constituting probable cause to be imputed from one officer to another***.... We see no reason why the same rule should not allow the information that a misdemeanor has occurred in the presence of an officer to be imputed from one officer to another.

901 So. 2d at 224 (citations omitted, emphasis added). The court explained

> The fellow officer rule is typically, although not always, a rule permitting an officer who has lawful power to arrest a person the option of delegating that function to

[5] Note that the fellow officer rule does not impute the knowledge of citizen informants to officers. See Sawyer v. State, 905 So. 2d 232, 234 (Fla. 2d DCA 2005), quoting Steiner v. State, 690 So. 2d 706, 709 (Fla. 4th DCA 1997).

> another officer. As a result, the rule is related to the provision in section 901.18, Florida Statutes (2003), which permits an officer making an arrest to "command the aid of persons she or he deems necessary to make the arrest." Under that statute, we have expressly allowed an officer observing a misdemeanor in his presence to delegate to a fellow officer the authority to make the misdemeanor arrest.

Id. at 224.

This Court held that "[u]nder the fellow-officer rule, ***information shared by officers investigating a crime is imputed to any one of their number***, even those from different agencies working together." Johnson v. State, 660 So. 2d 648, 654 (Fla. 1995)(emphasis added). See also Voorhees v. State, 699 So. 2d 602, 609 (Fla. 1997)(imputation of collective knowledge of police from two different states investigating the same crime); State v. Peterson, 739 So. 2d at 566, quoting United States v. Wilson, 894 F.2d 1245, 1254 (11th Cir. 1990) ("[m]oreover, when a group of officers is conducting an operation and there exists at least minimal communication between them, their collective knowledge is determinative of probable cause").

However the fellow officer rule is a judicially created rule for imputation of knowledge, not a rule of evidence. As explained infra, nothing in the Florida Evidence Code or in any Florida appellate opinion would purport to create a "fellow officer" exception to the hearsay rule. An officer can take action to seize a person or to search based on information supplied by another officer with whom he

is in communication. Such information is imputed to the first officer. But, as explained infra, only in the very limited sense of stating the probable cause supporting his own action could an officer testify about what he learned from another officer under the fellow officer rule.

Policy Underlying the Fellow Officer Rule

When one officer becomes aware of some circumstance that makes it necessary to take immediate action to keep the peace or to arrest a suspected felon who might otherwise escape, that officer may be unable to act immediately by himself. Therefore the officer should be able to communicate to other officers who are in a position to assist. It is entirely reasonable for an officer to seek assistance in that situation.

> The fellow officer rule provides a mechanism by which officers can rely on their collective knowledge to act in the field. Under this rule, the collective knowledge of officers investigating a crime is imputed to each officer and one officer may rely on the knowledge and information possessed by another officer to establish probable cause. See Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 568... (1971); State v. Maynard, 783 So.2d 226, 229 (Fla.2001); Strickroth v. State, 963 So.2d 366, 368 n. 1 (Fla. 2d DCA 2007) (" '[T]he collective knowledge of police investigating a crime is imputed to each member....' ") (quoting Johnson v. State, 660 So.2d 648, 657 (Fla.1995)); State v. Boatman, 901 So.2d 222, 224 (Fla. 2d DCA 2005) ("[T]he rule operates to impute the knowledge of one officer in the chain of investigation to another."). "It can involve direct communications between officers who have sufficient information and the officer who stops the

> suspect, or it can involve general communications among officers of whom at least one possesses the required level of suspicion." Strickroth, 963 So.2d at 368 n. 1.

R.264-65; Bowers at 769-70.

However once the urgent situation in the field has been resolved, the necessity for quick action has passed. At a hearing or trial weeks or months after an event, nothing would prevent all of the officers involved from appearing before a court to report what they each personally observed. Such personal observation of a witness is subject to cross examination and impeachment; where that testimony survives adversarial testing, it is highly reliable. "Confrontation... forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'...." California v. Green, 399 U.S. 149, 158 (1970), quoting 5 Wigmore, Evidence § 1367.

Where it is possible to test the reliability of evidence, public policy dictates that such testing is in order. The United States Supreme Court discussed the purpose of the Sixth Amendment Confrontation Clause in Crawford v. Washington, 541 U.S. 36, 61-62 (2004):

> the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373

> ("This open examination of witnesses ... is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Professor McCormick agreed: "For two centuries, common law judges and lawyers have regarded the opportunity for cross examination as an essential safeguard of the accuracy and completeness of testimony. They have insisted that the opportunity is a right, not a mere privilege." McCormick, Evidence § 19 (6th ed.)

Not only is hearsay not testable by cross examination, it is presumptively unreliable. See Hadden at 578. Thus admission of hearsay fails to meet the public policy goal of courts deciding fact questions based on "reliable evidence (a point on which there could be little dissent)". Crawford at 61. However in the instant case, even without reliability testing, the hearsay evidence not sufficiently convincing for the trial court to find that the State carried its burden to find that the traffic stop passed Fourth Amendment muster. R.066; R.118, lines 16-17.

Application of the Fellow Officer Rule to Facts in the Instant Case

In the instant case the fellow officer rule has no application because one officer did not rely upon information received from another officer to establish probable cause for the seizure of the Defendant. Officer Tracy testified that when

he arrived, “the car was already pulled over” and Officer Suskovich was investigating the circumstances. R.093, lines 14 - 18. Officer Tracy’s testimony left no doubt that he arrived on the scene after Officer Suskovich had already seized the vehicle driven by the Defendant. R.093, line 3 - R.094, line 1.

Nothing in the record on appeal would establish what Officer Suskovich saw except the brief repetition of his statement by Officer Tracy. Officer Suskovich did not testify at any time. No report written by Officer Suskovich is in the record on appeal, and none is known to exist. Nothing in the record on appeal (including Officer Tracy’s hearsay testimony) suggests, much less would establish, what data Officer Suskovich may have relied upon to formulate probable cause for the stop. No imputation of knowledge of one officer to another for the purpose of probable cause has been shown to exist in the instant case. Apparently Officer Suskovich was entirely responsible for the stop of the Defendant. Officer Tracy arrived later and made no contribution to the stop. R.093, line 3 - R.094, line 1.

The testimony of Officer Tracy repeating what Officer Suskovich told him should not have been admitted in this case because it was simply hearsay. Even so, that testimony included nothing to show that Officer Suskovich received information from any other officer. On cross examination Officer Tracy answered “yes” to the question whether he was “just relying on one statement that Officer Suskovich... told you?” R. 093, lines 10 - 13.

The county court allowed Officer Tracy to testify to what Officer Suskovich had told him. But even if the fellow officer rule would allow one officer to testify about what another officer told him as a basis for probable cause, there was no evidence of such communication between Officer Suskovich and any other officer prior to the stop of the vehicle driven by the Defendant. Therefore the fellow officer rule has no application in the instant case. Officer Suskovich did not testify because he failed to appear in response to the State's subpoena.

Application of the Hearsay Rule to the Facts in the Instant Case

In this case the probable cause determination was made by Officer Suskovich prior to the traffic stop. Officer Tracy did not participate in the stop. He arrived later, and simply testified about what Officer Suskovich told him.

The hearsay rule is well known: "Except as provided by statute, hearsay evidence is inadmissible." § 90.802 Fla. Stat. (2006). The relevant testimony presented in the trial court by Officer Tracy was hearsay to the extent that he repeated what Officer Suskovich told him. That testimony was used to prove the truth of the matter asserted, i.e. the reason for the stop by Officer Suskovich.

In the trial court the Defendant moved to suppress all of the results of the traffic stop because of an absence of "well-founded, articulable suspicion of criminal activity of any description, or any violation of the traffic code of any description prior to the time the officer stopped the vehicle allegedly driven by the

Defendant." R.077. Therefore "everything observed and seized after the vehicle allegedly driven by the Defendant was improperly stopped was the fruit of an illegal detention and must be suppressed." R.078.

No authority exists which might make the fellow officer rule a blanket exception to the provisions of the evidence code which addresses the admissibility of hearsay. Under some circumstances an officer who stopped a vehicle could testify that his basis for the stop was that another officer had observed a traffic violation. However nothing in the fellow officer rule would allow an officer who did not participate in the stop to testify about the predicate for a stop in which he did not actually participate. Such testimony would simply be hearsay. By relying on the fellow officer rule, the circuit court applied the wrong law. R.063-64. The district court recognized that error. R.266-68 (Bowers at 770-71).

The rule that one officer can not simply repeat in testimony what another officer told him is analogous to the rule that the contents of a dispatch given a police officer is inadmissible hearsay. In order to explain police action it is permissible for an officer to testify that a dispatch occurred, but the hearsay contents of the dispatch are inadmissible for the purpose of proving the truthfulness of the information. See Conley v. State, 620 So. 2d 180, 182-83 (Fla. 1993); Taylor v. State, 845 So. 2d 301, 303 (Fla. 2d DCA 2003).

The content of a dispatch is not admissible even where merely offered to

prove why the officer went to the scene to investigate. Conley at 182-83. This Court held that where such testimony is not used to prove the truth of the matter asserted, the contents of the statement are not relevant to establish a logical sequence of events. Id. at 183. Likewise the reason why officers arrived at the scene is not a material issue in most criminal cases. Id. The inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information to establish a logical sequence of events outweighs the probative value of such evidence. Id. In Taylor the district court held that "Conley clearly established that the State may prove the fact of a dispatch to explain police actions, but normally it may not introduce the hearsay content of a dispatch, especially to prove the truthfulness contained within that content." Taylor at 303.

The same is true of the content of a communication received from a fellow officer. Whether or not the officer who initiated the communication testifies, the content of a prior communication made by such an officer is obviously a statement "other than one made by the declarant made while testifying at the trial or hearing...." § 90.801(1)(c) Florida Statutes (2006). Therefore the statement in the communication is hearsay if used for its truth. Id. Of course if the facts were otherwise admissible, the officer who observed the event and initiated the communication could appear and testify. Likewise if the contents of the communication were within one of the recognized exceptions to the hearsay rule,

they might be offered for admission to evidence under such exception. No such exception applies here.

The Right to Confrontation

The State incorrectly asserted: "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)." Amended Initial Brief at 14 n.1. That assertion contains several factual errors. The objection at the hearing on the motion to suppress was "I can't cross examine him." R.084, lines 10-11. That objection addresses both hearsay and the right to confrontation. As a practical matter the two are inseparable. See California v. Green at 158.

The issue of right to confrontation at the hearing on the motion to suppress was not addressed in the courts below. The right to confrontation and the rule in Crawford v. Washington were addressed only in passing in the Petition for Writ of Certiorari. R.036 n.3; R.039. The State did not address the same at all in the Response. R.154-160. The right to confrontation and the rule in Crawford were addressed briefly in the Reply to the Response. R.175-176.

The State now argues that "almost every court that has ruled post-Crawford has ascertained that the confrontation clause still does not involve pre-trial

hearings." Amended Initial Brief at 14. Unfortunately the State only listed a variety of cases from foreign jurisdictions in support of the suggestion that "the confrontation clause still does not involve pre-trial hearings." The State provided no analysis of the holdings of any of the cited cases, and no information at all as to what (if any) statutory framework might exist in those jurisdictions, or whether such statutes might be similar to the Florida Evidence Code. Amended Initial Brief at 14-15.

Ferrer was decided in 2001, Lara was decided in 1985, and Cortez was decided in 1998. All predate the opinion in Crawford v. Washington. The Crawford Court firmly and expressly rejected the rule in Ohio v. Roberts, 448 U.S. 56 (1980), which had provided that the statement of a hearsay declarant is admissible at trial "if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Roberts at 66. Instead the Crawford Court held that admission of a hearsay statement made by a declarant who does not testify at trial violates the Confrontation Clause of the Sixth Amendment if (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross- examination of the declarant. The Court emphasized that where "testimonial" evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-

examination." See State v. Contreras, 979 So. 2d 896, 902 (Fla. 2008), quoting Crawford at 68.

"Court disputes should be decided upon the most reliable evidence available." Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 570 So. 2d 892, 898 (Fla. 1990). Testimony about things observed by a witness is subject to cross-examination and impeachment. Where such testimony survives adversarial testing, it is highly reliable. "Confrontation... forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'...." California v. Green at 158.

It is very much in the interest of the State of Florida and its citizens that issues before the our courts be decided on the basis of reliable evidence. Therefore where it is possible to test the reliability of evidence, public policy dictates that such testing is in order. That should be the clear and unequivocal policy of our courts, in particular where fundamental constitutional rights are at issue, and where the ultimate result may be the loss of liberty of a citizen.

Often cases, like the instant case, ultimately turn on the propriety of a warrantless seizure or search. In such situations the initial determination of admissibility of evidence is effectively dispositive of the case. It follows that the rule in Crawford, requiring testing of the reliability of evidence by cross-examination (or a showing of unavailability of the witness and a prior opportunity

for cross-examination) should be followed at hearings on motions to suppress evidence. Failure to make that effort impugns this Court's rule that court disputes should be decided upon the most reliable evidence available.

Given the marked transformation in the law following the United States Supreme Court opinion in Crawford, it would be entirely appropriate to revisit the underpinnings of the opinions in Ferrer, Lara, and Cortez, which were decided under the rule in Ohio v. Roberts. Given the inattention of the courts below to the application of the rule in Crawford to the instant facts, it might be appropriate for this Court to order supplemental briefing on that important issue.

CONCLUSION

WHEREFORE the Defendant requests this Honorable Court to affirm the opinion of the Second District Court in Bowers v. State, and hold that the Florida Evidence Code and the rule in Crawford v. Washington apply to evidentiary hearings on motions to suppress evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been furnished by U.S. mail, postage prepaid, to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, on this 25th day of March, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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