Supreme Court of Florida

MONDAY, JANUARY 31, 1994

IN RE: FLORIDA EVIDENCE CODE
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CASE NO. 82,146

Motion to Adopt the Amicus Curiae Brief is hereby granted and the Florida Public Defender Association, Inc., is allowed to adopt the amicus curiae brief by Richard Jorandby. Please submit eight (8) copies of the adopted brief immediately.

A True Copy

TEST:

Sid J. White,
Clerk Supreme Court

KBB
cc: Mr. Dennis Roberts
Mr. Eric M. Cumfer
Mr. Richard L. Jorandby
Mr. John F. Harkness
Mr. John A. Boggs

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FILED
SID J. WHITE
JAN 3 1994
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN RE:
FLORIDA EVIDENCE CODE,
an original proceeding.

Case No. 82,146

AMICUS CURIAE BRIEF OF RICHARD L. JORANDBY

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STATEMENT OF THE CASE AND FACTS

Upon a petition by the Florida Bar, this Court on December 16, 1993 adopted as a rule of court a number of changes to the Florida Evidence Code to the extent they were procedural in nature. Among the statutes adopted was Ch. 91-255 §12, Laws of Florida. That statute enacted the following subsection:

> An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, shall be admissible in evidence under exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit shall be admissible without further authentication and shall be presumptive proof of the results of the authorized test to determine alcohol content of the blood or breath if the affidavit discloses:
>
> (a) The type of test administered and the procedures followed;
>
> (b) The time of the collection of the blood or breath sample analyzed;
>
> (c) The numerical results of the test indicating the alcohol content of the blood or breath;
>
> (d) The type and status of any permit issued by the Department of Health and Rehabilitative Services that was held by the person who performed the test; and
>
> (e) If the test was administered by means of a breath testing instrument, the date of the performance of the most recent required maintenance on such instrument.
>
> The Department of Health and Rehabilitative Services shall provide a form for the affidavit. Admissibility of the affidavit shall not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding.

§316.1934(5), Fla.Stat. (1993). That statute also amended the public records exception to the hearsay rule. The older version of that rule did not allow use of public records of matters observed by the police against criminal defendants, but the amended section does permit use of the affidavits described in

§316.1934(5). §90.803(8), Fla.Stat. (1993).

SUMMARY OF THE ARGUMENT

POINT I

The statute permitting use of an affidavit in lieu of live testimony of the breathalyzer operator violates the confrontation clauses of the Florida and United States Constitutions and so should not be adopted as a rule of court. The confrontation clauses were enacted precisely to prevent the use of affidavits in lieu of live testimony. Under more modern interpretations of the confrontation clauses, hearsay which does not fall under a firmly rooted exception to the hearsay rule is not admissible absent some particularized guarantee of trustworthiness. There is no history of acceptance of the kind of affidavit in question as an exception to the hearsay rule; longstanding judicial experience shows just the opposite: affidavits prepared in anticipation of litigation are extremely suspect and unreliable. The use of such affidavits is not allowed in federal courts and has only been permitted by statute in Florida courts since 1991. The use of these affidavits does not fall within a firmly rooted exception to the hearsay rule and so violates the confrontation clauses.

POINT II

The statute shifts the burden of proof to the defendant contrary to the requirements of the due process of law. It permits the State to prove an element of the offense by simply putting an otherwise inadmissible affidavit into evidence. The witnesses who can explain the results and tests reflected in the affidavit need not be called. The defendant is required to call witnesses whose

testimony should be presented as part of the State's case-in-chief. This statute puts a burden of proof on a defendant. The statute violates due process since those provisions of the constitutions require the State to shoulder the burden of proof.

ARGUMENT

POINT I

§316.1934(5), FLORIDA STATUTES VIOLATES THE CONFRONTATION CLAUSES OF THE FEDERAL AND FLORIDA CONSTITUTIONS.

§316.1934(5) violates the confrontation clauses of the Florida and Federal Constitution.[1] See State v. Ruiz, 1 Fla.L. Weekly Supp. 532 (Dade Co.Ct. August 24, 1993). A unanimous Supreme Court has recognized - while rejecting a claim that a defendant's rights were violated by the failure of the police to preserve a breath sample - that a "defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilzyer test and attempt to raise doubts in the mind of the factfinder whether the test was properly administered." California v. Trombetta, 467 U.S. 479, 490, 104 S.Ct. 2528, 2535, 81 L.Ed.2d 413 (1984).

Although this statement in Trombetta was dicta, examination of the Supreme Court's cases on the confrontation clause shows this dicta is a correct statement of the law as the Dade County Court recognized in Ruiz. The confrontation clause was enacted:

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[1] The Florida Constitution requires:

> In all criminal prosecutions the accused . . . shall have the right . . . to confront at trial adverse witnesses . . . .

FLA.CONST. Art.I,§16(a).

The United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S.CONST., Amend. VI.

> to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). More recently, the Supreme Court recognized that the confrontation clause was originally enacted to "prevent a particular abuse common in 16th and 17th century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial." White v. Illinois, 112 S.Ct. 736, 740 (1992).

Trial by affidavit is precisely what would occur if §316.1934(5) were followed. Instead of calling the breathalyzer operator, the State simply has the technician jot down a few answers to blanks on an affidavit and then uses that affidavit in lieu of the witness' direct testimony. This procedure violates the protections of the confrontation clause under even the most restrictive interpretation of its reach.

However, the Supreme Court has rejected any notion that the confrontation clause prohibits only the use of affidavits in lieu of testimony; it also excludes certain types of hearsay even when not prepared for use as testimony at trial. The Supreme Court holds that hearsay not falling "within a firmly rooted hearsay exception" requires "a showing of particularized guarantees of trustworthiness" before the confrontation clause will permit its

admission. Ohio v. Roberts, 448 U.S.56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

§316.1934(5) does not fall into a firmly rooted hearsay exception. Ruiz, 1 Fla.L. Weekly Supp. at 534-5. Not every codified hearsay exception is "firmly rooted" in the constitutional sense. The Supreme Court has held the co-conspirator hearsay exception is a firmly rooted one, see Bourjaily v. United States, 483 U.S. 171, 183-4, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), as are spontaneous declarations and statements made for medical diagnosis. See White, 112 S.Ct. at 742 n.8. However, it has held a codified residual hearsay exception is not. See Idaho v. Wright, 110 S.Ct. 3139, 3147 (1990). In Bourjaily, the Court noted the federal co-conspirator exception was first articulated in 1827 as part of the older res gestae rule and had a long history of acceptance since. Bourjaily, 483 U.S. at 183. In White, the court noted the spontaneous declaration exception was at least two centuries old and the medical statements exception had long and wide acceptance. 112 S.Ct. at 742 n.8; see also Mattox, 15 S.Ct. at 340 (suggesting confrontation clause allows only those hearsay exceptions existing at time of its enactment). In Wright, the Court warned against automatically assuming every codified hearsay exception must be considered as "firmly rooted." Wright, 110 S.Ct. at 3148. To be firmly rooted, the hearsay exception must have "longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Id. at 3147.

§316.1934(5) has no longstanding acceptance; it is precisely the kind of affidavit whose use the confrontation clause was intended to prevent. Indeed, the longstanding experience of the courts shows that an affidavit prepared in anticipation of litigation positively lacks trustworthiness. For example, business records prepared in anticipation of litigation are inadmissible because they are considered untrustworthy. See Smith v. Frisch's Big Boy, Inc., 208 So.2d 310, 312 (Fla. 2d DCA 1968)(police report not a business record); Stambor v. One Hundred Seventy-Second Collins Corp., 465 So.2d 1296, 1298 (Fla. 3d DCA 1985)(citing cases); United States v. Bohrer, 807 F.2d 159, 162-3 (10th Cir. 1987)(admission of contact card which IRS prepared anticipating litigation posed situation which dripped with motives to misrepresent).

> Whenever a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized.

C. Ehrhardt, Florida Evidence, §803.6, 491 (2d Ed. 1984). As the Supreme Court said in discussing the predecessor to the Federal business records hearsay exception,[2] "But there is nothing in the background of the law . . . which suggests for a moment that the business of preparing cases for trial should be included." Palmer v. Hoffman, 318 U.S. 109, 114, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943). In Palmer, the Court held a hearsay report on a wreck by a train engineer prepared for his employer pursuant to a regular business

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[2] The 1943 business record statute was created by 49 Stat. 1561 (1936), then codified at 28 U.S.C. §695. Palmer, 318 U.S. at 111 n.1.

practice was not admissible as a business record since it was not prepared in the course of business, rather for litigation. The Court disapproved use of the business record exception for organizations whose business is to prepare for trial:

> The result would be the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule [cites omitted] Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability [cite omitted] acquired from their source and origin and nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning.

Palmer, 318 U.S. at 114 (e.a.). Cases hold that this same untrustworthiness infects public records so made. See United States v. Stone, 604 F.2d 922, 925-6 (5th Cir. 1979); see also Dykes v. Quincy Telephone Company, 539 So.2d 503, 505-6 (Fla. 1st DCA 1989)(hearing officer's proposed order not a public record in part because adjudicative in nature); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 n.11, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988)(citing Palmer in discussion on reliability under Federal public records hearsay exception).

Because the breathalyzer affidavit was prepared in anticipation of litigation, it has no longstanding acceptance as a hearsay exception, indeed just the opposite. Simply because this hearsay exception was enacted by the legislature does not make it a firmly rooted one. Modern rules of evidence have liberalized

use of hearsay, but that liberalization does not comport with the confrontation clause's conservative purpose - to protect the rights guaranteed English subjects at the time of the clause's enactment in this country. See Mattox, 15 S.Ct. at 339. Use of an affidavit prepared in anticipation of litigation is a 'recent sprout,' like the exception in Wright, not "firmly rooted," in the growth of the law.

The state may argue the hearsay exception is firmly rooted because it is a variant of the public record exception. However, expanding a traditional hearsay exception to include new classes of hearsay does not mean the new class of hearsay is firmly rooted in the constitutional sense. In Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), a plurality of the court examined the record for particularized reliability of a co-conspirator's statements admitted under a Georgia rule broader than the Federal co-conspirator exception because, while the co-conspirator exception itself was commonly accepted hearsay, the particular kind of statement which was admissible in Georgia under that exception was not. Thus, the issue would not be whether the public records exception is firmly rooted but whether the particular type of public record at issue in this case has enjoyed longstanding, widespread acceptance as a hearsay exception.

Florida did not allow the kind of public record at issue here into evidence until the legislature enacted §316.134(5) in 1991. The State may rely on Smith v. Mott, 100 So.2d 173 (Fla. 1958) in arguing that this kind of affidavit would have been admissible as

a public record before enactment of the Evidence Code. In Smith, this Court approved use of a blood alcohol level report prepared by a medical examiner which was a public record. However, Smith was a civil case; nothing suggests it applied to criminal cases. The public record exception, until 1991, expressly excluded all "matters observed by a police officer or other law enforcement personnel" from admission in criminal cases. §90.803(8), Fla.Stat. (1989). Federal cases show this kind of affidavit concerns a matter observed by a policeman.[3] In United States v. Oats, 560 F.2d 45 (2d Cir. 1977), the Second Circuit Court of Appeals held a United States Custom's Service chemist whose report opined the substance seized from the defendant was heroin was a 'law enforcement personnel' who observed a matter within the meaning of Federal Rule of Evidence 803(8) and whose report thus could not be admitted into evidence. Similarly, an affidavit memorializing a breath test

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[3] Florida rules of evidence, when based on substantially similar federal counterparts, are usually interpreted the same way. See Moore v. State, 452 So.2d 559 (Fla. 1984). Federal Rule 803(8) varies slightly from §90.803(8), but its import is the same. It defines as admissible:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. Rules Evid. Rule 803(8), 28 U.S.C.A.

concerns a matter observed by the police. Florida's pre-1991 public records exception would not have permitted this hearsay to be admitted. Federal Rule of Evidence 803(8) does not permit such hearsay now. Since this form of hearsay has gained only limited acceptance in recent years, it is, like the residual hearsay exception at issue in Wright, not firmly rooted enough to be admissible as a class without some particularized guarantees of trustworthiness.

Since this statute violates the confrontation clauses of both the Florida and United States Constitution, this Court should not adopt it as a rule of court.

POINT II

§316.1934(5) SHIFTS THE BURDEN OF PROOF TO THE DEFENSE CONTRARY TO THE DUE PROCESS OF LAW.

§316.1934(5) allows the state to put into evidence an affidavit describing the results of a breath or blood test. It permits defendants to call the breath test operator as a witness in the defense case and examine them as an adverse witness. It says nothing about calling the maintenance personnel. §316.193(1)(b), Florida Statutes states one of the alternate ways to prove driving under the influence is if the driver's blood or breath alcohol level exceeds .10 per cent.[4] §316.1934(5) thus places the burden on the defense to disprove a material element of the offense.

It is a black letter rule that the due process of law - guaranteed by Article I, §9 of the Florida Constitution and the Fourteenth Amendment to the Federal - places on the government the burden to prove beyond a reasonable doubt all the elements of charges in all criminal prosecutions. See Mullaney v. Wilbur, 421 U.S. 684, 701, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); State v. Cohen, 568 So.2d 49, 51 (Fla. 1990); State ex rel. Boyd v. Green, 355 So.2d 789, 794 (Fla. 1978). This fundamental principle protects the administration of justice by reducing the likelihood of an erroneous conviction. See Mullaney, 421 U.S. at 701.

The situation presented by §316.134(5) is similar to those in

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[4] This statute has been amended effective January 1, 1994 to criminalize driving with a breath or blood alcohol level above .08 per cent. §316.193(b), Fla.Stat. (1993).

which the legislature adopted bifurcated guilt/insanity proceedings and in which it set up a so-called "affirmative defense" which was nothing more than an element of the offense. In Green, the Florida Supreme Court held that bifurcating a trial into guilt and insanity phases violated due process because it, in effect, created a rebuttable presumption that the defendant had the necessary intent to commit the crime in the guilt phase which the defendant had to rebut in the penalty phase. 355 So.2d at 793-4. In Cohen, the Court ruled unconstitutional a legislative attempt to shift the burden of proof onto a defendant in a witness tampering statute that the defendant was acting "lawfully" and attempting to get a witness to testify "truthfully" in his actions. Since this so-called "affirmative defense" does not concede the offense, but instead negates it, putting the burden of proof on the defendant to prove that set of facts violated due process. 568 So.2d at 52.

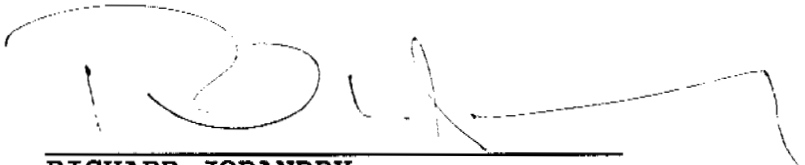
In this case, the State orders that an affidavit, regardless how unreliable, be put in evidence. The affidavit establishes the defendant's guilt of an element of the offense. Witnesses who would be otherwise necessary to introduce this evidence can be called by the defense but need not be called by the State. This law relieves the State of its burden to come forward with the evidence needed to prove guilt. In effect, the affidavit creates a presumption that the defendant is guilty of this element of the offense even though it may not be relied upon by a jury who knows the full facts how the test is carried out; yet, the defendant must bring out evidence to rebut it. As in Cohen and Green, such burden

shifting violates due process. For this reason as well, this Court must refuse to adopt §316.134(5).

CONCLUSION

For the foregoing reasons, Mr. Jorandby respectfully requests this Court not to adopt Ch. 91-255 §12, Laws of Florida as a rule of court.

Respectfully submitted,



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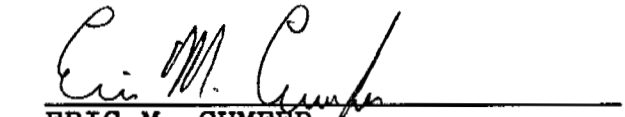

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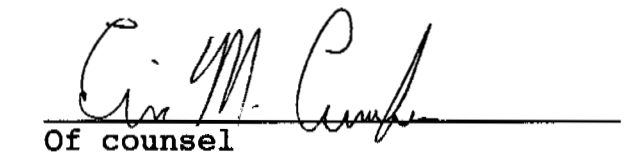
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to JOHN F. HARKNESS, Esq., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 30th day of December, 1993.



Of counsel