IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant

vs.

JEFFREY SCOTT RATNER,

Appellee.

CASE NOS.: SC05-1007 & SC05-1009 (CONSOLIDATED)

L.T. NO.: 4D04-2513

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ON DIRECT APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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APPELLANT'S REPLY BRIEF

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POINT I

SHOULD THE DECISION OF THE UNTIED STATES SUPREME COURT IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) BE INTERPRETED TO PRECLUDE THE ADMISSION OF A STATEMENT WHICH WOULD OTHERWISE BE ADMISSIBLE UNDER THE EXCITED UTTERANCE EXCEPTION TO HEARSAY?

Appellee initially claims the trial court's order in this case contains an "implicit finding" that the victim's statement to Officer Darville was testimonial in nature. (AB. 16-17; R. 218-219). The trial court never found the victim's statement to be testimonial in nature, and no "implicit finding" exists in the trial court's order. (R. 218-219). In addition to being based upon a faulty premise, the argument in appellee's Answer Brief ignores the fact that the overwhelming majority of American courts entertaining this issue have held that excited utterances, similar to the ones made by the victim in this case, are nontestimonial under Crawford. See, e.g., United States v. Todd, 2005 U.S. App. LEXIS 22772 (11th Cir. Oct. 20, 2005)(although not weighing in on whether the victim's comments were nontestimonial, the court noted that "most courts have concluded that the 911 statements under review were not testimonial"). In fact, numerous opinions supporting the State's position have been published since the Initial Brief was filed in this case. See Salt Lake City v. Williams, 2005 UT

App. LEXIS 493 (Utah Ct. App. Nov. 10, 2005)(statements to 911 operator that the defendant threatened to kill the victim were nontestimonial under Crawford and admissible as excited utterances); State v. Kemp, 2005 Mo. App. LEXIS 1660 (Mo. Ct. App. Nov. 8, 2005)(victim's statements to 911 operator were nontestimonial, and other statements she made to neighbors were admissible as excited utterances); Wallace v. State, 836 N.E.2d 985 (Ind. Ct. App. 2005)(victim's statements to emergency personnel identifying defendant as the shooter were admissible as excited utterances); State v. Searcy, 2005 Wisc. App. LEXIS 1124 (Wis. Ct. App. Dec. 21, 2005)(statements made by victim's cousin to the police were nontestimonial and admissible as excited utterances); Campos v. State, 2005 Tex. App. LEXIS 9814 (Tx. Ct. App. Nov. 23, 2005)(tape of victim's 911 call to the police was admissible as an excited utterance; victim's statements to neighbor were nontestimonial); United States v. Hadley, 2005 U.S. App. LEXIS 26526 (6th Cir. Dec. 6, 2005)(trial court did not err by admitting statement of victim to the police into evidence as an excited utterance).

Appellee claims, without citing any pertinent authority, the victim's statements were testimonial because Officer Darville asked the victim "my goodness, what happened to you?" (AB. 19-20). This argument ignores the fact that the victim was

crying, had swollen eyes, and was bleeding from the eyebrow when she approached Officer Darville. (SR. 8). Officer Darville provided aid to the victim in this case, and the question he asked does not constitute structured police questioning. Furthermore, the victim did not make her statements in a formal setting, or in a formalized document. Appellee's argument on this matter has been rejected by a multitude of courts from other jurisdictions, and this Court should reject it as well. State v. Warsame, 701 N.W.2d 305 (Minn. Ct. App. 2005)("a majority of post-Crawford cases involving initial police-victim interactions at the scene hold that the situations do not involve interrogation and that resulting statements are not testimonial."); People v. Bradley, 799 N.Y.S.2d 472 (N.Y. App. Div. 2005)(victim's statement made to responding officer was not testimonial under Crawford); People v. Mackey, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2005)(victim's responses to officer's question "what is wrong" were not testimonial); Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004)(officer's questioning of victim, which occurred seven minutes after incident, did not qualify as "police interrogation," and the victim's statements to the officer were not "testimonial" in nature); see also Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986)(officer asked surviving victim what happened at scene of the crime; officer's trial

testimony regarding the surviving victim's statement about what happened was admissible as an excited utterance); Torres-Arboledo v. State, 524 So. 2d 403, 408 (Fla. 1988)(witness's statement constituted excited utterance, even though the statement was made in response to the question "what happened?").

Although appellee cites Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) in his Answer Brief, he does not respond to the State's argument that an excited utterance cannot be testimonial in nature because the person making the statement does not have the reflective capacity essential for conscious misrepresentation. In Lopez, the First District held the victim's excited utterance was testimonial under Crawford because "he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant." Lopez, 888 So. 2d at 700. This holding is fundamentally flawed because it fails to acknowledge that a declarant who makes an excited utterance, by definition, does not have the reflective capacity essential for conscious misrepresentation. See Williams v. State, 909 So. 2d 599 (Fla. 5th DCA 2005)(excited utterances made to a 911 operator were not testimonial in nature); Rogers v. State, 660 So. 2d 234, 240 (Fla. 1995); McGauley v. State, 638 So. 2d 973, 974 (Fla. 4th DCA 1994).

Logic dictates that if a declarant does not have the reflective capacity essential for conscious misrepresentation when making an excited utterance, she cannot harbor any "reasonable expectation" when making such an utterance. Even though courts from several other jurisdictions have endorsed this view, appellee simply cites Lopez and fails to directly address the argument. See State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. Jan. 27, 2005), rev. granted, 2005 Tenn. App. LEXIS 571 (Tenn. June 20, 2005); State v. Aguilar, 107 P.3d 377, 378 (Ariz. Ct. App. 2005)(because an excited utterance "is made by a declarant whose reflective faculties have been stilled, the excited declarant will not simultaneously be rationally anticipating that his utterance might be used at a future court proceeding."). The State respectfully requests this Court embrace the sound reasoning adopted by courts in other jurisdictions, and reject the illogical analysis set forth in Lopez.

Finally, the State would note that this issue may soon be resolved by the United States Supreme Court. On October 31, 2005, the United States Supreme Court granted certiorari in two cases involving analogous issues. See Hammon v. State, 829 N.E.2d 444 (Ind. 2005)(considering application of the Confrontation Clause to statements made to officers responding

to a crime scene), cert. granted, 126 S. Ct. 552 (2005); State v. Davis, 111 P.3d 844 (Wash. 2005)(considering application of the Confrontation Clause to excited utterances made in 911 calls), cert. granted, 126 S. Ct. 547 (2005). Therefore, the United States Supreme Court's resolution of Hammon and Davis will undoubtedly have a tremendous impact on the outcome in the instant case.

POINT II

DO FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(4), 9.140(C)(2), AND 9.160 PROVIDE A DISTRICT COURT OF APPEAL WITH DISCRETIONARY JURISDICTION OVER A NON-FINAL COUNTY COURT ORDER (OTHERWISE APPEALABLE TO THE CIRCUIT COURT) WHICH CERTIFIES A QUESTION OF GREAT PUBLIC IMPORTANCE?

Appellee contends the Fourth District did not have jurisdiction over the instant case because "there is no provision in the Florida Rules of Appellate Procedure for the state to appeal the instant non-final order to the Fourth District in this case." (AB. 31). Appellee's position ignores the fact that Florida Rule of Appellate Procedure 9.030(b)(4)(B) provides district courts of appeal with discretionary review over "non-final orders, otherwise appealable to the circuit court under rule 9.140(c), that the county court has certified to be of great public importance." The trial court in this case certified a question of great public importance, and Rule

9.140(c)(2) expressly states "[t]he state as provided by general law may appeal to the circuit court non-final orders rendered in county court." The general law, i.e., sections 924.071(h) and (1) of the Florida Statues, permits the State to appeal, from the county court to the circuit court, "[a]ll other pretrial orders, except that it may not take more than one appeal under this subsection in any case" and "[a]n order or ruling suppressing evidence or evidence in limine at trial." Since the State can appeal the trial court's ruling to the circuit court under sections 924.071(h) and (1) of the Florida Statues and Rule 9.140(c)(2), the Fourth District had jurisdiction over this case under Rule 9.030(b)(4)(B) because the trial court certified a question of great public importance. See Fla. R. App. P. 9.030(b)(4); Fla. R. App. P. 9.140(c)(2); §§ 924.07(1)(h) & (l), Fla. Stat.

Appellee suggests the cases cited by the State in its Initial Brief are distinguishable because they involved "matters of a constitutional nature." (AB. 31). This attempt to distinguish the State's caselaw must fail because the instant case clearly involves "matters of a constitutional nature," i.e., appellee's Confrontation Clause rights. Id. Appellee's argument ignores the interplay between the provisions in Rule 9.030(b)(4), Rule 9.140(c)(2), Rule 9.160, and sections

924.07(1)(h) & (l) of the Florida Statutes, which demonstrate that a district court of appeal may exercise its discretionary review over a State appeal from a non-final county court order which certifies a question of great public importance.

Appellee posits, without citing any applicable authority, that "[o]nly appeals taken pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(A)-(P) are appealable to the Circuit Court." (AB. 35). This argument must fail because it ignores the plain language of Rule 9.030(b)(4), Rule 9.140(c)(2), Rule 9.160, and the applicable Florida Statutes. Appellee also claims that Rule 9.140(c)(2) "only grants the state the right to appeal to the circuit court non-final orders rendered in county court." Id. This contention is fallacious because the general law establishes which cases appealable to the circuit court, not the Florida Rules of Appellate Procedure enacted by this Court. Art. V, § 5(b), Fla. Const. ("The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law."); Blore v. Fierro, 636 So. 2d 1329, 1331-1332 (Fla. 1994)("while this Court is given exclusive rulemaking authority over interlocutory appeals to the district courts of appeal, the Constitution does not provide this Court with such authority for appeals from the county court to the circuit court. The authority for appeals to

the circuit court is established solely by general law as enacted by the legislature."). The "bottom line" remains that a district court of appeal may exercise its discretionary review over a State appeal from a non-final county court order which certifies a question of great public importance.[1]

POINT III

THE PROVISIONS OF SECTION 924.07(1) OF THE FLORIDA STATUTES RELIED UPON THE STATE IN THIS CASE ARE NOT UNCONSTITUTIONAL AS TO CERTAIN APPEALS TO DISTRICT COURTS OF APPEAL

Appellee's argument on this point overlooks the strong presumption in favor of the constitutionality of statutes, and merely parrots the Fourth District's faulty analysis to arrive at the conclusion that sections 924.07(1)(h) and (l) of the Florida Statutes "are unconstitutional as to appeals to district courts of appeal." Ratner, 902 So. 2d at 269. Appellee does

[1] Appellee claims that "The state misinterprets Florida Rule of Appellate Procedure 9.030(b)(4)(B), however, as giving it the right to appeal all non-final orders if they are certified to be questions of great public importance. This is not the case. If the state's position were correct, there would be no need to adopt the laundry list of orders which may be appealed by the state in Florida Rule of Appellate Procedure 9.140(c)(1)." (AB. 35). The plain language of the applicable statutes and Rules of Appellate Procedure demonstrate that the State has the ability to appeal non-final county court orders certifying a question of great public importance to a district court of appeal, but no such "right" exists because a district court of appeal has the absolute discretion to accept or reject jurisdiction over such an appeal. In this case, the Fourth District initially exercised its discretion and accepted jurisdiction over the appeal.

not dispute that the trial court's order in this case was appealable from the trial court to the circuit court. Id. ("This order does appear to fall within the category of 'other pre-trial orders,' which the state can appeal to circuit court under *section* 924.07(1)(h)."). However, this case was also appealable to the Fourth District because the trial court certified a question of great public importance. See Fla. R. App. P. 9.030(b)(4)(B)(district courts of appeal have discretionary review over "non-final orders, otherwise appealable to the circuit court under rule 9.140(c), that the county court has certified to be of great public importance."); Fla. R. App. P. 9.140(c)(2)("[t]he state as provided by general law may appeal to the circuit court non-final orders rendered in county court.").

Appellee fails to acknowledge that the general law involving non-final appeals from the county court to the circuit court is specifically incorporated into the Florida Rules of Appellate Procedure via Rule 9.140(c)(2) and Rule 9.030(b)(4)(B). The interplay between Rule 9.030(b)(4)(B) and Rule 9.140(c)(2) essentially provides district courts of appeal jurisdiction over non-final county court orders, otherwise appealable to the circuit court, where the county court has certified a question of great public importance. This Court

essentially "breathed life" into the statutes and rules applicable in this case, so the Fourth District's decision in Ratner should be reversed. See Fla. R. App. P. 9.030(b)(4)(B); Fla. R. App. P. 9.140(c)(2); §§ 924.07(1)(h) & (l), Fla. Stat.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, and in the Initial Brief, the State respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and hold (1) that excited utterances are admissible under Crawford because they are not testimonial in nature, (2) the Fourth District had jurisdiction over the instant case, and (3) that the provisions of section 924.07(1) of the Florida Statutes relied upon by the State in this case are not unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: James Eisenberg, 250 Australian Avenue, South, Suite 704, West Palm Beach, FL on December __, 2005.

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RICHARD VALUNTAS
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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