IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

vs.

BRUCE BELVIN,

Respondent.

CASE NO.: SC06-593

L.T. NO.: 4D04-4235

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S REPLY BRIEF

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ARGUMENT

POINT I

DOES ADMISSION OF THOSE PORTIONS OF THE BREATH TEST AFFIDAVIT PERTAINING TO THE BREATH TEST OPERATOR'S PROCEDURES AND OBSERVATIONS IN ADMINISTERING THE BREATH TEST CONSTITUTE TESTIMONIAL EVIDENCE AND VIOLATE THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE IN LIGHT OF THE UNITED STATES SUPREME COURT'S HOLDING IN CRAWFORD V. WASHINGTON, 541 U.S. 36, 124 S.CT. 1354, 158 L.ED. 2D 177 (2004)?

Breath Test Affidavits Are Not Testimonial

The breath test affidavits provided for in section 316.1934(5) of the Florida Statutes are simply a written record of observations made on a pre-printed form by a breath test operator who administered the test. (R.E. B). The breath test affidavits are obviously produced in the ordinary course of business, by a person with knowledge, at or near the time of the event, so the breath test affidavit is more akin to a "business record" or "public record" than it is to an "affidavit." Id.; § 90.803(6)(a), Fla. Stat. (2003). The State maintains that breath test affidavits are the functional equivalent of "warrants of deportation" or "certificates of nonexistence of record," which are clearly not testimonial under the post-Crawford case law. See United States v. Olmos-Esparza, 149 Fed. Appx. 596 (9th Cir. 2006)(introduction of a "certificate of

nonexistence of record," a document which shows a defendant did not seek permission to re-enter the country, to prove an element of an offense did not violate Crawford); United States v. Salazar-Gonzalez, 2006 U.S. App. LEXIS 20833 (9th Cir. Aug. 15, 2006)("certificate of nonexistence of record" was properly admitted as a nontestimonial public record); United States v. Cantellano, 430 F.3d 1142 (11th Cir. 2005)("warrant of deportation," which records facts about where, when, and how a deportee left the country, was not testimonial and did not violate the defendant's confrontation clause rights). Respondent does not address the State's argument on this point and refuses to acknowledge that certain records from law enforcement agencies have long been admissible as public records. See (AB. 18-19); United States v. Union Nacional de Trabajadores, 576 F.2d 388, 390-391 (1st Cir. 1978)("At common law the sheriff's return of service was admissible under the 'official records' exception to the hearsay rule."); United States v. Agustino-Hernandez, 14 F.3d 42, 43 (11th Cir. 1994)("admission of routinely and mechanically kept I.N.S. records" does not violate the "law enforcement exception" to the "public records" exception to the hearsay rule.). Since breath test affidavits are the functional equivalent of "warrants of deportation," which are not testimonial, this Court should hold

they are admissible as either business or public records. See United States v. Ellis, 2006 U.S. App. LEXIS 21417 (7th Cir. Aug. 22, 2006)(defendant submitted to blood and urine tests when he was stopped and suspected of DUI; admission of results of defendant's blood tests as business records was proper even though test was taken during an investigation to determine whether a crime was committed).

Respondent's reliance upon the First District's decision in Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005) is misplaced because the holding in that case is against the vast majority of precedent from around the nation. See Commonwealth v. Walther, 189 S.W.3d 570 (Ky. 2006)("Every jurisdiction but one that has considered this issue since Crawford has concluded that maintenance and performance test records of breath-analysis instruments are not testimonial, thus their admissibility is not governed by Crawford."): Jarrell v. State, 2006 Ind. App. LEXIS 1680 (Ind. Ct. App. Aug. 24, 2006)(the overwhelming majority of courts have held that certificates attesting to the accuracy of a breath test instrument are not testimonial under Crawford). The State acknowledges the decisions respondent cites involving related issues (AB. 17-19), but would point out that all of

these cases are currently pending before this Court.[1] Accordingly, the State respectfully requests this Court reject the reasoning contained in Sobota, Williams, and Johnson because it is inherently flawed and contrary to the majority of American case law on the issue.

Technician Smith's Breath Test Affidavit In This Case Was Admissible Under Crawford

The breath test affidavit in this case was admissible because Crawford did not render all testimonial hearsay evidence inadmissible at trial; instead, Crawford held that testimonial hearsay is inadmissible unless (1) the declarant is unavailable, and (2) the defendant is given a prior opportunity for cross-examination. Contrary to respondent's assertion, the record in this case demonstrates that Technician Smith was unavailable. (AB. 24). In fact, respondent's counsel repeatedly told the trial court that Technician Smith was "not available to anybody at this point" because she allegedly left the State in order to avoid a misdemeanor battery charge. (R.E. A., p. 26-27). To allow respondent to now attack Technician Smith's "unavailability" would "reduce the criminal justice system to a game of 'check' and 'checkmate' or 'heads I win, tails you

[1] See Sobota v. State, 31 Fla. L. Weekly D2012 (Fla. 2d DCA July 28, 2006), Case No. SC06-1547; Williams v. State, 31 Fla. L. Weekly D2013 (Fla. 2d DCA July 28, 2006); Case No. SC06-1618; Johnson v. State, 929 So. 2d 4 (Fla. 2d DCA 2005), rev. granted, 924 So. 2d 810 (Fla. 2006).

lose.'" Weber v. State, 602 So. 2d 1316, 1318-1319 (Fla. 5th DCA 1992). This is especially true when respondent affirmatively told the trial court that "[Technician Smith] is not available to anybody, the State or the defense." (R.E. A., p. 27). Accordingly, this Court should hold the record in this case demonstrates that Technician Smith was unavailable under the decision in Crawford.

In addition to unavailability, the Supreme Court's decision in Crawford states the Confrontation Clause requires that a defendant be afforded an "opportunity for cross-examination" before a testimonial hearsay statement can be entered into evidence. Crawford, 541 U.S. at 68. The Fourth District's analysis in Belvin v. State, 922 So. 2d 1046 (Fla. 4th DCA 2006) regarding the "opportunity for cross-examination" prong of the Crawford test is flawed because respondent waived his "opportunity for cross-examination" by failing to depose Technician Smith under Florida Rule of Criminal Procedure 3.220(h)(1)(D). Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004); State v. Campbell, 719 N.W.2d 374 (N.D. 2006)(defendants, one of whom was charged with driving while under the influence of alcohol or drugs, waived any potential Confrontation Clause claims regarding "laboratory reports" because the defendants

failed to avail themselves of the opportunity to subpoena the authors of the "laboratory reports").

Respondent, as he admitted to the trial court, could have cross-examined Technician Smith in this case prior to the admission of the breath test affidavit into evidence by seeking to depose her when her whereabouts were known. (R.E. A., p. 29, 35). He chose not to do so, and there is no evidence in this case that respondent ever set Technician Smith for a deposition. Respondent cannot seriously complain about his purported inability to cross-examine Technician Smith when he never attempted to cross-examine her prior to trial. Blanton, 880 So. 2d at 801; Campbell, 719 N.W.2d 374.

Respondent was afforded the "opportunity for cross-examination" in this case because he could have cross-examined Technician Smith by deposing her under Rule 3.220(h)(1)(D). (R.E. A., p. 29, 35). Respondent, however, failed to exercise his "opportunity for cross-examination" of Technician Smith. Thus, the circuit court properly held the breath test affidavit in this case was admissible under Crawford because (1) respondent conceded that Technician Smith was unavailable, and (2) respondent had the opportunity to cross-examine her, which he waived by failing to do so. Blanton, 880 So. 2d at 801 ("as Crawford points out, the primary goal of the Confrontation

Clause is to prevent the use of statements not previously tested through the adversarial process. This goal is ordinarily met when an accused is provided with notice of the charges, a copy of the witness's statement, and a reasonable opportunity to test the veracity of the statement by deposition."); Campbell, 719 N.W.2d 374 ("Because neither Pinks nor Campbell attempted to subpoena the forensic scientist as provided by statute, they have waived their ability to complain of a constitutional violation."). Accordingly, the Fourth District's decision in Belvin should be reversed because the requirements for the admission of testimonial hearsay under Crawford were satisfied in this case.

Respondent's Answer Brief, like the Fourth District's decision in Belvin, ignores the fact that all breath test affidavits are not created at the behest of law enforcement officers. Section 316.1932(1)(d) of the Florida Statutes allows a driver to demand a breath test if an arresting officer does not request one. In fact, when a driver requests a breath test "the arresting officer shall have the test performed." See § 316.1932(1)(d), Fla. Stat. (2003). If a breath test is conducted when a driver exercises his right under section 316.1932(1)(d), how can the subsequent admission of a breath test affidavit violate a driver's Confrontation Clause rights?

The simple answer is that a driver's Confrontation Clause rights cannot be violated under these circumstances, and the Fourth District's decision in Belvin overlooked this situation when it held, without qualification, that the "portions of the breath test affidavit pertaining to the breath test technician's procedures and observations in administering the breath test constitute testimonial evidence." Belvin, 922 So. 2d at 1054. Therefore, the Fourth District's decision in Belvin should be reversed because the results of a breath test requested by a driver cannot logically constitute "testimonial" statements.

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 that breath test affidavits are admissible as public records under Crawford because they are not testimonial in nature.

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: Richard W. Springer and Catherine Mazzullo, Attorneys for Respondent, 300 South Congress Avenue, Suite 1A, Palm Springs, FL 33461 on September 7, 2006.

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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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