IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

Case No. SC09-1971

v.

2d DCA No. 2D08-3251

MICHELLE BOWERS,
Respondent.
_____/

On Appeal from the Second District Court of Appeal

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts for the purpose of this jurisdictional brief.

SUMMARY OF ARGUMENT

The opinion of the Second District Court in the instant case does not expressly conflict with the opinion of the Fourth District Court in Ferrer v. State, 785 So. 2d 709 (Fla. 4th DCA 2001). The Second District Court concluded that both the Fourth District Court and the Twentieth Circuit Court (sitting in its appellate capacity in this case) had mistakenly applied the fellow officer rule to a situation where an officer relied upon what another officer had told him. In essence the Second District Court held that the fellow officer rule had no proper application either in this case or in Ferrer.

Nevertheless this Court may well want to accept jurisdiction and consider this case because (1) Florida trial courts have had difficulty with the admissibility of hearsay evidence at hearings on motions to suppress evidence; (2) Florida trial courts have had difficulty with the application of the fellow officer rule; and (3) this Court has not addressed application of the rule in Crawford v. Washington, 541 U.S. 36 (2004), to hearings on motions to suppress evidence.

ARGUMENT

In its Jurisdictional Brief, the State first asserted that

> the Second District determined that the fellow officer rule does not allow one officer to testify for another at a suppression hearing. The Second District reasoned that the fellow officer rule worked to build probable cause between officers working together but could not be a rule of evidence applied in a suppression hearing.

State's Jurisdictional Brief at 3-4.

The Second District Court did indeed rule that one officer is not allowed to testify for another at a suppression hearing. However the State's analysis of the reasoning by the district court is seriously flawed. The opinion of the Second District Court contained nothing to the effect that "the fellow officer rule worked to build probable cause between officers". Here the district court held:

> 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***.

Bowers v. State, No. 2D08-3251 (Fla. 2d DCA Oct. 16, 2009), slip opinion at 6 (emphasis added). In effect the district court held that the fellow officer rule had no application in this case because the second officer, Tracy, did not rely on anything told to him as a basis to stop anyone. Tracy had no part in the stop. He arrived after the stop was complete; the stop was solely the act of Suskovich. Under the hearsay rule, only Suskovich could testify about his reason for stopping the car driven by the Respondent. Tracy's repetition of what Suskovich told him was inadmissible hearsay.

Therefore the district court held that the circuit court had misapplied the opinion of the Fourth District Court in Ferrer v. State, 785 So. 2d 709 (Fla. 4th DCA 2001). "In Ferrer the Fourth District similarly misapplied the fellow officer rule." Bowers at 6. The district court reviewed the facts in Ferrer and concluded "we grant certiorari relief on the basis that Ferrer misapplied the fellow officer rule and should be rejected." Bowers at 7. In essence the Second District Court concluded that both the Fourth District Court and the Twentieth Circuit Court (sitting in its appellate capacity in this case) had mistakenly applied the fellow officer rule to a situation where no officer relied upon what another officer had told

him. Neither in Ferrer nor in the instant case had the second officer relied upon what he had been told by the first officer to make a stop. In both cases the second officer repeated in testimony what the first officer told him. That testimonial repetition of an out of court statement violated the hearsay rule.

The Second District Court certified conflict with Ferrer on the basis that the Ferrer court misapplied the fellow officer rule. Bowers at 7-8. Therefore this Court may choose not to accept jurisdiction because the opinion in Ferrer does not actually conflict with the opinion of the Second District Court. The district court held that the fellow officer rule was not properly applied to the facts presented either in the instant case or in Ferrer. Therefore no actual conflict exists between the district court opinion here and the Fourth District Court opinion in Ferrer.

Other Grounds to Accept Jurisdiction

Nevertheless this Court may well want to accept jurisdiction and consider this case for three reasons: (1) Florida trial courts have had difficulty with the admissibility of hearsay evidence at hearings on motions to suppress evidence; (2) Florida trial courts have had difficulty with the application of the fellow officer rule; and (3) this Court has not addressed application of the rule in Crawford v. Washington, 541 U.S. 36 (2004), to hearings on motions to suppress evidence. The Respondent will address each in turn.

In its jurisdictional brief, the State argued that "The Fourth District views suppression hearings as probable cause hearings where evidence may be presented. This means a more relaxed form of evidentiary rules apply." State's Jurisdictional Brief at 4.

As the Second District Court understood, no general exception to the hearsay rule appears in Florida statutory or decisional law for hearings on motions to suppress evidence. Bowers at 5. Nevertheless, prosecutors are fond of citing this Court's opinion in Lara v. State, 464 So. 2d 1173 (Fla. 1985), for the proposition that hearsay evidence is admissible in an evidentiary hearing on motion to suppress. However a review of the opinion in Lara demonstrates that such a broad reading of that opinion is not supported by anything therein.

In Lara, this Court reviewed a motion to suppress the result of a search of a residence where the person who allegedly consented to the search did not testify. This Court held that the hearsay evidence establishing consent was properly admitted at the suppression hearing. This Court reasoned that an affidavit for a search warrant may be based on hearsay information. In addition, the Court noted that an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay. Lara at 1177.

The Ferrer court pointed out that in Lara this Court

> did not directly address the question of a defendant's right to cross-examination in a motion to suppress hearing. We note, however, that the court held, inter alia, that hearsay evidence which established that the murder victim's boyfriend consented to the search of the victim's apartment was properly admitted at the suppression hearing even though the boyfriend was unavailable for cross-examination.

785 So. 2d at 712. In effect the Ferrer court read this Court's opinion in Lara to mean that an officer may testify to the basis for a warrantless entry into a residence when that basis was the statement of another person who was not available to testify. See Lara at 1177. However that rule would only allow the officer who decided that probable cause existed to repeat a hearsay statement which was the basis for his probable cause determination, except where such statements might be admissible on some other ground. Nothing in Lara would purport to make all hearsay admissible in hearings on motions to suppress.

In addition, the Lara Court did not base its determination regarding the propriety of the search solely on the issue of admissibility of hearsay. The Court also held that exigent circumstances justified the entry: "without regard to the consensual nature of the entry, we hold that the search... was justified under the exigent circumstances exception to the warrant requirement." Lara at 1177.

In similar fashion other lower courts have struggled with the interaction of the fellow officer rule and the hearsay rule. The instant case is a perfect example. In the instant case the county court allowed hearsay testimony because the county court believed it to be admissible under the fellow officer rule, but granted the Respondent's motion to suppress because it "expressed difficulty in reaching a decision about whether the officer had a reasonable basis to believe that Bowers committed a traffic infraction." Bowers at 3. "The circuit court found that Officer Tracy's testimony regarding Officer Suskovich's statements was admissible under the fellow officer rule and concluded that the county court's decision to grant the motion to suppress was not supported by competent, substantial evidence or the law." Id. The Second District Court reversed because the circuit court "misapplied" the fellow officer rule. Bowers at 6. 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." Bowers at 5. A clear re-statement of the rule addressing the standard for admission of hearsay at hearings on motions to suppress would have been valuable to the lower courts.

Prosecutors are also fond of citing State v. Cortez, 705 So. 2d 676, 679 (Fla. 3rd DCA 1998), review dismissed, 731 So. 2d 1267 (Fla. 1991), to argue for

admission of any and all hearsay evidence at hearings on motions to suppress. Reviewing a very different set of facts in Cortez, the Third District Court considered admissibility of hearsay at "an evidentiary hearing on a motion to suppress evidence. Hearsay is admissible in such a proceeding...." In support the Cortez court cited Lara. Cortez at 679. However the Cortez court was quick to point out that that testimony was admitted "without objection." Id. Therefore the issue was not properly preserved for review and the part of the Cortez opinion apparently expanding the rule in Lara should be considered dictum.

Application of the Rule in Crawford v. Washington

Ferrer was decided in 2001, Lara was decided in 1985, and Cortez was decided in 1998. All predate the seminal United States Supreme Court 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.

Given the marked transformation in the law following the opinion in Crawford, it would be useful to revisit the underpinnings of the opinions in Ferrer, Lara, and Cortez for that reason alone. No Florida district court has addressed the application of the rule in Crawford to a hearing on a motion to suppress evidence. It would be appropriate for this Court to do so. Although neither the circuit court nor the district court addressed the rule in Crawford in its opinion in this case, the issue was preserved in the trial court. Counsel for the Respondent objected to the hearsay statements of Officer Suskovich as repeated by officer Tracy because "I can't cross examine him." Transcript of hearing on motion to suppress on 10 July 2007, page 5, lines 12-13.

CONCLUSION

WHEREFORE the Respondent requests this Honorable Court to decline jurisdiction in this case because the facts in this case present no actual conflict

between the opinion of the Second District Court in this case and the Fourth District Court in Ferrer. However if this Court is inclined to address the broader issues of admissibility of hearsay evidence based on the fellow officer rule and admissibility of hearsay evidence at hearings on motions to suppress, then this Court should accept jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief 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 13th day of November, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

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