IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

ROBERT SPOSATO,

Appellee.
_____/

CASE NO.: CJAP 08-22
County Ct. Case No.: 2007-CT-3869-0

Appeal from County Court,
Orange County, Florida

Honorable Wayne J. Shoemaker,
County Judge

Esther M. Whitehead, Assistant State Attorney
for Appellant

Joerg F. Jaeger, Esquire,
for Appellee

Before Powell, Dawson, and Bronson, J.J.

FINAL ORDER REVERSING LOWER COURT

The State appeals an order granting appellee's pretrial motion to suppress. We have carefully reviewed the record on appeal and the briefs, and read the transcript of the motion hearing proceedings. We dispense with oral argument pursuant to *Florida Rule of Appellate Procedure 3.920.*

Appellant's motion alleges that the reason suppression is sought is based on "the lack of probable cause or founded suspicion to stop" appellant's vehicle. The only facts alleged in support of this conclusion are as follows:

> [T]hat on March 8, 2007, Deputy Anthony Shea of the Orange County Sheriff"s Office allegedly observed the Defendant's vehicle traveling with its left brake lights not working. Deputy Shea then initiated a traffic stop of the Defendant's vehicle. That

> driving your vehicle with its left brake lights not working, without more, does not constitute articulable suspicion of a criminal act nor probable cause to believe that a traffic infraction has occurred.

We read the motion to say that the stop was unlawful because driving a vehicle with its left brake lights not working is not a violation of the state traffic laws. This is not correct; in fact, it is a misstatement of law. *See section 316.234 (2), Florida Statutes,* which requires that a vehicle such as that driven by appellant be equipped with electric turn signals; that the lamps showing to the rear, when signaling, shall emit a red or amber light; and that a violation of this section is a noncriminal traffic violation. Implicit in the statute is that a traffic violation occurs if a required turn signal on a vehicle being driven on a public street or highway is not working. Appellant's motion to suppress was legally insufficient on its face, and the trial judge erred by not reviewing it carefully and denying it without going further.[1]

Although perhaps not necessary, we will address the remaining issues at the motion hearing for the future guidance of the court and counsel in this and future cases. Where an investigatory stop of a vehicle occurs, and the stop and all that follows is without an arrest or search warrant, the burden shifts to the State[2] to establish by a preponderance of the evidence[3] that the officer's actions were lawful. A trial court can take judicial notice of the absence of a warrant in the court file, and this is sufficient to shift the burden to the State.[4] We are doubtful that the officer's arrest report, while admissible,[5] would be sufficient standing alone

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[1] *Florida Rule of Criminal Procedure 3.190(g)(3)* provides in part that, "Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied . . . ." A defendant must plead sufficient facts in his motion to establish there was an illegal search. *State v. Lyons*, 293 So. 2d 391 (Fla. 2d DCA 1974); *State v. Hinton*, 305 So. 2d 804 (Fla. 4th DCA 1975).

[2] *See Beasley v. State*, 939 So. 2d 220 (Fla. 1st DCA 2006).

[3] *See U.S. v. Matlock*, 415 U.S. 164 (1974); *Hinton*, 305 So. 2d at 804.

[4] *See Hinton*, 305 So. 2d at 804.

[5] It is well settled that hearsay evidence is admissible in a motion to suppress hearing, even though the witness is available, has not been questioned by the adverse party prior to the hearing, and the evidence does not fall within the twenty-seven exceptions to the rule. *See Matlock*, 415 U. S. at 164; *U.S. v. Raddatz*, 447 U.S. 667, 669 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial."); *Ferrer v. State*, 785 So. 2d 709 (Fla. 4th DCA 2001), *rev. denied* 817 So. 2d 802 (Fla. 2002).

to carry the State's burden of proof.[6] Lastly, there is the intriguing issue of whether a defendant's constitutional right to confrontation applies in motion to suppress hearings. This issue may be resolved by the Florida Supreme Court since it accepted review on November 30, 2009 to resolve the conflict between *Ferrer* and *Bowers v. State*[7] on another point. Hopefully, a decision will be rendered shortly.

Consequently, the order appealed from will be reversed, without prejudice to appellee to file an amended motion to suppress if so desired.

REVERSED and REMANDED.

DONE and ORDERED at Orlando, Orange County, Florida, this __3___ day of _____January_____, 2011.

_/S/_____
Rom W. Powell, Senior Judge

_/S/_____
Daniel P. Dawson, Circuit Court Judge

__/S_____
Theotis Bronson, Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to the Office of the State Attorney, Appeals Unit, 415 N. Orange Avenue, Orlando, Florida 32801, and Joerg F. Jaeger, Esquire, Attorney for Appellee, 217 E. Ivanhoe Blvd., North, Orlando, Florida 32804, by mail, this _3____ day of ___January_____, 2011.

__/S/_____
Judicial Assistant

[6] The cases cited by the State in support of that proposition were Florida Circuit Court appeal opinions. No higher court has ever so held. There is also the confrontation issue which remains unresolved.

[7] 23 So. 3d 767 (Fla. 2d DCA 2009) (right of confrontation does apply at motion to suppress hearings).