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

APPELLATE CASE NO: 2011-AP-36-A-O
Lower Court Case No: 2011-CT-3700-A-O

STATE OF FLORIDA,

Appellant,
v.

ADAM CHRISTOPHER MARGIO,

Appellee.
_____/

DATE: August 27, 2013

Appeal from the County Court
for Orange County, Florida,
Martha C. Adams, County Court Judge

Lawson Lamar, State Attorney and
David H. Margolis, Assistant State Attorney,
for Appellant

William R. Ponall, Esq.
Michael J. Snure, Esq.
for Appellee

Before POWELL, GRINCEWICZ, and TURNER, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellee was charged with DUI With Injuries. He filed a pretrial motion to suppress claiming the stop, detention, and arrest were unlawful, and requested that all evidence of the stop and what followed thereafter be excluded.

On March 18, 2011, the county court convened an evidentiary hearing on the motion to suppress. The only two officers involved in the case, Goodling and Chaplin, were present in court to testify. Officer Goodling took the stand, and his testimony, in summary, was as follows.

After receiving a dispatch, he and officer Chaplin responded to the scene of a two-car crash. Officer Goodling observed one person standing near a white car which had rear end damage, and another person standing near a red car with front end damage. There were two other persons who did not see the accident happen but were standing nearby. He asked the person standing near the white car if he was in the accident and the person said yes.

At this point in Goodling's testimony, Appellee's counsel objected to the question of what the person told the officer on the basis that it was hearsay and inadmissible. The court heard argument from both counsel, and a lengthy off-the-record conference ensued. After the conference was over, there was some further discussion back on the record between the court, the prosecutor, and Appellee's counsel. The judge then stated

> We're not going to take any action today. I'll let the state and defense get together about a possible resolution and an agreement. If an agreement is not made, I will make a ruling at that time based on the case.

Both counsel said "Thank you, judge." The judge then set the case for status conference on June 30.

On June 30, the prosecutor filed and served a memorandum of law addressing the hearsay issue. The memorandum contained an offer of proof that if the judge had permitted it, Officer Goodling would have testified that the red car driver identified Appellee as the driver of the white car. The case was called that same day. The judge stated she had read the prosecutor's memorandum. Then she announced

> The problem in Mr. Margio's case is, when you have crash cases and the only witness that's there to testify is the law enforcement officer who was using hearsay statements to offer evidence, it is being offered for the truth of the matter asserted because it is about who the driver really is.

> I had no testimony from Officer Chaplin at that point – and it was my understanding that, he could not give any testimony as to who were driving the car. So I think the identification of Mr. Margio as the driver was definitely a hearsay statement, and it goes to the complete basis for the Motion to Suppress. So based on that, I am going to grant the Motion to Suppress at this time.

Some further conversation ensued of what was discussed off the record at the March 18 hearing. The prosecutor said it was her understanding that the State was waiting for the court's ruling on the hearsay objection, then the State would ask to either put the two officers back on the stand and proceed with the hearing, or make an offer of proof of what was in both the (arrest) affidavit[1] and in the State's memo. Nevertheless the motion was granted and this appeal followed.

The rule is fundamental and well settled in Florida that hearsay evidence is admissible in a suppression hearing on the issue of reasonable cause for a stop, detention and probable cause to arrest. *See Erhardt, Erhardt's Florida Evidence,* §§ 90.103, P. 6, FN 7 and § 90.802, P. 832, FN8. *See also Bauer v. State*, 528 So. 2d 6 (Fla. 2d DCA 1988); *State v. Cortez*, 705 So. 2d 679 (Fla. 3d DCA 1998); *Myles v. State*, 54 So. 3d 509 (Fla. 3d DCA 2010); and *State v. Littles*, 68 So. 3d 976 (Fla. 5th DCA 2011), which were not contained in the 2011 edition of Erhardt's book.

The crime of Driving While Under the Influence has two elements: 1) the defendant was in actual physical control of a motor vehicle, and 2) while his normal faculties were impaired by the use of alcohol or drugs. § 316.193, Fla. Stat. (2011). Element 1) could have been established by one of two ways. One would have been if Chaplin himself heard and testified about the

[1] Officer Chaplin's arrest affidavit is contained in the record on appeal. It states in summary that Officer Goodlin handled the crash investigation and finished. Chaplin announced that he was commencing the criminal DUI investigation, gave Appellee his Miranda rights and the implied consent warning. It further states that the driver of the white car and two witnesses who arrived after the crash stated that they saw Appellee get out from behind the wheel of the red car. The affidavit went on to describe Chaplin's observations of Appellee's signs of impairment, poor performance on the field sobriety exercises, after which Chaplin arrested Appellee for DUI.

statements of the two bystanders and/or the white car driver. *See State v. Hemmerly*, 723 So. 2d 324 (5th DCA 1998) (passenger told DUI investigator that defendant was driving the car). The other would be, alternatively, if Chaplin did not hear their statements to Goodling, but Goodling did and told Chaplin what they said, this testimony by Chaplin would be admissible under the "fellow officer" rule. *See State v. Cino*, 931 So. 2d 164 (Fla. 5th DCA 2006). Had he been allowed to testify, element 2) could have been established by Officer Chaplin's own personal observations as to the damage to the vehicles and Appellee's signs of impairment, his *Mirandized* admissions, and poor performance on the field sobriety tests.[2] This proffered testimony would have been admissible and sufficient to establish at the suppression hearing reasonable suspicion for the investigative detention of Appellee and probable cause for his arrest.

Based on the foregoing, we conclude that the trial court erred by holding the bystander white car driver statements inadmissible, by denying the State due process by refusing to permit the State to fully present its case, and by granting the motion to suppress.

REVERSED and REMANDED with directions to conduct a new hearing in accordance with this opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **William R. Ponall, Esq.**, **Michael J. Snure, Esq.,** Snure & Ponall, P.A., 425 West New England Ave., Ste. 200, Winter Park, Florida 32789; and **Dugald McMillan, Assistant State Attorney,** 415 N. Orange Ave., Ste. 200, Orlando, Florida 32802-1673; **Honorable Martha C. Adams**, 425 N. Orange Ave., Orlando, FL 32801, this 28th day of August, 2013.

/S/_____
Judicial Assistant

[2] These are contained in Chaplin's sworn arrest affidavit which is contained in the record on appeal, and a part of the prosecutor's proffer.