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

CASE NO: 2012-AP-44-A-O
Lower Court Case No: 2011-CT-12388-A-O

STATE OF FLORIDA,

Appellant,
v.

JUSTIN PAUL ROBINSON,

Appellee.
_____________________________/

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

Lawson Lamar, State Attorney and
Syed M. Qadri, Assistant State Attorney,
for Appellant

Whitney S. Boan, Esq.,
for Appellee

Before POWELL, DAVIS, and J. KEST, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State of Florida appeals an order granting Appellee Justin Robinson's pretrial motion to suppress which suppressed all evidence resulting from Appellee's detention and arrest for DUI. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

The operative facts are not in dispute and may be summarized as follows. On October 15, 2011, shortly after midnight, Deputies Campbell and Wilson were dispatched to a two-car automobile accident. Deputy Campbell arrived first, then Deputy Wilson several minutes later.

Deputy Wilson observed both vehicles which had damage to them with both Appellee and another man, Mark Hyzen, standing near the vehicles. Hyzen told Deputy Wilson that he had been waiting to turn at a stop light, and was struck from the rear by the other car. When he got out of his vehicle, he saw Appellee sitting alone behind the steering wheel of the other car.

After the crash investigation by Deputy Campbell had concluded, Deputy Wilson made contact with Appellee. He told Appellee that he was now conducting a DUI investigation and read Appellee the *Miranda* and implied consent warnings. He smelled the odor of alcohol emanating from Appellee, and noticed that Appellee's eyes were bloodshot, his balance was "very off", and he walked shuffled and "staggery" [sic]. Appellee agreed to take the field sobriety tests and performed poorly. Then, Officer Wilson arrested Appellee for Driving While Under the Influence.

Hyzen did not testify at the suppression hearing. Appellee's counsel timely objected to what Hyzen told Deputy Wilson on grounds of hearsay and violation of Sixth Amendment confrontation rights. The trial judge reserved ruling on the objections, and after hearing arguments of counsel, she ruled as follows:

> My ruling is this, that based on the fact that the officers determined their probable cause from a witness who was not present to testify, that for all the reasons I've stated before, my – gleaning from the Supreme Court's rationalization out of *Bowers*[1], and the sort of the cro – and as well as the right to cross-examine any witnesses that specifically are being used for that probable cause determination, I am granting that the motion to suppress should be granted as based on the fact that nobody can put the Defendant behind the wheel of the car.

[1] *State v. Bowers*, 87 So. 3d 704 (Fla. 2012).

Hearsay Evidence In Suppression Hearings/Effect of Bowers

There is an undisturbed line of Florida Supreme Court and District Courts of Appeal cases which hold that hearsay evidence is admissible in motion to suppress hearings on the issues of reasonable suspicion and probable cause. One case, *State v. Hemmerly*, 723 So. 2d 324 (Fla. 5th DCA 1998), is closely similar on its facts to the case before us. In that case, two officers responded to a car crash where a Suzuki automobile had been driven into a parked car. A female passenger in the Suzuki told the investigating officer that the defendant Hemmerly had been driving it. Observing Hemmerly's obvious signs of impairment, the officer arrested him for DUI. The District Court noted that section 316.145 of the Florida Statutes authorizes an officer at a traffic accident scene to arrest any involved driver when, based on his personal investigation, he or she has "reasonable grounds to believe" that the driver has committed the misdemeanor crime of DUI. The District Court quashed the circuit appellate court's decision and allowed the county court's denial of the defendant's motion to suppress to stand.

The Florida cases are in accord with cases from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, and the District Court for the Middle District of Florida. *See U.S. v. Raddatz*, 447 U.S. 667 (1980); *U.S. v. Franklin*, 284 F.App'x 701 (11th Cir. 2008) and *Leon v. Sec'y, Dept. of Corr.*, 210 WL 3467128 (M.D. Fla. 2010) (interpreting the Federal Fourth Amendment).

The facts in *Bowers* are distinguishable from the facts in the case at bar. *Bowers* involved a moving vehicle stop where the validity of the stop was in issue. The instant case dealt with a two-car crash in which the issues were the validity of Appellee's detention and arrest. *Bowers* focused on the State's position that the "fellow officer" rule applied to validate the stop, whereas the State did not argue the "fellow officer" rule in the case at bar. The holding in

Bowers was limited to the facts in that case, and there was nothing in the opinion which extended the holding to crash cases where probable cause depended in part on hearsay obtained face-to-face from a civilian witness. Consequently, we hold that the failure to call the civilian witness Hyzen to testify at the suppression hearing did not invalidate Appellee's detention and arrest.

The Confrontation Clause Does Not Apply To Suppression Hearings

The Sixth Amendment of the U.S. Constitution provides in part that "[I]n all criminal prosecutions, the accused shall enjoy the right......to be confronted with witnesses against him....".

In its own cases dealing with the Sixth Amendment, the U.S. Supreme Court has never said that the right of confrontation applies to suppression hearings. It has always emphasized that it is a right at trials. In *U.S. v. Raddatz*, 447 U.S. 667,679 (1980), the Court said "[T]he interests at stake in a suppression hearing are of a lesser magnitude than those in a criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial." *See also Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right.").

One federal circuit appeals court and one federal district court have squarely held that the right of confrontation does not apply in suppression hearings. *See U.S. v. Boyce*, 797 F.2d 691 (8th Cir. 1986); *U.S. v. Pritchett*, 2006 WL 3826980 (N.D. Fla. 2006). Appellee has not cited, nor have we found any federal circuit or district court cases to the contrary.

In *State v. Fortun-Cebada,* 241 P.3d 800 (Wash. Ct. App. 2010) the court said "The over-whelming majority of state courts which have addressed the question of whether *Crawford* [2] applies to a preliminary hearing such as a motion to suppress, have also held that the right of confrontation is not implicated." Several of those cases dealt with vehicle stops in DUI cases.

[2] *Crawford v. Washington*, 541 U.S. 36 (2004).

See e.g. State v. Watkins, 190 P.3d 266 (Kan. Ct. App. 2007) and *Vanmeter v. State*, 165 S.W.3d 68 (Tex. App. 2005).

Appellee takes the contrary view in his answer brief, but the three Florida cases he cites[3] are factually distinguishable and thus are not controlling. Neither the State nor Appellee mention in their briefs the case of *Ferrer v. State*, 785 So. 2d 709 (Fla. 4th DCA 2001), *rev. denied*, 817 So. 2d 846 (Fla. 2002). There the Fourth District Court of Appeal held that a police officer's hearsay testimony at a suppression hearing regarding another officer's basis for stopping the defendant Ferrer did not violate his constitutional right to confront the hearsay declarant, because such right did not apply to the same extent in pretrial hearings as it does at trial. The Florida Supreme Court denied review. *Ferrer* had two issues. We recognize that *Bowers* overruled *Ferrer* on the "Fellow Officer Rule" issue, but the opinion said nothing about the confrontation issue. Thus it would appear that the ruling in *Ferrer* on the confrontation issue is still good law. *See also State v. Champagne,* 14 Fla. Law Weekly Supp. 668a (Fla. 12th Cir. Ct. May 4, 2007) (Sixth Amendment right to confrontation does not apply at suppression hearings.)

Based upon the foregoing, we join the majority of courts, which have considered this issue, and hold that the constitutional confrontation right does not apply to pre-trial evidentiary suppression hearings.

Conclusion

Based on the foregoing, we conclude that neither *Bowers* nor the constitutional confrontation clause required the State to produce the other driver, Hyzen, at the suppression hearing. His statement to Officer Wilson identifying Appellee as the at-fault driver was admissible and the trial court should have considered it. Officer Wilson's independent

[3] *State v. Cino*, 931 So. 2d 164 (Fla. 5th DCA 2006); *Hamilton v. State*, 552 So. 2d 1145 (Fla. 5th DCA 1989); *State v. Sigerson*, 282 So. 2d 649 (Fla. 2d DCA 1973).

observations, Hyzen's statement and Appellee's obvious signs of impairment was competent substantial evidence supporting reasonable suspicion to detain Appellee, and probable cause to arrest him for DUI. The trial court erred in granting Appellee's motion to suppress.

Accordingly, the order appealed from is reversed and this case is remanded for further proceedings.

REVERSED and REMANDED.

DONE AND ORDERED at Orlando, Florida this 12th day of March, 2014.

/S/ ______________________________
ROM W. POWELL
Presiding Senior Judge

DAVIS and J. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to: **Whitney S. Boan, Esq.,** Law Offices of Whitney S. Boan, P.A., 1238 E. Concord Street, Orlando, Florida 32803; **Syed M. Qadri, Assistant State Attorney,** 415 N. Orange Avenue, Ste. 300, Orlando, Florida 32801, this 12th day of March , 2014.

/S/ ______________________________
Judicial Assistant