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

STATE OF FLORIDA,

Appellant,

v.

KIRK P. REID,

Appellee.
_____/

CASE NO.: 2018-AP-000028-A-O

Appeal from the County Court of
Orange County, Florida
Gisela T. Laurent, County Court Judge

Aramis D. Ayala, State Attorney and
Kenneth Sloan Nunnelley, Assistant State Attorney,
for Appellant.

Robert Wesley, Public Defender and
Sarah Jordan, Assistant Public Defender
for Appellee.

Before WHITEHEAD, WILSON, and CARSTEN, J.J.

PER CURIAM.

Appellant, the State of Florida, timely appeals an order granting Appellee Kirk Reid's pretrial motion to suppress, which suppressed evidence unlawfully obtained by law enforcement resulting from Appellee's detention and arrest.[1] We reverse.

[1] This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes and Florida Rule of Appellate Procedure 9.030 (c)(1)(B). We dispense with oral argument pursuant to Fla. R. of App. P. 9.320.

Facts

The facts presented at the hearing on the motion to suppress[2] were as follows:

On September 13, 2017, Officer Brian Harris of the Ocoee Police Department responded to a two vehicle crash. When he arrived on scene, he saw both vehicles still there and met with two individuals standing by the vehicles. One of the individuals was the Appellee, and the other was the owner of the parked car that was struck. Officer Harris did not recall whether he saw the Appellee inside the vehicle. He recalled seeing the Appellee outside of the vehicle.

The owner of the parked car that was struck told Officer Harris what happened. When Appellant sought testimony from Officer Harris as to what the owner of the car that was hit told him, Appellee objected as to hearsay. Appellant stated that Officer Harris would be testifying as to the effect on the listener, explaining why he had reasonable suspicion and why he took certain actions, not presenting testimony for the truth of the matter asserted.[3] Appellee argued that law enforcement lacked reasonable suspicion that Appellee was operating or in actual physical control of a motor vehicle. Appellee stated on the record, "for purposes of the motion to suppress, you can rely on hearsay," but argued that if the only basis Appellant presented to support reasonable suspicion was hearsay, Appellee would be unable to cross-examine the witness, citing *Crawford v. Washington*, 541 U.S. 36 (2004)[4]. During this discussion, the Court

---

[2] The notice of hearing indicates the hearing was set to address all motions unrelated to Intoxilyzer 8000 litigation. Out of the various motions to suppress Appellee filed on January 12, 2018, six of them were unrelated to the Intoxilyzer 8000. Appellant and Appellee stipulated to two motions: Motion in Limine to Prohibit the State from Introducing Evidence of Defendant's Performance on Field Sobriety Exercises, and Motion to Suppress Statements Protected by the Accident Report Privilege. The record is ambiguous as to which motion the trial court proceeded to hear on September 14, 2018. The trial court also does not make clear which motion to suppress was granted, and if in part or whole. The court states, "the motion to suppress calls for the suppression of evidence unlawfully obtained by the law enforcement officer pursuant to the unlawful detention and seizure . . . I'm going to grant the motion to suppress."

[3] Appellant states in its brief this served as its proffer.

[4] *Crawford* held testimonial statements of a witness who did not appear at trial are not admissible unless he was available to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. at 54.

stated Officer Harris established he never saw Appellee inside the vehicle, when he had not yet testified to that fact. Appellant, under the belief that hearsay evidence would be admissible, had no other witnesses present for the hearing except Officer Harris. The trial court did not allow Appellant additional time to contact another witness for the hearing, to find case law to support the contention that hearsay would be admissible, or to contact a supervisor, as Appellant was represented by a Certified Legal Intern. Appellee then interjected, before the Court announced its ruling, stating that if the Appellant disagreed with the Court granting a motion to suppress, Appellant can appeal, but made no mention of an obligation to proffer. The Court then granted the motion to suppress.

The trial court found that Officer Harris did not have reasonable suspicion that Appellee was driving or in actual physical control of a motor vehicle while under the influence. The trial court stated, "he did not see [Appellee] driving and does not recall if he saw [Appellee] inside or outside of the vehicle." There were no other witnesses at the hearing to support an allegation that Appellee was in actual physical control of the vehicle to support an arrest for DUI. Based on the lack of witnesses, the trial court granted the motion to suppress.

Appellant states in its initial brief that Appellee admitted to drinking and driving the vehicle, which Appellee disputes. Appellee also contends that Appellant did not proffer as to what the missing witness said to Officer Harris or to what the witness would testify. Appellant claims it proffered to the extent allowed by the court that the officer would testify about what actions he took and why he had reasonable suspicion and probable cause to arrest Appellee.

Arguments on Appeal

On appeal, Appellant contends that simply based on Appellee's physical appearance, and eyewitness information that Appellee was the driver of the vehicle, Officer Harris had reasonable

suspicion to detain him for a DUI investigation.[5] Appellant argues the accident report privilege only applies to the Appellee, not other witnesses. Furthermore, Appellant claims the trial court erred in sustaining Appellee's hearsay objection and Appellant's proffer was sufficient to preserve the issue. Appellant maintains hearsay evidence is admissible in suppression hearings,[6] and the hearsay testimony should have been admitted, which would have sufficiently supported reasonable suspicion that a DUI had been committed. Therefore, according to Appellant, the order granting the motion to suppress should be reversed.

Appellee responds that the trial court did not err in granting the motion to suppress. Appellee argues Appellant's reliance on *State v. Cino*, 931 So. 2d 164 (Fla. 5th DCA 2006) is misplaced, because unlike the case at bar, the defendant in *Cino* was injured in the crash. Appellee also contends Appellant's reliance on *State v. Littles*, 68 So. 3d 976 (Fla. 5th DCA 2011) is misplaced because in *Littles*, the statements of the witnesses were corroborated by law enforcement's observations. Appellee argues that Appellant's proffer was not sufficient to preserve the issue for appeal. In the alternative, Appellee maintains that any error made by the trial court is harmless error.

For the reasons articulated below, we agree with Appellant and reverse the county court's order granting the motion to suppress.

Standard of Review

Our review of the trial court's ruling on the motion to suppress evidence involves a mixed question of law and fact. There is a presumption of correctness where the trial court's factual findings are supported by competent, substantial evidence. *Maurer v. State*, 668 So. 2d

---

[5] Appellant relies on *State v. Cino*, 931 So. 2d 164, 168-69 (Fla. 5th DCA 2006), which stated, "[t]he observation of Cino's physical appearance alone would have justified detaining Cino for a DUI investigation."

[6] In support, Appellant cites *J.D. v. State*, 920 So. 2d 117, 118 (Fla. 4th DCA 2006) and *State v. Littles*, 68 So. 3d 976, 978 (Fla. 5th DCA 2011).

1077, 1078-79 (Fla. 5th DCA 1996). However, the trial court's application of the law to the facts is reviewed *de novo*. *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001); *State v. Quinn*, 41 So. 3d 1011, 1013 (Fla. 5th DCA 2010).

Analysis

The United States Supreme Court, the Florida Supreme Court, and Florida District Courts of Appeal have long held that hearsay evidence is admissible in motion to suppress hearings on the issues of reasonable suspicion and probable cause. *United States v. Raddatz,* 447 U.S. 667, 679 (1980); *United States v. Matlock,* 415 U.S. 164, 172-74, (1974); *Lara v. State,* 464 So. 2d 1173, 1177 (Fla. 1985); *J.D. v. State*, 920 So. 2d 117, 118 (Fla. 4th DCA 2006); *State v. Littles*, 68 So. 3d 976, 978 (Fla. 5th DCA 2011).

The cases Appellee cites are distinguishable from the case at bar. First, Appellee's interpretation of *Cino* is incorrect. *Cino* did not state that law enforcement had reasonable suspicion *because of* the defendant's injury. While the law enforcement officer believed Cino was one of the drivers because of his injury, he also relied on another driver placing Cino behind the wheel of one of the vehicles. The District Court of Appeal quashed the decision of the Circuit Court, which held that the State could not rely upon another driver's statements that placed Cino behind the wheel. *Cino*, 931 So. 2d at 167, 169. The District Court of Appeal held that "the fact Cino was in one of the vehicles, coupled with obvious signs of intoxication, would have given law enforcement reasonable suspicion," (*Id.* at 169 n.6.) and the observation of Cino's physical appearance *alone* gave law enforcement reasonable suspicion to detain him for a DUI investigation. *Id.* at 169 (emphasis added). As in *Cino*, it is improper not to allow the statement of a witness to the crash.

Appellee's interpretation of *Littles* is also incorrect. The trial court suppressed evidence after finding law enforcement lacked probable cause. While Appellee is correct that the District Court of Appeal referenced the fellow officer rule, it was not the basis for the ruling. "The fellow officer rule allows an arresting officer to assume probable cause to arrest a suspect from information supplied by other officers." *Voorhees v. State*, 699 So. 2d 602, 609 (Fla. 1997). The District Court of Appeal reversed the trial court's order, holding that law enforcement did have probable cause and finding the trial court failed to consider the totality of circumstances known to the officers, including that they corroborated the witnesses' statements with their own observations. The fact that an arresting officer can assume probable cause to arrest based on information he received from another officer does not negate the well-established line of cases that have held hearsay evidence is admissible in suppression hearings.[7] The Court also stated,

> [W]e note that both below and on appeal, Littles mistakenly focuses on the hearsay nature of some of the information testified to during the suppression hearing. For example, every time that an officer would testify to information relayed to him by another officer during the surveillance, Littles would interpose a hearsay objection. And, on appeal, Littles argues that these facts should not be considered as part of the probable cause determination because the testimony should not have been admitted at the suppression hearing over his objections. The trial court correctly ruled that these statements were not hearsay because they were not being offered for the truth of the matter asserted. . . . Instead, these statements were offered to show what information the arresting officer had when making his probable cause determination. . . . We also note that "hearsay evidence is admissible in suppression hearings." (citation omitted.)
>
> *Id.* at 978.

Appellee argues Appellant failed to proffer to what the witness would testify, relying on *Whitley v. State*, 349 So. 2d 840 (Fla. 2d DCA 1977). The issue in *Whitley* was whether law enforcement had reasonable suspicion based on the officer's observation of Whitley entering a car that was used in a drug transaction two weeks earlier. *Id.* at 841. The officers did not see a

[7] The Court in *Littles* cited *J.D. v. State*, 920 So. 2d 117, 118 (Fla. 4th DCA 2006) (citing *Lara v. State*, 464 So. 2d 1173, 1177 (Fla. 1985); *State v. Cortez*, 705 So. 2d 676, 679 (Fla. 3d DCA 1998)).

traffic violation being committed; they were not making a license check; they did not have a warrant or consent to stop and search the vehicle; and Whitley was not connected with the previous drug transaction that took place in the car. *Id.* The Court in *Whitley* noted that the State did not proffer what the police officer would have testified to regarding statements he received from confidential informants. *Id.* However, the Court also stated,

> At the hearing, objections to several questions propounded to Hitchcox concerning what certain confidential informants had told him were sustained on the basis of hearsay. Since this was a hearing on a motion to suppress and the issue was whether the police had a well-founded suspicion of criminal activity, the questions were proper and Hitchcox should have been permitted to answer.
>
> *Id.*

The District Court of Appeal reversed the denial of the motion to suppress, holding that the officers did not have reasonable suspicion based on occupancy of the vehicle known to have been used in commission of a crime. *Id.* The Court's basis for reversal was not because the State failed to proffer the substance of the officer's proposed testimony.

Last, Appellee contends the trial court has discretion to disallow hearsay statements, and cites *State v. Rand*, 209 So. 3d 660 (Fla. 1st DCA 2017) in support, which found it could not fault the trial court for discounting hearsay testimony of the school's principal. In *Rand*, the District Court of Appeal's reasoning in affirming the trial court's order granting the motion to suppress was not because hearsay statements were excluded. *Id.* at 666-67. Rather, the Court affirmed the order because the law enforcement officer did not have probable cause to arrest Rand. *Id.* Rand was using a middle school's track at night, which was open to the public and had signs inviting the public to access the track. *Id.* at 662. The officer arrested Rand for trespassing, and found a handgun in Rand's pocket during the post-arrest search. *Id.* Rand was then charged for crimes related to carrying the firearm. *Id.* The officer did not know the track was open to the

public and disregarded the signs. *Id.* The Court held the officer's mistake was not reasonable under the circumstances. *Id.* The trial court *discounted* a statement allegedly made by the school principal to the officer that "she wants nobody on campus after hours and nobody should be on campus after hours." *Id.* at 666 (emphasis added). The trial court did not find this statement credible, considering the officer also testified that he did not enforce a "nobody-on-campus" policy, and he had training instructing him to allow individuals to be on campus if they had a legitimate purpose. *Id.* The District Court of Appeal did not find the statement by the principal was rightly excluded. In fact, in the dissenting opinion, Justice Kelsey explained the principal's statement was allowed over objection by defense counsel, for the purpose of demonstrating its effect on the officer. *Id.* at 671 (Kelsey, J., dissenting). *Rand* does not support Appellee's contention that the trial court has discretion to disallow statements.

Regarding the argument raised by Appellee in the suppression hearing that he would be unable to cross-examine the witness, the U.S. Supreme Court has never found that the right of confrontation applies to suppression hearings. It has always held that it is a right at trials. *See U.S. v. Boyce*, 797 F.2d 691, 693 (8th Cir. 1986); *U.S. v. Pritchett*, No. 303CR114/RV, 2006 WL 3826980, at *4 (N.D. Fla. Dec. 27, 2006); *State v. Champagne*, 14 Fla. L. Weekly Supp. 668a (Fla. 12th Cir. Ct. May 4, 2007). The Court held in *U.S. v. Raddatz*, 447 U.S. 667, 679 (1980), "[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." The constitutional confrontation clause would not have required Appellant to produce another witness at the suppression hearing.

Finally, the harmless error test involves a question of whether there is a reasonable possibility that the error complained of contributed to the verdict or conviction. *State v. DiGuilio*,

491 So. 2d 1129, 1135 (Fla. 1986) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). *See also Cooper v. State*, 43 So. 3d 42 (Fla. 2010). It is premature for this Court to undergo a harmless error analysis, as this case is ongoing and there has not been a final disposition yet. The Court will not address the harmless error issue at this time.

Accordingly, we hold that the failure to call the eyewitness to testify at the suppression hearing did not invalidate Appellee's detention and arrest. Statements from an eyewitness to Officer Harris identifying Appellee as the driver are admissible and the trial court should have considered them in order to determine if Officer Harris had reasonable suspicion to detain Appellee and probable cause to arrest him for DUI. The trial court erred in granting Appellee's motion to suppress.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the "Order on Defendant's Motion to Suppress," dated September 24, 2018, is **REVERSED and REMANDED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 26 day of August, 2019.

/S/
REGINALD K. WHITEHEAD
Presiding Circuit Judge

WILSON and CARSTEN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26 day of August, 2019, a true and correct copy of the foregoing Order has been furnished to **Gisela T. Laurent**, *County Court Judge*, at 425 N. Orange Ave., Orlando, FL 32801; **Kenneth Sloan Nunnelley**, Assistant State Atttorney, *Counsel for Appellant*, at Post Office Box 1673, Orlando, Florida 32802; and **Sarah Jordan**, Assistant Public Defender, *Counsel for Appellee*, at 2 Courthouse Square, Suite 1600, Kissimmee, Florida 34741.

/S/ Pat Beckton
Pat Beckton, Judicial Assistant