DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2005

BRUCE BELVIN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D04-4235

[June 8, 2005]

TAYLOR, J.

Petitioner Bruce Belvin seeks certiorari review of a final decision of the Palm Beach Circuit Court, rendered in its appellate capacity, affirming his conviction and sentence for driving under the influence of alcohol. Because we agree with petitioner that admission of the breath test affidavit at his criminal trial violated his constitutional right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), we grant the writ and remand this cause for a new trial.

Bruce Belvin was arrested for driving under the influence (DUI) and transported to a breath testing facility. There, he submitted to a breath test. His breath test results measured 0.165, 0.144, and 0.150. At Belvin's non-jury trial, the arresting officer testified that he made the traffic stop and requested the breath samples. He also signed a breath test affidavit, along with Breath Test Technician Rebecca Smith. Technician Smith administered the breath test and prepared the breath test affidavit, but she did not testify at trial. Belvin objected to introduction of the breath test affidavit, arguing that admission of the affidavit violated his constitutional right of confrontation under *Crawford*. The trial court overruled petitioner's objection and received the breath test affidavit into evidence. The court found Belvin guilty of DUI.

Petitioner appealed his conviction and sentence to the circuit court. The circuit court initially reversed the county court conviction, but

affirmed it on rehearing, holding that breath test affidavits are not testimonial in nature, and therefore, the Confrontation Clause does not apply. The circuit court's ruling prompted this petition for writ of certiorari.

In *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995), the supreme court discussed the standard of review that applies when a district court reviews an appellate decision of a circuit court. The court explained that the proper inquiry is whether the circuit court afforded the petitioner procedural due process and applied the correct law. Failure to apply the correct law, which is synonymous with a departure from the essential requirements of the law, is something more than a simple legal error. *Id.* at 528. To warrant a writ of certiorari, the error must be "serious enough to constitute a departure from the essential requirements of the law." *Id.* There must be a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id.* (citing *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983)).

The state argues that the petitioner has not made an adequate preliminary showing that the circuit court's decision violated "a clearly established principle of law." In so arguing, the state asserts that the county court properly admitted the affidavit pursuant to sections 316.1934(5) and 90.803(8), Florida Statutes, and based on controlling precedent from our district. *See Gehrmann v. State*, 650 So. 2d 1021 (Fla. 4th DCA 1995) (denying certiorari review of a circuit court appellate decision holding that section 316.1934(5) does not violate the confrontation clause); *State v. Irizarry*, 698 So. 2d 912 (Fla. 4th DCA 1997) (holding that a breath test affidavit that complies with section 316.1934(5) is admissible into evidence without proof of maintenance of equipment).

Section 316.1934(5), Florida Statutes, provides:

> An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by § 316.1932 or 316.1933, is admissible in evidence under the exception to the hearsay rule in § 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:
>
> (a) The type of test administered and the procedures followed;

(b) The time of the collection of the blood or breath sample analyzed;

(c) The numerical results of the test indicating the alcohol content of the blood or breath;

(d) The type and status of any permit issued by the Department of Law Enforcement that was held by the person who performed the test; and

(e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.

The Department of Law Enforcement shall provide a form for the affidavit. Admissibility of the affidavit does not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding.

Section 90.803(8) provides as an exception to hearsay:

(8) Public records and reports.—Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. *The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934* or s. 327.354 (emphasis added).

As mentioned above, the state argues that certiorari review should not be granted because the above statutes and case law demonstrate that the circuit court's decision did not violate "a clearly established principle of law." True, ample precedent existed for the court's decision to admit the breath test affidavit. But for purposes of certiorari review, "clearly established law" can derive from recent controlling constitutional law. *See Allstate Insurance Company v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003) (noting that "'clearly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law.").

In arguing that admission of the breath test affidavit constitutes a violation of clearly established law, petitioner relies on the Supreme Court's recent ruling in *Crawford v. Washington*. There, the Court held that an out-of-court statement that is "testimonial" in nature is inadmissible in criminal prosecutions, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statement is deemed reliable by the court.

In deciding *Crawford*, the Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which had dispensed with the need for face-to-face confrontation if the hearsay evidence bore "particularized guarantees of trustworthiness" or fell under a "firmly rooted hearsay exception." *Crawford*, 124 S.Ct. at 1369 (citing *Roberts*, 448 U.S. at 66). The Court determined that the test set forth in *Roberts* failed to satisfy the historical concerns of the Confrontation Clause, stating:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 1370.

Although the *Crawford* Court declined to provide a complete definition of "testimonial" evidence, petitioner argues that its partial definition encompasses the breath test affidavit. The Court explained that the Confrontation Clause:

> [A]pplies to "witnesses" against the accused--in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The

> constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent--that is, material such as *affidavits*, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements ... contained in formalized testimonial materials, such as *affidavits*, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Id. at 1364 (citations omitted) (emphasis added).

Here, it is undisputed that the sole purpose of the breath test affidavit generated by law enforcement is for use at a DUI trial. A breath test affidavit thus appears to fall squarely within *Crawford's* "core class of 'testimonial' statements."

The state makes a two-fold argument that breath test affidavits are admissible under *Crawford* because: (1) the affidavits are not testimonial in nature, and (2) they qualify as "public records" excluded from *Crawford's* definition of testimony. Though the state acknowledges that *Crawford* lists affidavits as items which could be considered testimonial in nature, it contends that breath test affidavits are different than the affidavits contemplated in *Crawford* because they "simply involve a technician's observations regarding the administration of a breath test, not the examination of a declarant and the give-and-take of questions and answers." In our view, this is a distinction without a difference. The observations of a breath test technician are based on that individual's personal recording of what he or she observed while testing the subject, and the affidavit form itself supplies the questions and answers involved. The affidavit contains the technician's statement of when the observation period began, what procedures were employed in the test, when the last agency inspection of the testing instrument was completed, and whether the instrument passed inspection. Thus, the affidavit meets the definition of formalized "pretrial statements that declarants would reasonably expect to be used prosecutorially."

The state further argues that *Crawford* would allow admission of breath test affidavits because it suggests that business records and some other official records are not testimonial in nature. *See Crawford*, 124 S.Ct. at 1367 n.6 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records ..."), and at 1378 (Rhenquist, C.J., noting in his concurrence that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official record."). The state maintains that, because sections 316.1934(5) and 90.803(8) expressly state that breath test affidavits are public records and reports, they are not testimonial. But the statutory listing of breath test affidavits under the public records and reports exception to the hearsay rule does not control whether they are testimonial under *Crawford*. As mentioned above, these affidavits are prepared for use at a criminal prosecution. They are pretrial statements expected to be admitted into evidence at trial. As such, they fit under *Crawford's* definition of testimonial evidence and are subject to the requirements articulated in *Crawford*.[1]

Recently, the First District Court of Appeal cited *Crawford* in holding that the trial court erred in admitting a breath test affidavit into evidence at a felony DUI trial. *See Shiver v. State*, 30 Fla. L. Weekly D653 (Fla. 1st DCA March 8, 2005). There, the state trooper who administered the breath test and prepared the breath test affidavit testified at trial. *Id.* at D654. The breath test affidavit, however, contained hearsay statements regarding the timely and proper maintenance of the breath test instrument. *Id.* The trooper did not personally perform the required maintenance; he was not qualified to testify as to whether the instrument met the statutory requirements. *Id.* Over the defendant's objection, the trial court admitted the breath test affidavit pursuant to section 316.1934(5). *Id.*

On appeal, the first district determined that the portion of the affidavit pertaining to the breath testing machine's maintenance was testimonial. The court noted that the affidavit "contained statements one would reasonably expect to be used prosecutorially, and was made under circumstances which would lead an objective witness to reasonably

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[1] Professor John F. Yetter of Florida State University College of Law writes "[a]ffidavits and other documents prepared by and setting forth the assertions of state agents with the contemplation of later use in evidence would . . . seem to fall squarely within the concept of 'testimonial statements.'" *Wrestling With Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 Fla. B.J. 26, 32 (October 2004).

believe the statements would be available for trial." *Id*. Therefore, the court concluded, *Crawford* precluded its admission, "because appellant was unable to challenge the accuracy of the instrument by the constitutionally mandated method of cross-examination of the person who performed the maintenance." *Id*. Emphasizing the critical nature of evidence regarding the machine's maintenance, the court held that introduction of the affidavit violated the defendant's right to confront and cross-examine witnesses. *Id*.

Recent decisions from other jurisdictions have also found violations of *Crawford* where blood and other lab test reports were admitted without the opportunity for cross-examination. *See*, e.g., *People v. Rogers*, 8 A.D.3d 888, 891, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (holding that a report giving the results of testing on the victim's blood was improperly admitted as a business record, because, since the test was initiated by the prosecution and generated by the desire to discover evidence against the defendant, the results were actually testimonial in nature); *City of Las Vegas v. Walsh*, 91 P.3d 591, 594-95 (Nev. 2004) (construing *Crawford* and holding that the affidavit of a health care professional who withdraws blood from another for analysis by an expert is prepared solely for the prosecution's use at trial and thus is testimonial). *See also Napier v. State*, 820 N.E.2d 144 (Ind. Ct. App. 2005) (holding, *inter alia*, that the state's failure to present any "live" testimony at trial from the law enforcement officer who conducted chemical breath tests on defendant violated the Confrontation Clause, in light of *Crawford v. Washington*, where the state offered an "evidence ticket" into evidence displaying test results, absent any witness to present this exhibit, and, thus, defendant was not only precluded form conducting any cross-examination with respect to breath test operator's qualifications, but he was not afforded opportunity to question or attack test results). *Cf. State v. Cook*, 2005 WL 736671 (Ohio App. Mar. 31, 2005) (holding that an affidavit of the custodian of the records attesting to the records' authenticity and the fact that they are made and kept in the ordinary course of business was properly admitted and did not violate Confrontation Clause under *Crawford*).

The state argues that even if the breath test affidavit is deemed testimonial in nature, the petition should be denied because the petitioner could have cross-examined the technician prior to trial by seeking to depose her under Rule 3.220(h)(1)(D). This discovery rule permits defendants to take depositions in cases involving misdemeanors or criminal traffic offenses when good cause is shown to the trial court. According to the state, the circuit court properly held that the breath test

affidavit in this case was admissible under *Crawford* because: (1) the technician was unavailable, and (2) petitioner waived his opportunity to cross-examine her by failing to depose her. To support its position, the state cites *Blanton v. State*, 880 So. 2d 798, 801 (Fla. 5th DCA 2004). In *Blanton*, the fifth district held that *Crawford's* goal of preventing the use of statements not previously tested through the adversary process is ordinarily met by means of a discovery deposition.

However, in *Lopez v. State*, 888 So. 2d 693, 701 (Fla. 1st DCA 2004), the first district rejected this position, concluding that a discovery deposition does not qualify as a prior opportunity for cross-examination. The court disagreed with *Blanton* for several reasons. First, the court distinguished between a discovery deposition and a deposition to perpetuate testimony under rule 3.190(j), explaining that the former is a discovery tool not intended for cross-examination. Second, the court explained that the defendant is not entitled to be present at a discovery deposition, as he or she would be during cross-examination of a witness at trial. The court stated:

> Only in the broadest possible sense could it be said that a discovery deposition offers an "opportunity" for cross-examination. We think that it plainly does not offer the kind of opportunity the Court was referring to in *Crawford*. If we were to conclude that the taking of a discovery deposition satisfies the right of confrontation, we would also have to conclude that the right is satisfied even if the defendant neglects or declines to depose the witness. And it would be a very short step from there to extend the rule to defendants who have not even elected to participate in discovery. After all, the defendant has an opportunity to participate in discovery and an opportunity to depose witnesses listed by the state. We could even say that the Florida discovery rule effectively eliminates the constitutional requirements announced in *Crawford*, so long as the state can show that the declarant was available for deposition at some time before the trial. As these possibilities illustrate, the taking of a discovery deposition cannot be treated as a proceeding that affords an opportunity for cross-examination.

Id.

We agree with *Lopez* and conclude that a discovery deposition of the breath test technician would not have sufficed as a substitute for the "prior opportunity for cross-examination" required by *Crawford*.

In sum, the breath test affidavit in this case constituted testimonial evidence and its admission at petitioner's criminal DUI trial violated petitioner's right of confrontation, under *Crawford*, as there was no showing of unavailability and a prior opportunity for cross-examination of the technician/affiant. Because petitioner was prevented from confronting the only evidence of his blood alcohol level presented at trial, admission of the breath test affidavit was serious enough to constitute a violation of a clearly established principle of law resulting in a miscarriage of justice. Accordingly, we grant the writ of certiorari, quash the circuit court's decision below, and remand this case for further proceedings consistent with this opinion.

WARNER and HAZOURI, JJ., CONCUR.

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Petition for writ of certiorari to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack H Cook, Richard I. Wennet and Richard L. Oftedal, Judges; L.T. Case No. 02-11 ACAO2.

Richard W. Springer and Catherine Mazzullo of Richard W. Springer, P.A. for petitioner.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Richard Valuntas, Assistant Attorney General, West Palm Beach, for respondent.

Not final until disposition of timely filed motion for rehearing.