DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

STATE OF FLORIDA,
Appellant,

v.

BRANDON ABBEY,
Appellee.

No. 4D09-88

[November 18, 2009]

TAYLOR, J.

In this prosecution for vehicular homicide, the state appeals the trial court's order granting the defendant's motion to suppress evidence seized after execution of a search warrant. The trial court found that the affidavit and application for a search warrant for the "black box" from the defendant's vehicle lacked sufficient facts to establish probable cause for issuance of the warrant. We disagree and reverse.

On September 25, 2006, around 12:48 p.m., the defendant was driving his Corvette northbound on Military Trail in the right lane, when Joseph Hatton, driving a Toyota Camry southbound in the left lane of Military Trail, attempted to make a left turn onto N.W. 5th Street in Deerfield Beach. The cars collided, and Hatton died as a result of his injuries from the crash.

Detective John Grimes of the Broward County Sheriff's Office investigated the accident and filed a General Affidavit and Application for Search Warrant for the sensing and diagnostic module ("SDM") (also known as a "black box") from the defendant's vehicle. The officer alleged in his affidavit that his investigation revealed that the defendant was traveling well in excess of the 40 m.p.h. posted speed limit. He stated that the "[p]ost impact distance traveled by both vehicles was greater than one hundred twenty five feet. There were no pre-impact tire marks, suggesting that no braking took place before impact. Post impact tire marks along with physical evidence on scene suggest that [the defendant's] vehicle was traveling in excess of 70 [m.p.h.]." The affidavit further reported that an eyewitness "stated that she heard the tires on the vehicle that [the defendant] was driving 'chirp' as the vehicle was changing into a faster gear."

The officer explained in the affidavit that the "black box" located in the defendant's vehicle "may contain electronically stored data including, but not limited to, data pertaining to the pre impact speed of the vehicle, airbag system deployment time and status, engine RPM's, brake circuit status, seat belt circuit status, Delta 'V' readings, and ignition cycles." A reviewing magistrate issued the search warrant. Subsequently, information downloaded from the "black box" revealed that the defendant's speed was 103 m.p.h. five seconds before impact and 98 m.p.h. one second before impact.

The defendant filed a motion to suppress physical evidence from his vehicle, including information downloaded from the black box. After a hearing on the motion, the trial court granted the defendant's motion to suppress the evidence. The court concluded "[t]hat the general affidavit and application for search warrant did not contain specific and sufficient facts to establish probable cause that a crime had been committed and that the evidence of that crime would be found in the defendant's vehicle. Speed alone was insufficient."

A search warrant for property may be issued "[w]hen any property constitutes evidence relevant to proving that a felony has been committed." § 933.02(3), Fla. Stat. (2006).

We review an appeal of an order granting a motion to suppress under the following standard of review:

> Typically, "[t]he standard of review applicable to a motion to suppress evidence requires that this Court defer to the trial court's factual findings but review legal conclusions de novo." *Backus v. State,* 864 So. 2d 1158, 1159 (Fla. 4th DCA 2003) (citing *Batson v. State,* 847 So. 2d 1149, 1150 (Fla. 4th DCA 2003)). However, where the issuance of a search warrant based on a probable cause affidavit is at issue, the standard of review is not de novo, but rather a standard of "great deference." *See United States v. Soderstrand,* 412 F.3d 1146, 1152 (10th Cir. 2005). This standard of "great deference" is defined as follows:
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> > "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of reviewing courts is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed."

> *DeLaPaz v. State,* 453 So. 2d 445, 446 (Fla. 4th DCA 1984) (quoting *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); *see also Schmitt v. State,* 590 So. 2d 404, 409 (Fla.1991) (same). When so reviewing the issuance of a warrant based on a probable cause affidavit, a court is confined to a consideration of the four corners of the probable cause affidavit. *See Schmitt,* 590 So. 2d at 409; *Brachlow v. State,* 907 So. 2d 626, 628 (Fla. 4th DCA 2005). In sum, "[a]lthough the reviewing court 'should afford a magistrate's probable cause decision great deference,' it should 'not defer if there is no "substantial basis for concluding that probable cause existed."'" *United States v. Beck,* 139 Fed.Appx. 950, 954 (10th Cir.2005).

State v. Rabb, 920 So. 2d 1175, 1180–81 (Fla. 4th DCA 2006) (alterations in original).

The Florida Supreme Court "defined 'probable cause' as a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged. The reasons cited by the police must be sufficient to create a reasonable belief that a crime has been committed. As long as the neutral magistrate has a substantial basis for concluding that a search would uncover evidence of wrongdoing, the requirement of probable cause is satisfied." *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991) (internal citations omitted). Further, the "existence of probable cause is not susceptible to formulaic determination. Rather, it is the 'probability, not a prima facie showing, of criminal activity [that] is the standard of probable cause.'" *Doorbal v. State*, 837 So. 2d 940, 952–53 (Fla. 2003) (citing *Illinois v. Gates*, 462 U.S. 213, 230–39 (1983)) (alterations in original). The issuing magistrate's duty "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that . . . evidence of a crime will be found in a particular place." *Rabb*, 920 So. 2d at 1180 (internal quotations and citations omitted).

Vehicular homicide is "the killing of a human being . . . caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another." § 782.071, Fla. Stat. (2006). Vehicular homicide, by definition, requires proving reckless driving, which is "driving with a willful or wanton disregard for safety." *D.E. v. State*, 904 So. 2d 558, 561 (Fla. 5th DCA 2005); *accord* § 316.192(1)(a), Fla. Stat. (2006).

We have held that "the rate of speed of a vehicle can be firmly shown . . . to be *so* excessive under the circumstances that to travel that fast under the conditions is by itself a reckless disregard for human life or the safety of

persons exposed to the speed." *Copertino v. State*, 726 So. 2d 330, 332 (Fla. 4th DCA 1999). In *Copertino*, we explained that speeding above the limit—for example, only five miles per hour above—does not normally prove the gross, wanton, or willful conduct that is associated with the "reckless disregard for human life or safety." *Id.* We distinguished between speeding slightly over the speed limit, and speeding at "such an immensely excessive rate that no one could reasonably drive." *Id.* Reckless disregard can be shown where a person drives "at an enormously excessive rate at a time and in a place where it might have been dangerous to exceed the posted limits by even a little." *Id.* at 333.

In *Copertino*, the defendant, a young, inexperienced driver, was operating his vehicle in the late evening with reduced visibility at a major thoroughfare near residential areas in a large city. He had nine passengers crowded into his compact car, seven of whom were in the back seat not wearing seatbelts. *Id.* His speedometer was locked at 90.41 m.p.h. *Id.* We affirmed his conviction for manslaughter by culpable negligence, stating: "Driving this fast under these circumstances so logically evinces to us the required reckless disregard for human life . . . that we frankly cannot see the plausibility of arguing otherwise." *Id.*

In *Pozo v. State*, 963 So. 2d 831, 833 (Fla. 4th DCA 2007) (quoting *Copertino*, 726 So. 2d at 332–33), we reiterated that "grossly excessive speed alone can constitute such reckless conduct as to support a charge of manslaughter by culpable negligence." Pozo, a high school student, was driving between 67 and 90 m.p.h. in a 35 m.p.h. residential zone in a rain storm, holding the steering wheel with one hand and selecting a CD to play with the other, when he lost control of the vehicle on a curve and hit a tree. His passenger was killed. *Id.* at 832–33. We held that all these factors, combined with his speed, provided sufficient evidence to withstand his motion for judgment of acquittal. *Id.* at 833. We noted, however, that the mere fact that he was driving at an excessive speed in a residential neighborhood was enough to bring his case in line with *Copertino* and justify denying his motion for judgment of acquittal. *Id.* at 833–34. We explained that "the recklessness necessary to prove vehicular homicide is less than that of culpable negligence." *Id.*

Here, the detective presented enough facts in his affidavit for the magistrate to make a practical, common-sense decision, based on the circumstances set forth in the affidavit, that there was a fair probability that evidence of vehicular homicide would be recovered from the Corvette's black box. The affidavit alleged that the accident occurred on a Monday afternoon at 12:48 p.m. at the intersection of North Military Trail and N.W. 5th Street in Deerfield Beach, which is a residential area. The affidavit further alleged that the defendant was traveling in excess of 70 m.p.h. in a 40-m.p.h. zone. Finally, the affidavit alleged that the vehicles traveled one-hundred-twenty-five feet after impact,

that the lack of pre-impact tire marks suggested braking did not occur, and that a witness heard the gears "chirp" as the car accelerated to a faster gear. These facts showing excessive speed in a residential area, like those in *Copertino,* were enough to evince "a reckless disregard for human life or the safety of persons exposed to the speed." 726 So. 2d at 332.

The magistrate needed only to determine whether the facts related in the supporting affidavit were sufficient to justify a probable cause determination, not whether the facts made a prima facie showing that the crime occurred. *Doorbal*, 837 So. 2d at 952–53. Because the general affidavit and application for the search warrant in this case contained sufficient facts to establish probable cause that vehicular homicide was committed and that the evidence of that crime would be found in the defendant's vehicle, the magistrate properly issued the search warrant. Accordingly, we reverse the trial court's order suppressing the evidence.

Reversed.

GROSS, C.J., and HAZOURI, J., concur.

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Appeal of non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Stanton S. Kaplan, Judge; L.T. Case No. 06-22827 CF 10A.

Bill McCollum, Attorney General, Tallahassee, and Heidi L. Bettendorf, Assistant Attorney General, West Palm Beach, for appellant.

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Not final until disposition of timely filed motion for rehearing.