IN THE CIRCUIT COURT OF APPEALS FOR THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

CIRCUIT COURT OF APPEALS CASE NO. 05-2010-AP-005943-A

COUNTY COURT CASE NO. 05-2009-CT-046972-A

XXXX XX XXXXX,
Defendant/Appellant,

vs.

STATE OF FLORIDA,
Plaintiff/Appellee.

ON APPEAL FROM THE COUNTY COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA
- CRIMINAL DIVISION -

INITIAL BRIEF OF APPELLANT

Submitted pursuant to
Anders v. California, 386 U.S. 738, 87 S.Ct. 493 (1967)

JAMES RUSSO
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CIRCUIT COURT OF APPEALS CASE NO. 05-2010-AP-005943-A
XXXX XX XXXXX vs. State of Florida

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Defendant/Appellant, XXXX XX XXXXX, certifies that the following persons and entities have, or may have, an interest in the outcome of this case:

1. The Honorable KELLY J. MCKIBBEN
County Court Judge for the Eighteenth Judicial Circuit
(Trial Court Judge)

2. The Honorable JAMES RUSSO
Public Defender for the Eighteenth Judicial Circuit

3. The Honorable NORMAN R. WOLFINGER
State Attorney for the Eighteenth Judicial Circuit

4. TROY J. WEBBER
Assistant Public Defender, Eighteenth Judicial Circuit
(Appointed Appellate Counsel for Defendant/Appellant)

5. JASON A. HICKS
Assistant State Attorney, for the Eighteenth Judicial Circuit
(Trial Court Counsel for Plaintiff/Appellee)

6. TODD DERATANY, P.A.
Attorney at Law
(Trial Court Counsel for Defendant/Appellant)

7. XXXX XX XXXXX
Defendant/Appellant

TABLE OF CONTENTS

Page No.

CERTIFICATE OF INTERESTED PERSONS…… 2

TABLE OF CONTENTS……. 3

TABLE OF AUTHORITIES……... 4

PRELIMINARY STATEMENT……..…… 5

STATEMENT OF THE CASE AND FACTS……..……..…..……6

STANDARD OF REVIEW……..……. 8

SUMMARY OF ARGUMENT……..……. 9

ARGUMENT……..……11

DID THE TRIAL COURT ERR BY OVERRULING THE DEFENSE 'TESTIMONIAL HEARSAY' OBJECTION WHEN THE STATE INTRODUCED A CERTIFIED COPY OF THE DEFENDANT'S COMPLETE DHSMV DRIVING RECORD INTO EVIDENCE?

CONCLUSION……..……..…… 16

CERTIFICATE OF SERVICE……..…….. 18

CERTIFICATE OF COMPLIANCE……18

TABLE OF AUTHORITIES

CASES

Anders v. California, 386 U.S. 738, 87 S.Ct. 493 (1967)……..7, 9

Card v. State, 927 So.2d 200 (Fla. 5th DCA 2006)……..12, 13, 15

State v. Causey, 503 So.2d 321 (Fla. 1987)…….10

City of Hollywood v. Mulligan, 934 So.2d 1238 (Fla. 2006)……8

City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002)…….8

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)…….9, 12, 13, 16

Hardin v. State, 938 So.2d 578 (Fla. 5th DCA 2006)……..16

State v. J.P., 907 So. 2d 1101 (Fla. 2007)……8

Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S.Ct. 2527 (2009)…….9, 12-16

Sproule v. State, 927 So.2d 46 (Fla. 4th DCA 2006)…….13, 15

Transportes Aereos Nacionales, S.A. v. DeBrenes, 625 So.2d 4 (Fla. 3rd DCA 1993)……8

CONSTITUTION, STATUTES & JURY INSTRUCTIONS

Florida Standard Jury Instructions (Crim.) 28.11……12

Massachusetts General Laws 111, Section 13 (West 2006)…….14

Section 90.803, Florida Statutes (2009)……..16

Section 322.201, Florida Statutes (2009)…….6, 12

Section 322.34, Florida Statutes (2009)……6, 11, 12

United States Constitution, Sixth Amendment……..6, 9, 11, 13-15

PRELIMINARY STATEMENT

Appellant was the Defendant and the Appellee was the Prosecution in the Criminal Division of the County Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida.

In this brief, the parties shall be referred to as they appeared before the County Court at trial of this case except the Appellee shall also be referred to as the "State" or the "Prosecution."

In this brief, the symbol "R." will be used to denote the Record on Appeal. The symbol "Tr." will be used to designate a transcript within the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Defendant/Appellant, XXXX XX XXXXX, was charged by Information with one count of Driving While License Suspended, Revoked or Cancelled With Knowledge, contrary to Section 322.34(2) of Florida Statutes (2009). (R.25) On April 9, 2010, the Defendant's case was heard at non-jury trial before County Court Judge Kelly J. McKibben. (R.Vol.2,Tr.4) During the trial, the Plaintiff/Appellee sought admission into evidence of the Defendant's complete Florida Department of Highway Safety and Motor Vehicles (DHSMV) driving record. (R.Vol.2,Tr.12) The Prosecutor argued that the record was admissible hearsay as it was a self-authenticating document that had been certified to be a true and correct copy by the Clerk of Courts for the Eighteenth Judicial Circuit. (R.Vol.2,Tr.14-15, 19) The Prosecutor's argument was based on the authority of Section 322.201 of Florida Statutes, which declares a certified DHSMV driving record admissible as evidence in any court as a self-authenticating document.

The Defendant objected to the admission of the driving record as testimonial hearsay and, if admitted into evidence, would violate the Defendant's rights guaranteed by the Confrontation Clause of the Sixth Amendment. (R.Vol.2,Tr.17-26) Citing the authority of Section 322.201 describing the certified driving record as a self-authenticating document, the Court overruled the defense objection and the driving record was admitted into evidence. (R.Vol.2,Tr.31) The Defendant was found guilty as charged. (R.Vol.2,Tr.41) The Defendant was adjudicated guilty and sentenced to thirty days at the Brevard County Work Farm and a six-month term of probation. (R. 54-55)

The sentence was stayed by the Court pending this appeal. (R.Vol.2,Tr.54-55) The Defendant sought appeal of the Trial Court's overruling the defense objection to admission of the Defendant's DHSMV driving record. (R. 84, 90-91, 96-98)

The Office of the Public Defender was appointed to represent the Defendant for the purposes of this appeal. This initial brief follows in compliance with the decision of the United State Supreme Court in Anders v. California, 386 U.S. 738, 87 S.Ct. 493 (1967).

STANDARD OF REVIEW

The county court's ruling on the admissibility of the certified driving record is a question of law subject to de novo review by the circuit court acting in its appellate capacity. See State v. J.P., 907 So.2d 1101 (Fla. 2007); City of Hollywood v. Mulligan, 934 So.2d 1238 (Fla. 2006); City of Miami v. McGrath, 824 So.2d 143 (Fla. 2002). De novo review means that the appellate court is free to decide the question of law without deference to the trial judge, as if the appellate court was deciding the question in the first instance. Transportes Aereos Nacionales, S.A., v. DeBrenes, 625 So.2d 4 (Fla 3rd DCA 1993).

SUMMARY OF THE ARGUMENT

The Defendant asserts that admission of a clerk-certified copy of his complete DHSMV driving record violated his Sixth Amendment right to confront witnesses against him. The Defendant argued that the document in question was produced by the clerk's office for the sole purpose as evidence against him at trial. Therefore, the evidence is testimonial hearsay and absent the requirements outlined by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S.Ct. 2527 (2009), that testimonial statements are inadmissible in evidence unless the witness, in this case the DHSMV custodian of records, is available for cross-examination at trial, or if unavailable at trial, the defendant had a prior opportunity to cross-examine the witness.

The Defendant's argument at trial that the DHSMV driving record was testimonial hearsay and, as such, was inadmissible absent the protections outlined in Crawford was based upon an inaccurate interpretation of controlling case law.

Therefore, undersigned counsel files this initial brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 493 (1967). Pursuant to Anders, an appellate court must examine the record on appeal to the extent necessary to discover any errors apparent on the face of the record. Should the court, in its independent review find an issue to be arguable on the merits, counsel should be directed to file supplemental briefs addressing such issue for the benefit of the court. State v. Causey, 503 So.2d 321 (Fla. 1987).

ARGUMENT

DID THE TRIAL COURT ERR BY OVERRULING THE DEFENSE "TESTIMONIAL HEARSAY" OBJECTION WHEN THE STATE INTRODUCED A CERTIFIED COPY OF THE DEFENDANT'S COMPLETE DHSMV DRIVING RECORD INTO EVIDENCE?

The Defendant/Appellant, XXXX XX XXXXX, was charged by Information with one count of Driving While License Suspended, Revoked or Cancelled With Knowledge contrary to Section 322.34(2) of Florida Statutes (2009). Subsequently, the Defendant was found guilty at non-jury trial. The Defendant appeals his conviction, arguing that his DHSMV driving record is testimonial hearsay and its admission at trial without testimony from the DHSMV records custodian violated his Sixth Amendment right to confront and cross-examine under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), and Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S.Ct. 2527 (2009).

To sustain a conviction under Section 322.34(2), the State must prove the following three elements: (1) the defendant drove a motor vehicle upon a highway in this state, (2) at the time, the defendant's license was suspended, revoked or cancelled and (3) at the time the defendant drove a motor vehicle upon a highway in this state he knew that his license had been suspended, revoked or cancelled. See Fla. Std. Jury Instr. (Crim.) 28.11. The State may prove the second element of suspension, revocation or cancellation of a driver license by presenting a certified copy of a defendant's DHSMV driving record to the trier of fact. See Card v. State, 927 So.2d 200 (Fla. 5th DCA 2006).

Although Section 322.201 of Florida Statutes (2009), makes a certified DHSMV driving record self-authenticating and admissible in evidence, Card, 927 So.2d at 201, at trial, the Defendant argued consistent with the holding of Crawford v. Washington as interpreted by the Fifth District Court of Appeal which stated: "as a prerequisite to the introduction of testimonial hearsay evidence in a criminal trial, the witness who made the statement must be unavailable and the defendant must have had a prior opportunity to cross-examine that witness." Card, 927 So.2d at 202. The issue to be decided prior to applying the Crawford test is whether the Defendant's driving record is non-testimonial hearsay and admissible under state statute or testimonial that might implicate Sixth Amendment confrontation rights.

Contrary to the proposition that "a driving record is not testimonial in nature and, therefore, falls outside Crawford's proscriptions," Card, 927 So.2d at 203, relying on Sproule v. State, 927 So.2d 46 (Fla. 4th DCA 2006), the Defendant maintained that the subsequent decision in Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S.Ct. 2527 (2009), re-defined "testimonial hearsay" and the DHSMV driving record in the present case falls into that 're-defined' category of evidence.

In Melendez-Diaz, following the seizure of contraband, the defendant was charged with distributing and trafficking cocaine. Id. at 2530. At trial, the prosecution placed the seized cocaine into evidence along with three "certificates of analysis" showing the forensic results of the seized drug. Id. at 2530-31. The

certificates displayed notarized signatures of the laboratory analysts who performed the analyses. Id. at 2531. Over defense objection, the certificates were admitted into evidence pursuant to Massachusetts law that specifically authorizes the admission at trial of a lab analyst's "certificate of analysis." Id.; Mass. Gen. Laws 111, §13 (2006). The jury found Melendez-Diaz guilty and he appealed the admission of the "certificates of analysis" as a violation of his Sixth Amendment rights. Id. Relying on state law, the Massachusetts appellate court rejected the Sixth Amendment claim affirming the conviction and the state Supreme Judicial Court denied review. Id. Melendez-Diaz appealed to the United States Supreme Court.

The Supreme Court reversed, holding that the Sixth Amendment precluded the admission of the "certificates of analysis" into evidence. Id. at 2532. The Court found that the certificates at issue were essentially "affidavits" in that they were "declaration[s] of fact written down and sworn to by the declarant before an officer authorized to administer oaths." Id. As affidavits, the certificates fell within the "core class of testimonial statements" that are subject to a defendant's rights under the Confrontation Clause. Id. By denying the right of confrontation, the Massachusetts Appeals Court deprived the defendant of the opportunity to "weed out not only the fraudulent analyst, but the incompetent one as well." Id. at 2537.

The Court further explained that the certificates, despite being produced as a regularly conducted business activity, do implicate Sixth Amendment protections because they are produced for the sole purpose of providing evidence against a defendant. Id. at 2539. This purpose provides the distinction between business records that implicate confrontation rights from those that qualify under an exception to the hearsay rules. The Court clarified the "business record" issue stating:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here - prepared specifically for use at petitioner's trial - were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. at 2539-40 (emphasis added).

In Card, the Fifth District Court addressed the testimonial and non-testimonial hearsay nature of the DHSMV driving record stating:

> A driving record properly authenticated by the DHSMV does not seem to us to be testimonial because it is not accusatory and does not describe specific criminal wrongdoing of the defendant. Rather, it merely represents the objective result of a public records search.

Driving records are kept in Florida for the public benefit and are not solely prepared for trial purposes. A driving record contains neither expressions of opinion nor conclusions requiring the exercise of discretion, and is not made or kept for law enforcement or trial purposes. Thus, it clearly falls within the type of hearsay recognized in Crawford that is admissible in a criminal trial without implicating the defendant's confrontation rights. Id. at 203 (citations omitted) (emphasis added); see Sproule v. State, 927 So.2d 46 (Fla. 4th DCA 2006) (defendant's certified driving record was properly admitted as a hearsay exception under Section 90.803(8), Florida Statutes, because Crawford did not change the law pertinent to admission of non-testimonial hearsay that falls within a hearsay exception); see also Hardin v. State, 938 So.2d 578 (Fla. 1st DCA 2006).

Finding that Florida courts clearly define DHSMV driving records as non-testimonial "business record" hearsay and the Melendez-Diaz ruling has no effect on this issue, the Defendant's confrontation rights

were not denied. Therefore, the trial court correctly overruled the Defendant's objection to admission of his driving record into evidence.

CONCLUSION

For the reasons stated herein, undersigned counsel respectfully requests permission to withdraw as counsel for the Defendant/Appellant, and that this Court allow the Defendant/Appellant, on his own, or through other counsel, sufficient time to submit a brief on points he may perceive as appropriate. If this Court finds reversible error in this appeal, the undersigned respectfully requests that this application be withdrawn and an opportunity granted to file another brief for the Defendant/Appellant.

Respectfully submitted,
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_____
TROY J. WEBBER
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