NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

JASON CHEPENIK

Appellant,

v.

Appeal No. CRC 08-00040APANO
Lower Court No: CTC07-9135XCEANC
UCN522007CT012846XXXXXX

STATE OF FLORIDA
Appellee.
_____/

Opinion filed _____.

Appeal from a judgment and sentence
entered by the Pinellas County Court,
County Judge John Carballo

Curt Murtha, Esquire
Attorney for Appellant

Ryan D. Bresler, Esquire
Attorney for Appellee

ORDER AND OPINION

ANDREWS, Judge.

THIS MATTER is before the Court on Appellant, Jason Chepenik's, appeal from a conviction, after a jury trial, of Driving Under the Influence, a first degree misdemeanor, in violation of §316.193 Fla. Stat. (2008). After review of the record and the briefs, this Court affirms the judgment and sentence.

Factual Background and Trial Court Proceedings

On January 26th, 2007 Appellant was observed by Sergeant Nalven of the Pinellas County Sheriff's Office failing to stop at a red light. During the ensuing traffic stop Sergeant Nalven observed an odor of alcohol emanating from the interior of that Appellant's vehicle. When talking to Appellant the sergeant also smelled the odor of alcohol coming from Appellant. Appellant admitted that he had been drinking. A driving under the influence investigation was conducted by Sergeant Nalven with the assistance of Deputy Paniagua. Deputy Paniagua observed the Appellant to have a strong odor of alcohol emanating from Appellant's breath and Appellant's eyes were bloodshot, red and glassy. Deputy Paniagua conducted sobriety exercises including the "walk and turn" and the "one-leg stand" both of which Appellant failed. Appellant was interviewed by Deputy Paniagua post *Miranda*. Appellant admitted to drinking over a six hour period, did not know what time it was but admitted to consuming two beers, one shot and two whisky and cokes. Deputy Paniagua who is certified by the Florida Department of Law Enforcement as a breath test operator performed the breath test on Appellant. Appellant's breath alcohol level was .154.

At trial the breath test results were entered into evidence over Appellant's objection because the state of Florida did not present the testimony of Ms. Vicky Adye who performed the December 22, 2006 monthly maintenance which was the most recent monthly maintenance conducted prior to Appellant's test. Instead, the State presented the testimony of Ms. Cheryl Peacock of the Pinellas County Sheriff's Office who is a certified agency inspector. Ms. Peacock testified as to the procedures required to conduct a monthly inspection of the Intoxilyzer 8000. During the test, a simulator device is used to simulate the introduction of a breath sample into the instrument. Five separate samples with five different solutions are introduced into the

instrument. A 0.000 solution, a 0.000 solution with acetone, a 0.050 solution, a 0.080 solution and a 0.200 solution are all introduced and tested. Three samples or analyses for each solution are tested. The same test is done for the annual maintenance except that 10 analyses for each is conducted. The Intoxilyzer 8000 automatically generates the date of the most recent monthly inspection on the breath test affidavit unlike the Intoxilyzer 5000.

Issues

The issue in this case is whether the monthly maintenance and inspection report conducted pursuant to Rule 11D-8.006(1) Florida Administrative Code (2008) can be introduced into evidence as a business record or is the report testimonial in nature thereby requiring the introduction of the report through the maintenance inspector who performed the most recent monthly inspection.

Standard of Review

The issue involved in this cause is a mixed question of law and fact and are subject to *de novo* review. *State v. Petion*, 992 So.2d 889 (Fla. 2d DCA 2008). *See also, State v. Shearod,* 992 So.2d 900 (Fla. 2d. DCA 2008) (on appellate review of the granting or denial of a motion for judgment of acquittal, the de novo standard of review applies).

Argument and Analysis of the Present Case.

The Appellant asserts the lower court's denial of his Motion in Limine requesting that the court declare his monthly maintenance report testimonial under *Crawford v. Washington* 541 U.S. 36 (2004) was error. Additionally the Appellant asserts that under *Crawford* the State is required to present the testimony of the monthly inspector who actually maintained and inspected the breath testing instrument. The State counters that the monthly maintenance reports

are not created during a criminal investigation of a particular defendant and therefore are not within the purview of *Crawford,* in that they are non-testimonial.

In *Crawford,* the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment excludes from evidence any out of court, testimonial statements unless the witness is found to be unavailable and the defense is provided a prior opportunity for cross-examination. *Id.* at 68. The *Crawford* Court did not establish a precise definition of testimonial but established that at a minimum testimonial statements would include prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations. *Peters v. State,* 984 So.2d 1227, 1229 (Fla. 2008). This pronouncement was clarified somewhat in *Davis v. Washington,* 547 U.S. 813 (2006). In *Davis* the Court stated:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively demonstrate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. Under *Crawford,* evidence that qualifies as "testimony" or "testimonial" includes statements, declarations or affirmations made for the purpose of proving a particular fact. *Card v. State*, 927 So.2d 200, 202 (Fla. 5th DCA 2006). "*Crawford* also observed that '[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy.'" *Id.* Notwithstanding the Court's assertion that business records may not be testimonial Florida courts have not adopted the wholesale approach that business records are not testimonial. *Id. See also, Johnson v. State* 929 So.2d 4 (Fla. 2 DCA 2005) ("despite *Crawford's* suggestion that all business records are nontestimonial, we hold that an FDLE lab report prepared pursuant to police investigation and

admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record"). If the nature of the statement is that its intent is to lodge a criminal accusation against a defendant it is testimonial. *Johnson*, at 8.

In *State v. Belvin*, 986 So.2d 516 (Fla. 2008) the defendant was charged with DUI. At trial in county court, the breath test technician who administered the breath test and prepared the breath test affidavit, did not testify. *Id.* at 518. The breath test affidavit was admitted over defendant's objection that the technician should be present and subject to cross-examination. *Id.* Belvin appealed his conviction and sentence to the circuit court arguing the failure to have the breath test technician testify in person at trial violated his right to confrontation as espoused in *Crawford*. *Id.* 519. The circuit court affirmed the conviction and ruled that the breath test affidavit was not testimonial in nature and that *Crawford* did not preclude its admission. *Id.* The defendant next sought the review of the district court. The Fourth District reversed stating "[b]reath test affidavits are usually generated by law enforcement for use at a later criminal trial or driver's license revocation proceeding. They thus qualify as '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.'" *Belvin v. State* 922 So.2d 1046, 1050 (Fla. 4th DCA 2006). In affirming the decision of the district court the supreme court analyzed:

> Applying the rationales of *Davis* and *Crawford* to the instant case, we conclude that the breath test affidavit is testimonial. First, the affidavit was 'acting as a witness' against the accused. The technician who created the breath test affidavit did so to prove a critical element in Belvin's DUI criminal prosecution. In other words, the breath test affidavit was created 'to establish or prove past events potentially relevant to later criminal prosecution.' Second, the affidavit was not created during an ongoing emergency or contemporaneously with the crime. Instead, it was created 'well after the criminal events had transpired.' Third, the affidavit was created at the request of the police for Belvin's DUI prosecution. Finally, the affidavit falls squarely into the category of "formalized testimonial materials, *such as affidavits,*' which the Supreme Court listed in the various formulations of the core class of "testimonial" statements. (emphasis added). A

> breath test affidavit is created under circumstances where the technician is expecting it will be used at a later trial. More precisely, the sole purpose of a breath test affidavit is to authenticate the results of the test for use at trial.

State v. Belvin, 986 So.2d at 521 (citations omitted). Pursuant to *Belvin*, an analysis of whether evidence presented is "testimonial" involves an inquiry into whether the document (1) acted or will act as a witness against the accused, (2) was created during an ongoing emergency or contemporaneously with the crime, (3) was created at the request of the police specifically for the prosecution in the case before the court and (4) falls within the category of formalized testimonial materials such as affidavits where its "sole purpose" is for use at trial. *Id.*

In *Card v. State*, 927 So.2d 200 (Fla. 5th DCA 2006) the defendant challenged his conviction for driving while his license was revoked as a habitual offender. He argued that driving records are testimonial hearsay and his rights guaranteed to him by the Confrontation Clause of the Sixth Amendment were violated when his driving record was introduced at trial without the testimony of the Florida Department of Highway Safety and Motor Vehicles representative being present and subject to cross examination. *Id.* at 201. In rejecting the defendant's argument the Fifth District held:

> 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. (emphasis added).

In *Pflieger v. State*, 952 So.2d 1251(Fla. 4th DCA 2007) the defendant challenged the admission of the annual department inspection report because the technician who performed the

annual inspection was not present at trial. The county court certified a question of great public importance asking if the introduction of the annual inspection of the breath testing instrument violated the Confrontation Clause under *Crawford*. *Id.* at. 1252. Answering the certified question in the negative the Fourth District took note that annual inspections are required to be done by the Florida Administrative Code and not necessarily for any other purpose.

> Annual inspection reports contain an inspector's technical review of the Intoxilyzer 5000 pursuant to the applicable administrative requirements. Pursuant to Florida Administrative Code Rule 11D-8.006(1), evidentiary breath test instruments shall be inspected by an agency inspector at least once each calendar month. This inspection 'validates the approval, accuracy and reliability of an evidentiary breath test instrument.' Fla. Admin. Code R. 11D-8.003(4). Unlike *Shiver*[*v. State*, 900 So.2d 615 (Fla. 1st DCA 2005)] where an affidavit was specifically prepared for trial that mentions portions of the report, the actual maintenance report is not compiled during the investigation of a particular crime, as *Crawford* contemplates. *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, 477 (2006). The evidence is not 'against' any particular defendant. . . . An inspection report, like the hospital record of a blood test, is intended for the non-testimonial purpose of making sure the machine is working properly. . . Using these reports for a litigation purpose is a secondary purpose and therefore does not raise the concerns expressed in *Crawford* of unreliability.

Id at 1253-1254. At bar, the Appellant labors to extrapolate the holding in *State v. Belvin*, 986 So.2d 516 to the admission of the monthly maintenance report in this cause and to distinguish the decision in *Pflieger v. State*, 952 So.2d 1251. After considering both the decision in *Belvin* and *Pflieger*, we conclude that the monthly maintenance report is non-testimonial. The fact that the results of the monthly inspection are included in the breath test affidavit does not suggest that the monthly inspection results are intended to "act as a witness" against any particular defendant. *Belvin* at 521. *See also, Pflieger supra; Card, supra.* The administrative code requires that a monthly inspections be completed. Florida Administrative Code Rule 11D-8.006(1). Section 11D-8.0075 Florida Administrative Code requires that "agency inspection reports" be retained for a period of three years from the last entry date. Whether the breath testing instrument is used

at all during a given calendar month or year, the inspections must be conducted and a report made. Therefore, it cannot be said that the monthly inspection reports are created during an ongoing emergency or contemporaneously with criminal activity. *Belvin* at 521. Nor can it be said that the monthly maintenance report was created at the request of the police for the prosecution of a particular defendant. *Id. See also, Pflieger supra; Card, supra.* Monthly maintenance reports do not qualify as "formalized testimonial materials" the sole purpose of which is for use at trial. *Id. See also, Pflieger supra; Card, supra.* Further, it has not been established that the monthly maintenance report contains expressions of opinion or conclusions by law enforcement requiring the exercise of discretion. *Card* at 201. The monthly testing procedure is not done in conjunction with any investigation. The alcohol concentration of the various testing solutions are dictated by rule and required to be approved by the Florida Department of Law Enforcement prior to being used for testing. Florida Administrative Code Rule 11D-8.0035. The alcohol testing solutions are pretested, prepackaged and then shipped to the various agencies for use in the required monthly and annual testing. *Id.* The officer's function during testing is to verify and record whether the analysis results fall within the acceptable range. *Id.* There appears to be no requirement that any maintenance officer expresses any opinion at all or does anything more than record the results.

Appellant argues that because results of the monthly maintenance are statutorily required to be included on the breath test affidavit it is "logical" that the person who performed the maintenance be required to testify. (Brief of Appellant at 15). Appellant also argues that to consider the monthly maintenance records business records is overreaching and contrary to the purpose behind the business records exception to the hearsay rule. (Brief of Appellant at 16). "The business at issue is the business of a law enforcement agency. The monthly maintenance

inspection is not a record pertinent to running a law enforcement agency nor is the document kept for any other reason than compliance with the Administrative rules that require adherence to statutory regulations if the State intends to use a document at trial for the purpose of prosecuting individuals." (Brief of Appellant at 16). In *Gonzalez v. State* 965 So.2d 273, 274 (Fla. 5th DCA 2007) the defendant appealed his burglary conviction asserting that his rights were violated under *Crawford* because the State introduced a pawn shop transaction form that was testimonial. During the State's case-in-chief the General Manager of EZ Pawn testified that when a customer sells or pawns an item at his store, the staff is required by state law to fill out a Florida Pawn Broker's transaction form in compliance with section 539.001(8), Fla. Stat. (2006). *Id.* The manager also testified that EZ Pawn employees complete the computerized transaction forms in the normal course of business. *Id.* Each transaction form includes information for the purpose of customer identification including the customer's name, address, driver's license number and expiration date. *Id.* Identifying information is also obtained on the item sold or purchased including date and time of purchase or sale. *Id.* The customer is required to place his thumbprint and signature on the transaction form. *Id.* Rejecting the suggestion that business records created or kept in compliance with statutory requirements are testimonial the court held:

> [A] pawn shop transaction form is *not prepared primarily to be used in a criminal prosecution with the purpose of bearing witness against the customer.* While a transaction form might be used in a criminal prosecution, *see* section 539.001(9), Florida Statutes (2005) (requiring that pawn shop owners submit transaction forms to local law enforcement on a daily basis), it has other record-keeping purposes. . . . Most businesses maintain records in the ordinary course of commercial activity. Many of those records are kept to comply with various federal, state and local laws. That fact notwithstanding, *we cannot accept the notion that simply because the law requires a record to be maintained, and the possibility exists that such a record might be used in a criminal prosecution, an otherwise ordinary business record somehow morphs into testimonial hearsay.*

Id. at 276 (emphasis added). The Appellant has failed to establish that the monthly maintenance report admitted in this cause is not a business record or runs afoul of the dictates of *Crawford* and *Belvin*.

Conclusion

As stated above, this Court finds that the trial court did not err in failing to grant Appellant's Pre-trial Motion in Limine. Further the trial court did not err in granting the State's Motion in Limine admitting the breath test results and the breath test reading. For the reasons set forth above, this Court concludes that the judgment and sentence of the trial court were lawfully entered and should be affirmed.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is affirmed.

ORDERED at Clearwater, Pinellas County, Florida this 27th day of March, 2009.

Original opinion entered by Circuit Judges R. Timothy Peters, Michael F. Andrews, & Raymond O. Gross.

cc: Honorable John Carballo
Office of the State Attorney
Curt Murtha, Esquire