IN THE SUPREME COURT OF FLORIDA

ANTHONY S. BROWN, :

Appellant, :

vs. : CASE NO. 64,247

STATE OF FLORIDA, :

Appellee. :

_____ :

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT, IN
AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER

MICHAEL J. MINERVA
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

ANTHONY S. BROWN, :

Appellant, :

vs. : CASE NO. 64,247

STATE OF FLORIDA, :

Appellee. :

_____ :

REPLY BRIEF OF APPELLANT

I ARGUMENT

ISSUE I

A NEW TRIAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE.

Two questions are raised under this point. One is the abstract legal point of whether the Court will grant a new trial because of conflicts in the state's evidence and the second is whether the evidence supporting the verdict is so internally inconsistent that a new trial should be granted.

In Tibbs v. State, 397 So.2d 1120 (Fla. 1981) this Court held that:

> Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial. 397 So.2d at 1125.

The Court apparently still retains, however, the prerogative of granting a new trial in the interest of justice. In a capital case the requirement that the court review the evidence to determine if the interest of justice requires a new trial was interpreted to mean that the court must review the evidence even if not raised and reverse the conviction if warranted. The consequence of that reversal would be "to bar retrial under the Double

Jeopardy Clause". Id., at 1126.

Tibbs, therefore, is a rigid rule on evidentiary sufficiency that presents an appellate court with only two options. If the evidence is legally sufficient the court is powerless to reverse for a new trial regardless of the conflicts or improbabilities in the evidence. On the other hand, if the evidence is not legally sufficient the court must order an acquittal. There is no middle ground for an appellate court to decide that even though the evidence was legally sufficient it is so unsatisfactory that in the interest of justice a new trial should be granted.

In Tibbs v. Florida, 457 U.S. 31 (1982) the United States Supreme Court for the first time recognized that double jeopardy does not prevent a retrial when an appellate court (and by implication a trial court) grants a new trial based on insufficient weight of the evidence.

Ultimately it is a question of policy whether appellate courts should have the power to order new trials when the verdict is contrary to the weight of evidence. In Tibbs, supra, the United States Supreme Court said that:

> A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment. An appellate court's decision to give the defendant this second chance does not create "an unacceptably high risk that the Government, with its superior resources, [will] wear down [the] defendant" and obtain conviction solely through its persistence. (footnote omitted) 457 U.S. at 42, 43.

The Court also said that a contrary rule, precluding retrial, might prompt state legislators simply to forbid courts to reweigh the evidence; rule-makers willing to permit a new trial "may be less willing to free completely a defendant convicted by a jury of his peers." 457 U.S. at 45, n. 22.

The United States Supreme Court was obviously impressed with the possible unfairness of appellate courts being faced with the dilemma of either affirming a conviction because the evidence was legally sufficient but unsatisfactory or, in the alternative, finding that the evidence was insufficient and ordering an acquittal. In those circumstances, such as Tibbs in which the evidence was legally sufficient the appellant would have no remedy on appeal. Allowing a reversal for a new trial was the proper result when this Court first considered Tibbs. Many reasons were given for reversing Tibbs' conviction. Tibbs v. State, 337 So.2d 788 (Fla. 1976). It is difficult to imagine that if confronted with those same facts again this Court would, or any court should, ignore the insubstantiality of the evidence and affirm the conviction. A rule of law absolutely prohibiting relief which should be granted is not a sound rule.

Appellate courts are capable of weighing evidence. To some extent Florida appellate courts must perform that function when ruling on orders granting or denying new trials based upon the sufficiency of the evidence. The Court reserved judgment on this point when deciding Tibbs for the second time. Allowing reversals for insufficient weight of evidence would not result in a great quantity of reversals. The trial judge's ruling on the motion is entitled to great weight and should not be overturned on appeal without some showing that the interest of justice would best be served by having the issue submitted again to a new finder-of-fact.

The question boils down to a review of the trial judge's discretion in denying a motion for new trial. Discretion has been described as whether "reasonable men could differ as to the propriety of the action taken . . . .". Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). In those rare circumstances in which an appellant can demonstrate an abuse of discretion by the trial judge in ruling on the weight of the evidence the appellate courts

should be empowered to award a new trial.

This rule, moreover, would not necessarily lead to multiple trials because of the same evidence being presented and being found lacking in quality. As the Supreme Court noted in Tibbs, supra:

> The weight of the evidence rule, moreover, often derives from a mandate to act in the interest of justice. . . . Although reversal of a first conviction based on sharply conflicting testimony may serve the interest of justice, reversal of a second conviction based upon the same evidence may not. 457 U.S. at 43, n. 18.

It is, of course, essential to distinguish the situation in this case from that normally presented in review of conflicting evidence supporting a conviction. The state correctly points out that conflicts in testimony are properly resolved by the jury or, when sitting without a jury, by the trial judge. Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Abbott v. State, 334 So.2d 642 (Fla. 3rd DCA 1976); Dawson v. State, 338 So.2d 242 (Fla. 3rd DCA 1976) (appellate review is to determine whether the record contains substantial competent evidence, which if believed, supports the verdict. All conflicts and reasonable inferences from the evidence must be resolved in favor of the conviction).

This rule is deceptively simple. It enables the state, as it did here, to argue that "the testimony of Wydell Rogers alone" sustains the verdict. (State's Brief at 2) Appellant agrees with that statement. It does not, however, dispose of the case. Other evidence, also presented by the state to prove appellant's guilt, was inconsistent with Rogers' testimony on significant points. By looking beyond Rogers' testimony to the evidence which came from other state witnesses the proof of guilt switches from clear to murky. This is the heart of the factual issue here. It cannot be disposed of by the superficial application of a rule which states that when a verdict is supported by competent substantial evidence it should not be

disturbed on appeal or by the rule that conflicts in the evidence are to be resolved exclusively by the trier of fact.

The legal and factual issue presented here is what relief can an appellate court grant when the state's material evidence, matched against itself, is irreconcilable.

The many conflicts on materials points presented by the state have been outlined in appellant's initial brief. Most will not be repeated here. The most significant conflicts arose between Wydell Rogers and other state witnesses. Rogers' story about the telephone calls supposedly made by appellant was inconsistent with the time that another state witness said she received the calls. Rogers' statement that appellant made the calls was also contradicted by that same state witness who said the caller was a woman. Rogers himself said that he only saw appellant make one call and had to loan the money for that yet two calls had been made. The second call was an inquiry about where the gas man was and why he had not yet delivered the gas. A person making a call from where Rogers said it occurred could not have known that the gas had not been delivered yet and, more importantly, the robbers would not have wanted the gas truck to have come that soon because they were not even in position to commit the robbery. Rogers' testimony also differed from Dave Davis, who was present during all of the events, on where the car was when appellant returned to it after supposedly committing the robbery. Of greatest significance is Davis' testimony that he did not hear appellant make any admissions in the car about shooting the victim whereas Rogers said appellant made those statements.

Rogers also contradicted himself by admitting he had told the police that appellant left the car with the shotgun whereas at trial Rogers said he gave appellant the shotgun after they left the car.

These and other major differences in the testimony of the state's

witnesses were sufficient to cause grave doubts as to appellant's guilt. They are not the kind of conflicts that arise in the traditional sense between evidence presented by the state on the one hand and the defense on the other. This is more like the situation presented in Majors v. State, 247 So.2d 446 (Fla. 1st DCA 1971) in which the state charged two men with committing an assault and according to the evidence only one of them could have done it. Several state witnesses said that the appellant Majors committed the assault while other state witnesses said that the co-defendant, Bellamy, committed the assault. Majors was convicted but on appeal the District Court reversed saying:

> [W]hen the prosecution presented the testimony of four eyewitnesses, as a part of the prosecution's case, that the appellant did not commit the crime for which he was being tried, the prosecution's case "created a reasonable doubt as a matter of law". 247 So.2d at 447.

Majors is distinguishable in that here the state's evidence did not contradict itself to the extent of proving guilt and innocence at the same time. Nevertheless, substantial portions of the state's evidence was self-contraditory, leading to almost the same conclusion. In Urga v. State, 36 So.2d 421 (Fla. 1956) this Court reversed an order granting a new trial, holding that there was competent substantial evidence to support the jury verdict. In dissent, Justice Sebring pointed out the novel situation which also occurred here saying:

> In the case at bar I find not only that the evidence offered by the contending parties at the trial was in sharp conflict, but also that the evidence offered by the appellant to sustain the allegations of her petition was conflicting and confusing within itself. It is my view that under such circumstances it cannot be said that the trial judge abused his judicial discretion in granting a new trial. (Emphasis added) 36 So.2d at 424.

This Court has the authority to award a new trial. The facts of

this case deserve one. It is not important whether the Court chooses the interest of justice or weight of the evidence as the ground. The gist of appellant's complaint is that the state's evidence was marred by self-contradictions in material facts which, combined with other errors, deprived him of the substance of a fair trial. The fact that this is a capital case lends greater urgency to the point, but in any case in which the state has obtained a conviction the appellate court should not be powerless to correct an injustice when it is painfully obvious that the evidence, though legally sufficient, is lacking in quality or is inherently improbable. This safeguard is needed to correct those rare occasions when the pressures of local passion have engulfed not only the jurors but the trial judge as well, suspending temporarily the mature judgment demanded of them.

The appellate courts are separated from this passing local fervor by time and distance. The appeals are heard many months after trial and in a calmer atmosphere. Appellate judges should be permitted to find, in exceptional cases, that a new trial coming at another time and before another jury is a needed remedy to ensure against a wrongfully or at least dubiously obtained conviction.

The conflicts in the evidence are the major source of error. The other errors, many of which were not objected to, have been presented already in the initial brief. Together they add up to one conclusion. Appellant did not receive a fair trial and his conviction should therefore be reversed.

ISSUE II

THE WARRANTLESS SEIZURE OF APPELLANT'S WRISTWATCH VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION BECAUSE THERE WAS NEITHER PROBABLE CAUSE NOR VOLUNTARY CONSENT.

The state's argument is trapped by the same fallacy that ensnared the trial judge. Both seemed to equate seizures with searches and, finding

no search, failed to consider whether there had nevertheless been an illegal seizure. The state uses search doctrines like a magician to hide the seizure issue, relying on Hester v. United States, 265 U.S. 57 (1924) and Oliver v. United States, ___ U.S. ___ (1984), 35 Cr.L.R.3011. Appellant does not dispute the holdings of those cases, that there is no reasonable expectation of privacy in an open field.

Like the trial judge's reliance on Ensor v. State, 403 So.2d 349 (Fla. 1981) which holds that contraband in open view may be seized without a warrant, the state's reliance on the open fields doctrine misses the point at issue. Admittedly the watch was in plain view. The question is whether probable cause existed to justify seizing the watch. Probable cause is essential for a seizure even when an item is in plain view.

Interestingly the state did not even mention Ensor in its brief, although it was the entire basis for the trial judge's ruling. The inevitable conclusion to be drawn from this omission is that the state on appeal could not support the trial judge's rationale but instead had to search for a more acceptable theory. That possibly explains why the state made no assertion that probable cause existed. Whatever incriminating inference might have arisen from the spot on the watch was cancelled by the fresh needle mark on appellant's arm, oozing blood. The United States Supreme Court recently reaffirmed the probable cause requirement in Segura v. United States, ____ U.S. ____ (1984), 35 Cr.L.R. 3298, 3302 saying that society's interest in the discovery of incriminating evidence can supersede possessory interests in property "provided that there is probable cause to belive that that property is associated with criminal activity."

Shifting its argument, the state explains that the watch was acquired through voluntary consent. In doing so the state overlooks one vital point. Consent is an issue of fact, to be decided under the totality of the

circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bailey v. State, 319 So.2d 22 (Fla. 1975). Here the trial judge, the trier of fact on the issue of consent, made no ruling.

The totality of circumstances here do not amount to consent. Appellant was merely giving in to the command of Officer Lodge to relinquish custody of his watch. The Miranda warnings did not pertain to appellant's right to refuse consent and, therefore, they did not eliminate the requirement of proving consent.

In summarizing its position the state betrays itself by stating:

> But if the act of Deputy Lodge in requesting appellant's watch can be viewed as a seizure, then the facts gleaned from the record and applicable case law compel the conclusion that appellant's compliance was voluntary. (Emphasis added) (State's brief at 18)

This quotation shows how the state had merged two distinct theories - (1) seizure, which is involuntary and (2) consent, which is voluntary. A seizure does not depend on voluntariness but on probable cause. The state says, however, that the "seizure" was accomplished with "appellant's compliance". On the contrary, the "request" by Deputy Lodge in reality was a command and appellant's "compliance" was acquiescence to a claim of apparent authority. There was neither probable cause nor voluntary consent, and therefore the watch was illegally seized.

The authorities cited by the state do not show that the appellant's watch was properly acquired. In Smith v. State, 333 So.2d 91 (Fla. 1st DCA 1976) officers obtained possession of bags of marijuana thrown from defendant's van. The Court properly said this act of abandonment was not a search or a seizure. In Mata v. State, 380 So.2d 1157 (Fla. 3rd DCA 1980); Covalluzzi v. State, 409 So.2d 1108 (Fla. 3rd DCA 1982); and State v. Goodby, 381 So.2d 1180 (Fla. 3rd DCA 1980) there was no seizure when police moved luggage voluntarily checked with the airlines by defendants a slight distance

for sniffing by trained dogs to discover the presence of contraband. In Neely v. State, 402 So.2d 477 (Fla. 2nd DCA 1981) the defendant, lawfully questioned about a bulge in his pocket, "went beyond the officer's inquiry about what caused the bulge and spontaneously pulled . . . methaqualone tables out of his pocket." Id., at 479. The Court in this "close case" could "only speculate" on what action the officer might have taken if the defendant's response had been unsatisfactory. Since a search did not take place the methaqualone was "properly seized as contraband when [defendant] brought it in plain view." Ibid.

In Neely, supra, the Court distinguished Hunt v. State, 371 So.2d 205 (Fla. 2nd DCA 1981). An officer told Hunt to show him what was in his pocket. The defendant's act of producing two bags of marijuana, much like appellant's giving the watch to Deputy Lodge, was "because he thought the police officer had the authority to tell him to do so." Id., at 206. Hunt supports appellant's position much more than the decisions cited by the state support its argument.

The state's cases are all different from appellant's. Here there was no abandonment and no voluntary relinquishment of custody as there was in the decisions cited by the state. Appellant was told to give his watch to Officer Lodge and he did. This was not voluntary consent.

ISSUE III

THE STATE INTRODUCED AT TRIAL PORTIONS OF A DEPOSITION TAKEN TO PERPETUATE TESTIMONY AT WHICH THE APPELLANT WAS NOT PRESENT, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE FLORIDA CONSTITUTION.

All the state says is that appellant waived his absence at the deposition by not objecting at trial. This is not sufficient to be a waiver by appellant of his personal right to be present at trial. Francis v. State,

413 So.2d 1175 (Fla. 1982). The state did not even mention, much less attempt to distinguish, Francis.

The supplemental record is conclusive proof that appellant was not given notice of the deposition as Fla.R.Cr.P. 3.190(j) requires.

Appellant could not have had the benefit of his right to be present at all critical stages of the trial when Officer Lodge's deposition, later used in the trial, was taken during appellant's involuntary absence. He did not waive this right.

Ohio v. Roberts, 448 U.S. 56 (1980) cited by the state holds that a transcript of testimony taken from a witness at a preliminary hearing may be used at trial without violating the defendant's right to confrontation. The Ohio statute allowing use of that testimony made the defendant's presence at the preliminary hearing a condition of admissibility. 488 U.S. at 59, n. 2. Thus the Court had no occasion in Roberts to rule on the issue here, which is the use of out-of-court testimony as substantive evidence when the defendant is absent.

Francis and Illinois v. Allen, 397 U. S. 337 (1970) implement the broader right,that of being present at trial. This right was violated when Lodge was deposed while appellant was involuntarily absent. The error requires reversal.

ISSUE IV

THE DEATH SENTENCE FOR THIS FELONY MURDER SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE (A) TWO AGGRAVATING CIRCUMSTANCES WERE IMPROPERLY FOUND, (B) THE JURY'S LIFE RECOMMENDATION WAS IMPROPERLY OVERRIDDEN AND (C) THE FACTS OF THIS CASE COMPARED WITH OTHERS DO NOT SUPPORT DEATH.

The state's brief reads as if the jury recommended death. It did not. The jury recommended life. This put the burden on the trial judge and the state to demonstrate that virtually no reasonable person could differ with a death sentence. Tedder v. State, 322 So.2d 908 (Fla. 1975). The judge's

order and the state's brief ignore the possible mitigation which the jury could have found to offset the two uncontested aggravating circumstances.

The state tried to have this Court view the death sentence as findings of fact which should not be disturbed unless unsupported by competent substantial evidence. (State's brief at 30). That rule yields to the preference for the jury's life recommendation; the jury's verdict is presumed correct.

When,as here, there is no showing of irrationality in the jury's recommendation,and the record contains evidence of mitigating circumstances, the judge's contrary sentence must be set aside.

[THERE WILL BE NO FURTHER ARGUMENT UNDER ISSUES V AND VI]

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER

MICHAEL J. MINERVA
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by U.S. mail to Wallace E. Allbritton, Assistant Attorney General,The Capitol, Tallahassee, Florida; and to Mr. Anthony S. Brown, #838162, Post Office Box 747, Starke, Florida 32091, on this 24th day of July, 1984.

MICHAEL J. MINERVA