

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 GENE MOORE,)
)
 Respondent.)
 _____)

CASE NO. 66,315

FILED
 SID J. WHITE
 JAN 21 1985
 CLERK, SUPREME COURT
 By _____
 Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
 Attorney General
 Tallahassee, Florida

MARLYN J. ALTMAN
 Assistant Attorney General
 111 Georgia Avenue, Suite 204
 West Palm Beach, Florida 33401
 Telephone: (305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2-3
POINT ON APPEAL	4
ARGUMENT	5-9
THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON GROUNDS OF INSUFFICIENT EVIDENCE.	
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Ashe v. Swenson</u> , 90 S.Ct. 1189 (1970)	6
<u>Brown v. State</u> , 413 So.2d 414 (Fla. 5th DCA 1982)	7
<u>Lynch v. State</u> , 293 So.2d 44, 45 (Fla. 1974)	6
<u>State v. Moore</u> , 424 So.2d 920 (Fla. 4th DCA 1982)	2
<u>Moore v. State</u> , 452 So.2d 559 (Fla. 1984)	2
<u>Rodriguez v. State</u> , 436 So.2d 219 (Fla. 2nd DCA 1983)	6
<u>Rose v. State</u> , 425 So.2d 521 (1982)	7
<u>Tibbs v. State</u> , 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)	3,8,9
<u>United States v. Orrico</u> , 599 F.2d 113 (6th Cir. 1979)	3,9

OTHER AUTHORITIES

	<u>PAGE</u>
24 Fla. Jr. 2d <u>Evidence and Witnesses</u> , Section 695 (1981)	6
Florida Evidence Code, Section 90.801(2)(a)	2

PRELIMINARY STATEMENT

Petitioner was the Prosecution in the trial court and Appellee in the Fourth District Court of Appeal. Respondent was the Defendant in the trial court and Appellant in the Fourth District Court of Appeal. The parties will be referred to in this brief as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal.

The Statement of the Case and Facts will be taken directly from the opinion of the lower court.

STATEMENT OF THE CASE AND FACTS

The grand jury indicted Respondent for first degree murder. Two witnesses testified before the grand jury and identified Respondent as the murderer but later recanted their statements in deposition. Respondent moved to dismiss the indictment on the grounds that no evidence existed to establish that he committed the murder. The trial court granted the motion and the State appealed. The district court reversed and held that the Florida Evidence Code, Section 90.801(2)(a) authorizes the use of prior inconsistent statements as substantive evidence. State v. Moore, 424 So.2d 920 (Fla. 4th DCA 1982). Respondent petitioned the Supreme Court for review and the Supreme Court in Moore v. State, 452 So.2d 559 (Fla. 1984) approved the lower court decision.

Before Respondent came to trial, the State prosecuted the two witnesses for perjury. Both pled guilty. Before accepting their pleas the judge asked the witnesses under oath which statements were true. Both testified that they had lied before the grand jury and that they had testified truthfully on deposition.

At the conclusion of the State's case, Respondent moved for a judgment of acquittal which was denied. The jury found Respondent guilty of second degree murder.

In reviewing the conviction the district court held that, "in the absence of some competent corroborating evidence

the admittedly perjured testimony of the witnesses did not constitute sufficient competent evidence to support Appellant's conviction of second degree murder."

The district court opinion states that court's reliance on United States v. Orrico, 599 F.2d 113 (6th Cir. 1979) in holding that prior inconsistent statements standing alone do not constitute sufficient evidence to sustain a conviction. Additionally, the court noted that this case involves not just prior inconsistent statements, but prior inconsistent statements which the witnesses admitted in their perjury trial had been false.

The district court opinion acknowledges, that Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), prohibits an appellate court from reweighing the evidence on appeal and limits review to a consideration of the sufficiency of the evidence. However, no analysis of the application of Tibbs to the case at bar is contained in the opinion. The district court found the issue to be one of first impression in Florida and considered the question raised in the appeal to be one of great importance. Therefore, the following question was certified as one of great public importance.

WHETHER A CONVICTION CAN BE SUSTAINED WHICH
IS BASED SOLELY UPON RECALLED GRAND JURY
TESTIMONY OF WITNESSES WHO ADMITTED THAT
THEY PERJURED THEMSELVES WHEN GIVING THE
TESTIMONY RELIED UPON TO SUSTAIN THE
CONVICTION?

POINT ON APPEAL

WHETHER THE TRIAL ERRED IN DENYING THE
MOTION FOR DIRECTED VERDICT OF ACQUITTAL
ON GROUNDS OF INSUFFICIENT EVIDENCE?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING THE
MOTION FOR DIRECTED VERDICT OF ACQUITTAL
ON GROUNDS OF INSUFFICIENT EVIDENCE.

The question certified to this Court by the district court must be answered in the affirmative. A conviction can be sustained despite the fact that it is based solely upon the recanted grand jury testimony of witnesses who admitted that they perjured themselves when giving the testimony relied upon to sustain the conviction. Consequently, the order of the district court reversing Respondent's conviction must be quashed and the case remanded to the district court for reinstatement of Respondent's conviction and sentence.

Initially, Petitioner would point out that the district court decision awarded unwarranted significance to the fact that the recanting witnesses stated under oath that they had lied before the grand jury. Their statement that they lied before the grand jury is not conclusive and not equivalent to a judicial determination that the testimony before the grand jury was perjured. As noted by the trial judge, when Judge Mounts accepted the plea of guilty and found that they had committed perjury by inconsistent statements, he did not make a finding that the grand jury testimony was false, merely that there had been contradictory statements.¹

FOOTNOTE 1

¹Inasmuch as Respondent claimed the existence of an estoppel argument against the use of the recanted grand jury testimony because of the witnesses' conviction of perjury by

The district court was wrong in finding that prior inconsistent statements standing alone could not constitute sufficient evidence to sustain the conviction. This case essentially dealt with the statements of two witnesses who later contradicted themselves. The credibility of such witnesses and their statements should properly be left to the assessment of the jury. 24 Fla. Jur. 2d Evidence and Witnesses, Section 695 (1981); Rodriguez v. State, 436 So. 2d 219 (Fla. 2nd DCA 1983). The Rodriguez case cites the earlier case of Lynch v. State, 293 So.2d 44, 45 (Fla. 1974) in which this Court stated that:

The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

Despite Respondent's contentions to the contrary there was certainly a reasonable and convincing basis for the jury to find that the prior statements made to the grand jury were more reliable than the recantation testimony of the two witnesses. Defense counsel had the opportunity of full cross-examination and provided the witnesses with the opportunity to explain the inconsistency of their testimony. The fact

FOOTNOTE 1 (cont.)

contradictory statements, reliance upon the doctrine of collateral estoppel is misplaced. In Ashe v. Swenson, 90 S.Ct. 1189 (1970) the United States Supreme Court held collateral estoppel to apply where an issue of ultimate fact has been determined by a valid and final judgment and that such issue cannot again be litigated between the same parties in any future law suit. In the instant case, Respondent was not a party to the perjury prosecutions nor was the issue of truth or falsity of the respective statements an element of the crime of perjury by contradictory statements, therefore the estoppel argument cannot apply.

that the jury chose to believe the grand jury testimony as opposed to the recantation is not a basis for holding that the evidence was insufficient. Clearly, the trial judge properly denied the motion for judgment of acquittal and in reviewing this issue the standard to be applied is not whether in the opinion of the trial judge or of the appellate court the evidence failed to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude.

Rose v. State, 425 So. 2d 521 (1982). Likewise the motion for new trial asserting that the weight of the evidence did not support the jury verdict of guilty was properly denied because there was a very sufficient basis for the finding of guilt by the jury.

Essentially, the district court reweighed the evidence in this cause and determined that although prior inconsistent statements may qualify as competent evidence, such evidence cannot sustain a conviction without corroboration. On this point the district court opinion is incorrect.

The case of Brown v. State, 413 So.2d 414 (Fla. 5th DCA 1982) presented a somewhat analogous situation wherein excluding Brown's illegally induced confession, there was no evidence identifying him as one of the perpetrators, except out-of-court statements made by the victims of the crime, Mr. and Mrs. Boatman. Brown had originally been identified from a group of photographs by Mr. Boatman who later signed an affidavit recanting his prior identification. Mrs.

Boatman also identified Brown as one of the three or four involved in the crime shortly after it was committed; but on the stand, she denied making the prior identification. Although Brown's conviction was reversed on the confession issue, the court remanded for a new trial finding it possible that the jury could have believed the prior identifications, despite the in-court doubts and denials.

In reversing the conviction at bar the district court opinion acknowledged ^{that} Tibbs v. State, 397 So.2d 1120 (Fla. 1981) aff'd 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) prohibits reweighing the evidence on appeal and limits review to a consideration of the sufficiency of the evidence. However, the district court opinion offers no analysis of the reversal under Tibbs to demonstrate that the court was not in fact reweighing the evidence as Petitioner maintains occurred.

The lower court opinion sub judice unwittingly reinstates that third category of appellate reversals referred to in Tibbs, supra at 1125 where the evidence is technically sufficient but its weight tenuous or insubstantial. However, Tibbs made clear that no appellate court should reverse a conviction on the ground that the weight of the evidence is tenuous or insubstantial. The role of Florida appellate courts is limited to examining the sufficiency of the evidence, leaving questions of weight for resolution only before the trier of fact.

The district court opinion relies upon the case of United States v. Orrico, 599 F.2d 113 (6th Cir. 1979), as authority for the reversal herein. That case represents an example of the adage that "hard facts make bad law." In Orrico, the evidence incriminating the defendant was as attenuated as is reasonably imaginable which explains, but does not justify, that court reaching the result which it did. In any event, the decision is not binding on this Court.


Upon review of the record it should be clear to this Court that sufficient evidence was presented upon which a reasonable jury could have convicted the Respondent. The fact that the only evidence the State could present was later disavowed by those witnesses does not effect the sufficiency of the evidence, only the weight of that evidence. Consequently, under Tibbs, supra, reversal of Respondent's conviction was improper.

CONCLUSION

Based on the foregoing presentation, supported by the authorities cited therein, Petitioner respectfully urges this Court to enter an Order quashing the decision of the district court below.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida 32301




MARLYN J. ALTMAN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished, by United States Mail, to NELSON E. BAILEY, ESQUIRE, Commerce Center, Suite 303, 324 Datura Street, West Palm Beach, Florida 33401, this 17th day of January, 1985.



Of Counsel