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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 66,315
	)	
GENE MOORE,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S REPLY BRIEF

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

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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.

STATEMENT OF THE CASE AND FACTS

Petitioner finds Respondent's submission under "Statement of the Case and Facts" to be argumentative, and conclusory, and presents an extremely one-sided version of facts or so-called facts, non-essential to the issue before the Court. However, rather than motion this Court to strike Respondent's Facts, Petitioner will supplement its own Statement of the Case and Facts in order to provide the Court with a comprehensive report of the circumstances of this case.

One of the recanting witnesses, A.C. Tumblin, Jr., testified at trial that he was not present the night Robert Neller was shot and killed (R. 268). However, he did say that he was good friends with the Respondent and that Respondent was his uncle-in-law (R. 270). Tumblin was interviewed by Officer Franklin and Detective Perry and shortly thereafter gave his grand jury testimony. Prior to the grand jury testimony he had not told his wife or family that he had spoken with the police and reported that Respondent had shot and killed the man on Singer Island (R. 273-274). Subsequent to that he was confronted by his wife and other members of his family who had a copy of his grand jury statement and told him he was lying (R. 282). His wife asked him why he had lied (R. 284). And that was the first time Tumblin had said the police coerced or tricked him into saying that Gene committed the murder (R. 284).

Prior to the deposition in which Tumblin recanted his grand jury testimony, he received a note from Respondent's girlfriend to get in touch with Respondent's lawyer. The note was dated March 19, 1981. Tumblin was aware that Janis had gone to visit the Respondent (R. 287).

During the deposition in which Mr. Tumblin recanted his grand jury testimony he stated that the police had not told him the facts of the case and that he knew about it from T.V. (R. 294). He also stated that he didn't make the incriminating statement to the police because he was afraid of them but because he had been drinking when they came and that they didn't threaten him (R. 297-298). He admitted testifying before the grand jury that he had seen Gene Moore shoot the man two times. When asked where he had learned those facts from he said he didn't learn them from any place and that they were lies made up out of the clear blue sky (R. 301). Despite his earlier deposition statement that he had heard about the incident on T.V., on the witness stand he denied seeing it on the television and denied that the police had told him about the incident (R. 303). Prior to giving his recantation, Tumblin had heard that Gene Moore was going to be out of jail in about seventy-two hours (R. 306-307). Tumblin also heard through one of Respondent's visitors that Respondent had said Tumblin lied on him (R. 309-310). Further Tumblin stated that no one had told him what Crystal Price had told the police (R 311).

A.C. Tumblin's wife Brenda Tumblin testified that when the family came over to the house with copies of her husband's

statements, she got on his case (R. 350). She also told him to give the deposition and tell the "truth." (R. 355).

Detective Milton Perry had interviewed A.C. Tumblin and testified that Tumblin was very concerned about family reactions in this case. He didn't want the police to tell the family, especially the wife about the statement he had made (R. 404-405).

Crystal Price Copen also testified to being good friends with the Respondent (R. 412). The Respondent's brother picked her up and took her to the deposition in which she recanted her grand jury testimony (R. 415). It was her belief at that time that there was a possibility that all charges against the Respondent would be dropped (R. 416).

Although Ms. Copen denied ever having been to Singer Island until a date subsequent to the incident in question, her testimony was impeached by that of Tina Piper who testified that she had spoken to Ms. Copen behind the Blue Heron Bar and was told about the shooting on Singer Island and that the Respondent had shot the man twice (R. 460-465).

POINT ON APPEAL

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

SUMMARY OF THE ARGUMENT

Petitioner's position is that Respondent's conviction should 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.

ARGUMENT

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

Respondent has argued that the State prosecuted this case through the "knowing use of perjured testimony." It must be emphasized that when Judge Mounts accepted the pleas of guilty and found that Tumblin and Price 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] Further, while there was no evidence beyond the recanted Grand Jury testimony, it is important to note that the Grand Jury testimony of each witness corroborated that of the other on all pertinent points.

Additionally, Respondent has argued that defense counsel was precluded from effect cross examination of the two recanting witnesses. But in fact defense counsel was permitted to examine the witnesses at length regarding how it came to be that they gave these allegedly "false statements" to the Grand Jury. And what is clear is that despite the defense presentation that Tumblin and Price had been coerced by the police into giving the Grand Jury statements, the jury

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FOOTNOTE 1

[1]Inasmuch as Respondent claims an estoppel argument against use of the recanted Grand Jury testimony, see footnote 1 in Petitioner's initial brief.

obviously chose to believe those statements and not their trial testimony. Contradictory statements of a witness are matters for the jury, and, unless they are so flagrant as to make the testimony entirely unworthy of belief, a finding of the jury based on the testimony of that witness will not be disturbed. 24 Fla. Jur. 2d Evidence and Witnesses, Section 695 (1981). It is the sole responsibility of the jury (note the trial or appellate court) to assess the credibility of witnesses, Rodriguez v. State, 436 So.2d 219 (Fla. 2d DCA 1983).

Petitioner would reassert the analogousness of Brown v. State, 413 So.2d 414 (Fla. 5th DCA 1982) to the case at bar. 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. Just as those statements identifying Brown as the perpetrator were stated sufficient to maintain a conviction, so too, should the prior sworn statements in the case at bar be held sufficient to support Respondent's conviction.

There are additional analogies to be made between Brown, supra, and the case at bar. Both the witnesses in Brown and in the instant case testified that they had not been intimidated by the defendant's family. However, in Brown as in the case at bar, there were circumstnaces which might lead a jury to conclude otherwise, e.g. subsequent to Tumblin's Grand Jury testimony he was confronted by his wife

and other members of the family who had a copy of the statement and told him he was lying (R. 282). Further, just as Boatman gave testimony in which he contradicted himself, so too here, Mr. Tumblin gave statements which were contradictory.[2] The court in Brown, supra, at 416 then found that

> Under these circumstances, it appears the jury could have believed the prior identifications, despite the in-court doubts and denial. As Judge Friendly said in United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964), quoting McCormick Evidence 75-76 (1954):
>
> > Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation or appeal to sympathy ... [but] the greater the lapse of time between the event and the trial,

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FOOTNOTE 2

[2]During the deposition in which Mr. Tumblin recanted his Grand Jury testimony he stated that the police had not told him the facts of the case and that he knew about it from T.V. (R. 294). He also stated that he didn't make the incriminating statement to the police because he was afraid of them but because he had been drinking when they came and that they didn't threaten him (R. 297-298). He admitted testifying before the grand jury that he had seen Gene Moore shoot the man two times. When asked where he had learned those facts from he said he didn't learn them from any place and that they were lies made up out of the clear blue sky (R. 301). Despite his earlier deposition statement that he had heard about the incident on T.V., on the witness stand he denied seeing it on the television and denied that the police had told him about the incident (R. 303). Prior to giving his recantation, Tumblin had heard that Gene Moore was going to be out of jail in about seventy-two hours (R. 306-307). Tumblin also heard through one of Appellant's visitors that Appellant had said Tumblin lied on him (R. 309-310). Further Appellant stated that no one had told him what Crystal Price had told the police (R. 311).

> the greater the chance of exposure of the witness to each of these influences ...

Similarly, in the instant case, the circumstances were such that 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 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 (Fla. 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 guilty by the jury.

In summary, it has been established that the recanted Grand Jury testimony was properly admitted as substantive evidence at trial. This evidence was sufficient to convince a properly instructed jury beyond a reasonable doubt that the

Respondentwas guilty of the offense of second degree murder. 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 v. State, 397 So.2d 1120 (Fla. 1981) aff'd 457 U.S. 31 (1982), 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 and remanding the case to that Court for reinstatement of Respondent's conviction and sentence.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Marlyn J. Altman

MARLYN J. ALTMAN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33402
Telephone: (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief has been furnished by United States mail to NELSON E. BAILEY, LAWYER, Commerce Center, Suite 303, 324 Datura Street, West Palm Beach, Florida 33401 this 26th day of February, 1985.

Marlyn J. Altman
Of Counsel