IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

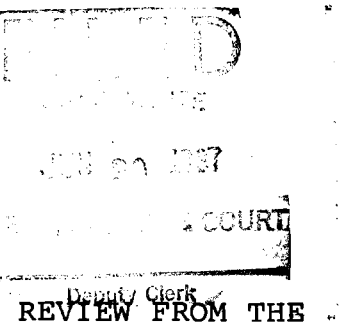
Petitioner,

vs.

CASE NO. FSC 70789
CASE NO. 5DCA 86-1016

JAMES HENDERSON,

Respondent.



ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

On April 26, 1985, the respondent, James Henderson, was charged by information with the crimes of second degree murder, possession of a firearm in the commission of a felony, and carrying a concealed firearm. All three charges related to the April 5, 1985 shooting death of one Jimmy Lee Edwards. On April 14-17, 1986, the respondent was tried before a jury on said information.

At trial, the state presented evidence from numerous witnesses. Patricia Brisbane, an eyewitness to the shooting, testified that she and the deceased, Jimmy Lee Edwards, were traveling to the store on a bicycle when a group of people drove up in a pickup truck. [See Appendix 1 - Testimony of Patricia Brisbane] (R 27). As she and Jimmy Edwards were entering the store, someone in the truck called Jimmy Edwards a "nigger" (R 27). The person who made that statement was identified as the respondent, the person who later "jumped out of the truck and shot [Jimmy Edwards]" (R 27). The respondent got out of the truck, went into the middle of the road and asked Jimmy Edwards if he wanted to fight (R 28-30, 41). Patricia Brisbane observed the respondent "[reach] from the back of his pants", pull a gun and shoot Jimmy Edwards (R 29). Jimmy Edwards never approached or attacked the respondent (R 29, 36). The respondent jumped back in the truck and left (R 30). During this time, Patricia Brisbane was within fifteen feet of Jimmy Edwards (R 34).

The respondent also testified. He claimed that he attempted to retreat from the confrontation in the middle of the street.

The respondent testified that Jimmy Edwards pursued him across the street where a struggle ensued beside the truck in which the respondent had been a passenger. The respondent claimed that he acted in self-defense during this renewed encounter. The respondent also claimed the shooting was accidental.

On April 17, 1986 the jury found the respondent guilty as charged. The lower court thereupon adjudicated the respondent guilty. On May 30, 1986, the lower court sentenced the respondent to seventeen years in prison followed by five years probation.

The respondent appealed. The Fifth District Court of Appeal, with one dissent, reversed the respondent's convictions for second degree murder and possession of a firearm in the commission of a felony. [See Appendix 2 - Decision rendered April 9, 1987]. Henderson v. State, 12 F.L.W. 990 (Fla. 5th DCA April 9, 1987). In rendering its decision, the district court discussed at length the character of the testimony given by Patricia Brisbane. With respect to the issue of self-defense, the district court characterized Brisbane's testimony as "negative", i.e., that Brisbane did not observe whether Jimmy Edwards renewed the confrontation after it had been interrupted. In characterizing Brisbane's testimony as "negative", the district court found Brisbane's testimony legally insufficient to overcome the respondent's version of events, which the district court characterized as "positive" testimony. Citing Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961), and Welfare v. Seaboard Coast Line Railroad

Company, 373 So.2d 886 (Fla. 1979), the district court ruled

> Such negative testimony as that given by Brisbane has consistently been held insufficient to create a factual issue in the face of positive testimony.

In reversing two of the respondent's three convictions, the district court maintained it was not "reweighing" the evidence presented to the jury.

Following the denial of a motion for rehearing, the petitioner timely filed its notice to invoke discretionary jurisdiction. [See Appendix 3 - Order denying motion for rehearing, dated May 22, 1987].

SUMMARY OF ARGUMENT

In rendering the instant decision, the district court below has both misinterpreted and misapplied this Court's decisions in Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961), and Welfare v. Seaboard Coast Line Railroad Company, 373 So.2d 886 (Fla. 1979). The district court below has misinterpreted Tyus and Welfare by holding that appellate review of evidentiary sufficiency extends to the reevaluation of the sufficiency of "negative" testimony to overcome "positive" testimony of self-defense. Those two cases actually hold that the evaluation of "negative testimony v. positive testimony" is not an issue of evidentiary sufficiency but rather an issue of evidentiary weight to be decided by the trier of fact. In misinterpreting Tyus and Welfare, the district court below has exceeded the bounds of appellate review as authorized by Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Moreover, the district court below misapplied Tyus and Welfare as it should have concluded that any "negative" testimony by Brisbane was competent, i.e., that it was made based upon having had sufficiently observed the events about which she testified. Therefore, the decision of the district court below expressly and directly conflicts with this Court's prior decisions in Tyus and Welfare.

ARGUMENT

ISSUE

WHETHER THE INSTANT DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961), AND Welfare v. Seaboard Coast Line Railroad Company, 373 So.2d 886 (Fla. 1979).

In Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580, 585 (Fla. 1961), and Welfare v. Seaboard Coast Line Railroad Company, 373 So.2d 886, 888 (Fla. 1979), this Court held

> The gist of our rule in relation to negative testimony in the face of positive testimony to the contrary is that if **a jury decides** that the attention of the witness whose testimony is negative in character, is actually directed to the fact or situation, about which he later testifies, regardless of the reason therefor, said jury may consider such negative testimony and accord to it the weight it may deem proper.

The decision of the Fifth District Court of Appeal sub judice expressly and directly conflicts with this rule as established by this Court's Tyus and Welfare decisions.

In the decision sub judice, the district court discussed at considerable length the character of the testimony of Patricia Brisbane. The district court concluded that the testimony of Patricia Brisbane was "negative" testimony and that the record did not demonstrate whether Brisbane sufficiently observed the events leading up to the death of Jimmy Edwards. In essence, the district court concluded that Brisbane's testimony was incompetent as it related to the respondent's claim of self-

defense. Relying on this Court's decisions in Tyus, supra, and Welfare, supra, the district court below ruled

> Such negative testimony as that given by Brisbane has consistently been held insufficient to create a factual issue in the face of positive testimony.

In the decision sub judice, the district court has plainly misinterpreted this Court's rulings in Tyus, supra, and Welfare, supra. The district court below may not rely on the "negative testimony v. positive testimony" distinction as the Tyus and Welfare decisions expressly hold that said distinction is one of evidentiary weight. This point is clearly proven in the Welfare case. In the district court case in Welfare, the First District Court of Appeal reviewed the evidence and characterized the relevant testimony as either positive or negative. See, Seaboard Coast Line Railroad Company v. Welfare, 350 So.2d 476, 478-479, (Fla. 1st DCA 1977). However, in Welfare, supra at 373 So.2d 888-889, this Court criticized the district court for its "review" of the evidence.

> As to whether evidence of excessive speed presented a jury question on proximate cause, we cite as controlling our recent case of Helman v. Seaborad Coast Line Railroad, 349 So.2d 1187 (Fla. 1977), and our directions to the appellate courts of this state stated therein:
>
> We initiate this analysis by articulating three incontrovertible premises of law which are relevant to our disposition of this case. First, it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury ...Second, if there is any competent evidence to

> support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness. . .Finally, the question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question... [Citations omitted].
> . . .Because there was some competent evidence to support the jury verdict that respondents were negligent in traveling at an excessive speed and in failing to sound their whistle when required, the jury was concomitantly imbued with the function of deciding whether such negligence was a proximate cause of the injury.

[emphasis supplied]. In its decision herein, the Fifth District Court of Appeal has made the same mistake criticized in Welfare, supra. The decision sub judice should be likewise quashed.

Since the Tyus and Welfare decisions clearly indicate that the "negative testimony v. positive testimony" distinction is a matter of evidentiary weight to be resolved by the trier of fact, it is likewise clear that the district court below could not reconsider the sufficiency of Brisbane's testimony on this basis. In the decision sub judice, the district court has plainly reweighed the evidence contrary to Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Moreover, to do so with express reliance on Tyus, supra, and Welfare, supra, provides this Court with the requisite express and direct conflict upon which it may accept review of this case.

Even if the district court below has not misinterpreted the

Tyus and Welfare decisions, that court has definitely misapplied them. Assuming that the district court can review "negative testimony v. positive testimony" in the guise of appellate review of the legal sufficiency of the evidence in this case, the district court has definitely overlooked that there was substantial evidence to show that Patricia Brisbane's testimony was competent, i.e., that she had the ability to observe who renewed the confrontation between the respondent and Jimmy Edwards and did not see Edwards act as the aggressor. The record clearly demonstrates that at the relevant times Patricia Brisbane was able to observe the respondent as he started a fight with Jimmy Edwards and shot him (R 34).

The instant decision of the district court should be reviewed. This Court's decisions in Tyus, supra, and Welfare, supra, do not provide any exception to its strict rule prohibiting district courts from reweighing the evidence on appeal. The district court has done so by its decision herein and has grievously erred in reversing a conviction for second degree murder. This Court should accept jurisidiction in this case, quash the decision of the district court, and reinstate the judgment and sentence of the trial court.

CONCLUSION

Based upon the arguments and authorities herein, the petitioner respectfully requests this Court to rule that the decision sub judice expressly and directly conflicts with prior decisions of this Court. The petitioner further requests this Court to accept discretionary review of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on jurisdiction has been furnished by mail to: Mark L. Lubet, Esquire, Lubet & Woodard, P.A., 209 East Ridgewood Street, Orlando, FL 32801 on this 29th day of June, 1987.

JOSEPH N. D'ACHILLE, JR.
OF COUNSEL