DH 1-6-88

Reg App

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
NOV 4 1987
CLERK, SUPREME COURT
By
Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 70,789

JAMES HENDERSON,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

AUTHORITIES CITED

CASES — PAGE

STATEMENT OF THE CASE

On April 26, 1985, the respondent, James Leroy 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 (R 650-51). All three charges related to the shooting death of one Jimmy Lee Edwards. On April 14-17, 1986, respondent was tried before a jury on said information (R 699-71).

On April 17, 1986, the jury found respondent guilty as charged (R 700-01, 704-06). The trial court thereupon adjudicated respondent guilty (R 707-09). On May 30, 1986, the trial court sentenced respondent to seventeen years in prison followed by five years probation (R 730-33, 735). An appeal to the Fifth District Court of Appeals followed.

On April 9, 1987, the district court reversed respondent's murder and firearm use convictions, and affirmed the concealed weapon conviction. Henderson v. State, 507 So.2d 632 (Fla. 5th DCA 1987). Petitioner then sought to invoke the discretionary jurisidction of this court, on the basis that the decision of the district court conflicted with prior decisions of this court on which the district court decision was based. This court accepted jurisdiction on September 15, 1987.

STATEMENT OF THE FACTS

On the evening of April 25, 1985, Respondent, his wife Dina Henderson, and their friends Johnny Eastham, Chris Eastham and Rhonda Butcher drove to Orlando from their hometown of Sanford (R 451). The group was travelling in Johnny Eastham's customized Bronco truck, which due to its oversized tires, rides about three feet off of the ground (R 302). Respondent had in his possession a .25 caliber handgun (R 450). The group drove to the Tangerine Bowl, which is a stadium located in a section of Orlando that is populated primarily by blacks (R 451). The purpose for going to the T-Bowl was so that respondent could show Johnny Eastham, the driver of the Bronco, a shortcut into the stadium for future attendance at tractor pulls (R 299).

Prior to arriving at the T-Bowl, respondent had shot at a streetlight (R 397). While at the T-Bowl or a short distance from it, the group in the truck encountered Jimmy Lee Edwards, a black man, who was riding a bicycle down the street with an eleven-year-old black girl, Patricia Brisbane, seated on the handlebars (R 27). The events that followed are in conflict. This being the case, petitioner will shortly relate the facts as they were told by and/or about each of the participants in that evening's tragedy. For the moment, it is enough to say that respondent shot and killed Edwards, jumped back into the truck, and returned to Sanford with his buddies (R 30).

Detective John Chisari of the Orlando Police Department was the lead investigator in the case. He testified at trial that his initial investigation turned up no leads as to the identity

of Edwards' killer (R 47-52). Four days after the shooting, Jim Bishop of the department's Crimeline unit informed Chisari that he had received information from an anonymous source regarding who participated in the shooting (R 53). The source identified by name all members in the truck (R 54). Statements were obtained from all of these witnesses (R 54-61). Respondent gave a taped statement (R 59-61, 165-171), which was introduced into evidence (R 170-71). The conflicting facts are as follows:

Jimmy Lee Edwards:

Obviously Mr. Edwards was not available to testify, as he was shot in the heart by respondent that night and died shortly thereafter. However, a number of other witnesses testified as to what Edwards did, what he saw, how he felt, and why he felt that way.

Dr. Thomas Hegert, an expert in pathology, was the medical examiner who performed the autopsy on Edwards (R 114). Dr. Hegert found no evidence of powder tattooing or powder residue on Edwards' skin or shirt to indicate close proximity of the muzzle of the gun to Edwards (R 120, 123). Dr. Hegert also testified that there was cocaine in Edwards' urine at the time of death, but that without any information as to the condition of the blood, he would be unable to render an opinion as to whether or not Edwards was under the influence of cocaine (R 155). Jack Smith, the lab technician who performed the tests on Edwards' urine, testified that in his opinion Edwards was under the influence of cocaine when he died (R 198).

Dr. Daniel Goldwyn, a psychiatrist called by the defense,

testified regarding Edwards' "cocaine intoxication". He had testified about cocaine intoxication at least two other times (R 262). He testified that there are four criteria involved in determining cocaine intoxication, and at least three variables in determining how long it lasts (R 242, 263-64). A diagnosis cannot be based on proof of only one criterion (R 264). The fact that Edwards had cocaine in his urine satisified one of those criteria (R 263). Goldwyn had never treated or examined Edwards (R 264). He based his opinion on the fact that Edwards had cocaine in his urine, and on statements from defense witnesses about Edwards behavior (R 269).

Donald Adams was the paramedic who was called to the scene (R 87). He found Edwards laying face down, with one arm folded beneath him and one at his side (R 88). There was a knife laying on top of his back, with the handle facing towards Edwards' head, and the blade close to his pocket (R 89).

Patricia Brisbane:

Miss Brisbane is the eleven-year-old girl who was seated on the handlebars of the bike Edwards was pedalling (R 27). They were riding on the side of the road (R 32). She testified that she and Edwards had ridden to a store, and as they were stepping up to the store, petitioner called them niggers (R 27, 34). Edwards called him a name back (R 28). Respondent jumped off the back of the truck, and asked Edwards if he wanted to fight (R 28-30, 41). Both men were in the middle of the road (R 30). Brisbane stated that the truck ran Edwards off the road, and respondent got up on the truck (R 37). Brisbane heard a lady in

the truck tell respondent "don't do it," then Brisbane stated "he did it anyway" (R 38). Brisbane observed the two men going around in a circle, and respondent just pulled out a gun (R 336). Brisbane testified that Edwards did not pull a knife, although he was reaching back there for "something" (R 29). Brisbane did not see Edwards approach respondent or try to cut him (R 29). The two men were never closer than four feet to each other (R 36), and Brisbane was approximately fifteen feet away (R 34). After shooting Edwards, respondent jumped back in the truck, the truck drove off, and Brisbane ran home got her mother. They called the police, and went in search of Edwards (R 28-31).

Johnny Eastham:

Eastham was driving the truck that night (R 300-01). In his initial statement to the police several days after the incident, Eastham stated that when he stopped the truck, the black boy was a good hundred feet away, and also stopped (R 317). Respondent jumped out of the truck, and the black boy started walking toward respondent (R 317). Respondent started walking toward the black boy, then went back to the truck, reached in and grabbed a gun, put it in his back pocket and walked toward the black boy (R 317). Eastham stated that respondent could have gotten back in the truck at that point, but instead he put the gun in his back pocket (R 319). It was a black boy, and he just wanted to fight him (R 320). When the black boy swung, respondent reached for his back pocket and got the gun out (R 327). Respondent did not go past his waist and did not have a chance to aim (R 327).

Eastham never told the police that Edwards was making remarks about the women in the truck (R 315). At trial, Eastham testified that everything in his statement was wrong (R 320).

At his deposition in August, 1985, Eastham stated that he knew respondent was carrying a gun, and he had shot out a street light when they were driving around prior to the incident (R 321, 326). Eastham again stated that respondent could have just gotten back in the truck (R 322). Eastham had seen a "similar" incident reported on the news the night after the instant incident occurred (R 332).

At trial Eastham testified that his group was sitting and talking in the truck near the parking area at the T-Bowl (R 300-01). Mr. Edwards (the "black boy") and the little girl (Brisbane) rode in front of them on the sidewalk (R 301). Edwards said something about the headlights and something about the girls in the truck (R 302). The truck pulled out and proceeded down the road (R 302). The truck passed the bicycle, and the bicycle proceeded down the sidewalk in the same direction, with Edwards hollering the entire time (R 303). At some point, respondent said something to Edwards (R 303).

The truck then pulled up to a store, which was closed, so Eastham turned the truck around and pulled back out onto the same street (R 304). Edwards had gotten off of his bike, and was still hollering (R 304). Edwards was walking towards the truck, which was moving away from him (R 305). Eastham stopped the truck and respondent got out (R 305). Eastham sort of "cocked my truck around like this" (R 305). The truck was 50-75 feet away

(R 307). Respondent was calmly walking toward Edwards, and before Respondent got four or five feet in front Edwards, Edwards pulled a knife from "behind his back leg" (R 305).

Edwards swung the knife at respondent, and respondent ducked (R 306). Edwards "stayed on" respondent (R 306). Edwards was swinging the knife and respondent was backing up the entire time (R 306-07, 324). Edwards backed respondent from the right side to the left side of the road (R 307). They were moving toward the truck (R 307). Respondent could not turn his back the entire time (R 307, 323, 324).

Eastham moved the truck until he got to them, and stopped (R 308). Edwards was directly in front of the truck, about one foot away (R 308, 345). Respondent was on the passenger side attempting to get back in the truck (R 308). Eastham believed he heard a warning about the gun (R 309). Edwards came around the front of the truck and lunged at respondent, and the gunfire went off (R 308).

Due to the height of the truck, Eastham did not see the gun, respondent's arm or respondent's waist (R 328-29). Eastham assumed the gun came from respondent's waist because he had a holster (R 329). It was "just imagination" (R 331). After the shooting, everyone headed back home to Sanford, and not a word was spoken the entire way (R 333). Eastham read about the incident after giving his statement to the police (R 311). If he had known Edwards was shot, he would have called the police (R 311).

Dina Henderson

Dina Henderson is respondent's wife, and she was seated in the middle of the back seat (R 300-01). Henderson testified that Edwards was walking down the street and said something to them (R 350). She then stated that Edwards was riding a bike and said something she could not make out (R 350). Edwards walked across the street to where the truck was, and respondent got out of the truck to find out what Edwards' problem was (R 351). She did not see the knife until Edwards had respondent backed up against the truck (R 352).

Eastham was moving the truck forward because respondent was running from Edwards, and Edwards was right on his heels (R 366, 368). Edwards had respondent backed up against the truck (R 352, 353, 366). Respondent was on the passenger side of the truck, with his back to the truck, and had one hand in the air and was asking Edwards what was the problem (R 353, 366). Respondent told Edwards that he did not have a problem with him, and also that he had a gun (R 353). Edwards swung the knife at respondent's neck level, respondent ducked, and Henderson heard a shot (R 353, 367).

Henderson also testified that she never said anything to respondent while he was confronting Edwards, that respondent never came back to the truck to retrieve anything, that she never saw or heard any publicity on the incident, and that respondent stated he did not think he had shot Edwards (R 356, 357).

In her statement to the police several days after the incident, Henderson stated that after respondent got back in the

truck he said he shot the man (R 361-62).

Chris Eastham:

Chris Eastham is Johnny Eastham's younger brother, and he was sitting in the front passenger seat (R 300-301). Eastham testified that Edwards had crossed in front of them and said something about the headlights being in his face (R 373). Respondent then stood up and asked Edwards if the little girl's mom knew where she was (R 374). Edwards left, and they drove by him again, at which time Edwards said something about the girls in the truck (R 374). Respondent did not say anything, and jumped out of the truck (R 375, 383). Respondent was standing there and Edwards, who had jumped off his bike, began walking toward him (R 376). Johnny Eastham said that Edwards had a knife (R 376). The witness really did not remember what happened after that, because he was in the truck covered up (R 379). There was no conversation on the way home (R 379).

Eastham testified he never saw any media coverage of the incident (R 380). He would have called the police if he had known Edwards had been shot (R 380).

In both his statement several days after the incident and his deposition several months after the incident Eastham stated that respondent had said, "Stop the truck. I'm fixing to kick his butt." (R 384-85).

Rhonda Butcher:

Butcher was Johnny Eastham's girlfriend, and she was sitting in the back seat on the passenger side of the truck (R 393). Butcher testified that they were driving down the road and the

bicycle pulled up beside them on the sidewalk (R 397). As Edwards was riding next to them, he asked if the men were having trouble with their women (R 398). Respondent said to Eastham, "Have you ever seen me fight before? I'm going to get out and fight him. Let me out." (R 399, 412). The truck stopped, and respondent got out (R 400). Butcher thought respondent was carrying the gun with him in the holster (R 400).

Edwards got off the bike and threw it to the ground and stood at the edge (R 401). Respondent had gotten out of the truck before Edwards started approaching (R 411). Edwards was sitting there saying "come on, come on." (R 411). Edwards reached for his pant leg and started walking toward respondent "pretty fast" (R 401). Respondent started backing away, saying that he had a gun (R 401). Edwards kept coming, and Butcher saw a shiny reflection that looked like a knife, which Edwards kept slashing at respondent (R 401). Respondent kept backing up, saying he had a gun (R 401). Respondent warned Edwards about the gun five or six times (R 402).

The truck turned around (R 402). Edwards and respondent were in the street, after they had backed up to and from each other (R 402). The truck separated them, and Edwards came toward respondent, and respondent shot him (R 402). The two were about arm's length apart, and Edwards was stabbing down in a slashing motion and respondent was backing up as the shot was fired (R 403). Butcher did not see the shot (R 403).

Butcher also testified that when respondent hopped out, he had both hands free, and when he saw Edwards grab for a knife, he

started backing up (R 410). The prosecutor then asked "and then he [respondent] got the gun and then approached at the same time the truck was in between the defendant and the victim?" (R 410). Butcher replied "Yes ma'am. It was at the very beginning, the truck was to the right of - of to Jimmy" (R 410).

In her statement to the police, Butcher had said that respondent was in the middle of the road, and Edwards took out a knife and swiped down. Respondent backed up and obtained a gun, and told Edwards to put the knife down (R 408). Respondent said "let's fight fair because I have a gun" (R 408).

Butcher testified that respondent did not know if he had shot Edwards, and they were speculating about it on the way home (R 404). Johnny Eastham heard about the incident on the news and told her about it (R 405).

Respondent

Respondent testified that the truck was in the parking lot at the T-Bowl when the bike rode in front of them (R 452). Edwards and Brisbane were both off the bike, and Edwards said something to the people in the truck (R 453). The truck drove off, and respondent asked Edwards if the little girl's mama knew where she was (R 453). Edwards was riding beside the truck yelling things at the girls in the truck, then he was chasing the truck making gestures and still yelling (R 455). Respondent believed that Johnny Eastham wanted to "meet" with Edwards (R 455). Initially respondent told Eastham just to leave, beause they did not "need this" (R 455), but then he told Johnny to go ahead and stop the truck and he would take care of it (R 455).

Respondent climbed over the side of the truck, and stayed at the side of the truck (R 455-56). Edwards got off the bike, and left Brisbane there holding it (R 456). They were about 75 feet from the truck (R 456). Edwards started toward respondent at a fast pace, and respondent stopped maybe twelve feet from the truck (R 456). Respondent saw Edwards pull something from his sock (R 456). The truck was being turned around as he was pulling the knife out of his sock (R 471). Edwards had to pull his pants way up (R 456). He pulled it from his left boot or sock, put it behind his back and switched it to his right hand (R 456). Edwards was walking toward respondent, who figured he had a gun or knife (R 456). Apparently respondent could not quite make out what it was when he saw Edwards switching hands behind his back. Respondent took a step back because Edwards was going to lunge at him, and that was when the first swing came (R 457). Respondent was carrying the gun on his belt, right behind the belt loop (R 457).

Respondent next testified that he got out of the trunk and asked Edwards what the problem was (R 458). Edwards swung the knife, and respondent told him to put the knife down because he had a gun (R 458). Respondent put his hand on the gun, looked at the truck and started to run sideways (R 458). Edwards moved with him, and respondent turned in a full run toward the truck, hoping Edwards would not follow him (R 458). The truck went past respondent and pushed Edwards up on the curb (R 458). Respondent went from the back of the truck to the right rear wheel, and saw Edwards coming around the front of the hood with the knife up (R

458). Respondent told Edwards to stop, because he had a gun (R 458). Respondent put his hand on the gun, unsnapped it and took it out (R 458). He told Edwards he was leaving, and put his foot up (R 458). Edwards took one big step and swung the knife down again (R 458). Respondent put his foot down, let go of the truck, and fired the gun (R 458).

Respondent testified that he warned Edwards about the gun three times (R 459). When Edwards swung the knife, respondent told him "Don't. I have a gun back at the truck" (R 459). Respondent told him again, and again before he shot him (R 459). Edwards acted like the gun was not there (R 460).

Respondent next testified that when he first met Edwards, he put his hand on the gun (R 460). As respondent was running back to the truck, he unsnapped the gun and left it loose (R 460). When respondent came back down from the truck, he pulled the gun out (R 460). When Edwards saw the gun, respondent had it sideways in his hand (R 460).

Respondent next testified that he had run 50-75 feet, and was in the process of being backed up against the truck (R 461). When the shot was fired, he was pulling the gun from his side (R 461). Respondent also stated that Edwards had swung at him twice, in his face and behind him (R 462). Although respondent could not see him swinging, he could hear his feet (R 462).

Respondent testified that nobody in the truck made any statements to him, and he did not make any to them (R 466). Respondent had not aimed the gun, and did not know he had shot

Edwards (R 477, 479). Respondent dropped his wife off at home, went for a ride, and threw the gun in the St. John's River (R 474). Respondent read about an incident "like ours" in the paper (R 481).

In his initial statement to the police, respondent stated he had the gun in his pocket when he got out of the truck (R 470). At trial, respondent testified that that was a lie, but he said it to make it seem "less wrong" (R 484). Respondent also testified that he had fired the gun earlier that night to make sure it worked (R 465). Respondent claimed he acted in self-defense.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeals erred in reversing respondent's murder and firearm convictions. In reversing the convictions, the district court reweighed the evidence, and determined that the testimony of an eyewitness for the state that she "didn't see" was negative in character, and therefore insufficient to negate respondent's claim of self-defense. The decision of the district court conflicts with this court's decisions regarding negative versus positive testimony, which state that the weight to be given to such testimony is clearly an issue for the trier of fact.

Even if the district court has not misinterpreted the prior decisions of this court, it definitely misapplied them. The district court, under the guise of a sufficiency of the evidence analysis, clearly reweighed the evidence. The district court examined the testimony of the state's witness out of context, and gave substantial weight to only one statement. It is not the duty of the appellate court to reweigh the evidence. The jury verdict in the instant case is supported by substantial competent evidence, so this court should quash the decision of the district court and reinstate the judgment and sentence of the trial court.

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEALS ERRED IN REVERSING RESPONDENT'S MURDER AND FIREARM USE CONVICTIONS BY REWEIGHING THE EVIDENCE AND DETERMINING THAT THE TESTIMONY GIVEN BY A STATE WITNESS WAS NEGATIVE AND THEREFORE INSUFFICIENT TO CREATE A FACTUAL ISSUE IN THE FACE OF POSITIVE TESTIMONY GIVEN BY DEFENSE WITNESSES.

On April 17, 1986, respondent was convicted of second-degree murder, use of a firearm in the commission of a felony, and carrying a concealed firearm. Respondent appealed his convictions to the Fifth District Court of Appeals. The district court determined that at one point in the confrontation the respondent and the victim had been separated, so the ultimate question was who renewed the confrontation. The district court, in reversing respondents convictions, held that the testimony of Patricia Brisbane, that she "didn't see" who renewed the confrontation, was negative in character and insufficient to negate respondent's theory of self-defense.

The Fifth District Court of Appeals reversed respondent's murder and firearm use convictions based on this court's rulings in Tyus v. Appalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961) and Welfare v. Seaboard Coast Line Railroad Company, 373 So.2d 886 (1979). Those cases involved the issue of the weight to be accorded "negative testimony" versus "positive testimony," specifically whether a witness' testimony that he did not hear a railroad whistle should have probative value on the issue of whether the train whistle was sounded. This court concluded that the weight to be given to such testimony was

clearly an issue for the trier of fact. 130 So.2d at 585; 373 So.2d at 888. In its decision sub judice, the district court clearly misinterpreted these cases.

In its decision, the district court discussed the testimony of Patricia Brisbane at considerable length. It concluded that Miss Brisbane's testimony was "negative" in character, and that the record did not demonstrate whether she sufficiently observed the events leading up to the death of Jimmy Edwards. 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.

Henderson v. State, 507 So.2d 632 (Fla. 5th DCA 1987). Petitioner submits that the district court may not rely on the "negative testimony v. positive testimony" distinction, since the Tyus and Welfare decisions expressly hold that this distinction is one of evidentiary weight. This point is clearly demonstrated in the both cases.

In Tyus, this court began its analysis of the issue by recognizing that it had never stated, nor had it ever inferred such a rule that negative testimony will not make an issue in the face of positive testimony. The court stated that its prior conclusion on the issue, with reference to the relative weight that should be given to negative and positive testimony, was

> ...when negative testimony is relied upon to contradict positive evidence, it should appear that the negative statements were made by

> persons whose attention was directed to the fact that they were looking, watching and listening for the fact. Not only that the opportunity for observing the fact existed, but that their attention was directed to the fact.

Id. at 584, citing Powell v. Gray, 146 Fla. 334, 200 So. 855 (1941). The court then ruled that if a jury decides that the witness' attention was actually directed to the situation he later testifies about, regardless of the reasons therefor, the jury may consider the negative testimony and accord to it the weight it deems proper. Id. at 585.

It is clear in the instant case that the jury considered all of Brisbane's testimony and concluded that her statement "I didn't see it" referred to the events as described by the respondent and his defense witnesses. As the dissenting opinion so aptly states

> ...the majority opinion denies the jury the right to totally disregard such testimony [by defense witnesses] and thus rely solely on the testimony of Miss Brisbane. It is clear from the jury's verdict that they regarded the testimony of the defense witnesses as contrived and incredible rather than "positive" as found by the majority opinion.

Henderson, 507 So.2d at 637 (Harris, C.M., Associate Judge, dissenting).

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. Seaboard Coast Line Railroad Company v. Welfare, 350 So.2d 476 (Fla. 1st

DCA 1977). The court stated that the testimony of the witnesses who testified that they did not hear the train whistle was "negative", and had to be discarded because it could not stand against the "positive" testimony of witnesses who stated that the train whistle was constantly blowing. Id. at 478 . The reason the court gave for this holding was that the "negative" testimony did not affirmatively show that those witnesses' attention was directed to the fact of whether or not the whistle was blowing. Id.

However, in Welfare, supra, at 373 So.2d 888-89, this Court criticized the district court for its review of the evidence. This court pointed out several incontrovertible premises of law which were relevant to the case. One was that it is not an appellate court's function to reevaluate the evidence and substitute its judgment for that of the jury. Another was that if there is any competent evidence to support the verdict, that verdict must be sustained regardless of the district court's opinion as to its appropriateness. This court then concluded that there was some competent evidence to support the jury verdict, albeit "negative" in nature, and quashed the decision of the district court. Id. at 889.

In its decision herein, the Fifth District Court of Appeal has made the same mistake criticized in Welfare, supra. It concentrated on one statement by Brisbane, "I didn't see," just as the Welfare district court did with the statements " I did not hear," and determined that such testimony did not affirmatively show that her attention was directed to the confrontation. The

decision sub judice should likewise be quashed. As the Tyus court recognized, if testimony to the effect that an event did not happen was regarded as wholly without probative value, a party would frequently be left with no means of proving its case. Id at 584. Such a result is not reasonable nor logical.

Since the Tyus and Welfare decisions indicate that the "negative testimony v. positive testimony" distinction is a matter of evidentiary weight to be resolved by the jury, it is likewise clear that the district court below could not reconsider the sufficiency of Brisbane's testimony on this basis. In its decision sub judice the district court has plainly reweighed the evidence contrary to Tibbs v. State, 397 So.2d 1120 (Fla. 1982).

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 the legal sufficiency of the evidence, the district court overlooked the fact that there was substantial evidence to show that Brisbane had the ability to observe the confrontation and that her attention was directed at it. In doing this, the court clearly weighed the evidence rather than examining the sufficiency of the evidence. The Tyus, supra court provided the means for analyzing this issue, as it was reconsidering the merits of that case.

The first thing the Tyus court stated was that the witness' testimony should not be taken and considered out of context, but rather it should be studied in light of all of the relevant testimony given on the issue. Id at 585. As already stated, the

district court concentrated on only one statement of Brisbane's, " I didn't see," to reach its decision. The district court did not even recognize the word before this statement, which, in response to the question "Did he (the victim) ever approach the white man?" was "No.". The district court then faulted the prosecutor for failing to ascertain by further questioning whether "I didn't see" referred to the fact that Brisbane's view was blocked by the Bronco, or that she had already turned to flee home, or that she positively saw that Edwards made no aggressive move toward respondent.

A review of all Brisbanes's testimony reveals that she had a clear view of all the events, she did not "flee" until after Edwards had been shot, and her attention was directed to the fact that Edwards made no aggressive move with a knife toward respondent. Even Johnny Eastham, one of the defense witnesses, testified that Brisbane's view of the events was never obstructed. It was therfore not necessary to question her any further regarding these events. Even the brief portion of Brisbane's testimony quoted by the district court evidences this, and evidences it by way of "positve testimony." Miss Brisbane testified that she saw the respondent go up on the truck, she heard one of the women in the truck say to respondent "don't do it," she saw respondent jump back off the truck, she saw respondent reach from the back of his pants, pull out his gun, shoot Jimmy Lee Edwards, and jump back in the truck and leave. Although Brisbane saw Edwards "reaching back there for something," she never saw him pull a knife. 507 So.2d at 634.

Yet the district court ignored all of this "positive testimony," and based its decision on the weight of one "negative" statement by Brisbane.

Once it is determined that a witness' attention is directed toward the fact about which he is testifying, it is then for the jury and not the appellate court to decide the verity of such testimony. Tyus, supra at 585. By the verdict in the instant case, it is obvious that the jury determined that Brisbane's attention was focused on the events, and that "I didn't see" was only negative "in effect", and as positive upon the point at issue as any testimony of the defense witnesses. Id. at 586. The record clearly demonstrates that at the relevent times Brisbane was able to observe the respondent as he started a fight with Jimmy Edwards and shot him.

It is also interesting to note that not only did the district court reweigh the evidence, it also drew inferences from the evidence. The court determined that there was no way defense witnesses could have known about the knife when their statements were taken several days after the incident if Edwards had not produced the knife during the confrontation. This inference by the district court overlooks the fact that the details of the murder were highly publicized both in the newspaper and on television, and virtually all of the defense witnesses admitted at one time or another (statements, depositions, or witness stand) that they were aware of the publicity prior to their initial statements. In any event, it is a function of the jury, and not the appellate court to believe or disbelieve the

testimony, weigh the evidence and draw inferences therefrom.

The district court also concluded that there was unrefuted evidence that urine tests on Edwards showed "cocaine intoxication" at the time of death, which accounted for his sense of invulnerability, according to psychiatric testimony. Henderson, supra at 636. The medical examiner who performed the autopsy on Mr. Edwards testified that without any information as to the condition of the blood, he would be unable to render an opinion as to whether or not Edwards was under the influence of cocaine (R 155). Dr. Daniel Goldwyn, the psychiatrist who testified, stated that there are four criteria involved in determining the existence of cocaine intoxication, and three variables in determining how long it lasts. The fact that Edwards had cocaine in his urine satisfied only one of those criteria. Dr. Goldwyn based his opinion as to Edward's cocaine intoxication on that, and statements provided by the defense attorney. A lab technician also testified that in his opinion Edwards was under the influence of cocaine. Petitioner respectfully submits that this is hardly unrefuted evidence that Edwards felt invulnerable due to cocaine intoxication.

Although the burden of disproving self-defense is undeniably on the state at trial, appellate review of this issue is entirely another matter. In a case such as this where the state prevails over a claim of self-defense and obtains a murder conviction, the standard of appellate review of evidentiary sufficiency is the same as in all other cases. A conviction will not be overturned if it is supported by substantial competent evidence. Tibbs,

supra. It is not the duty of an appellate court to reweigh the evidence, but only to judge its legal sufficiency. Id. In examining the legal sufficiency of the evidence, the appellate court is not governed by the facts as presented in a defendant's claim of self-defense. Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986). Rather, all facts must be viewed in the light most favorable to the verdict. All conflicts in the evidence, including issues of credibility, must be resolved in favor of the verdict; as well, all reasonable inferences from the evidence must be made in favor of the verdict. Tibbs, supra.

Patricia Brisbane's testimony is direct evidence of the crime. It was not, however, the only evidence. Her version of the incident was corroborated by the physical evidence and testimony of the medical examiner, Dr. Thomas Hegert. Hegert, an expert in pathology, testified that neither the body of the deceased nor his clothing revealed any evidence of gunpowder or tattooing. The reasonable inference from this evidence is that the deceased never approached the appellant, and therefore never constituted a threat to the appellant. The appellant's claim of self-defense was not only defeated by the testimony of Patricia Brisbane, it was diametrically opposed to the uncontroverted physical evidence.

There was other, circumstantial evidence in this case which rightfully defeats the appellant's claim of self-defense. The evidence plainly indicated that the appellant and his friends had driven down from Sanford and had been causing trouble; the appellant had used the gun earlier to shoot out street lights.

There was also evidence that the appellant intended to cause a fight before he got out of the truck. Finally, the appellant's own admission that he destroyed evidence by throwing his gun in the St. Johns River is circumstantial evidence that the appellant knew he had exercised unlawful force against the deceased. The totality of the credible evidence substantiates the theory of the state's case that the appellant was out to cause trouble that night.

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 quash the decision of the district court, and reinstate the judgment and sentence of the trial court.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court quash the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on the merits has been furnished by mail to: Mark S. Blechman, Esquire, Lubet & Woodard, P.A., 209 East Ridgewood Street, Orlando, FL 32801, on this 2 day of November, 1987.

KELLIE A. NIELAN
OF COUNSEL