OA 1-6.88

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.: 70,789

JAMES HENDERSON,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

MARK S. BLECHMAN, ESQUIRE
LUBET & WOODARD, P.A.
209 East Ridgewood Street
Orlando, Florida 32801
(305) 841-9336

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case set out by Petitioner with the following addition:

A Mandate was issued by the Fifth District Court of Appeal to the Circuit Court of Orange County, Florida. That Mandate was acted upon by the Circuit Court of Orange County, Florida and a Judgment of Acquittal was granted as to the charges of Second Degree Murder and Use of a Firearm in the Commission of a Felony. At no time did the Petitioner move to stay the issuance of the Mandate, nor appeal the actions of the Circuit Court in acting upon said Mandate.

STATEMENT OF THE FACTS

The Respondent objects to the Petitioner's Statement of the Facts, in that obviously, the Petitioner has related a Statement of Facts in a light most favorable to the State, leaving out crucial and material elements which were highly relevant to the Statement of Facts cited by Petitioner. The Respondent has filed with his brief, a Motion to Strike Petitioner's Statement of Facts, and prays the Court will order Petitioner to refile a Statement of Facts with its brief, in keeping with Florida Rules of Appellate Procedure and their intent. The Respondent would also make a part hereof the Motion to Strike Petitioner's Statement of Facts filed contemporaneously with this Answer Brief, which shows the gross errors and inaccuracies by Petitioner as to the facts of this case.

The Motion to Strike Petitioner's Statement of Facts sets out several inconsistencies with the evidence which Petitioner alleges as fact in the case, and which from a review of the Record, are clearly inaccurate.

The Respondent prays this Court accept and read in pari materia its Motion to Strike Petitioner's Statement of Facts when considering the facts in this case.

SUMMARY OF ARGUMENT

Petitioner argues that the Fifth District Court of Appeal misinterpreted and/or misapplied this Court's holdings regarding "negative" versus "positive" testimony.

The Fifth District Court of Appeal properly interpreted the law regarding "negative" versus "positive" testimony as requiring the threshold element of a witness having the opportunity to observe and actually observing the fact at issue before a "negative" statement such as, "I did not see" can be submitted to a jury to be weighed against "positive" testimony.

The Fifth District Court of Appeal properly applied the threshold element in the case at bar and correctly held that the State of Florida failed to satisfy the threshold element; and therefore, presented insufficient evidence to disprove the claim of self-defense, and thereby insufficient evidence to prove guilt beyond a reasonable doubt.

Since the Fifth District Court of Appeal properly interpreted and applied the law as relates to "negative" testimony versus "positive" testimony, its decision should be upheld.

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL NEITHER MISINTERPRETED NOR MISAPPLIED THIS COURT'S HOLDINGS REGARDING 'NEGATIVE' VERSUS 'POSITIVE' TESTIMONY AND WAS CORRECT IN REVERSING RESPONDENT'S CONVICTIONS.

The Petitioner appeals from the Fifth District Court of Appeal's decision in Henderson v. State, 507 So.2d 632 (5th DCA 1987), based upon an alleged conflict with Welfare v. Seaboard Coast Line R. Co., 373 So.2d 886 (Fla. 1979) and Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961). In its brief, Petitioner argues that the appellate court misinterpreted and/or misapplied this Court's holdings in Welfare and Tyus regarding the issue of "negative" versus "positive" testimony.

In Henderson, the Fifth District Court of Appeal reversed the Respondent's convictions for Second Degree Murder and Use of a Firearm in the Commission of a Felony, upon a finding that the evidence presented at trial was insufficient as a matter of law to prove beyond a reasonable doubt that the defendant did not act in self defense. Henderson, supra at 636, See also, Brown v. State, 454 So.2d 596 (5th DCA) rev. denied, 461 So.2d 116 (Fla. 1984). The court, after reviewing the evidence, stated that the ultimate question before it was

who renewed the confrontation between the Respondent and the deceased, after they were separated. Henderson, supra at 633.

At the trial there were a number of witnesses on behalf of the Respondent who affirmatively stated that the deceased, armed with a knife, renewed the confrontation. The State of Florida presented only one witness in its efforts to prove beyond a reasonable doubt that the Respondent renewed the conflict; and therefore, did not act in self-defense. Henderson, supra at 633-636. This witness, who also believed the deceased to have a knife, in answering the question by the prosecutor as to whether the deceased ever approached the Respondent after their separation, stated, "No. I didn't see." Henderson, supra at 634. The Fifth District Court of Appeal held that:

> The testimony of Brisbane (the only state witness), 'No, I didn't see' in answer to the question as to whether Edwards (the deceased) ever approached Henderson (Respondent) is simply not sufficient, as required by Brown (State v. Brown, supra) to negate Henderson's theory of self-defense. (Emphasis added)

Henderson, supra at 634.

A.

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY INTERPRETED WELFARE AND TYUS.

A review of this Court's holdings regarding the issue of "negative" versus "positive" testimony reveals that a threshold

element exists before a jury may weigh the "negative" testimony against the "positive" testimony. The threshold element requires proof that a witness stating "I did not see" had the opportunity to view the fact at issue and had his attention focused on the fact. Absent this threshold being satisfied, a statement of "I did not see" has no meaning and therefore is probative of nothing.

A thorough examination of this Court's pronouncements regarding the issue of "negative" versus "positive" testimony must begin with Seaboard Air Line Ry. Co. v. Myrick, 109 So. 194 (Fla. 1926). It should be noted that the Henderson court in addition to citing to Welfare and Tyus, cited to the Myrick decision.

The facts of Myrick involve an action for damages arising out of a collision between an automobile and a train. At issue on appeal, was whether the railroad had provided sufficient evidence to prove that an audio warning of the train's presence was provided. The testimony at the trial revealed a number of witnesses who either "did not see" or "did not hear" an audio warning. In discussing the sufficiency of such a statement, the Myrick court stated:

> It is not alone sufficient for the injured plaintiff to say that he 'did not see' the approaching train, nor hear any whistle or bell or noise of its approach, in order to overcome positive evidence that all ordinary warnings were given of the train's approach. 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 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. The word 'see' or 'hear,' when used in a negative statement, is often used to express the negation of apprehension or conscious knowledge. One may see or hear and yet not observe; that is, not have a conscious knowledge of the object or noise he actually sees or hears, and, ordinarily, when questioned as to the fact, will say that he did not see or hear. (Emphasis added)

Myrick, supra at 195. The Myrick court, therefore, set a threshold element which must be met before a statement such as, "I did not see" will be sufficient for a jury to consider it in weighing the evidence. This threshold element requires evidence that a witness who states that he "did not see" must have had the opportunity for observing the fact and that his attention was directed to that fact.

The threshold element was also required in Powell v. Gary, 200 So. 854 (Fla. 1941). The Powell case also involved a collision between a motor vehicle and a train. As in Myrick, the issue at trial was whether or not an audio warning had been provided. At the trial, several witnesses for the railroad testified affirmatively and positively that audio warnings were given. The witnesses for the plaintiff testified that they "did not hear the whistle blowing or bell ringing." Powell, supra at 855. The Powell court in finding that the negative

testimony of the plaintiff's witnesses did not overcome the positive testimony of the defendant's witnesses, held that there was a "lack of evidence" to sustain the allegations of the plaintiff. Powell, supra at 856. This finding was made after a review of the Myrick decision. In particular, the language regarding the existence of the opportunity for observing and the requirement that the witnesses' attention must be directed to the fact. In effect, the Powell court held that the plaintiff failed to satisfy the threshold element that the plaintiff's witnesses had the opportunity for observing the fact and their attention was directed to that fact.

The Tyus case, also a railroad crossing collision case, involved the same issue as Myrick and Powell. The Tyus opinion attempts to resolve a conflict created by the district court appealed from regarding the issue of "negative" versus "positive" testimony. The Tyus court corrects the district court in its belief that negative testimony will not overcome positive testimony. The Tyus court reviewed the Myrick and Powell decisions and stated:

> 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.

Tyus, supra at 585.

The Court determined that each of the plaintiff's witnesses which involved "negative" testimony testified "positively that her (their) attention was directed to the fact concerning which she was called upon to testify ..." Tyus, supra at 586. The Court therefore, determined that the threshold element required in Myrick was satisfied; and therefore, it was up to the jury to determine the weight of the testimony.

As in the above cases, the Welfare case also involved a railroad crossing collision. In its decision, the Welfare Court dealt with the "negative" versus "positive" testimony issue. The Court cited to Tyus in requiring the attention of a witness directed to the fact in issue before a jury may consider negative testimony and accord to it the weight it may deem proper. Welfare, supra at 888.

The threshold element was also required in Loftin v. Kubica, 68 So.2d 390 (Fla. 1953), American Motorists Ins. Co. v. Battista, 370 So.2d 445 (1st DCA 1979) and Marks v. Delcastillo, 386 So.2d 1259 (3rd DCA 1980). The Loftin case also involved a railroad crossing collision and the issue of "negative" versus "positive" testimony. After citing to Myrick regarding the issue of negative testimony contradicting positive evidence, the court stated:

> In order for this rule to apply it must be made to 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. They must not only have the opportunity but their attention must be directed to the fact.

Loftin, supra at 392. The Battista case involved a collision between two motor vehicles at an intersection. The First District Court of Appeal addressed the issue of "negative" versus "positive" testimony and applied the Myrick and Tyus decisions. The court distinguished that facts in the Myrick case from its case, in that none of the witnesses giving the "negative" testimony in the Myrick case indicated that their attention was directed to the particular fact in question. The "negative" testimony of the defendant in the Battista case satisfied the threshold element required in Myrick and Tyus; and therefore, was held to have created a factual issue sufficient to be presented to a jury. As the court found,

> Stated more simply, the defendant did not testify that 'I saw nothing', but rather stated, in essence, that 'I looked where I should have been looking and there was nothing to see'.

Battista, supra at 446. The Delacastillo case in addressing the issue of "negative" versus "positive" testimony also found the evidence presented at the trial sufficient to satisfy the threshold element. The Delacastillo court cited to Battista and quoted the above language, in addition to citing to Welfare and Tyus.

In the case sub judice, the Fifth District Court of Appeal stated:

> Such negative testimony as that given by Brisbane (the only state witness) has consistently been held insufficient to create a factual issue in the face of positive testimony. (Citations omitted)

Henderson, supra at 634. This statement was based on the court finding that the prosecutor at trial failed to ascertain certain critical facts to clarify the statement, "No. I didn't see". These facts could alternately have included: that the view was obscured; that the witness was not paying attention and therefore, "... didn't see"; or, that her attention was directed at the activities and she positively saw that the deceased made no aggressive moves with his knife toward the Respondent. Henderson, supra at 634. In other words, the court determined that the threshold element was not satisfied.

The Fifth District Court of Appeal did properly interpret Welfare and Tyus in requiring that there exist evidence that a witness have the opportunity to observe and actually observe the fact at issue before a jury can weigh "negative" testimony against "positive" testimony.

B.

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY APPLIED WELFARE AND TYUS.

Petitioner argues that the Fifth District Court of Appeal clearly reweighed the evidence presented at trial, in contravention of this Court's opinion in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affm'd. 457 U.S. 31 (1982). The argument is premised upon Petitioner's belief that Welfare and Tyus hold that the "negative" versus "positive" testimony issue is solely one of weight to be determined by a jury. As previously argued, however, there is a threshold element that must be satisfied prior to a jury weighing the testimony. Absent any evidence to prove this threshold element, the "negative" testimony will not make an issue of fact sufficient to go to a jury for weight considerations.

While Tyus holds that if a jury decides that witnesses' attention is actually directed to the situation it may consider the negative testimony, the prosecution presented no evidence for a jury to make such a determination as to whether or not the attention was actually directed to the situation.

Petitioner argues that the Fifth District Court of Appeal overlooked evidence to show that the witness had the ability to observe the confrontation, and that her attention was directed at it. In support thereof, the Petitioner argues that the court concentrated only the statement, "I didn't see"

to reach its decision. It goes on to argue that the court did not even recognize the word before the above quotation. A reading of the opinion, however, shows that the court was not only aware of the full statement by the witness, but also quoted it in the opinion. Henderson, supra at 634.

Petitioner also argues that all of the witness' testimony revealed that she had a clear view and that her attention was directed to the fact that the deceased made no aggressive movements with his knife toward Respondent. A review of the witness' complete testimony reveals nothing of the sort. For instance, when asked whether she was still with the deceased when the driver of the truck tried to run him off the road, the witness answered, "I was standing up there near Jimmy Lee (the deceased), and I ran home to get my Momma." (Brisbane Trial Testimony at p. 28). Further in the testimony the following dialogue took place:

> Prosecutor:
> Q. Did you ever see Jimmy Lee Edwards pull a knife?
>
> Ms. Brisbane:
> A. I didn't see him, but he was just reaching back there for something.
>
> Prosecutor:
> A. Did you ever see Jimmy Lee Edwards try to cut the white man?
>
> Ms. Brisbane:
> A. No.
>
> Prosecutor:
> Q. Did he ever approach the white man?

Ms. Brisbane:
A. No. I didn't see.

Brisbane Trial Testimony, p. 29. This testimony taken in pari materia with the witness' previous testimony that she ran home to get her mother when the truck tried to run the deceased off the road, simply fails to prove that the witness' attention was directed toward the renewal of the confrontation. All the prosecutor had to do to satisfy the threshold element was ascertain whether the witness had an unobscured view of the situation and had her attention directed toward it. See, Loftin, supra; Battista, supra; and Delcastillo, supra. Had the prosecutor ascertained such, the jury could then have attempted to weigh the statement against the defense witnesses.

At trial, in the case at bar, the State of Florida had the burden of proving beyond a reasonable doubt that the Defendant/Respondent did not act in self-defense. Brown, supra at 598. All of the witnesses who affirmatively stated that their attention was directed toward the confrontation indicated that the deceased, armed with a knife, renewed the confrontation. The State of Florida presented only one witness to prove beyond a reasonable doubt that the Respondent renewed the conflict. This one witness stated that she did not see who renewed the conflict. There was, therefore, no evidence that the Respondent renewed the conflict, on the contrary, the only evidence presented at trial was that the deceased renewed the confrontation. The definition of "sufficient evidence" as

stated in Tibbs is:

> Such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded.

Tibbs, supra at 1123, citing, Black's Law Dictionary, 1285, 5th Ed. 1979.

In addition to alleging that the Fifth District Court of Appeal reweighed the evidence, Petitioner accuses the court of drawing inferences from the evidence. It is the Petitioner and not the Fifth District Court of Appeal that is drawing inferences. An example of this is the Petitioner stating that the court overlooked the fact that the details of the murder were highly publicized, both in newspaper and on television. This statement was made by Petitioner in support of the argument that the defense witnesses knew about the knife from the publicity. The inference the Petitioner makes of course, is that the alleged publicity included details regarding the knife. As we are all aware, police, in investigating crimes and releasing press reports, keep certain information of the crime from the public to assist them in ferreting out false witnesses or suspects.

Another inference Petitioner makes regards the issue of circumstantial evidence supporting the claim that the Respondent did not act in self-defense. Petitioner believes that the absence of gun shot residue or tattooing on the

deceased negates a claim of self-defense. There was, however, no evidence presented at trial that there would have been gun shot residue or tattooing, nor at what distance the residue or tattooing would have occurred. Without this vital information, the absence of the residue or tattooing is irrelevant to the issue of self-defense.

Petitioner also argues that the facts presented at trial regarding (1) Respondent and his friends driving from Sanford and causing trouble that night, (2) using a gun earlier to shoot out a light, and (3) intending to cause a fight before he got out of the truck, are circumstantial evidence defeating the claim of self-defense. Petitioner fails to realize, however, that the issue at trial was who renewed the confrontation between the deceased and the Respondent after they were separated. Henderson, supra at 633. In this light, the actions of the Respondent prior to the separation are irrelevant as to his claim of self-defense since under the law, a person may withdraw from a confrontation and role as aggressor and may make a claim of self-defense. Fla. Crim. Standard Jury Instr. 3.04(d). Even accepting, arguendo, Petitioner's argument that the actions of the Respondent stated above were circumstantial evidence directed toward defeating the claim of self-defense, it would not exclude every reasonable hypothesis of innocence as required by the law. McArthur v. State, 351 So.2d (Fla. 1977). Clearly, one

reasonable hypothesis of innocence is that the deceased, under the influence of cocaine, armed with a butcher knife with an eight inch blade, renewed the confrontation, as was testified to by numerous defense witnesses. Citing, Fowler v. State, 492 So.2d 1344 (1st DCA 1986), Petitioner argues that a court is not governed by the facts presented by the defendant in a claim of self-defense. The First District Court of Appeal, however, states that:

> The jury could choose to disbelieve the defense only 'regarding facts on which the state has presented contrary testimony.' (Emphasis added) (Citations omitted)

Fowler, supra at 1347. In the case at bar, since the prosecutor failed to satisfy the threshold element required in Welfare and Tyus, the State of Florida presented no evidence to contradict the testimony of the defense witnesses.

The prosecutor's failure to inquire as to the facts surrounding the witness' statement of "I didn't see" fails to satisfy the threshold element which would entitle a jury to weigh the "negative" testimony of the witness against the "positive" testimony of the defense witnesses. As such, the State of Florida presented no evidence, much less substantial competent evidence, to prove beyond a reasonable doubt that the Respondent did not act in self-defense. Therefore, the opinion of the Fifth District Court of Appeal in reversing the Respondent's convictions for Second Degree Murder and Use of a Firearm in the Commission of a Felony, based upon insufficiency of the evidence, was correct and should be upheld.

CONCLUSION

The Fifth District Court of Appeal, in accordance with this Court's holdings in Welfare and Tyus, properly determined that insufficient evidence was presented at the trial to prove the defendant guilty beyond a reasonable doubt. As such, the opinion rendered by the Fifth District Court of Appeal should be upheld.

Respectfully submitted,

MARK S. BLECHMAN, ESQUIRE
LUBET & WOODARD, P.A.
209 East Ridgewood Street
Orlando, Florida 32801
(305) 841-9336

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to ASSISTANT ATTORNEY GENERAL, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014 this 16th day of November, 1987, by U.S. MAIL.

MARK S. BLECHMAN, ESQUIRE
LUBET & WOODARD, P.A.
209 East Ridgewood Street
Orlando, Florida 32801
(305) 841-9336