

IN THE SUPREME COURT OF FLORIDA

CASE NO.

**TONY BROWN,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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**BRIEF OF PETITIONER ON JURISDICTION**

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL  
OF FLORIDA, THIRD DISTRICT

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## STATEMENT OF THE CASE AND FACTS

The jury in this case found Tony Brown guilty of 1) second degree murder as a lesser included charge of first degree murder, 2) attempted first degree murder, 3) armed robbery, and 4) attempted armed robbery (A. 6).<sup>1</sup> The State's case at the trial was based on an identification of Brown by victim Michael Morris, Brown's DNA found on a skully cap located near the scene of the shooting, and inconsistent statements made to the police by Brown (A. 2-4). Morris qualified his identification by stating that he "was 60 per cent certain" that the individual he selected from the photo array was the man who shot him (A. 3). The defense case at trial was based on the alibi testimony of Brown's girlfriend that Brown was with her at the time of the shooting, and the girlfriend's explanation as to how Brown's skully cap may have been dropped near the scene of the shooting (A. 4-5).

Following the jury verdict, the defense filed a motion for new trial arguing that the evidence at trial was legally insufficient to support the verdict, that the verdict was contrary to the weight of the evidence, and that the court erred in denying a motion for mistrial based on the State's comments on Brown's right to remain silent (A. 6). Concerned about the credibility of Morris' identification of Brown, the trial court asked the State if Morris or the detective who showed the photo array to Morris would be willing to take a polygraph examination (A. 6).

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<sup>1</sup> In this brief, all references are to the appendix attached to this brief, paginated separately and identified as "A," followed by the page number(s).

The State objected and neither State witness took the test (A. 6). The State also objected to the court's consideration of the results of the polygraph tests of the defendant and the girlfriend (A. 7). The trial court then stated that it would not consider the polygraph results in ruling on the motion for new trial (A. 7). The trial court subsequently granted the motion for new trial based on its finding that the jury verdict was contrary to the weight of the evidence, and based on the State's improper comment on the defendant's right to remain silent (A. 7).

The State appealed the order granting the motion for new trial to the Third District Court of Appeal, and that court reversed (A. 7). The Third District conducted a lengthy review of the evidence in the case, and determined that the verdict was not contrary to the weight of the evidence (A. 2-5, 8-9). The court found that Morris' identification and the skully cap containing Brown's DNA to be convincing evidence of Brown's guilt (A. 8). The court found the inconsistencies in Brown's statements to the police to be convincing evidence of Brown's guilt (A. 8). The court found that the girlfriend's testimony was not convincing evidence of Brown's innocence (A. 8-9). The court noted that portions of the girlfriend's testimony were unverifiable, and the court further noted the unavailability of other evidence that would have corroborated the girlfriend's testimony (A. 8).

The Third District also held that the trial court erroneously relied on polygraph evidence in granting the motion (A. 9-10). The Third District

acknowledged the trial court's statement that it would not rely on the polygraph evidence in ruling on the motion for new trial, but the Third District determined that it was "entirely clear from the record" that the trial court "was, at least, minimally influenced by the polygraphs in arriving at its decision" (A. 9-10).

Finally, the Third District also found that the trial court erred in ruling that statements made by the prosecutor in closing argument constituted improper comments on the defendant's right to remain silent (A. 10-12). Notice invoking this Court's discretionary jurisdiction was filed on December 6, 2011.

### **SUMMARY OF ARGUMENT**

In reversing the trial court's order granting the motion for new trial on the basis that the verdict was contrary to the weight of the evidence, the Third District Court of Appeal reweighed the evidence presented at the jury trial and made its own determinations as to the credibility of the witnesses who testified at that trial. This Court's decision in *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981) establishes that while a trial court has the power to make these determinations in ruling on a motion for new trial, an appellate court is prohibited from making such determinations. Thus, the decision of the Third District in this case expressly and directly conflicts with the decision of this Court in *Tibbs*.

In reversing the trial court's order granting the defendant's motion for new trial, the Third District Court of Appeal also refused to accept the trial court's

statement that it was disregarding inadmissible evidence in its ruling on the motion for new trial. By refusing to apply the legal presumption that the trial court did not consider the inadmissible evidence and by making its own factual determination that the trial court did in fact consider the inadmissible evidence, the decision of the Third District in this case expressly and directly conflicts with the decision of this Court in *Petion v. State*, 48 So.3d 726 (Fla. 2010).

### **ARGUMENT**

**THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981) AND *Petion v. State*, 48 So.3d 726 (Fla. 2010).**

In reversing the trial court's order granting the defendant's motion for new trial, the decision of the Third District Court of Appeal in this case reweighed the conflicting evidence presented to the jury in this case, and refused to accept the trial court's statement that it was disregarding inadmissible evidence in its ruling on the motion for new trial. By reweighing the evidence and refusing to accept the trial court's statement that it was disregarding inadmissible evidence, the Third District's decision expressly and directly conflicts with the decisions of this Court in *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981) and *Petion v. State*, 48 So.3d 726 (Fla. 2010), warranting exercise of this Court's discretionary jurisdiction.

### **Express and Direct Conflict With *Tibbs***

This Court's decision in *Tibbs* drew a clear boundary between the power of a trial court and the power of an appellate court to weigh the evidence and determine the credibility of witnesses at a jury trial. This Court pointed out that Florida Rule of Criminal Procedure 3.600(a)(2) "enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror." *Tibbs*, 397 So. 2d at 1123 n.9. On the other hand, "an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact." *Id.* 397 So. 2d at 1123. "Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." *Id.*

In this case, the trial court properly exercised the power granted exclusively to a trial judge by Rule 3.600(a)(2), and granted the defendant's motion for new trial after the court weighed the evidence presented at the jury trial, determined the credibility of the witnesses who testified at the jury trial, and acting as an additional juror determined that the greater weight of the credible evidence at trial did not support the jury's guilty verdict. The appellate court, however, strayed beyond its legal powers and reversed the trial court's order granting the motion for new trial based on its own weighing of the evidence presented at the jury trial and its own determination of the credibility of the witnesses who testified at the trial.



The decision of the district court of appeal in this case begins with a detailed review of the evidence presented at the jury trial (A. 2). In discussing that evidence, the appellate court provides an explanation for any seeming weakness perceived by the trial court in the State's evidence of the defendant's guilt. For example, after noting that victim Morris qualified his identification of the defendant by stating that he was only 60 per cent certain of that identification, the appellate court emphasizes that Morris explained that he said 60 per cent because he was trained as a chemist and tended to quantify things based on that background (A. 3). The decision notes inconsistencies and shortcomings in the statements which the defendant gave to the police, and points out that the defendant "was unable to provide any corroboration for his explanation that he was there to borrow a generator from an unidentifiable friend." (A. 4, 8). The decision details the testimony presented at trial by the defendant's girlfriend as a defense witness and focuses on weaknesses in that testimony:

Upon arriving at the scene, she claims to have called 911 twice, but hung up on both occasions because the 911 operator was "acting confused." *There is no record of these alleged 911 phone calls.* When asked the identity of the friend she believed had been shot, the girlfriend responded that his nickname was "Yellow." *When questioned about Yellow's identity, she could not provide an actual name for this person. The girlfriend never presented her account of the events to the police, despite the investigation and subsequent arrest of the defendant. She said absolutely nothing about a supposed generator that the defendant had claimed to be picking up at the nightclub and, contrary to what the defendant had told the police,*

*placed the defendant at the club during the early morning hours of the day of the murder.* (A. 4-5)(emphasis added).

The decision highlights the lack of corroboration of the girlfriend's testimony:

Several elements of the girlfriend's testimony were equally unverifiable; she was unable to provide the name of either the person who allegedly called to tell her about the shooting or the friend who she claims she believed had been shot. Additionally, the cell phone records that would have proven that the girlfriend made the 911 calls were no longer available from the girlfriend's cell phone provider and records of the calls were also unavailable from 911. (A. 8)

These portions of the Third District's decision demonstrate that the appellate court reweighed the evidence presented at the jury trial and made its own determinations as to the credibility of the witnesses who testified at the trial. This Court's decision in *Tibbs* establishes that while a trial court has the power to make these determinations in ruling on a motion for new trial, an appellate court is prohibited from making such determinations. Thus, the Third District's decision in this case expressly and directly conflicts with the decision of this Court in *Tibbs*.

**Express and Direct Conflict With *Petion***

In *Petion*, this Court reaffirmed the well established principle that trial judges are presumed to have based their legal decisions upon admissible evidence and to have disregarded inadmissible evidence, unless they state otherwise:

The initial presumption that a trial court has disregarded inadmissible evidence during a non-jury trial is well established in Florida. In a non-jury trial, the factual findings of the judge are entitled to the weight of a jury verdict. . . . However, unlike a jury, it is generally understood that a trial judge acting as both the trier of fact

and arbiter of the law “is trained by learning and experience to segregate evidence” that is inadmissible and improperly prejudicial from evidence that is admissible, reliable, and relevant to the issue. . . . From that principle, the appellate courts of Florida have derived the rebuttable presumption that in non-jury cases, trial judges base their decisions upon admissible evidence and have disregarded inadmissible evidence. . . . Accordingly, if a trial judge receives evidence as the finder of fact and hears inadmissible evidence, such as through a suppression hearing, a proffer, a motion in limine, or prior to sustaining an objection to the evidence, the judge is generally presumed to have disregarded the improper evidence . . . . However, this presumption can be rebutted through a trial court’s express and specific finding of admissibility on the record or a statement on the record which discloses that the trial judge has actually relied upon the erroneous evidence to support the verdict or result.

*Petion*, 48 So. 3d at 730 (citations omitted).

Thus, as a matter of law, the trial judge in this case is presumed to have based his decision granting the motion for new trial upon admissible evidence and to have disregarded the inadmissible polygraph evidence. This presumption can only be rebutted through the trial court’s express and specific finding of admissibility of the polygraph results on the record, or a statement on the record which discloses that the trial judge actually relied upon the inadmissible polygraph evidence to support his ruling granting the motion for new trial. Neither basis for rebutting the presumption is present in this case. The trial court made an express finding of *inadmissibility* of the polygraph results on the record, and the trial court made an express and unambiguous statement on the record that it would *not* rely on that inadmissible evidence in its ruling on the motion for new trial:

[J]ust so that we are both clear, I can't force anybody to take the polygraph . . . [H]owever, just so that we are clear, the fact that the defendant took a polygraph test and passed it . . . the fact that the alibi witness took and passed the polygraph . . . that I'm not considering it in any capacity whatsoever for purposes of the hearing today; just so that we are all clear. I saw the State's memorandum in opposition to it. I'm telling you all no, that that will not be considered in the motion or in the ruling on the motion. (A. 7).

Thus, the law presumes that the trial court did not consider the inadmissible polygraph results, and no legal basis for disregarding that presumption is present in this case. However, the Third District refused to apply this legal presumption and instead made a factual determination that the trial court did in fact consider the inadmissible polygraph results:

Although the trial court asserted that it was not going to rely upon the results of the polygraph examinations, absent their consideration, it is extremely difficult to reconcile the sharp contrast in the trial court's original emphasis on its inclination to deny the motion for a new trial and its subsequent granting of the motion. *It is entirely clear from the record that the trial court requested the polygraphs, reviewed the results, and was, at least, minimally influenced by the polygraphs in arriving at its decision.* (A. 9-10)(emphasis added).

By refusing to apply the legal presumption that the trial court did not consider the inadmissible evidence, and by making its own factual determination that the trial court did consider the inadmissible evidence, the decision of the Third District in this case expressly and directly conflicts with the decision of this Court in *Petion*.

This Court's exercise of its discretionary jurisdiction to review the decision of the Third District in this case is essential to maintain jurisprudential harmony in

this state. The Third District's determinations of purely factual matters to support its reversal of the trial court's order granting the motion for new trial cannot be reconciled with longstanding precedent of this Court.

### **CONCLUSION**

Petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE AND CERTIFICATE OF FONT**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 16th day of December, 2011, and that the type used in this brief is 14 point proportionately spaced Times New Roman.

\_\_\_\_\_  
**HOWARD K. BLUMBERG**  
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