In the

ORIGINAL

Supreme Court of the United States

DELBERT LEE TIBBS,

Petitioner,

v.

FLORIDA

No. 81-5114

Washington, D. C.

Tuesday, March 2, 1982

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400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 o'clock a.m.

APPEARANCES:

LOUIS R. BELLER, ESQ., 420 Lincoln Road, Suite 238 Miami Beach, Florida 33139; on behalf of Petitioner.

MICHAEL A. PALECKI, ESQ., Assistant Attorney General, State of Florida, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida; on behalf of Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments in Tibbs against Florida. Mr. Beller, you may proceed whenever you're ready.

ORAL ARGUMENT OF LOUIS R. BELLER, ESQ.,

ON BEHALF OF PETITIONER

MR. BELLER: Mr. Chief Justice and may it please the Court:

I received the briefs, both the brief of the United States as amicus curiae and the answering brief from the State of Florida. I think the question has been misstated in the answering brief for the State of Florida. The question that they cite is whether the constitutional prohibition against double jeopardy precludes retrial of the Petitioner where the appellate court, acting as a thirteenth juror, assessed the credibility of the witnesses and re-weighed the evidence, concluding that although the evidence was sufficient as a matter of law to sustain the verdicts, the Petitioner should be afforded a new trial.

I think the question is just pure and simple, as stated in my original brief, whether or not the double jeopardy applies where the Court has grounds for retrial under the double jeopardy clause because of the fact that the court originally weighed and found the

evidence insufficient to convict the Petitioner.

QUESTION: Mr. Beller, where is Mr. Tibbs now?

MR. BELLER: Mr. Tibbs is in Chicago. He was -- on the motion to dismiss, the case was discharged. He was out on bond at that particular time, but of course the bond would then be dropped.

QUESTION: But he is not incarcerated now?

MR. BELLER: No, he is not.

The question of double jeopardy, as opposed to weight, is presented in the Government's brief as amicus curiae, and they say it would affect Rule 33 of the Federal Rules of Criminal Procedure. Rule 33 of the Federal Rules of Criminal Procedure applies to the trial court, who in effect is sitting as a thirteenth juror, because the trial court does see the evidence, does see the witnesses, weighs the credibility of the witnesses.

I don't think anything that this Court does in the Delbert Tibbs case should have any effect upon Rule 33. I think that's a good rule. The trial court sitting as a thirteenth juror -- that's the trial court, not an appellate court -- has the same opportunity as the parties who are the jurors to weigh the evidence. And if the trial court feels under Rule 33 that there should be a new trial, it orders a new trial in the

interest of justice.

Now, what happened in this particular case is that the appellate court of the State of Florida, the Supreme Court, who is the direct court of appeals in a murder trial, under Rule 9.140 of the Florida Rules of Criminal Procedure -- or Appellate Procedure -- (f), did review the case and reviewed the totality of the case, did, as it is required to do, did a total review of the evidence.

And I'm sure the Court is aware of the various points of evidence that it did review. But what it did was this. It said that this evidence is insufficient. It didn't use that phraseology. It said that the evidence was -- there were insufficiences in the evidence. There were things about the evidence. And then it went on to list --

QUESTION: Did they not say in effect there was not enough evidence here for the jury to reach the verdict that it reached?

MR. BELLER: Correct. They concluded that there was not enough evidence for a reasonable man to conclude beyond a reasonable doubt that the Defendant was guilty. And that's weighing the sufficiency of the evidence.

And they concluded by saying, rather than risk

the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial.

Now, this happened prior to this Court's decision in Burks and Greene, and there was a concurring opinion by Justice Boyd at that particular time, who said, I believe that this man should not be retried, but under the current law he probably can be retried. Burks and Greene, if my understanding of them is correct, said simply this: that where a trial court -- where an appellate court reweighs the evidence and finds that the evidence is not enough to convict beyond and to the exclusion of every reasonable doubt, that it's the same as finding that there is insufficient evidence and that he cannot retry them under the double jeopardy clause.

QUESTION: Mr. Beller, I thought the trial court simply made a determination that in the interest of justice the Defendant should have a new trial. They pointed out seven so-called weaknesses in the state's case and then said there should be a new trial. Isn't that so?

MR. BELLER: When they reviewed their initial decision, yes, they said there should be a new trial. But that was prior to Burks and Greene, and Burks and Greene simply set up the proposition that you did not

waive the right to the double jeopardy clause by asking for a new trial. I think previous to that the law was that if you applied to an appellate court for a new trial and the court granted you a new trial, it was simply doing what you asked for and you had waived your right to the double jeopardy clause when you got your new trial, even if it was a question of evidentiary insufficiency.

And the problem here is, what did they reverse on. They did set up a series of nine various deficiencies, and they all go to evidentiary weight. None of them go to any question of a legal insufficiency, whether or not he had admitted something improperly, whether or not a question had been asked that should have been excluded. None of these were raised.

So it was a question of whether or not the entire evidence was sufficient to convict.

QUESTION: Well, in their second opinion they certainly take a different view of what they did in their first opinion than you do.

MR. BELLER: Let me apply it to the second opinion. The second opinion, through the fifth section of the second opinion -- in fact, when I read the second opinion -- and you'll find that the dissenting judges

all concur in it through Roman numeral number V, their fifth section, which is the majority of the second opinion.

The second opinion reviews the District Court, the Second District Court of Appeals opinion, which said that he should be retried because the reversal was not based on insufficiency, but was based on weight of the evidence, that though there was enough evidence to legally convict Tibbs, yet because of the weight in the interest of justice they felt he should have a new trial.

They went through and reviewed it, the majority in the second opinion, and they said, well, weight and insufficiency are so close we're never going to do that again. In fact, quoting from their second opinion -- and this is from the Joint Appendix on page 19: "Henceforth, no appellate court should reverse a conviction or judgment on the grounds that the weight of the evidence is tenuous or insubstantial. Cases now pending on appeal in which a court has characterized the reversal as based on evidentiary weight should be reconsidered in light of our decision today, and under the doctrine of Burks and Greene any retrial of those cases may or may not be barred on the basis of former jeopardy."

QUESTION: Well, let me call your attention to page 22 of the Joint Appendix, which is part of part five of the court's second opinion, down at the bottom of the page where they say: "The fact remains that we cannot fairly conclude from our original opinion that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency."

Now, don't you agree that at least the second time around in interpreting their first opinion they said that they had not reversed for evidentiary insufficiency?

MR. BELLER: I would agree with that. What they said is that they're never going to do it again. But what they said is that in this particular case they had reversed on the weight. Now, there really have been no Supreme Court cases that establish weight versus insufficiency.

And as I said, through paragraph five -- I thought, in fact, when I read the case through number five, I thought I had won the case. I thought that they were going to let Tibbs go. And if you look at the concurring opinions -- the dissenting opinions, they all agree through paragraph five, because the court does, it dissects -- dissects; pardon me -- the original application of weight versus insufficiency, and says

it's too hard to determine.

In fact, they went through -- if you look at, and I'm sure you have -- but they went through and delineated all the cases in Florida that had used the weight theory and said that they were very tenuous, and that most of these cases were reversed on insufficient evidence, and therefore, as I said before, they then concluded that no court should reverse on the weight again.

However, they left in effect Rule 9.140(f) of the Florida Rules of Appellate Procedure, and that rule says: "In the interest of justice, the court may grant any relief to which any of the parties is entitled in capital cases. In capital cases" -- and this was a capital case -- the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review."

But then they went on to say that if a court does under 9.140 review the insufficiency of the evidence to determine whether or not it's sufficient and reverses -- and this is, I'm quoting from 21, the second paragraph. This is from the Joint Appendix:

"With respect to the special mention of capital cases in the second sentence of the rule, we

take that sentence to mean no more than that an additional review requirement is imposed when insufficiency of the evidence is not specifically raised on appeal -- namely, that the reviewing court shall consider sufficiency anyhow and, if warranted, reverse the conviction. The consequence of that action would be to bar retrial under the double jeopardy clause."

They're saying if a court does review the sufficiency of the evidence it would bar it. Now, I raised this point in my brief and I think it's important to raise the point, because it's a question of interpretation of what the court originally said.

The three dissents here, the three justices that say that the evidence was insufficient, and there is a very -- and I quoted extensively from Justice Sundberg's opinion in my brief, because I think he said it better than I can.

But the three justices there were part of the original majority that had reversed for a new trial. There was only one justice of the original majority that didn't join in, and the reason he didn't join in is because he wasn't on the court, as far as I could determine. And nobody can read the man's mind, of course.

But what I'm saying is that the people who

wrote the opinion -- Justice England, who wrote the opinion, the original opinion, said in the interest of justice we should let him go. What he's doing is applying -- and he did quote Rule 9.140(f). What he's doing is saying, under Rule 9.140(f), as the majority said here, we reviewed the evidence, we found it insufficient, therefore double jeopardy bars a retrial. In the interest of justice he should not be retried.

And he did it very shortly. Justice Englander in his dissent said, I agree with the court through part five. I agree with the court through part five, too.

Justice Sundberg in his dissent started out with saying, I agree with the court through part five. Because through part five the court says, we shouldn't use the standard of weight or insufficiency, because weight is too tenuous. And then they finally come -- they do come to the conclusion in this particular case that they had made an error, that they had used the standard of weight rather than insufficiency.

And they said we could do three things. We could vacate our original order and say that we shouldn't have reversed and sustain the original conviction. We can send back for a new trial. Or we could release him. And we think of the three we should do the medium thing, which is send back for a new

trial.

QUESTION: Well, I suppose one of the questions is whether that is an appropriate remedy for a reviewing court, is it not?

MR. BELLER: Sure. I really do not think that the first option is a viable option, where they could say at this late date their original conviction should stand.

QUESTION: I'm just talking about the second alternative that they took. Are they not open to at least the arguable suggestion that they were sitting as a jury?

MR. BELLER: To a certain extent, I think every court sits as a jury, though the law -- and they fairly pronounce what they consider law now. They say, we should not sit as a juror, we should not do -- we should just determine whether as a legal matter the evidence was insufficient. And I think that's what they did determine, because, just to give you a brief resume of the case, because I know this Court is familiar with the briefs, this was a one-witness case.

QUESTION: I think you can assume we're all familiar with the facts, counsel.

MR. BELLER: But there is one other point that I would like to make --

QUESTION: Don't we have to accept what the court said that it did? You're not asking us to reweigh the question and say that the Florida court did something else, are you?

MR. BELLER: I'm asking you to determine what the Florida court did in the original Tibbs decision in the light of Burks and Greene, which is the subsequent decisions of this particular court.

QUESTION: Well, I thought you were asking us to say that if a conviction is set aside because it's against the weight of the evidence that we should apply double jeopardy to it. But what I think I hear you saying is that we should re-examine this whole question for the Florida court to say they did something other than what they said they did.

MR. BELLER: Whether they call it weight or insufficiency, if the court ruled on the evidence and didn't rule on any legal point other than just the evidence, that brings it within the double jeopardy clause.

QUESTION: Well, what do you do in the case where the trial court simply sets aside the verdict and grants a new trial, sitting as a so-called thirteenth juror?

MR. BELLER: I think that's a different

situation, because the trial court is a thirteenth juror.

QUESTION: Well, but within a system of state procedure certainly the appellate court can decide it will sit as a thirteenth juror too, can't it?

MR. BELLER: Under Rule 9.140 the court has left itself that option. It says they should never reverse -- review the weight of the evidence. But then again, the Florida Supreme Court has set out what it can do. It said under Rule 9.140(f), if we do review the evidence and determine that it's not enough, then they say the consequence of that act would be to bar retrial under the double jeopardy clause.

What we're saying is the original court didn't know Burks and Greene. Burks and Greene came afterwards. The original court did sit down and did an extensive review of the evidence and found it lacking to convict beyond and to the exclusion of every reasonable doubt. And actually, they came within the standards, I think, that were set by this Court in --

(Pause.)

MR. BELLER: This Court has set various standards, and that's the standard, is beyond the exclusion of every reasonable doubt. If you don't come to that standard -- and Justice Sundberg set out the

case. I think it was Scott, but let me find it.

QUESTION: Well, are you saying, counsel, that what the Supreme Court of Florida did is to hold that the trial judge should not have let the case go to the jury in the first instance?

MR. BELLER: I think that's very possible, Your Honor. I think that the trial court should not have. The Florida law does allow conviction by testimony of just the prosecutrix alone, unsubstantiated testimony. However, what the Florida Supreme Court says, in that instance there must be some other, however tenuous, corroborating evidence. And that's why they said in this case there was nothing but Cynthia Nadeau's word. There's nothing to show the man was a resident of the area, that he was ever in the area, that he had ever seen the person before, or that she knew him or any otherwise.

And in most convictions where there is a prosecutrix's testimony alone they have something else to substantiate. They went through a whole series. Again, I won't burden the Court with the various criteria that they went through. There is nothing to show that he had owned a car. There was nothing to show he had ever been in that particular area.

There was nothing substantiating her testimony

in and of -- naked testimony -- in and of itself, other than the factor that there was a so-called confession to an inmate within the jail, which the court discounted, because I think this Court is familiar and every court is familiar with the fact that you can get people in jail to say anything if it will lessen their sentence one day.

QUESTION: Mr. Beller, may I ask, Justice Boyd in the first go-around was the crucial vote, was he not?

MR. BELLER: Yes.

QUESTION: And certainly in the second go-around in his dissent he took the position clearly -- or I'm asking whether he did -- that his vote was on insufficiency.

MR. BELLER: Well, there's no question about that.

QUESTION: So it gets down to what the three of the plurality of the first go-around held.

MR. BELLER: What I'm saying is that the original first court, the surviving members of the original majority have all said that their vote was on insufficiency. Justice Sundberg wrote the largest dissent and he clearly comes to the conclusion that his original opinion in concurrence was on insufficiency.

Justice Boyd says it. And Justice Englander says, I concur with the court through section five, but then I use Florida Rule 9.140(f) and --

QUESTION: But as Justice O'Connor said, in the second go-around the majority said otherwise. And is this like, as is so often the case here, we are confronted with a later Congress' expression of what it earlier meant?

MR. BELLER: I think so. And also, the expression is by the second court, the majority in the second court. Two of the majority in the second court were the dissents in the first court. They would have upheld the original conviction. And two are new members of the court.

QUESTION: Well, the Florida Supreme Court certainly messed it up in a way, didn't it?

MR. BELLER: I certainly think they did. And certainly -- let's not lose sight of one particular aspect of the double jeopardy clause. Frankly, that's exactly what the double jeopardy clause means to me, is that the state doesn't get a second bite at the apple, that the state, if it doesn't have sufficient evidence or enough evidence or the weight of the evidence at the first trial -- whatever you want to call it, but the court says it has to be enough evidence to convince a

person beyond and to the exclusion of every reasonable doubt, and if the appellate court says that they didn't have that much evidence then --

QUESTION: Mr. Beller, what I meant by my last remark is that they messed it up for us in considering the double jeopardy feature. And I'm sure they feel they did the right thing as far as their procedure is concerned. It makes it a ticklish case for you and your client and your opposition.

QUESTION: Mr. Beller, when a court gives a new trial to a Defendant because the conviction is against the weight of the evidence, isn't the court merely granting the Defendant a second opportunity to get an acquittal? And if your rule were adopted, if double jeopardy has to apply, wouldn't you preclude state court judges from, in the interest of justice, giving a Defendant that kind of an opportunity?

MR. BELLER: The Supreme Court of the State of Florida said it didn't do that in this particular case. It said, we specifically reserve the right under Rule 9.140(f) to grant new trials in the interest of justice. Then they went on to interpret it and say, if under 9.140(f) we reweigh the evidence, then double jeopardy applies. At least that's my thinking of what they said, and I'm not sure that they're clear in what

they said in that particular paragraph.

They said in this particular -- they didn't say we grant -- and that's where I take issue with the brief of the State. Nowhere did they say in there that we're granting a new -- that we granted a new trial in the interest of justice in the original case. They said we made a mistake in the original case. They said we reweighed the evidence. We used the weight of the evidence, which we shouldn't use; that an appellate court should just act on whether or not the evidence is legally sufficient or not.

They said, but we don't preclude an appellate court granting a new trial under Rule 9.140(f). And then they went on to say that if they do consider the sufficiency of the evidence under Rule 9.140(f), in light of Burks and Greene they would have to say that he could not be retried.

There was no other consideration, no other technical consideration, other than the evidence. And I think that the majority in this court states the law right and comes to the wrong conclusion to a certain extent. And that's why the dissents all joined in through paragraph five, through section five of the majority's opinion, in that the weight and insufficiency are so hard to distinguish, even for a court; whether or

not I have insufficient money or the weight of the money is great enough, or coffee or whatever. It's a tenuous aspect that an appellate court shouldn't get into.

The appellate court, if there is legally sufficient evidence, should not reverse.

QUESTION: Suppose an appellate court, suppose the Florida Supreme Court, reversed, simply citing the rule, mentioning nothing about the evidence, that they're granting a new trial in the interest of justice under the rule, nothing more. Double jeopardy?

MR. BELLER: Under that supposition, granting the rule and not knowing what the court's consideration was, he might be able to be retried. Maybe at that point there should be a motion for clarification of the court's ruling, trying to find out what --

QUESTION: Let's assume there was and the court denied it.

MR. BELLER: If I were a defense attorney and if there were nothing that the court had considered other than in the Tibbs case, I would make the same motion that I made before the trial court now. Because if the court just considers evidence and it does not consider technical objects, whether they call it weight, whether they call it insufficiency, whatever label they put on it, they're saying there was not enough evidence

to convict this particular party. And that's insufficient.

QUESTION: Well, they might, if they merely cited the rule, they might be doing it for an accumulation of trial errors which they've elected not to identify.

MR. BELLER: I think the court has that option. But they did elect to identify what they reversed it under in this particular instance.

QUESTION: In the first opinion.

MR. BELLER: In the first opinion.

QUESTION: But is the first opinion of any significance now? Isn't that vacated and the second opinion is the only one we deal with?

MR. BELLER: You can't possibly -- you can't separate the two, because the second opinion is an interpretation of what the first opinion meant. The second opinion is saying, based on our first opinion, we think we did this and we think we did that. So there's no way to separate it. It doesn't exist in a vacuum in and of itself.

It would be meaningless to read the second opinion without reading the first opinion, because that's what the court's doing. It's saying, we're rereading our opinion in the light of Burks and Greene,

which are new cases, and we're determining whether or not we reverse on weight or insufficiency. And what they did say was, we reversed on weight in this particular case, though we've never done it before, and we're never going to do it again.

QUESTION: Well, Mr. Beller, isn't that logical to believe that it's true, where you have a situation where the evidence in the case consisted of the testimony of the eyewitness victim, hardly insufficient as a matter of law? Isn't it a case where the court of appeals said, we didn't believe her? Reading the cold record, we just don't believe here. We're going to weigh it differently.

But that isn't insufficient evidence as a matter of law, is it?

MR. BELLER: I think as a matter of law it might be, unless there's some even very faint corroboration. I think that most cases that have held eyewitness testimony to be the sole convicting factor have had some strands of corroboration. And that's what the court went into, the fact that there wasn't the vaguest point of corroboration other than her story, and that there were reasons to judge her story suspect, not the least of which was the factor that she made an identification based on solely a photographic exhibition

of Delbert Tibbs.

In fact, I didn't handle the original appeal, but that strikes me as almost the classic example of fruits of a poisonous tree. It was mentioned in passing by the court, not as a major reason for the reversal, but as the reason to suspect Nadeau's testimony, to find that her testimony wasn't completely within the bounds of the law, that it was based on a faulty exhibition of just these photographs of Tibbs.

She saw three photographs of Tibbs himself, as part of the original testimony.

MR. BELLER: That white light bothers me.

CHIEF JUSTICE BURGER: That means you have about three and a half minutes left.

MR. BELLER: Well, let me sum up, then, if I may.

CHIEF JUSTICE BURGER: That's the time you've reserved for rebuttal.

MR. BELLER: All right. I will reserve that time, Your Honor.

CHIEF JUSTICE BURGER: Mr. Palecki?

ORAL ARGUMENT OF MICHAEL A. PALECKI, ESQ.

ON BEHALF OF RESPONDENT

MR. PALECKI: Mr. Chief Justice and may it please the Court:

The Respondent here did not misstate the issue. Clearly, the appellate court in the instant case did act as a thirteenth juror. In the second Tibbs case, the court stated in effect that it did act as a thirteenth juror. The court stated that their previous opinion reversing and remanding for a new trial was based upon evidentiary weight. The court stated that the trial testimony was legally sufficient to support Tibbs' conviction under Florida law.

The court stated, we reweighed the evidence supporting Tibbs' conviction. And finally, the court stated, "We cannot fairly conclude that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency."

Clearly, this is what is meant by an appellate court sitting as a thirteenth juror.

QUESTION: Of course, not everybody agreed with it. Not everybody on the court agreed with your analysis.

MR. PALECKI: That's correct, but that is the opinion of the court, the majority of the opinion of the court, which is now the law in the State of Florida. And the Petitioner here is merely asking this Court to --

QUESTION: Mr. Attorney General, supposing the

law of Florida had been perfectly clear that at the time prior to this decision that the only action an appellate court could take would be to reverse for insufficiency, and some of the judges of your court say that was what the law was. And say it's also perfectly clear that after this decision that's the only action the court can take, and they hold that in this one case we'll do everything differently. Would that be permissible?

MR. PALECKI: That would be permissible, Your Honor. However, that's not what occurred here, first of all. And secondly, when you're talking --

QUESTION: That's what some of the dissenting judges say occurred.

MR. PALECKI: That's true. That is what the dissenting judges say occurred. But the dissenting judges are in the minority in this case.

Now first of all, to answer your question --

QUESTION: Aren't they usually?

MR. PALECKI: Excuse me?

QUESTION: Aren't they usually?

MR. PALECKI: Yes, they are.

(Laughter.)

MR. PALECKI: My point is that the dissenting -- the opinion of the dissenting judges is not the law in the State of Florida.

QUESTION: No, but my question was, assuming they correctly summarized the law and you agreed with it, before this decision and after this decision, would it be constitutionally permissible to have this case be decided on the weight of the evidence, whereas all other cases like it have been decided on sufficiency grounds?

MR. PALECKI: Well, one thing I think throughout the country I would say pretty much universally -- perhaps there are some exceptions -- the courts throughout the country for the last century have been saying appellate courts should not reweigh the evidence. And we learned this in law school. You know, it's one of the elementary principals of appellate law.

Yet, time and time again appellate courts do reweigh the evidence. It's a matter of fact. I have read dissenting opinions of this Court where the dissent says the majority here reweighs the evidence. I believe also this Court has written majority opinions saying that the dissent is reweighing the evidence.

So we have an area of law which it appears that very often courts try to dodge or evade, and courts are continuously reweighing the evidence, even though they say that they aren't. But in any event, the law in the State of Florida in this particular case perhaps is not clear that the courts can't reweigh the evidence.

And I would refer the Court to the opinion of the Second District Court of Appeal, which is in the appendix, where the Second District Court of Appeal cites at least ten cases in the State of Florida where appellate courts had reweighed the evidence. So the fact of the matter is that there is a bulk of caselaw in Florida which has the effect of saying that in Florida the appellate courts up until that time can reweigh the evidence.

Now, in this case not only did the Florida Supreme Court rule that Tibbs' reversal was not based upon evidentiary insufficiency; the court ruled that it had improperly reweighed the evidence and described Tibbs' reversal as an appellate reversal improperly entered. So the Florida Supreme Court has conceded that it reweighed the evidence and has described its earlier decision as an appellate reversal improperly entered.

And the court went on to state: "We could simply apply the principles enunciated in today's decision, vacate our previous reversal, and affirm Tibbs' conviction." So not only was Tibbs' reversal not an acquittal here; it should not even have been a reversal, according to the Supreme Court of Florida.

Here retrial does not give the State a second choice -- excuse me -- a second chance to supply evidence that it failed to muster in the first trial.

Here retrial gives the Defendant a second chance to convince the jury of his innocence.

In this court --

QUESTION: How long under Florida law do you think that that could keep on going?

MR. PALECKI: I'm not sure I understand the question.

QUESTION: Suppose he goes back and he's tried again and the 12 jurors find him guilty, he goes up to the reviewing court and they say, we still have these doubts. Can they send it back again?

MR. PALECKI: Yes, Your Honor, they can.

QUESTION: How long? My question is, how long can that go on?

MR. PALECKI: Well, I would answer that question by referring the Court to its caselaw on hung juries. This Court has written several opinions which say when there is a hung jury there can be a retrial.

QUESTION: Yes, but then there is no verdict. That's quite a different situation.

MR. PALECKI: That's true, Your Honor, there is no verdict.

QUESTION: And there's been no determination at all.

MR. PALECKI: But in this regard the hung jury

case is closer to one terminating in an acquittal than the case where the appellate court reverses, despite the technical sufficiency of the evidence.

QUESTION: You mean it's a hung jury because the thirteenth juror is holding out?

MR. PALECKI: It's very analogous to a hung jury, because the appellate court as a thirteenth juror is merely saying, we disagree with the other twelve jurors. So in that case, in that way, it is very analogous to a hung jury. But as I stated earlier, the situation of a hung jury is even closer to an acquittal than in the case where an appellate court reverses despite the technical sufficiency of the evidence. Because after a hung jury the prosecutor knows his case has not led to a conviction, whereas in the case here the prosecutor knows that his case has led to a conviction and that the twelve jurors have believed the Defendant Tibbs was guilty.

I would cite this Court -- excuse me.

I would argue that in this situation it is Tibbs who gets the proverbial second bite at the apple and not the State of Florida, because Tibbs gets to go in front of a jury again and perhaps Tibbs can be acquitted the second time.

QUESTION: Where did Tibbs get the right to

prove his innocence?

MR. PALECKI: Well --

QUESTION: That was your phrase. I never knew we required anybody to prove their innocence. I thought that was the Napoleonic Code.

MR. PALECKI: Well, Your Honor, that was a slip of the tongue. Perhaps I should have used the word that Tibbs will be found innocent by the -- found innocent by the jury in his second trial, not that he'll have to prove his innocence.

QUESTION: Well, I don't think that the average citizen is required to have a jury to declare him innocent. I thought he was presumed a little bit.

MR. PALECKI: Well, at this time he is presumed innocent, because the Florida Supreme Court has reversed his conviction and said that Tibbs starts off on a clean slate.

QUESTION: And if he's presumed to be innocent, he doesn't have the right to prove his innocence.

MR. PALECKI: That's correct, Your Honor, and he does not have to prove his innocence.

In upholding the Massachusetts dual tier trial system, this Court held that nothing in the double jeopardy clause prohibits a state from affording a

Defendant two opportunities to avoid conviction and secure an acquittal. And that's merely what I'm saying in this case.

Under Burks, the Defendant will go free only when the prosecution's failure is clear. Petitioner requests a drastic broadening of Burks to cover the situation where not only isn't failure clear, but where there is no failure at all, because here the Florida Supreme Court has said that its reversal was improperly entered, that they made a mistake and they should never even have reversed it in the first place.

So in this case there has been no failure at all, and to extend Burks to a situation where there has been no failure at all is completely uncalled for. Now, this --

QUESTION: Is it your position that the opinion in the first case by the Supreme Court is vacated totally, or is it merely modified?

MR. PALECKI: Well, they state that we could simply apply the principles enunciated in today's decision, vacate our previous reversal, and affirm Tibbs' conviction, but they chose not to do so. They felt that Tibbs would be prejudiced by doing so because they've already told Tibbs he can have another trial and they're going to let him have the second trial.

QUESTION: Mr. Attorney General, was a judgment entered after the first one, if you know?

MR. PALECKI: Yes, Your Honor. A judgment was entered.

QUESTION: In Florida, once a judgment's issued can it be recalled?

MR. PALECKI: I think the appellate law in Florida is similar to other states, in that once a judgment is entered the appellate court can reverse the previous conviction and remand, if necessary, for a new trial.

QUESTION: The same court? Once a judgment is issued, the same court can reverse that judgment?

MR. PALECKI: Well, I don't see anything in the Constitution of the United States that would prohibit that, Your Honor. And as far as Florida law is concerned, the Supreme Court of Florida has in effect done that, although this was an appellate decision and not a judgment. I think there's a distinction between an appellate decision and a judgment.

Here the Florida Supreme Court said that its previous appellate decision was wrong. Just I would say it's similar to the Burks case, where this Court has said that Bryant is no longer the law in this state. I think that an appellate court --

QUESTION: I'm talking about in the same case. They didn't say that. This is the exact same case. I thought judgment was final. Our Constitution allows us to hear only appeals from final judgments. So if the Florida court in the first case issued a final judgment, "final" in quotes, double underscored, can the same court reverse that final judgment in that case? That's my problem.

MR. PALECKI: Well, in this case the Florida Supreme Court did not reverse its previous judgment. It merely said that it's reasoning in reaching the previous judgment was incorrect and that it should not have done that. But they've pretty much stuck with their judgment that --

QUESTION: So the judgment was not reversed.

MR. PALECKI: That's correct, Your Honor.

QUESTION: That's what I'm trying to get.

MR. PALECKI: Petitioner is asking this Court to redetermine a matter of state law. In this case the Florida Supreme Court has said that it reweighed the decision, its previous -- it reweighed the testimony in its previous decision, and that this was not a case that was overturned based on evidentiary insufficiency.

The case of Bell v. Maryland stands for the proposition that the Supreme Court of the United States

will not redetermine matters of state law. Here evidence -- the evidence was sufficient under Jackson v. Virginia. That is, in viewing the evidence in the light most favorable to the prosecution, a rational tryer of fact could have found guilt here.

QUESTION: Well, if they had stopped there we might have a different case, would we not?

MR. PALECKI: Yes, Your Honor. I think that if they had stopped there we wouldn't have any of the problems that we have right here, because the facts are very clear that Cynthia Nadeau on two occasions specifically identified Mr. Tibbs in the courtroom, pointed to him and said, that is the man that raped me, he is the man that murdered Terry Milroy.

She testified that Tibbs shot Milroy in the back, that he then went over to Milroy, who was pleading for his life, pleading, don't shoot me again, and said to Milroy, does it hurt, boy, are you in pain? Finally, after he was done taunting Milroy he dispatched him with a single bullet to the head.

Thereafter, he went on to rape Cynthia Nadeau. There was the testimony of the doctor that she did have sperm in her vagina. There was the corroborating testimony of Tibbs' jailmate, who testified that Tibbs had told him he committed the

murder and went into some detail, stated that he, Tibbs, had told him that he was driving down the road in Fort Myer when he saw a couple hitchhiking, and he mentioned the name of the road, Cleveland or Fowler.

Tibbs told his cellmate that he, on the pretense of running out of gas, he went out into a field where there was some farm machinery, presumably to siphon gas out of it. Tibbs' cellmate said that Tibbs had offered the fellow money if he walked off; that Tibbs told him that he pulled out his gun and told the dude to start running; that Tibbs told him that he shot the dude that was running; that Tibbs said that he had sex with the girl and walked over and shot the dude again; that Tibbs said he was fixing to kill the girl, but she swayed him not to by telling him she would be his woman; and finally, that the girl jumped out of the truck and that a car was coming at that time, so he had to get going.

So in detail Tibbs' cellmate gave the story of the crime, and it corroborates on many points with the testimony of Ms. Nadeau.

QUESTION: Did his cellmate explain what happened to the truck?

MR. PALECKI: He testified that Tibbs had told him that the truck had run out of gas between Fort Myers

and, I don't remember if it was Miami or Fort Lauderdale, but on the east coast of Florida. The truck was never able to be found, although certainly that's not fatally deficient under the test of Jackson v. Virginia.

It's very clear that under Jackson v. Virginia that there was a sufficient evidence that a reasonable jury could have found guilt. And under Jackson v. Virginia we must view the evidence in the light most favorable to the prosecution.

If there is any question at all that the Florida Supreme Court didn't act in good faith here, that their second opinion was merely a ruse used in order to get by Burks, I think it's clear that that's not the case, because the Florida Supreme Court in a similar case, McArthur v. Nourse, just some weeks before this case had ruled that Burks applied. Because in that case they said they had based their opinion upon insufficiency.

So the Florida Supreme Court -- there's no showing that the Florida Supreme Court used its second opinion as a means of somehow evading the Burks opinion. As the Florida Supreme Court stated in its second opinion, prior to Burks there was no reason whatsoever to be precise in your language concerning

evidentiary insufficiency, because Burks broke with a long line of precedent reaching all the way back to 1896, United States versus Ball.

So there was no reason for the Florida Supreme Court to believe in the first case that this question would ever arise. And I don't see any problem with the Florida Supreme Court coming back with a second opinion saying, this is what we meant, and being precise with our language here now that we know what Burks is the law, this is what we meant when we came out with our first opinion.

Now, the Petitioner incorrectly analyzes United States v. Scott in his brief, and comes up with a nice neat test, that there are two categories: one is reversals based on fact, which means there must be an acquittal; and the other is reversals based on trial error, under which case there cannot be an acquittal.

But the Petitioner fails to recognize the distinction between a dismissal at trial and a reversal on appeal. At trial where there's a dismissal you're taking the case away from a jury which might well find the defendant not guilty, whereas on appeal we know that the jury has found the defendant guilty.

In this case the 12 jurors said Tibbs is guilty of first degree murder and rape, and for that

reason there are -- the test in Scott is not the same test used in Burks, because the test in Scott does not work on an appellate reversal, because every appellate reversal based upon facts isn't necessarily an acquittal.

In Burks this Court said that an acquittal after the court reversed must mean that the evidence should never even have gone to the jury. The appellate court in this case, in the first Burks case, never said or even hinted that the evidence should not have gone to the jury. They never said that the trial court erred in not granting an acquittal.

So for these reasons, the nice neat package we have in Scott, where we have two categories -- reversal based upon facts and reversal based upon trial error -- does not work on an appeal situation. On an appeal situation we must have two different categories. We have -- and this is, I think, supported by Burks -- those categories are reversals based upon evidentiary insufficiency and every other ground for reversal.

On reversals based upon evidentiary insufficiency, the double jeopardy clause applies and the state cannot retry the defendant. On every other ground for reversal the double jeopardy clause does not apply and the state can retry the defendant.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Beller, you have only two minutes remaining.

REBUTTAL ARGUMENT OF LOUIS R. BELLER, ESQ.,

ON BEHALF OF PETITIONER

MR. BELLER: Well, just shortly, Your Honor, the State has brought up the District Court of Appeals review of various courts. I would call the Court's attention to the joint appendix, page 16, in which the Supreme Court of Florida reviewed all those cases that the appellate court brought up and said they all were reversals on insufficient evidence, in the concluding paragraph.

QUESTION: Mr. Beller, suppose when the case -- did you argue the case in the --

MR. BELLER: Yes, Your Honor.

QUESTION: Suppose during the argument the court said, we have concluded there's enough evidence to affirm the conviction, but we think maybe in the interest of justice we would grant a new trial if you want one. But if you don't want one, why, we'll just affirm the conviction.

Could the state put that to you, fairly put that to you, without violating the double jeopardy

clause?

MR. BELLER: I don't think so, Your Honor. I think that's the problem that this Court faced in Greene and Burks, the old problem of, if you ask for a new trial you waive your right to double jeopardy. Certainly any defendant faced with the possibility of either affirmation of a conviction or a new trial will take the new trial, if the court put it in that blunt words.

QUESTION: All right, suppose you took it. And then you think you should win a motion, then, in the trial court based on double jeopardy grounds?

MR. BELLER: Because subsequent this Court said that's exactly what we should win, that we don't waive our rights to new trial -- pardon me, I may have answered you wrong. I didn't argue the original appellate court decision, the appeal. I argued the second appeal.

QUESTION: Well, suppose during that appeal they had said that. You think that if you'd have taken the new trial that in the trial court you could have moved successfully to dismiss the case on double jeopardy grounds?

QUESTION: Certainly under Greene and Burks, because subsequent to that appeal, that particular

decision, this Court said, you don't waive your right to a new trial if the court reverses on evidentiary matters.

I would also state that the test is in Scott. The test -- the Scott test is a very good test, and that wasn't --

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Beller.

MR. BELLER: All right. I would just reaffirm that we feel that the test in Scott and this decision of the court in Scott applies the standards.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:03 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Delbert Lee Tibbs, Petitioner v. Florida - No. 81-5114

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BY Suzanne Young