IN THE SUPREME COURT OF FLORIDA

PERRY OMAR BUCKNER,)
)
Appellant,)
)
vs.) CASE NUMBER 89,001
)
STATE OF FLORIDA,)
)
Appellee .)
)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING BUCKNER'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PROVE PREMEDITATION BEYOND A REASONABLE DOUBT.

The state asserts that appellant has confused the burden of proof which the state must meet on the issue of premeditation. In its answer brief the state correctly points out that it has a "heavy burden" at trial to prove that appellant acted with premeditation. s e l y the burden of proof that appellant attacks on appeal. The state seems to believe that, once a jury returns with a verdict first-degree murder, the state has met its burden of proof. Fortunately, that is not the law in this state. The reporters are full of cases reversed by appellant courts based on insufficient evidence, even though the juries erroneously concluded that the evidence was sufficient. Appellant's argument on appeal is that the trial court should

have recognized that the evidence was legally insufficient to prove premeditation and, as a result, should have granted the motion for judgment of acquittal as to premeditation and allowed the jury to determine appellant's guilt as to second-degree murder. Appellant believes that he has overcome the "heavy burden" to justify reversal of the trial court's order by this Court.

In their argument, the state relies on, *inter alia*, that the victim was shot five times and that appellant fled the scene and hid from police for two days. In Kirkland v. State, 684 So.2d 732 (Fla. 1996), this Court found the evidence insufficient to support the requisite premeditation for first-degree murder, even though the victim's wounds were caused by "many slashes" and the defendant left town and was arrested five days later in another city. At most, appellant's shooting of Thaddeus Richardson was a "heat of passion" killing outside a bar that had just closed. There is no evidence that appellant intended to kill Richardson before their fatal encounter. This was not a first-degree premeditated murder. The trial court conceded that the question was a close one but decided to let the issue go to the jury. The court's ruling was erroneous. This Court should reverse.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE HE WAS INVOLUNTARILY ABSENT DURING PORTIONS OF THE PROCEEDINGS, ADDITIONALLY, WHEN BUCKNER WAS PRESENT HE WAS SHACKLED IN LEG IRONS WHICH HINDERED HIS ABILITY TO EFFECTIVELY PARTICIPATE IN HIS OWN CAPITAL MURDER TRIAL.

The Coney[1] violation.

The state submits that the Coney issue is not preserved due to the failure to interpose an objection at trial. The Fourth District Court of Appeal addressed this very contention by the state in Brower v. State, 684 So.2d 1378, 1380 (Fla. 4th DCA 1996):

> The supreme court did not imply any need for a contemporaneous objection in Coney, and it is clear that violating a defendant's right to be present at the time of peremptory jury challenges is fundamental error that may be raised for the first time on motion for new trial or on the appeal. [citations omitted]. Patently, the procedure the Coney court prescribed in order for a defendant to waive his presence or ratify jury selection in the defendant's absence would be superfluous if the simple failure to make a timely objection had the same result. We note that in *Mejia*, the First District recognized that to require a contemporaneous objection to preserve for appeal the issue of depravation of the right to be present at the bench conference for peremptory challenges would render meaningless. 675 So.2d at 999.

The state also disputes the existence of a "Coney window" where the holding in Coney was in effect prior to the effective date of the amendment to Florida Rule of Criminal Procedure 3.180 announcing a new definition of "presence." In Gonev v. State, 691 So.2d

[1] Conev v. State, 653 So.2d 1009 (Fla. 1995)

1133, 1134 (Fla. 5th 1997), the court recognized:

> This trial took place during March of 1996. It is within the "window" of the ***Coney*** decision issued in January of 1995, which had been given prospective application only, and the supreme court's clarification of Florida Rule of Criminal Procedure 3.180 which is intended to provide a "clearer standard" to determine what the rule means by a criminal defendant's "presence." ***Boyette v. State, 688*** So.2d 308, 310, n.1 (Fla. 1996). That amended rule would provide us with a valid basis to affirm this case except that it may not be retroactively applied. See ***Mathews v. State, 687 So.2d 908 (Fla. 4th DCA 1997).***

See also Daniels v. State, 691 So.2d 1139, 1140 (Fla. 1st DCA 1997)["Daniels thus was tried in the ***Coney*** window."]

The state also points out that Buckner would not have the benefit of this procedural right at any retrial of this case based on this Court's amendment of Florida Rule of Criminal Procedure 3.180. Appellant submits that this assertion is probably erroneous. In Chavez v. State, 22 Fla.L. Weekly D1591 (Fla. 3rd DCA July 2, 1997), Chief Judge Schwartz in a specially concurring opinion wrote:

> While, for the reasons set out in Judge Gersten's opinion, I entirely agree that new trials are required, I would go further and hold that, to vindicate the ***Coney*** rights to which Chavez was entitled and of which he was erroneously deprived at the first trials, fundamental fairness requires that he be given those rights at the new one, notwithstanding the intervening change in the rule.[citations omitted]. To hold otherwise amounts to an acceptance of the unacceptable conclusion that a defendant may be deprived of a legal right solely because of a judicial error .

The state argues alternatively that Buckner waived his Coney right to participate in bench conferences. The state correctly points out that trial counsel advised Buckner that he

had the right to attend the bench conferences and asked Buckner if it was "all right if he remained at counsel table". Buckner answered in the affirmative. However, this is the only personnel **"waiver"** by Omar Buckner in the record. Defense counsel's explanation to Buckner on the record talk about "legal arguments" at the bench, not jury selection. No where does defense counsel or anyone else explain on the record to Omar Buckner that his jury will be selected at the bench outside of his presence while he remained at counsel table in shackles. Appellant submits that this **"waiver"** is insufficient under any definition of that word.

Shackling Omar in Leg Irons Resulted in His Involuntarily Absence and Prevented Him From Seeing Evidence That the State Used Against Him.

Appellant concedes that defense counsel did not expressly object to the shackling of Buckner at the commencement of trial. The transcript of the jury trial appears to begin in the middle of a discussion regarding Mr. Buckner rising (while wearing shackles) when the jury entered. Appellant submits it is clear that defense counsel was attempting to cooperate with the trial court's security measure of shackling Buckner during his trial. On the other hand, defense counsel clearly did not want the jury to see Mr. Buckner wearing shackles. Defense counsel did convince the trial court to allow Buckner to rise when the jury entered without fear that the jury would see the shackles, However, when defense counsel requested that the shackles be removed so that Buckner could reposition himself to observe the state's videotaped evidence, the trial court gave Buckner a choice of allowing the jury to see him in shackles or not allowing him to see the video as it played.

THE COURT: If he wants to watch it, just march him

> right over there and sit down and he stays in shackles.
>
> [Defense counsel]: Ok. He will choose not to watch it at this time, Your Honor.

(T 482)(Emphasis added) The "choice" was in fact no choice at all. Buckner's shackling also probably weighed heavily in defense counsel's "advice" to Buckner to "waive" his presence at the bench during voir dire. Appellant contends that it is clear from the record that an objection to the initial shackling of Buckner would have been a futile act. This issue has been sufficiently preserved.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, and those cited in the initial brief Appellant respectfully requests this Honorable Court to grant the following relief:

As to Point I, vacate Appellant's conviction and sentence for first-degree murder and remand with instructions to adjudicate appellant guilty of second-degree murder and resentence accordingly;

As to Points II, V, and VI, reverse and remand for a new trial; and,

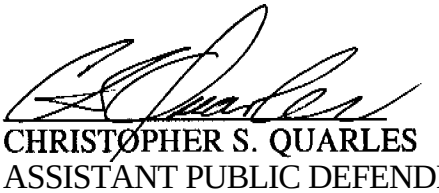
As to Point III, vacate Appellant's death sentence and remand for the imposition of a life sentence without possibility of parole;

As to Point IV, vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, for resentencing;

As to Point VII, vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, for a new penalty phase.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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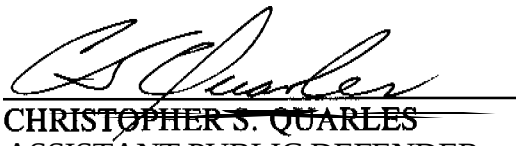
I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Perry Omar Buckner, #124314, Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 29th day of October, 1997.



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