W00A 047

IN THE SUPREME COURT OF FLORIDA

DAVID P. CARMICHAEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,811

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4612

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES AND RULES

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, David P. Carmichael, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

Because the volume designations in the Index to the Record on Appeal do not match the cover sheets of each volume, the symbols "R" and "SuppR" will designate the initial 54-page record and 13-page supplemental record, respectively. The symbol "T" will refer to the transcript of trial court proceedings followed by the date of the transcribed court proceeding. "IB" will designate Petitioner's Initial Brief on the Merits. Each of these symbols is followed by any appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Pertinent history and facts are set out in the attached decision of the lower tribunal, downloaded electronically and found at 693 So.2d 1141.

As it did in the DCA, the State will argue that Petitioner failed to preserve this claim. Therefore, the State adds the following facts. Neither Petitioner nor his trial attorney voiced

any concern as the trial court announced the product of the peremptory challenges, that is, the names of those who will sit on the jury (See T6/26/95 39-40). The day of trial, the trial court asked, "Do either of you have anything you want to put on the record before we start the trial?" (T6/28/95 4), to which defense counsel responded: "None by the defense, Your Honor" (T6/28/95 4). Immediately thereafter, the trial court announced without objection that the jury would be sworn in (T6/28/95 5).

The State also adds that a court reporter was present at voir dire (See T6/26/95 1-41).

The State also adds that Petitioner was present in the courtroom during jury selection "seated . . . next to" defense counsel (T6/26/95 5. See SuppR 12).

SUMMARY OF ARGUMENT

Petitioner complains about a situation that he created. He and his counsel were not concerned about his presence at the bench during jury selection. They did not raise the current claim with the trial court, and, as a result, the court reporter was not invited to the bench. Petitioner did not avail himself of the court-reporter service that was readily available to him. Therefore, Petitioner's failure to preserve his current argument created the silence in the record. Petitioner not only failed to preserve his claim but also thereby failed in his duty to assure that an available record is transmitted to a reviewing appellate court.

Moreover, Petitioner wishes a new trial because of a jury-selection right he said he was not provided here. However, the jury selection in a new trial, on remand, lawfully can be conducted exactly the same way as the one here. Here, Petitioner was "present" under current criminal procedure Rule 3.180(b). The facts in this case demonstrate quintessential non-prejudice and harmlessness.

ARGUMENT

ISSUE

IS PETITIONER ENTITLED TO A NEW TRIAL WHERE HE DID NOT APPRISE THE TRIAL COURT THAT HE WISHED TO BE AT THE BENCH DURING ANY PEREMPTORY CHALLENGES, WHERE HE DID NOT ESTABLISH ON APPEAL THAT HE HAD A RIGHT TO BE AT THE BENCH, AND WHERE, UPON ANY REVERSAL AND REMAND, HE WOULD HAVE THE SAME RIGHTS AS PROVIDED IN THE PREVIOUS TRIAL? (Restated)

Petitioner claims that he is entitled to a new trial because his rights under Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), were violated. The State has three responses that support the DCA's affirmance of the conviction. First, Petitioner did not apprise the trial court of his wish to be at the bench during any peremptory challenges, thereby failing to preserve his claim for appeal. Second, as the DCA held, Petitioner did not establish that any right under Conev existed because he did not establish a record showing peremptory challenges exercised at the bench. And, third, Petitioner should not be awarded a new trial based on a purported error in the trial court's failure to sua sponte invite Petitioner to the bench when any re-trial could lawfully proceed exactly as the reversed trial.

A. This claim was not preserved for appeal.[1]

This Court has consistently held that a party must contemporaneously object or otherwise raise and maintain a claim before the trial court in order to preserve that claim for appellate review. See, e.g., Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993); Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Accord §§90.104(1)(a), 924.051(1)(b),(3), Fla. Stat. Cf. Fla. R. App. P. 9.140(d)(2) ("A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal").

This Contemporaneous Objection Rule applies to jury selection. See Franqui v. Stat-e, 22 Fla. L. Weekly S391, S391 (Fla. July 3, 1997) (peremptory challenge issue procedurally barred "because defense counsel failed to properly renew his objection . . . before accepting the jury and allowing it be sworn"); Melbourne v. State, 679 So.2d 759 (Fla. 1996) ("party objecting to the other side's use of a peremptory challenge on racial grounds must . . . make a timely objection on that basis"); Willacy v. State, 640 so. 2d 1079, 1082-83 (Fla. 1994)(waiver by failing to object to a juror when purportedly prejudicial information revealed about the juror during trial); Joiner v. State, 618 So. 2d 174, 176 (Fla. 1992)(jury selection issue waived by accepting jury without reservation); Brown v. ate, 606 So. 2d 742, 743 (Fla. 1st DCA 1992)("failed to preserve for appeal his objection to the

---

[1] Although the DCA's opinion did not address it, the State argued preservation there.

composition of the jury panel") approved Brown v. State, 620 So. 2d 1240 (Fla. 1993). Compare Suggs v. State, 620 So. 2d 1231 (Fla. 1993)(accepting jury subject to earlier objection sufficient to preserve jury selection issue).

A fortiori, in contrast to the weighty racial claims presented in Melbourne et al, the issue presented here concerns an interpretation of Rule 3.180, Fla. R. Cr. P., that no longer applies today. See section "C" infra on non-prejudicial, harmless error infra. Therefore, this Court has not exempted a Coney claim from the Contemporaneous objection Rule.

Initially, it appeared that this Court would exempt Coney from the Contemporaneous Objection Rule: "Obviously, no contemporaneous objection is required to preserve this issue for review . . . ." Conev, 20 Fla. L. Weekly S16, S17 (Fla. Jan. 5, 1995). However, the final version of Conev, reported at 20 Fla. L. Weekly S255, S256 (Fla. Apr. 27, 1995), and 653 So. 2d 1009, 1013 (Fla. 1995), did not include any mention of exempting this area of the law from the Contemporaneous Objection Rule. The deletion of the exempting language, at 20 Fla. L. Weekly 5204, means that the general rule (the Contemporaneous Objection Rule) applies here. Moreover, its deletion portended that this Court would apply the Contemporaneous Objection Rule to bar an appellate assertion of a defendant's right to be present at the bench during juror-challenges.

Accordingly, Gibson v. State, 661 So.2d 288, 290-291 (Fla. 1995), fulfilled the portent of Coney's revision. Under Gibson,

petitioner's claim was not preserved because it was not conveyed to the trial court. Gibson controls:

> In *Steinhorst v. State, 412 So.* 2d 332 (Fla. 1982), we said that, 'in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.' In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude or admit, he did not convey this to the trial court.

661 So.2d at 290-291. Since Gibson's claim was not cognizable on appeal, neither is Petitioner's. Here, as in Gibson, "[o]n this record, no objection to the court's procedure was ever made." See also Shriner v. State, 452 So. 2d 929, 930 (Fla. 1984) (defendant's absence from unspecified bench conferences not fundamental error).

Moreover, unlike Gibson, where, during jury selection, the trial court denied defense counsel's request for a "ten-minute recess to permit him to consult with his client," here Petitioner and counsel consulted prior to exercising challenges (SuppR 12).

Federal courts have taken a similar position. A criminal defendant need not be warned of his right to be present under Federal Rule 43, comparable to former Rule 3.180, and the right is waived unless the defendant expressly invokes it. See Fed. Rules Cr. Pr. 43; U.S. v. Bertoli, *40* F. 3d 1384, 1398 (3d Cir. 1994)(defendant's right to be present during conference between trial court and juror, subject to waiver and harmless error); U.S. v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)(right waived where defendants did not ask to be present

during in camera discussion among judge, juror, and defense lawyer).

As U.S. v. Brantley, 68 F.3d 1283, 1291 (11th Cir. 1995) (footnote omitted), reasoned:

> Defendants need not be expressly warned of their rights under Rule 43, and such rights may be waived by a voluntary absence from trial. Taylor v. *United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973) (per curiam); Fed.R.Crim.P. 43. The waiver does not have to be express or on the record in order to be valid. *Taylor*, 414 U.S. at 20, 94 S.Ct. at 196. Failure to assert the right to presence or to object to a violation of Rule 43 may constitute a valid waiver. *Gagnon*, 470 U.S. at 529, 105 S.Ct. at 1485-86.
>
> This court has held that with respect to jury selection, the right to presence may be waived by a defendant's voluntary absence. *United States v. Willis*, 759 F.2d 1486, 1500 (11th Cir.), cert. denied, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985). In *Willis*, the defendants were present for general voir dire but did not attend the individual voir dire subsequently held by the court in chambers. We found that the defendants had waived their right to be present during the individual voir dire. If waiver may be effected by a defendant's voluntary absence in these circumstances, which involve a more significant phase of jury selection than that at issue in this case, it follows that the appellants in this case also effected a valid waiver by their voluntary absence.

Here, instead of voicing any objection or even any vague concern, Petitioner, as well as his attorney, sat mute as the trial court inquired in open court before the jury was sworn:

- "Do either of you have anything you want to put on the record before we start the trial?" (T6/28/95 4);

and as defense counsel responded:

- "None by the defense, Your Honor" (T6/28/95 4).

Immediately thereafter, the trial court announced without objection that the jury would be sworn in (T6/28/95 5). Under Gibson, Joiner, and kindred cases cited above, Petitioner thereby did not preserve this claim.[2]

B. As the DCA held, no Conev right was ever established.

The DCA held below that since Petitioner did not establish that defense peremptory challenges were made at the bench in his absence there, Petitioner was not entitled to a new trial. Petitioner claims that a record silent on whether peremptories were exercised at the bench supports reversal. The DCA's analysis was correct.

Petitioner's position violates one of the most basic precepts of appellate review, the presumption of correctness. See Operation Rescue v. Women 's Health Center, 626 So.2d 664 (Fla. 1993); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

As this Court applied the presumption of correctness in Beech v. ate, 436 So. 2d 82, 85 (Fla. 1983), in rejecting a due process/vindictive sentencing claim, it should be applied here, where the record is totally devoid of a showing of any right:

> Since there is no evidence in the records of these cases to show that the sentences here in question are both more severe than the original punishments and were imposed to retaliate against

---

[2] Any error predicated on a right that no longer exists, cannot be "fundamental." Instead, here there was no prejudice to Petitioner. See section "C" infra,

> the petitioners for having pursued their rights, the presumption of correctness stands. We therefore hold that these sentences did not deprive petitioners of due process. *Accord Stuckey v. Stynchcombe,* 614 F.2d 75 (5th Cir.1980); *Jones v. United States, 538* F.2d 1346 (8th Cir.1976).

436 So.2d at 85.

Similarly, in Ford v. Wainwriuht, 451 So.2d 471 (Fla. 1984), regarding a jury instruction issue, this Court rejected an inference of prejudice and reasoned that "reversible error cannot be predicated on conjecture."

Hampton v. State, 28 N.W.2d 322, 324 (Neb. 1947), essentially applied the presumption of correctness to a claim that the defendant was not present at a jury view of the crime scene. The Nebraska Supreme Court rejected the claim because an error must affirmatively appear on the record. Otherwise, it will be assumed that the trial court followed proper procedures.

Therefore, because the trial court is presumed correct on appeal, an appellant, here Petitioner, bears the burden of showing on the record that a right existed and was denied. Instead of such a showing, Petitioner turns the presumption on its head by arguing that a silent record is ground for reversal.

As Judge Webster wrote for a unanimous en banc DCA:

> Moreover, the burden is on appellant to establish the existence of reversible error. E.g., Moore *v. State,* 504 So.2d 1311 (Fla. 1st DCA) (claim that reversible error occurred because defense counsel was not present when trial court responded to jury question supported by nothing more than speculation where record was silent on issue), *review denied,* 513 So.2d 1062 (Fla.1987). We have been unable to find anything in the record to support appellant's contention that he was not present at the bench conference during which challenges were exercised.

Mathis v. State, 683 So.2d 582, 583 (Fla. 1st DCA 1996).

Petitioner's brief assumes what he must establish. He assumes that a right existed. This assumption is the foundation of his argument that, because the right existed, the State must show that it was not violated.

Petitioner's argument is like contending that the State did not show where in the record the defendant was Mirandized. However, for any such argument to be cognizable, the defendant-appellant must show that there was police custodial interrogation resulting in a statement. The right to the warnings are inapplicable unless and until the defendant shows in the record that he was entitled to them. See, e.g., Riechmann v. State, **581** So.2d 133, 137 (Fla. 1991) ("Miranda does not apply to questioning outside a custodial situation"). Petitioner's claim is like arguing that he is entitled to a new trial because he **might** have made a statement to the police without properly Mirandizing him. Just a record failing to show a statement does not provide the basis of reversible error, neither does a record failing to show peremptories at the bench. In both instances, the appellant has failed to establish in the record the existence of the right upon which reversible error could be predicated.

In search and seizure law, the State has no burden unless and until the defendant establishes standing. For a purported search, the defendant must establish that he or she had a reasonable expectation of privacy upon which the police intruded. See, e.g., Jones v. Stat-e, 648 So.2d 669, 675 (Fla. 1994) ("in order to

challenge a search, a defendant must demonstrate that he or she had a reasonable expectation of privacy in the premises or property searched"); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 434 (1978). Until then, there is no Fourth Amendment right that can be asserted. Here, Petitioner's failure is like failing to establish that there was a police search at all. Petitioner had no Coney right unless and until he established that pertinent challenges were exercised at the bench without his presence there. He failed to establish his Coney right.

Returning to the law of jury selection, in Melbourne v. State, supra 679 So.2d 759, this Court detailed a multi-step process with a goal of "the elimination of racial discrimination in the exercise of peremptory challenges." Everyone can agree to the seriousness of rights pertaining to discrimination based on race and other unacceptable criteria, but Melbourne's multi-step process is not triggered until it is established in **the record** that a peremptory challenge was used on a "venireperson [who] is a member of a distinct racial group," 679 So.2d at 764. There is no right for the multi-step process to protect until the other party establishes **on the record,** inter alia, the requisite objection and distinctive racial group. A fortiori, here, Petitioner showed no rule-of-procedure-based Conev right in the record. He failed to establish that the challenges to which the procedural right attached were exercised. Instead, he merely speculates that jury selection might have been different.

In support of his argument, Petitioner cites to Delap v. State, 350 So.2d 462, 463 (Fla. 1977). However, Delap, which emphasized this Court's "mandatory constitutional duty to hear appeals from final judgments of trial courts imposing the death penalty," 350 So.2d at 463 n. 1, was devoid of significant portions of the transcript, that is, the

> transcript of the jury charge conferences; charge to the jury in both the trial and penalty phases; voir dire of the jury; or closing arguments of counsel in both the trial and penalty phases regarding the trial . . . .

350 So.2d at 463. In contrast, here a court reporter was present at voir dire (See T6/26/95 1-41).

Delap might apply here if there were no court reporter in the courtroom during jury selection or if the court reporter had lost those notes – and, of course, if the record could not be reconstructed. Instead, here, the court reporter was present in the courtroom – ready, willing, and able to take down anything Petitioner or his counsel wished to put on the record.

Therefore, in contrast to Delap, all Petitioner or his counsel needed to do was bring the current concern to the trial court's attention, that is, alert the trial court to the substance of the current claim. Instead, they sat mute, and as a result, the court reporter was not invited to the bench. See Sonuer v. Wainwriaht, 423 So.2d 355, 356 (Fla. 1982) (failure to include transcript of charge conference in record; no prejudice; "no objection made by trial counsel").

In this sense, Petitioner was an integral participant in creating the silence in the record. See Terry v. State, 668 So.2d 954, 962 (Fla. 1996)("[m]ost importantly, a party may not invite error and then be heard to complain of that error on appeal"); White v. State, 446 So.2d 1031, 1036 (Fla. 1984)(invited error applied to the submission of a chart; "cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis"); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979)(order "induced by stipulation of the parties. One who has contributed to alleged error will not be heard to complain on appeal"); Francois v. Wainwright, 741 F.2d 1275, 1282 (11th Cir. 1984)(citing and summarizing several cases) Here, if Petitioner had preserved his current claim, See section "A" supra, he would have no complaint about a silent record.

This situation is like a transcript ready to be included in the record on appeal, which the appellant fails to include in it. Just as an appellant has a duty to "ensure that the record is prepared and transmitted" to the appellate court, Fla. R. App. P. 9.200 (e), Petitioner here had a duty to ensure that a readily available record was made 'below. An appellant who fails to make a readily available record should not be heard to complain that it does not exist.

Petitioner's argument thus distills to an assertion that a trial judge has a duty to sua sponte ensure that a court reporter should be every place where something **might** be said pertaining

to a defendant's right that **might** exist. Petitioner would assume that effective appellate review is precluded by the failure to transcribe an event at which a right **might** exist and **might** be violated. Petitioner's argument would open "pandora's box,"

The State respectfully submits that scarce public resources should not be predicated on conjecture, caused by an appellant, regarding a purely procedural right that has since been abrogated. This brings the discussion to the State's final argument.

C. Petitioner was not prejudiced in a manner meriting a new trial.

Petitioner speculates on the existence of a right, speculates that it was violated, and wishes another trial at which it is not open to speculation that he would no longer have that right.

Because the Coney rule Petitioner attempts to invoke would be inapplicable upon any re-trial, Petitioner asks this Court for relief so that he might be tried again in the same manner upon which he seeks trial-court reversal.

This Court has receded from the rule of law announced in Coney, thereby eliminating it as a basis for reversible error:

> We have modified the proposed amendment to subdivision (b) of rule 3.180, Presence of Defendant,[2] to provide:
>
> A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed.
>
> '[footnote in original] This amendment supersedes Coney v. State, 653 So.2d 1009 (Fla.1995).

Amendments to the Florida Rules of Crimina1 Procedure, 685 So.2d 1253, 1254 (Fla. 1996). Accord Bovett v. State, 688 So.2d 308, 310 (Fla. 1996)(in Coney "the state conceded that the defendant's absence from the immediate site where challenges were held was error"; "incorrect for us to accept the state's concession of error"); Mathis v. State, 688 So.2d 334, 335 (Fla. 1997) ("[w]e acknowledged there that we had incorrectly accepted the State's concession that not allowing Coney to be present at the immediate site of juror challenges was error"); Rafael v. State, 688 So.2d 335, 336 (Fla. 1997)(same); Caldwell v. State, 687 So.2d 1297, 1297 (Fla. 1996) (same); Lee v. State, 685 So.2d 1275, 1276 (Fla. 1996) (same); Page v. State, 684 So.2d 817, 817 (Fla. 1996)(same).

Coney's applicability also has been pared to cases in which jury selection transpired after April 27, 1995. See State v. Meiia, 696 So.2d 339 (Fla. 1997); Henderson v. State, 22 Fla. L. Weekly 5384 (Fla. June 26, 1997).

Thus, Coney applied, at most, only to cases in which jury selection transpired from April 27, 1995, to January 1, 1997, the effective date of the amended rules of criminal procedure, 685 So.2d at 1255, and it would not apply to a jury selection in this case upon any re-trial. In essence, then, Petitioner seeks a re-trial so that his jury can be selected, without any error, in precisely the same manner in which it was selected in this case. For this reason, Petitioner should not be given what he already had in the first trial, a jury selection with Petitioner "present," 685 So.2d at 1254.

Indeed, Petitioner was not only present in the courtroom but he also conferred with counsel during the jury selection process. (SuppR 12: "appellant was in the courtroom and had previously conferred with his counsel prior to the challenging procedure." T6/26/95 5: "defendant is David Paul Carmichael, seated over next to Mr. Mooneyham [defense counsel]")

Accordingly, harmless error analysis applies to so-called Coney rights. There was "no prejudice to Coney," 653 So.2d at 1013, and there was no prejudice to Carmichael. See Mejia v. State, 675 So.2d 996 (Fla. 1st DCA 1996); Thomas v. State, 695 So.2d 1288, 1289 (Fla. 4th DCA 1997); Garcia v. State, 694 So.2d 815, 817 (Fla. 4th DCA 1997); Golden v. State, 688 So.2d 419, 420 (Fla. 1st DCA 1997); Williams v. State, 687 So.2d 858, 860 n. * (Fla. 3d DCA 1997); Brown v. State, 676 So.2d 1034 (Fla. 1st DCA 1996) ("appellant consulted with his attorney immediately before the bench conference, and immediately after the bench conference, but before his attorney accepted the jury"); U.S. v. Brantley, supra 68 F.3d at 1291 ("Even assuming there was a Rule 43 violation and no effective waiver of it, the error was harmless"; defendants present during voir dire in open court with opportunity to consult with counsel),

Thus, Petitioner wishes a new trial predicated upon a currently non-existent right that he has failed to demonstrate was ever violated. On remand, Petitioner would be entitled to precisely what he received in the trial he wishes reversed. Petitioner's position would "elevate form over substance and

hamper the goal of efficient use of judicial resources," Heuss v. State, 687 So.2d 823, 824 (Fla. 1996) (rationale for harmless error analysis).

As this Court reasoned in State v. Strasser, 445 So.2d 322, 322-23 (Fla. 1983)(trial court refused to instruct on attempted robbery):

> [I]n *Burney* [v. State, 402 So.2d 38 (Fla. 2d DCA 1981)], the Second District refused to remand for new trial, noting, 'We are not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief.' 402 So.2d at 39. We agree. Strasser would gain nothing from a new trial. The only effect would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.

Accord Kocsis v. State, 467 So.2d 384, 385 (Fla. 5th DCA 1985)(jury instruction changed in subsequent rule of criminal procedure; "no practical or effectual result can be attained by ordering a retrial merely because of the failure to give the penalty instruction") rev. denied 475 So.2d 695 (Fla. 1985); Boston v. State, 411 So.2d 1345, 1346 (Fla. 1st DCA 1982)("since upon retrial appellant would not be entitled to the attempt instruction because of changes in the Rules of Criminal Procedure which now provide that the attempt instruction shall not be given if the only evidence proves a completed offense, a retrial would serve no useful purpose") rev. denied 418 So.2d 1278 (Fla. 1982); Burnev v. State, 402 So.2d 38, 39 (Fla. 2d DCA 1981)("We are not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief. Since no practical

result can be attained by ordering a retrial on the failure to give the charge of attempted possession of a firearm by a convicted felon, we affirm") uuoted approvinalv Strasser, supra, 445 So.2d 322.

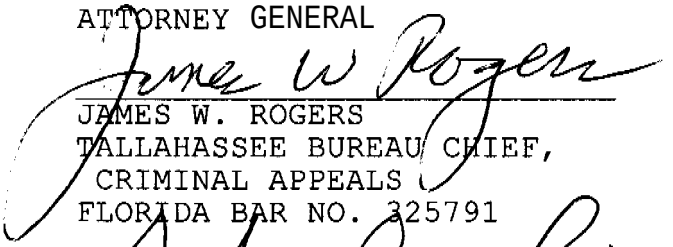
In Strasser, Kocsis, Boston, and Burney, the right that formed the basis of reversible error in the first trial was eliminated prior to when the cases would have been re-tried upon any reversal and remand. Similarly, here, Cone?/ rights, upon which Petitioner now predicates his purported reversible error, would be inapplicable at a re-trial upon any reversal and remand. Remanding for re-trial would "ignore the substance of justice in a blind adherence to its forms" in an "overburdened judicial system," Strasser, i n g "no practical or effectual result," Kocsis, or "useful purpose," Boston.

CONCLUSION.

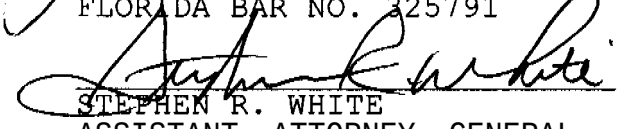
Based on the foregoing discussion as well as the DCA's reasoning, the State respectfully submits that the opinion and result of the District Court of Appeal reported at 693 So.2d 1141, affirming Petitioner's conviction, should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791



STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4612

COUNSEL FOR RESPONDENT
[AGO# L97-1-9006]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Charles Raymond Dix, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of November, 1997.

Stephen R. White
Attorney for State of Florida

[C:\USERS\CRIMINAL\PLEADING\97109006\CARMICBA.WPD --- 11/19/97,12:38 pm]

IN THE SUPREME COURT OF FLORIDA

DAVID P. CARMICHAEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,811

APPENDIX

Carmichael v. State, 693 So.2d 1141 (Fla. 1st DCA 1997).

*1141 693 So.2d 1141

22 Fla. L. Weekly D1303

David P. CARMICHAEL, Appellant,

v.

STATE of Florida, Appellee.

No. 95-3069.

District Court of Appeal of Florida,
First District.
May 22, 1997.

Defendant was convicted in the Circuit Court, Walton County, Lewis R. Lindsey, J., of driving under influence of intoxicant (DUI). Defendant appealed. The District Court of Appeal, **Mickle,** J., held that defendant's absence from bench conference during procedures for challenging jury was not reversible error.

Affirmed.

CRIMINAL LAW ⚿ 1166.14
110 ----
110XXIV Review
1 10XXIV(Q) Harmless and Reversible Error
1 10kl166.5 Conduct of Trial in General
110k1166.14 Absence of accused.
Fla.App. 1 Dist. 1997.

Defendant's absence from bench conference during procedures for challenging jury was not reversible error in absence of showing that defense attorney exercised peremptory strikes.

Nancy Daniels, Public Defender, and Jean R. Wilson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Stephen R. White, Assistant Attorney General, Tallahassee, for Appellee.

MICKLE, Judge.

Appellant challenges his conviction for felony DUI. We affirm the conviction and sentence in all respects and write only to address the single point which we believe warrants discussion. Relying on Coney ***v. State,*** 653 So.2d 1009 (Fla.), cert. ***denied,*** --- U.S. - ---, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), appellant asserts he is entitled to a new trial because, although present in the courtroom during jury selection, he was not physically present at a bench conference during which *1142. jury challenges were exercised. The transcript of the voir die proceedings reflects that, after the attorneys completed their questioning, the jury was selected at an unreported bench conference. As it was not apparent from the transcript of voir dire whether appellant was present at the bench conference, or whether he conferred with counsel when any peremptory challenges were exercised, this court permitted supplementation of the record with a reconstruction of the jury selection bench conference proceedings. The record was thereafter supplemented with an order of the trial judge finding that appellant was not physically present at the bench conference during the jury challenging procedures but that appellant was in the courtroom and had previously conferred with counsel prior to the challenging procedure.

Where defense counsel does not exercise any peremptory challenges, there is no basis for reversal under Coney. ***See Ganyard v. State, 686*** So.2d 1361 (Fla. 1st DCA 1996). The burden is on appellant to establish the existence of reversible error. ***Mathis v. State,*** 683 So.2d 582 (Fla. 1st DCA 1996). Herein, the record fails to show that peremptory challenges were exercised by defense counsel. Hence, ***as in Mathis v. State,*** we hold that appellant has failed to carry his burden to establish the existence of reversible error by demonstrating, from the record, that he was not present at the bench conference during which peremptory challenges were exercised. ***See also Daniels v. State,*** 691 So.2d 1139 (Fla. 1st DCA 1997); ***McNabb v. State,*** 689 So.2d 371 (Fla. 1st DCA 1997) (Coney argument rejected where record is insufficient to show that peremptory challenges were exercised); ***Moore*** v. ***State,*** 685 So.2d 87 (Fla. 1st DCA 1996).

We decline to address the remaining issue raised by appellant as it was not presented to the trial court and was thus not preserved for appellate review.

AFFIRMED.

ALLEN and PADOVANO, JJ., concur.