IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 23 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

DAVID CARMICHAEL,

Petitioner,

v.

STATE OF FLORIDA,

Appellee.

SUP.CT. CASE NO. 90,811
1ST DCA CASE NO. 95-3069

ON REVIEW FROM THE DISTRICT COURT
OF THE FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

'RAYMOND DIX
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 919896
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
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ATTORNEY FOR APPELLANT

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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DAVID CARMICHAEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SUP.CT. CASE NO. _____
1ST DCA CASE NO. 95-3069

JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

On June 29, 1995, Mr. Carmichael was found guilty of DUI by a jury, following which the state introduced into evidence a certified computer printed driving record. Based on the conviction and the driving record, the trial court adjudicated Carmichael guilty of felony DUI and sentenced him to one year in jail, followed by 3½-year state probation. Appeal was filed August 28, 1995.

The DCA issued an opinion, Carmichael v. State, 22 Fla. L. Weekly D1303a (Fla. 1st DCA May 22, 1997), affirming Appellant's convictions and sentences based on Coney v. State, 653 So.2d 1009 (Fla. 1995); Ganyard v. State, 686 So.2d 1361 (Fla. 1st DCA 1996) (review granted, Florida Supreme Court case no. 89,759); and Mathis v. State, 683 So.2d 582 (Fla. 1st DCA 1996). The mandate issued June 9, 1997. Mr. Carmichael seeks discretionary review in a timely manner.

SUMMARY OF THE ARGUMENT

This Court should grant discretionary review because the decision of the lower tribunal is in express and direct conflict with decisions of this Court and of other District Courts of Appeal.

The decision is in direct conflict with a decision of this Court because the decision fails to grant relief accorded similarly situated appellants by a decision of this Court. It further conflicts with a decision of this Court where it is based on a decision pending review by this Court on the same issue.

The decision is in direct conflict with a decision of the 4th DCA which grants relief under identical circumstances.

Finally, the decision is in direct conflict with a decision of the 4th DCA which places the burden of proof on the state, not the defendant, as was done here.

ARGUMENT

ISSUE I

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT OR OF OTHER DISTRICT COURTS OF APPEAL?

A. JURISDICTIONAL CRITERIA

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9,030(a)(2)(A)(iv), which parallels Article V, Section 3(b)(3), Fla. Const. The Constitution provides:

> The supreme court... [m]ay review any decision of a district court of appeal... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986); Accord Dept. Of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, **Inc.,** 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of ***decisions,*** not conflict of ***opinions*** or ***reasons*** that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359 ***(italics*** supplied).

In Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958), this Court explained:

> The... Supreme Court... functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Thus, the determination of conflict jurisdiction depends on whether the District Court's decision reached a result opposite decisions of this Court and other District Court's.

B. THE DECISION BELOW IS IN "EXPRESS AND DIRECT" CONFLICT WITH *GANYARD V. STATE*.

Coney v. State, 653 So.2d 1009 (Fla. 1995) provides the basis for relief if it is shown that peremptory challenges were made. See Vann v. State, 687 So.2d 851 (Fla. 1st DCA 1997) (reversed for new trial on Coney); Matthews v. State, 687 So.2d 908 (Fla. 4th DCA 1997)(rehearing denied March 6, 1997)(reversed for new trial on Coney); Haggins v. State, Fla. L. Weekly D1222a (Fla. 4th DCA, May 14, 1997)(reversed for new trial on Coney). Mr. Carmichael's case involves a variation of that relief, whether failure to "exercise" or to prove the "exercise" of peremptory challenges, as is before this Court in Ganyard, precludes relief.

Thus, there is a conflict within the opinion issued February 20, 1997, on the face of the opinion itself. The Court opined:

> We reject his argument pursuant to Coney . . . because the record is insufficient to show that peremptory challenges were exercised. See Ganyard v. State, 22 Fla. L. Weekly D92 (Fla. 1st DCA Dec. 30, 1996).

The First DCA relied upon Ganyard, where it found no error and held that a defendant has a right to be present only when peremptory challenges "are exercised." Id at 1362. Yet, the First

DCA had already certified the following question to this Court in Ganyard:

> DOES *CONEY V. STATE,* 653 So.2d 1009 (FLA.) ... PROVIDE A BASIS FOR REVERSAL OF A CONVICTION WHEN THE DEFENDANT'S **COUNSEL EXERCISED NO PEREMPTORY CHALLENGES?**

Ganyard v. State, 686 So.2d 1361, 1362-63 (Fla. 1st DCA 1996) (review granted, Florida Supreme Court Case No. 89,759).

The First DCA relied on its decision in Ganyard to deny relief to Mr. Carmichael, and it is illogical and unfair for the Florida Supreme Court to have this issue before it in Ganyard but not Mr. Carmichael's case. This forms the grounds for review under Jollie v. State, 405 So.2d 418 (Fla. 1981).

> Moreover, there can be no actual conflict discernible in an opinion... unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court. See Jollie v. State, 405 So.2d 418, 420 (Fla. 1981).

The Florida Star v. B.J.F., **530** So.2d **286, 288** n.3 (Fla. 1988).

Ganyard, cited by the First DCA **as** authority is before this Court for review, on the necessity of peremptories having been made to bring the case under the holding in Coney. Here, as noted in the opinion, there is no proof that peremptory challenges were made by the defense. There is no difference.

c. THE DECISION BELOW IS IN "EXPRESS AND DIRECT" CONFLICT WITH *MATTHEWS V. STATE,* 687 So.2d 908 (Fla. 4th DCA 1997).

There is conflict on the face of this opinion when it is compared with the opinion in Matthews v. State, **687** So.2d 908 (Fla. 4th DCA 1997) where the 4th District held that relief was available on the same factual situation. As Mr. Carmichael's

case, the trial court in Matthews failed to follow the dictates of Coney, AND the record **was** unclear as to whether peremptory challenges had been made. None-the-less, the 4th District granted relief noting that the:

> burden is upon the trial court or the State to make the record show that all requirements of due process have been met.

Matthews, at 910, n.2, citing Alexander v. State, 575 So.2d 1370 (Fla. 4th DCA 1991).

D. THE DECISION BELOW IS IN "EXPRESS AND DIRECT" CONFLICT WITH *ALEXANDER V. STATE*, 575 So.2d 1370 (Fla. 4th DCA 1991).

The First DCA held in Mr. Carmichael's case that "the 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." As noted above, in Alexander the 4th DCA held exactly the opposite:

> We hold that it is the burden of the court, or the state, to make the record show that all requirements of due process... have been met.

Alexander, **575** So.2d at 1371.

Here, the First DCA held that it was the defendant's burden, not the state's burden to show that due process was or was not complied with. This is a direct conflict.

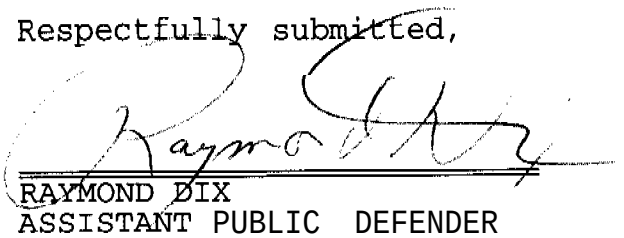
CONCLUSION

Based on the forgoing, Petitioner, David P. Carmichael, respectfully requests this Honorable Court exercise its discretionary jurisdiction and accept this case for review,

CERTIFICATE OF SERVICE

I HEREBY CERTIE'Y that a copy of the foregoing Jurisdictional Brief of Petitioner has been furnished by delivery to Stephen R. White, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to Petitioner, David Carmichael, on this day of June, 1997.

Respectfully submitted,



RAYMOND DIX
ASSISTANT PUBLIC DEFENDER
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FLORIDA BAR NO. 919896

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SUP.CT. CASE NO. _____
1ST DCA CASE NO. 95-3069

STATE OF FLORIDA,

Respondent.

A P P E N D I X

TO

JURISDICTIONAL BRIEF OF PETITIONER

ITEMS

Carmichael v. State, DCA Case No. 95-3069, issued May 22, 1997

Alexander v. State, *575* So.2d 1370 (Fla. 4th DCA 1991)

Ganyard v. State, 686 So.2d 1361 (Fla. 1st DCA 1996)

Matthews v. State, *687* So.2d 908 (Fla. 4th DCA 1997)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DAVID P. CARMICHAEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF, IF FILED.

CASE NO. 953069

Opinion filed May 22, 1997

An appeal from the Circuit Court for Walton County
Lewis R. Lindsey, Judge.

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

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

MICKLE, J.

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 jury challenges were exercised. The transcript of the voir dire 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 Seeley v. State, 686 So. 2d 1361 (Fla. 1 st 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, Case No. 95-3621 (Fla. 1 st DCA April 14, 1997); McNabb v. State, 689 So. 2d 371 (Fla. 1 st DCA 1997)(Coney argument rejected where record is insufficient to show that peremptory challenges were exercised); Moore v. State, 685 So. 2d 87 (Fla. 1 st 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.

deemed a nullity, see State v. *Anderson*, 537 So.2d 1373 (Fla.1980); and (c) by the common sense of the situation: the state can hardly be required to bring a defendant to trial in a case which does not conceptually or actually even exist.

Prohibition denied.

Eddie B. ALEXANDER, Appellant,

v.

STATE of Florida, Appellee.

No. 89-1237.

District Court of Appeal of Florida, Fourth District.

March 13, 1991.

Defendant was convicted in the Circuit Court, Palm Beach County, James T. Carlisle, J., and defendant appealed. The District Court of Appeal, Downey, J., held that trial court's colloquy with jury as to whether jury could have police reports was reversible error, where record failed to show that defense counsel was present.

Reversed and remanded.

1. Criminal Law ⇐1086.11

Burden is upon court or State to make record show that all requirements of due process, including opportunity for defendant to be heard on instruction to be given, have been met. U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law ⇐1086.11

Progress report of "blue card," which concluded with stamped statement that there was no objection to instructions given by court, did not suffice to show that defense counsel was present and failed to make objection.

3. Criminal Law ⇐864, 1174(5)

Trial judge's short colloquy with jury regarding its written question as to whether jury could have police reports was reversible error, where record failed to show that defense counsel was present when colloquy occurred. U.S.C.A. Const.Amends. 6, 14.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Lynn G. Waxman, Asst. Atty. Gen., West Palm Beach, for appellee.

DOWNEY, Judge.

Appellant, Eddie Alexander, appeals from a judgment of conviction and sentence of three and one-half years in the Department of Corrections.

Five appellate points have been presented, all dealing with alleged errors occurring during the trial. We have carefully considered all of said points and find reversible error demonstrated in only one, having to do with communication between the court and jury without counsel being present and afforded an opportunity to present argument and objections.

It appears from this record that the jury returned to the courtroom during its deliberations and presented a written question to the court: "May we have the police reports admitted as evidence for further review?" The trial judge held a short col-

loquy[1] with the jury in which he told them the reports were inadmissible and that they were to decide the case based upon the evidence they had. As he put it: "You've got to play with the deck you have been dealt" Appellant contends in his brief that counsel was not present when this occurred and thus had no opportunity to participate in the ruling or make any record of their objection as required by Florida Rule of Criminal Procedure 3.410.

Appellee contends in its brief that the colloquy took place in the presence of counsel. Oddly enough, neither party cites to any part of the record for its statement and we have found none. Furthermore, we relinquished jurisdiction to fill in the gaps in the transcript which might show that counsel was present. As one might surmise, neither the trial judge nor counsel, with the multitude of work they are involved in, could remember the situation vividly enough to state the fact of what had transpired. Nevertheless, we not8 that the record contains a progress report or 'blue card," which states what transpired in the courtroom and concludes with the stamped statement, "There being no objection to the instructions given by the court, court recessed at 10:15 A.M. pending the call of the jury." Appellee argued that this cryptic note means counsel was present and failed to make any objection.

The Supreme Court of Florida in *Ivory*[2] and *Williams*[3] held that a trial judge may not respond to a jury's request for additional instructions without both counsel being present and having an opportunity to participate in the action to be taken by the court Violation of that rule is per se reversible error.

[1-3] We hold that it is the burden of the court, or the state, to make the record show that all requirements of due process, including the opportunity to be heard on the instruction to be given, have been met. This "blue card" statement will not suffice to meet that important responsibility.

Westlund v. Stat%, 570 So.2d 1133 (Fla. 4th DCA 1990), is not controlling here because, *in Westlund, the record* shows counsel was present and simply failed to object to the court's action.

Accordingly, the judgment of conviction and sentence appealed from are reversed and the cause is remanded for a new trial.

REVERSED and REMANDED.

GUNTHER and WARNER, JJ., concur.

Lawrence VINSON, Appellant,

v.

STATE of Florida, Appellee.

No. 90-0279.

District Court of Appeal of Florida, Fourth District.

March 18, 1991.

Defendant was convicted of burglary of a dwelling with assault and battery following jury trial in the Circuit Court, Indi-

1. THE COURT: The question is: You bave the police reports. I know some references were made to police reports during the course of the trial. Nobody really understands the law of hearsay. But I understand it well enough to tell you that the police reports are inadmissible as hearsay.
It's like playing the hand of poker. You've got to play the deck you have been dealt. Decide the case, based on the evidence that is before you and nothing else.
The police reports are not in evidence. Okay?

2. *Ivory* v. *State*, 351 So.2d 26 (Fla.1977).

3. *Williams v. State*, 488 So.2d 62 (Fla.1986).

arena, we find reassuring this legislative recognition of the need to afford due process, notice and hearing before settlement terms are approved. By prohibiting contract zoning, the same due process rights have been protected in the local exercise of zoning power.

Accordingly, we affirm the trial court's order in this case, which vacated the stipulated final judgment between Chung and Sarasota County. Further, we certify the following question of great public importance:

WHETHER A COUNTY OR LOCAL GOVERNMEN' CAN ENTER INTO A SETTLEMENT AGREEMENT IN ZONING LITIGAT ON WITHOUT FIRST ADHERING T THE DUE PROCESS AND STATUT RY/ORDINANCE REQUIREMENTS FOR ENACTING THE ZONING CHAI GES CONTEMPLATED BY THE AGRE MENT?

SCHOONOVER .C.J., and FULMER, J., concur.

WEST KEY NUMBER SYSTEM

James D. GANYARD, Appellant,

v.

STATE of Florida, Appellee.

No. 95-1536.

District Court of Appeal of Florida, First District.

Dec. 30, 1996,

Rehearing Denied Feb. 7, 1997.

Defendant was convicted in the Circuit Court, Leon County, J. Lewis Hall, Jr., J., and he appealed. The District Court of Appeal, Allen, J., held that: (1) defendant has no right to be physically present whenever peremptory challenges might be exercised and has only the right to be present when peremptory challenges "are exercised,,, and (2) defendant was not prejudiced by his absence from bench conference when peremptory challenges were exercised by prosecutor, despite claim that he was prejudiced because his attorney might have exercised challenges at the conference.

Affirmed and question certified.

Lawrence, J., filed a specially concurring opinion.

Webster, J., dissented and filed an opinion in which Mickle, J., joined.

1. Criminal Law ⇐636(3)

It was error not to have defendant physically present at bench conference during which jury challenges were exercised where he never waived his presence or ratified the strikes made outside his presence. (Per Allen, J., with one Judge concurring and one Judge concurring specially.)

2. Criminal Law -1166.14

Defendant was not prejudiced by his absence from bench conference when peremptory challenges were exercised by prosecutor because challenges were within the discretion of the prosecutor, despite claim that defendant was prejudiced because his attorney might have exercised challenges at the conference. (Per Allen, J., with one Judge concurring and one Judge concurring specially.)

3. Criminal Law ⇐636(3)

Defendant has no right to be physically present whenever peremptory challenges might be exercised; he has only the right to be present when peremptory challenges "are exercised." (Per Allen, J., with one Judge concurring and one Judge concurring specially.)

Nancy A. Daniels, Public Defender, and Raymond Dix, Assistant Public Defender, Tallahassee, for Appellant.

Robert A Butterworth, Attorney General, and Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

CRIMINAL DIVISION EN BANC

ALLEN, Judge.

Having considered the various arguments presented by the appellant in this direct criminal appeal, we affirm his conviction. Only his argument pursuant to *Coney v. State*, 653 So.2d 1009 (Fla.), cert. *denied*, — U.S. —, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), requires discussion. We conclude that although error was committed when the appellant was not present during the prosecution's exercise of challenges for cause, the error was harmless. We further conclude that there was no error by virtue of the fact that the appellant was absent when his counsel might have exercised peremptory challenges but failed to do so.

In Coney, the supreme court clarified the intent behind Florida Rule of Criminal Procedure 3.180(a)(4), which states that "[i]n all prosecutions for crime the defendant shall be present . . . at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury." The court held that unless the defendant waives his presence or ratifies the strikes made outside his presence, he has the right to be physically present at the immediate site where pretrial juror challenges are exercised. The court held further that a violation of the rule as interpreted is subject to a harmless error analysis.

[1] The appellant was not physically present at the bench conference during which jury challenges were exercised in the present case, and he never waived his presence or ratified the strikes made outside his presence. The rule, as interpreted in Coney, was therefore violated. Nevertheless, the error was harmless.

[2] Only the prosecution exercised peremptory challenges in the present case. The appellant was not prejudiced by his absence from the bench when these challenges were exercised because the challenges were within the discretion of the prosecutor.

[3] The appellant argues, however, that there was harmful error because of his absence when his counsel might have exercised peremptory challenges. But there was no error at all in this regard because the court in *Coney* did not hold that a defendant has a right to be physically present whenever peremptory challenges might be exercised. The court held that a defendant has a right to be present only when peremptory challenges "are exercised."

The *Coney* court indicated that a defendant's absence from a bench conference at which peremptories are exercised is permissible where the defendant has expressed his "approval of the strikes" and willingness to "ratify strikes." The court made no mention of any obligation to secure a defendant's ratification of a decision not to exercise available peremptories, thus indicating that a defendant has no right to be present when defense counsel declines to exercise available peremptories.

Further, the *Coney* court found no basis for reversal due to Coney's absence from the bench conference therein where only challenges for cause were exercised. Peremptories presumably could have been exercised during the bench conference, but, observing that none were actually exercised, the court concluded that there was no basis for reversal.

Because the defense exercised no peremptories in the present case, there is no basis for reversal. However, we certify to the supreme court the following question of great public importance:

DOES *CONEY V. STATE, 653* So.2d 1009 (Fla.), *CERT. DENIED,* — US. —, 116 S.CT. 315, 133 L.ED.2D 218 (1995), PROVIDE A BASIS FOR REVERSAL OF A CONVICTION WHEN THE DE-

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MINER, J., concurs.

LAWRENCE, J., spe
written opinion.

WEBSTER, J., dissen
opinion.

MICKLE, J., joins in
dissent.

LAWRENCE, Judge

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1. For a history of eve
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opinion in *Coney* v. S
16 (Fla.) (Overton,
cert. denied, — U.S
L.Ed.2d 218. (1995).

FENDANT'S COUNSEL EXERCISED NO PEREMPTORY CHALLANCES?

The appellant's conviction is affirmed.

MINER, J., concurs.

LAWRENCE, J., specially concurs with written opinion.

WEBSTER, J., dissents with written opinion.

MICKLE, J., joins in WEBSTER, J.'s dissent.

LAWRENCE, Judge, specially concurring.

I concur with the majority opinion affirming Ganyard's conviction for sexual battery. I write only to address any suggestion in the dissenting opinion that Florida Rule of Criminal Procedure 3.180(a)(4) is the only significant safeguard to a defendant's meaningful participation in jury selection.

It has long been the obligation of counsel for a criminal defendant to consult with and inform his client regarding the right to meaningful input in the jury-selection process. See R. Regulating Fla. Bar 4–1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."); R. Regulating Fla. Bar 4–1.4(b) ("Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). If an attorney fails to do so during the course of the trial, a defendant may call such failure to the attention of the trial judge for redress. If a defendant is unaware of his right in this regard, he also may obtain relief in postconviction proceedings. Fla. R.Crim. P. 3.850. Apparently these lesser safeguards worked remarkably well during the fifteen-year *pre-Coney* period [1]—claims for relief on this issue during this period were uncommon, both during trial and in postconviction proceedings. The position taken in the dissent would unduly narrow the supreme court's harmless error analysis, beyond what is required to safeguard a defendant's right to have meaningful participation in jury selection.

I accordingly conclude that the Coney court wisely adopted a more liberal harmless error standard than the narrow approach urged by the dissent. I concur with the majority for this reason, as well as for the reasons expressed in its opinion.

WEBSTER, Judge, dissenting.

The majority holds that a *Coney* [2] error occurred only because appellant was not physically present at the immediate site where the state exercised peremptory challenges, and he did not waive his presence. However, that error was harmless because appellant could not have provided any meaningful input regarding the exercise of those challenges by the state. I agree that any Coney error that occurred because of appellant's absence during the exercise of challenges by the state was harmless. Nevertheless, I would reverse and remand for a new trial because I do not believe that the rule announced in Coney requires that peremptory challenges actually be exercised by a defendant's counsel as a condition to its applicability, and I am unable to conclude that appellant's absence when his counsel decided not to exercise any peremptory challenges was harmless beyond a reasonable doubt. Accordingly, respectfully, I dissent.

As noted by the majority, in Coney, the supreme court purported to "clarify" the intent behind Florida Rule of Criminal Proce-

1. For a history of events leading up to the Coney interpretation of Florida Rule of Criminal Procedure 3.180, see Justice Overton's concurring opinion in Coney *v. State, 653* So.2d 1009, 1015–16 (Fla.) (Overton, J., concurring in result only), *cert. denied,* — *U.S.* —, 116 S.Ct. 315, 133 L.Ed.2d 218, (1995).

2. *Coney v. State, 653* So.2d 1009 (Fla.), cert. *denied,* -U.S. —, 1.16 S.Ct. 315, 133 L.Ed.2d 218 (1995).

dure 3.180(a)(4), which states that, "[i]n all prosecutions for crime[,] the defendant shall be present . . . at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury"; and its previous decision in ***Francis v. State,*** 413 So.2d 1175 (Fla.1982). In *Coney,* the court held:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See ***Francis.*** Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See *State v. Melendez,* ***244*** So.2d 137 (Fla.1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry.

653 So.2d at 1013. The court held, further, that a violation of rule 3.180(a)(4), as interpreted, is subject to a harmless error analysis. ***Id.***

In Mr. Coney's case, "[j]uror challenges . . . were exercised on two occasions: first, during a brief bench conference after prospective jurors had been polled concerning their willingness to impose death, and second, during a lengthy proceeding at the conclusion of voir dire." ***Id. Coney*** was absent only on the former occasion, when challenges for cause were exercised by the state and Coney's counsel. ***Id.*** Because Coney neither waived his presence at the bench conference nor ratified the challenges for cause exercised by his counsel, the court concluded that error had occurred. ***Id.*** However, because the challenges " 'involved a legal issue toward which [Coney] would have had no basis for input,' i.e., the death qualifying of prospective jurors," the court concluded, further, that the error was harmless. ***Id*** (citation omitted). From this, it seems to me relatively clear that Coney was absent only when *Witherspoon*[3] challenges were being exercised by counsel-he was present at the immediate site where peremptory challenges (and, perhaps, cause challenges based on grounds other than views regarding the death penalty) were exercised. It seems to me, further, that the court concluded that Coney's absence from the site of the exercise of the *Witherspoon* challenges was harmless solely because it assumed that Coney could not have had any input regarding whether a particular *Witherspoon* challenge should be exercised. While one might disagree with the court's assumption that a defendant can never have any meaningful input to offer on the question of whether his counsel should exercise a particular challenge for cause in such circumstances, it seems to me that the majority reads far more into this portion of the court's opinion than was intended when it concludes that harmful error can occur only when the defendant's counsel actually exercises peremptory challenges in the defendant's absence.

The majority focuses narrowly on the words "are exercised" in the language from *Coney* that "[t]he defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." ***653*** So.2d at 1013. In ***Francis v. State,*** 413 So.2d 1175, 1178–79 (Fla.1982), the court said that "[t]he ***exercise*** of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." In ***Mejia v. State,*** 675 So.2d 996, 1000 (Fla. 1st DCA), *review pending,* Case No. 88,684 (filed Aug. 6, 1996), we concluded "that the procedural rule set out in Coney is intended to ensure that a defendant's right to meaningful participation in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected." It seems to me that the majority's reading of the language regarding "the exercise" of challenges is unreasonably narrow. I fmd it much more plausible that, when the court used the phrase "[t]he exercise of peremp***Francis,*** it intended to process by which one d exercise one or more pert rather than merely to tht lenging a particular prosp wise, I find it much mor court intended the same t similar language in *Coney.*

Frankly, I am unable t rule which is designed t dant's right to meaning decisions regarding the lenges, but would permit a error only when at lea challenge was exercise counsel. Surely, it is jus defendant have an oppor regarding the decision n prospective jurors perem defendant have an oppor regarding the decision t lar prospective juror p latter case, it is clear tha not present at the immt challenge is made and h right to be present nor s the challenge, Coney ha according to the majorit no Coney error occurs counsel exercised no pe notwithstanding that th present at the immediat sion not to exercise a lenges was made by waived the right to be quently ratified counsel to me that the fact that in one case but not in t tion without a differe concerned about is the meaningful participatio

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3. *Witherspoon v.* Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

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"[t]he exercise of peremptory challenges" in *Francis*, it intended to refer to the entire process by which one decides whether to exercise one or more peremptory challenges, rather than merely to the actual act of challenging a particular prospective juror. Likewise, I find it much more plausible that the court intended the same thing when it used similar language in *Coney*.

Frankly, I am unable to see the logic in a rule which is designed to protect a defendant's right to meaningful participation in decisions regarding the exercise of challenges, but would permit a finding of harmful error only when at least one peremptory challenge was exercised by a defendant's counsel. Surely, it is just as important that a defendant have an opportunity to offer input regarding the decision not to challenge any prospective jurors peremptorily as it is that a defendant have an opportunity to offer input regarding the decision to challenge a particular prospective juror peremptorily. In the latter case, it is clear that, if the defendant is not present at the immediate site where the challenge is made and has neither waived the right to be present nor subsequently ratified the challenge, Coney has been violated. Yet, according to the majority, in the former case, no *Coney* error occurs because defendant's counsel exercised no peremptory challenges, notwithstanding that the defendant was not present at the immediate site where the decision not to exercise any peremptory challenges was made by counsel, and neither waived the right to be present nor subsequently ratified counsel's decision. It seems to me that the fact that a challenge was made in one case but not in the other is a distinction without a difference if what we are concerned about is the defendant's right to meaningful participation in the decision.

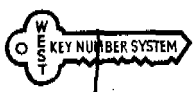
It seems to me, further, that the same analysis holds with regard to challenges for cause. Assuming that the challenge is one regarding the exercise of which a defendant might offer meaningful input (such as, for instance, when the challenge is one which, for tactical reasons, might not be exercised even if available), I see no logical reason why Coney should not apply. It might well be that a defendant would prefer to have a particular prospective juror on the panel, given the alternatives, notwithstanding the availability of a challenge for cause. In such a case, application of Coney would ensure that the defendant would have an opportunity to inform counsel of his or her wishes.

In short, based upon *my* reading of *Coney*, it seems to me that the court intended the rule to apply during the entire process of challenging prospective jurors, to ensure that a defendant would have an opportunity to discuss possible challenges with counsel before a decision is made. More particularly, I believe that Coney was intended to apply to cases such as this one, notwithstanding the fact that appellant's counsel did not exercise any peremptory challenges. In my opinion, pursuant to Coney, absent a waiver or a subsequent ratification of his counsel's decision, appellant was entitled to be present at the bench conference during which his counsel decided not to exercise any peremptory challenges.

It is undisputed that appellant was not present at the bench conference during which challenges *were* discussed (and his counsel announced that he would not exercise any peremptory challenges), and that appellant neither waived his right to be present nor subsequently ratified his counsel's decision. Accordingly, I suggest that the only remaining question is whether the failure to follow Coney constituted harmful error. We discussed the appropriate harmless error analysis in *Mejia v. State*, 675 So.2d 996 (Fla. 1st DCA), review *pending, Case No. 88,684* (filed Aug. 6, 1996). Applying that analysis to the facts of this case, I am unable to conclude "that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986). There is nothing in this record to suggest that appellant was even aware of his right to participate in decisions regarding the exercise of peremptory challenges. It seems to me entirely plausible that.., had appellant been present at the bench conference, he would have insisted that coun-

sel excuse one or more prospective jurors. However, we shall never know because the procedure mandated by *Coney* was not followed.

This was not a case in which the evidence of guilt was overwhelming. Rather, the case was essentially a swearing match between appellant and his accuser. A different jury might well have reached a different verdict. As in *Francis*, 413 So.2d at 1179, I am unable to determine "the extent of prejudice, if any," appellant sustained as the result of not being present at the bench conference held for the purpose of permitting the exercise of peremptory challenges. Accordingly, as in *Francis,* I am unable to say, to the exclusion of all reasonable doubt, that the error was harmless. Therefore, I would reverse, and remand for a new trial. Because the majority affirms, I dissent.



STATE of Florida, Appellant,

v.

J.A.S., a Child, and J.L.R., a Child, Appellees.

Nos. 95–2261, 95–2439.

District Court of Appeal of Florida, Fifth District.

Jan. 3, 1997.

Statutory rape charges were brought against two 15-year-old boys who engaged in "consensual" sex with two 12-year-old girls. The Circuit Court for Marion County, Victor J. Musleh, J., dismissed on grounds that pertinent statute dealing with lewd, lascivious, or indecent assault or act upon or in presence of child was unconstitutional as applied to the boys because it violated their right to privacy and equal protection, and further observed that potential sanction if the boys were sentenced as adults was grossly disproportionate to the crime and would constitute cruel and unusual punishment. State appealed. The District Court of Appeal, Peterson, C.J., held that: (1) trial judge's experience as juvenile judge was improper evidentiary basis for dismissing on equal protection grounds; (2) potential penalties which could be imposed upon the boys if they were sentenced as adults was not appropriate test to determine whether they were subjected to cruel and unusual punishment; and (3) application of statute did not unconstitutionally invade the boys' privacy rights.

Vacated and remanded; question certified.

1. Constitutional Law ⇐44.1
Infants ⇐173.1

Trial judge's recollection as juvenile judge that it was always boys rather than girls who were charged with statutory rape was not proper evidentiary basis for judge's conclusion that rape charges against two 15-year-old boys who engaged in "consensual" sex with two 12-year-old girls violated their equal protection rights; absence of evidence supporting such recollection made it impossible for the state to refute or for appellate court to review. West's F.S.A. Const. Art. 1, § 2; West's F.S.A. § 800.04.

2. Constitutional Law ⇐250.1(3)

The decision by a prosecutor to charge only some offenders is not a ground for a claim of denial of equal protection. West's F.S.A. Const. Art. 1, § 2.

3. District and Prosecuting Attorneys ⇐8

The decision to charge and prosecute a defendant is completely discretionary and is vested in the hands of the prosecutor.

4. Criminal Law ⇐1213.14

Potential penalties which could be imposed on boys if they were sentenced as adults for statutory rape "consensual" sex with was not appropriate test er they were subjected punishment. U.S.C.A. West's F.S.A. § 800.04.

5. Infants -13,153

It is appropriate t der statute dealing wit indecent assault or act child. West's F.S.A. §

6. Constitutional Law
Infants -12,132

Application of statu lascivious, or indecent in presence of child to who engaged in "cons 12-year-old girls did invade boys' privacy ri of privacy a minor ur does not extend to an lated right to engage ix a minor also under tha § 800.04.

Robert A. Butterwo Tallahassee, and Wesle torney General, Daytc lant.

James. B. Gibson, Kenneth Witts, Assist Daytona Beach, for Ap

PETERSON, Chief

The State of Florida of charges of statutory year-old boys who en sex with two 12–year court dismissed the ch

1. 800.04. Lewd, lascivic act upon or in presence A person who:

(4) Knowingly comm act in the presence of 16 years, without

tween wills and trusts, for the reasoning of *DeWitt*, and the purpose of section 733.103(2), as it was articulated in *DeWitt*, to preclude the claims brought in this case. We thus reverse the order determining that the sons in the present case are barred from litigating their tortious interference case in so far as it precludes them from challenging the trusts.

FARMER and GROSS, JJ., concur.

Gary Lavitor MATTHEWS, Appellant,

v.

STATE of Florida, Appellee.

No. 961582

District Court of Appeal of Florida, Fourth District.

Jan. 29, 1997.

Rehearing and **Certification** *of* **Question** Denied March **6, 1997.**

Defendant was **convicted in** the **Circuit** Court for the Nineteenth **Judicial Circuit,** St **Lucie County,** Cynthia **Angelos, J.,** of **sexual** battery and **false imprisonment.** Defendant appealed **The District Court of Appeal,** Gunther, **C.J.,** held that **trial court's** failure **to certify that defendant waived his presence during bench conferences concerning jury selection** violated **defendant's** right **to** be **present at all critical stages of his trial and required reversal** of his **convictions.**

Reversed and **remanded.**

1. Criminal Law ⇐636(1)

Defendant has **constitutional right** to be **present at all stages of trial where fundamental fairness might be thwarted by his or** her **absence. U.S.C.A. Const.Amend. 14.**

2. Criminal Law ⇐636(3)

Examination and **challenge** of **potential jurors is one of essential stages of criminal trial** at which **defendant's** presence **is** mandated; **exercise** of **jury** challenges by defendant is **not necessarily mere** mechanical function and may **involve** formulation **of on-the-spot strategy** decisions which **may be influenced** by action8 of state at that- time. **U.S.C.A. Const.Amend.** 14; West's **F.S.A. RCrP** Rule **3.180(a)(4).**

3 **Criminal Law ⇐1086.4**

Burden is upon trial court or state **to** make **record show that all requirements** of due **process** have been **met. U.S.C.A. Const. Amend. 14.**

4. Criminal Law ⇐636(3), 1166.14

Trial court's fake to **certify** that **defendant waived his presence during bench conferences at which trial court examined two potential jurors about** being **victims** of prior **assaults and at** which prosecutor and defense counsel used **peremptory** challenges to **select jury violated defendant's** right **to** be present **at all critical stages of his trial and required reversal of his convictions. U.S.C.A. Const. Amend. 14;** West's **F.S.A. RCrP** Rule **3.180(a)(4).**

Richard L. Jorandby, Public Defender, and **Cherry Grant, Assistant** Public Defender, West Palm Beach, for **appellant.**

Robert A **Butterworth,** Attorney **General, Tallahassee,** and Joan **L.** Greenberg, **Assistant Attorney** General, **West** Palm Beach, for **appellee.**

GUNTHER, Chief Judge.

Appellant, Gary **Matthews,** defendant below, (Matthews), appeals his **convictions** and

So.2d 1316 (Fla. 2d DCA 1988). The notice of administration of the estate, which starts the time period for challenging a will, need not be served on the beneficiaries of the trusts into which the will pours over. Section 733.212(3). Fii, wills, unlike trusts, must be challenged within several months after the testator's death. Section 733312.

sentence for sexual battery and false imprisonment. Because Matthews was not present at two bench conferences during voir dire, we reverse.

Matthews was charged by information with sexual battery and false imprisonment. He allegedly dragged the victim out of a bar to his automobile, drove around with her, and attempted to forcibly have intercourse with the victim. Matthews pled not guilty and the cause proceeded to a jury trial.

During voir dire, a prospective juror indicated that she could not be fair and asked to privately speak with the trial court. As a result, the trial court summoned her and the attorneys to the bench, where she indicated that she had been sexually assaulted as a child. She was excused for cause without objection. A second juror then approached the bench and admitted she had also been previously attacked. After questioning by the trial court, the second juror agreed to sit through counsels' questioning. Subsequently, at the close of voir dire, the attorneys again approached the bench to exercise their jury challenges. Ultimately, the jury returned a verdict finding Matthews guilty as charged on both counts.

[1, 2] A defendant has a constitutional right to be present at all stages of a trial where fundamental fairness might be thwarted by his or her absence. *Francis v. State*, 413 So.2d 1175 (Fla.1982); *Gelsey a State*, 565 So.2d 876 (Fla. 5th DCA 1990). The examination and challenge of potential jurors is one of the essential stages of a criminal trial where a defendant's presence is mandated. *Francis*, 413 So.2d at 1177; *Lane v. State*, 459 So.2d 1145 (Fla. 3d DCA 1984); *Walker v. State*, 438 So.2d 969 (Fla. 2d DCA 1983). The exercise of jury challenges by a defendant is not necessarily a mere mechanical function. *Walker*, 438 So.2d at 970. It may involve the formulation of on-the-spot strategy decisions which may be influenced by the actions of the state at the time. *Id.*

Florida Rule of Criminal Procedure 3.130 provides that in all prosecutions for crime, the defendant shall be present at the beginning of trial during the examination, challenging, impanelling and swearing *of the* jury. Fla. R.Crim. P. 3.180(a)(4).[1] Prior to 1995, the courts had interpreted this rule to merely require the defendants presence in the same room while jury challenges were made at the trial bench *See, e.g., Lewis v. State*, 566 So.2d 270 (Fla. 2d DCA 1990), *rev. denied*, 581 So.2d 165 (Fla.1991); *Willis v. State*, 523 So.2d 1283 (Fla. 4th DCA 1988).

Early in 1995, the supreme court clarified the scope of rule 3.180(a)(4). In *Coney v. State*, 653 So.2d 1009, 1013 (Fla.), *cert. denied*, — U.S. —, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), the supreme court concluded that rule 3.180 meant just what it said: "The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." The *Coney* court then delineated the procedure to be utilized where a defendant% presence is impractical:

> Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made.

Id. (citations omitted). Nevertheless in *Coney*, because no jurors were excused peremptorily, and because the side bar conference there involved purely legal issues, the sum court found any error in the defendant's exclusion harmless. *Id.; see Hardwick v. Dugger*, 648 So.2d 100, 105 (Fla. 1994)(a defendant has no constitutional right to be present at the bench during conferences that involve purely legal matters).

1. Since the appeal of this case, rule 3.180 has been amended to define presence as being "physically in attendance for the courtroom proceeding, and [having] a meaningful opportunity to be heard through counsel on the issues being discussed." *Amendments to the Florida Rules of Criminal Procedure*, 685 So.2d 1253, 1254 & n. 2 (Fla. 1996)(also noting that this amendment supersedes *Coney*). The Florida Supreme Court has recognized that this amendment "will provide a clearer standard by which to resolve such issues in the future." *Boyett v. State*, 21 FILL. Weekly S535, S536 a 1. — So.2d —, — n. 1 (Fla.Dec. 5. 1996).

[3, 4] The first *bench* conference challenged by Matthews occurred when the two prospective jurors approached to talk to the court in private.[2] One was excused for cause; the other was questioned at the bench by the trial court. In addition to the challenging of the venire, de 3.180(a)(4) requires a defendant's presence during the examination of the venire members. Logic mandates that for a defendant to intelligently participate in jury challenges, the defendant must be present for the questioning of the jurors. At no time did the trial court, through appropriate inquiry, certify that Matthews waived his presence during this conference. Thus the bench conference violated the dictates of *Coney*.

The second bench conference challenged by Matthews falls squarely within the ambit of the *Coney* holding. During the second bench conference, Matthews' attorney and the prosecutor utilized their peremptory challenges to ultimately select an acceptable jury. The trial court below never certified that Matthews knowingly waived his right afforded by rule 3.180. Additionally, the trial court failed to certify Matthews' approval of the strikes by inquiring whether he acquiesced after they were made. Thus, the procedure used in the instant case for peremptory challenges violated rule 3.180 and the supreme court's holding in Coney.

The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. *Francis*, 413 So.2d at 1178–79. It is often exercised on the basis of sudden impressions and - t a b l e prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. Id at 1179.

In the instant case, we are unable to say that the jury selection process utilized was harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). Hence, Matthews' right to be present at all critical stages of his trial was violated and his convictions must be reversed.

Our resolution of this issue renders it unnecessary to address Matthews' remaining issues. The case is reversed and remanded for a new trial.

REVERSED AND REMANDED.

STONE and PARIENTE, JJ., concur.

2. The State argues that the record is unclear whether Matthews was actually present at the bench during the conferences in question. The burden is upon the trial court or the State to make the record show that all requirements of due process have been met. A - *v. State*, 575 So.2d 1370 (Fla. 4th DCA 1991).

Anthony Joseph JULIANO, Appellant,

v.

Sandra Kay JULIANO, Appellee.

No. 96-327.

District Court of Appeal of Florida, Third District.

Jan. 29, 1997.

The Circuit Court, Monroe County, Steven P. Shea, J., denied former husband's motion for continuance, heard former wife's testimony at motion calendar hearing, and granted wife's settlement enforcement motion in marital dissolution proceeding, and husband appealed. The District Court of Appeal, Fletcher, J., held that: (1) if court allows testimony in disputed motion calendar hearings, specific notice of such intention must be given, with sufficient interval to prepare and adequate opportunity to present contrary testimony prior to ruling, and (2) husband's request for continuance should have been granted.

Reversed and remanded.