ORIGINAL

IN THE SUPREME COURT OF FLORIDA

DAVID P. CARMICHAEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,811

JURISDICTIONAL BRIEF OF RESPONDENT

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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.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the 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

The pertinent history and facts are set out in the attached decision of the lower tribunal, downloaded electronically and found at 22 Fla. L. Weekly D1303.

SUMMARY OF ARGUMENT.

Petitioner wishes to prevail upon this Court to enforce a rule that no longer exists and, when the rule did exist, did not apply to him. In other words, he wishes this Court to exercise its discretionary jurisdiction to give him a new trial, which could lawfully proceed in a manner identical to the one for which review is sought. The State respectfully submits that this would be a waste of this Court's time, as well as a waste of all of the State's resources that would be poured into a re-trial and

subsequent appeal(s). Moreover, there is no conflict or other basis for jurisdiction.

ARGUMENT

ISSUE: SHOULD DISCRETIONARY JURISDICTION BE EXERCISED WHERE PETITIONER WOULD NOT BE ENTITLED TO ANY RELIEF UPON A NEW TRIAL AND WHERE THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND OTHER DCA DECISIONS? (Restated)

The State does not contest Petitioner's "Jurisdictional Criteria" (PJB 4-5) in the abstract, as his summary tracks verbatim much of what the State has previously presented to this Court in other cases. However, the State contests the application of those criteria here. In the words of Ansin v. Thurston, 101 So. 2d 808, **810** (Fla. 1958), the DCA's decision, as in "most instances," should be "final and absolute" – here, for two reasons. First, Petitioner seeks to invoke jurisdiction, which, as a matter of discretion, this case does not merit. And, second, there is no conflict in the holdings of the cases on which Petitioner would base jurisdiction. See generally Coffin v. State, **374** So.2d 504 (Fla. 1979)("we urge appellees to carefully examine these jurisdictional issues and raise with the court, prior to argument, motions challenging the necessity of Supreme Court appellate review").

A. This case does not merit this Court's attention or further taxpayer expense through the exercise of discretionary jurisdiction,

Because the Coney rule Petitioner attempts to invoke would be inapplicable upon any re-trial, Petitioner asks this Court for

review so that he might be tried again in the same manner upon which he seeks trial-court reversal. Under such conditions, assuming arguendo that the trial court committed reversible error **at the time of the trial,** the State respectfully submits that this is not an appropriate case to exercise discretion to review.

This Court has receded from the rule of law announced in Coney v. State, 653 So.2d 1009 (Fla. 1995), 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,' 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 Criminal Procedure, 685 So.2d 1253, 1254 (Fla. 1996). Accord Bovett v. , ate, 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 Mejia v. State, 22 Fla. L. Weekly S384 (Fla. June 26, 1997); Henderson v. State, 22 Fla. L. Weekly S384 (Fla. June 26, 1997).

Thus, Conev 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, the State urges that discretion not be exercised to give Petitioner what he already had in the first trial, a jury selection with Petitioner "present," 685 So.2d at 1254.

In addition, Petitioner's complains that the DCA required him to show through the record on appeal that the trial court denied him a right. In other words, he wishes a new trial under circumstances in which he has failed to show that any right was violated within the narrow window of Coney's applicability.

In sum, **Petitioner wishes this Court to exercise its jurisdiction to review lower court decisions pertaining to a currently non-existent right that he has failed to demonstrate was ever violated.** 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). Cf. Keane v. Andrews,

581 So.2d 160 (Fla. 1991)(summarily declined jurisdiction on certified question). See also Gibson v. State, 436 So.2d 32 (Fla. 1983)("we decline to accept jurisdiction. We therefore deny the petition for review").

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); Burney 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") quoted approvingly Strasser, supra, 445 So.2d 322.

In Strasser, Kocsis, Boston, and Burnev, 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, Coney rights, upon which Petitioner now predicates his purported reversible error, would be inapplicable at a re-trial upon any reversal and remand. For this Court to exercise its discretionary jurisdiction would "ignore the substance of justice in a blind adherence to its forms" in an "overburdened judicial system," Strasser, having "no practical or effectual result," Kocsis, or "useful purpose," Boston.

The State respectfully submits that jurisdiction should be declined in the interest of judicial economy and the public purse.

B. There is no conflict or other basis for jurisdiction.

Petitioner's proposed jurisdiction is based upon purported conflict with Ganyard v. State, 686 So.2d 1361 (Fla. 1st DCA 1996) rev. granted FSC #89,759 (PJB 5-6), Matthews v. State, 687 So.2d 908 (Fla. 4th DCA 1997) (PJB 6-7), and Alexander v. State, 575 So.2d 1370 (Fla. 4th DCA 1991) (PJB 7). He is incorrect.

Arguendo, assuming conflict between Ganyard and the instant case, Ganyard cannot constitute the basis of this Court's conflict jurisdiction because it originated from the same district court of

Appeal as here. Thus, as a matter of constitutional law, it cannot furnish discretionary jurisdiction. See Art. V, § 3(b)(3), Fla. Const. ("expressly and directly conflicts with a decision of **another** district court of appeal"); Fla. R. App. P. 9.030, Committee Notes ("The new article also terminates supreme court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in rule 9.331"); State v. Walker, 593 So.2d 1049 (Fla. 1992) (a later decision within a DCA overrules and earlier conflicting one, thereby eliminating the conflict; "without jurisdiction to hear this cause and the case is hereby dismissed").

Even though Petitioner couches his issue and subheading entirely in terms of conflict, he also cites to Jollie v. State, 405 So.2d 418 (Fla. 1981) (PJB 6). This reliance is also misplaced. Ganvard concerned a disparate "question of law," Art. V, § 3(b)(3), Fla. Const., from here, where Petitioner failed to establish a factual predicate for the purported right he wished to assert on appeal. In other words, the DCA's holding in the instant case concerned the burden on an appellant to establish that a right existed whereas Ganvard's holding addressed the scope of the right itself. The holding here is a logical application of the presumption of correctness that cloaks trial court decision making, See Operation Rescue v. Women's Health Center, 626 So. 2d 664 (Fla. 1993); Awwleaate v. Ba ett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979), thereby requiring an appellant to establish error, whereas Ganvard concerned the scope of a right itself. In sum, Petitioner's reliance upon Ganvard is, at most, one of "opinions or reasons,"

not "of decisions," Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Ganyard provides no basis for discretionary jurisdiction.

Matthews' and Alexander's operative facts are materially different than those here, thereby not involving the "same question of law," Art. V, § 3(b)(3), Fla. Const. In Matthews, the defendant's bench-side right under Coney had been established, yet the record was unclear whether the defendant was given that right. Similarly, in Alexander, the right to be present during the jury's query of the trial judge was established. Here, in contrast, Petitioner did not show the DCA that he had any Coney or other jury-related right at all. This case is like the failure of litigant to establish a right, for example, to introduce evidence, See, e.g., Lucas v. State, 568 So.2d 18, 22 (Fla. 1990) ("defense did not proffer what the witness would have said"; "an appellate court will not otherwise speculate about the admissibility"). Petitioner has failed to show the factual predicate for the purported right that Matthews and Alexander did establish. Matthews and Alexander are distinguishable and therefore not in conflict here.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT 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 14th day of July, 1997.

Stephen R. White
Attorney for the State of Florida

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Appendix

Criminal law--Jury selection--Absence of defendant from bench conference--Defendant failed to establish existence of reversible error resulting from absence from bench conference during which peremptory challenges were exercised where defendant was present in courtroom, defendant had previously conferred with counsel, and defense counsel did not exercise any peremptory challenges

DAVID P. CARMICHAEL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-3069. Opinion filed May 22, 1997. An appeal from the Circuit Court for Walton County. Lewis R. Lindsey, Judge. Counsel: 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.

(MICIUE, 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. 3 15, 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 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,* Case No. 95-3621 (Fla. 1st DCA April 14, 1997) [22 Fla. L. Weekly D976a]; *McNabb* v. *State, 689 So.* 2d 37 1 (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. 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.)

* * *