IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 91,061

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Pursuant to Florida Rule of Appellate Procedure 9.210(b)(3), references to the record will be prefaced "R", followed by the volume number (in Roman numerals), followed by the page number(s). For example, "RIII-17-22" refers to pages 17 to 22 of volume III of the record.

STATEMENT OF THE CASE AND FACTS

The parties will be referred to as "defendant" and "the state".

Following a jury trial, defendant was convicted as charged of all seven counts with which he was charged. The offenses, with their respective sentences, are as follows:

> COUNT I - Escape while being transported (Section 944.40, Florida Statutes (1995)) - 10 years imprisonment, habitual offender.
>
> COUNT II - Battery on law enforcement officer (Section 784.07, Florida Statutes (1995)) - same sentence as Count I, concurrent.
>
> COUNT III - Obstructing officer with violence (Section 843.01, Florida Statutes (1995)) - same sentence as Count I, concurrent.
>
> COUNT IV - Possession of cocaine (Section 893.13(6)(a), Florida Statutes (1995)) - five years imprisonment, concurrent.
>
> COUNT V - Possession of cocaine (Section 893.13(6)(a), Florida Statutes (1995)) - five years imprisonment, concurrent.
>
> COUNT VI - Misdemeanor possession of marijuana (Section 893.13(6)(b), Florida Statutes (1995)) - time served.
>
> COUNT VII - Possession of drug paraphernalia (Section 893.147, Florida Statutes (1995)) - time served.

(RI-12-15(information); 54-55(verdict); 56-70(judgment and sentences)).

The judgment and sentences were entered on January 3, 1996. (RI-56-70) Notice of appeal was filed on January 16, 1995. (RI-77)

The offenses charged in Counts I through IV occurred on June 1, 1995; the other three occurred on June 15, 1995. (RI-12-15)

These latter three counts were based on items found when the police came to arrest defendant for the June 1 offenses.

During voir dire, after counsel for both sides had questioned the first batch of prospective jurors, the following appears in the transcript:

> THE COURT: Counsel approach the bench, please, when you're ready.
>
> (The following bench discussion ensued:
>
> THE COURT: What says the State?
>
> [The State]: Accept.
>
> THE COURT: What do you say?
>
> [Defense Counsel]: The whole panel, Your Honor?
>
> Strike Mr. Vanwinkle.

(RII-25)

Defense counsel went on to strike three more jurors peremptorily. (RII-25-26)

As voir dire continued, the above scenario occurred four more times. (RII-42, 53, 67, 74) On each occasion, the trial court asked "counsel [to] approach the bench" and there is no indication that defendant was present on any of the occasions. The trial court never inquired of defendant whether he was waiving his right to be present at these bench conferences; nor did the trial court ask defendant if he ratified the challenges made by defense counsel outside defendant's presence.

During voir dire, defense counsel asked a group of prospective jurors if they felt that "police officers are only human and can

make mistakes?" (RII-35) Several panel members agreed with counsel's statement. (RII-36) The following exchange then occurred with panel member Holmes:

> [Defense counsel]: So you would agree that a police officer would be trained to focus in on detail at the time of, perhaps, an arrest?
>
> MS. HOLMES: Yes, to notice something that I wouldn't notice, perhaps.
>
> [Defense counsel]: Okay. Would you hold them to a higher standard then? When a police officer gets up there and says this is the way it is, I mean, would it -- would you just -- it goes back to the credibility again of their testimony. They say they saw something a certain way and somebody else, a lay witness, says, well, I saw the same thing, but that's not the way it occurred. And all things being equal, aside from the fact that one's a trained police officer and one's not, are you going to give that trained police officer's version a little more credibility?
>
> MS. HOLMES: I might be tempted, yeah.
>
> [Defense counsel]: Okay. So what you're saying is you couldn't be sure whether or not you would not, in fact, give their testimony a little greater weight than a-non-police officer's testimony if all things were equal?
>
> MS. HOLMES: If all things were equal.
>
> [Defense counsel]: All other things equal, okay.

(RII-37-38)

Defense counsel moved to strike Ms. Holmes for cause; the motion was denied. (RII-42) At the end of voir dire, after defense counsel had used all his peremptory challenges, the following exchange occurred:

> [Defense counsel]: I'm going to ask for more peremptory challenges.

> **THE COURT:** Negative. Why do you think you're entitled to one?
>
> **[Defense counsel]:** I would strike Mr. Kaufmann.
>
> **THE COURT:** Why do you think you're entitled to one?
>
> **[Defense counsel]:** I believe the Court denied one challenge for cause that I had. I'm asking for a peremptory.
>
> **THE COURT:** Denied.

(RII-75)

Prospective Juror Thornton was questioned about midway through the voir dire. (RII-42) He agreed with the State that marijuana should be illegal, and he said that "law enforcement officers should [not] be given any more credibility just because of [their status as officers]." (RII-43-44) The State then asked Mr. Thornton "do you know anybody, or yourself who's had a negative experience with law enforcement?" (RII-46) When Mr. Thornton replied "myself," the following exchange occurred:

> **[The State]:** You have? And would that experience affect your ability to be fair and impartial?
>
> **MR. THORNTON:** No.
>
> **[The State]:** Okay. And was that -- you indicated you were accused of a crime or knew somebody accused of a crime. Is that where your negative experience came from?
>
> **MR. THORNTON:** It was myself.
>
> **[The State]:** Excuse me, I didn't --
>
> **MR. THORNTON:** It was myself was accused of a crime.

[The State]: Uh-huh. And do you know anybody who's had maybe a negative experience with law enforcement officers in any way?

MR. THORNTON: No.

[The State]: Okay. And the fact that you -- actually you've been on both sides. You've been a victim and you've been accused of a crime.

Do you feel that the system, the judicial system, the justice system, however you want to call it, has worked for you? Has it been fair for you, or do you feel that it hasn't?

MR. THORNTON: Well, it -- we have -- I really can't answer that one right now.

[The State]: Is there something you would feel more comfortable saying outside the presence of other people?

MR. THORNTON: No, it's just hard to answer that question right now.

[The State]: Is there something you would feel more comfortable saying outside the presence of other people?

MR. THORNTON: No, it's just hard to answer that question right now.

[The State]: All right. And that brings us to the reasonable doubt....

(RII-46-47)

Mr. Thornton went on to assert he "d[id]n't have a problem" with the reasonable doubt standard, or with "relying simply on verbal testimony"; nor did he think he would "have a problem paying attention on Friday, because of something going on Friday in [his] li[fe]." (RII-48-50) He also said he did not have "any problems with African-Americans" and he agreed 1) "Police officers are human beings like the rest of us; they make mistakes"; 2) "The proof can only come from the witness stand"; 3) He "would...be able to put

his two cents worth in back there, if [he] were picked as a juror"; and 4) He would "stick to [his] guns [and] not sign a verdict form [he] didn't believe in." (RII-52-53)

The State moved to strike Mr. Thornton for cause, prompting the following exchange:

> [The State]: The cause is that he was not able to answer my question whether the criminal justice system was fair. Since he can't answer that question at this time, we argue he's not being forthright with the Court at this time as to his opinions as to whether or not the system has treated him fairly or not and that has a bearing upon his ability to be a fair and impartial juror in this case.
>
> [Defense counsel]: Your Honor, I object. At most, he was just very careful to think about, you know, answering a problem like -- I don't understand where he's coming up with a failure to be forthright. He answered all the questions.
>
> THE COURT: Do you recollect that he refused or failed to answer that question?
>
> [Defense counsel]: Wait a minute. Well, I believe -- now, I believe there was one question, but I would ask the Court to ask him if he would like to answer that outside the presence of the jury.
>
> THE COURT: No, we don't do that, not a question that simple. You can ask some woman if she's ever been raped and she wants to talk about it outside the presence of the jury, that's one question, but do you think the judicial system works -- is that the way you got it? Did you understand he didn't have an opinion?
>
> [Defense counsel]: He just didn't appear to -- didn't appear to want to answer it.
>
> THE COURT: Okay. Then I'll grant that. We'll let it go. Any others?

[Defense counsel]: But I mean, I would -- if I could just follow-up, Your Honor.

THE COURT: No, he's gone.

(RII-54-55)

At trial, two witnesses testified about the events on June 1, 1995. Deputies Harrell and Morris testified that they made a traffic stop of a car in which defendant was riding as a passenger. (RII-95-96) As defendant was getting out of the car, the deputies noticed two pieces of crack cocaine laying on the passenger's seat, where defendant had been sitting. (RII-97-98, 121-124) Defendant was arrested (for possessing this cocaine), handcuffed, and walked back to Deputy Harrell's cruiser. (RII-99-100, 125-129) Defendant then broke free, struck Deputy Harrell in the side, and fled on foot; the deputies pursued but lost track of him. (RII-101-102, 130-131)

On June 15, the deputies received information about where Defendant was living. (RII-137-138) When Deputy Billor went in the house, he found defendant coming down from the attic; defendant was wearing a pair of white shorts and a t-shirt. (RII-161-162) Deputy Billor went up into the attic and found a rolled up pair of brown pants. (RII-162) When he came down with the pants, defendant said "Hey, those are my pants." (RII-164) When Deputy Billor pulled several pieces of crack cocaine out of the pants, defendant then said "those aren't my pants." (RII-164) Deputy Billor also found a small amount of marijuana and some rolling papers in the pants pockets. (RII-164-166)

Laboratory analyst James Gibson verified that the substances found in the car on June 1 and in the pants on June 15 were crack cocaine and marijuana. (RII-180-183)

On direct appeal, defendant raised the same three issues he is raising in this Court. Affirming the convictions, the district court did not address Issues II and III. Lee v. State, 22 FLW D1608 (Fla. 2d DCA, July 2, 1997)(copy attached as appendix). As to Issue I, the court asserted:

> [F]ailure to obtain a "Coney [v. State, 653 so. 2d 1009 (Fla. 1995)]" waiver cannot be raised on direct appeal without an objection made on the same grounds at trial. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). We recognize that failure to obtain a Coney waiver has been deemed fundamental error by other district courts, see Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996); Wilson v. State, 680 so. 2d 592 (Fla. 3d DCA 1996), dismissed, No. 89,381 (Fla. Apr.21, 1997); Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1996), rev. granted, No. 89,968 (Fla. May 14, 1997); however, we believe it more appropriate to raise allegations of unpreserved error in a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. This approach to reviewing Coney errors gives defendants a meaningful opportunity to allege and demonstrate prejudice, and also serves to protect judicial resources.
>
> We, therefore, affirm Lee's judgment and sentence. We acknowledge interdistrict conflict on this issue and certify to the Florida Supreme Court [the following question]:
>
> > IF A CONEY ISSUE IS NOT PRESERVED AT TRIAL, MUST A PRISONER FILE A POST-CONVICTION MOTION ALLEGING UNDER OATH THAT HE OR SHE WOULD NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

Id.

Defendant was tried on November 15, 1996. (RII-79) Coney applies here. State v. Mejia, 22 FLW S384 (Fla., June 26, 1997).

SUMMARY OF THE ARGUMENT

ISSUE I The trial court fundamentally erred in failing to insure that Appellant knowingly, voluntarily, and intelligently waived his right to be present at the bench when juror challenges were exercised or that Appellant ratified the challenges that were made outside his presence. Coney violations are fundamental error because Coney's requirement of express waiver or ratification would be meaningless if waiver could be found in silence. Thus, the interdistrict conflict must be resolved by quashing the decision below, and the certified question is moot (because it is based on the assumption that Coney violations are not fundamental error).

ISSUE II The trial court erred in failing to excuse Ms. Holmes for cause because Mr. Holmes' statements indicated a bias in favor of police officers.

ISSUE III The trial court erred in excusing Mr. Thornton for cause because there were no grounds for this excusal.

ARGUMENT

ISSUE I

THE TRIAL COURT FUNDAMENTALLY ERRED IN FAILING TO INSURE THAT APPELLANT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS RIGHT TO BE PRESENT AT THE BENCH WHEN JUROR CHALLENGES WERE EXERCISED OR THAT APPELLANT RATIFIED THE CHALLENGES THAT WERE MADE OUTSIDE HIS PRESENCE.

The district court certified conflict on the question of whether "failure to obtain a Coney waiver [is] fundamental error...." Lee, supra, 22 FLW at D1608. The question certified by the district court is premised on the assumption that failure to obtain a Coney waiver is not fundamental error. Thus, this question will be addressed first.

A. CONEY AND FUNDAMENTAL ERROR

In Coney, the court held that "the defendant has a right to be physically present at the immediate site where potential juror challenges are exercised". 653 So. 2d at 1013. The facts in Coney were as follows:

> Juror challenges in the present case 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. Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes.

Id.

The Court adopted the following rules of law:

As to Coney's absence from the bench conference, this Court has ruled:

> [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.

Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982) (citations omitted). Florida Rule of Criminal Procedure 3.180 provides:

> (a) Presence of the Defendant. In all prosecutions for crime the defendant shall be present:
>
> ....
>
> (4) at the beginning of the trial during the...challenging...of the jury.

Fla.R.Crim.P. 3.180(a).

We conclude that the rule means just what it says: 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, voluntary, and intelligent. Alternatively, a 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.

Id.

The state then conceded that a violation of these rules had occurred at Coney's trial, but argued that the error was harmless. The Court agreed, as follows:

> [T]he record shows no prejudice to Coney. During the brief conference, several jurors were struck for cause by both the State and

> defense because of their views on the death penalty. None were excused peremptorily. The excusals "involved a legal issue toward which [Coney] would have had no basis for input," i.e., the death-qualifying of prospective jurors. [Citation omitted]

Id.

When first released, the Conev opinion contained the following sentence: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." Conev v. State, 20 Fla. L. Weekly S16, 17 (Fla., Jan. 5, 1995). However, this sentence was deleted (without explanation) in the final revised opinion.

The majority of the district courts have held that Conev violations are fundamental error:

> According to the supreme court, "[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." [Citations omitted] Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in Coney, we conclude that a violation of that rule constitutes fundamental error....

Mejia v. State, 675 So. 2d 996,998 (Fla.lst DCA 1996), rev. on other grounds, State v. Mejia, 22 FLW S384 (Fla., June 26, 1997).

Accord, Brower v. State, 684 So. 2d 1378, 1379 (Fla. 4th DCA 1996) ("the procedure the Coney court prescribed in order for a defendant to waive his presence or ratify jury selection in the defendant's absence would be superfluous if the simple failure to make a timely objection had the same result"); Wilson v. State, 680 So. 2d 592 (Fla. 3d DCA 1996).

The second district disagrees, although its reasons for doing so are unclear. In the present case, the court agreed with Judge Altenbernd's concurring opinion in Hill v. State, 22 FLW D484 (Fla. 2d DCA, Feb. 21, 1997), in which he asserted:

> Although I conclude that Mr. Hill has the right to raise the Coney issue, I do not believe he has the right to raise it on direct appeal.
>
> * * *
>
> There is nothing in this record to suggest that Mr. Hill would have taken any action at the bench that would have affected the make-up of this jury.
>
> I will not enter the debate concerning the supreme court's reason for removing the sentence in the initial release of Coney that suggested a defendant need not or cannot preserve this issue at trial.
>
> * * *
>
> I assume a prisoner can raise this issue in a postconviction motion without the need to preserve it at trial. A prisoner may allege that his lawyer was ineffective by failing to read the advance sheets and advise the trial court of his client's newly announced right.
>
> On the other hand, I cannot conclude that the Coney issue is a per se error.
>
> * * *
>
> Unlike a Neil issue where a jury either includes someone who should have been dismissed or excludes someone who should not have been dismissed, the Coney issue does not automatically affect the make-up of the jury.
>
> * * *
>
> Therefore, I conclude that Mr. Hill should be required to allege under oath and prove that

> he would have affected the make-up of his jury if he had been allowed to be physically present at the bench conference.

Id. at D485 (citations and footnote omitted).

This, of course, is also the reasoning that supports the certified question in the present case.

It is clear that the second district is in error on this issue, for the reasons stated by the other district courts: if the defendant's right to be present is waived by silence (i.e., by failure to object), why would express waiver or ratification be necessary?

This conclusion is reinforced by the reasoning in three prior cases from this Court: the two cases Coney relied upon (Melendez and Francis) and Turner v. State, 530 So. 2d 45 (Fla. 1987).

In Melendez, the defendant arrived late on the morning of the first day of trial. His attorney had consented to proceeding with jury selection in his absence, which was completed by the time the defendant arrived. Then, "after careful questioning by the trial judge as to his willingness and understanding, [the defendant] ratified the selection of the jury, which was then sworn". 244 So. 2d at 138. Taking jurisdiction to resolve a conflict in the case law, the Court first stated the following principles of law:

> The defendant has a right to be, and is required to be, present during certain phases of his trial, including all stages of jury selection.
>
> * * *
>
> [T]he requirement of the defendant's presence is for his protection, and therefore he

> can waive it if he chooses by voluntarily absenting himself.
>
> * * *
>
> Recent Florida cases have witnessed the emergence of a concept of constructive notice, in that when a defendant is absent but is represented by counsel to whom he has not objected, who waives objection to the defendant's absence, actual or constructive knowledge of the proceedings may be imputed to the defendant. Recognizing the possibilities of abuse of this doctrine, its application has been, and should be, limited to those cases in which the defendant, upon his reappearance at his trial, acquiesces in or ratifies the actions taken by his counsel during his absence.

Id. at 139.

Applying those principles to the pending case, the Court concluded that no error occurred because the defendant had "freely ratified the actions of his counsel". Id.

The court went on to note the following:

> Even lacking constructive notice, the result is the same on the facts in the case sub judice. We hold that when a defendant is absent from a portion of his trial due to lack of notice, is represented by counsel to whom he has not objected, when his counsel waives objection to the defendant's absence, and when the defendant thereafter appears and freely and willingly, knowingly and with understanding, waives objection to and ratifies the actions taken by his counsel, the judge does not abuse his discretion if he elects to proceed with the trial. We do not hold that a defendant's absence due to lack of notice or which is otherwise involuntary can be subsequently cured by defendant's silent acquiescence in continuation of his trial, without a showing of actual or constructive knowledge.
>
> In either case, continuation of the trial must depend on the defendant's consent. When he objects, or when he is absent without a showing that he knew or should have known of

> the proceedings, if he fails to ratify the burden shifts to the State to prove that the defendant was voluntarily absent....

Id. at 140 (emphasis added).

In Francis, the defendant went to the bathroom before the start of the afternoon session of the second day of voir dire. Without consulting the defendant, defense counsel waived the defendant's presence and voir dire continued. When the defendant returned from the bathroom, he sat in the courtroom while the trial judge and the attorneys completed the jury selection in a jury room. "No inquiry of [the defendant] was made by the court as to whether he ratified the jury which was selected in his absence". 413 so. 2d at 1177. In a post trial motion for new trial, the defendant

> objected to this selection of the jury outside his presence. At this hearing, he testified that he wanted to be present during the jury selection process but that he was told by his counsel that he would not be permitted to accompany the judge, counsel, and court reporter into the jury room. He further stated that he had not consented to his counsel's waiver of his right to be present.

Id.

Following Melendez, the Court found reversible error, as follows:

> Francis was absent during a crucial stage of his trial and his absence was not voluntary. He had been excused by the court momentarily to go to the restroom. After he had returned to the courtroom, his counsel, the prosecutor, the judge, and the court reporter retired to the jury room to exercise Francis' and the State's peremptory challenges. His counsel had told him he could not go with them into the jury room. His counsel had not ob-

> tained his express consent to challenge peremptorily the jury in his absence.
>
> * * *
>
> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present....

Id. at 1178 (emphasis added).

Finally, in Turner, the defendant was present while the venire was questioned and he fully discussed with his attorneys which jurors they wanted to strike. However, the strikes themselves were exercised in a jury room, with only the court personnel present and the defendant remaining in the courtroom. The defense did not use all its peremptory strikes, and the panel was not sworn until the next day, after the defendant had been fully informed by counsel about the completed jury selection. Although finding the error harmless, the Court did hold that error had been committed:

> We cannot agree that Turner waived his right to be present during the exercise of challenges or that he constructively ratified or affirmed counsel's actions. A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary.
>
> * * *
>
> Turner's defense counsel testified that he did not advise Turner of his right to be present.

> The record does not indicate that the trial court informed Turner of his right or questioned him as to any ratification of counsel's exercise of challenges in his absence. A defendant cannot knowinslv and intellisentlv waive a right of which he is unaware. Silence is insufficient to show acquiescence....

530 So. 2d at 49 (emphasis added)(citations omitted).

As these cases make clear, only the defendant himself can waive his right to be present for juror challenges, and that waiver must be express and knowing; mere silence (i.e., failure to object) is insufficient. See also Garcia v. State, 492 So. 2d 360, 363 (Fla. 1986) ("counsel's waiver of a defendant's absence at a crucial stage of a trial, without acquiescence or ratification by the defendant, is error").

Thus, Coney violations are fundamental error and the interdistrict conflict must be resolved on that basis. This of course also effectively answers the certified question: As fundamental error, the issue should be raised on direct appeal.

B. HARMLESS ERROR

As noted earlier, Coney violations may be harmless. Coney, supra, 653 So. 2d at 1013. It is the state's burden to prove harmlessness beyond a reasonable doubt. Garcia, supra, 492 So. 2d at 364; State v. DiGuilio, 491 So. 2d 1124 (Fla. 1986).

The error was deemed harmless in Coney because only cause challenges were exercised in Coney's absence and thus "the excusals involved a legal issue toward which [Coney] would have had no basis for input...." Id. (citation and internal quotes omitted). Harmless error has been found in the district courts when the

record shows "the defendant actively participate[d] in or ha[d] the opportunity to consult with counsel during jury selection...." Hardy v. State, 22 FLW 1411 (Fla. 2d DCA, June 13, 1997); Garcia v. State, 22 FLW 1219 (Fla. 4th DCA, May 23, 1997); Golden v. State, 688 So. 2d 419 (Fla. 1st DCA 1997).

However, if peremptory strikes were exercised and the defendant had no input into that process, the error is deemed harmful because "if defendant had participated in the exercising of peremptory strikes, it may have resulted in different jurors deciding his guilt or innocence". Dorsey v. State, 684 So. 2d 880 (Fla. 4th DCA 1996); Chavez v. State, 22 FLW D1591 (Fla. 3d DCA July 2, 1997).

This Court has adopted these same principles in its prior cases. In Francis, where the defendant neither waived his presence nor ratified the strikes, the Court found the error to be harmful because "we are unable to assess the extent of the prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised". 413 So. 2d at 1179. Conversely, in Turner, the error was deemed harmless because the defendant had an opportunity to consult with counsel and provide his input before the strikes were exercised.

In the present case, peremptory challenges were exercised in defendant's absence and the record fails to establish that defendant had any input into the exercise of the strikes. The Coney violation cannot be proven to be harmless beyond a reasonable doubt.

ISSUE II[1]

THE TRIAL COURT ERRED IN FAILING TO EXCUSE MS. HOLMES FOR CAUSE BECAUSE MR. HOLMES' STATEMENTS INDICATED A BIAS IN FAVOR OF POLICE OFFICERS.

"If there exists basis for a reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused...." Sinser v. State, 109 So. 2d 7, 23-24 (Fla. 1959). "The test...is whether the juror can lay aside any bias or prejudice and render his verdict solely on the evidence...and the instructions...." Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert.denied, 469 U.S. 873 (1984).

It is well-settled that equivocal statements indicating a bias towards police officers and an inclination to believe their testimony over that of lay witnesses is the type of bias that requires excusal for cause. Duncan v. State, 588 So. 2d 50 (Fla. 3d DCA 1991)(error to deny cause challenge "to exclude two jurors who admitted they were biased in favor of the credibility of police officers"); Mann v. State, 571 So. 2d 551 (Fla. 3d DCA 1991)(error to deny cause challenge to juror who said she "would...try to be as fair as possible[,] but I'd give greater weight to what the police say").

---

[1] Although Issues II and III are not part of the certified question or conflict, once this Court takes jurisdiction, all issues may be addressed. State v. Smith, 573 So. 2d 306 (Fla. 1990).

In the present case, Ms. Holmes agreed she would be "tempted" to "give [a] police officer's version a little more credibility" and she "couldn't be sure whether or not [she] would...give their testimony a little greater weight...." (RII-32) This raises a reasonable doubt about whether she could be fair and impartial, and thus Appellant's cause challenge should have been granted. Since Appellant 1) used all his peremptories, 2) requested an additional peremptory, and 3) identified a specific juror he wanted to strike (T75), the error was preserved for appeal and it is reversible. Trotter v. State, 576 So. 2d 691 (Fla. 1990).

ISSUE III

THE TRIAL COURT ERRED IN EXCUSING MR. THORNTON FOR CAUSE BECAUSE THERE WERE NO GROUNDS FOR THIS EXCUSAL.

When Mr. Thornton was asked if his "negative experience with law enforcement" would "affect [his] ability to be fair and impartial", Mr. Thornton responded with an unequivocal "no." (RII-45-46) After noting that Mr. Thornton had "been on both sides" because he had "been a victim [and] been accused of a crime," the state asked Mr. Thornton a compound and ambiguous question: "The justice system, . ..has [it] worked for you? Has it been fair to you.. .?" (RII-46-47) Mr. Thornton replied "I really can't answer that one right now... it's just hard to answer right now." (RII-47) Over Appellant's objection, Mr. Thornton was excused for cause. (RII-54-55)

This was error. Mr. Thornton said nothing that indicated he could not be fair and impartial. Appellant is aware of no case law holding that such a vague response to such broad and ambiguous questions disqualifies one for jury duty.

It is per se reversible error to improperly overrule a defendant's objection to a cause challenge by the State. Farina v. State, 680 So. 2d 392 (Fla. 1996).

CONCLUSION

The interdistrict conflict should be resolved by recognizing Coney violations as fundamental error. This in turn would render the certified question moot. The decision of the district court should be quashed and the cause remanded to the district court with instructions to reverse the convictions and remand for a new trial.

APPENDIX

sion to impose adult sanctions was appropriate. *See* § 39.059(7)(d), Fla. Stat. (1995). In addition, as of October 1 1994, trial courts are no longer required to set forth specific findings of fact to support their decision to sentence juveniles as adults. Ch. 94-209, §§ 51, 150 at 1306. 1384, Laws of Fla. Rather, the only requirement is that the decision be made in writing. § 39.059(7)(d), Fla. Stat. (1995).

The record in this case does not contain a written decision. Accordingly, we remand for entry of an order conforming to the trial court's oral pronouncement of its decision to impose adult sanctions. This is merely a ministerial action, and Perkins need not be present.

Affirmed but remanded for entry of a written order. (LAZZARA, A.C.J., and FULMER and WHATLEY, JJ., Concur.)

* * *

Criminal law-Sentencing-Correction-Credit for time served-Jail time-Probation revocation--Where written sentence reflects that the only credit for time served awarded defendant was for time spent in jail awaiting imposition of the present sentence, case remanded for correction of written sentence to comport with trial court's oral pronouncement at sentencing that defendant be *given* credit for time served and entitled gain time

BRENT SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 9640913. Opinion filed July 2. 1997. Appeal from the Circuit Court for Highlands County; J. David Langford, Judge. Counsel: James Marion Moortnan. Public Defender, and Timothy J. Ferreri, Assistant Public Defender, Bat-tow, for Appellant. Robert A. Buttemorth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Brent Smith appeals the sentence he received after his probation was revoked. He contends the trial court did not award him the appropriate amount of credit for time served on the incarcerative portion of his probationary split sentence pursuant to *Tripp v. State*, 622 So. 2d 941 (Fla. 1993). The written sentence reflects that the only credit for time served awarded Smith was for time spent in jail awaiting imposition of the present sentence. The provision on the written sentence directing that Smith be allowed credit for all time previously served in the Department of Corrections was not marked. At sentencing, however, the trial court directed that Smith be given credit for time served as well as for any gain time to which he might be entitled.

Accordingly, we remand this case for correction of the written sentence to comport with the trial court's oral pronouncement at sentencing.

Affirmed but remanded for correction of sentence. (LAZZARA, A.C.J., and FULMER and WHATLEY, JJ., Concur.)

* * *

Criminal law-Sentencing-Habitual offender-Possession of cocaine-Trial court erred in sentencing defendant as a habitual felony offender for delivery and possession of cocaine where statute provides such felonies are not subject to habitual offender sentencing

FRANK JAMES MILLER, Appellant. v. STATE OF FLORIDA. Appellee. 2nd District. Case No. 9543957. Opinion tiled Julv 2. 1997. Appeal from the Circuit Court for Hillsborough County; J.. Rogers Padgcn, Judge. Counsel: James Marion Moorman. Public Defender. and Richard J. Sanders, Assistant Public Defender. Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Stephen D. Akc, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Appellant challenges his convictions and sentences for delivery and possession of cocaine. We affirm appellam's convictions without discussion. However, the trial court sentenced appellant as a habitual felony offender for both offenses. Under section 775.084(1)(a)3, Florida Statutes (1993), purchase and possession of controlled substances are felonies that are not subject to habitual offender sentencing. See *Belton v. Slate,* 673 So. 2d 880 (Fla. 2d DCA 1996). As indicated by the sentencing guidelines score sheet, appellant's sentences were within the guidelines. Accordingly, we remand with directions to remove the habitual felony offender designation on the sentence for possession of cocaine. *See Tisdale v. State*, 22 Fla. L. Weekly D688 (Fla. 2d DCA March 12, 1997). We affirm appellant's sentences in all other respects,

Affirmed in part, reversed in part, and remanded with directions. (LAZZARA, A.C.J., and FULMER and WHATLEY, JJ., Concur.)

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Criminal law-Absence of defendant-Juror challenges—Appeals-Failure of trial court to obtain defendant's waiver of right to be present at bench during exercise of pretrial juror challenges cannot be raised on direct appeal without objection made on same grounds at trial-Conflict certified-Allegations of unpreserved error are more appropriately raised in rule 3.850 **motion for post conviction relief-Question certified: If a Coney issue is not preserved at trial, must a prisoner file a postconviction motion alleging under oath that he or she would *not* have exercised peremptory challenges in the same manner as his or her attorney?**

TIMOTHY LEE. Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-00360. Opinion filed July 2. 1997. Appeal from the Circuit Court for Hillsborough County; J. Rogers Padgett. Judge. Counsel: James Marion Moortnan. Public Defender, Bartow, and Richard J. Sanders, Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General. Tallahassee. and William 1. Munsey, Jr.. Assistant Attorney General, Tampa, for Appellee.

(QUINCE, Judge.) Timothy Lee appeals his convictions and sentences for battery on a law enforcement officer; escape; and possession of cocaine, marijuana, and drug paraphernalia. He alleges, among other issues, that the trial court erred in failing to determine if he knowingly and voluntarily waived his right to be present at the bench where pretrial juror challenges were exercised. We affirm because the issue has not been preserved for review on direct appeal. We also affirm without further comments the other issues raised.

Lee alleges he is entitled to a new trial based on the trial court's failure to follow the procedure announced in Coney v. *Sate, 653 So,* 2d 1009 (Fla. 1995). *cert. denied,* ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995). i.e., to affirmatively inquire as to whether a defendant wishes to waive his/her right to be present at the bench during the exercise of pretrial juror challenges. Lee's trial transcript indicates that defense counsel and the prosecutor exercised challenges at the bench on four separate occasions during voir dire; however, there is nothing in the record to indicate that Lee was asked whether he wished to be present at the bench. It also appears from the record that neither Lee nor defense counsel lodged an objection or requested that Lee be present at the bench.

Lee was tried on November 15, 1995, more than seven months after the supreme court denied rehearing in *Coney*; therefore, Coney is applicable to this case. See *Boyett v. State*, 688 So. 2d 308 (Fla. 1996). However, in *Hill* v. *Store,* 22 Fla. L. Weekly D484 (Fla. 2d DCA Feb. 21, 1997), Judge Altenbemd in his concurring opinion stated, and we agree, that failure to obtain a "*Coney*" waiver cannot be raised on direct appeal without an objection made on the same grounds at trial. *Steinhorst* v. *State*, 412 So, 2d 332 (Fla. 1982). We recognize that failure to obtain a Coney waiver has been deemed fundamental error by other district courts, see *Butler* v. *Stare,* 676 So. 2d 1034 (Fla. 1st DCA 1996); *Wilson* v. *State*, 680 So. 2d 592 (Fla. 3d DCA 1996), *dismissed,* No. 89,381 (Fla. Apr. 21. 1997); *Brower v. State, 684* So. 2d 1378 (Fla. 4th DCA 1996), *rev. granted,* No. 89,968 (Fla. May 14, 1997); however, we believe it more appropriate to raise allegations of unpreserved error in a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. This approach to reviewing Coney errors gives defendants a meaningful opportunity to allege and demonstrate prejudice, and also serves to protect judicial resources.

A.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 22 day of August, 1997.

Respectfully submitted,

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