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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 91,154

FILED
SID J. WHITE
AUG 22 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

CAMERON ELLIS,

Respondent,

P E T I T I O N E R ' S

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited

Rules Cited

PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St, Lucie County, Florida, Respondent was the appellant, and Petitioner was the appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as the Respondent or the Defendant and the Petitioner or the State. The symbol "A" denotes the appendix hereto attached.

STATEMENT OF THE CASE AND FACTS

The State relies on the facts set out in the opinion of the Fourth District Court of Appeal (A. 1-2). In the opinion, the Fourth District reasoned that because the record was silent as to whether Respondent was present at the bench when peremptory challenges were exercised, that State did not meet its burden of demonstrating that Respondent was present during peremptory challenges (A. 2). The Fourth District specifically recognized conflict with the First District which has found that it is an appellant's burden of showing that he was not present during juror challenges, citing to Faison v. State, 22 Fla. L. Weekly D 1230 (Fla. 1st DCA May 13, 1997), Daniels v. State, 691 So. 2d 1139 (Fla. 1st DCA 1997), and Moore v. State, 685 So. 2d 87 (Fla. 1st DCA 1996).

SUMMARY OF THE ARGUMENT

The Fourth District's opinion directly and expressly conflicts with cases from this court an other district courts. Accordingly, the State asks this court to accept jurisdiction in this case so to resolve the conflict.

ARGUMENT

THE FOURTH DISTRICT'S OPINION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH CASES FROM THIS COURT AND OTHER DISTRICT COURTS.

In **Jenkins v.** State, 385 So. 2d 1356, 1359 (Fla. 1980), this Court defined the parameters of its conflict review, and stated that this Court may review a decision of a district court that expressly and directly conflicts with a decision of another district court or the Supreme Court. See also Reaves v. State, 485 so. 2d 829 (Fla. 1986) . See generally Withlacoochee River Electonic Co-or, v. Tampa Electric Co., 158 So. 2d 136 (Fla. 1963); Ansin v. State, 101 so. 2d 808 (Fla. 1958). In order for two court decisions to be in express and direct conflict for the purpose of invoking this court ' s discretionary jurisdiction under rule 9.030(a)(A)(iv), Florida Rules of Appellate Procedure, the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of mandatory authority. See generally Mancini v. State, 312 So. 2d 732 (Fla. 1975). Here, the Fourth District's opinion that the State has the burden of showing that a defendant was present during peremptory challenges conflicts with

decisions from other courts that hold that the appellant has the burden of showing on the record that he **was** not present during peremptory challenges in order to establish error under Coney v. State, 653 So. 2d 1009 (Fla. 1995).

Indeed, the Fourth District explicitly recognized conflict with the First District, citing to Faison v. State, 22 Fla. L. Weekly D 1230 (Fla. 1st DCA May 13, 1997), Daniels v. State, 691 so. 2d 1139 (Fla. 1st DCA 1997), and Moore v. State, 685 So. 2d 87 (Fla. 1st DCA 1996). In Faison, the First District held, "Because the record is silent with respect to whether Faison was absent from the bench conference during jury selection and he has failed to sustain the burden of proof to demonstrate reversible error, we affirm the judgment and sentence of the trial court in all respects," 22 Fla. L. Weekly at D1230. In Daniels, the court stated, 'The burden is on an appellant to establish reversible error; when the record fails to support appellant's allegation that he was absent from the bench when his counsel exercised peremptory challenges, appellant fails to show reversible error, even if Coney is applicable." 691 So. 2d at 1140. And, in Moore, the First District concluded, "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 challenges were exercised." 685 So. 2d at 87.

Recently, the Second District agreed with the First District when it cited Moore and ruled in Neal v. State, 22 Fla. L. Weekly D 1883 (Fla. 2d DCA July 30, 1997) that it must affirm the case because a Conev error was not clear on the record. Moreover, in Gibson v. State, **661** so. 2d 288, 290-291 (Fla. 1995), this court noted:

> Further, there is no indication in the record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no obiectidn to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor preiudice on the record before this Court. Cf. Coney v. State, **653** So. 2d 1009, 1013 (Fla. 1995) (holding trial court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond a reasonable doubt).

CONCLUSION

Based on the foregoing argument and citation of authority, the State respectfully requests that this court accept jurisdiction in this case based on direct and express conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by courier to GARY CALDWELL, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, Florida 33401, on this 20th day of August, 1997.

Of Counsel

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

CAMERON ELLIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-2011

opinion filed July 2, 1997

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; C. Pfeiffer Trowbridge, Judge; L.T. Case No. 95-1675 CF.

Richard L. Jorandby, Public Defender, and Gary Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Robert A, Butterworth, Attorney General, Tallahassee, and Melynda Melear, Assistant Attorney General, West Palm Beach, for appellee.

GUNTHER, J.

Appellant, Cameron Ellis, appeals his conviction and sentence for battery on a law enforcement officer and resisting an officer with violence. Only one of the three issues raised merits discussion. Because the trial court did not comply with the dictates of Coney v. State, 653 So. 2d 1009, 1013 (Fla.), cert. denied, 116 S. Ct. 315 (1995), we reverse.

In Coney, the Florida Supreme Court concluded that a defendant had the right to be physically present at the immediate site where the juror challenges are exercised.[1] The Coney court also found:

> 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 madioutside his presence by acquiescing in the strikes after they are made. Again, the court must certify the defendant's approval of the strikes through proper inquiry.

Id. (citations omitted). Where the procedure in Coney is not followed the cause must be reversed for a new trial. Id. However, the supreme court has recognized that a Coney error is subject to a harmless error analysis. Id.; see Anderson v. State, 22 Fla. L. Weekly D736 (Fla. 5th DCA Mar. 21, 1997); Mejia v. State, 675 So. 2d 996, 1000-01 (Fla. 1st DCA 1996), rev. granted, 687 So. 2d 1306 (Fla. 1997).

In the instant case, it is not clear from the record whether Appellant was present at the immediate site where the juror challenges were exercised or whether he conferred with counsel prior to the peremptory challenges being exercised. Therefore, we relinquished jurisdiction to the trial court for a reconstruction of the events surrounding the bench conference where peremptory and for cause challenges were exercised. See Golden v. State, 688

[1] Since the appeal of this case, 'presence" has been redefined under rule 3.180, Florida Rules of Criminal Procedure, as being "physically in attendance for the courtroom proceeding, and [having] a meaningful opportunity to be heard through counsel on the issue being discussed." Amendments to the Fla. R. Crim. P., 685 So. 2d 1253, 1254 & n.2 (Fla. 1996)(also noting that this amendment supersedes Coney). amendment, however, cannot be applied retroactively. Goney v. State, 69 1 So. 2d I 133 (Fla. 5th DCA 1997).

So. 2d 419, 420 (Fla. 1st DCA 1997). However, the trial court, the State, and defense counsel did not have any specific recollection of such events.

Thus, we are left with a record that is silent as to Appellant's presence at the immediate site where jurors were peremptorily challenged. A defendant has a due process right to be present at the site where peremptory challenges are exercised. See Coney, 653 So. 2d at 1012-13; Matthews v. State, 687 So. 2d 908,909 (Fla. 4th DCA 1997). Since the burden is upon the trial court or the State to make the record show that all requirements of due process have been met, we hold that the burden is on the trial court or the State to make the record show that the dictates of Coney have been complied with See id. at 9 10 n.2; Alexander v. State, 575 So. 2d 1370,137 1 (Fla 4th DCA 199 1). Here, neither the trial court nor the State has met this burden as they have failed to demonstrate that Appellant was present at the site where jurors were peremptorily challenged,

In so holding, we recognize conflict with the First District which has found that since it is the appellant's burden to show reversible error, it is the appellant's burden to demonstrate that he was not present at the site where juror challenges were exercised. See Faison v. State, 22 Fla. L. Weekly D1230 (Fla. 1st DCA May 13, 1997); Daniels v. State, 691 So. 2d 1139 (Fla. 1st DCA 1997); Moore v. State, 685 So. 2d 87 (Fla. 1st DCA 1996). Where the record is silent, we do not see how the appellant would ever be able to meet this burden. We find that the more prudent approach would be to keep the burden on the trial court and the State to show that the Coney requirements have been met. See Matthews, 687 So. 2d at 910 n.2; Alexander, 575 So. 2d at 1371.

In addition to **the trial court *or* the State failing to** show that Appellant was present at the immediate site where juror challenges were exercised, the record does not reflect that Appellant knowingly and voluntarily waived his right to be present at the site or that he ratified the juror challenges that were made outside his presence. Thus, the rule set forth in Coney has been violated. 653 So. 2d at 1012 13. Further, we do not find that this error was harmless. Accordingly, we must reverse and remand for a new trial. See id.

REVERSED AND REMANDED.

FARMER, J. and MAY, MELANIE G., Associate Judge, concur.

NOT FINAL, UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.