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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 8 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

CAMERON ELLIS,

Respondent.

CASE NO. 91,154

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

On a Petition for Discretionary Review from the District Court of Appeal, Fourth District of Florida.

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE

A jury found Cameron Ellis, respondent, guilty of battery on a police officer and resisting arrest with violence. On appeal, he argued that his absence from a bench conference, at which counsel exercised peremptory challenges to potential jurors, required reversal, and that his convictions for both battery on a police officer and resisting arrest with violence violated the Double Jeopardy Clause. The District Court of Appeal reversed the convictions because the record did not show compliance with Coney v. State, 653 So.2d 1009 (Fla.1995). It did not address the double jeopardy issue. Ellis v. State, 696 So.2d 904 (Fla. 4th DCA 1997).

SUMMARY OF THE ARGUMENT

The case at bar is not appropriate for discretionary review. It presents a garden variety case involving a record that cannot be reconstructed. Such matters are invariably case specific, so that this Court should not exercise its discretion by second-guessing the decision of the lower court on this point. Further, if this Court does accept jurisdiction it should also consider the Double Jeopardy issue raised, but not addressed, in the lower court.

ARGUMENT

POINT I

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION OF THE LOWER COURT.

The case at bar presents garden variety problems concerning an incomplete record. The general record in criminal cases is that reversal is required where the record is inadequate to afford full appellate review. DeLap v. State, 350 So. 2d 462 (Fla.1977), M.R.G. v. State, 576 So.2d 1378 (Fla.2d DCA 1991). It appears that the First District has carved out its own exception to the rule in cases involving the defendant's absence from bench conferences in the window period covered by Coney v. State, 653 So.2d 1009 (Fla.1995). Inarguably, the decision of the lower court conflicts with these First District cases on this very narrow issue. Nevertheless, petitioner has not advanced any reason that this Court should exercise its discretion and disturb the ruling of the lower court.

Since the Coney window period has closed,[1] there is little likelihood of this question recurring. The First District's narrow exception to DeLap sunsets since Coney will not apply to future cases. Hence, there is no significant present

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[1] In Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla.1996), this Court ended the Coney window period.

controversy calling for this Court's intervention.

Further, if this Court does accept jurisdiction, it should consider the Double Jeopardy question concerning respondent's convictions for battery on a law enforcement officer and resisting an officer with violence. This issue does involve a significant recurring issue appropriate for resolution by this Court. Alternatively, this Court should remand to the lower court for consideration of that issue in light of State v. Anderson, 22 Fla. L. Weekly S 300 (Fla. May 29, 1997) and Gibbs v. State, 22 Fla. L. Weekly S 504 (Fla. Aug. 21, 1997).