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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91, 154

STATE OF FLORIDA

Petitioner,

vs.

CAMERON ELLIS,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Cameron Ellis, was the defendant, and Petitioner, the State of Florida, was the prosecution, in the trial on criminal charges filed in 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 appeal filed with the District Court of Appeal, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as "the State."

The following symbols will be used in this brief:

A = Appendix

R = Record on Appeal

SR = Supplemental Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

Respondent was found guilt of battery on a police officer and resisting arrest with violence on April 9, 1996 (R. 14, 19-24, 31-36). During trial, at the end of the voir dire examination, defense counsel exercised a peremptory challenge (SR 104-105). The record of the jury selection does not show whether Respondent was present at the bench conference in which the challenge was made (A. 1-2). The Fourth District held that because the record was silent, the State and trial court failed to properly make a record of Respondent's presence (A. 2). Therefore, it reversed Respondent's conviction for a new trial.

SUMMARY OF ARGUMENT

Point I

Respondent, as the appellant below, had the burden of making the record on appeal show that he was not present during jury selection. The Fourth District incorrectly shifted this burden to the State or trial court.

Point II

The Fourth District erred in reversing Respondent's conviction based on a presumption that Respondent was not present during the bench conference. Respondent was present during jury selection by virtue of his being present in the courtroom and by not raising any objection to the selection procedure.

ARGUMENT

POINT I

WHETHER RESPONDENT AS APPELLANT HAD THE BURDEN OF MAKING THE RECORD ON APPEAL SHOW THAT HE WAS NOT PRESENT DURING JURY SELECTION.

The Fourth District incorrectly placed the burden of showing no error on appeal on the State and trial court. A decision of the trial court has a presumption of correctness. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980). An appellate court must affirm a conviction unless the presumption of correctness is overcome by matters contained in the record. See Kauffmann v. Baker, 392 So. 2d 13, 15 (Fla. 4th DCA 1980); White v. White, 306 So. 2d 608 (Fla. 1st DCA 1975). In other words, the party seeking review has the burden of submitting a record sufficient to demonstrate reversible error. See Applegate, 377 So. 2d at 1152 (burden is on appellant to demonstrate error); City of Hialeah v. CasCardo, 443 So. 2d 448, 450 (Fla. 1st DCA 1984); Mills v. Heenan, 382 So. 2d 1317, 1318 (Fla. 5th DCA 1980).

An appellant's burden to establish error on appeal is no different in the context of a defendant's presence during jury selection. Indeed, in O'Steen v. State, 111 So. 725 (Fla. 1927),

this Court presumed that the defendant had been formally arraigned where the record did not expressly show whether there had been a formal arraignment. Recognizing that a defendant has the right to be present at arraignment, this Court said that if this right is being violated, then defense counsel has the obligation of objecting and making the record affirmatively show the absence of the defendant. Id. at 728. This Court stressed that a judgment is presumed correct and will not be reversed absent an affirmative showing of error. More recently, 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 objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice 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).

In addition, the First District, in 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), and Moore v. State, 685 So. 2d 87

(Fla. 1st DCA 1996), has held that the defendant who appeals his conviction has the burden of showing that he was not present during jury selection in order to prevail on a claim that he was absent. 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.

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 Coney error was not clear on the record. The conviction in this case should likewise be affirmed because Respondent has failed to show that he was not present when the peremptory challenge was exercised.

POINT II[1]

THE DISTRICT COURT ERRED IN REVERSING RESPONDENT'S CONVICTION BASED ON A PRESUMPTION THAT RESPONDENT WAS NOT PRESENT AT THE BENCH CONFERENCE DURING JURY SELECTION.

Fla. R. Crim. P. 3.180(a)(4) requires a defendant's presence at the beginning of a trial during the examination, challenging, impanelling, and swearing of the jury. In Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), this Court held for the first time that under Fla. R. Crim. P. 3.180, a defendant's right to be physically present where juror challenges are exercised means at the immediate site where they are exercised. In Coney, the State conceded that the defendant's absence from the bench during peremptory challenges was error,[2] and this Court accepted that concession.

However, in Boyett v. State, 688 So. 2d 308 (Fla.1996), this Court stated that, "It was incorrect for us to accept the state's

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[1]Since this Court has accepted jurisdiction to resolve the issue before it in this case, it has jurisdiction to consider all other issues. See Feller v. State, 637 So. 2d 911, 914 (Fla. 1994); Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982).

[2]This concession was therefore **that if peremptory challenges** are made at the bench, immediate site means at the bench.

concession of error. Because the definition of 'presence' had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site." Id. at 310. This Court further stated that such clarification was being provided in an approved amendment to Fla. R. Crim. P. 3.180(b), which reads, "A defendant is present for purposes of this rule if the defendant is physically present in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed. Id.[3]

Boyett overruled Coney's "new" definition of presence. In other words, Boyett at the very least held that immediate site does not mean "at the bench." Therefore, as of December 5, 1996, when the Bovett opinion was issued, the definition of "presence" is that a defendant has a right to be physically present at the immediate site where jury challenges are exercised (without the Coney concession that immediate site means at the bench), with the added clarification that immediate site means in the courtroom and having a meaningful opportunity to be heard through counsel. Furthermore,

[3] This rule was amended effective January 1, 1997. Amendments to the Florida Rules of Criminal Procedure, 685 So. 2d 1253 (Fla. 1996).

pursuant to Boyett, even if the above clarification was not effective until the effective date of the amendment to the rules of procedure, there can be no error in failing to ensure Respondent was at the immediate site, because the definition of "presence" had not been clarified as of the date of Respondent's trial.

Any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Smith v. State, 598 So. 2d 1063 (Fla. 1992). Since this appeal was pending when Boyett was issued, the Fourth District Court of Appeal should have applied this new rule of law announced therein to this case. Instead, the Fourth District applied the expanded definition of presence, which was derived from this Court's acceptance of the State's concession of error in Coney.

Furthermore, even if the new rule of law espoused in Boyett was not intended to become effective until January 1, 1997, the effective date of the amendment to the rules of criminal procedure, it should have been retrospectively applied to this pending case.

While statutory changes in the law are normally presumed to apply prospectively, procedural changes are to be applied to pending cases. Harris v. State, 400 So. 2d 819, 820 (Fla. 5th DCA 1981).

In this matter, the record clearly reflects that Respondent was present during the questioning of the potential jurors and was in the courtroom and had a meaningful opportunity to be heard through counsel during peremptory challenges. At no time did Respondent ever object to the procedure used or to an inability to communicate his preferences. Therefore, Respondent should have been estopped from asserting that he was not given an opportunity to be heard on the issue of jury selection. See also Kellar v. State, 690 So. 2d 630 (Fla. 1st DCA 1997).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State of Florida respectfully submits that the decision of the district court should be QUASHED and the conviction and sentence be REINSTATED.

Respectfully submitted,

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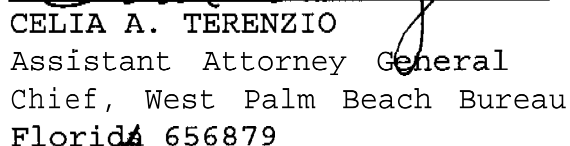

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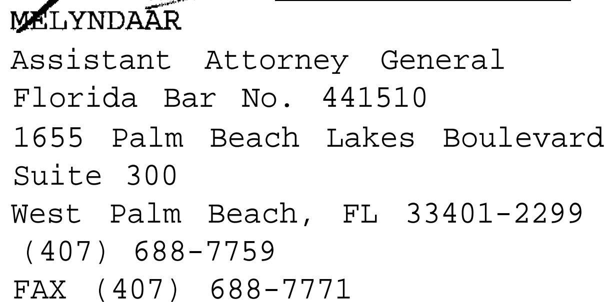

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CASE NO. 91, 154

STATE OF FLORIDA

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ON PETITION FOR CERTIORARI REVIEW

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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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 made outside 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 & n2 (Fla. 1996)(also noting that this amendment supersedes Coney). This amendment, however, cannot be applied retroactively. Coney v. State, 691 So. 2d 1133 (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 S&e to make the record show that the dictates of Coney have been complied with. See id. at 910 n.2; Alexander v. State, 575 So. 2d 1370, 1371 (Fla. 4th DCA 1991). Here, neither the trial court nor the State has met this burden as they have failed to demons&ate 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 Coney, 653 So. 2d at 1013. Further, we do not find that this error was harmless. Accordingly, we must reverse and remand for a new trial. See id.

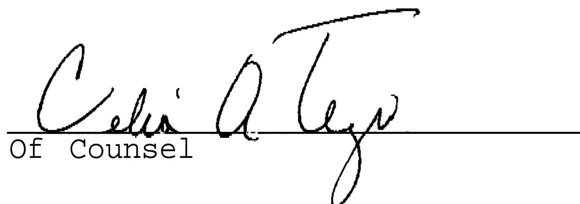
REVERSED AND REMANDED.

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: GARY CALDWELL, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 12th day of November, 1997.



Of Counsel