Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

vs.

CAMERON ELLIS,
Respondent.

No. 91,154

[July 9, 1998]

SHAW, J.

We have for review Ellis v. State, 696 So. 2d 904 (Fla. 4th DCA 1997), based on conflict with Carmichael v. State, No. 90,811 (Fla. July 19, 1998). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We quash Ellis.

Cameron Ellis was charged with battery on a law enforcement officer and resisting arrest with violence. Following voir dire, the jury was selected at a bench conference on April 8, 1996, where several juror challenges were exercised. Although Ellis was present in the courtroom during jury selection, the record is silent as to whether he was present at the bench. He was convicted as charged and the district court reversed because the State could not show conclusively that he was present at the bench. The State contends that the trial court did not err in selecting the jury. We agree.

The Court in Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), ruled that under our then-current rules of procedure, the defendant had a right to be present at the bench when pretrial juror challenges were exercised.[1] We recently held in Carmichael v. State, No. 90,811 (Fla. July 19, 1998), that the defendant must timely raise this issue. In the present case, although Ellis was present in the courtroom when the jury was selected, the record fails to show that either he or his lawyer expressed any interest in Ellis being present at the bench. We note that our decision in Coney had been issued months earlier, giving Ellis ample notice of the existence of this right. On this record, we find no error.

We quash Ellis.

It is so ordered.

OVERTON, KOGAN and WELLS, JJ., concur.

PARIENTE, J., concurs in result only with an opinion.

HARDING, C.J., dissents with an opinion, in which ANSTEAD, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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[1] Coney has since been superseded. See Amendments to Florida Rules of Criminal Procedure, 685 So. 2d 1253, 1254 n.2 (Fla. 1996) ("This amendment supersedes Coney v. State, 653 So. 2d 1009 (Fla. 1995)."). Coney is applicable only to those cases falling within a narrow window—i.e., where jury selection took place after April 27, 1995 (the date Coney became final), and before January 1, 1997 (the date the corrective amendment to rule 3.180 became effective). See State v. Mejia, 696 So. 2d 339 (Fla. 1997); Amendments

PARIENTE, J., concurring in result only.

I concur in the result only for the reasons stated in my concurrence in Carmichael v. State, No. 90,811 (Fla. July 9, 1998). I add the caveat that an affirmance does not preclude the defendant from raising this issue by way of postconviction relief as suggested by Judge Altenbernd in his concurrence in Hill v. State, 696 So. 2d 798, 800 (Fla. 2d DCA), decision approved, 700 So. 2d 646 (Fla. 1997).

HARDING, C. J., dissenting.

For the reasons stated in my concurring opinion in Carmichael v. State, No. 90,811 (Fla. July 9, 1998), I dissent because I believe that Coney violations that occurred within the Coney window can be raised for the first time on appeal or in a motion for new trial.

After establishing that an error occurred, I am unable to conclude that this error was harmless. Unlike Carmichael, the record in this case does not indicate that the defense counsel ever conferred with Ellis before exercising peremptory challenges. Therefore, it is impossible to determine the extent of the prejudice that Ellis suffered. See Brower v. State, 684 So. 2d 1378, 1381 (Fla. 4th DCA 1996).

Consequently, I believe that the proper relief in this case is to grant Ellis a new trial. I acknowledge that the new trial will be governed by the 1997 amendment to rule 3.180. See State v. Strasser, 445 So. 2d 322, 322 (Fla. 1983) (stating that a rule of procedure that has been amended would control any new trial that the defendant could be granted). Thus, one might argue that by applying this amendment to Ellis's new trial, Ellis will receive no additional rights than he already received at his previous trial. See Strasser, 445 So. 2d at 322 (quoting Burney v. State, 402 So. 2d 38, 39 (Fla. 2d DCA 1981), which stated, "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."). However, Strasser is distinguishable from the present case. At his new trial, Ellis would receive additional safeguards that he was not afforded in his first trial. At the first trial, it was not clear what was required for a defendant to be considered "present" under rule 3.180. The 1997 amendment to the rule provides a clearer standard--"A defendant is present for the 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." Fla. R. Crim. P. 3.180(b).

ANSTEAD, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Fourth District - Case No. 96-2011

(St. Lucie County)

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