ORIGINAL

IN THE SUPREME COURT OF FLORIDA

AUG 15 1997

ISIAIH NEAL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 91,249

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Isiaih Neal, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered July 30, 1997.

STATEMENT OF THE CASE AND FACTS

On August 3, 1996, the state attorney of the Twentieth Judicial Circuit in Lee County filed an information charging Appellant with second degree murder in violation of section 782.04(2), Florida Statutes (1993). This offense allegedly occurred on July 4, 1994. Judge Jay B. Rosman presided over the jury trial conducted in this case on June 7 and 8, 1995. After the attorneys asked voir dire questions, the judge allowed them a few minutes to consider their selections and requested the attorneys to approach the judge at side bar. Cause and peremptory challenges were exercised at the bench. Defense counsel accepted the panel, after making strikes, without further consultation with Petitioner. The trial court asked if the panel was acceptable to the defense and received a response from defense counsel, but he did not inquire of Appellant if the jury panel was acceptable to him.

On June 8, 1995, the jury returned a verdict of guilty of the lesser included offense of manslaughter. Appellant was sentenced on July 7, 1995, to the maximum guidelines sentence of 94.7 months imprisonment followed by 7 years probation. Appellant timely filed his notice of appeal on July 7, 1995. In his appeal, Mr. Neal attacked the procedure of allowing the state attorney and defense counsel to exercise challenges of the jurors at the bench outside of Mr. Neal's immediate presence.

A summary of the facts of the case follows: Upon arrival at the crime scene on July 4, 1994, Detective Nicholson of the Fort Myers Police Department saw crime scene tape around the area. Mary

Neal, the victim, had already been transported by emergency medical personnel. There was blood in the driveway of a residential house at 1518 Palmetto Avenue.

Nicholson took taped statements from two witnesses, Bobby Marshall and Lawrence Davis. Marshall and Davis had indicated that Isiaih had walked away from the house on Palmetto.

Nicholson interviewed another witness, Lena Neal, on July 11. Lena had picked up a pocket knife from her bedroom. Lena had fallen into some bushes after she exited the front door and was unconscious for five to ten minutes.

Nicholson took a taped statement from Isiaih Neal. Neal indicated he had been drinking,with a bunch of people at the house where his daughter was going to fix dinner. Isiaih was talking to a lady, and Mary, his estranged wife, kept looking at him.

Neal didn't know Mary was going to be there, but he just talked to her. Isiaih asked her about the house. They got into an argument about signing some papers or something. Mary started drinking a little bit and Mary came after Isiaih with a knife in her hand. Neal took off down the driveway to get her out of the way. Neal grabbed her in the back and turned her around. Neal was scared because he knew how she was over the years. After it happened, Neal took off on foot because he heard someone say, "shoot him." Neal got in his car and went to friend's house for the night. After Neal woke up, he realized what had happened and turned himself into the police.

Neal hardly remembered stabbing Mary, but thought he might have stabbed her once. Later Isiaih could not remember stabbing Mary. Neal thought the knife was lying there with the food. Mary jumped up and got the knife. Neal backed up and started out the driveway. Mary ran behind him and stabbed Isiaih in the back. Later Isiaih said Mary tried to stab him but only grabbed him in the back.

Isiaih spun around, grabbed Mary, and she fell down. Isiaih thought this was when he stabbed Mary. Isiaih thought he just dropped the knife. Isiaih fell on top of Mary and the knife fell out of her hand. Both Mary and Isiaih had a knife. Isiaih got a knife from the little brick wall before Mary charged him. Isiaih heard somebody say, "you got the gun, then shoot him." When Isiaih got up, Mary just laid there. Isiaih heard his daughter say, "you done stabbed momma." Isiaih did not see any blood.

Davis was at his brother and sister in law's house on July 4, 1994 for a cook out. Davis did not see Isiaih and Mary arguing that night. Mary went outside of the gate to talk with her daughters. Isiaih was standing in the doorway. While inside the house, Isiaih had raised up his shirt and showed Davis and Lena a knife he had in his shirt. Davis did not mention this in the report he gave to the detective the night of the incident because he was in shock.

Lena was standing on the sidewalk that leads to the little gate when she screamed, because Isiaih was charging toward her. Isiaih knocked Lena down and then headed toward Mary. Mary was trying to get out of the gate when Isiaih stabbed Mary, Davis and

Bobby Brown wrestled Isiaih to the ground. Isiaih dropped the knife and then walked away.

Lena Neal was having a family cookout on July 4, 1994. As Lena was returning outside from the bathroom, she saw Mary Neal sitting in the chair in the walkway, and Isiaih was coming from the side of the house. Lena asked Isiaih what was wrong. After a couple of minutes, Isiaih came out of his shirt and he and Lena argued. Isiaih swung and Lena swung. During this exchange, Isiaih hit Lena in the back with a knife, and she passed out. When Lena got up, she was dazed.

Lena could see a shadow up against the gate and she yelled "get off my momma." Lena saw two quick hand throws, and she dove on Isiaih's back. They both fell to the ground and tussled in the driveway. Isiaih was still using the knife, which was in his left hand, and he stuck Lena in the knee. Lena went over to her mother and a rolled her off her face. Mary's eyes were white, her mouth was opened, and Lena could not feel a pulse on her.

Doctor Wallace M. Graves Jr., the medical examiner for Lee County, performed an autopsy on Mary Neal. Graves determined that Mary Neal bled to death from a stab wound to the heart. One stab wound in the chest was 3 or 4 inches deep and the fatal wound that penetrated the heart was 5 or 6 inches deep.

The Second District Court of Appeal considered the issue of whether the trial court erred in allowing counsel to exercise challenges to prospective jurors at a bench conference outside Neal's immediate presence. The appellate court affirmed on the

basis that no such error appeared in the record and also indicated that the issue was not preserved for review on direct appeal.

SUMMARY OF THE ARGUMENT

In holding that no error appeared in the record, the Second District Court of Appeal is in conflict with other districts that have held that the trial court and the State have the burden of showing that a defendant was present during the exercise of peremptory challenges. The Second District Court of Appeal acknowledged that their decision that this issue was not preserved for appeal was in conflict with other districts that have held that Coney errors are fundamental.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN Neal v. State, Case No. 95-2792 (Fla. 2d DCA July 30, 1997), CONFLICTS WITH FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS AS TO WHAT IS NEEDED TO SHOW A CONEY VIOLATION AND IS SUCH VIOLATION FUNDAMENTAL ERROR?

After voir dire, the trial court allowed counsel a few minutes to consider their selections and then invited the attorneys to approach the judge at side bar. The record does not show that Petitioner was present at the side bar where peremptory and cause challenges were exercised. The panel was accepted by defense counsel but no inquiry was made of Petitioner whether he accepted the panel or if he ratified the exercise of peremptory challenges made by his attorney.

A defendant has a right to be present at the site where peremptory challenges are exercised. Coney v State, 653 So. 2d 1009, 1012, 1013 (Fla. 1995). The Second District Court of Appeal's decision in this case affirming the lower court because the record did not disclose whether Neal attended the sidebar conference is in conflict with Chavez v. State, 22 Fla. L. Weekly D1591 (Fla. 3d DCA July 2, 1997) and Ellis v. State, 22 Fla. L. Weekly D1621 (Fla. 4th DCA July 2, 1997). Ellis held 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. Id. at D1621. In Chavez, the record did not reflect whether the defendant was present during the side

bar discussion at which jurors were selected and peremptories were exercised yet the appellate court held that the trial court or the State needed to establish that all due process requirements had been met. Chavez at D1591. Since the State or the trial court could not establish that all due process requirements had been met, the case was reversed for a new trial. Chavez at 1592

In this case, the Second District Court of Appeal's opinion goes on to state that the issue of a Coney error was not preserved for review because there was no objection at trial. The Second District Court of Appeal did acknowledge that they were in conflict with the First and Fourth District Courts of Appeal that have held Coney errors are fundamental. See, Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996); Wilson v. State, 680 So. 2d 592 (Fla. 3d DCA 1996); Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1996), review granted, 694 So. 2d 739 (Fla. 1997). By finding the Coney issue was not preserved for appeal and by finding no error where the record does not disclose whether Neal attended the sidebar conference and where no waiver was obtained, the Second District Court of appeal has conflicted with other District Court of Appeal's decisions.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and other District Courts of Appeal so as to invoke discretionary review.

APPENDIX

PAGE NO.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ISIAIH NEAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 9502792

Opinion filed July 30, 1997.

Appeal from the Circuit Court for Lee County; Jay B. Rosman, Judge.

James Marion Moorman, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Jon J. Johnson, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge.

Isiaih Neal was tried before a jury on a charge of second degree murder. The jury found him guilty of manslaughter. Neal challenges his conviction on the sole ground that the trial court allowed counsel to exercise challenges to prospective jurors

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at a bench conference outside Neal's immediate presence, in violation of the rule announced in Conev v. State, 653 So. 2d 1009, 1013 (Fla.), cert. denied, ___ U.S. ___, 16 S. Ct. 315, 133 L. Ed. 2d 218 (1995). We affirm because no such error appears in the record, and, in any event, this issue was not preserved for review on direct appeal.

Neal was present in the courtroom during jury selection, After voir dire, the judge asked counsel to take a few minutes to consider their selections and then approach the sidebar. The record does not disclose whether Neal attended the sidebar conference. It does reflect that the judge did not inquire whether Neal waived his right to be present at the bench during the juror challenges, and that neither Neal nor defense counsel made any objections in this regard.

An appellant bears the burden to establish the existence of reversible error. E.g., Moore v. State, 504 So. 2d 1311 (Fla. 1 st DCA) (claim that reversible error occurred because defense counsel was not present when trial court responded to jury question was mere speculation because the record was silent on the issue), review denied, 513 So, 2d 1062 (Fla. 1987). Here, the record fails to reflect that Neal was not immediately present during the juror challenges; to the contrary, the judge's failure to make a waiver inquiry and the failure of the defense to object on that ground are consistent with the possibility that Neal actually was at the bench conference. Because no error appears in the record, we must affirm. See Mathis v. State, 683 So. 2d 582 (Fla. 1 st DCA 1996) (Criminal Division en banc), decision approved on other grounds, 688 So. 2d 334 (Fla. 1997).

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Beyond that, even if a Coney error had appeared in this record, it was not preserved for review. This court recently has held that the failure to obtain a Coney waiver cannot be raised on direct appeal unless an objection on that ground was made at trial. Lee v. State, Case No. 96-00360 (Fla. 2d DCA July 2, 1997). Instead, it is more appropriate to allege such an error in a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We acknowledge that we are in conflict with decisions of other districts holding that Conev errors are fundamental. See, Butler v. State, 676 So. 2d 1034 (Fla. 1 st DCA 1996); Wilson v, State, 680 So. 2d 592; Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1996), review granted, 694 So. 2d 739 (Fla. 1997).

Affirmed.

DANAHY, A.C.J., and FRANK, J., Concur

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Jon J. Johnson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 14th day of August, 1997.

Respectfully submitted,

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