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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 19 1998
CLERK, SUPREME COURT
By________
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 91,654

EDDIE J. WILLIAMS

Respondent.

______________________________/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant was the defendant in the trial court, appellant in the Fourth District Court of Appeal and the respondent in this Court. He will be referred to as respondent in this brief.

The record on appeal is not consecutively numbered. All references to the record volume will be by the symbol "R" followed by the appropriate page number in parentheses.

All references to the transcript will be designated by the symbol “T” followed by the appropriate page numbers in parentheses. The supplemental record December 16, 1996, will be designated by “SR.”

STATEMENT OF THE CASE AND FACTS

Respondent accepts factually petitioner's Statement of the Case and Facts except that respondent adds the following. Respondent's trial began on April 29, 1996. After challenges for cause were exercised at the bench, respondent's lawyer, Mr. Barnett, said that appellant was not present but was waiving that right:

> MR. BARNETT: For the record, I am sorry, Judge, I should have done this.
>
> Defense Counsel discussed with the client the right to be present during the jury selection process and they waived that right. So we are on the record, we waive that.
>
> THE COURT: Okay, thank you.

(R-136).

Mr. Barnett then exercised the defendant's peremptory challenges without the defendant being present (T-137). The court did not inquire further or ever ask respondent if he affirmed or agreed to waive his fundamental right to be present.

SUMMARY OF ARGUMENT

The decision in respondent's case, Williams v. State, 22 Fla. Law Weekly D2139 (Fla. 4th DCA 1997), represents an appropriate application of this Court's decision in Coney v. State, 653 So. 2d 1009,1013 (Fla. 1995), certiorari denied, __ U.S. __, 116 S. Ct. 315, 113 L. Ed. 2d 218 (1995), since this Court's subsequent decision in Boyett v. State, 688 So. 2d 308,310 (Fla. 1996), held only that the decision in Coney was to be applied prospectively and not to cases that were pending on direct appeal at the time Coney was decided.

Boyett has not been interpreted or viewed by the district court's as overruling Coney and petitioner's position to that effect is not supported by the Boyett decision. This Court should interpret the amended rule consistent with Coney to give effect to the defendant's meaningful opportunity to be present and heard at the exercise of the defendant's peremptory challenges. The subsequent amendment to Florida Rule of Criminal Procedure 3.180, should not be applied retroactively to respondent's case on appeal, since the scope of this rule involved respondent's substantive constitutional right to be present during all "critical stages" of the proceedings against him. Thus, the Fourth District Court of Appeal's decision in Williams constituted an appropriate application of Coney, and must be affirmed by this Court.

ARGUMENT

THE AMENDMENT TO FLA. R. CRIM. P. 3.180 SHOULD NOT BE APPLIED RETROACTIVELY AND WILLIAMS V. STATE, 22 Fla. Law Weekly D2139 (Fla. 4th DCA 1997), MUST BE AFFIRMED.

Petitioner makes two arguments in support of reversal of Williams v. State, 22 Fla. Law Weekly D2139 (Fla. 4th DCA 1997), on the Fourth District's certified question which asks if a rule change should be retroactively applied. First, petitioner contends that this Court's decision in Boyett v. State, 688 So. 2d 308 (Fla. 1996), effectively overruled the Court's prior decision in Coney v. State, 653 So. 2d 1009 (Fla. 1995) certiorari denied ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), on the question of whether a criminal defendant can said to be "actually present" during jury selection without being at the immediate site where a jury selection takes place. Thus, according to petitioner, since Boyett was decided prior to the Fourth District Court's ruling in Williams the latter decisions' reliance on Coney was misplaced, entitling petitioner to a reversal in this Court. Second, petitioner interprets this Court's subsequent amendment to Rule 3.180 (b), of the Rules of Criminal Procedure, which petitioner claims to provide a definition for "presence" in a manner contrary to Coney, Amendments to the Florida Rules of Criminal Procedure, 385 So. 2d 1253, 1259 (Fla. 1996), as a mere "procedural change," entitling petitioner to retroactive application of the Rule change to Respondent's appeal.

The state's argument is premised on its assumption that Boyett overruled Coney and that the January 1, 1997 amendment to Florida Rules of Criminal Procedure 3.180(b) automatically voids the decision in Coney so that the law has been returned to the pre-Coney state. This is not necessarily so as this Court has yet to interpret Boyett or the rule change as having had such an effect

on the law. See Lewek v. State, 702 So. 2d 527 (Fla. 4th DCA 1997). Boyett plainly does not overrule Coney but states only that the Coney decision does not apply to Mr. Boyett on the basis that Mr. Boyett's trial occurred prior to the date Coney was final, since Coney itself stated that its ruling would be applied prospectively-only, 688 So. 2d at 310. Additionally, this Court found Boyett's argument that the Coney rule was not new, entitling Boyett to the benefit of Coney was unavailing, 688 So. 2d at 309-310.

In Coney v. State, this Court clarified the requirement for the defendant's presence provided in Fla. R. Crim. P. 3.180(a)(4) and held that it codified a constitutional right to be present:

> [The defendant] has a constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.

The Coney Court held that a defendant can waive his constitutional right to be "physically present," however, the trial court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary" or the defendant "can ratify strikes made outside his presence by acquiescing in the strikes after they are made." Coney, 653 at 1013. In either case, this Court determined that it was not necessary the defendant "contemporaneously objec[t]" to "preserve this issue for review...[T]he defendant can not be imputed with a lawyer's knowledge of the rules of criminal procedure."

Fla. R. Crim. P. 3.180 protects a constitutional right to be present not an evidentiary right. Francis v. State, 413 So. 2d 1175 (Fla. 1982). In Francis the Court also found that "the exercise of peremptory challenges... to be essential to the fairness of a trial by jury... as one of the most important rights secured to a defendant." 413 So. 2d. At 1178-179 (citations omitted; emphasis

supplied.) In future cases, this Court may well have to interpret the amendment to the Rule 3.180 consistent with what it had already said in Coney for if the defendant is not present at the immediate site where peremptories are exercised and does not have an opportunity participate in the process by which the defendant's only peremptories are exercised, it cannot be said that the defendant"had a meaningful opportunity to be heard through counsel during peremptory challenges." The rule amendment may yet be interpreted to require the defendant's actual presence at the bench or in the judge's chambers or in whatever other place the peremptories are exercised so that the defendant's fundamental right to be present and participate through counsel is not denied.

A close examination of Boyett shows it does not "recede from" Coney on the precise issue involved in respondent's appeal, i.e., whether respondent's presence in the same room as jury selection, but not at the immediate site of selection, constitutes error. Instead, it is clear that Boyett merely clarified that Coney was meant to be applied prospectively as to Coney himself, and not just as to criminal defendants whose trials occurred subsequent to Coney:

> We recognize that in Coney we applied the new definition of "presence" to the defendant in that case. . . it was incorrect for us to accept the state's concession of error [on this issue]. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site. . . we recede from Coney to the extent that we held the new definition of "presence" applicable to Coney Himself.

688 So. 2d at 310 (emphasis supplied). As the Fifth DCA found in Anderson v. State, 22 Fla. L. Weekly D736 (Fla. 5th DCA March 21, 1997):

> By this statement, [this] Court only expressly reced[ed] from Coney to the extent that the new definition of "presence" should not have been applied to that case, since it was first formulated in that opinion. [This] Court did not, by this statement, expressly recede from the new definition [itself].

In fact, the extension of prospectivity for the Coney decision in Boyett to Coney himself, as well as Coney's own prospective-only ruling, is not unprecedented; this Court has on numerous prior occasions announced that its decisions were to be given prospective-only application, either in general or including the defendants involved in those appeals, see e.g. Allen v. State, 662 So. 2d 323 (Fla. 1995)(procedure for presenting mitigating evidence in death penalty case prospective only); In Re Instructions in Criminal Cases, 652 So. 2d 814,815 (Fla. 1995)(deletion of standard jury instruction concerning inconsistent exculpatory statements applied only to trials commencing subsequent to date that decision became final); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1994)(Supreme Court decision barring use of flight instruction prospective); Peterka v. State, 640 So. 2d 59 (Fla. 1994), cert. denied, ___ U. S. ___, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1994)(Supreme Court decision requiring sentencing judge in capital murder case to discuss mitigating circumstances orally prospective-only); see also State v. Johans, 613 So. 2d 1319,1321 (Fla. 1993)(requirement that trial court inquire in all circumstances where issue raised concerning racial bias in peremptory challenges prospective-only, and did not apply to Johans himself); accord Valentine v. State, 616 So. 2d 971,974 (Fla. 1993); Reaves v. State, 574 So. 2d 105 (Fla. 1991), appeal after remand, 639 So. 2d 1 (Fla. 1993), cert. denied at ___ U. S. ___, 115 S. Ct. 488, 130 L. Ed. 2d 400 (1994)(rule announced in Supreme Court decision disqualifying prosecutor who previously represented charged defendant applied prospectively-only). Thus, respondent has made abundantly clear, petitioner's claim that Boyett undermines the holding in Coney applicable to respondent's appeal is totally without merit.

Should the amended rule represent a change in the law and the court interpret "actual presence" as different from Coney, the amendment may not be applied retroactively to respondent's

trial that began on April 29, 1996. The amendment to Rule 3.180(b) was deemed effective on January 1, 1997, Amendments to Florida Rules of Criminal Procedure, 685 So. 2d 1253,1255 (Fla. 1996). Where an explicit effective date for rule changes exists, this Court has previously found a rule amendment improperly applied retroactively, Cerniglia v. Cerniglia, 679 So. 2d 1160,1164 (Fla. 1996); Mendez-Perez v. Perez, 656 So. 2d 458,459-460 (Fla. 1995). Moreover, although the disposition of a case on appeal is generally made on the basis of the law in effect at the time of the appellate court's decision, this rule does not apply where a substantive legal right is altered, State v. Lavazzoli, 434 So. 2d 321,323 (Fla. 1983). As the Fourth District Court noted in Matthews v. State, 687 So. 2d 908,909 (Fla. 4th DCA 1997), citing this Court's decision in Francis v. State, 413 So. 2d 1175,1177-1179 (Fla. 1982), appeal after remand, 473 So. 2d 672 (Fla. 1986):

> A [criminal] defendant has a constitutional right to be present at all stages of a trial where fundamental fairness might be thwarted by his or her absence. . . the examination and challenge of potential jurors is one of the essential stages of a criminal trial where a defendant's presence is mandated [,since] [t]he exercise of a jury challenges by the defendant is not necessarily a mere mechanical function . . . [, as] [i]t may involve the formulation of on-the-spot strategy decision which may be influenced by the actions of the state at the time. . . the exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury, and has been described as one of the most important rights secured [by] a defendant . . . (citations admitted.

As a result, application of the amendment to Rule 3.180(b) to respondent would be improper in this case, see e.g. Najar v. State, 614 So. 2d 644,645, n.1 (Fla. 2d DCA 1993)(improper to apply amendment to criminal rule involving sentencing guidelines to permit scoring victim injury for each count at conviction, as changed substantive, rather than procedural).

Petitioner gives no reason for the rule to be applied retroactively except for its concern for cost of a new trial but cites no case that cost alone is ever a valid consideration and on which basis

justice may rest. Also, as the Fourth District recently observed in Lewek, that the district courts have consistently refused to give the amended rule a retroactive effect precisely because this Court has said that Coney is not retroactive:

> Furthermore, consistent with the Florida Supreme Court's repeated statement that the Coney rule is not retroactive, see, e.g., State v. Mejia, 22 Fla. L. Weekly S384 (Fla. June 26, 1997); Henderson v. State, 22 Fla. L. Weekly S384 (Fla. June 26, 1997); Boyett v. State, 688 So. 2d 308 (Fla. 1996), the majority of Florida district courts, including this Court, has specifically held that the 1997 amendment to rule 3.810(b) shall not be applied retroactively. See Ellis 22 Fla. L. Weekly at D1621 n.1; Chavez, 22 Fla. L. Weekly at D1591; Goney v. State, 691 So. 2d 1133 (Fla. 5th DCA 1997). Accordingly, because the 1997 amendment to rule 3.180(b) is not to be applied retroactively, it cannot affect our decision today.

As petitioner has failed to demonstrate why the certified question should be answered in the affirmative, the decision of the district court in respondent's case must be affirmed.

CONCLUSION

Wherefore, based on the foregoing argument and authorities cited, this Court must affirm Williams v. State, 22 Fla. Law Weekly D2139 (Fla. 4th DCA 1997).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to DAVID M. SCHULTZ, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 18th day of FEBRUARY, 1998.

Margaret Good-Earnest
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Assistant Public Defender