

Supreme Court of Florida

ANTHONY LOPEZ,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

No. 92,292

[August 20, 1998]

SHAW, J.

We have for review Lopez v. State, 707 So. 2d 770 (Fla. 2d DCA 1998), based on conflict with Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1996). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve the result in Lopez as explained below.

Anthony Lopez was charged with robbery with a firearm. During voir dire on September 11, 1995, defense counsel exercised several juror challenges at the bench. Although Lopez was not present at the bench during the strikes, he was seated in the courtroom and had conferred with his lawyer immediately before the strikes were made. He was convicted of armed robbery and the district court affirmed.¹ He now claims that he is

¹ The district court recognized conflict with other district courts that have held a Coney error to be fundamental error. The district court certified the following question:

If a Coney issue is not preserved at trial, must a prisoner file a postconviction motion alleging

entitled to a new trial because he was not present at the bench when the jury was selected. We disagree.

This 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.² We recently held in Carmichael v. State, 23 Fla. L. Weekly S377 (Fla. July 9, 1998), that the defendant must timely raise this issue. In the present case, although Lopez 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 Lopez being present at the bench. We note that our decision in Coney had been issued months earlier, giving Lopez ample notice of the

under oath that he or she would not have exercised peremptory challenges in the same manner as his or her attorney?

Lopez, 707 So. 2d at 771. This question is rendered moot by our decision in Carmichael v. State, 23 Fla. L. Weekly S377 (Fla. July 9, 1998), wherein we held that in order to be cognizable on review a Coney claim must be timely raised with the trial court.

² Coney has since been superseded.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.

existence of this right. We find no error.

We approve the result in Lopez on this issue as explained above.³

It is so ordered.

OVERTON, KOGAN and WELLS, JJ.,
concur.

PARIENTE, J., concurs 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.

PARIENTE, J., concurring.

I concur in the result only for the reasons
stated in my concurrence in Carmichael v.
State, 23 Fla. L. Weekly S377 (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.

I dissent for reasons stated in my
dissenting opinion in State v. Ellis, 23 Fla. L.
Weekly S382 (Fla. July 9, 1998). The
majority opinion states that Lopez "had
conferred with his lawyer immediately before
the strikes were made." The record reflects
that Lopez did confer with defense counsel
during the questioning of the jury panel.
However, there is nothing in the record to
indicate that Lopez was informed of his right

³ We decline to address the other issues raised by
Lopez.

to be present at sidebar or that Lopez was
consulted as to which jurors should be
challenged.

ANSTEAD, J., concurs.

Application for Review of the Decision of the
District Court of Appeal - Certified Great
Public Importance

Second District - Case No. 95-04183

(Hillsborough County)

James Marion Moorman, Public Defender,
and John C. Fisher, Assistant Public
Defender, Tenth Judicial Circuit, Bartow,
Florida,

for Petitioner

Robert A. Butterworth, Attorney General, and
Angela D. McCarvy, Assistant Attorney
General, Tampa, Florida,

for Respondent