IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIAM DARDEN, JR.,

Respondent.

CASE NO. 92,317

5th DCA CASE NO. 96-2257

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE

Respondent, William Darden, Jr., was convicted at trial in May, 1996 of burglary of a dwelling, burglary of a conveyance, possession of burglary tools and felony petit theft. On direct appeal, the Fifth District Court of Appeal vacated his conviction and sentences, finding a violation of the rule announced in Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, --- U.S. ----, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995). In doing so, the court certified conflict with the second district, which has held that a Coney error can not be raised on direct appeal in the absence of an objection at trial or a timely motion for post-conviction relief. The State timely petitioned this honorable Court for review of the Fifth District Court's opinion, and the Fifth District Court has stayed mandate pending review.

FACTS

Respondent, William Darden, Jr., was charged by information in St. Johns County with burglary of a dwelling, burglary of a conveyance, possession of burglary tools, and felony petit theft. (R 1-2) Respondent proceeded to trial by jury in May, 1996. (R 23-24)

Respondent was represented by counsel at the trial and was present in the courtroom during jury selection. (T 7) After questioning jurors but prior to exercising any challenges Respondent's trial counsel was provided an opportunity to discuss potential challenges with Respondent. (T 32)

Challenges were exercised at the sidebar, and the record does not reflect whether respondent was present at the bench. (T 32) Respondent's trial counsel exercised three peremptory strikes and one challenge for cause. (T 33) Following the challenges, the parties returned to the counsel tables and Respondent was provided an opportunity to examine the jury as they were individually called up and seated in the jury box. (T 33-34) Following this procedure, Respondent's counsel again announced his acceptance of the jury. (T 34)

Respondent was then tried, found guilty and convicted as charged. (R 23-24) Respondent did not object to the jury selection procedure in the trial court.

SUMMARY OF ARGUMENT

Fundamental error is error that "goes to the foundation of the case or goes to the merits of the cause of action", or is so egregious that it amounts to a denial of due process. To qualify as fundamental, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without it. The doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Mere procedural errors are not fundamental.

A criminal defendant has a constitutional right to be present at jury selection, however, the manner in which the defendant's presence is achieved is procedural. Therefore, a Coney error is not fundamental and the failure to object to jury selection procedures which do not include a defendant's presence at the bench where peremptory challenges are exercised waives appellate review of the issue. Because Respondent did not object to the jury selection procedures employed at the trial in the instant case, he is procedurally barred from raising the issue on appeal. Accordingly, the Fifth District's opinion is in error and must be reversed.

The Fifth District also erred in not finding the error in the instant case harmless. Respondent was physically present in the courtroom and had an opportunity to be heard through counsel, and

was thus afforded exactly the same protections he would receive on retrial. A reversal of his conviction, for the alleged infringement of a procedural right to which he is no longer entitled, would be a useless act which this honorable Court should not affirm.

Furthermore, Respondent was afforded the opportunity to participate in a meaningful way. Respondent was given opportunities to consult with his trial counsel though each stage of the jury selection process, and, through counsel, affirmatively accepted the jury as selected. Because Respondent was not prejudiced by the jury selection process in the instant case, any error was harmless and the decision of the Fifth District Court of Appeal must be reversed.

ARGUMENT

POINT I

WHETHER A CONEY ERROR CONSTITUTES FUNDAMENTAL ERROR WHICH CAN BE RAISED ON DIRECT APPEAL WHEN NO OBJECTION WAS MADE ON THE SAME GROUNDS AT TRIAL

The Fifth District Court of Appeal vacated Respondent's convictions and sentences, bound by it's previous decision in Anderson v. State, 697 So. 2d 878, 879 (Fla. 5th DCA 1997). Anderson held that unless a criminal defendant was present at the sidebar where peremptory challenges were exercised, under Conev v. State, *653 So.* 2d 1009 (Fla.), cert. *denied, ---* U.S. ----, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) the trial judge must affirmatively inquire of the defendant to certify that the defendant has either made a knowing and voluntary waiver of his right to be present at the bench or has acquiesced in the strikes after they were made.

In following Anderson in the instant case, the Fifth District certified conflict with the Second District Court of Appeal, which has held that a Conev error is not fundamental and may not be raised by a defendant on direct appeal in the absence of an objection. See, Lee v. State, 695 So. 2d 1314 (Fla. 2d DCA) rev. *granted, 697* So. 2d 942 (Fla. 1997); Neal v. State, 697 So. 2d 941 (Fla. 2d DCA) *rev. granted,* Case No. 91,249 (Fla. Oct. 29, 1997). This Court thus has jurisdiction under Article V, section 3(b)(4) of the Florida Constitution. Because the error, if any, in the instant case is procedural in nature and does not extend to the

merits of the trial or **amount to a denial of due process, the error** can **not be deemed fundamental and this Court must reverse the** decision of the Fifth District.

A criminal defendant who fails to raise an objection at trial waives appellate review even in cases where the error at trial rises to the level of constitutional error. D'Oleo-Valdez v. State, 531 So. 2d 1347, 1348 (Fla. 1988). The exception to this rule is that the defendant may still obtain review where the error is "fundamental". Id. Fundamental error is error that "goes to the foundation of the case or goes to the merits of the cause of action", or is so egregious that it amounts to a denial of due process. Clark v. State, 363 So. 2d 331, 333 (Fla. 1978); Ray v. State, 403 So. 2d 956, 960 (Fla. 1981). "To justify not imposing the contemporaneous objection rule, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 645 (Fla. 1991), quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960).

Appellate courts have been cautioned to exercise their discretion concerning fundamental error "very guardedly." Ray, at 960. The doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Id.

Simply because a right is constitutional in nature, a violation of that right is not necessarily fundamental.

D'Oleo-Valdez. Furthermore, where the protection of a constitutional right is achieved through a procedural rule, a violation of that rule does not equate with a constitutional violation or fundamental error.

For example, due process demands that a criminal defendant be psychiatrically evaluated if there is reason to doubt his competency. Scott v. State, 420 So. 2d 595 (Fla. 1982). The Florida Rules of Criminal Procedure proscribe the manner in which a defendant's competency will be evaluated, and require that the court appoint no fewer than two experts to perform the evaluation. Fla. R. Crim. P. 3.210(b) (1998). Although the right to a competency evaluation is fundamental and a deprivation of that right would be fundamental error requiring reversal, the manner in which the evaluation is carried out is procedural and does not go to the foundation of the case or the merits of the cause of action. D'Oleo-Valdez, at 1348. Thus, a defendant who receives only one competency examination and fails to object to the violation of the procedural rule waives the right to appellate review. Id.

A criminal defendant has the constitutional right to be present in the courtroom at jury selection, a right which has been codified in Florida Rule of Criminal Procedure 3.180(a)(4) (1997). Francis v. State, 413 so.2d 1175, 1177 (Fla. 1982). Prior to the issuance of Coney, 653 So. 2d 1009, a defendant's absence from the courtroom during jury selection resulted in reversal of his conviction. Francis, at 1177. However, courts had consistently and repeatedly held that where a criminal defendant was present in

the courtroom during voir dire, but not at the bench while challenges were made, the defendant was effectively present for jury selection as long as there were no limitations on the defendant's ability to consult with counsel. See, Quince v. State, 660 So. 2d 370 (Fla. 4th DCA 1995); Lewis v. State, 566 So. 2d 270 (Fla. 2d DCA 1990); Willis v. State, 523 So. 2d 1283 (Fla. 4th DCA 1988); Smith v. State, 476 So. 2d 748 (Fla. 3d DCA 1985) affirmed, 500 So. 2d 125 (Fla. 1986).

In Coney, this Court accepted the State's improper concession of error and held for the first time that under Florida Rule of Criminal Procedure 3.180, a defendant had a right to be physically present at the immediate site where challenges are exercised. Where the defendant's presence was impractical, the defendant could either make an informed waiver of this right on the record or could ratify the choices of his defense counsel. Coney, at 1013.

Following its decision in Coney, this Court decided Boyett v. State, 688 So. 2d 308 (Fla. 1996). In Boyett, the Defendant and was in the courtroom during jury selection but not at the bench where preemptory challenges were exercised. Id., at 309. Although the defendant in Boyett was tried prior to Coney, his case was not final when Coney was decided and Boyett was thus the first of many "pipeline" cases decided by this Court. Id.

Boyett argued that he was entitled to a new trial because the rule announced in Coney was actually not new, but was merely an application of Francis v. State, 413 So. 2d 1175. The Court expressly rejected this argument, noting that in Coney it had

created a new definition of "presence" which required the presence of the defendant himself at the immediate site of jury selection. However, the Court held that it had done so upon the State's improper concession of error, and went on to note,

> Although it does not change our analysis in this case, we note that we have recently approved an amendment to rule 3.180(b) which will provide a clearer standard by which to resolve such issues in the future. The rule will now read: "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."

Boyett, at 310 n. 1 (citations omitted). Because the rule announced in Coney was entirely new and not simply a ratification of the fundamental right recognized by the Francis Court, Boyett was denied relief. Id.

It is clear from this progression that while a defendant may have a constitutional right to be "present" at jury selection, the manner in which the defendant's presence is achieved is a matter of procedure and Coney's interpretation of the definition of "presence" under rule 3.180 can only be procedural. See, Hill v. State, 696 So. 2d 798, 801 (Fla. 2d DCA) ***approved on other grounds,*** 700 So.2d 646 (Fla. 1997) Altenbrand, J., concurring specially (actual physical presence at the bench is not a constitutional requirement, but simply a procedure created by a rule of court to assure total compliance with due process). If a violation of the Coney rule were so egregious that it amounted to a denial of due process, then the defendant in Boyett would have been entitled to relief and the clarification of Rule 3.180 announced in Boyett

would be unconstitutional. See Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996), Lawrence, J., dissenting in part.

Applying this reasoning, the Second District Court of Appeal has concluded that a Coney violation does not constitute fundamental error, and a defendant who fails to preserve a Coney error can not obtain review on direct appeal. See Lee v. State, 695 So. 2d 1314 (Fla. 2d DCA) rev. granted, 697 So. 2d 942 (Fla. 1997); Neal v. State, 697 So. 2d 941 (Fla. 2d DCA) rev. granted, Case No. 91,249 (Fla. Oct. 29, 1997). The Second District is thus in express and direct conflict with the Fourth District Court of Appeal in Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA) rev. granted, 694 So. 2d 739 (Fla. 1997), and with the decision of the Fifth District Court of Appeal in the instant case. See Darden v. [redacted] No. 96-2552 (Fla. 5th DCA January 16, 1998).

In the instant case Respondent was present in the courtroom where the jury was selected, and was represented by counsel. (T 7) The record does not reflect whether Respondent was present at the bench where peremptory strikes were exercised, but it does reflect that counsel had an opportunity to consult with Respondent both prior to exercising any strikes and prior to finally accepting the jury as empaneled. (T 32-34) Thus, Respondent's fundamental right, the right to be present with a meaningful opportunity to be heard through counsel, was protected. And, while the window of time after the issuance of Coney and before the adoption of Rule 3.180(b) may have provided Respondent with the additional right to

be present at the bench where peremptory strikes were exercised, this right was procedural at most. Accordingly, by failing to object to the jury selection procedures employed in the instant case, Respondent waived appellate review of the issue.

The Second District notes that a defendant who has failed to preserve a Coney issue is not without a remedy, since such a defendant has the ability to seek collateral review if an alleged deficiency of his trial counsel has caused him prejudice. See Lee, at 1316; Neal, at 942. This position recognizes that a Coney error is not a per-se error; in most cases a defendant who is represented by counsel and is present in the courtroom during jury selection will naturally consult with counsel during the jury selection process and will be afforded a meaningful opportunity to be heard through counsel. Should trial counsel fail to effectively represent the defendant's interests or choices, then collateral review is and has been the only appropriate remedy to address the claim.

Further, restricting unpreserved Coney claims to collateral review is consistent with an appellant's traditional burden of demonstrating reversible error in the record, Mathis v. State, 683 So.2d 582, 583 (Fla. 1st DCA) *affirmed, 688* So.2d 334 (Fla. 1997). For example, the record in the instant case is silent as to whether Respondent was at the bench during the selection process[1]. (T 32-34) The record also does not reflect whether

[1] The district court's opinion states that Respondent was not present at the sidebar conferences. The record, however, is

Respondent and his trial counsel consulted during the breaks before jury selection and before the jury was empaneled as selected, or whether Respondent's trial counsel ascertained Respondent's wishes regarding jury selection. (T 32-34) Because the burden is on the Appellant in a criminal proceeding to show the presence of error in the record, and because these are factual matters which can only be determined in an evidentiary hearing, a defendant who can actually allege that his counsel was deficient in this regard and that the deficiency prejudiced him will be able to obtain collateral relief. The record in the instant case, however, fails to demonstrate reversible error and Respondent is not entitled to relief.

A Coney error is a technical error which does not, in itself, result in a denial of due process or undermine the legitimacy of a jury verdict. An unpreserved Coney claim is not fundamental error, and a criminal defendant who was represented by counsel and was in the courtroom during jury selection is not entitled to direct appellate review, although the defendant is entitled to seek collateral review. The decision of the Fifth District Court is thus in error, and must be reversed.

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entirely silent on this issue. While it does not reflect that Respondent was present, it also does not reflect that he was not.

POINT II

WHETHER THE DISTRICT COURT'S OPINION MUST BE REVERSED BECAUSE THE ERROR IN THE INSTANT CASE IS HARMLESS

The Fifth District's opinion must also be reversed because even if a Coney error is fundamental error, the error in the instant case **was harmless.** Because Respondent would not be entitled, on remand, to be physically present at the bench while peremptory strikes are exercised, **a** reversal of the instant case for an alleged Coney error is a futile act which ignores the substance of justice in a blind adherence to its form. Further, since respondent had the opportunity to consult with his trial counsel both before peremptory strikes were exercised and before accepting the jury as selected, Respondent was afforded an opportunity to participate in a meaningful **way** and if a technical Coney error occurred it **was** harmless.

The heart of the harmless error doctrine is a pragmatic recognition of the futility of reversing a conviction when a retrial of the **case** will reach the identical result **as** was first obtained. Chapman **v.** California, **386** U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986) ; **§** 924.33, Fla. Stat. (1997) . The harmless error doctrine prevents reversal of convictions for small errors or defects, even those of a constitutional nature, that have little, if any, likelihood of having changed the result of the trial. Chapman, at **386** U.S. 22, 87 S.Ct. 827. Thus, where nothing would be gained by a new trial, reversal for a violation of **a** procedural rule, even

one which protects a constitutional right, is improper. Chapman; State v. Strasser, 445 So.2d 322 (Fla. 1983).

For example, in Strasser, the defendant was tried for the offense of robbery, but the trial court refused to instruct the jury on the offense of attempted robbery. Id. At the time of the trial, such refusal was reversible error; however, the standard jury instructions were subsequently amended so that a trial court was not required to instruct on attempt when that offense was not supported by the evidence at trial. Id.

On direct appeal, the Fourth District Court of Appeal found that the failure to give the instruction was reversible error. Id. Upon review based upon conflict with the Second District Court of Appeal,[2] the this Court quashed[3] the opinion of the Fourth District and stated the following:

> "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." . . . Strasser would gain nothing from a new trial. The only effect would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its form.

Id., at 322-323.

Although the Strasser opinion does not use the term "harmless error", there can be no doubt that Strasser's ruling embodies the

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[2] *Burney v. State, 402 So.* 2d 38 (Fla. 2d DCA 1981).

[3] On rehearing the Supreme Court remanded for a new trial based upon an unrelated issue which it had failed to address in its initial opinion.

harmless error doctrine. Chapman; See also, Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982) ("since upon retrial appellant would not be entitled to the attempt instruction because of changes in the Rules of Criminal Procedure.. .a retrial would serve no useful purpose"); Kocsis v. State, 467 So. 2d 384 (Fla. 5th DCA 1985)(conviction affirmed where "no practical OK effectual result" could be obtained by ordering a retrial merely because of the failure to give a penalty instruction to which defendant was no longer entitled under new rule of procedure); Washington v. Murray, 952 F. 2d 1472 (4th Cir. 1991) (defendant failed so show ineffective assistance of counsel in capital case since the admission of victim-impact testimony which had been improperly admitted under existing case law would be admitted upon resentencing); Hodges v. State:, 595 So. 2d 929 (Fla. 1992), ***vacated on other grounds, 506*** **U.S. 803,** 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992)[4] (similar holding to the Murray decision).

If the instant case were retried, the new Rule 3.180(b) announced in Boyett would be used. Under this definition, a defendant is present if he is physically in attendance in the courtroom and has an opportunity to be heard through counsel. Boyett, at 310; Fla. R. Crim. P. 3.180(b) (1997). Because

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[4] For reconsideration in light of ***Espinosa v. Florida,*** ___ ***U.S.*** , 112 S. Ct. 2926, 120 L. Ed. 2d ***854 (1992). See Hodges v. State,*** 619 So. 2d 272 (Fla. 1993), which affirmed based on failure to object.

Respondent was physically present in the courtroom and had an opportunity to be heard through counsel, he was afforded exactly the same protections he would receive on retrial. A reversal of his conviction, for the alleged infringement of a procedural right to which he is no longer entitled, would be a useless act which this honorable Court should not affirm.

Opponents of this construction have suggested that to apply a harmless error analysis in this manner is to improperly apply the amended rule retroactively. See, Chavez v. State, 698 So.2d 284, 286 (Fla. 3d DCA 1997). However, the disposition of a case on appeal is made in accordance with the procedural law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment under appeal was rendered. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983); Harris v. State, 400 So.2d 819, 820(Fla. 5th DCA 1981). Accordingly, because the additional right granted in Coney, the right to be present at the bench while peremptory challenges were exercised, was procedural in nature application to pending cases is appropriate. Further, the question of whether Respondent will gain anything other than an undeserved windfall by receiving a new trial in the absence of harmful error is a separate question from the question of whether the amended rule applies to pending cases. See, Chavez, at 288, Levy, J., dissenting. Under either view, however, reversal of respondent's convictions is not warranted.

Furthermore, even if Rule 3.180 had not been clarified, if a Coney error occurred in the instant case it was harmless because Respondent was afforded the opportunity to participate in a meaningful way. Mejia v. State, 675 So.2d 996, 1000, 1001 (Fla. 1st DCA 1996) *approved on other grounds,* State v. Mejia, 696 So.2d 339, 340 (Fla. 1997) ("technical" Coney error harmless where appellant had the opportunity to "participate in a meaningful way in the decisions regarding the exercise of peremptory challenges"); Kellar v. State, 690 So.2d 630, 631 (Fla. 1st DCA 1997)(same); *Accord* Brown v. State, 676 So.2d 1034 (Fla. 1st DCA 1996) (although Coney was not applicable, court would have found noncompliance with Coney procedure was harmless, as record reflected appellant consulted with counsel immediately before bench conference and immediately after, before counsel accepted jury).

Respondent was given opportunities to consult with his trial counsel though each stage of the jury selection process, and, through counsel, affirmatively accepted the jury as selected. (T 32-34) Because Respondent was not prejudiced by the jury selection process in the instant case, any error was harmless and the decision of the Fifth District Court of Appeal must be reversed.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court reverse the judgment of the Fifth District Court of Appeal and resolve the certified conflict in favor of a finding that a Coney error is not fundamental error. Alternatively, the State requests this Court to hold that the error is harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Initial Brief has been furnished by delivery to Susan A. Fagan, Assistant Public Defender, attorney for the Respondent, this 9th day of March, 1998.

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