IN THE SUPREME COURT OF FLORIDA

CEDRICK JONES, **CASE NO. SC04-**

Petitioner, **LT Case No. 4D01-3810**

v.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page Number**

Florida Constitution Cited

Rules Cited

PRELIMINARY STATEMENT

The petitioner, Cedrick Jones, was the defendant in the trial court and was the appellant in the Fourth District Court of Appeal. The petitioner will be referred to herein as "petitioner." The respondent, the State of Florida, was the prosecution in the trial court and was the appellee in the Fourth District Court of Appeal. The respondent will be referred to as "respondent" or "the State." The following abbreviations will also be used: R = Record on Appeal, T = Trial Transcripts, SR = Supplemental Record on Appeal prepared 5/30/03.

STATEMENT OF THE CASE AND FACTS

After a jury trial, petitioner was found guilty of two counts of battery on a law enforcement officer, guilty of the lesser included offense of resisting without violence, and not guilty of depriving an officer of means of communication. (T. 315-316). Petitioner filed a motion for new trial that set forth numerous bases for relief. (R. 122-123). Petitioner's motion for new trial did not raise any issues regarding jury selection. Id. Petitioner did not raise any issues regarding jury selection at the hearing on his motion for new trial. (T. 328-333). The trial court denied petitioner's motion for new trial. (T. 334).

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal. Petitioner filed an exhaustive statement of judicial acts to be reviewed. (R. 144-145). Petitioner's statement of judicial acts to be reviewed did not raise any issues regarding jury selection during this trial. Id.

The voir dire portion of trial was not included in the Record on Appeal when petitioner appealed to the Fourth District Court of Appeal. The Fourth District relinquished jurisdiction to the trial court in order to reconstruct the record. Jones v. State, 870 So. 2d 904 (Fla. 4th DCA 2004). At the reconstruction hearing, the prosecutor (Ms. Porter) had a recollection of the voir dire in this case. (SR. 72). A chart containing Ms. Porter's notes during petitioner's trial was entered into evidence. (SR. 73). Ms. Porter exercised two peremptory challenges during voir dire and petitioner exercised three peremptory challenges. (SR. 72). Ms. Porter did not recall petitioner exercising any cause challenges. (SR. 73). Ms. Porter did not believe any Neil-Slappy challenges were made when she exercised her peremptory challenges because she believed the two people stricken where white. (SR. 81).

Petitioner's trial counsel (Mr. Simon) did not recall anything about the voir dire in this case. (SR. 107, 110-111).

According to petitioner, who has multiple felony convictions, Mr. Simon "was saying something like Neo [sic] Slappy when the State was striking a witness or something." (SR. 118; R. 131). Petitioner could not remember how many challenges Mr. Simon used in this case, nor could he recall the race of the two persons stricken by Ms. Porter. (SR. 119-121).

The trial court found that petitioner had three peremptory strikes left when the jury was sworn in this case. (SR. 128). The trial court then stated that the voir dire in this case cannot be accurately reconstructed. (SR. 128-129, 131). Petitioner requested the trial court to find that "it is likely that objections were made that cannot be recalled as well as rulings of the Court." (SR. 129). The trial court expressly refrained from making any such finding in this case. Id.

On appeal to the Fourth District, petitioner conceded he "does not know if errors occurred in voir dire." Jones, 870 So. 2d at 904. Nevertheless, petitioner argued he was entitled to a new trial based solely upon the lack of a voir dire transcript in this case. Id. The Fourth District rejected petitioner's argument.

SUMMARY ARGUMENT

This Court should decline to review the instant case since there is there is no express and direct conflict between the

instant case and the decisions of other district courts of appeal.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT; THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, section 3(b)(3), of the Constitution of the State of Florida. This section grants this Court discretionary jurisdiction to review "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Id.; see also Fla. R. App. P. 9.030(a)(2)(A)(iv). Specifically, Petitioner contends the Fourth District's decision in the instant case conflicts with the Third District's decisions in Blasco v. State, 680 So. 2d 1052 (Fla. 3d DCA 1996), Swain v. State, 701 So. 2d 675 (Fla. 3d DCA 1997), and Rozier v. State, 669 So. 2d 353 (Fla. 3d DCA 1996), and the Second District's decisions in Jones v. State, 780 So. 2d 218 (Fla. 2d DCA 2001), and McKenzie v. State, 754 So. 2d 851 (Fla. 2d DCA 2000). For the reasons set forth below, it is clear that there is no conflict and this Court should decline to exercise its

jurisdiction to hear this case.

Petitioner contends that the Fourth District's decision in the instant case conflicts with the Third District's decisions in Blasco, Swain, and Rozier. Petitioner's argument is misplaced because the Third District's decisions in Blasco, Swain, and Rozier are factually distinguishable from the instant case. In Blasco, the trial transcript did not include all of the evidence presented at trial. The court reporter's notes of the State's rebuttal witnesses were lost, and the record could not be adequately reconstructed. Blasco, 680 So. 2d at 1052-1053. In contrast, the trial transcript in this case included all of the evidence presented against petitioner at trial. Furthermore, the trial court specifically found that petitioner used only three peremptory challenges during voir dire, which effectively precluded petitioner from challenging any of the jurors that actually sat on the panel. See Burgess v. State, 766 So. 2d 293 (Fla. 4th DCA 2000); Green v. State, 711 So. 2d 69 (Fla. 4th DCA 1998). Accordingly, it is clear that there is no conflict between Blasco and the Fourth District's decision in the instant case.

The Third District's decision in Swain is distinguishable because the State conceded the voir dire portion of the trial could not be reconstructed. Swain, 701 So. 2d at 675. No such

concession exists in the instant case. In fact, the voir dire in the instant case was partially reconstructed by the trial court, i.e., petitioner had three peremptory strikes left when the jury was sworn in this case. The Third District's decision in Swain did not involve the partial reconstruction of voir dire, and the opinion does not demonstrate that the defendant was effectively precluded from challenging any of the jurors that actually sat on the panel (as petitioner was in this case). Thus, there is no express conflict between the decisions in Swain and this case.

The Third District's decision in Rozier is also distinguishable from the instant case. In Rozier, the Third District appointed a commissioner, not the trial court judge, to inquire into the circumstances of the incomplete record. Rozier, 669 So. 2d at 353. In this case, the trial court judge presided over the reconstruction proceedings. In Rozier, the commissioner reported that the voir dire proceedings could not be reconstructed and recommended that a new trial be awarded. In contrast, the trial court in Jones found that the voir dire proceedings could be partially reconstructed (i.e., petitioner had three peremptory strikes left when the jury was sworn in this case), and no recommendation for a new trial was made. Nothing in Rozier indicates how many peremptory challenges were

made by each side, so it is unclear whether the defendant was effectively precluded from challenging any of the jurors that actually sat on the panel (as petitioner was in this case). Accordingly, there is no conflict between the Fourth District's decision in this case and the Third District's decision in Rozier.[1]

Petitioner also submits the decision in the instant case conflicts with the Second District's decisions in Jones and McKenzie. Petitioner's argument is misplaced because the Second District's decisions in Jones and McKenzie are factually distinguishable from the instant case. The Second District's decision in Jones is distinguishable because the "the transcript

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[1] The State would also point out that the evidence presented at the reconstruction hearing in this case refuted any allegations of error petitioner could have raised on appeal. The fact that petitioner only exercised three peremptory challenges precluded him from challenging any of the jurors that actually sat on the panel. See Burgess; Green. Assuming *arguendo* that petitioner actually made Neil-Slappy challenges during voir dire, the jury chart entered into evidence established there were race-neutral reasons for the State's peremptory strikes, i.e., one prospective juror was a crime victim and the other was affiliated with law enforcement officers. (7/30/03 Sup. Rec.). The trial court would have obviously found Ms. Porter's challenges to be genuine and race-neutral because neither Ms. Normington nor Mr. Wolf (the potential jurors stricken by the State) sat on the jury. (R. 105). Accordingly, the voir dire transcripts in this case were not necessary for a complete review because any claim of error regarding the purported Neil-Slappy challenges could have been decided as a matter of law. See Velez v. State, 645 So. 2d 42, 44 (Fla. 4th DCA 1994).

reported the bench conferences as inaudible, the defense closing arguments appear incomplete, and the State's closing argument is completely missing." Jones, 780 So. 2d at 218. Upon relinquishment, the trial court concluded it was impossible to reconstruct the missing portions with any accuracy. In contrast, the only portion of the transcript missing from the instant case was the voir dire proceedings, which the trial court was able to partially reconstruct. The trial court in the Second District's decision in Jones, however, was not able to partially reconstruct the missing portions of the transcript.

In the instant case, petitioner filed a 14-point motion for new trial which did not address jury selection, and petitioner did not raise any jury selection issues during the hearing on the motion. (R. 122-123; T. 330-334). Petitioner's statement of judicial acts to be reviewed listed 19 points, none of which raised a jury issue in this case. (R. 144-145). Nothing in the Second District's decision in Jones reveals that the defendant's trial counsel filed such an exhaustive motion for new trial and statement of judicial acts to be reviewed without mentioning the State's closing argument. Finally, the record in this case clearly demonstrated that no error could have occurred during

the voir dire proceedings,[2] whereas the record in the Second District's Jones decision did not. Jones, 780 So. 2d at 219.

The Second District's decision in McKenzie is clearly distinguishable because the defendant in that case alleged the State improperly exercised a peremptory challenge on the sole African-American member of the jury panel. McKenzie, 754 So. 2d at 852. Petitioner makes no such allegation in the instant case, and the record conclusively refutes such an assertion. Furthermore, at least eight bench conferences were unrecorded in McKenzie, whereas the only portion of the transcript missing in the instant case was the voir dire proceedings. For the reasons stated above, there is no conflict between the Fourth District's decision in Jones and the Second District's decision in McKenzie.

Finally, Petitioner's Brief on Jurisdiction fails to

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[2] Again, the fact that petitioner only exercised three peremptory challenges precluded him from challenging any of the jurors that actually sat on the panel. See Burgess; Green. The jury chart entered into evidence established there were race-neutral reasons for the State's peremptory strikes, i.e., one prospective juror was a crime victim and the other was affiliated with law enforcement officers. (7/30/03 Sup. Rec.). The trial court would have obviously found Ms. Porter's challenges to be genuine and race-neutral because neither Ms. Normington nor Mr. Wolf (the potential jurors stricken by the State) sat on the jury. (R. 105). Accordingly, the voir dire transcripts in this case were not necessary for a complete review because any claim of error regarding the purported Neil-Slappy challenges could have been decided as a matter of law. See Velez, 645 So. 2d at 44.

acknowledge, as the Fourth District's decision in Jones did, that this Court's decision in Darling v. State, 808 So. 2d 145 (Fla. 2002), is controlling on this issue. The opinions in all of the "conflict cases" cited by petitioner were rendered prior to this Court's decision in Darling, and the law is clear that the district courts of appeal are bound to follow this Court's decision in Darling. Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973)(district courts of appeal are bound to follow the case law set forth by this Court). In light of this Court's decisions in Darling and Armstrong v. State, 862 So. 2d 705, 721 (Fla. 2003)(defendant claimed, in habeas petition, he was denied a proper direct appeal because portions of the transcript were missing. This Court rejected defendant's argument and held "bare allegations of unrecorded depositions and proceedings are legally insufficient to entitle him to relief. As for voir dire conferences, Armstrong has failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced by its absence."), there is no conflict for this Court to resolve.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to decline to exercise its jurisdiction to hear this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by courier to: Margaret Good-Earnest, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on July 12, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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Of Counsel