

IN THE SUPREME COURT OF FLORIDA

CEDRICK JONES

Petitioner,

vs.

CASE NO. SC _____
DCA NO. 4D01-3810

STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

MARGARET GOOD-EARNEST
Assistant Public Defender
Chief, Appellate Division
Attorney for Cedrick Jones
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 192356

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STATEMENT OF THE CASE AND FACTS

The facts are taken from the decision of the district court in petitioner's case, *Jones v. State*, 870 So. 2d 904 (Fla. 4th DCA 2004) and the decision is contained in the appendix. (A-1-2).

Mr. Jones was convicted after a jury trial in Broward County and appealed his criminal conviction to the District Court of Appeal, Fourth District. The voir dire transcript was not available due to a computer error and attempts to reconstruct the record were unsuccessful. The circuit judge found that "the record could not be reconstructed but noted that defendant had used only three peremptory challenges." (A-1). Because petitioner had no record of his voir dire he was unable to determine whether any prejudicial errors occurred during voir dire and urged the district court to reverse for a new trial. Relying on precedent from this court and other Fourth District decisions, *Darling v. State*, 808 So.2d 145 (Fla.2002), *Burgess v. State*, 766 So.2d 293 (Fla. 4th DCA 2000), and *Velez v. State*, 645 So.2d 42 (Fla. 4th DCA 1994), the Fourth District concluded that petitioner was not entitled to a new trial due to the absence of a voir dire transcript on appeal unless he could demonstrate a specific, identifiable issue on appeal was contained in the missing transcript. (Appendix-2):

Under existing law by which we are bound, defendant has failed to demonstrate that the missing portions of the transcript are necessary for meaningful review of a specific, identifiable issue in his appeal. It is not enough to say that

as a result of the omission we do not know whether any error occurred, and therefore a new trial is required. A new trial would be required under *Darling-Burgess-Velez* only if Jones could point to a specific decision by the trial judge that he would use to show reversible error.

Jones v. State, 870 So. 2d 904 (Fla. 4th DCA 2004) (Appendix-2)

Petitioner's timely filed motion for rehearing was denied on May 13, 2004.

Notice to invoke this court's discretionary review jurisdiction was timely filed on Monday, June 14. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

This court should exercise its discretionary review jurisdiction because of express and direct conflict among the district courts as to what must be shown about a missing transcript on appeal of a criminal case before a new trial is ordered. The Second and Third Districts only require a missing transcript of an important part of the proceedings during which reversible error could have been committed before reversal is required. But in petitioner's case, the Fourth District affirms because petitioner did not show that the missing voir dire transcript contained "a specific decision by the trial judge that he would use to show reversible error."

Petitioner also asserts that this decision in his case expressly and directly conflicts with two decisions from the Third District on identical fact where the absence of a voir dire transcript that could not be reconstructed required reversal. Not so in the Fourth District in petitioner's case where the Fourth District finds no reversible error because it requires the appellant to demonstrate that a point of reversible error is contained in the missing portion of the appellate record that cannot be reconstructed.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS ON THE SAME ISSUE OF LAW-THE STANDARD BY WHICH AN APPELLATE COURT MUST DETERMINE WHETHER A MISSING PORTION OF A TRANSCRIPT, VOIR DIRE, IS NECESSARY FOR COMPLETE APPELLATE REVIEW OF A CRIMINAL CONVICTION.

There is a conflict among the district courts of appeal in Florida as to what a criminal defendant must show on appeal to be entitled to a new trial due to a missing voir dire transcript that cannot be reconstructed. In petitioner's case, the Fourth District reads its own precedent and this court's decision in *Darling, supra*, to require the criminal defendant identify some specific ruling of the trial judge that would be reversible error before reversal for an incomplete transcript is required. (A-1-2). In other district courts the absence of a portion of the proceedings, such as voir dire or closing arguments, which cannot be reconstructed, requires reversal even though the court does "not know, and [is] not capable of knowing, whether any reversible error was committed during" the missing portions of the trial. *Blasco v. State*, 680 So. 2d 1052, 1053 (Fla. 3rd DCA 1996). *Jones v. State*, 780 So. 2d 218 (Fla. 2nd DCA 2001)(defendant prejudiced by absent transcript of closing arguments where no reconstructed record available to show that error did not occur).

This court has jurisdiction under article V, section 3 (b)(3), Florida Constitution on the basis that identical facts on appeal in the Third District's decisions in *Swain v. State*, 701 So. 2d 675 (Fla. 3rd DCA 1997) and *Rozier v State*, 669 So. 2d 353 (Fla. 3rd DCA 1996) reached a different result than in petitioner's case. In *Swain v State*, where the voir dire from the defendant's criminal trial was missing and could not be reconstructed except to show peremptory challenges were used by both sides, the Third District required a new trial under *Delap v. State*, 350 So.2d 462, 463 (Fla.1977). Likewise, in *Rozier*, the Third District ordered a new trial finding the absence of voir dire or a reconstructed record of voir dire required a new trial. The contrary standard between the Third and the Fourth districts has already been noted in a compared citation reference in *Mackenzie v. State*, 754 So. 2d 851 (Fla. 2nd DCA 2000), which followed this court's decision in *Delap* to conclude the absence of a "full and accurate transcript of the trial proceedings . . . necessary to a complete review of this cause" required reversal for a new trial.

On a policy basis this Court should take jurisdiction to determine the requirements of due process and the standard by which appellate courts should determine whether a missing portion of the transcript is necessary for complete appellate review. If the decision in petitioner's case is allowed to stand, it will severely diminish the right to appeal in a criminal case. The constitutional right to appeal from

a judgment of conviction and sentence is protected by Article V, section 4(b) of the Florida Constitution. *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996). Due process should require that a missing voir dire transcript, completely unavailable, and not able to be reconstructed, impairs a criminal defendant's constitutional right to meaningful appellate review and requires reversal of his criminal conviction.

CONCLUSION

This court should exercise its discretionary review jurisdiction.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

MARGARET GOOD-EARNEST
Assistant Public Defender
Florida Bar No. 192356

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Richard Valuntas, Assistant Attorney General, 1515 North Flagler Drive, 9th floor, West Palm Beach, FL 33401-3432 this 21st day of June, 2004.

Attorney for Cedrick Jones

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 pt. Times
New Roman font.

Of Counsel

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_____ /

APPENDIX

Jones v. State, 870 So. 2d 904 (Fla. 4th DCA 2004)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Appendix has been furnished by courier to Asst. Atty. Gen. Richard Valuntas, 1515 N. Flagler Blvd., 9F, W. Palm Beach, FL 33401, this 21st day of June, 2004.

—
Of Counsel

Appendix A