

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KEVIN DEWAYNE POWELL,

Respondent.

Case No. SC07-2295

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

SUSAN M. SHANAHAN
Assistant Attorney General
Florida Bar No. 976059
3507 E. Frontage Road, Suite 700
Tampa, Florida 33607
(813)287-7900
Fax (813)281-5500

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

CERTIFIED QUESTION 2

DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF
THE RIGHT TO THE PRESENCE OF COUNSEL DURING
QUESTIONING VITIATE MIRANDA WARNINGS WHICH
ADVISE OF BOTH (A) THE RIGHT TO TALK TO A
LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT
TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY
TIME" DURING QUESTIONING?

CONCLUSION 5

CERTIFICATE OF SERVICE 5

CERTIFICATE OF FONT COMPLIANCE 5

TABLE OF CITATIONS

Brown v. Crosby,
249 F. Supp. 2d 1285 (2003) 3

M.A.B. v. State,
957 So. 2d 1219 (Fla. 2d DCA 2007) 2,3

Miranda v. Arizona,
384 U.S. 436 (1966) 1,2,4

Powell v. State,
969 So. 2d 1060 (Fla. 2d DCA 2007) 2

OTHER AUTHORITIES

Fla. R. App. P. 9.210(a)(2) 5

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the statement of case and facts as set forth in Petitioner's Initial Brief on the merits.

SUMMARY OF THE ARGUMENT

The language used by the officer in giving Miranda warnings to Respondent did not suggest any restrictions on Respondent's right to the presence of an attorney prior to or during questioning. Pursuant to Miranda the exact words used by law enforcement to advise suspects of their rights is not as important as whether the admonitions reasonably convey the required rights. Considering the totality of the warnings given to Respondent, the warnings reasonably conveyed to Respondent his continuing right of access to counsel.

ARGUMENT

CERTIFIED QUESTION

DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE MIRANDA WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

Respondent was properly advised of both the right to talk to a lawyer before questioning and the right to use his right to consult a lawyer at any time during the interview. Therefore, contrary to the Second District Court of Appeal's conclusion in this case, Respondent was properly informed of his ongoing right of access to counsel as required under Miranda v. Arizona, 384 U.S. 436 (1966).

Recently, in Bailey v. State, 2D05-1697 (Fla. Feb. 1, 2008), Judge Villanti wrote, in a specially concurring opinion, that he did not agree with the Powell¹ majority for the reasons outlined in Judge Canady's concurrence in M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007). In addition to the reasoning of the concurrence in M.A.B., Judge Villanti stated the following:

For over forty years, ordinary people past the age of reason have consistently understood Miranda's right-to-counsel warning as encompassing the entire duration of a police interrogation. I submit that if only Mensa-type wordsmiths can ferret out an inadequacy in the warning's language, then the warning as given was both adequate and

¹Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007).

reasonably understandable by the ordinary person. I am still convinced that the M.A.B. concurring opinion is correct.

Bailey, No. 2D05-1697 at 2 (Villanti, J., Specially concurring).

Additionally, Respondent's reliance on Brown v. Crosby, 249 F. Supp. 2d 1285 (2003), in support of his position is misplaced as Brown is distinguishable from the instant case. Brown, a mildly retarded juvenile, was informed that he had the right to speak to an attorney and have him there with him **before** the police asked him any questions. Id. He was also advised that if he decided to answer questions then without an attorney present, he would give up the right to stop answering questions until he spoke to an attorney. Id. The court held that, "the initial warning that Brown would 'give up the right to stop answering questions' is not an accurate reflection of Brown's right to cease questioning at any time, as articulated in Miranda." Id. at 1304.

The court in Brown recognized, "the Supreme Court has never indicated that Miranda requires any precise formulation of the warnings given criminal defendants." Id. at 1305. However, the court determined the case did not merely involve review of the adequacy of the warnings, but whether Brown's waiver of Miranda rights was knowing and intelligent given the totality of the circumstances such as the child's age and sub-normal IQ. Id.

Unlike Brown, the issue here is the adequacy of the warnings.

Also, contrary to the defendant in Brown, Respondent was advised he had the right to talk to a lawyer before answering any questions **and** that he could use this right **any** time **during** the interview.

Respondent is attempting to create formalistic pronouncements not required by Miranda. One must not lose sight of the meaning of Miranda which is, given the totality of the circumstances, do the warnings adequately convey to the suspect his rights. In the instant case, the warnings provided to Respondent reasonably conveyed his continuing right of access to counsel.

CONCLUSION

Respondent respectfully requests that this Honorable Court reverse the Second District's opinion and reinstate the trial court's ruling that Respondent's statements were admissible.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Cynthia J. Dodge, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000, this 11th day of February, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

SUSAN M. SHANAHAN
Assistant Attorney General
Florida Bar No. 976059
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607
(813)287-7900
Fax (813)281-5500
COUNSEL FOR RESPONDENT