

IN THE SUPREME COURT OF FLORIDA

JOSEPH MODESTE,

Petitioner,

v.

CASE NO.: SC08-1723

5TH DCA CASE NO.: 5D07-2010

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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33 Fla. L. Weekly S 778 (Fla. Sept. 29, 2008) *passim*

MISCELLANEOUS:

Art. V, § 3(b)(3), Fla. Const. 4

STATEMENT OF THE CASE AND FACTS

In the instant case, the Fifth District Court of Appeal issued an en banc opinion finding that Petitioner was adequately advised of his Miranda¹ Rights. State v. Modeste, 987 So. 2d 787 (Fla. 5th DCA 2008). The Fifth District wrote, "We recognize that our conclusion on this issue may be in conflict with the Second District Court of Appeal's decision in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007), jurisdiction accepted, 973 So. 2d 1123 (Fla. 2008). However, our decision is consistent with Judge Canady's conclusion in M.A.B.² that the reference to access to counsel before questioning cannot reasonably be understood to imply that access to counsel would be terminated once questioning began. M.A.B., 957 So. 2d at 1226." Id. at 792.

Petitioner filed a jurisdictional brief, and this Court issued a stay pending disposition of Powell. While this case was stayed, this Court issued State v. Powell, 33 Fla. L. Weekly S 778 (Fla. Sept. 29, 2008). In its decision, the Court wrote, "Both Miranda and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the

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

² M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA), rev. granted, 962 So. 2d 337 (Fla. 2007).

right to have a lawyer present during questioning. Based on this conclusion, we approve the Second District's decision in Powell to the extent the decision is consistent." The State will now address jurisdiction in the instant case in light of this Court's decision in Powell.

SUMMARY OF ARGUMENT

This Court should remand this case to the Fifth District Court of Appeal for reconsideration in light of the holding in Powell.

ARGUMENT

THIS COURT SHOULD REMAND THIS CASE TO THE
FIFTH DISTRICT COURT OF APPEAL FOR
RECONSIDERATION IN LIGHT OF THE HOLDING IN
POWELL.

This Court has jurisdiction to review the decision of a district court when that decision "expressly and directly conflicts" with a decision of either this Court or of another district court. Art. V, § 3(b)(3), Fla. Const. However, this Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Powell was pending before this Court when the Fifth District Court of Appeal issued its opinion in Modeste. In fact, the Fifth District wrote, "We recognize that our conclusion on this issue may be in conflict with the Second District Court of Appeal's decision in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007), jurisdiction accepted, 973 So. 2d 1123 (Fla. 2008)." Modeste, 987 So. 2d at 792.

Now that Powell has been decided, it would be proper for the district court to reconsider its opinion in light of this Court's decision. Powell finds that it is a violation of Miranda if a defendant is not informed that he has the right to

an attorney both before questioning and during questioning. Given this clarification, the lower court should be given the opportunity to apply the holding to the facts of the instant case. Potentially, there are factual differences in the two cases which need to be considered. For example, Modeste signed a written waiver prior to his interview which provided, "[Y]ou are entitled to talk to an attorney now and have him present now or at any time during questioning." Modeste, 987 So. 2d at 789. The court in Modeste wrote that the State could not rely upon that waiver given that Modeste had not reviewed it; however, the State would submit that such a finding was dicta, was not addressed in detail by either party below, and is but one example of why the case should be remanded to the district court for additional review in light of this Court's ruling in Powell.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court remand this case to the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Amended Brief on Jurisdiction has been furnished by U.S. mail to Frank J. Bankowitz, attorney for the Petitioner, 207 E. Livingston Street, Orlando, FL 32801, this _____ day of October 2008.

CERTIFICATE OF 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).

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