Supreme Court of Florida

No. SC10-78

CATALINO BURGOS, JR.,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[October 27, 2011]

LABARGA, J.

This case is before the Court for review of the decision of the Second District Court of Appeal in Burgos v. State, 32 So. 3d 130 (Fla. 2d DCA 2009). The district court certified that its decision is in direct conflict with the decision of the First District Court of Appeal in Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA 2009). We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.

We previously accepted jurisdiction in Montgomery and stayed proceedings in Burgos pending disposition of Montgomery. In State v. Montgomery, 39 So. 3d 252 (Fla. 2010), we held that because defendant Montgomery, who was convicted of second-degree murder, was entitled to an accurate jury instruction on the

necessarily lesser included offense of manslaughter by act, the use of the then-standard jury instruction on manslaughter by act constituted fundamental reversible error in his case because it erroneously required the jury to find that the defendant intentionally caused the death of the victim. We then affirmed the district court's reversal of Montgomery's conviction for second-degree murder. We subsequently issued an order in Burgos directing the State to show cause why we should not accept jurisdiction, summarily quash the decision under review, and remand for reconsideration in light of our decision in Montgomery.

Upon review of the parties' responses and the decision below, we conclude that the district court's reliance upon Zeigler v. State, 18 So. 3d 1239 (Fla. 2d DCA 2009), is inconsistent with our reasoning in Montgomery and our conclusion that the use of the erroneous manslaughter by act instruction constituted fundamental error that required reversal of Montgomery's conviction for second-degree murder. Accordingly, we accept jurisdiction and grant the petition for review. The decision below is quashed, and this matter is remanded to the Second District Court of Appeal for reconsideration upon application of our decision in Montgomery.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

Second District - Case No. 2D08-2895

(Hillsborough County)

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for Petitioner

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for Respondent