

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)	
)	
Appellant,)	
)	
v.)	Case No. 2D07-5999
)	
DARRYL M. SMITH,)	
)	
Appellee.)	
_____)	

Opinion filed February 25, 2009.

Appeal from the Circuit Court for Hillsborough County; Nick Nazaretian, Acting Circuit Judge.

Bill McCollum, Attorney General, Tallahassee, and Elba Caridad Martin, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, and Richard J. Sanders, Assistant Public Defender, Bartow, for Appellee.

NORTHCUTT, Chief Judge.

The circuit court granted Darryl Smith's motion to suppress in reliance on this court's decision in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007), approved,

34 Fla. L. Weekly S2 (Fla. Dec. 23, 2008). However, the Miranda warning given in this case materially differed from the warning at issue in Powell. Therefore, we reverse.

As explained by this court and the Florida Supreme Court in their respective Powell decisions, the Miranda warning given to Kevin Powell was constitutionally deficient because it did not convey his right to the presence of an attorney during questioning. Rather, Powell was told that he had the right to talk to a lawyer before answering questions. 34 Fla. L. Weekly at S5. This instruction was misleading because "[t]he 'before questioning' warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning." Id. at S5. Although Powell was also told that he could use his rights during the interview, this portion of the warning "could not cure the deficiency because Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation." Id. at S6.

In this case, however, Smith was told: "You have the right to the presence of an attorney." Nothing Smith was told suggested that his right to the presence of an attorney was limited to the period "before questioning." Therefore, this case is distinguishable from Powell and more akin to Graham v. State, 974 So. 2d 440 (Fla. 2d DCA 2007), review denied, 984 So. 2d 1250 (Fla. 2008), which distinguished Powell because the warning given to Wilson Graham advised "that Graham had the right to the presence of an attorney and did not include any timeframe limitation." 974 So. 2d at 440. In fact, the supreme court cited Graham and noted this distinction in Powell, 34

Fla. L. Weekly at S5. Accordingly, we reverse the order granting the motion to suppress.

Reversed and remanded.

SILBERMAN and LaROSE, JJ., Concur.