

IN THE SUPREME COURT OF FLORIDA

TYRONE E. McDANIEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 86-1355

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The State filed an information on December 16, 1985, in the circuit court of the Thirteenth Judicial Circuit, Hillsborough County, Florida, charging the petitioner, TYRONE E. McDANIEL, with felony possession of with intent to sell cannabis in violation of section 893.13(1)(a)2, Florida Statutes, notwithstanding that the information failed to allege an amount of cannabis over 20 grams. (R4-5) The second count charged misdemeanor possession of cannabis in violation of section 893.13(1)(f), Florida Statutes.

Petitioner filed a motion to dismiss the felony count on the ground that by failing to allege an amount of cannabis over 20 grams, the information merely charged a misdemeanor, over which the circuit court lacked jurisdiction. (R16,23) The motion was heard on April 7, 1986, before the Honorable M. William Graybill, Circuit Judge, who granted the motion by order filed May 27, 1986. (R17,28)

The State filed a timely notice of appeal to the Second District Court of Appeal. (R18) On appeal the State claimed that possession of cannabis with the added element of "with intent to sell" raised the offense to a third-degree felony, unless the information affirmatively alleged that the amount was under 20 grams.

On February 25, 1987, the District Court filed its opinion holding that possession with intent to sell any amount of marijuana constitutes a third-degree felony. State v. McDaniel, No. 86-1355 (Fla. 2d DCA filed Feb. 27, 1987).

Petitioner filed a timely notice invoking the jurisdiction of the Florida Supreme Court.

ARGUMENT

ISSUE I

THE COURT HAS JURISDICTION BECAUSE THE
DECISION ON PETITIONER'S APPEAL EXPRESSLY
AND DIRECTLY CONFLICTS WITH THE DECISION
OF ANOTHER DISTRICT COURT OF APPEAL IN
FRANKLIN V. STATE, 346 So.2d 137 (Fla. 1st
DCA 1977).

The Second District Court of Appeal's decision on Petitioner's appeal expressly and directly conflicts with the First District's decision in Franklin v. State, 346 So.2d 137 (Fla. 1st DCA 1977), vesting jurisdiction in this Honorable Court to review Petitioner's case. Art. V, section 3(b)(3), Fla. Const.; Fla.R.App.P 9.030(a)(2)(A)(iv). The trial court felt compelled to grant Petitioner's motion to dismiss given the authority of Franklin. (R27) In issuing its decision in Petitioner's case, the Second District Court of Appeal expressly and directly rejected the Franklin decision in favor of its own decision in State v. McGee, 494 So. 2d 255 (Fla. 2d DCA 1986) which contra to Franklin held that possession with intent to sell any amount of cannabis is a felony. 494 So.2d at 256.


The McGee decision certified the conflict with Franklin and the issue. This Honorable Court accepted jurisdiction in McGee v. State, No. 69,340 on September 27, 1986. Petitioner submits that the interests of justice as well as his right to equal protection dictate that he be afforded an opportunity for review equal to Mr. McGee's.

CONCLUSION

Appellant respectfully requests this Honorabel Court to grant discretionary jurisdiction in this cause.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 9th day of March, 1987.


A. N. RADABAUGH