IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 30 1989
CLERK, SUPREME COURT
By Chief Deputy Clerk

MICHAEL McBRIDE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO.
(4DCA NO. 87-2108)

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

PATRICIA G. LAMPERT
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Respondent was the prosecution in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and Petitioner was the defendant, respectively. The parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on page one (1) of his brief on jurisdiction as being substantially true and correct with the following addition:

1. The Mandate was issued by the Fourth District Court of Appeal on January 13, 1989.

SUMMARY OF THE ARGUMENT

The decision of the district court in McBride v. State is a per curiam opinion. The Mandate was issued by this Honorable Court on January 13, 1989 (See Appendix) thus, this appeal is moot. Further, this case is not unique as this issue is being entertained by this Honorable Court in Avery v. State, Case No. 73,289. Accordingly, this Court has no basis for exercising its discretionary jurisdiction under Article V, Section (b)(4) of the Florida Constitution.

ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE DECISION IN PETITIONER'S CASE.

This Court should not exercise its discretionary jurisdiction in this matter. The Mandate in the instant case was filed on January 13, 1989. It is well-settled that the judgment of an appellate court, where it issues a mandate, is a final judgment. Thibodeau v. Sarasota Memorial Hospital, 449 So.2d 297 (Fla. 1st DCA 1984). Further, the fact that the petitioner may attempt to secure discretionary review by the Florida Supreme Court should not avoid the finality of an appellate court's judgment, in the absence of a stay ordered by the appellate court. Thibodeau. Petitioner did not obtain a stay in the instant case as indicated by the Mandate, attached. This case is not unique as this issue is being considered by this Honorable Court in Avery v. State, Case No. 73,289.

However, should this Court exercise its discretionary jurisdiction, this case should travel with Avery. No merit briefs need to be filed in the instant case as the briefs in Avery will control the result. If this Court chooses to request briefing on the merits, such briefing should be postponed until Avery is decided.

CONCLUSION

Wherefore, Respondent respectfully requests that this Court deny jurisdiction in this case.

Respectively submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

PATRICIA G. LAMPERT
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by courier to ELLEN MORRIS, ESQUIRE, Assistant Public Defender, Fifteenth Judicial Circuit, The Governmental Center, 301 N. Olive Avenue/9th Floor, West Palm Beach, Florida 33401 this 18th day of January, 1989.

Of Counsel