IN THE SUPREME COURT OF FLORIDA

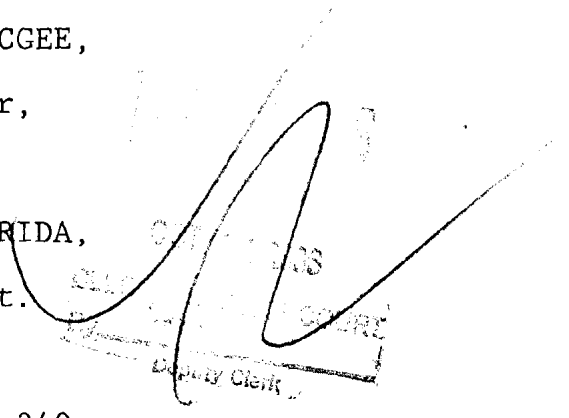
MANDELL C. MCGEE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



Case No. 69,340

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

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, MANDELL C. MCGEE, was the Appellee in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellant in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level and is contained in one volume, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner, Mandell C. McGee, was charged by information filed in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, with possession of cannabis with intent to sell as proscribed by Section 893.13 (1)(a)(2), Fla. Stat. (1983)(R2). Petitioner moved to dismiss the information on the grounds that it charged a misdemeanor by not alleging over 20 grams involved; and, therefore the trial court lacked jurisdiction to hear the case (R3).

Argument on the motion to dismiss was presented before the Honorable Manuel Menendez, Jr., Circuit Judge, on October 9, 1985 (R14-23). The trial court granted the motion to dismiss on the authority of Franklin v. State, 346 So.2d 137 (Fla.1st DCA 1977), which it believed to be on point (R23,11). The State filed a timely notice of appeal (R7).

On appeal the State claimed that possession with intent to sell any amount is a felony, contrary to the holding in Franklin, supra. The Second District Court of Appeal agreed with the State and reversed the trial court's decision granting the motion to dismiss, certifying the conflict and the issue.

SUMMARY OF ARGUMENT

Possession of cannabis is a misdemeanor if it is less than 20 grams. Possession with intent to sell cannabis does not allege a "sale". Without allegations showing consideration or more than 20 grams, an information charging possession with intent to sell does not allege a felony. The circuit court, therefore, was correct in dismissing the information in this case inasmuch as it had no jurisdiction over a misdemeanor case.

ARGUMENT

DID THE TRIAL COURT ERR BY GRANTING THE MOTION TO DISMISS?

In this case the State charged Mr. McGee with possession of cannabis with intent to sell under Fla. Stat. 893.13(1)(a)(2) (R2). There is nothing in the information as to consideration or amount; and Fla. Stat. 893.13(1)(f) specifically states that if the offense is possession or delivery without consideration of not more than 20 grams of cannabis, then the crime is only a misdemeanor. The court in Franklin v. State, 346 So.2d 137 (Fla.1st DCA 1977), examined a situation almost identical to the one sub judice and found the State's failure to allege an amount in excess of the exception in subsection (f) - at that time only 5 grams - made the charge only a misdemeanor. The circuit court having no jurisdiction over misdemeanors, therefore, had no jurisdiction to impose judgment and sentence. The judgment and sentence were set aside. See Radford v. State, 360 So.2d 1303 (Fla.2d DCA 1978).

In the Second District Court of Appeal the State argued that Franklin is no longer the law in light of the ruling in State v. Stewart, 374 So.2d 1381 (Fla.1979). In Stewart the Florida Supreme Court held that the State need not allege a prior conviction for drugs, consideration or an amount in excess of 5 grams in order to charge a felony when alleging a sale of cannabis. Looking at the common understanding and ordinary

dictionary definition, the court found "sale" to include within its definition consideration. Thus, since sale included consideration, the qualifying exception of subsection (f) did not apply and the information properly charged a felony. Because Stewart involved an actual sale, its facts differ from those in Franklin and Mr. McGee's cases and the holding in Stewart cannot be applied to Franklin and Mr. McGee.

In recent cases examining informations charging delivery without specifying the quantity delivered or without specifying consideration, the courts, including this court, have held that such a charge is only a misdemeanor. See Fike v. State, 474 So.2d 1192 (Fla.1985); Fike v. State, 455 So.2d 628 (Fla.5th DCA 1984); and Canty v. State, 471 So.2d 676 (Fla.1st DCA 1985). Offenses involving "delivery," however, are only half of section 893.13(1)(f). The other half of that statute applies to offenses involving "possession".

In reversing Petitioner's case, the Second District Court of Appeal stated that it could not ignore the words "intent to sell" in a charge involving "possession with intent to sell; yet, ignoring "intent to sell" as surplusage is required to make the "possession" half of section 893.13(1)(f) meaningful. Fla. Stat. 893.13(1)(a) makes it unlawful to sell, manufacture, deliver, or possess with intent to sell, manufacture or deliver a controlled substance. That section then goes on to list the various controlled substances and their respective sentences.

Mere "possession" is not listed; and it is Petitioner's contention that the "possession" part of section 893.13 (1)(f) is meaningless if it does not refer back to section 893.13(1)(a). The Second District Court of Appeal points to section 893.13(1)(e) as the "possession" referred to in 893.13(1)(f), but Petitioner points out that subsection (e) does not refer specifically to cannabis as does subsection (a). In addition, both subsections (a) and (e) punish cannabis as a third-degree felony; and it is equally plausible that subsection (f) applies to both subsections (a) and (e) where cannabis is concerned. Lastly, subsection (f) refers back to subsection (a) for "delivery"; thus, it is only logical that (f) also refers to (a) for "possession."

Interpretations of acts which violate Fla. Stat. 893.13 have been examined extremely closely, and the least different factual situation or change in wording is enough to result in different court rulings. In Patterson v. State, 313 So.2d 712 (Fla.1975), the information charged sale but the facts were that the State had stipulated that there was no consideration. The court held that without consideration there could be no sale, and the defendant could only be found guilty of a misdemeanor. In Bosier v. State, 419 So.2d 1042 (Fla.1982), the defendant was charged with delivery for consideration. The defendant equated this wording with sale, reasoning that a sale was delivery with consideration; and argued reversible error had been committed when he was not allowed the lesser of attempted

sale. Noting the weakness in the statute as to definitional problems, the Supreme Court held that delivery for consideration was not a sale and the "for consideration," was surplusage. The court concluded by noting that the weaknesses in the statute had to be cured by the legislature.

In Petitioner's case the information charged possession with intent to sell. As in Bosier, the "with intent to sell" should be looked upon as surplusage. In addition, "intent to sell" does not mean consideration. The "intent" part puts consideration into issue. It is also to be noted that the State could not prove more than 20 grams - the increased limits under the amended subsection (f) - because only 6.5 grams were involved (R15). The State did not object to this statement, but merely claimed that the weight was not relevant (R15,16). In light of the lack of consideration allegation, weight was relevant. A stipulation in Patterson was enough to distinguish Stewart; thus, an acquiesence to the weight being less than 20 grams puts the possession into the misdemeanor exception of subsection (f).

In light of the above, the ruling in Stewart cannot be applied. The allegations and facts in this case differ too much to apply Stewart. Franklin, on the other hand, is directly on point and is supported by the logic in Bosier. If there is any question in this court's mind as to how the statute is worded and how it is to be construed, then Fla. Stat. 775.021 requires that it be construed most favorably to the accused. This court, therefore, should follow Franklin and uphold the trial

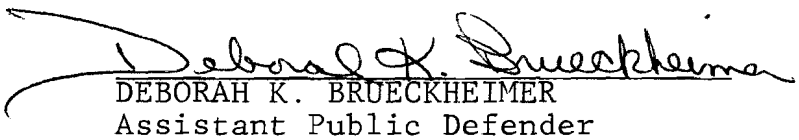
court's dismissal of Petitioner's case.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to uphold the trial court's dismissal of Petitioner's case.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 9th day of October, 1986.

Deborah K. Brueckheimer

DEBORAH K. BRUECKHEIMER