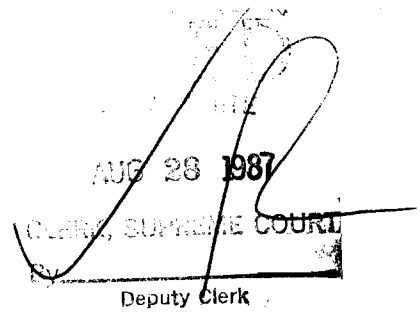
IN THE SUPREME COURT OF FLORIDA



TYRONE E. McDANIEL, :

Petitioner, :

vs. : Case No. 70,188

STATE OF FLORIDA, :

Respondent. :

_____ :

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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STATEMENT OF THE CASE AND FACTS

The State filed an information in December 16, 1985, in the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, 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 Circuit Judge M. William Graybill, 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 it opinion holding that possession with intent to sell any amount of marijuana constitutes a third-degree felony. State v. McDaniel, 12 F.L.W. 658 (Fla. 2d DCA Feb. 27, 1987).

Petitioner filed a timely notice invoking the jurisdiction of the Florida Supreme Court. This Honorable Court accepted jurisdiction on August 3, 1987.

SUMMARY OF ARGUMENT

The Court's previous ruling in McGee v. State on the same issue failed to fully consider legislative intent. Possession of cannabis is criminalized in three major categories: under 20 grams (misdemeanor); from 20 grams to 100 lbs. (3d degree felony); and over 100 lbs. (first degree felony). Possession of cannabis in the middle quantity range is a third degree felony whether it be mere possession or possession with intent to sell. The misdemeanor and trafficking ranges specify only possession without reference to intent. If an allegation of possession of cannabis with intent to sell is automatically a felony because the misdemeanor category does not specify intent to sell, then possession of over 100 lbs. with intent to sell would be only a third degree felony because the trafficking category does not specify "with intent to sell." That is obviously contrary to legislative intent as the application to the misdemeanor category is also contrary to legislative intent. Though it would make a difference when applied to some other controlled substances, the intent behind the possession of cannabis in insignificant.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE CIRCUIT COURT'S DISMISSAL OF A FELONY CHARGE WHICH FAILED TO STATE THE AMOUNT OF CANNABIS POSSESSED.

The State filed a two-count information charging the defendant with possession of cannabis with intent to sell in violation of section 893.13(1)(a)2, Florida Statutes (1985) and with possession of cannabis in violation of section 893.13(1)(f), Florida Statutes (1985). Neither count of the information is specified the amount of cannabis involved and did not specifically mention consideration. The defendant, relying on State v. Johnson, 354 So.2d 902 (Fla. 1st DCA 1978), and Franklin v. State, 346 So.2d 137 (Fla. 1st DCA 1977), filed a motion to dismiss the information on the ground that the trial court lacked subject matter jurisdiction because the information did not allege a felony. Although the trial judge disagreed with the holding in Johnson and Franklin, he felt that he was bound by them and, accordingly, granted the motion to dismiss. State v. McDaniel, 12 F.L.W. 658 (Fla. 2d DCA 1987). The Second District Court of Appeal specifically recognized conflict with Franklin and ruled consistent with that court's previous ruling in State v. McGee, 494 So.2d 255 (Fla. 2d DCA 1986).

This Honorable Court recently affirmed that courts previous ruling in McGee. McGee v. State, 12 F.L.W. 332 (Fla. 1987). In affirming the lower court's decision, this Honorable Court quoted the Second District Court of Appeal:

> The Franklin court apparently equated mere "possession with intent to sell." This court cannot simply ignore the words "intent to sell." To do so would unjustifiably abridge the statutes and usurp the power of the legislature to define what is or is not a crime.
>
> The mere possession of a "controlled substance" is a crime. §893.13(1)(e), Fla.Stat. (1985). Cannabis is a controlled substance. §893.13(1)(c)3, Fla.Stat. (1985). One who possesses 20 grams or more is guilty of a third degree felony. §893.13(1)(e), Fla.Stat. (1985). Possession of "not more than 20 grams" is a first degree misdemeanor. §893.13(1)(f), Fla.Stat. (1985). On the other hand, possession with intent to sell cannabis is a third degree felony. §§893.13(1)(a); 893.03(1)(c)3, and 893.13(1)(a)2, Fla.Stat. (1985).
>
> The mere possession of cannabis is different from possession with intent to sell.

State v. McGee, supra at 255-256; McGee v. State, supra. Petitioner requests this Honorable Court reconsider the same issue in this case giving further consideration to legislative intent.

Cannabis is specifically designated a controlled substance. §893.03(1)(c), Fla.Stat. (1985) As such, the legislature created three major categories of crimes according to the quantity of cannabis involved in the violation. A crime involving over 100 lbs. of cannabis is the first degree felony, trafficking in cannabis. §893.135(1)(a), Fla.Stat. (1985). The legislative intent in that category is obvious. One in possession of over 100 lbs. of cannabis is obviously a trafficker or major dealer in the drug, and the crime is accordingly designated. Possession of a lesser amount of cannabis is a third degree felony unless it falls into the under 20 grams third category. It is then a misdemeanor. §§893.13(1)(a)2; 893.13(1)(e) and 893.13(1)(f), Fla.Stats. (1985).

Possession of over 20 grams of cannabis is punishable as a third degree felony regardless of whether the possession is with or without intent to sell. The legislature specified that "possession of delivery without consideration of not more that 20 grams of cannabis" is a misdemeanor. §893.13(1)(f), Fla.Stat. (1985). This Court's logic in McGee is that, since possession with intent to sell is specifically listed as a felony crime in the middle range category and not specifically listed in the misdemeanor category, a charge of possession with intent to sell is a felony without allegation of the amount. That logic could then be extended to a hypothetical. If someone were guilty of possession of over 100 lbs. of cannabis with intent to sell, he would then be guilty of only a third degree felony since the trafficking first degree felony statute does not specify possession with intent to sell. It only specifies possession as in the misdemeanor category. That logic, when applied to the trafficking statute, is obviously contrary to legislative intent. Petitioner now contends that application of that logic to the misdemeanor statute is equally contrary to legislative intent.

The legislature obviously intended that possession of a small amount of cannabis, 20 grams and under, to be a misdemeanor. In all three statutory ranges the intent of the cannabis possession is of no significance. When charging the possession of cannabis, the amount alleged determines the degree of the crime. Though it would make a difference with some other controlled

substances, the allegation of intent to sell with cannabis is insignificant. When no amount is alleged, the misdemeanor is charged. The Second District Court of Appeal erred in finding contra.

CONCLUSION

Based upon the cases cited and the argument presented herein, Petitioner respectfully requests the Honorable Court reverse the decision of the Second District Court of Appeal and remand this cause for affirmation of the circuit court's decision dismissing the charge.

Respectfully submitted,

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