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w/APP

FILED
SID J. WHITE 11-10
OCT 19 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MICHAEL EARL DOBBINS,

CASE NO. : 80,580

Petitioner,

vs.

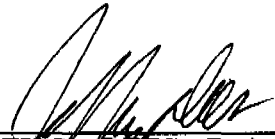
STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S AMENDED BRIEF AS TO JURISDICTION

The Petitioner, hereby files this Amended Brief as to Jurisdiction pursuant to Order of the Court dated October 12, 1992,



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TABLE OF CASES AND AUTHORITIES

Cases:

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<u>Florida Star v. B.J.F.</u> , 530 So.2d 286 (Fla. 1988)	3,4
<u>R.A.V. v. City of St. Paul</u> , _____ U.S. _____, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)	2,4
<u>State v. Mitchell</u> , 485 N.W.2d 807, 812 (Wis. 1992)	5

Statutes:

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Article V, Section 3(b)(3), Florida Constitution	2,3,6

STATEMENT OF THE CASE

This is an appeal from a criminal conviction under Florida's so-called Hate Crimes Law, Section 775.085, Florida Statutes (1989) (the "Statute").

The Appellant was convicted of the crime of battery upon a Jewish youth, which was enhanced from a misdemeanor to a third-degree felony under the Statute.

Prior to trial, Appellant filed a Motion to Dismiss on the grounds that the Statute was unconstitutional, on its face and as applied, under the First Amendment of the U.S. Constitution and under Article I, Section 4 of the Florida Constitution. The grounds of the challenge were that the Statute was vague, overbroad and punished protected opinion.

The trial court denied the motion and upheld the constitutionality of the statute. Following a verdict of guilty at a jury trial, the court adjudicated the Appellant guilty of a third-degree felony and imposed sentence of 364 days incarceration followed by four (4) years probation.

On appeal to the Fifth District Court of Appeal, the Appellant again argued that the Hate Crimes Statute was unconstitutional because it is vague, overbroad and imposes criminal punishment upon protected opinions and beliefs.

In an opinion rendered on September 24, 1992, the Court of Appeals expressly held that this Statute is valid.¹ The opinion of the court also analyzed several cases in support of its conclusion that the Statute is not an unconstitutional abridgment of rights guaranteed by the First Amendment.

¹Full text of the opinion is attached as Appendix A to this Brief.

SUMMARY OF ARGUMENT

This Court has jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution because the lower court expressly declared that the Statute, Section 775.085, Florida Statutes (1989), is valid. In addition, the lower court opinion expressly holds the Statute to be constitutional (under the First Amendment) conferring jurisdiction on this ground as well.

In light of the United States Supreme Court's recent decision, R.A.V. v. City of St. Paul, _____ U.S. _____, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), there is substantial uncertainty of Florida if the Statute is valid, or even if it is, what conduct, opinion or speech is lawfully subject to its prohibition. Questions of great public importance are raised under the Statute, which this court has not reviewed previously, and there is no controlling precedent in Florida.

ARGUMENT AS TO JURISDICTION

Appellant seeks discretionary review in this court pursuant to the jurisdiction granted to it by Article V, Section 3(b)(3) of the Florida Constitution which provides as follows:

3. Supreme court

(b) Jurisdiction.-The supreme court:

* * *

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The Appellant submits that this Court has clear jurisdiction because the lower court expressly declared that Section 775.085, Florida Statutes (1989) is valid. In addition, the opinion expressly holds the Statute to be constitutional (under the First Amendment), conferring jurisdiction on this ground as well.

In Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), it was unanimously held that the Court had jurisdiction under this section over an appeal of a decision of an intermediate appellate court expressly citing a statute (F.S. 794.03), even though the statute was only quoted and was neither discussed nor expressly upheld against the Appellant's constitutional challenge under the First and Fourteenth Amendments.

Similarly, in Cantor v. Davis, 489 So.2d 18 (Fla. 1986), it was held that jurisdiction existed over an appeal of a decision of an intermediary appellate court expressly declaring Section 768.56, Florida Statutes (1981) was valid and constitutional. This court held:

The district court's expressly finding section 768.56 to be constitutional conveyed jurisdiction to this Court. Article V, Section 3(b)(3), Florida Constitution. 489 So.2d at 20.

The Appellant submits that the Court should exercise its discretion to afford review in this case for the following reasons:

- (a) Questions of great public importance are raised as to whether, or to what extent, the First Amendment protects citizens convicted of crime from enhanced punishment on the basis of the content of their underlying opinions or expressed motivation, where the State could not constitutionally punish the possession of such opinions directly.
- (b) The potential for conflicting decisions among the district courts of appeal is great. Potential conflict was also recognized in Florida Star v. B.J.F., supra, as a ground for jurisdiction.
- (c) If the opinion of the lower court stands (that the Legislature may selectively choose to enhance the punishment of certain crimes because of disagreement with the content of the defendant's underlying racial or religious-bias motives toward the victim) does not the reverse follow: that another Legislature could choose to exempt avored racial or religious-bias motivated crimes from any criminal sanction at all?
- (d) This court's voice should be heard as to whether Florida's Hate Crime Statute is constitutional in light of the U.S. Supreme Court's recent decision in R.A.V. v. City of St. Paul, _____ U.S. _____, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).²

This Court has not reviewed the Statute previously, and there is no controlling precedent in Florida.

²In R.A.V., the U.S. Supreme Court imposed a "content discrimination" limitation upon a State's prohibition of otherwise proscribable speech.

Newspapers have recently reported decisions by Florida trial judges dismissing prosecutions on the grounds that the Statute is unconstitutional under the First Amendment. (As the lower court's opinion recognizes, the highest courts of other States have reached differing conclusions as to the constitutionality of their own, similar Statutes.)³

There is substantial uncertainty in Florida if the Statute is valid, or, even if it is, what conduct, opinion or speech is lawfully subject to its prohibition. Review by this Court is not only of great importance to the Appellant, but may serve to protect hundreds of citizens from unconstitutional action by the State.

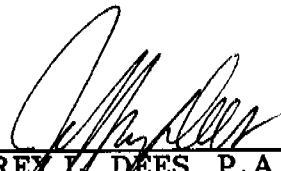
³In State v. Mitchell, 485 N.W.2d 807, 812 (Wis. 1992), in holding the Wisconsin statute unconstitutional under the First Amendment, the Wisconsin Supreme Court stated:

Without doubt the hate crime statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of defendant's selection, the reason the defendant selected the victim, the motive behind the selection.

CONCLUSION

The Appellant respectfully submits that the Court has jurisdiction of this appeal under Article V, Section 3(b)(3) of the Florida Constitution.

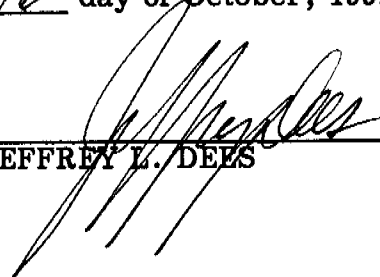
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to the Assistant Attorney General's Office, 210 North Palmetto Avenue, Daytona Beach, Florida 32114, this 16 day of October, 1992.



JEFFREY L. DEES