IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,612

BARBARA METCLAF,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

ANSWER BRIEF OF THE STATE ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar 134924
Office of the Atty. General
Dept. of Legal Affairs, Suite #300
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(407) 688-7759

Counsel for the State

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: PAGE

FLORIDA CONSTITUTION:

FLORIDA RULE:

PRELIMINARY STATEMENT

Petitioner, Barbara Metcalf, the criminal defendant and appellant below in the appended Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA January 27, 1993), the decision over which review is sought, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

No references to the record on appeal will be either necessary or appropriate. Cf. e.g. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) and Reaves v. State, 485 So.2d 829, 830 note 3 (Fla. 1986).

Any emphasis will be supplied by the State unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous decision of the Fourth District Court of Appeal in Metcalf v. State, 18 Fla. L. Weekly D427, which the State adopts as its statement of the case and facts.

The State thus rejects petitioner's "statement of the case and facts," plus those passages in other portions of her jurisdictional brief and appendix containing factual assertions, inasmuch as these statements impermissibly stray from the face of this decision. Jenkins v. State, 385 So. 2d 1356, 1359; Reaves v. State, 485 So. 2d 829, 830 note 3.

SUMMARY OF ARGUMENT

There is absolutely no basis for this Court's assumption of constitutional construction certiorari jurisdiction over the decision below.

ISSUE

THE DECISION BELOW DOES NOT EXPRESSLY CONSTRUE THE STATE OR FEDERAL CONSTITUTIONS; THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR REVIEW

ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Honorable Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida to review the Fourth District Court of Appeal's decision in Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA January 27, 1993). Petitioner alleges that the decision expressly construes a provision of the state or federal constitutions within the meaning of Fla.R.App.P. 9.030(a)(2)(A)(ii). Quite simply, Petitioner is wrong.

Respondent acknowledges that the Metcalf decision makes reference to the concept of "due process". However, the Fourth District Court of Appeal did not in any manner construe the Constitution in the instant case. Thus, this Court should decline to exercise its discretionary jurisdiction.

It is axiomatic that in order to establish this Court's conflict jurisdiction or to establish jurisdiction on the basis that a district court opinion affects a class of constitutional officers, the basis for the discretionary review must appeal on the face of the district court opinion. See: School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985). This requirement of expression on the face of the opinion extends to constitutional construction as well.

In order to expressly construe a provision of the state or federal constitution for the purpose of invoking this Court's discretionary jurisdiction, a district court's decision must explicitly "explain, define, or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." Ogle v. Pepin, 273 So. 2d 391, 393 (Fla. 1973), quoting Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958). Moreover, as noted, the construction must be clear from the face of the district court's opinion.

There is no question that the opinion below contains a passing reference to Petitioner's "due process rights". However, the Fourth District did not, in any manner, expressly construe those rights within the meaning of Ogle v. Pepin, supra. The fact that Petitioner vigorously (and understandably) disagrees with the Fourth District's negative resolution of her direct appeal does not change matters. See: Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Reaves v. State, 485 So. 2d 829, 830, note 3 (Fla. 1986).

The mere mention of the words "due process" in a District Court opinion does not, ipso facto, mean that a constitutional provision was construed. At bar, no constitutional provision was construed. Accordingly, this Court should decline to exercise its discretionary jurisdiction.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must summarily DENY the petition for writ of constitutional construction certiorari.

Respectfully submitted,

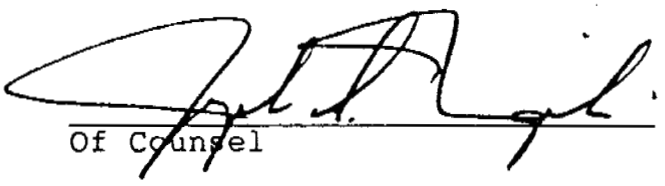
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 134924
Office of the Attorney General
Third Floor
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401-2299
Telephone: (407) 688-7759

Counsel for the State

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by courier to: Mr. Louis G. Carres, Esq., Assistant Public Defender, 421 3rd Street, West Palm Beach, FL 33401, this 10th day of May, 1993.



Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

BARBARA METCALF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-0885.

L.T. CASE NO. 91-24354 CF.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed January 27, 1993

Appeal from the Circuit Court for Broward County; Robert Fogan, Judge.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

STONE, J.

The issue is whether a defendant, who otherwise would be discharged if prosecuted for the purchase of cocaine, pursuant to Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992), may nevertheless be convicted of solicitation to deliver cocaine. The deputy arrested the Defendant in a "reverse sting" in which the only drug involved was crack cocaine unlawfully manufactured by the sheriff's lab, a circumstance which this Court has determined is a due process violation. Kelly. The trial court denied Appellant's motion to dismiss. We affirm.