

IN THE SUPREME COURT OF FLORIDA
CASE NO. 86-1060

71,416

THE STATE OF FLORIDA,
Petitioner,

vs.

RUSSELL SANBORN,
Respondent.

FILED
DEC 14 1987
CLERK, SUPREME COURT
Deputy Clerk

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, State of Florida, was the Appellee in the District Court of Appeals and prosecution in the trial court. The Respondent was the Appellant in the District Court of Appeals and the Defendant in the trial court. The parties will be referred to as they stand before this Honorable Court. References to the Petitioner's Appendix will be by the Letter "A". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as true and correct.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD
DISTRICT COURT OF APPEALS IN THE
INSTANT CASE EXPRESSLY AND DIRECTLY
CONFLICTS WITH THE OPINION IN WIL-
LIAMSON v. STATE, 510 So. 2d 335
(Fla. 4th DCA 1987).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT
COURT OF APPEALS IN THE INSTANT
CASE DOES NOT EXPRESSLY CONFLICT
WITH THE DECISION IN WILLIAMSON
v. STATE, 510 So. 2d 335 (Fla. 4th
DCA 1987).

In Williamson v. State, 510 So. 2d 335 (Fla. 4th DCA 1987), the Court found:

This was a non-jury trial. There were no jury charges to be reviewed upon which the appellant could have objected to this lesser included charge. Although the prosecutor mentioned false imprisonment in his argument, the appellant's counsel neither relied on the lesser-included offense in her argument to the court, nor evidenced in any way an invitation to the court to consider it as a lesser charge.

(p. 338)

and,

In this case where defense counsel was not presented with a jury charge to object to, nor did the court invite counsel to object to any of the lesser-included offenses he was considering, the mere silence in the face of the prosecutor's argument to the court cannot be considered as a waiver sufficient under Ray to forego his constitutional right of due process. We therefore reverse the Defendant's conviction for false imprisonment.

(p. 338)

In the instant case, the District Court decided:


Next, Sanborn argues that the trial court should not have overruled his counsel's objection to the jury instruction as to kidnapping and relying on Mills v. State, 40 So. 2d 218 (Fla. 3d DCA 1981), he cites error in the trial court's failure to instruct the jury on the lesser included offense of false imprisonment. We agree that the court's omission constitutes reversible error.

(A. 3).

No jury instructions were involved in Williamson, supra, as there was no jury! The failure to give a jury instruction in a non-jury case is not the point of the instant District Court opinion. The facts of this case are not similar to those of Williamson. Therefore, the instant opinion does not expressly and directly conflict with Williamson so as to create a basis for the jurisdiction of this Honorable Court.

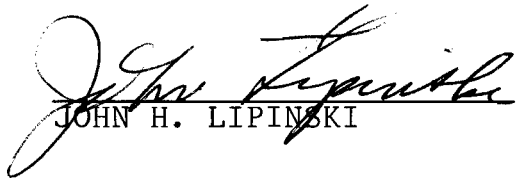
CONCLUSION

As no express and direct conflict exists, the petition for review should be denied.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Attorney General's Office at 401 N.W. 2nd Avenue, Miami, Florida 33128; this 9 day of Dec, 1987.


JOHN H. LIPINSKI