0A 5-26-88

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THE SUPREME COURT OF FLORIDA

CASE NO. 71,416

THE STATE OF FLORIDA,

Petitioner,

vs.

RUSSELL SANBORN,

Respondent.

By [illegible] Deputy Clerk

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the Appellee in the District Court of Appeal and the prosecution in the trial court. Respondent, Russell Sanborn, was the Appellant in the District Court of Appeal and the defendant in the trial court. In this brief the parties will be referred to as the State and Respondent. The symbol "R" will designate the record on appeal. The symbol "T" will designate the transcript of proceedings. The symbol "A" will designate the Appendix to this Brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent was tried for and convicted of first degree murder, burglary of a dwelling, two counts of robbery with a deadly weapon, two counts of kidnapping, and aggravated battery with a deadly weapon. Respondent was sentenced for each offense. (A. 2).

On direct appeal Respondent challenged the kidnapping convictions on two grounds. (A. 2, 3). First he contended that the evidence was insufficient to support the kidnapping

conviction. (A. 2). Second, he contended that it was reversible error for the trial court to have refused to give the necessarily lesser included offense instruction of false imprisonment. (A. 3). The State responded that since Respondent was charged with kidnapping either to facilitate the commission of a felony or to inflict bodily harm or terrorize the victim, the evidence was more than sufficient to establish either of the intents alleged. As to the second allegation, the State contended it was not properly preserved for appeal. (A. 3).

The Third District found that the evidence established both the intent to facilitate the commission of felonies and to inflict bodily harm or to terrorize the victim. (A. 2, 3). The Third District, however, found that false imprisonment is a necessarily lesser included offense of kidnapping and further found that Respondent did preserve the error for appeal. Based on the latter ground the kidnapping convictions were reversed. In so doing the Third District acknowledged direct and express conflict on the issue with Williamson v. State, 510 So.2d 335 (Fla. 4th DCA 1987). (A. 3).

Based on the acknowledged conflict the State sought this Court's discretionary review. However based on the

insignificant effect the ruling has on the instant case, a stay a mandate was not sought. The reason for seeking review was to eleminate the conflict and allow the trial court's the ability to instruct the jury properly. Thereafter this Court accepted jurisdiction and this appeal followed.

POINT INVOLVED ON APPEAL

WHETHER FALSE IMPRISONMENT IS A NECESSARILY LESSER INCLUDED OFFENSE OF KIDNAPPING.

SUMMARY OF THE ARGUMENT

False imprisonment is not a necessarily lesser included offense of kidnapping inasmuch as each offense contains an different essential element from the other. The different essential element is the intent involved. In order to charge kidnapping a specific intent is required to be charged. This specific intent necessarily excludes false imprisonment since the intent required for false imprisonment is any other intent other then the intent required for kidnapping. Since the kidnapping charge necessarily excludes the offense of false imprisonment, false imprisonment cannot be a necessarily lesser included offense of kidnapping.

ARGUMENT

FALSE IMPRISONMENT IS NOT A NECESSARILY LESSER INCLUDED OFFENSE OF KIDNAPPING.

The Third District, in the instant case, has held that false imprisonment is a necessarily lesser included offense of kidnapping. (A. 3). In so doing, the Court relied on Cabe v. State, 408 So.2d 694 (Fla. 1 DCA 1982) review denied 435 So.2d 821 (Fla. 1983) and Mills v. State, 407 So.2d 218 (Fla. 3 DCA 1981). Neither Cabe nor Mills gave any legal analysis to the question. Cabe simply relied on this Court's listing false imprisonment as necessarily lesser included offense as basis for its holding. In Mills, the issue was never raised, but merely addressed in a footnote and found, without analysis, that since other states found false imprisonment was a necessarily lesser included offense of kidnapping, Florida should also so hold.

The Fourth District in Rauso v. State, 425 So.2d 618 (Fla. 4th DCA 1983) and Williamson v. State, 510 So.2d 335 (Fla. 4th DCA 1987) has held that, despite false imprisonment's inclusion in the criminal jury instructions as a necessarily lesser included offense of kidnapping, it is not a necessarily lesser included offense of kidnapping.

In Rauso v. State, supra, the Fourth District after reviewing the kidnapping[1] and false imprisonment[2] statutes, reasoned that:

> To prove kidnapping it is necessary to introduce evidence of specific intent in one of four enumerated categories. To prove to prove the existence of "any purpose other than those" four. Unless this is substantially equivalent to a provision that intent is not a necessary element of the crime of false imprisonment then the test is not met. A more logical interpretation is that scienter is an essential element of the crime of false imprisonment. Accepting that premise an intent (other than Section 787.01(a) motives) must be alleged in the accusatory pleading and proven at trial beyond a reasonable doubt in order to convict a person of false

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[1]The pertinent parts of section 787.01 Provides:

(1)(a) "Kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

[2]The pertinent parts of section 787.02 provides:

(1)(a) "False imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against his will with any purpose other than those referred to in s. 787.01.

of false imprisonment. We accept this construction of the statute.

(Emphasis in original)
Id. at 620.

The use of a specific intent to determine essential elements of offenses has been utilized by this Court to determine whether one offense is a necessarily lesser included offense of another.[3] The most analogous situation is sexual battery and lewd and lascivious conduct.

In Ray v. State, 403 So.2d 956 (Fla. 1981), and State v. Hightower, 509 So.2d 1078 (Fla. 1987) this court held that lewd and lascivious conduct is not a necessarily lesser included offense of sexual battery. This Court reasoned that since intent to commit a sexual battery is an essential element of said offense, then lewd and lascivious conduct could not be a necessarily lesser included offense of sexual battery since an essential element of lewd assault is that the sexual battery is not intended. See also Harrielson v. State, 441 So.2d 691 (Fla. 5th DCA 1983). Therefore under the Blockburger[4] test lewd and lascivious conduct is

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[3]The use of the essential elements test to determine necessarily lesser included offenses does not pose double jeopardy problems since only one act is being punished by excluding the ability to be convicted for the other offense arising from the same act. Carawan v. State, 515 So.2d 161 (Fla. 1987).

[4]Blockburger v. United States, 284 U.S. 299 52 S.Ct 180, 76 L.Ed 306 (1932), stated that lesser included offenses are tantamountto the greater offense charged if all the constituent elements of such lesser offenses are included within the elements of the greater offense.

not a necessarily lesser included offense of sexual battery. However if the indictment varied from the statute also alleging lewd and lascivious conduct and there was evidence to support the offensive conduct charged then lewd and lascivious could be a category two lesser included offense.

The foregoing rationale is equally applicable to the present situation. Kidnapping is a specific intent crime and the charging document must allege which of the specific intents listed are to be proved. Therefore it is clear that the charging document charges no offensive conduct other than the acts which constitute kidnapping. The State must prove the specific intents enumerated in the charging document in order for a kidnapping conviction to be sustained. The failure to prove specific intent requires an acquittal. False imprisonment, on the other hand, requires intent other then that require for kidnapping. Therefore a charging document which contains a specific intent charge under kidnapping cannot at the same time charge the offense of false imprisonment. Simply put intent for kidnapping necessarily excludes intent for false imprisonment. Since the intents are mutually exclusive false imprisonment and kidnapping each contains a different essential element from

the other. Since theessential elements are different false imprisonment cannot be a necessarily lesser included offense of kidnapping.[5]

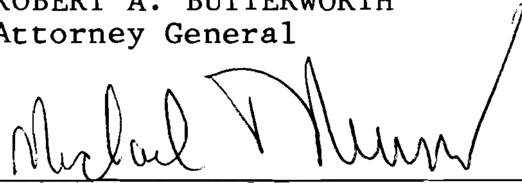
[5]If a kidnapping information contains enough surplusage to charge false imprisonment, and the evidence established false imprisonment, false imprisonment can then be a category two lesser included offense of the specific charging document.

CONCLUSION

Based on the foregoing facts, authorities and argument, the State respectfully requests this Court to quash the decision of the Third District Court of Appeal and to hold that false imprisonment is not a necessarily lesser included offense of kidnapping.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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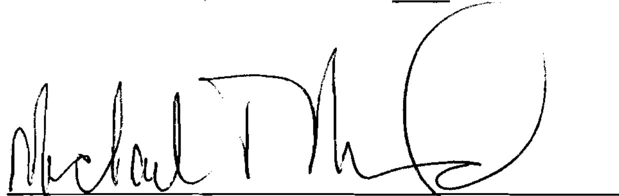
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to JOHN H. LIPINSKI, Attorney for Respondent, 15912 S.W. 92nd Avenue, Miami, Florida 33157, on this 7th day of March, 1988.



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MJN/ds