IN THE SUPREME COURT OF FLORIDA

CHARLES W. FERGUSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 72,102
	)	(DCA #87-0714)
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITIES

Florida Statutes

STATEMENT OF THE CASE

Petitioner was charged by a three count information with armed kidnapping of James Daniels to facilitate a robbery, robbery with a firearm of James Daniels and possession of a firearm during commission of the felony of robbery (R-243). He was tried by a jury and found guilty as charged (R-245-247).

On appeal to the District Court of Appeal, Fourth District, petitioner contended that the evidence was legally insufficient to support an additional and separate offense of kidnapping.

In its decision affirming petitioner's separate conviction for kidnapping the court set forth the facts as follows:

> The defendant robbed an Arby's restaurant. After he was given the money, the defendant, at gunpoint, forced the manager and three employees outside of the store and put them into a restroom located in the rear. The defendant told the victims to stay inside. After thirty seconds the manager peeked out. The defendant yelled, "get back into the bathroom." The victims obeyed for another thirty seconds, when they looked out and observed the defendant riding off on a bicycle. Ferguson v. State, 519 So.2d 747 (Fla. 4th DCA 1988). (Appendix - 1-2).

The Fourth District recognized conflict with Chaney v. State, 464 So.2d 1261 (Fla. 1st DCA), rev.den. 479 So.2d 118 (Fla. 1985). Contrary to Chaney the Fourth District held that putting the victims in the restroom and warning them to stay put was sufficient confinement, independent of the robbery, not slight, inconsequential or merely incidental so as to justify a separate conviction for kidnapping.

Petition for discretionary review was timely filed. By order dated June 6, 1988, this Court accepted jurisdiction and set the case for oral argument on September 2, 1988.

STATEMENT OF THE FACTS

Around 10:20 a.m. on August 15, 1986, before it opened for the day the Arby's restaurant in Hollywood was robbed by a man who entered through the back door as the assistant manager, James Daniels, re-entered the restaurant after a delivery (R-17-20). This robber displayed a gun and told the assistant manager to take him to the safe (R-21). Daniels opened the safe for the robber and put money inside a pillow case (R-22). Daniels did not get a chance to observe the robber's face during the robbery (R-22).

While Daniels was opening the safe, the robber had the three employees come to the kitchen and face the wall (R-23). Then Daniels went to the front of the restaurant and emptied the registers as the robber commanded. The robber then told all the employees to go outside and he put them in the men's bathroom (R-24).

Through the back door of the restaurant is a shed area for the dry goods with a small cubby hole and a freezer. Directly across from the freezer is the men's restroom. This restroom is attached to the store but is on the outside (R-20). Upon walking out the back door, the restroom is the next door over (R-49).

After the robber placed Daniels and his three employees in the bathroom, the robber instructed them to stay in there (R-27). Daniels did not get an opportunity to observe the robber until, 30 seconds after being in the men's room, he opened the door and looked out and saw the petitioner running across the street. Petitioner yelled to Mr. Daniels to get back into the bathroom

(R-27). Mr. Daniels waited another 30 seconds and opened the door to see the robber get on a bicycle in the alley way across the street (R-27).

Daniels' identification of the petitioner as the robber was based on seeing petitioner as he ran from the store (R-26).

Two of the employees, Lorraine Ayers and Grace Carter did not look at the robber and were unable to identify him (R-45,58).

Dennis Garcia was washing dishes when the robber entered the Arby's on August 15 (R-68). Garcia said he saw the robber's face when he came in the back door and identified petitioner as the robber (R-70). After the robbery, petitioner ordered everyone into the men's room and told them not to come out for a while (R-72). Garcia said the men's room was not locked (R-77). Garcia stated he also gained an opportunity to view petitioner when he peeked out the door with Daniels after the robbery (R-72). Garcia said petitioner got on the bicycle and rode away as the employees were going back into the store (R-77).

Garcia was also present during a September 15 robbery at the same Arby's (R-81). Garcia said that the person who committed the August 15 robbery was not the same as the person who committed the September 15 robbery.

Detective Soccol testified that both Daniels and Garcia made positive identification of petitioner in both the photographic and live lineups which Soccol conducted (R-88-89).

Soccol further testified that the manager of the Arby's during the August 3 robbery, Mark Shefter, had identified petitioner as the person who committed that robbery (R-91). Soccol

developed a suspect, Kenneth Weaver, as the perpetrator of the September 15 Arby's robbery. Petitioner was in custody for the August 3 robbery at the time of the September 15 robbery (R-97).

Petitioner presented the testimony of Mark Shefter, the assistant manager of Arby's on duty during the August 3 robbery and the September 15 robbery (R-109,114). Shefter was not present during the August 15 robbery. Shefter said that he thought, at one point, that the robber of August 3 and the robber of September 15 were the same person (R-118-119).

Kenneth Weaver testified that he was incarcerated and facing various robberies, including the charge of robbery of the Arby's on September 15 (R-129). Roosevelt Dozier was his cousin (R-129). Weaver said he did not speak to Dozier concerning the Arby's robberies and took the Fifth Amendment when asked if he told Dozier that he committed the Arby's robberies on August 3, August 15 and September 15 (R-130).

Weaver was 17 years old and petitioner was 23 or 24 (R-135).

Gene Roussea was an employee of the Arby's that was present during the August 3 robbery. When he was shown photographic and a live lineup, Roussea told the detectives that petitioner was not the robber; he identified someone else as the August 3 robber (R-146).

Roosevelt Dozier testified that Kenneth Weaver was his cousin. Before Weaver went to jail, Dozier had a conversation with him. Weaver told Dozier that he had robbed the Arby's a couple of times and that Charles Ferguson went to jail for him (R-158-160).

SUMMARY OF ARGUMENT

Point I: Movement of Daniels and his three employees to the outside men's restroom was slight, inconsequential and merely incidental to the crime of robbery. This movement had no independent significance and in fact substantially heightened, rather than substantially lessened, the risk of detection. Daniels' sole chance to observe the robber came when he looked at the robber from the bathroom door (R-26-27). The bathroom door was not locked nor barricaded in any way. Plainly, petitioner is not criminally liable for the additional offense of kidnapping because Daniels and his employees spent 60 seconds in the men's bathroom after the robbery.

Point II: Petitioner's conviction for use of a firearm in commission of the felony of robbery is improper and prohibited by this Court's recent decision in Hall v. State, 517 So.2d 678 (Fla. 1988). Even though this issue has not been previously raised, the error is fundamental and must be corrected.

ARGUMENT

POINT I

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S CONVICTION FOR KIDNAPPING WHERE CONFINEMENT IN AN UNLOCKED BATHROOM WAS SLIGHT, INCONSEQUENTIAL AND DID NOT SUBSTANTIALLY LESSEN THE RISK OF DETECTION.

Petitioner was charged with kidnapping with intent to "commit or facilitate the commission of a felony, to wit: Robbery." (R-248). Kidnapping is defined in Section 787.01(a)(2) as including:

> [F]orcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
>
> * * *
>
> 2. Commit or facilitate commission of any felony.

Recognizing that a literal construction of this language would automatically include kidnapping with virtually every rape or robbery, this Court has construed this portion of the kidnapping statute to mean that:

> The offending movement of confinement must not be slight, inconsequential, and merely incidental to the other felony; must not be of the kind inherent in the nature of the other crime; and must have some significance independent of the crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Carron v. State, 427 So.2d 192,193 (Fla. 1983).

Petitioner placed Mr. Daniels and his employees in the bathroom. This men's restroom was entered from the outside of the Arby's and was immediately adjacent to the back door. It was

included within the area of the rear door where a freezer and a shed for dry goods was located. This area was visible from the street but could be partially obscured depending on a person's line of vision (R-20).

Mr. Daniels was only confined within the bathroom for a period of 60 seconds. After the first 30 seconds in the bathroom, Daniels looked out and was able to see the robber and his features for the first time, as the robber ran across the parking lot (R-26-27). The robber turned and told Mr. Daniels to return to the bathroom, which Daniels did. Daniels stayed in the bathroom for another 30 seconds and emerged with the employees to re-enter the store, as the robber was running across the street and getting on a bicycle in an alley way (R-27,77-78). The total time of confinement was 60 seconds according to Daniels' testimony.

The facts of this case are that the confinement was slight and merely incidental to the robbery, was of the kind inherent in robbery, and had no significance independent of the robbery. All three criteria must be met in order for the movement to constitute an independent offense of kidnapping. Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987).

In Mobley v. State, 409 So.2d 1031 (Fla. 1982), this Court first construed the kidnapping statute and said:

> The prevalent view nationwide is that kidnapping statutes, regardless of their wording, do not apply to unlawful confinement or movement incidental to other felonies. Most courts have reasoned that the legislatures do not intend for the statutes to be literally applied (footnotes omitted). 409 So.2d at 1034-35.

Among the decisions cited by this Court was People v. Daniels, 459 P.2d 225 (Cal. 1969). The test in California, before Daniels, was that the fact, and not the distance, of asportation was decisive in determining whether kidnapping could be upheld as a separate crime. In Daniels the Court rejected that test in favor of the view taken in the Model Penal Code that a kidnapping occurs when the victim is moved a substantial distance from the vicinity where he is found or if he is unlawfully confined for a substantial period in a place of isolation. The Court said that it was excluding from the reach of the kidnapping statute those movements of the victim which were merely incidental to the commission of the robbery and which did not substantially increase the risk of harm over and above that necessarily present within the crime itself.

But for the Fourth District's decision in petitioner's case, Florida courts have previously determined that slight movement of robbery victims around the premises being robbed and leaving them in an unlocked bathroom does not constitute a separate crime of kidnapping where the confinement is slight, of minimal duration, without significant asportation and where it does not significantly lessen the risk of detection. See Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980), Chaney v. State, 464 So.2d 1261 (Fla. 1st DCA 1985), Brinson v. State, 483 So.2d 13 (Fla. 1st DCA 1985) and Kirtsey v. State, supra.

In Friend v. State, supra, the robbery victims were placed in a bathroom and commanded to stay there while a robbery was committed. The door was not barricaded in any way and the

robbery victims were not tied or restrained by any bonds. The employees emerged after five minutes and noticed the robbers were gone. The court held that a conviction for kidnapping was not permissible because the confinement of the employees was without independent significance in that it "did not significantly lessen the risk of detection or make the robbery substantially easier to complete than would any alternative forcible restraint essential to the commission of the robbery." 385 at 697.

In Chaney v. State, supra, after robbing a plant nursery, the victim, Baker, was directed to enter the restroom. The robber then placed 30 to 40 fifty pound bags in front of the door. Baker waited approximately 60 seconds until he heard two car doors shut and an engine start. He then struggled to push open the door for 10 to 15 seconds and escaped from the bathroom in time to observe the car's tag number. This confinement did not constitute kidnapping, it did not facilitate or make the robbery easier to complete; it occurred after the robbery was complete. Nor did the confinement substantially lessen the risk of detection. It had the opposite result. The court found that it was without independent significance and thus not within the intended purview of Section 787.01(1)(a)(2), Florida Statutes.

In Brinson v. State, supra, during a home burglary and robbery the victims were moved from room to room and eventually tied with neckties before the robbers departed. The victims freed themselves within a minute or two and called the police. The Court held these facts did not support a separate conviction

for kidnapping because the acts constituting the confinement were slight and inconsequential so as to be incidental to the crimes of robbery and burglary.

The slight and inconsequential confinement of tying up the victims and moving them about the interior of Pizza Hut during a robbery at closing was not sufficient to constitute kidnapping in Kirtsey v. State, supra. There the Fifth District found the acts were not inherent in robbery and may have made the robbery easier to commit. Yet, no kidnapping occurred because the acts of confinement were also slight and merely incidental to robbery.

In affirming petitioner's separate conviction for kidnapping the district court gave a string cite of cases which had affirmed separate convictions for kidnapping. Ferguson v. State, 519 So.2d 747,748 (Fla. 4th DCA 1988). However, none of those cases involves placement of a robbery victim in an unlocked bathroom for an insignificant amount of time. Without any further explanation or analysis the Fourth District likens placement in an unlocked bathroom with restraint by tying.

Here are short summaries of the cases that were string-cited by the Fourth District: Faison v. State, 426 So.2d 963 (Fla. 1983) (Movement of sexual battery victim from a front office to a room in the back to commit rape and movement from the kitchen of a home to the relative seclusion of a bedroom, thereby removing the victim from access to a door, lessened the risk of detection and made the crimes easier to commit). In Faison the movement was to facilitate sexual battery since it occurred before commis-

sion of those felonies and aided in their commission; Johnson v. State, 509 So.2d 1237 (Fla. 4th DCA 1987) (barricading a convenience store robbery victim in a bathroom by use of shopping carts); Lamarca v. State, 515 So.2d 309 (Fla. 3d DCA 1987) (moving the victim from the sink area to last stall in a women's bathroom where the defendant attempted sexual battery. Removal of the victim was found to reduce the risk of detection of the sexual battery the defendant intended to commit after moving the victim); Sanborn v. State, 513 So.2d 1380 (Fla. 3d DCA 1987) (The victims were not moved from their beds but were tied up and one victim's ear was cut. The defendant then left the home with jewelry, money and the victims' daughter, who was later found dead in a field); Taylor v. State, 481 So.2d 97 (Fla. 3d DCA 1986) (where, during robbery of a drive-in food store the victim was confined to the bathroom and then forced to come out and wait on customers to avoid their detection of the robbery in progress); Carter v. State, 468 So.2d 370 (Fla. 1st DCA), rev.den. 478 So.2d 53 (Fla. 1985) (The victim was tied up in her bathroom after a burglary and robbery. It required her determined effort, to the point of bruising herself, to escape. The court held this was still kidnapping under the Faison test because the purpose of the confinement in restraining the victim by tying her was to buy time for a clean getaway); Sorey v. State, 419 So.2d 8110 (Fla. 3d DCA 1982) (After a robbery of a Burger King, four employees were left on the floor with their hands tied behind their backs. The victims did not escape their bonds but were later found. Here, the tying facilitated escape and lessened the risk of

detection); Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1982) (A manager of a Taco Bell was required to re-enter the store from a well lighted parking lot and crawl to the safe in front. The requirement that he stay out of sight below the counter level in moving to and from the safe lessened the risk of detection). The Fourth District's final cite was Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980), where there was a roped confinement, the victim was tied to a bed in order to facilitate sexual assault and to stab him to death. These acts were found not incidental,or inherent in those felonies and the kidnapping was independently established.

Each of the cases cited by the Fourth District are distinguishable not only by the kind of confinement but by its duration and significance. In affirming petitioner's conviction the district court said:

> [T]here is little reason to consider barricading a door as any more confining than pointing a gun at a victim and warning him to stay put. Certainly a prudent victim can be expected to pay as much heed to a direct or implied threat to his life as to other means of securing his confinement.

Ferguson v. State, supra at 748.

This analysis by the district court proves only that petitioner confined Mr. Daniels and the other employees. It does not establish why that confinement was substantial, not slight, or independent of the robbery so as to constitute the separate and more serious crime of kidnapping.

Some analysis of the three part criteria accepted by this Court in Faison v. State, where Florida, in essence, adopted the

same test of People v. Daniels based upon State v. Buggs, 219 Kan. 203, 547 P.2d 720 (1976), is necessary. The fact of confinement alone is not sufficient to establish kidnapping. Here, Fourth District found confinement and concluded its analysis without extended proper review necessary to determine sufficiency of evidence.

Previously, the Fourth District found a confinement took place but held that it was insufficient to establish the independent crime of kidnapping in Jackson v. State, 436 So.2d 1101 (Fla. 4th DCA 1983). There the robbers pushed the victim through the door to his motel room as he unlocked it. Nonetheless, the court said:

> Despite the fact that the robbery became easier and less detectable inside the room we conclude that the movement was slight, inconsequential and merely incidental to the robbery.

Id. at 1102.

Likewise in this case the movement of the victim into the bathroom, and the ensuing confinement of only one minute was slight, inconsequential and merely incidental to the robbery. This movement and confinement were essentially inherent in the crime and did not meet the test for separate adjudication and sentence for kidnapping. Mr. Daniels remained in the same general vicinity of the robbery. He was not physically restrained or harmed and there was no impediment to opening the door. Mr. Daniels did open the door within 30 seconds and had his sole opportunity to observe the robber's features (R-26). Daniels' ability to identify and thus to aid in the robber's

detection was achieved precisely because he was placed in the unlocked bathroom, which gave him a clear opportunity to view the robber and his manner of departure. These facts establish no more than the "forcible restraint" mentioned in Friend, supra, as essential to the robbery.

The decision of the district court affirming the judgment and sentence for kidnapping therefore, should be vacated. The district court has failed to follow and apply the required test in Florida, that more than mere confinement must be established in order to constitute the independent crime of kidnapping to facilitate commission of a felony.

POINT II

PETITIONER'S CONVICTION FOR USE OF A FIREARM IN COMMISSION OF A FELONY MUST BE VACATED.

Although the decision of the district court recites only that petitioner was convicted of two felonies, robbery and kidnapping, Ferguson v. State, 519 at 747, petitioner was additionally convicted of a third count, use of a firearm in commission of a felony, to wit: robbery (R-247,249). Petitioner also received a separate sentence for this conviction of use of a firearm in commission of a felony (R-252). Recently, on January 7, 1988, in Hall v. State, 517 So.2d 678 (Fla. 1988), this Court overruled State v. Gibson, 452 So.2d 533,558 (Fla. 1984), and held that dual convictions for robbery with a firearm and use of a firearm in commission of a felony are improper and prohibited by double jeopardy because of legislative intent.

Petitioner acknowledges that this issue was not raised in the trial court nor in the district court of appeal. However, Double Jeopardy claims are fundamental and are not waived by lack of objection. State v. Johnson, 483 So.2d 420 (Fla. 1986). A Double Jeopardy issue is not waived even where it is not asserted until after appeals have been concluded, Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Due to the recent, fundamental change in the law which effects the validity of appellant's third conviction for use of a firearm in commission of a felony, this Court should vacate his invalid, improper conviction under Hall v. State, supra.

CONCLUSION

Based on the foregoing reasons and authorities cited, petitioner requests this Court to vacate the decision of the district court of appeal, Fourth District, with directions that petitioner's separate convictions for kidnapping and use of a firearm in commission of a felony be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to MARDI LEVEY COHEN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 1st day of July, 1988.

Margaret Good

MARGARET GOOD
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