IN THE SUPREME COURT OF FLORIDA

FILED
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JUN 19 1995
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GERMAINE BERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 85,540

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal.

Respondent was the prosecution and appellee.

The following symbol will be used:

R = record on appeal

STATEMENT OF THE CASE

Petitioner and five co-defendants were charged by information with two counts of armed robbery and two counts of armed kidnapping (R 203). Appellant was tried separately from the co-defendants and found guilty of the charges (R 214-217). He was sentenced to four concurrent terms of 20 years in prison with a mandatory three year minimum, followed by a period of five years probation (R 218-219, 223-236). An appeal was taken to the Fourth District Court of Appeal. The court affirmed all convictions but on rehearing struck the mandatory minimum portions of the sentences. Berry v. State, 652 So. 2d 836 (Fla. 4th DCA 1995). On the kidnapping issue the court certified conflict with Brinson v. State, 483 So. 2d 13 (Fla. 1st DCA 1986). 652 So. 2d at 839. Petitioner filed a timely notice to this Court for discretionary review. This Court postponed its decision on jurisdiction and ordered briefing on the merits. The brief on its merits follows.

STATEMENT OF THE FACTS

Natalie Sinclair dated Nasezze Salako, a man who took her to nice restaurants and bought her expensive gifts (R 84-85). After she broke up with him, she told Sheldon Morgan, Richard Ferguson and Petitioner about how much money he had and that Salako owned credit cards (R 84-85). One day after visiting Natalie, Petitioner along with Morgan and Ferguson, followed Salako home to determine his address (R 87). On March 2, 1991, the three men along with Al Whittick and Andrew Mitchell returned to Salako's apartment (R 78). Morgan and Appellant walked up to Salako's apartment and knocked on the door (R 80). Al Whittick stayed in the car (R 81). When Salako answered he was met by Petitioner and Sheldon Morgan, who had a gun (R 19). Ferguson and Mitchell entered the apartment shortly thereafter (R 22). While inside they discovered Mr. Laro, a visiting friend of Salako (R 23, 58-59). According to Salako Petitioner was armed and watched while two co-defendants tied Laro up with a coat hanger and a phone cord (R 24, 25). Laro was left in the same room in which he was found (R 24). Salako then walked the group around the apartment showing them items of value to steal (R 21). When they were ready to leave someone also tied up Salako (R 34-35). Immediately after Petitioner and his group left the apartment, Salako was able to break free and called the police (R 39). The entire incident took 20-30 minutes (R 38).

An investigation by Detective Lewis led to the vehicle used in the robbery (R 94-95). Lewis was able to gather information from the car's owner that tied Petitioner and the five co-defendants to the armed robbery (R 94-97).

SUMMARY OF ARGUMENT

Petitioner and several codefendants went into an apartment to rob Nasezze Salako. Once inside they discovered a second man present so they tied him up. Salako walked around the apartment showing the men where his valuables were. Petitioner and his codefendants took the property, tied up Salako, and left. The robbery lasted approximately 20-30 minutes. Salako immediately freed himself and called police.

Under the current test, adopted by this Court in Faison v. State, 426 So. 2d 963 (Fla. 1983), the evidence here was insufficient to support a conviction for kidnapping because the movement and confinement were part and parcel of the robbery; they lacked the independent significance needed to support the separate crime of kidnapping. The first district's decision in Brinson v. State, 483 So. 2d 13 (Fla. 1st DCA 1986) and the fifth district's decision in Kirtsey v. State, 511 So. 2d 744 (Fla. 5th DCA 1987), correctly applied the Faison test to facts nearly identical to those of the instant case and found no independent kidnapping had occurred.

The contrary decision by the fourth district in the instant case is the result of the many confusing and inconsistent decisions all attempting to apply Faison to various factual situations. Application of Faison has proved nearly impossible in hindsight; certainly more troublesome than beneficial. The court should therefore either recede from or clarify the Faison factors such that kidnapping is treated not as a catch-all but as the serious separate felony which the legislature intended to create.

ARGUMENT

POINT I

UNDER THE CURRENT TEST THE EVIDENCE WAS INSUFFICIENT TO FIND PETITIONER COMMITTED ARMED KIDNAPPING BECAUSE THE MOVEMENT AND CONFINEMENT WERE SLIGHT, INCONSEQUENTIAL, AND MERELY INCIDENTAL TO THE ARMED ROBBERY. HOWEVER, BECAUSE THE CURRENT TEST ADOPTED IN FAISON TO DETERMINE WHETHER OR NOT THE CRIME OF KIDNAPPING HAS BEEN COMMITTED, WHEN THERE IS AN UNDERLYING FELONY IS CONFUSING AND AMBIGUOUS IN APPLICATION, IT NEEDS TO BE REVISED.

Petitioner was charged with kidnapping in an information which alleged that he confined, abducted or imprisoned two men against their will with the intent to facilitate the robbery with which he was also charged. The evidence showed that Petitioner and three other men forced their way into the apartment of Mr. Salako. Once inside Petitioner and his friends discovered Mr. Laro, a visiting friend of Salako. They tied up Laro and left him in the same room where they found him. Petitioner and his friends then walked Salako around the apartment in search of items to steal. When they were ready to leave, someone from Petitioner's group tied up Salako. Salako was immediately able to free himself and called the police. The entire event took between 20 and 30 minutes. After a short investigation Appellant was arrested and charged with two counts each of armed robbery and armed kidnapping.

At trial, Petitioner was found guilty of both armed kidnapping and armed robbery. On appeal he argued that the evidence presented at trial was insufficient to prove kidnapping because the confinement and movement of Salako and Laro was slight, inconsequential, and merely incidental to the robbery. The Fourth

District Court of Appeal rejected that argument by a vote of 2 to 1. Berry v. State, 652 So. 2d 836 (Fla. 4th DCA 1995).

In 1979, the legislature rewrote the state's kidnapping statute, Florida Statute 787.01. This court's first opportunity to construe that new statute came in Mobley v. State, 409 So. 2d 1031 (Fla. 1982), wherein the court first recognized the potential for the kidnapping statute to be so broadly applied as to virtually eliminate the distinction between kidnapping and any crime which necessarily involves some confinement in its commission. That concern has repeatedly been echoed by the cases, a more recent example being Walker v. State, 604 So. 2d 475, 477 (Fla. 1992). From the beginning, this Court believed that overly broad application of the kidnapping statute was not the intent of the legislature so, a year after Mobley, this Court in Faison v. State, 426 So. 2d 963 (Fla. 1983), established a standard whereby the courts were to be able to determine whether the confinement of a person facilitated the commission of a felony: (a) kidnapping was not to include movement or confinement that is inconsequential and merely incidental to the other crime, and (b) it must not be of a kind inherent in the nature of the other crime, and (c) it must have some significance independent of the other offense in that it makes the other offense *substantially* easier to commit or *substantially* lessens the risk of detection. 426 So. 2d at 965-966. The courts have been struggling with this "test" ever since. For as the Fourth District observed in Johnson v. State, 509 So.2d 1237, 1239 (Fla. 4th DCA 1987), while the words appear clear, " the application of it's principles continues to prove difficult in practice."

Indeed, the lower courts have applied the test in Faison to cases with similar fact patterns only to reach opposite conclusions. Here are a sampling of cases to illustrate the difficulty the courts have had in interpreting the test spelled out in Faison. The first set involves kidnapping where the victim has been bounded or tied. Brinson v. State, 483 So. 2d 13 (Fla. 1st DCA 1986), review denied, 492 So. 2d 1335 (Fla. 1986), (three armed men forced their way into a home where they moved two of the occupants from the kitchen to the family den; third occupant forced to retrieve a money bag containing $2,000 worth of rental receipts, another occupant forced to retrieve jewelry from each bedroom, assailants tied up occupants and forced them to lie on their stomachs, one victim escaped within minutes of robbers leaving freeing the others; kidnapping convictions reversed finding that the movement and confinement were slight, inconsequential, and incidental to the other crimes concurrently perpetrated); Kirtsey v. State, 511 So. 2d 744 (Fla. 5th DCA 1987), (two defendants forced their way into a Pizza Hut as the last two employees were closing the store, one employee was tied up and moved about the interior of the store, the other forced to open the safe and threatened with a gun; kidnapping conviction reversed, "the confinement and movement were limited to the interior of the restaurant. While these acts were not inherent in the offense of robbery (b), and arguably may have made the attempted robbery easier to commit (c), the acts were slight and merely incidental to the robbery offense (a).") 511 So. 2d at 745; Jenkins v. State, 433 So. 2d 603 (Fla 1st DCA 1983) (murdered woman was found gagged and bound in her ransacked house, no evidence of when tied up or

how long; kidnapping conviction reversed "because the record does not establish that the confinement was not merely incidental to another felony."). The rule from these three cases is consistent with Faison, tying or binding of a victim may be slight, inconsequential or merely be incidental to the underlying felony.

A second group of cases reaches the opposite conclusion. Merrit v. State, 516 So. 2d 290 (Fla. 1st DCA 1988) (two defendants entered a home looking for a safe, armed themselves, found two sleeping girls who they awoke and then tied up and gagged when they struggled, house ransacked stealing money and jewelry before departing, the girls were left tied and gagged in the same bedroom in which they were initially confronted but bindings loosened and assailants called police to set the girls free, entire episode until the girls gained their release lasted 30 minutes; kidnapping conviction affirmed, purporting to distinguish Brinson and two other cases, Chaney v. State, 464 So. 2d 1261 (Fla. 1st DCA), rev. denied, 479 So. 2d 118 (Fla. 1985) and Friend v. State, 385 So. 2d 696 (Fla. 1st DCA 1980) stating "each of these cases involved slight and inconsequential movement and slight and inconsequential confinement.") Merrit, 516 So. 2d at 292. More specifically, as to Brinson the Merrit court stated, "the confinement in Brinson consisted of the victims being forced to lie on their stomachs in the family den where their hands and legs were bound by neckties. The robbers then departed and one or two minutes later one of the victims was able to escape his bonds, free the others, and call the police. The movement and confinement was obviously slight or in consequential." Id.; Carter v. State, 468 So. 2d 370 (Fla. 1st DCA 1985), review denied, 478 So. 2d 53 (Fla. 1985) (two men robbed

woman in her apartment living room then tied her arms to towel rack in bathroom, woman able to escape within minutes but arms were bruised while freeing herself; kidnapping affirmed because purpose of tying was to effect "clean getaway."); Carron v. State, 414 So. 2d 288 (Fla. 2d DCA 1982), affirmed, 427 So. 2d 192 (Fla. 1983) (evidence sufficient to support kidnapping charge where two men were moved from room to room, tied with telephone cord and placed in a bathroom by two armed men who robbed them and ransacked the house.) See also Sanborn v. State, 513 So. 2d 1380 (Fla. 2d DCA 1987)[1] (the defendant was discovered by the mother of his girlfriend by the side of the bed that she and her husband were sleeping in and then after threatening to kill both of them, he tied them up and took some cash and jewelry and left with their daughter. The Third District Court of Appeal held that the confinement of the mother and father was not slight, inconsequential and merely incidental " to the robbery. Sanborn at 1382.) Of course the court in the instant case has taken an even stronger position ruling that any case involving tying will support a conviction for kidnapping.

In cases where the alleged kidnapping involves confinement and or movement, the lower courts have been just as conflicted. In Johnson, supra, the defendant after gaining access to the money at a convenience store, placed the store clerk in a bathroom, which he then barricaded by tying shopping carts to the door to make it

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[1] Although the court relied on the Faison rationale, the case may have more correctly been decided on other grounds since it is unclear whether in fact the robbery was incidental and the binding was to facilitate the kidnapping of the daughter.

more difficult for the clerk to escape. The clerk, however, was able to free himself quickly once he determined that the defendant had left the store. The district court affirmed the conviction for kidnapping by stating, "forcing the victim into the back room, and then into the bathroom, was not inherent in the nature of the completed robbery...barricading the victim in the room, even for a brief time, was intended to, and did facilitate the defendant's escape and lessen the risk of detection." 509 So. 2d at 1240. Likewise in Lamarca v. State, 515 So. 2d 309 (Fla. 3rd DCA 1987), the court ruled a defendant who entered a woman's restroom, grabbed a woman who was standing near the sink combing her hair, forced her at knife point into a bathroom stall and attempted to sexually assault her was properly convicted of kidnapping; "the movement of the prosecutrix from the sink area to the last stall in the restroom was not incidental to the attempted sexual battery, it was not necessary to move her to commit the act of sexual battery, and finally it clearly reduced the risk of detection. " 515 So. 2d at 311.

However, by contrast in Chaney v. State, 464 So. 2d 1261 (Fla. 1st DCA 1985), review denied, 479 So. 2d 118 (Fla. 1985), the court held that a defendant who robbed a plant nursery, placed the victim employee in a bathroom, then barricaded the door with 30 to 50 pound bags should not be convicted of kidnapping because "the confinement did not substantially lessen the risk of detection... nor did the confinement make the crime substantially easier to complete. In fact the robbery had already been completed at the time Baker [victim] was placed in the bathroom." 464 So. 2d at 1263. Kidnapping convictions were also reversed in Jones v. State,

20 Fla L. Weekly D828 (Fla. 3rd DCA April 5th 1995) (during a robbery the defendant ordered a store manager to the back office and directed her to open up a safe telling two patrons to remain in the store and to keep quiet while defendant attempted to open the safe and until he left the store; confinement reflected was slight, inconsequential, and merely incidental to the robberies), and in Wilcher v. State, 20 Fla L. Weekly D12 (Fla 4th DCA 1994) (defendant and two others entered a store to commit a robbery, and ushered several employees 50 to 60 feet to a back room where the victims were forced to lie on the floor; error to deny defendant's motion for judgmental of acquittal because the movement or confinement of the victims was inconsequential.)

As Petitioner has shown, there is little consistency in how the courts have interpreted Faison when determining whether or not the elements of kidnapping have been met. That the inconsistency has frustrated both litigants and courts alike is reflected in the Fourth District's statement in Johnson that "nothing is to be gained by attempting to reconcile these cases." 509 So. 2d at 1240. The instant case clearly demonstrates the difficulty the courts have in applying the Faison test.

Under that test Petitioner should not have been convicted of kidnapping. Petitioner and his co-defendants robbed two men. During the course of the robbery, which lasted less than 30 minutes, both men were tied up and held at gunpoint. Mr. Salako was also walked around his apartment for the purpose of locating items to steal. Once the robbers gathered up those items, they left. Salako immediately freed himself and called police. As the courts have repeatedly recognized, robbery necessarily involves some

confinement. The confinement and movement in this case was all a part of being able to complete the robbery; the robbers needed Salako to show them his valuables and the robbery could not be completed until he had done that. The fact that the robbers tied the two men's hands could hardly be said to have made the crime substantially easier to commit: the robbers were after all armed with one or more guns, a far more compelling factor in accomplishing their theft. Nor did the tying substantially reduce the risk of detection as demonstrated by the fact that Salako immediately escaped.[2]

The facts in the instant case are almost identical to those in both Kirtsey and Brinson: 1. the confinement of Laro and Salako were limited to the interior of the apartment, 2. the confinement was accomplished by tying up Laro and Salako, and 3. Salako was forced at gunpoint to move about in the apartment to show where items of value were located. As in Kirtsey, these acts, though not inherent in the offense of armed robbery, were slight and merely incidental to the armed robbery, even if they arguably may have made the armed robbery more convenient to commit. Id. Yet a divided Fourth District voted to affirm.

Walker, supra, is also similar, though it does not involve any tying of hands. In Walker, the defendant entered a convenience store demanding money. After taking money from the cash register and from a customer, Walker ordered all four of the occupants of the store to go to the back of the store and lie on the floor.

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[2] That fact should more properly be applied to circumstances where a person is taken from a public place to a private or isolated one.

Three individuals moved a distance of thirty to forty feet but did not lie down. The fourth individual moved a distance of ten feet after Walker threatened to shoot him. Walker left the store and was subsequently arrested and convicted for armed robbery and kidnapping. The Court reversed the kidnapping conviction stating the facts do not meet the first prong of the Faison analysis. The Court held the limited movement and confinement of the four occupants within the interior of the store were not significant but merely incidental to the robbery and therefore Walker could not be convicted of kidnapping. See also Simpkins v. State, 395 So. 2d 625 (Fla. 1st DCA 1981) (defendant was convicted for sexual battery and kidnapping; kidnapping conviction reversed holding the mere moving of victim from the bedroom to the living room during the course of a sexual battery did not constitute separate offense of kidnapping).

In the instant case the district court attempted to do something it had previously said in Johnson was futile: reconcile the cases in which the test in Faison had been used to determine whether the crime of kidnapping existed independent of the underlying felony. The court attempted this reconciliation by taking the position that despite cases to the contrary, when the victim is bounded or tied it's kidnapping.[3] But see Brinson and Kirtsey, supra. While one can applaud the district court's initiative in taking the bull by the horns and making a bright line rule, the rule is inconsistent with Faison because as cases such as Brinson and Kirtsey demonstrate, binding may be of very little

[3] " if you tie 'em up you've kidnapped 'em ". Berry v. State, 652 So. 2d at 839.

significance. The fact that the court felt it necessary to try to craft a bright line rule, however, really demonstrates the difficulty in applying the Faison test, a task somewhat akin to trying to determine how many angels can dance on the head of a pin.

Although it appears this court adopted the Faison test to: 1. aid the lower courts in their determination of whether a defendant should be charged with kidnapping when there is an underlying felony where force is used; and 2. prevent the injustice that would occur to defendant's where a "literal construction of subsection 787.01 (a)(2)[4] `would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery,' " 426 So. 2d at 966, these goals have not been met. This court should therefore reconsider and recede from it's position in Faison much as the court recently did in State v. Gray, 20 Fla. L. Weekly S204 (Fla 1995)[5], wherein the court receded from it's holding in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), which had recognized the offense of attempted felony murder.

> ...application of the majority's holding in Amlotte has proven more troublesome than beneficial.
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> * * *

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[4] The term "kidnapping" means forcibly, 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.

[5] Gray and two co-defendants robbed a restaurant in Dade County and fled by car. After police spotted the car, the driver went through a red light and hit another car. The driver of the other car was ejected and rendered a quadriplegic. Gray was convicted of armed robbery with a firearm and attempted first-degree murder. The Supreme Court rejected it's holding in Amlotte, infra, and reversed the attempted first-degree murder conviction.

> Although receding from a decision is not something we undertake lightly, we find that twenty-twenty hindsight has shown difficulties with applying Amlotte that twenty-twenty foresight could not predict

20 FLW at S205.

Just as in Amlotte, the application of the test in Faison has proved to be difficult to apply and thus, after over a decade of confusion, the test in Faison should be abandoned.

This Court needs to reassert the legislative intent of the kidnapping statute. Kidnapping should be a separate and independent crime with its essence involving elements of asportation and secret imprisonment.

> in basic concept the crime of kidnapping envisages the asportation of a person under restraint and compulsion. Usually the complete control of the person and the secrecy of his location are means of facilitating extortion. But since the control may be accomplished in a variety of ways, the New York statute has been drafted in very broad terms. Much of the definition related to traditional forms of kidnapping, but literally embraced in its terms any restraint.

People v. Levy, 15 N.Y.2d 159, 204 N.E. 2d 842, 844 (1965). The current interpretation of the law on kidnapping under Faison has the offense of kidnapping overrunning a host of other crimes, in particular, robbery and rape and in some circumstances assault as well, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes. Id.

"It is unlikely that these restraints, sometimes accompanied by asportation, which are incidents to other crimes and have long been treated as integral parts of other crimes, were intended by the legislature in framing its broad definition of kidnapping to

constitute a separate crime of kidnapping, even though kidnapping might sometimes be spelled out literally from the statutory words." 204 N.E. 2d at 844. This Court's intent when it approved of Faison was to abrogate and limit some of the difficulties that the lower courts had experience in their interpretation of these modern, broadly drawn kidnapping statutes. Unfortunately, Faison has only added more ambiguity to the area.

Petitioner's actions in this case involved robbery not kidnapping. Nothing in the record supports the premise that the Petitioner considered abducting or significantly imprisoning the victims. Yes, the victims in this case were tied up however, the binding was an act slight and merely incidental to the robbery. There was but one intent of the Petitioner which was to commit the robbery not kidnapping. It is not inconsistent that some of the elements of the crime of robbery may include acts found in kidnapping and not be kidnapping.

The cases cited above demonstrate that, on the facts presented above, and even under the test set forth in Faison, no separate crime of kidnapping occurred; all movement or confinement was part and parcel of the robberies. Thus, where the state fails to meet its burden of proving each and every element beyond a reasonable doubt a judgment of acquittal should be granted. See Ponsell v. State, 393 So. 2d 635 (Fla. 4th DCA 1981). Therefore, Petitioner respectfully requests this Court vacate the judgment and sentence for two counts of armed kidnapping.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court quash the decision of the Fourth District and vacate Petitioner's convictions for kidnapping.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Greenberg, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 14th day of June, 1995.

Frantz K. Vital

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