IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC01-1456

LORENZO SMITH,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE

On or about September 3, 1999, Respondent Lorenzo Smith was charged by amended information with one count of armed burglary of a dwelling with a firearm, one count of robbery with a firearm, one count of false imprisonment with a weapon, one count of grand theft, and one count of possession of a firearm by a convicted felon. (Vol. I, R. 8-12). The prosecutor filed a notice of intent to sentence Smith as a prison release reoffender pursuant to section 775.082(8)(a)(2) of the Florida Statutes (1997). (Vol. I, R. 15). The prosecutor also filed a notice of its intent to sentence Smith as a habitual felony and/or habitual violent offender pursuant to section 775.084 of the Florida Statutes (1997). (Vol. I, R. 17).

Smith was brought to trial on January 20, 2000. Prior to commencement of the jury trial, the state filed a nolle prosequi to the grand theft charge. (Vol. I, R. 23, Vol. I, T. 2).

The jury found Smith guilty of the lesser offense of burglary of a dwelling in count one, robbery with a weapon in count two, and false imprisonment with a weapon in count three. (Vol. I, R. 57-62, Vol. II, T. 233-234). The jury found Smith not guilty of possession of a firearm by a convicted felon. (Vol. I, R. 63, Vol. II, T. 234).

Smith was sentenced on March 14, 2000. He was declared a habitual felony offender, and sentenced as a habitual felony

offender to concurrent terms of thirty years on counts one and three to run consecutive to his term of life imprisonment on count two. (Vol. I, R. 87-88, 94-99).

Smith timely appealed his judgment and sentence to the Fifth District Court of Appeal. He raised three issues for appellate review: (1) there was insufficient evidence of guilt of false imprisonment; (2) the verdict for burglary of a dwelling without a firearm was truly inconsistent with the verdicts for robbery with a weapon but not a firearm, and false imprisonment with a weapon; and (3) the trial court erred in imposing consecutive habitual offender sentences.

The Fifth District Court of Appeal issued an opinion on April 27, 2001, affirming Smith's judgment and sentence on the burglary and robbery convictions. The court reversed the conviction for false imprisonment on the ground that the confinement for the false imprisonment was incidental to the primary charge of robbery, and thus could not stand. See Smith v. State, 785 So.2d 623 (Fla. 5th DCA 2001). Smith filed a motion for rehearing which was denied.

The State filed a notice to invoke the jurisdiction of this Court on the ground that the opinion below expressly and directly conflicted with Chaeld v. State, 599 So.2d 1362 (Fla. 1st DCA 1992); Scott v. State, 757 So.2d 574 (Fla. 4th DCA 2000) and Dowling v. State, 723 So.2d 307(Fla. 4th DCA 1998). This Court accepted jurisdiction on February 5, 2002.

STATEMENT OF FACTS

On July 12, 1999, Michelle Loughlin was vacationing at the Orlando attractions with her boyfriend, Edward Ponzio. (Vol. I, T. 76-77). The Pennsylvania residents were staying at the Days Inn in Kissimmee just off Highway 192. (Vol. I, T. 77).

Around 11:30 a.m. on July 12, 1999, Ms. Loughlin had walked out of their hotel room and obtained more towels from the hotel maid. (Vol. I, T. 78). She returned to their room, shut the door, and put the towels on the bed closest to the door. (Vol. I, T. 78). She and Mr. Ponzio were getting ready to leave to spend the day at Walt Disney World. They had already purchased their four day tickets. (Vol. I, T. 78-79).

When the two were about to leave, a man was standing at the hotel room door. (Vol. I, T. 79). This man, whom Ms. Loughlin identified in court as Smith, was opening their door and walking into their room. (Vol. I, T. 80, 89). She told Smith he had the wrong room, and Smith "nodded his head no and pulled out the gun on the side of his back." (Vol. I, T. 80). Smith pointed the gun at them and told them to lay flat on the bed with their faces down. (Vol. I, T. 80). Ms. Loughlin testified that Mr. Ponzio did as he was told but that she knelt down on the floor with her hands on the bed. (Vol. I, T. 82). She was too scared to turn her back towards the gun out of fear she would be shot. (Vol. I, T. 82).

Smith demanded money and drugs. (Vol. I, T. 83). Smith

reached into Ms. Loughlin's pockets, looking for money and then he searched Mr. Ponzio's pockets, taking his wallet which contained about $700. (Vol. I, T. 84-85). Smith made both Ms. Loughlin and Mr. Ponzio take off their jewelry and give it to him, while he continued pointing the gun at them. (Vol. I, T. 86). Smith then looked through the dresser drawers, and kept asking for money. (Vol. I, T. 87). He also asked for a key to the safe, but they told him they did not have one. (Vol. I, T. 91).

After Smith went through the drawers, he told Ms. Loughlin and Mr. Ponzio to go into the bathroom. (Vol. I, T. 90). He pointed the gun at them and motioned for the two of them to get into the bathroom. (Vol. I, T. 91). Ms. Loughlin testified that they went in the bathroom and locked the door. (Vol. I, T. 92). She heard him go through their luggage in the room and Smith told them that if he found any more money, somebody would be in trouble. (Vol. I, T. 92). He asked about a black bag and then he didn't say anything else. (Vol. I, T. 92-93). Smith turned up the volume on the television and left.

Ms. Loughlin testified that they stayed inside the bathroom for about five to ten minutes and after calling out to Smith and not hearing anything, they came out. (Vol. I, T. 93-94). Their bags were opened, their clothes were everywhere, and the dresser drawers were open. The hotel room door was open. (Vol. I, T. 94). Smith took $150 from the black bag, and the money and Disney

tickets which were in Mr. Ponzio's wallet. (Vol. I, T. 95).

Edward Ponzio echoed his girlfriend's testimony. He indicated that he and Michelle had arrived in Florida two days before the crimes. (Vol. I, T. 151). Mr. Ponzio testified that when Smith entered their hotel room, he thought Smith was lost or had walked into the wrong room. (Vol. I, T. 153).

Smith pulled a gun out and told Ponzio to lay down on the bed and turn around. (Vol. I, T. 153). Ponzio testified that Smith was armed with a small, silver handgun and he went through Mr. Ponzio's pockets, taking $670 and his wallet, which included his driver's license, social security card, and their Disney tickets. (Vol. I, T. 154-155). Smith also took Ponzio's silver bracelet and silver necklace, having Ponzio remove them himself. (Vol. I, T. 157). He took Ponzio's cellular phone and then went through Ms. Loughlin's pockets. Smith asked them if they had any drugs and asked for a key to the safe. (Vol. I, T. 158).

Ponzio testified that Smith told him to get into the bathroom or else he would shoot him. (Vol. I, T. 159). The two went into the bathroom, and closed the door, locking themselves inside. (Vol. I, T. 159). Ponzio continued to hear Smith going through their things, and Smith asked about a black bag. (Vol. I, T. 159). Ponzio testified that they stayed inside the bathroom for about ten minutes and after calling out to Smith and not hearing anything, they emerged from the bathroom. (Vol. I, T. 160).

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal erred in applying the three prong test of Faison v. State, 426 So.2d 963 (1983) to Smith's conviction of false imprisonment and then reversing that conviction on the ground that the false imprisonment was incidental to the primary charge of robbery. The Faison test can only be applied to kidnapping as the statutory element upon which that test is based, that the defendant acted with the intent to commit or facilitate the commission of any felony, is contained in the kidnapping statute only. Because this element triggers a Faison analysis, and that element is conspicuously absent from the false imprisonment statute, the district court erred in striking down Smith's conviction based upon Faison. To hold otherwise forces the state to put on proof beyond the plain and ordinary language of the false imprisonment statute. The First and Fourth Districts have recognized this statutory distinction and have refused to apply Faison to false imprisonment. See Chaeld v. State, 599 So.2d 1362 (Fla. 1st DCA 1992); Dowling v. State, 723 So.2d 307 (Fla. 4th DCA 1998); and Scott v. State, 757 So.2d 574 (Fla. 4th DCA 2000). This Court should hereby adopt the rationale for those decisions and quash the decision of the Fifth District as it relates to the false imprisonment conviction.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN APPLYING THE THREE PRONG TEST OF FAISON V. STATE TO SMITH'S CONVICTION OF FALSE IMPRISONMENT.

The State contends that the Fifth District Court of Appeal erred in reversing Smith's conviction for false imprisonment on the ground that the victims' confinement in the instance case was incidental to his primary conviction for robbery and thus, his dual convictions of robbery and false imprisonment constituted fundamental error. See Smith, 785 So.2d at 626.

In reaching this conclusion, the Fifth District applied Faison v. State, 426 So.2d 963 (Fla. 1983) to Smith's false imprisonment conviction and implicitly held that in order for the Smith to be found guilty of false imprisonment, the state was required to prove that he had the intent to confine, abduct, imprison or restraint the victims with intent to commit or facilitate commission of any felony. Smith, 785 So.2d at 626. Without even comparing the elements of kidnapping to false imprisonment, the district court instead found, "Therefore, there is no real difference between the convictions in Formor, robbery and kidnapping, and the convictions in the instant case, robbery and false imprisonment"[1] and struck down Smith's conviction for false imprisonment on the ground that

[1] The district court relied upon its prior decision in Formor v. State, 676 So.2d 1013 (Fla. 5th DCA 1996) where the Faison test was applied to a charge of kidnapping. Smith, 785 So.2d at 626.

it was incidental to the robbery.[2] Id.

However, the plain language of the present false imprisonment statute demonstrates that the State is not required to prove that a defendant had the intent to commit or facilitate the commission of a felony when the confinement occurs, rendering Faison inapplicable to false imprisonment.

When construing a statutory provision, legislative intent is the polestar that guides the inquiry of this Court.

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

McLaughlin v. State, 721 So.2d 1170, 1172 (Fla. 1998)(quoting Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984)(citations omitted)). "One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature." Raulerson v. State, 763 So.2d 285, 291 (Fla. 2000)(quoting Green v. State, 604 So.2d 471, 473 (Fla. 1992)).

Courts must read a statute as written for to do otherwise would constitute an abrogation of legislative power. Nicoll v. Baker, 668 So.2d 989, 991 (Fla. 1996). If the Legislature did not

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[2] The court rejected the state's argument that the Faison test was not applicable to false imprisonment by simply referring to its prior decision in Keller v. State, 586 So.2d 1258 (Fla. 5th DCA 1991) where Faison was applied to false imprisonment. Smith, 785 So.2d at 626.

intend the results mandated by the plain language of the statute, then the appropriate remedy is to amend the statute. Overstreet v. State, 629 So.2d 125, 126 (Fla. 1993). Legislative intent must be determined primarily from the language of the statute. Id.

Kidnapping requires proof that the defendant ". . . forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his or her will and without lawful authority, with intent to . . . [c]ommit or facilitate commission of any felony. Section 787.01(1)(a)(2), Fla. Stat. (1997)(emphasis added). On the other hand, false imprisonment occurs when a defendant "forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against his or her will." Section 787.02(1), Fla. Stat. (1997).

The statutory element triggering Faison[3] is contained in the

[3] In Faison, this court held that the proper construction of the kidnapping statute was that the "confining, abducting, or imprisoning another person . . . with intent to commit or facilitate commission of any felony" did not include movement or confinement that was inconsequential or inherent in the nature of the felony. Faison, 426 So.2d at 966 (quoting Harkins v. State, 380 So.2d 524, 528 (Fla. 5th DCA 1980)). This Court adopted a prong test which requires the state to prove that the acts of the defendant are not incidental to the primary charge and constitute a separate crime of kidnapping. The state must show that the movement or confinement (1) must not be slight, inconsequential and merely incidental to the other crime; (2) must not be of the kind inherent in the nature of the other crime; and (3) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. Faison, 426 So.2d at 965 (citing Harkins, 380 So.2d at 528 and State v. Buggs, 219 Kan. 203, 547 P.2d 720 (1976)).

kidnapping statute only. Because the Faison test is the tool used to prove that intent element, the element conspicuously absent from false imprisonment, it has no application to false imprisonment. See e.g., Thayer v. State, 335 So.2d 815, 817 (Fla. 1976)("It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another, expressio unius est exclusio alterius"). By allowing the implementation of the Faison test in false imprisonment cases, the courts are judicially grafting words into an otherwise plainly worded statute. This is improper. As a result, the use of the Faison test was not appropriate here and the application of that test should occur in kidnapping cases only. See e.g., Sean v. State, 775 So.2d 343, 344 (Fla. 2d DCA 2000)(kidnapping differs from false imprisonment by requiring proof by the State of one of four intent elements).

This Court noted the distinction between the two statutes in State v. Sanborn, 533 So.2d 1169 (Fla. 1988), holding that false imprisonment is a necessarily lesser included offense of kidnapping as the two statutes are identical except for the question of intent. Id. at 1170. The two differ in that false imprisonment is a general intent crime whereas kidnapping is a specific intent crime. Id. Yet, in Sanborn, this Court was not required to address whether Faison could in fact be applied to false imprisonment.

The First District did reach the issue in Chaeld v. State, 599

So.2d 1362 (Fla. 1st DCA 1992). There, Chaeld was charged with false imprisonment and simple battery after he grabbed a woman by her arms and tried to pull her into her apartment. The woman resisted and screamed. Chaeld let her go and left the building. Id. at 1362. During the charge conference, Chaeld requested a jury instruction on false imprisonment which included the three prong Faison test, arguing that this test logically applied to false imprisonment cases. He further argued that if that test was inappropriate, the jury should still be instructed that for false imprisonment to be proven, "the confinement or restraint must not be slight or inconsequential." Id. at 1363. The trial court denied the request and gave the standard jury instruction. Id.

In affirming the ruling of the trial court, the First District noted that the statutory elements of kidnapping were similar to false imprisonment but noted that the two differed as to the intent element. Id. (citing Sanborn, 533 So.2d at 1170). The court determined that the Faison test had been adopted in some kidnapping cases and, "This so-called Faison instruction must be given upon the defendant's request whenever the state charges kidnapping with the intent to commit or facilitate the commission of a felony under Sec. 787.01(1)(a)2." Id. at 1364. Nevertheless, the First District, noting the difference between kidnapping and false imprisonment, opined:

> Because the Faison instruction is implicated only when the state is attempting to prove a kidnapping with the

> intent to commit or facilitate the commission of a felony, and the crime of false imprisonment by definition and as interpreted by the Supreme Court in Sanborn does not require proof of such intent, we conclude that the judge properly denied the appellant's request for a Faison instruction.

Id.[4]

The Fourth District has likewise recognized the significance of this difference in the statutes as it relates to the intent elements. See Dowling v. State, 723 So.2d 307 (Fla. 4th DCA 1998). There, the trial court instructed the jury on the elements of false imprisonment omitting the part of the standard jury instruction which stated that the "defendant acted for a purpose other than to commit or facilitate the commission of a felony." Id. at 307. The Fourth District ruled that the jury was instructed correctly and held that the false imprisonment instruction given was complete and accurate in setting forth the elements of false imprisonment.[5] Id.

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[4] The First District stated that this conclusion created probable conflict with Keller v. State, 586 So.2d 1258 (Fla. 5th DCA 1991); Perez v. State, 566 So.2d 881 (Fla. 3d DCA 1990); and Hrindich v. State, 427 So.2d 212 (Fla. 5th DCA), rev. dismissed, 431 So.2d 989 (Fla. 1983).

[5] The jury was instructed as follows:

> As to counts IV, V, and VI, the charges are "False Imprisonment ." And before you find the defendant guilty of False Imprisonment, the State must prove the following three elements beyond a reasonable doubt (emphasis supplied).
>
> 1. [Defendant] forcibly or by threat, confined or abducted or imprisoned or restrained--there is a different victim alleged in each count. As to count IV, Peter Griffith, against his will. As to count V, John

at 308.

In Dowling, the Fourth District noted that the false imprisonment statute had been amended to exclude the language "with any purpose other than those referred to in section 787.01."[6] Id. at 309. The Fourth District concluded:

> Under the present version of the statute, it is no longer necessary for the state to prove, as an element of the crime of false imprisonment, that the defendant acted for a purpose other than any of the purposes listed in the kidnapping statute. The instant statute is purely a general intent crime statute with no requirement that the state prove a negative specific intent.

Id. See also Scott v. State, 757 So.2d 574, 576 (Fla. 4th DCA

> Demers, against his will. And as to count VI Terry Demers, against her will.
>
> 2. [Defendant] had no lawful authority.
>
> If you find the defendant guilty of any of the offenses defined under counts 1--excuse me--Counts IV, V and VI, you also need to decide if the defendant carried or possessed the firearm in the commission of the offense.

Dowling, 723 So.2d at 308.

[6] The statute formerly read:

> The term '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.

See section 787.02(1)(a), Fla. Stat. (1993)(emphasis added). This underlined provision was deleted by the Legislature in 1993 because that phrase precluded false imprisonment from being a lesser included offense of kidnapping. See Chapter 93-156, Laws of Florida (1993).

2000)(because of legislative amendment to false imprisonment statute jury instruction which charged that the confinement be for some other purpose that the commission of any felony should be omitted).

The rationale underlying Faison and the adoption of the three prong test was to avoid converting every first-degree robbery and every forcible rape into two life felonies. Faison, 426 So.2d at 965 (citing Harkins, 380 So.2d at 524). See also Berry v. State, 668 So.2d 967, 969 (Fla. 1996) (citing Mobley v. State, 409 So.2d 1031, 1034 (Fla. 1982))(a literal construction of section 787.01(1)(a)2 would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery and battery); Walker v. State, 604 So.2d 475, 477 (Fla. 1992)(literal construction of kidnapping statute would convert almost every forcible felony into kidnapping).

That same rationale cannot support the application of Faison in a false imprisonment case. Smith was charged with false imprisonment as a third degree felony and he was subject to a maximum prison term of five years.[7] See section 775.082(3)(d), Fla. Stat. (1997). Unlike kidnapping, there was no chance that his

[7] Smith's false imprisonment conviction was enhanced to a second degree felony because he was charged and found guilty of committing false imprisonment with the use of a weapon. (Vol. I, R. 6, 62). Because of his use of a firearm, his false imprisonment conviction was enhanced to a second degree felony pursuant to section 775.087(1), Fla. Stat. (1997).

conviction for false imprisonment alone would be converted into another life felony. A conviction of simple false imprisonment does not reach the severity level of a conviction of kidnapping. It was the seriousness and severity of the penalty of kidnapping which compelled this Court to adopt the Faison test. See Walker, 604 So.2d at 477; Faison, 426 So.2d at 965-966. Those concerns do not exist in a false imprisonment context, a crime the Legislature has classified two degrees less than kidnapping with the least severe penalty of all felonies. Thus, not only does false imprisonment not contain the statutory element which triggers a Faison analysis, but also the rationale for that analysis does not exist in a false imprisonment context.

By applying the Faison test to a false imprisonment case, the trial courts are essentially forcing the state to put on proof that goes beyond the statutory elements for that crime. The prosecution must therefore prove kidnapping in order to gain a conviction for false imprisonment. The judicially created imposition of this additional proof is improper given the plain statutory language. See McLaughlin, 721 So.2d at 1172 (quoting Holly, 450 So.2d at 219)("Courts of this state 'are without power to construe an unambiguous statue in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power'").

This Court, along with the Second, Third, Fourth, and Fifth

Districts, has applied the Faison test to false imprisonment. See State v. Lindsey, 446 So.2d 1074 (Fla. 1984)(citing Faison in finding that force exerted to commit false imprisonment was entirely separate from force exerted in committing robbery, and element of assault used to aggravate or enhance burglary).[8] However, in doing so, this Court did not examine how this test could be applied to false imprisonment when the Faison test focuses exclusively on a statutory element which does not exist in the false imprisonment statute.

Nevertheless, despite Lindsay, this Court has not included this additional proof in the standard jury instruction as the Faison test is not included in the current standard jury instruction for false imprisonment. In fact, the current standard jury instruction only requires the two elements of proof as the jury was instructed in Dowling. See Fla. Standard Jury Instr.

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[8] See e.g. Waits v. State, 795 So.2d 227 (Fla. 5th DCA 2001), rev. granted, Case No. SC01-2269 (Fla. February 5, 2002); Stringer v. State, 783 So.2d 1153 (Fla. 4th DCA 2001); Taylor v. State, 771 So.2d 1233 (Fla. 2d DCA 2000), rev. denied, 790 So.2d 1108 (Fla. 2001); McCutcheon v. State, 711 So.2d 1286 (Fla. 4th DCA 1998); Waddell v. State, 696 So.2d 1229 (Fla. 3d DCA 1997), rev. denied, 707 So.2d 1128 (Fla. 1998); Rohan v. State, 696 So.2d 901 (Fla. 4th DCA 1997); Higgs v. State, 652 So.2d 515 (Fla. 3d DCA 1995); Keller v. State, 586 So.2d 1258 (Fla. 5th DCA 1991); Perez v. State, 566 So.2d 881 (Fla. 3d DCA 1990); and Hrindich v. State, 427 So.2d 212 (Fla. 5th DCA 1983).

The Second District refused to address whether Faison applied to a false imprisonment charge in Blanchard v. State, 634 So.2d 1118, 1119 n.3 (Fla. 2d DCA 1994), receded from on other grounds, 742 So.2d 811 (Fla. 2d DCA 1999).

(Crim.).[9] The trial court gave this standard instruction here. (Vol. I, R. 35). In contrast, the present standard jury instruction for kidnapping contains the elements as listed in the three prong Faison test. The district court here did not analyze the differences in the statutes or examine this standard jury instruction, which expressly excludes the requirements of Faison to false imprisonment. The district court simply followed its own decisions in Formor, a kidnapping case, and in Keller, a false imprisonment case which applied Faison without explanation, to strike down Smith's conviction for false imprisonment on the ground that it did not meet Faison. Smith, 785 So.2d at 626. This was in error.

Furthermore, the evidence presented at trial shows that Smith's conduct met the elements of false imprisonment. The record reveals that while armed with a gun, Smith forced himself into Michelle Loughlin and Edward Ponzio's hotel room. He ordered both of them to lay on the bed with their heads down. Mr. Ponzio complied, laying face down on the bed, and Ms. Loughlin, fearful of being shot in the back, knelt down on the floor. (Vol. II, T. 81-84, 153). While the victims were forced to these positions, Smith kept the gun pointed at them, looked through their pockets, took their money, their jewelry, and other valuables. (Vol. II, T. 84-

[9] The standard jury instruction was amended in 1998. See In re Standard Jury Instructions in Criminal Cases (97-2), 723 So.2d 123, 143 (Fla. 1998).

90, 153-158). Smith then ordered them into the hotel room bathroom, telling them to do so or they would be shot. The victims complied, and locked themselves inside while Smith continued to go through their luggage and dresser drawers. (Vol. II, T. 90-93, 159-160). After about five to ten minutes and after calling out to the assailant, the victims emerged from the bathroom after Smith had left. (Vol. II, T. 94, 160).

These facts show that both Ms. Loughlin and Mr. Ponzio were "forcibly, by threat, or secretly confin[ed], abduct[ed], imprison[ed], or restrain[ed] . . . without lawful authority and against [their] will" by Smith. See section 787.02(1)(a). By presenting this evidence, the state proved the elements of false imprisonment as provided in the statute. As indicated supra, the state was not required to further prove whether the victims' confinements were incidental to the primary charge of robbery which the district court held to be a requirement pursuant to Faison. Smith, 785 So.2d at 626.

In all, the First District properly determined that the Faison test was not applicable in a false imprisonment case because that test is applicable to an element which is contained in the kidnapping statute only. See Chaeld, 599 So.2d at 1364. The Fourth District has also recognized this distinction. See Dowling, 723 So.2d at 309. Rather than address this distinction, the Fifth District erroneously applied Faison and concluded that Smith's

conviction for false imprisonment could not stand because that false imprisonment was incidental to his commission of robbery. This was legally incorrect. Accordingly, this Court should find that Faison was not applicable in the instant case, quash the decision of the Fifth District as it relates to the false imprisonment conviction, and reinstate Smith's conviction.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court quash the decision of the district court as it relates to the false imprisonment conviction, and reinstate Smith's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender Barbara C. Davis, counsel for Smith, this _____ day of February, 2002.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
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