

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

REPLY BRIEF OF PETITIONER

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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 maintains that the district court erred in applying the Faison test to Smith's conviction for false imprisonment and then finding that because the evidence failed to meet that test, his conviction for that crime had to be reversed.

Smith counters that the Faison test has been adopted in both kidnapping and false imprisonment cases in order to assess whether the confinement is inconsequential to the commission of the core felony offense, and if so, then the dual convictions of the core offense and either kidnapping or false imprisonment cannot stand. Smith takes great pains to argue that the Faison test was adopted to prevent the state from stacking charges in that if a person commits robbery or sexual battery and does some confining in the process, that additional conviction of kidnapping or false imprisonment cannot stand unless the Faison test is met.

However, Smith's entire argument fails to address the catalyst for application of the Faison test. That catalyst is the statutory element of the kidnapping statute which is conspicuously absent from the false imprisonment statute. Nowhere in his brief does Smith address the key difference in the statutes or even analyze the differing statutory elements.

Yet, Smith acknowledges, by his citation to Biggs v. State, 745 So.2d 1051 (Fla. 3d DCA 1999), the Faison test applies when a person is charged with kidnapping under section 787.01(1)(a)2 of the Florida Statutes (1997). That provision requires proof that “. . . 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.” (Emphasis added). This emphasized element, which triggers the Faison analysis, is absent from the false imprisonment statute. 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).

Despite Smith’s protestations regarding the rationale for the Faison test, that test is triggered by a unique element contained in the kidnapping statute only. The proof necessary to convict a person of false imprisonment cannot go beyond the statutory elements of that crime. Application of the Faison test to false imprisonment requires the state to have to do just that. As argued in the initial brief, by requiring the state to meet the Faison test in order to obtain a conviction for false imprisonment, the courts are judicially grafting an added element to an otherwise plainly worded false imprisonment statute. This is improper. See McLaughlin v. State, 721 So.2d 1170, 1172 (Fla. 1998) (quoting

Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984)) (“Courts of this state ‘are without power to construe an unambiguous statute 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’”).

Ironically, even this Court’s decision in State v. Lindsey, 446 So.2d 1074 (Fla. 1984), in which this Court applied the Faison test to false imprisonment and found that the confinement was entirely separate from the force used to commit robbery, this Court noted that the importance of the legislative intent in determining criminal acts. Id. at 1076. In rejecting the defendants’ argument that the acts of confinement were incidental, this Court noted:

Moreover, even if there were elements of factual proof common to two or more crimes, it is not clear that this would entitle respondents to the relief they seek since the matter of what statutory crimes were committed by the respondents’ acts is purely one of legislative intent.

Id.

This Court hit the nail on the head even in Lindsey.¹ The elements of a crime derive from the statutory language drafted by the Legislature. The element triggering Faison is not contained in the false imprisonment statute. The plain language of the false imprisonment statute is what is controlling and the record

¹ Smith refers to this aspect of Lindsey with regard to his double jeopardy argument. The issue of double jeopardy was not raised by Smith below. Nevertheless, Petitioner notes that Smith’s convictions for burglary of a dwelling with a firearm, robbery with a firearm, and false imprisonment do not violate double jeopardy as each of those crimes contains an element that the others do not.

demonstrates that Smith committed false imprisonment as that statute is plainly read.

Moreover, as argued in the initial brief, Petitioner reiterates that false imprisonment, as charged and convicted in the instant case as a third degree felony, is not converted into a forcible felony here. That conversion was the concern which led this Court to adopt the Faison test in kidnapping cases as kidnapping under section 787.01(1)(a)2 is a first degree felony punishable by a term of years not exceeding life. See Walker v. State, 604 So.2d 475, 477 (Fla. 1992); Faison, 426 So.2d at 965-966. It is simply not a consideration here and Smith does not address how this rationale can be applicable to the third degree felony, false imprisonment. Thus, not only does the plain language of the false imprisonment statute preclude application of Faison but also the rationale underlying Faison is not applicable here as well.

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 Reply Brief has been furnished by delivery to Assistant Public Defender Barbara C. Davis, counsel for Smith, this _____ day of March, 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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