IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	Supreme Court Case No. SC 01-2269
ARNELL WAITS,	)	
	)	
Respondent.	)	
_____	)	

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts as presented in the Petitioner's brief; with the following addition:

The Respondent's conviction for false imprisonment was not enhanced for the use of a firearm, as the jury found no deadly weapon was used. (Record on Appeal, Vol. 1 R, Pg. 47)

SUMMARY OF ARGUMENT

Inherent in the Petitioner's argument, is that the Double Jeopardy Clause does not protect those who contend double jeopardy bars their conviction for false imprisonment in conjunction with some other offense. According to the Petitioner, the so-called "Faison Test" - a test devised to determine whether a the confinement supporting a kidnap conviction was incidental to another offense for which the defendant was also convicted - cannot be applied to save the defendant from a double jeopardy violation if he was convicted of false imprisonment rather than kidnaping. The Petitioner's argument must be rejected for several reasons:

First, there is no logical reason to distinguish between kidnaping and false imprisonment if a conviction for false imprisonment and some other offense will constitute a double jeopardy violation. This Court has said as much.

Second, under the test for double jeopardy violations recently announced by this Court, (the courts are to determine legislative intent), it is clear that the constitutional protection against double jeopardy precluded the conviction for false imprisonment at issue here, because the legislature so intended.

The lower court's ruling should therefore be affirmed.

ARGUMENT

THE DECISION OF THE LOWER COURT SHOULD BE AFFIRMED, AS THE CONSTITUTIONAL BAR TO DOUBLE JEOPARDY APPLIES EQUALLY TO FALSE IMPRISONMENT AND KIDNAPING, PRECLUDING CONVICTION AND PUNISHMENT FOR EITHER OFFENSE, WHEN CONFINEMENT WAS INCIDENTAL TO ANOTHER OFFENSE. (Restated)

The so-called "Faison Test[1]" was announced by this Court in 1983, in order to prevent convictions for kidnaping in conjunction with convictions for some other offense, where there was no proof that the confinement supporting the kidnap conviction was separate and distinct from some other offense committed in a single criminal transaction[2]. ***See, Henderson v. State, 778 So.2d 1046, 1048 (Fla. 1st DCA 2001)***, (Kidnaping conviction must be reversed if the state fails to prove any of the essential elements of that offense - if the confinement was clearly slight, inconsequential and incidental to the other crime.) One year after ***Faison*** was decided, this Court applied the Faison Test in a case involving false imprisonment. ***State v. Lindsey, 446 So.2d 1074 (Fla. 1984)*** The ***Lindsey*** Opinion included language indicating that the question of whether the confinement element of

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[1] ***Faison v. State, 426 So. 2d 963 (Fla. 1983)***

[2] Henderson's kidnap conviction was affirmed, upon a finding that the element of confinement had been proven, and was separate and distinct from robbery for which he was also convicted.

kidnaping had been proven as distinct from some other offense, had implications beyond the State's burden of proof. Specifically, this Court indicated that application of the Faison Test involved a double jeopardy question as well; that is, the question as to whether a conviction for false imprisonment along with another offense would violate the prohibition of multiple punishments for a single offense. The ***Lindsey*** Court stated:

> The offense of false imprisonment was proved by evidence that the intruders confined the victim by tying her up with rope. It was entirely separate from the element of force exerted in committing the robbery and from the element of assault relied upon to aggravate or enhance the offense of burglary. See, ***Faison v. State, 426 So.2d 963 (Fla.1983)***. Moreover, even if there were elements of factual proof common to two or more of the 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. See 775.021(4), Fla. Stats***. ***(1979)***

Lindsey, supra, 446 So.2d at 1076.

The reference in ***Lindsey,*** to ***§ 775.021(4)*** of the 1979 Florida Statutes, leaves no doubt that a conviction for false imprisonment, if the confinement was incidental to some other offense, would call into question the "constitutionality of multiple convictions for offenses arising from the same criminal episode". ***See,***

Cruller v. State, 27 Fla. L. Weekly S 85, 86 (Fla. 1-24-02). Then, as now, the test for determining such double jeopardy violations was one of legislative intent. ***Cruller, supra, 27 Fla. L. Weekly at S 86.***

In 1979, ***Section 775.021(4)*** of the Florida Statutes read as follows:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

The present expression of legislative intent on the question of double jeopardy, ***§ 775.021(4) Fla. Stat. (2002)***, is somewhat more explicit than the 1979 statute, but is substantially the same in effect:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The implication of the Double Jeopardy Clause[3] cannot be ignored in this case. Adoption of the Petitioner's argument would mean that the Double Jeopardy Clause would not protect persons convicted of false imprisonment as an incident of some other offense. That would not only illogical, it would be contrary to the express intent of the legislature.

As shown hereinabove, "the [s]tandard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature intended to authorize separate punishments for the two crimes." ***Cruller, supra, 27 Fla. L. Weekly at S 86.*** The false imprisonment

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[3] ***U.S. Const., Amend. V; Art. 1, § 9 Fla. Const.***

statute, in pertinent part, reads as follows:

> (3)(a) A person who commits the offense of false imprisonment upon a child under the age of 13 and who, in the course of committing the offense, commits any offense enumerated in subparagraphs 1.-5., commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> 1. Aggravated child abuse, as defined in s. 827.03;
>
> 2. Sexual battery, as defined in chapter 794, against the child;
>
> 3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of s. 800.04;
>
> 4. A violation of s. 796.03 or s. 796.04, relating to prostitution, upon the child; or
>
> 5. Exploitation of the child or allowing the child to be exploited, in violation of s. 450.151.
>
> (b) ***Pursuant to s. 775.021(4), nothing contained herein shall be construed to prohibit the imposition of separate judgments and sentences for the first degree offense described in paragraph (a) and for each separate offense enumerated in subparagraphs (a)1.-5.*** (Emphasis added)

Section 787.02 et. seq., Florida Statutes (2002)

The legislature has expressly stated that double jeopardy bars convictions for

false imprisonment where the false imprisonment is committed as an incidental part of some other crime, unless the other crime is one of the offenses enumerated in Sub-Section ***787.02(3)(a) 1.-5.*** Had the legislature intended false imprisonment to be punished separately, even when the confinement element of the alleged false imprisonment was incidental to another offense such as battery or assault, the legislature would have so indicated. Or, stated differently, the legislature has expressed its' intent that a conviction for an offense such as robbery, assault or battery shall not, in every case, automatically give rise to a conviction for false imprisonment. The Faison Test is an established and workable method for insuring that the intent of the legislature regarding this premise will not be ignored. It therefore follows that the ruling of the lower court was well founded.

The Respondent is aware that the double jeopardy argument set forth herein while implicit, was not expressly incorporated in the argument below, or in the Opinion of the District Court. This does not, however, preclude this Court's consideration of the double jeopardy argument; nor does it preclude this Court from reliance upon the double jeopardy argument in affirming the decision of the District Court:

> It is elementary that the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from, although sometimes helpful,

> are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor. [...] The judgment of the trial court reached the district court clothed with a presumption in favor of its validity. Accordingly, if upon the pleadings and evidence before the trial court, there was any theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court was obliged to affirm that judgment. (Citations omitted)

Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 645 (Fla. 1999)

Based upon the foregoing, the Respondent submits that the ruling of the lower court should be affirmed.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Respondent respectfully requests that the ruling of the District Court in this case be affirmed.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, via his box at the Fifth District Court of Appeal and mailed to Mr. Arnell Waits, DC# 312356, Gulf Correctional Institution-Annex, 699 Ike Steele Road, Wewahitchka, Florida 32465-0130, on this 13th day of March, 2002.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

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APPENDIX

Arnell Waits v. State
26 Fla. L. Weekly D2322 (5th DCA, September 28, 2001)