IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC01-2269

ARNELL WAITS,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE

In July 2000, Arnell Waits was charged by amended information with two counts of aggravated battery with a deadly weapon, one count of aggravated assault with a deadly weapon, one count of false imprisonment with a weapon, and one count of resisting an officer without violence. (Vol. I, R. 18-22). On July 19, 2000, the state filed a notice of its intent to sentence Waits as a prison releasee reoffender pursuant to section 775.082(8)(a)2 of the Florida Statutes (1999). (Vol. I, R. 24).

Waits was brought to trial on September 12-13, 2000. The jury found Waits guilty of aggravated battery without the use of a deadly weapon in count one, aggravated battery with the use of a deadly weapon in count two, aggravated assault with a deadly weapon in count three, and false imprisonment with a weapon in count four. (Vol. I, R. 47-50). The jury found Waits not guilty of resisting an officer without violence. (Vol. I, R. 51).

Waits was sentenced following the verdicts. Waits was found to be a prison releasee reoffender. (Vol. II, T. 242). He was sentenced to fifteen years imprisonment on counts one, two, and four, and five years imprisonment on count three with all the terms to run consecutively. (Vol. I, R.62-66, Vol. II, T. 244-

246).

Waits timely appealed his judgment and sentence to the Fifth District Court of Appeal. He raised three issues for appellate review: (1) the trial court erred in denying his motion for judgment of acquittal on count one, aggravated battery; (2) the trial court erred in denying his motion for judgment of acquittal on false imprisonment; and (3) the trial court erred in sentencing him to consecutive terms as a prison releasee reoffender.

The Fifth District Court of Appeal issued an opinion on September 28, 2001, affirming Waits's convictions of aggravated battery in count two and aggravated assault in count three. Waits v. State, 795 So.2d 237 (Fla. 5th DCA 2001). The court reduced his conviction in count one from aggravated battery to simple battery. Id. at 238-239. The court reversed Waits's conviction for false imprisonment, finding that the victim was not confined beyond the time required to commit battery and aggravated assault. Id. at 239. The court also remanded the case to the trial court for resentencing, finding that the trial court could not impose consecutive prison releasee reoffender sentences. Id. at 238 n.1, 239.

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

Around 11:30 a.m. on April 22, 2000, Kissimmee Police Officer Regis McCue responded to a call regarding an aggravated battery. (Vol. I, T. 21-22). Officer McCue encountered April Salley who was crying and screaming. He also observed Waits about eight to ten feet away. (Vol. I, T. 22). Officer McCue testified that Ms. McCue was very upset and that she told him that Waits had hit and cut her. (Vol. I, T. 23-24). Officer McCue noted that the victim had small lacerations, one on her upper thigh and one on her forehead. (Vol. I, T. 28).

Justin Boutilier testified that he was working at the U-Haul center on the morning of April 22, 2000 when he heard people screaming. (Vol. I, T. 43-44). Boutilier observed a black man who had pinned down a black female and a white female on the ground. (Vol. I, T. 45). He testified that the assailant was yelling and cursing at the women and had them forcefully pinned down so they could not get up. (Vol. I, T. 45). Boutilier said the victims were trying to get away. (Vol. I, T. 46). Boutilier further testified that he observed these crimes with his boss, Lance Beesley, and he ran to call police when he saw the attacker take out a knife. (Vol. I, T. 46-47). He said that the two women were not fighting or striking the assailant and that the man was the aggressor in the attack. (Vol. I, T. 48).

Lance Beesley echoed Mr. Boutilier's testimony. An employee informed him that a man was attacking a woman in the back of their building, and Beesley went to the back. He observed a man pinning down a blond, white woman and a black woman, yelling and threatening them. (Vol. I, T. 67-68). The man was yelling at them that he wanted his money back. (Vol. I, T. 68). Beesley testified that the attacker had a knife and threatened to use it if the women did not keep quiet and give him back his money. (Vol. I, T. 69). Beesley then observed a Hispanic man who the attacker waived over and dragged down as well. (Vol. I, T. 70). Beesley indicated that the attacker was the aggressor and that the women were scared "out of their mind." (Vol. I, T. 73).

The victim, April Salley, testified that she had been partying with Vetra Raysor during the early morning hours of the day of the crimes. (Vol. I, T. 91). Ms. Salley said that Vetra said something to her that she better straighten something out because Waits was coming toward them. (Vol. I, T. 91). Ms. Salley said that Waits came up to her and hit her on the forehead with a blue bicycle pump. (Vol. I, T. 91-92, 97, 121). Waits then pinned her against a fence and was striking her. (Vol. I, T. 92). She said that she kept asking Waits to stop as he was repeatedly hitting her, and that at some point, he had her pinned on the ground. (Vol. I, T. 92-93,122). At some

point in the attack, Ms. Salley saw that Waits had a knife and he was cutting her, giving her a cut on her leg and her arm. (Vol. I, T. 93-94, 117). While he had her pinned down and was cutting on her leg, Waits kept asking her for his money. (Vol. I, T. 94). She testified on cross-examination that Waits had pinned her down for five to ten minutes. (Vol. I, T. 108, 123).

At some point, somebody came up behind Waits and Waits and the victim got up. Then Waits threw Ms. Salley down again, and took Vetra down on the ground with her, pinning them both down. (Vol. I, T. 95, 113-114, 124). He threatened Ms. Salley with the knife, talking about the money, and put the knife to her throat. (Vol. I, T. 95-96). Ms. Salley said that a small, Hispanic male was also dragged into the pile at the very end of the attack. (Vol. I, T. 96, 114). She said that Waits was gone when the police arrived, and that she received medical treatment at the scene but refused to go with the paramedics. (Vol. I, T. 98-99). She suffered cuts from the knife on her thigh and her arm. (Vol. I, T. 118).

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 Waits's conviction of false imprisonment and then reversing that conviction on the ground that the false imprisonment was incidental to the other crimes of battery and aggravated assault. 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 Waits'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 WAITS'S CONVICTION OF FALSE IMPRISONMENT.

The State contends that the Fifth District Court of Appeal erred in reversing Waits's conviction for false imprisonment on the ground that the victim's confinement in the instant case was incidental to the acts of battery and aggravated assault and thus, his conviction for false imprisonment was improper. See Waits, 795 So.2d at 239.

In reaching this conclusion, the Fifth District relied upon McCutcheon v. State, 711 So.2d 1286 (Fla. 4th DCA 1998) in which the Fourth District held, by applying the three part test in Faison v. State, 426 So.2d 963 (Fla. 1983), that the confinement of an employee during a robbery was incidental to that robbery and struck down the defendant's armed false imprisonment conviction. Waits, 795 So.2d at 239 (citing McCutcheon, 711 So.2d at 1289). Following McCutcheon, the Fifth District then held, "[T]he five to ten minute fight in which Waits committed both a battery and a separate aggravated assault, did not involve a further confinement separate and apart from these two crimes." Waits, 795 So.2d at 239. Without even comparing the elements of kidnapping to false imprisonment or noting that the Faison test was created for kidnapping cases, the Fifth District

struck down Waits's conviction for false imprisonment on the ground that it was incidental to the battery and aggravated assault. 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 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[1] is contained in the

[1] 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 three 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

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

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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)).

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.[2]

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

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[2] 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).

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.[3] Id. 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."[4] Id. at 309. The Fourth District concluded:

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[3] 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 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.

[4] The statute formerly read:

> 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 2000)(because of legislative amendment to false imprisonment statute jury instruction which charged that the confinement be for some other purpose than 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

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> 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).

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. Waits was charged with false imprisonment as a third degree felony and he was subject to a maximum prison term of five years.[5] See section 775.082(3)(d), Fla. Stat. (1997). Unlike kidnapping, there was no chance that his 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

[5] Waits'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. 21, 50). 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. (1999).

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).[6]

[6] See e.g. Smith v. State, 785 So.2d 623 (Fla. 5th DCA 2001), rev. granted, Case No. SC01-1456 (Fla. February 5, 2002); Stringer v. State, 783 So.2d 1153 (Fla. 4th DCA 2001); Taylor v.

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. (Crim.).[7] The trial court gave this standard instruction here. (Vol. I, R. 42, Vol. II, T. 221-222). In contrast, the present standard jury instruction for kidnapping contains the elements as listed in the three prong Faison test.

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).

[7] 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).

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 the Fourth District in McCutcheon which had applied Faison to strike down Waits's conviction for false imprisonment.[8] Waits, 795 So.2d at 239. This was in error.

Furthermore, the evidence presented at trial shows that Waits's conduct met the elements of false imprisonment. The record reveals that Waits attacked the victim first with a bicycle pump and then pinned her down against her will while threatening her with a knife, cutting her with that knife, hitting her, and demanding money. (Vol. I, T. 22-24, 91-94). When somebody approached from behind, Waits got up and the victim got up. Waits then again threw the victim down to the ground against her will, pinning her down and threatening her with the knife. (Vol. I, T. 45-47, 68-69, 95).

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[8] In McCutcheon, the Fourth District noted that because false imprisonment is a necessarily lesser included offense of kidnapping, proof of the elements of kidnapping constituted proof of the elements of false imprisonment. McCutcheon, 711 So.2d at 1288. The court then indicated that where both kidnapping or false imprisonment have been charged along with other crimes, the Faison test has been applied to avoid a literal interpretation of the statutes that would "'convert almost every forcible felony' into an additional crime." Id. (quoting Rohan v. State, 696 So.2d 901, 903 (Fla. 4th DCA 1997).

These facts show that Ms. Salley was "forcibly, by threat, or secretly confin[ed], abduct[ed], imprison[ed], or restrain[ed] . . . without lawful authority and against [her] will" by Waits. 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 victim's confinement was incidental to the charges of battery and aggravated assault which the district court held to be a requirement pursuant to Faison. Waits, 795 So.2d at 239.

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 Waits's conviction for false imprisonment could not stand because that false imprisonment was incidental to his commission of battery and aggravated assault. 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 Waits’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 Waits'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 Noel A. Pelella, counsel for Waits, 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.

_____
MARY G. JOLLEY
COUNSEL FOR PETITIONER