

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

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 Wait'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 Wait'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 maintains that the district court erred in applying the Faison test to Waits'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.

Waits does not address any of the arguments raised in the State's brief on the merits regarding the applicability of Faison to false imprisonment. He only claims that double jeopardy precluded his conviction for false imprisonment. Yet, Waits did not make this double jeopardy claim in his direct appeal. He contested his false imprisonment conviction on the grounds that the trial court should have granted his motion for judgment of acquittal and in doing so, he relied upon cases applying the Faison test. Thus, his double jeopardy argument has no bearing on this Court's acceptance of jurisdiction which was based upon conflict among the district courts on the applicability of the Faison test to false imprisonment.

Nevertheless, Waits argues that adoption of the State's argument would then take away a defendant's constitutional protection against double jeopardy because a defendant would be

convicted of a crime which was inconsequential or incident to some other offense. Respondent's Br. at 6. The State makes no such argument and does not disagree that an analysis of the statutory elements of a crime is determinative of a double jeopardy violation. See Gordon v. State, 780 So.2d 17, 20 (Fla. 2001)(citing Blockburger v. United States, 284 U.S. 299 (1932)). See also 775.021, Fla. Stat. (1997)(codifying Blockburger test). If a crime contains an element that the other does not, then the crimes are separate. Gordon, 780 So.2d at 20.

While Waits argues that double jeopardy applies and should be the basis for which this Court should affirm the opinion of the district court, he does not even conduct a Blockburger analysis and compare the statutory elements of false imprisonment to battery or aggravated assault. A straightforward application of the Blockburger test reveals that false imprisonment contains elements different from both battery and aggravated assault. It is an application of the same elements test alone which undermines Waits's entire argument. Because these crimes contain elements that the others do not, Waits's conviction for false imprisonment does not violate double jeopardy.¹ See Gordon, 780 So.2d at 20; Gaber v. State,

¹ See section 784.021, Fla. Stat. (1997)(aggravated assault); section 784.03, Fla. Stat (1997)(battery) and section 784.04, Fla. Stat. (1997)(aggravated battery).

684 So.2d 189, 192 (Fla. 1996). Accordingly, Waits entire argument fails.

Petitioner reiterates that kidnapping 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). Thus, the Faison 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'").

Yet, Waits relies upon language in section 787.02(3)(b) of the Florida Statutes (1997) which states that nothing prohibits the imposition of separate judgments and sentences for the first degree false imprisonment offense described in paragraph (a) and for each offense enumerated in subparagraphs (a)1-5 to argue that the legislature intended to preclude a conviction for false imprisonment committed incidental to some other crime. He claims that Faison is the workable method to apply this statutory provision. Waits's reliance upon this portion of the false imprisonment statute has no application here as it applies to first degree felony false imprisonment convictions. Moreover, this statutory language has no relation to the crux of the State's argument which is that Faison is simply not applicable because it derives from an element not contained in the false imprisonment statute. Waits is simply trying to

bootstrap this statutory language to support his unrelated double jeopardy claim.

Waits also relies upon this Court's decision in State v. Lindsey, 446 So.2d 1074 (Fla. 1984) to argue that double jeopardy precludes his false imprisonment conviction here. In Lindsey, this Court applied the Faison test to false imprisonment and found that the confinement was entirely separate from the force used to commit robbery. In doing so, this Court noted 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 in Lindsey. The elements of a crime derive from the statutory language drafted by the Legislature. The plain language of the false imprisonment statute is what is controlling and the record demonstrates that Waits committed false imprisonment as that statute is plainly read.

Moreover, as argued in the initial brief, 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 Waits 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 Waits'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 Noel A. Pelella, counsel for Waits, this _____ day of April, 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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