

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2030
DCA CASE NO. 3D08-1008, 06-16939

ROGELIO DELGADO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent(s).

**ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

BRIEF OF RESPONDENT ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief
Florida Bar No. 0230987

MAGALY RODRIGUEZ
Assistant Attorney General
Florida Bar No. 0598224
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone :(305) 377-5441
Facsimile: (305) 377-5655

TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

PETITIONER’S APPLICATION FOR
DISCRETIONARY REVIEW MUST BE DENIED
BECAUSE THE THIRD DISTRICT COURT OF
APPEAL’S DECISION DOES NOT DIRECTLY OR
EXPRESSLY CONFLICT WITH THE DECISION OF
THIS COURT IN *FAISON V. STATE*, 426 So. 2d 963
(Fla. 1983).

CONCLUSION 5

CERTIFICATE OF SERVICE 6

CERTIFICATE OF TYPEFACE COMPLIANCE 7

TABLE OF CITATIONS

CASES

PAGES

Delgado v. State,
---So. 2d--, Fla. L. Weekly D1985 (Fla. 3d DCA Sept. 30, 2009)2, 3, 4, 5,7

Faison v. State,
426 So. 2d 963 (Fla. 1983).....2, 3, 5, 6, 7, 9

Jenkins v. State,
385 So. 2d 1356 (Fla. 1980).....6

OTHER AUTHORITY

Fla. Const. Art. V. § 3 (b)(4).....5

Fla. R. App. P. 9030(a)(2)(A)(v)5

Fla. R. App. P. 9.030(a)(2)(iv).....9

INTRODUCTION

Petitioner, Rogelio Delgado, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stand in this court.

STATEMENT OF THE CASE AND FACTS

Petitioner appealed from his conviction and sentence for burglary of an occupied conveyance, petit theft, grand theft of a motor vehicle, and kidnapping. The pertinent facts as found by the district court are:

The Truck and the Child: Testimony at Trial

In May 2006, Mr. Gonzalez drove his two-door pickup truck to a furniture store. His girlfriend, Ms. Alvarado, sat in the front seat. His aunt sat in the back seat of the extended cab next to Ms. Alvarado's two year old daughter, who was asleep in a car seat. Mr. Gonzalez and his aunt started to move the furniture that was to be loaded into the bed of the truck, but they asked Ms. Alvarado to help.

When Ms. Alvarado exited the vehicle and walked into the store to help, the truck's engine was running and the keys were in the ignition. In a matter of minutes, and before Ms. Alvarado returned to the door of the furniture store, Delgado and his co-defendant commandeered the pickup truck and drove away. Surveillance video recorded the perpetrators and the theft.

The victims immediately reported the theft of the truck with the child inside it, and Ms. Alvarado reported that she had noticed two men in the area. The police found the truck within 30

minutes, about 3.6 miles away from the site of the theft. The truck was in the back of a business parking lot. The engine was still running and the doors were not locked. A detective opened the driver's side door and saw the child in back in the car seat. The child's eyes were puffy from crying, and mucus was on her face, but she was otherwise unharmed.

Importantly, the truck cab had been ransacked; the radio had been removed, and Mr. Gonzalez's tools had been taken as well. Police officers used the surveillance video to search for Delgado, and they found him that evening.

At the close of the State's case, Delgado moved for a judgment of acquittal on the kidnapping charge based on *Faison v. State*, 426 So.2d 963 (Fla.1983). The motion was denied, and Delgado was convicted of burglary of an occupied conveyance, petit theft, grand theft of a motor vehicle, and kidnapping.

Delgado v. State __ So. 2d __, Fla. L. Weekly D1985 (Fla. 3d DCA Sept. 30, 2009) (footnotes omitted).

On September 30, 2009, the Third District Court of Appeal affirmed in a written opinion. *Id.* The opinion addresses Petitioner's first issue¹ on appeal: "whether [Petitioner] committed kidnapping when he and a co-defendant jumped into a pickup truck left running by its driver and drove away with a two-year-old child asleep in the truck, seat-belted into the back seat." *Id.* at 1. In affirming the conviction, the district court found that "[e]ach of *Faison* three elements was

¹ The district court noted that Petitioner raised a second issue on appeal but that the argument concerning the second issue was meritless. *Delgado*, __ So. 2d __, Fla. L. Weekly D1985, at 1 n1.

satisfied. *Id.* at 2. After noting the definition of kidnapping and the *Faison*'s test, the district court stated that in this case, it was:

reasonable to infer from the evidence that Delgado became aware that the child was confined in the truck in the course of removing the radio, taking the owner's tools, and ransacking the interior of the vehicle in an obvious search for other valuables (if not at the time Delgado jumped into the front seat).

Delgado, _ So. 3d _ Fla. L. Weekly D1985 at 2.

The district court also concluded that the child's confinement in this case "continued through the theft of contents within the vehicle and even after Petitioner's abandonment of the unlocked, still-idling vehicle." *Id.* This continued confinement of the child, the district reasoned, "was essential to [Petitioner]'s attempt to avoid apprehension for the theft of the vehicle and its contents." *Id.* Thus, the district court concluded that "the child was not slight, inconsequential, and "merely incidental" to the theft of the truck and contents" because once Petitioner drove away with the child, "he moved from the realm of a crime against property to that of a crime against persons." *Id.*

The district court further found that *Faison*'s second and third prongs were satisfied because "[k]idnapping a child is not inherent in the nature of the theft of a vehicle and the property within the vehicle, and the confinement of the child had significance independent of those crimes;" and that "the continuation of that

confinement substantially lessened [Petitioner]’s risk of detection and apprehension.” *Delgado*, __ So. 3d __Fla. L. Weekly D1985 at 3. Petitioner now seeks discretionary review in this Court.

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District Court’s opinion does not expressly or directly or conflict with this Court’s decision in *Faison*. Consequently, conflict jurisdiction does not exist for the exercise of this Court’s discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner’s petition to review the decision of the district court.

ARGUMENT

PETITIONER’S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH THIS COURT’S DECISION IN *FAISON V. STATE*, 426 So. 2d 963 (FLA. 1983).

Petitioner contends that the Third District Court of Appeal’s Opinion in the instant case, *Delgado v. State*, __ So. 2d __, Fla. L. Weekly D1985 (Fla. 3d DCA Sept. 30, 2009) directly and expressly conflict with this Court’s decision in *Faison*

v. State, 426 So. 2d 963 (Fla. 1983). Petitioner specifically alleges conflict with the *Faison* decision for two reasons:

First, the child's confinement and movement were inseparable from the theft of the truck and were incidental to the taking thus failing to meet the first prong of the *Faison* test. Second, the fact that a child was in the backseat of the truck did not facilitate the commission of the auto theft, thus failing to satisfy the third prong of *Faison*.

(See Petitioner's Jurisdictional Brief at 3).

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. For example, this Court may "review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." Fla. Const. Art. V, § 3(b)(4); *See also*, Fla. R. App. P. 9.030(a)(2)(A)(v). The determination of whether an issue is one of great public importance is within the discretion of the district court.

Furthermore, Article V, § 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), provide that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. The rationale for limiting this Court's jurisdiction is the

recognition that district courts “are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.” *Jenkins v. State*, 385 So. 2d 1356, 1358 (Fla. 1980) (pointing that it is conflict of decisions, not of opinion or reason that provides Florida Court jurisdiction).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Petitioner’s claim, the decision below is not in express or direct conflict with this Court’s decision in *Faison*. In *Faison*, this Court adopted a three-prong test to determine whether the movement or confinement of a victim during the commission of another felony is sufficient to support a conviction for kidnapping. According to *Faison*, for a kidnapping conviction to stand, the resulting movement or confinement (1) must not be slight, inconsequential, and merely incidental to the other offense; (2) must not be of the kind inherent in the nature of the other offense; and (3) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection. *Id.* at 965. Each prong of the *Faison* test must be met before the kidnapping charge is sufficiently supported. *Id.*

Here, the Third District expressly noted the *Faison* three-part test and applied the test to the facts of the case. *Delgado*, _ So. 3d _Fla. L. Weekly D1985 at 2. Applying the test, the Third District concluded that the each of *Faison*'s prongs was satisfied in the instant case. *Id.*

First, the district court found that “[t]he confinement of the child was not slight, inconsequential, and merely incidental to the theft of the truck and contents” because by driving away “with someone’s child [Petitioner] moved from the realm of a crime against property to that of a crime against person.” Prior to reaching this conclusion, the district court stated:

In this case, it is reasonable to infer from the evidence that Delgado became aware that the child was confined in the truck in the course of removing the radio, taking the owner's tools, and ransacking the interior of the vehicle in an obvious search for other valuables (if not at the time Delgado jumped into the front seat).

Delgado, _ So. 3d _Fla. L. Weekly D1985 at 2.

The district court also stated that the child’s confinement “continued through the theft of contents within the vehicle and even after [Petitioner]’s abandonment of the unlocked, still-idling vehicle.” *Id.* The district court further noted that the child’s continued confinement “was essential to Delgado’s attempt to avoid apprehension for the theft of the vehicle and its contents.” *Id.*

Second, the district court found that *Faison's* second and third prongs were satisfied:

Kidnapping a child is not inherent in the nature of the theft of a vehicle and the property within the vehicle, and the confinement of the child had significance independent of those crimes. As already noted, the continuation of that confinement substantially lessened Delgado's risk of detection and apprehension.

Id. at 3.

By arguing the district court's opinion directly conflicts with *Faison*, Petitioner attempts to relitigate the factual and legal issues he argued below - that he did not caused the child's confinement because he was unaware of the child being in the back seat and that the child's movement did not facilitate the theft of the truck in the instant proceeding. Petitioner first argues that his conviction cannot be predicated on a confinement theory because he did not cause the child's confinement but at best prolonged it. (Petitioner's Jurisdictional Brief at 6). Petitioner further argues that the movement of the vehicle along with its contents was incidental to the auto theft. Lastly, Petitioner argues that the fact that the child was inside the vehicle did not facilitate the theft of the vehicle. *Id.* at 6-7. Petitioner alleges conflict based on the above arguments essentially reflecting disagreement with the outcome of his case. By claiming conflict based on those arguments, Petitioner seeks some general level of review from this Court. This

disagreement with the outcome of his case cannot form the basis of this Court's jurisdiction. Moreover, the fact of this case and *Faison* are not the same and thus cannot be compared and cannot provide basis for any conflict.

Petitioner also seeks the jurisdiction of this Court on the basis that clarification on the application of the *Faison* test to "circumstances similar" to his case is needed. (Petitioner's Jurisdictional Brief at 7) As the Third District correctly stated the applicable test of review as enunciated by this Court in *Faison* and applied that test to the facts and legal conclusion of the trial court, there is no express or direct conflict "on the same question of law." Fla. R. App. P. 9.030(a)(2)(iv), Thus, there is no conflict where the Third District applied the same and correct legal test to different facts. Accordingly, this Court should not exercise jurisdiction. *Id.*

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully Submitted,

BILL McCOLLUM
Attorney General

Richard L. Polin
RICHARD L. POLIN
Bureau Chief

Magaly Rodriguez
MAGALY RODRIGUEZ
Assistant Attorney General

Florida Bar No. 0230987

Florida Bar Number 0598224
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone: (305) 377-5441
Facsimile: (305)377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed to Manuel Alvarez, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, this 19 day of November, 2009.

Magaly Rodriguez
MAGALY RODRIGUEZ
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

Magaly Rodriguez
MAGALY RODRIGUEZ
Assistant Attorney General