

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2030

ROGELIO DELGADO,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Delgado v. State*, ___ So. 2d ___, Fla. L. Weekly D1985 (3d DCA Sept. 30, 2009), on the grounds of direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, paginated separately and identified as "A" followed by the page number.

STATEMENT OF THE CASE AND FACTS

On May 24, 2006, Juan Gonzalez drove his pickup truck to a furniture store in Hialeah along with his girlfriend, Luisa Alvarado, and his aunt (T. 183-84). The two-door truck had a large extended cab. Luisa sat in the back seat with her two year old daughter, M (T. 209). They parked about ten yards from the store. Juan and the aunt tried to load some furniture into the truck bed, but needed assistance. Luisa exited the vehicle, which had the keys in the ignition with the engine running, in order to help. She left M. in the back sleeping in a child safety seat and walked into the store for about five minutes (T. 194, 199-211). At some point she realized the truck was missing, but did not see who took it (T. 200, 210-11).

The police located the parked truck thirty (30) minutes later with the engine running and M. in the back seat (T. 248-54). The officer said that due to the dark

tinting on the windows he was unable to see the child when he looked into the truck from the outside (T. 257). Juan Gonzalez testified that the radio was missing as well as some tools (T. 191-92).

Mr. Delgado and the codefendant were later arrested and identified based on a surveillance video of the parking lot from which the truck was taken. When questioned by police, Mr. Delgado denied his involvement in the crime (T. 231). At the close of the State's case in chief, the defense attorney moved for a judgment of acquittal on the kidnapping charge on the grounds that the evidence did not satisfy the three-pronged *Faison* test (T. 332-44).¹ The court denied the first motion for a judgment of acquittal and reserved on the second motion (T. 344).

The jury found the defendant guilty of burglary of an occupied conveyance (count I), grand theft (count II), which was reduced by the court to petit theft, grand theft of a motor vehicle (count III), and kidnapping (count IV) (R. 115-16). Mr. Delgado was sentenced to life imprisonment on the kidnapping conviction (R. 199-202).

On appeal, the Third District Court of Appeal found that the evidence demonstrated circumstantially that Mr. Delgado "became aware that the child was confined in the truck in the course of removing the radio, taking the owner's

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

tools, and ransacking the interior of the truck. . .” Slip op. at 5. The court based its rationale on the fact that the child’s confinement continued after the defendant had become aware of the child’s presence in the truck and during the theft of certain items from inside the passenger compartment. The court then asserted that the confinement was not inconsequential, or incidental to the theft and that it facilitated the commission of the underlying offenses. *Id.* at 5-7.

The appellate court’s decision is in conflict with *Faison v. State*, 426 So. 2d 963 on two grounds. 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*.

A notice invoking this Court’s discretionary jurisdiction based on conflict was timely filed.

SUMMARY OF THE ARGUMENT

In this case the evidence failed to meet the *Faison* test. First, the defendant did not cause the child's confinement to the backseat of the truck since she was already in the backseat when the defendant entered the truck to commit a theft. The defendant's actions at most prolonged the child's pre-existing confinement to the vehicle by thirty (30) minutes. The child's confinement, therefore, cannot form the basis for the kidnapping conviction. Secondly, the child's movement was the result of the auto theft and was thus incidental to the other crime. Lastly, the child's presence in the truck did not facilitate the theft, or lessen the risk of detection. As such, the *Faison* test was not met and the lower court should have reversed the kidnapping conviction.

ARGUMENT

**THE DECISION OF THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT, IN THE PRESENT CASE DIRECTLY
CONFLICTS WITH THE DECISION OF THIS COURT IN
FAISON v. STATE, 426 So. 2d 963 (Fla. 1983).**

The evidence of the victim's movement and confinement required to establish kidnapping must satisfy the following three criteria:

- “(a) Must not be slight, inconsequential and merely incidental to the other crime;
- (b) Must not be of the kind inherent in the nature of the other crime; and
- (c) 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.”

Diez v. State, 970 So. 2d 931, 932-33 (Fla. 4th DCA 2008); *see also*, *Faison v. State*, 426 So. 2d 963 (Fla. 1983).

Kidnapping is a specific intent crime which means that the perpetrator must intend to move and/or confine the victim in order to accomplish (c), above. *See Viglione v. State*, 906 So. 2d 1158 (Fla. 5th DCA 2005).

The non-incidental confinement criterion of *Faison* requires the defendant to confine the victim in such a manner that the confinement is beyond the scope of the other felony. Otherwise, the confinement is deemed inherent to the other

felony. In *Sanders v. State*, 905 So. 2d 271 (Fla. 2d DCA 2005), the defendant imprisoned the victim in her apartment for three hours before sexually assaulting her. The Second District held that although the duration of the confinement could be considered a factor in determining whether it was inconsequential, the confinement of the victim in her apartment was incidental to the sexual battery. *Sanders*, 905 So. 2d at 274. Since the victim was already in her apartment when the defendant broke in, her inability to leave the apartment was integral to the sexual battery.

In the case *sub judice*, the defendant did not cause the child's confinement. Like *Sanders*, when the defendant entered the vehicle the child was already inside, "confined" to the backseat. The fact that the truck was moved to another location prolonged the child's pre-existing confinement by thirty (30) minutes, but it was not the cause of the confinement. Since the defendant did not cause the child's confinement, but at best prolonged it half an hour, the kidnapping conviction must not be predicated on a confinement theory.

The movement of the child along with the truck in this case fails to satisfy criteria (a) and (c). The movement of the vehicle along with its contents was incidental to the crime of auto theft. Moreover, the fact that the child was in the

backseat did not facilitate the theft of the truck, or lessen the possibility of detection, thus failing to meet (c).

It is respectfully submitted that this Court should accept jurisdiction in this case to resolve the conflict generated by the Third District's decision in this case and to clarify the application of the *Faison* test under circumstances similar to this case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 3rd day of November, 2009.

BY: _____
MANUEL ALVAREZ, ESQ.

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY: _____
MANUEL ALVAREZ, ESQ.