

IN THE SUPREME COURT OF FLORIDA

FSC CASE NO. 09-2177

RICARDO JOSE DAVILA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1961

MARTI ROTHENBERG
Assistant Public Defender
Florida Bar No. 320285

Counsel for Petitioner

TABLE OF CONTENTS

INTRODUCTION1

STATEMENT OF THE CASE AND FACTS1

SUMMARY OF ARGUMENT3

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CORRECTLY CERTIFIED DIRECT CONFLICT WITH THE DECISION OF THE SECOND DISTRICT IN MUNIZ v. STATE, 764 So.2d 729 (FLA. 2d DCA 2000), ON THE ISSUE WHETHER A PARENT WHO IS NOT DIVESTED OF CUSTODY CAN BE CONVICTED OF KIDNAPPING HIS OWN CHILD UNDER THE AGE OF 13.....5

CONCLUSION8

CERTIFICATE OF FONT AND SERVICE.....9

TABLE OF AUTHORITIES

CASES	PAGE
<i>Johnson v. State</i> , 637 So. 2d 3 (Fla. 3d DCA 1994)	2
<i>Lafleur v. State</i> , 661 So. 2d 346 (Fla. 3d DCA 1995)	2, 6
<i>Muniz v. State</i> , 764 So. 2d 729 (Fla. 2d DCA 2000)	2, 3, 4, 5, 6, 9
OTHER AUTHORITIES	
FLORIDA RULES OF CRIMINAL PROCEDURE 3.850.....	1
FLORIDA RULES OF APPELLATE PROCEDURE 9.030(a)(2)(A)(vi)	1,4, 8
FLORIDA STATUTES 787.01.....	3, 5

INTRODUCTION

This is a petition for discretionary review by the petitioner/defendant Ricardo Jose Davila based on certified direct conflict jurisdiction, Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, from the decision of the Third District Court of Appeal issued on October 21, 2009, with motion for rehearing denied on February 10, 2010. Citations are to the Appendix containing the decision attached hereto.

STATEMENT OF THE CASE AND FACTS

The facts relevant to a determination of whether discretionary review is warranted are set forth in the decision of the Third District as follows:

The decision of the Third District involved a pro se appeal by the petitioner of an order denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The Third District affirmed in part and reversed in part. (A: 2-5)

The petitioner was convicted of thirty counts of aggravated child abuse, one count of child neglect, one count of child abuse, and three counts of kidnapping. (A: 2) As one of his arguments in the postconviction motion, the petitioner argued that the three counts of kidnapping must be vacated because, as a matter of law, a parent cannot be convicted of kidnapping his own child. (A: 2-3) In its decision, the Third District noted that is the general rule, citing Johnson v. State, 637 So.2d 3, 4 (Fla. 3d DCA 1994).

The Third District observed that in this case, the petitioner was the father of

the child at issue, there was no order which had deprived the petitioner of his custody rights, the child was under the age of 13 and was the victim of the kidnapping charges. (A: 3-4)

The Third District recognized an exception to this general rule, however, where the parent “does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose, which is specifically forbidden by the kidnapping statute itself,” citing to its earlier case of Lafleur v. State, 661 So.2d 346, 349 (Fla. 3d DCA 1995). (A: 3) The Third District acknowledged that the Second District disagreed with it on this issue in the case of Muniz v. State, 764 So.2d 729, 731 (Fla. 2d DCA 2000), and acknowledged that if this case were pending in the Second District, then the petitioner would be entitled to relief on the kidnapping issue. (A: 3) The

Third District then followed Lafleur, denied petitioner relief on the issue, and certified direct conflict with Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000): “Accordingly we follow Lafleur and certify direct conflict with Muniz.”

(A: 3, 5)

By separate order on October 21, 2009, the Third District also appointed the Office of the Public Defender to represent petitioner for purposes of the certified conflict. (A: 6) The public defender filed a premature notice of discretionary jurisdiction, premature because petitioner’s pro se motion for an extension of time to file his pro se motion for rehearing was still pending in the Third District. On December 10, 2009, this Court stayed the discretionary review proceedings until the disposition of the motion

for rehearing. Petitioner's pro se motion for rehearing was denied on February 10, 2010.

SUMMARY OF ARGUMENT

The decision of the Third District certified direct conflict with the decision of the Second District in Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), on the issue whether the parent of a child under 13 years old, with no order depriving the parent of his custody right as a parent, can be convicted of kidnapping his own child under the Florida kidnapping statute, 787.01, Florida Statutes (2000).

In the present case, the Third District found that the petitioner, who was the father of the child who was under 13 years old, and who was not

divested of his custody rights by any court order, was properly convicted of kidnapping. The court noted the general rule that a parent cannot be convicted of kidnapping his own child, but relied on its own exception that such a parent can be convicted of kidnapping where he takes the child for an ulterior and unlawful purpose specifically forbidden by the kidnapping statute.

In Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), the defendant, as the petitioner here, was the child's legal father and thus a parent pursuant to the kidnapping statute, and there was no order depriving him of his custody rights. The Second District held that, although the defendant held the child hostage and could be convicted of child abuse offenses, he could not be convicted of the offense of kidnapping his own child.

Thus, as the Third District correctly acknowledged, if the petitioner here was in the Second District, he would be entitled to relief on the kidnapping issue. The facts in the present case, as set forth in the decision, are identical to the facts in Muniz. The Third District's decision in this case directly conflicts with Muniz and the Third District correctly certified direct conflict pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CORRECTLY CERTIFIED DIRECT CONFLICT WITH THE DECISION OF THE SECOND DISTRICT IN MUNIZ v. STATE, 764 So.2d 729 (FLA. 2d DCA 2000), ON THE ISSUE WHETHER A PARENT WHO IS NOT DIVESTED OF CUSTODY CAN BE CONVICTED OF KIDNAPPING HIS OWN CHILD UNDER THE AGE OF 13.

The decision of the Third District certified direct conflict with the decision of the Second District in Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), on the issue whether the parent of a child, where there is no order depriving the parent of his custody rights, can be convicted of kidnapping his own child under 13 years old under the Florida kidnapping statute, 787.01, Florida Statutes (2000).

Section 787.01(1)(a), Florida Statutes (2000), provides “The term ‘kidnapping’ means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will . . . , and subsection (b) further defines, with regard to children, that “[c]onfinement of a child under the age of 13 is against her or his will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian.”

In the Third District’s decision, the petitioner was convicted of thirty counts of aggravated child abuse, one count of child neglect, one count of child abuse, and three counts of kidnapping. The petitioner is the father of the child at issue and there is no order which had deprived the petitioner of his custody rights over the child. The child was under the age of 13 and was

the victim of the kidnapping. The court acknowledged that, as a general rule, as a matter of law, a parent cannot be convicted of kidnapping his own child. The court recognized an exception, however, to this general rule where the parent “does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself,” citing its earlier case of Lafleur v. State, 661 So.2d 346, 349 (Fla. 3d DCA 1995). The Third District thus found that a parent with custody rights over his child could be convicted of kidnapping because he took the child “for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute.”¹

¹ In Lafleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995), the defendant was the father of the child, who was under 13 years old, but was subject to a domestic violence order which precluded him from contact with the mother and gave the mother custody of the boy with visitation rights only

when “agreed by the parties.” The defendant entered the mother’s family home and took the baby hostage with a handgun, eventually releasing the baby after negotiations with the police. The Third District first held that the defendant was not entitled to custody of his son pursuant to the domestic violence order. Second, the court held that the defendant did not simply exercise his right to custody of the child, but took the child for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself, the intent to hold him as a shield or hostage, and thus, the defendant could be found guilty of kidnapping his own child.

In Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), the defendant, as the petitioner here, was the child's legal father and thus a "parent" pursuant to the kidnapping statute; there was no order depriving him of his custody rights. He was charged with kidnapping his child, who was under the age of 13, and holding him at razor-point, refusing to give him up to the police for several hours. The Second District held that, although the defendant's behavior was inappropriate and he could have been charged with assault on the child, child abuse, or contributing to the dependency of a minor, he could not be convicted of the offense of kidnapping his own child, given the elements of the kidnapping statute. The Second District recognized that the Lafleur court emphasized the father's ulterior and unlawful purpose in taking the child, but disagreed with Lafleur and held that not only did the

father's conduct in Lafleur violate an existing court order, which was not the case in Muniz, but the kidnapping statute simply does not permit the state to charge a parent with **kidnapping** of his own child when the parent confines the child for an unlawful purpose.

Thus, as the Third District correctly acknowledged, if the petitioner here was in the Second District, he would be entitled to relief on the kidnapping issue. The facts in the present case, as set forth in the decision, are identical to the facts in Muniz. The petitioner was the father of the child, the child was under 13 years old, there was no order divesting him of custody, he took the child for an unlawful purpose, and was charged with and convicted of kidnapping his own child. The Third District's decision in this case directly conflicts with Muniz and the Third District correctly certified direct

conflict pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure.

CONCLUSION

Based upon the foregoing, the petitioner requests that this Court exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in this case on certified direct conflict, Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure.

Respectfully submitted,

CARLOS J. MARTINEZ

Public Defender

Eleventh Judicial Circuit of Florida

1320 NW 14 Street

Miami, Florida 33125

(305) 545-1961

By: _____

MARTI ROTHENBERG

Assistant Public Defender

Florida Bar No: 320285

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that this brief was prepared using Times New Roman 14 point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

I hereby certify that a copy of the foregoing was mailed to Assistant Attorney General Ansley Peacock, Office of the Attorney General, Criminal Division, 444 Brickell Ave., #650, Miami, Florida 33131, this ____ day of March, 2010.

By: _____

—

MARTI ROTHENBERG
Assistant Public Defender
Florida Bar No: 320285