

DA 5-26-88

THE SUPREME COURT OF FLORIDA

CASE NO. 71,416

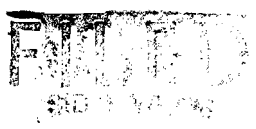
THE STATE OF FLORIDA,

Petitioner,

-vs-

RUSSELL SANBORN,

Respondent.



MAY 10 1988

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BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CITATIONS

- Brown v. State
206 So 2d 377 (Fla. 1968)
- Cabe v. State
408 So 2d 694 (Fla. 1st DCA 1982)
- Keith v. State
163 So 136 (Fla. 1935)
- Mills v. State
407 So 2d 218 (Fla. 3d DCA 1981)
- Wagner v. State
356 So 2d 867 (Fla. 4th DCA 1978)
- Skinner v. State
468 So 2d 270 (Fla. 2d DCA 1985)
- State v. Abreau
363 So 2d 1063 (Fla. 1978)
- State v. Brown
466 So 2d 1223 (Fla. 2d DCA 1985)
- State v. Oxx
417 So 2d 287 (Fla. 5th DCA 1982)
- State v. Wimberly
498 So 2d 929 (Fla. 1986)
- State v. Wilson
276 So 2d 45 (Fla. 1973)

INTRODUCTION

The Petitioner was the prosecution, State of Florida, in the trial court and the Appellee in the District Court of Appeals. The Respondent was the defendant in the trial court and the Appellant in the District Court of Appeals. The parties will be referred to as they stood in the trial court. The Record on Appeal will be referred to by the letter "R". The trial transcripts will be referred to by the letter "T". All emphasis is added unless otherwise indicated. The letter "A" will be used to refer to the Appendix to Petitioner's brief.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the state's Statement of the Case and Facts as substantially true and correct with the following exception:

The Petitioner argues that the District Court found that false imprisonment "is a necessarily lesser included offense of kidnapping" (p.2 of Petitioner's brief). That was not the language of the opinion to be renewed in this case (A.2). The District Court merely stated "We agree that the court's omission constitutes reversible error". (A.2).

POINT INVOLVED

The Respondent would respectfully rephrase Petitioner's
Point as follows:

WHETHER FALSE IMPRISONMENT
WAS A LESSER INCLUDED
OFFENSE OF KIDNAPPING
UNDER THE FACTS OF THIS CASE

SUMMARY OF THE ARGUMENT

Under the facts of this case, which are set forth in the District Court opinion (A.1), the trial court did err, as found by the District Court, in failing to give a Jury Instruction on False Imprisonment as a lesser included offense of Kidnapping.

ARGUMENT

FALSE IMPRISONMENT WAS
A LESSER INCLUDED OFFENSE
OF KIDNAPPING UNDER THE
FACTS OF THIS CASE

The Respondent would first submit that there is no direct conflict in District Court opinions so as to cause this Court to accept jurisdiction of this cause.

The Petitioner has sought the jurisdiction of this Court on the basis that the District Court erred in finding that false imprisonment was a necessarily included offense of the crime of kidnapping. The instant opinion of the District Court of Appeals makes no such finding (A. 1-2). The ruling of the District Court (A.2) is only that, in this case, the trial court erred in failing to instruct the jury as to the crime of false imprisonment. In the absence of a direct ruling by the District Court that, in this case, false imprisonment was a necessarily lesser included offense of the crime of kidnapping, the Respondent submits that there is not such clear and direct conflict as to invoke the jurisdiction of this Honorable Court.

Also, the argument of the Petitioner appears to be that the District Court opinion held that false imprisonment is a lesser included offense of kidnapping on which a jury instruction must always be given (category I). That, also, was not the ruling of the District Court (A. 1-2). The ruling of the District Court is susceptible to the argument that, on the facts of the case (A.1), the accusatory pleading and evidence presented would have supported

a finding of guilt as to false imprisonment. Therefore, for that reason, a jury instruction as to false imprisonment was required to have been given. See, State v. Wilson, 276 So 2d 45 (Fla. 1973); Wagner v. State, 356 So 2d 867 (Fla. 4th DCA 1978). That reasoning, a fair interpretation from the District Court's opinion (A. 1-2) would preclude the finding of a clear and direct conflict between the instant District Court opinion and the opinions of other District Courts on the same issues and facts such as is required to invoke the jurisdiction of this Honorable Court.

There is no doubt that False Imprisonment is listed as a necessarily lesser included offense of the crime of Kidnapping in the Florida Standard Criminal Jury Instructions. Additionally, there is no question that, so listed, those instructions are required to be given. See, Brown v. State, 206 So 2d 377 (Fla. 1968); State v. Abreau, 363 So 2d 1063 (Fla. 1978); State v. Wimberly, 498 So 2d 929 (Fla. 1986). The District Court, therefore, in reviewing the proceedings in the trial court, merely applied the law as per the Standard Jury Instructions and case decisions. See, Cabe v. State, 408 So 2d 694 (Fla. 1st DCA 1982). Just as the courts have, throughout the years, advised defendants and defense counsel to "take their case to the legislature" with reference to perceived inequities in legislation, so, too should the Petitioner seek to air its concerns on the instant issue before the Standard Jury Instructions Committee, rather than before this Honorable Court.

At common law, kidnapping was treated as an aggravated species of false imprisonment. See, Keith v. State, 163 So 136 (Fla. 1935).

Both statutes begin the same by proscribing the same conduct. The only difference between the two is the ending of the statutes regarding intent. Kidnapping requires a specific intent to do one of four acts. False imprisonment proscribes the same actions "with any purpose other than those referred to in §787.01" (Kidnapping).

Courts that have examined the two statutes have conclude that kidnapping requires specific intent while false imprisonment requires a general intent. See, Skinner v. State, 468 So 2d 270 (Fla. 2d DCA 1985); State v. Brown, 466 So 2d 1223 (Fla. 2d DCA 1985); Mills v. State, 407 So 2d 218 (Fla. 3d DCA 1981). Indeed, if false imprisonment required a specific intent, the validity of some of the charging documents used by Petitioner would be in question. See, State v. Brown, supra. The Respondent submits that the general intent of false imprisonment is included within the specific intent of kidnapping. See, State v. Oxx, 417 So 2d 287 (Fla. 5th DCA 1982). In the case of Brown v. State, 206 So 2d 377 (Fla. 1968) this Court considered Necessarily Included Offenses and stated:

This simply means that the lesser offense must be an essential aspect of the major offense. In other words, the burden of proof of the major crime cannot be discharged, without proving the lesser crime as an essential link in the chain of evidence.

(p.381-382).


A comparison of §787.01 (1) (a) and §787.02 (1) (a) finds that they are identical except for the question of intent. The Respondent submits that the general intent of §787.01 (1) (a) is included in the specific intent of § 787.01 (1) (a). The Respondent submits that

that pursuant to the above decisions and authorities, false imprisonment is a necessarily included offense of the crime of kidnapping, should this Honorable Court reach and decide that issue.

CONCLUSION


Based on the foregoing facts, arguments and authorities, the Respondent respectfully requests this Honorable Court to divest itself of jurisdiction this Cause, or, should it choose to reach the issue proposed by Petitioner, hold that false imprisonment is a necessarily lesser included offense of kidnapping.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was furnished to Michael J. Neimand, Esquire, Asst. Attorney General, Ruth Bryan Owen Rhode Building, Florida Regional Service Center, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Fla. 33128 and to Russell Sanborn, c882546 Union Correctional Institution, P.O. Box 221, Raiford, Fla. 32083, this 9 day of May 1988.


JOHN H. LIPINSKI, ESQUIRE