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IN THE SUPREME COURT

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 65,127
	)	
ANTHONY DEAN IAFORNARO,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON MERITS

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On September 6, 1982, Anthony Iafornaro was stopped for running his car through a red light. (SR 21). The arresting officer smelled the impurities of an alcoholic beverage on Iafornaro's breath, so he decided to administer a roadside sobriety test. (SR 21) Iafornaro failed the test. (SR 21).

Iafornaro was placed under arrest (SR 21) and told to place his hands on top of the car. (SR 21) Instead of complying, the Respondent fled. The arresting officer gave chase, but lost the Respondent when he (the officer) ran into a clothesline. (SR 21) Using Respondent's license and car tag, citations were issues.

The Respondent was charged with "escape" in violation of § 944.40, Fla. Stat. (R 2) Iafornaro filed a motion to dismiss pursuant to Fla. R. Crim. P. 3.190(6) challenging his status as a "prisoner", due to the absence of actual "confinement." (R 4) The motion was treated as a "(c)(4)" motion and was granted. (R 15)

The State brought a timely appeal, which was denied on authority of Ramsey v. State, 442 So.2d 303 (Fla. 5th DCA 1983).

POINT

AN ARRESTEE IN THE LAWFUL CUSTODY OF A POLICE OFFICER MAY, IF HE FLEES, BE CONVICTED OF ESCAPE.

Anthony Iafornaro, after failing the field sobriety tests administered by officer Albert, was placed under arrest and ordered to assume the position for a pat down search. Iafornaro chose to flee instead, escaping when officer Albert ran into a clothesline.

The Respondent contends that he was not a "prisoner" despite having been arrested and was not "in custody" because he was not physically incapacitated. (Brief of Iafornaro sub judice pg. 4 and 5) The Respondent, equating "lawful custody" with "physical restraint", contends that being placed under arrest by a uniformed officer is not enough to create "lawful custody". Rather, he says, one is not "really" arrested until he is immobilized! "Words" (such as "you are under arrest") meaning nothing, Iafornaro submits he was free to go.

The trial court granted Iafornaro's motion to dismiss without stating the basis for its decision. The Fifth District, without opinion but citing Ramsey v. State, 442 So.2d 303 (Fla. 5th DCA 1983), simply affirmed the trial court.

The State submits that this proposition, that

one is not in lawful custody until incapacitated, is foolhardy, dangerous, and not a correct statement of the law. Should this theory be upheld, someone will get hurt, or killed, while running away from an arresting officer, or a police officer will get killed or injured trying to physically restrain someone who, technically, is not in "lawful custody" until he is incapacitated.

The simple fact is that Mr. Iafornaro was a prisoner as soon as he was placed under arrest, even if he was not bound or shackled. "Prisoner" is defined by statute as"

> "...any person who is under arrest in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the division as provided by law."
> § 944.02(4), Fla. Stat.

There is no requirement of shackling, handcuffing or even physical confinement in a cell in this definition.

In State v. Akers, 367 So.2d 700, 702 (Fla. 2d DCA 1979) the court said:

> "We acknowledge that prior to the amendment of these statutory provisions in 1971, only persons who were convicted and sentenced could violate the provisions of § 944.40, Fla. Stat.

> (1969). Brochu v. State, 258 So.2d 286 (Fla. 1st DCA 1972). Florida courts have interpreted the present escape statute to include confinement after arrest but prior to conviction and sentencing. Estep v. State, 318 So.2d 520 (Fla. 1st DCA 1975). Such confinement is not limited to confinement in jail. Johnson v. State, 357 So. 2d 203 (Fla. 1st DCA 1978). For conviction under the escape statute, the State need show only (1) the right to legal custody and (2) a conscious and intenional act of the defendant in leaving the established area of such custody. Watford v. State, 353 So.2d 1263 (Fla. 1st DCA 1978)"

Akers, of course, fled the scene of his arrest (after being handcuffed) when a third person interfered. Akers conceded "lawful custody", choosing to contest the issue of whether he was in the process of being "transported" pursuant to § 944.40, Fla. Stat.. Addressing that issue, the court said:

> "We do not believe that the legislature perceived that the phrase found in § 944.40 "being transported to or from a place of confinement" should be interpreted as meaning that a defendant must be in a penal institution at the time of escape. To do so might result in allowing a "prisoner" to simply walk away after he was lawfully arrested and in lawful custody without penalty." id

That prophetic statement neatly summarizes the

case at bar. Iafornaro was under arrest and in lawful custody even though he was not bound, shackled or hog-tied. He had no right to run away after being arrested. That, however, was the Respondent's contention sub judice:

> "The testimony received under oath showed conclusively that the Appellee had never been placed in lawful custody. To the contrary, when Appellee was told "to put his hands on the car for a pat down, the Defendant took three (3) steps backwards and fled between two houses." (R 21) Since the Appellee was "free" enough to be able to walk away from Officer Albert and then run between two houses, (R 21) the sworn testimony relied upon by the State to support the charge of escape is inconsistent with the concept of being in lawful custody." (Iafornaro Brief pg. 4).

The Motion is meritless. There is no requirement of physical incapacitation as an element of the purely legal concept of "lawful custody".

As recently as last year the United States Supreme Court distinguished the concepts of actual physical restraint and lawful custody in a Fourth Amendment case, Florida v. Royer, ___ U.S. ___, 103 S.Ct. 1319 (1983). There, the court noted the existence of an unlawful seizure of Royer's person, by confining him in a room which Royer could not (in a practical sense)

leave although legally he could have walked out.

In our case, Iafornaro was legally not free to go, but from a practical standpoint he was able to flee. For both Iafornaro and Royer, however, the key to the case is the legality of the detention, not the physical "completeness" of it! Royer was trapped. That did not make his seizure legal or departure illegal. Iafornaro was under arrest but not trapped. That did not authorize flight.

In State v. Williams, 444 So.2d 13 (Fla. 1984) this Honorable Court reversed a decision of the Fifth District also relating to § 944.40, Fla. Stat. In that case, the District Court refused to acknowledge that Williams was a "prisoner" as defined by the statute simply because the state (after proving Williams lived in the jail, was carried on the logbooks as a prisoner, was booked and wore prison garb) failed to prove the "legality" of his detention by demonstrating the circumstances of his confinement. The Fifth there, as here, refused to indulge in a presumption of lawful confinement.

This court noted that the escape statute does not contain the adjective "lawful" before the word custody, stating that 'unlawfulness' is an affirmative defense which must be raised to rebut the presumption

of a valid dentention. Since, as this Court noted, there must be a rational nexus between the fact proved and the fact alleged, see Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943), it cannot be said that the lawfulness of a prisoner's custody is satisfied by proof of shackling or handcuffing.

Having established that the Respondent was under lawful arrest and was in lawful custody, the question arises as to the "moment" § 944.40, Fla. Stat. applies.

The State submits that the process of transporting a prisoner to a place of lawful confinement begins with his arrest. In his well written "concurrence" (due only to a "binding" decision in Ramsey) Chief Judge Orfinger, adopting Akers as a better statement of the controlling law, stated:

> "In disagreeing with Akers because there had been no showing that the prisoner was being "transported" to a place of confinement, Ramsey does not address the question of when and by what means 'transportation begins. Does transportation of a prisoner necessarily begin only when he is handcuffed? Or does it begin only when he is placed in the patrol car? Must the patrol car begin to move before transportation begins?"

Chief Judge Orfinger concluded correctly that:

> "Unless the facts clearly show that the officer had no inten-

> tion of taking him from the scene, "transportation to a place of confinement" begins at the time the suspect is placed under arrest, because that is the very first step in the process." (App. 6)

Ramsey, of course, is before this Honorable Court and provides in part the basis for review in this case. The chief factual distinction between Ramsey and our case is the presence of a pair of handcuffs. Both men fled the scene of their arrest.

As noted in Ramsey, the "escape" statute, while to some extent subject to "strict construction", is not to be so "strictly" construed that legislative intent becomes lost in the process, see e.g. United States v. Standard Oil Co., 384 U.S. 224 (1966)

The State would again compare this situation to the interpretation of § 843.12, Fla. Stat. (1981) ("aiding escape") used in Dupree v. State, 416 So.2d 1228 (Fla. 1st DCA 1982). In that case, an officer (with a valid warrant) went to the defendant's home to arrest a visitor in that house. The arrest was announced, but Dupree interfered, enabling his guest to flee. Dupree's conviction was affirmed even though his guest was merely an "arrestee" (such as Iafornaro).

Under Mr. Iafornaro's theory of "catch me if you can" justice, Dupree could not have been convicted

of aiding an "escape" because his guest was "free enough" to run away.

Again, there is no rational nexus between incapacitation and lawfulness. Dupree's guest "escaped, so did Iafornaro.

We simply cannot create a system where arrestees are free to "take off" any time they are not shackled, cuffed and sitting in a patrol car. Chief Judge Orfinger's reasoning is correct, and the order dismissing the charge against Mr. Iafornaro should be reversed.

CONCLUSION

It was error to rule that an arrestee is immune from any prosecution for "escape" if he commits his "get-away" prior to being shackled. A lawful arrest, once announced, creates lawful custody and commences the process of transportation to a place of confinement unless there is actual proof that the arrestee was not going to be taken to jail, on the record, to rebut the presumption.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on Merits has been furnished, by mail, to Russell H. Cullen, Jr., Esquire, Counsel for Respondent, at P.O. Box 114, Altamonte Springs, Florida 32715-1114 this 16th day of July, 1984.

MARK C. MENSER
Of Counsel