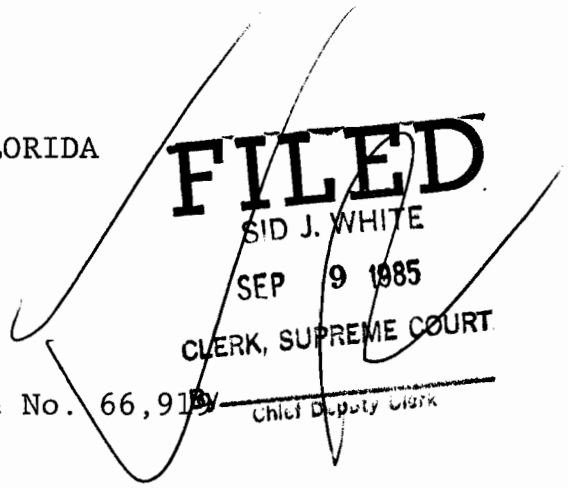
IN THE SUPREME COURT OF FLORIDA



RAYMOND EUGENE JOHNSON, :

Petitioner, :

vs. : Case No. 66,915

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOSEPH EUGENE PERRIN
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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner RAYMOND EUGENE JOHNSON was charged by information with escape, a violation of Section 944.40, Florida Statutes (1983).[1/] The information was filed May 11, 1984, in the Circuit Court, Polk County. (R3-5) Petitioner was convicted by a jury of escape August 6, 1984, Honorable Oliver L. Green, Circuit Judge, presiding. (R70-72) On September 5, 1984, Petitioner was sentenced to 18 months in prison. (R78-81)

Petitioner appealed to the Second District Court of Appeal on September 12, 1984. (R83) On March 8, 1985, the Court of Appeal affirmed on the authority of State v. Akers, 367 So.2d 700 (Fla.2d DCA 1979). No formal opinion was entered. Johnson v. State, No. 84-2037 (Fla.2d DCA March 8, 1985). Upon the Petitioner's Motion for Rehearing and/or Clarification of Conflict, the Court of Appeal stated, "In affirming by adhering to the authority of State v. Akers, 367 So.2d 700 (Fla.2d DCA 1979), we continue to be in conflict with Ramsey v. State, 442 So.2d 303 (Fla.5th DCA 1983)." Johnson v. State, No. 84-2037 (Fla.2d DCA April 12, 1985).

Petitioner filed notice of seeking discretionary review by the Florida Supreme Court April 12, 1985. The Supreme Court accepted jurisdiction on August 14, 1985.

[1/] Petitioner was also charged with and convicted of trespass and resisting arrest, but he is not appealing these convictions.

STATEMENT OF THE FACTS

Polk County Sheriff's Deputy Ray Allen responded to the Super Star Service Station, Highway 27 North, Lake Wales, on the evening of April 23, 1984. (R15) Sherita Hill, the clerk, had reported a shoplifting. (R15) Allen told Petitioner, the apparent suspect, to pay for the item in question (unspecified). (R16) Hill told Petitioner to leave the store and not to return, whereupon both Petitioner and Deputy Allen departed. (R16-17) Appellant resided behind the store. (R17)

Five minutes later, Allen was again dispatched to the store and found Petitioner throwing bottles. (R17) Petitioner was also calling the clerk, Ms. Hill, obscene names. (R18) Eventually Allen attempted to arrest the Petitioner for trespass and disorderly conduct. (R18) Appellant punched Deputy Allen in the shoulder as Allen tried to handcuff him. (R19) Petitioner was subdued with the assistance of Deputy Jose Gonzales. (R20) However, as the two deputies tried to place Petitioner in the patrol car, he bolted and ran. (R22) Deputy Timothy Glover pursued, yelling for Petitioner to stop. (R45-46) He would not do so. (R46) Some time later, Petitioner was found asleep in his bed, still handcuffed. (R38-40) Petitioner offered no further resistance. (R39) The Petitioner was charged with resisting arrest with force and violence, and battery on a law officer and booked into the Polk County Jail. (R1-2)

Deputy Allen was of the opinion the Petitioner suffered from emotional problems and had run away out of fear. (R26-27)

ARGUMENT SUMMARY

The instant case presents the question whether section 944.40, Florida Statutes (1983), dealing with escape, was intended to apply to persons who run from police officers immediately after having been arrested. Prior to 1971, the escape statute only applied to persons incarcerated after conviction and sentence. Brocha v. State, 258 So.2d 286 (Fla.1st DCA 1972).

In 1971 the Florida Legislature, in an attempt to apply the escape statute to all inmates incarcerated in a correctional facility, amended the definition of "prisoner" to include inmates confined prior to conviction. §944.02(5), Fla.Stat. (1971).

In an unprecedented opinion, the Second District Court of Appeal applied the escape statute to an arrested suspect who ran from police before being confined and transported to jail. State v. Akers, 367 So.2d 700 (Fla.2d DCA 1979). This Court expressly approved the Akers decision and held that once arrested, a suspect becames a prisoner for purposes of the escape statute even though he might successfully resist the actual confinement. State v. Ramsey, No. 64,776 (Fla. July 11, 1985).

The escape statute's inclusion within Chapter 944, Laws of Florida, reflects an effort on the part of the Legislature to limit this crime to escapes from the correctional system. The Legislature's duel requirement of arrest and lawful custody as contained in the definition of "prisoner" shows an intent of the Legislature to separate the crime of escape from the crime of resisting arrest.

The trial court should have granted the Petitioner's motion for judgment of acquittal. Though arrested, the Petitioner was never taken into custody. Because he successfully resisted an actual confinement, he was not a prisoner in transport as required for a conviction of escape. §944.02(5), Fla.Stat. (1981); §944.40, Fla.Stat. (1981).

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL WITH RESPECT TO THE CHARGE OF ESCAPE, WHERE THE PETITIONER WAS ARRESTED AND HANDCUFFED BUT FLED PRIOR TO BEING TAKEN INTO CUSTODY AND TRANSPORTED TO A PLACE OF CONFINEMENT.

The Petitioner twice moved the trial court for acquittal on the charge of escape. (R63-64,75) The Petitioner maintained "this is not the type of situation that is envisioned for the escape statute" because the Petitioner was not "in custody to such an extent that he would warrant being charged with escape." (R63) The Petitioner argued the State's evidence would only support a conviction of resisting an officer without violence. (R64,75) The trial court erroneously denied both motions. (R64,76)

Prior to 1971 the escape statute only applied to persons incarcerated after conviction and sentence. Brocha v. State, 258 So.2d 286 (Fla.1st DCA 1972); §944.02(5), Fla.Stat. (1969). In Brocha, the appellate court reversed the Appellant's conviction for escape since the State failed to prove the Appellant was serving a sentence at the time he left the correctional facility. The Court's reversal stated in part that there was no question the Appellant had left the Volusia County Convict Camp.

In an obvious attempt to prevent situations such as Broucha, the Legislature amended the escape statute's definition of "prisoner" to include incarcerated individuals awaiting trial or sentencing." It is obvious the Legislature's amendment was a result of their realization the dangers of a jail break are just as

great when an inmate awaiting trial or sentencing attempts to escape as when a convicted and sentenced inmate attempts to escape.

The State courts quickly accepted the amendment and closed the door on attempts by defendants to get around the escape statute on the issue of jail status. The amended statute was applied to cover all prisoners confined in jails regardless of the position of their case in the judicial stream. E.g. Estep v. State, 318 So.2d 520 (Fla.1st DCA 1975).

In an unprecedented opinion, the Second District Court of Appeal applied the escape statute to a nonjailed defendant. State v. Akers, 367 So.2d 700 (Fla.2d DCA 1979). The Court applied the escape statute to an arrested, handcuffed defendant who ran from arresting officers. The only authority cited for the innovative application was Watford v. State, 353 So.2d 1263 (Fla.1st DCA 1978).

The Second District Court of Appeal's reliance on Watford was misplaced. The Watford court was specifically dealing with the issue of when an individual could legally leave a correctional facility on the grounds of necessity. The Court was concerned with what constituted a prima facie escape when an individual lawfully confined in a correctional facility claims he left the facility out of necessity.

There was nothing in the Watford opinion to justify the overbroad application of the First District Court's specific holding to circumstances such as the case at hand. The Fifth District Court of Appeal recognized this misapplication of the

escape statute and overturned at the district court level escape convictions on facts remarkably similar to those in the case at bar. Ramsey v. State, 442 So.2d 303 (Fla.5th DCA 1983), quashed 10 F.L.W. 369 (Fla. July 11, 1985); State v. Iafornaro, 447 So.2d 961 (Fla.5th DCA 1984).

The Fifth District Court of Appeal, in expressly finding conflict with Akers, ruled the State was required to show more than a mere right to legal custody and reversed the Appellant's conviction on the grounds the State failed to prove the Appellant was being transported. Ramsey v. State, supra. In passing on the legislative intent, the Fifth District Court of Appeal stated:

> If section 944.40 were intended to encompass situations such as the one before us, then the legislature would have provided in the statute that any prisoner who escapes from lawful arrest is guilty of escape.... [T]he legislature intended to punish conduct other than fleeing from the custody of an arresting officer.

Id. at 304.

This court reviewed the District Court's opinion in Ramsey v. State as a result of the direct conflict with State v. Akers. State v. Ramsey, No. 64,776 (Fla. July 11, 1985). In quashing the Fifth District Court's decision, this Court approved the Akers decision. The Petitioner would respectfully suggest this Honorable Court misinterpreted the legislative intent underlying sections 944.02(5) and 944.40, Florida Statutes (1981), and would request it reverse its holding.

In an attempt to eliminate the difficult questions concerning the transportation element of the escape statute, this Court adopted the rationale of Akers. These difficult questions

arise when a statute obviously intended to punish this type of action in the correctional system is applied to resisting arrest cases. The escape statute's inclusion within Chapter 944, the State Correctional System, reflects an effort on the part of the Legislature to limit this crime to the correctional system.

In State v. Ramsey this Court quoted from Judge Orfinger's special concurrence in State v. Iafornaro. State v. Ramsey, No. 64,776 (Fla. July 12, 1985). In adopting Judge Orfinger's interpretation, this Court equated arrest and confinement requirements of the "prisoner" definition. §944.02(5), Fla.Stat. (1981). This, which can be done so easily in the courtroom, is a much more difficult task for the officer who is trying to arrest and confine an unruly suspect.

This is evident by the many cases, such at the one at bar, in which an officer is able to tell a suspect he is under arrest, but not able to confine the suspect. In this type case the suspect, though under arrest, continues to resist any restraint on his liberty and often flees before being actually contained by the officer.

It is evident the Legislature was aware of this by its use of the conjunctive word "and" in its definition:

> "Prisoner" means any person who is under arrest and in 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 department, as provided by law.

§944.02(5), Fla.Stat. (1981). (Emphasis added) As clearly stated, it takes more than just an arrest before a suspect becomes a prisoner.

Since a criminal statute requiring judicial construction must be strictly construed against the State and in favor of the accused, the mere arrest of the Petitioner without confinement or transportation should not satisfy the requirements of the escape statute. §775.021(1), Fla.Stat. (1983).

The Petitioner would respectfully disagree with this Court's analogizing Johnson v. State, 357 So.2d 203 (Fla.1st DCA 1978), cert.den., 362 So.2d 1054 (Fla.1978), to the circumstances at hand. The Appellant in Johnson had already been confined in a correctional facility and his liberty actually restrained. Once confined in a correctional facility, the actual location of the confinement became secondary.

In the case at hand the officer was unsuccessful in his attempt to lawfully confine the Petitioner for the first time. Actual confinement was never established, thus this case is factually distinct from Johnson.

This Court's liberal interpretation of the escape statutes will lead to escape convictions (felonies of the second degree) for crimes the Legislature intended to be punished under the obstruction of justice chapter (either a misdemeanor of the second degree or a felony of the third degree). For example, a person could be charged with escape if, upon being stopped for an arrestable traffic violation, he runs from his car as the officer shouts "you're under arrest."

The interpretation will lead to an overbroad application by overzealous prosecutors who will charge escape when the arresting officer only arrested the suspect on resisting arrest charges. Such is the case at hand. (R1,6-7,18,24)

The Petitioner's motions for judgment of acquittal should have been granted by the trial court on the grounds (1) the State did not prove the Petitioner was a "prisoner" as defined by section 944.02(5), Florida Statute (1981), and (2) the State did not prove the Petitioner left the custody of the officers while being transported to a place of confinement as required by section 944.40, Florida Statutes (1981).

The fact the officers had legal justification to arrest and confine the Petitioner is not sufficient for conviction under the escape statute. Though told he was under arrest, the Petitioner's continued resistance that eventually led to his running from the officers prevented the lawful confinement of his person. There was no departure from custody, thus the Petitioner was not a prisoner for purposes of the escape statute. Sullivan v. State, 430 So.2d 519 (Fla.2d DCA 1983); Williamson v. State, 388 So.2d 1345 (Fla.3d DCA 1980). Since the Petitioner was not a prisoner, he was not in transport to a place of confinement.

The jury convicted the Petitioner of resisting arrest without force and violence. (R66,71) It stands to reason that included within that verdict was the fact the Petitioner ran from the officers. The trial court erred in denying the Petitioner's motions for judgment of acquittal. This Court should restrict section 944.40 to departures from correctional confinement as intended by the Legislature and reverse the judgment and sentence for escape.

CONCLUSION

For the above reasons and authorities, the Petitioner respectfully requests this Honorable Court reverse the judgment and sentence for escape and remand to the trial court with directions to discharge the Petitioner as to that offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 6th day of September, 1985.

JOSEPH EUGENE PERRIN