IN THE SUPREME COURT OF FLORIDA

JOSEPH PUMPHREY,

Petitioner

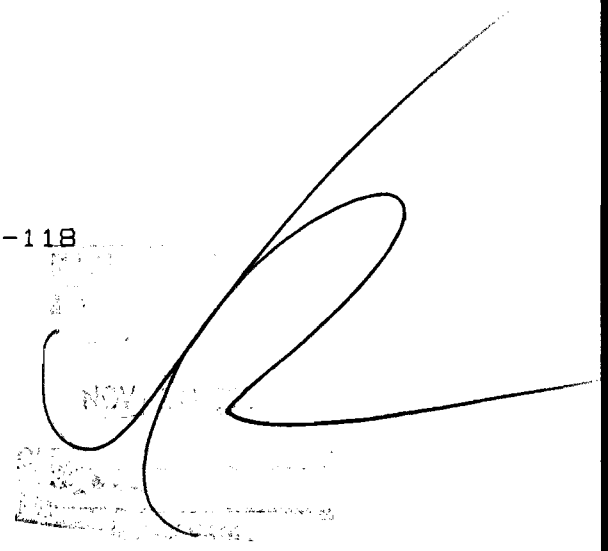
vs.

CASE NO.
DCA NO. BM-118

STATE OF FLORIDA,

Respondent.

_____/



ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the appellant in the district court and defendant in the trial court. The parties will be referred to as they appear before this Court. Attached hereto as Appendix A is the opinion of the district court. Appendix B is petitioner's motion for rehearing. Appendix C is the order denying petitioner's motion for rehearing.

II STATEMENT OF THE CASE AND FACTS

The history of the case is adequately stated in the opinion:

> . . . appellant was originally charged by information with [multiple counts of grand theft, forgery and uttering]. On December 5, 1985 he entered pleas of nolo contendere to all counts, in exchange for a cap of five years incarceration and the state's agreement to nolle prosse a fourth case. The trial court (Judge Davey) accepted the plea, withheld adjudication, ordered a presentence investigation and set sentencing for January 24, 1986. The court also granted appellant's request for a 24-hour furlough from jail to attend to a family matter at his grandmother's house, but warned appellant that "if you don't come back, that will be an additional offense and this plea negotiation is out the window." Appellant failed to return until January 7, 1986, at which time he voluntarily turned himself in to the Leon County Jail. Appellant was charged by information with escape. Because of his failure to return, Judge Davey rejected the plea agreement and sentenced appellant to two consecutive five-year terms of imprisonment in two of the cases and a concurrent five-year term in the third case. Those sentences were later appealed to this court.
>
> With regard to the escape charge, appellant was tried and found guilty.

Appendix at 2.

* * *

> In appealing his conviction for escape, Pumphrey argues that he was not "in custody" at the time Judge Davey granted the 24-hour furlough, but instead was merely a pretrial detainee, released on his own recognizance for a limited period of time. He thus concludes that he did not meet the definition of "prisoner" found in section 944.02(5), Florida Statutes (1985), and could not have been found guilty of escape as defined in section 944.40, Florida Statutes (1985).

> We disagree with appellant's argument.
>
> * * *
>
> At the time his furlough was granted by Judge Davey, appellant had been arrested on felony charges and was being held in the Leon County Jail pending adjudication and sentencing, thus satisfying both conditions of the first definition of prisoner found in section 944.02(5).

Appendix at 3-4.

Relying on Johnson v. State, 357 So.2d 203 (Fla. 1st DCA 1978), the majority of the district court said:

> The fact that he was not physically present in the jail at the time of his failure to return does not defeat this conclusion [that he was a prisoner].

Appendix at 4. Johnson involved an arrestee who became sick during the booking process, was escorted to a hospital emergency room, and left his guarded hospital room when his police escort left his post for a short time. In upholding Johnson's conviction for escape, the court held that the term "confinement" was not narrowly limited to "actual physical presence in the jail." Johnson at 204.

In the instant case, the majority applied the court's previous ruling in Johnson to petitioner's case, thus:

> Under the rationale of Johnson, appellant's confinement was not limited to his actual presence in the Leon County Jail, but extended for a 24-hour period to include the area of his grandmother's house, from which he unlawfully escaped. We therefore affirm appellant's judgment for escape.

Judge Nimmons, dissenting, viewed the majority's application of the escape statute to petitioner's case as "strained and unwarranted."

The dissent went on to say:

> . . . that what happened in the instant case is precisely the kind of situation the legislature intended to address by the adoption of the failure to appear statute. It is equally clear to me that the escape statute was never intended to encompass a pretrial failure to appear such as this.
>
> The apparent theory underlying the state's urging of the application of the escape statute to the instant situation is predicated upon a concept of an "extension of the limits of confinement" of the defendant. While the legislature has provided for the "extension of the limits of confinement" for county prisoners and for state prisoners via Sections 951.24 and 945.091, respectively, which sections specifically provide that the willful failure to remain within the extended limits of confinement shall be deemed an escape, the provisions of those sections apply only to prisoners who have been sentenced.[1]
>
> By being permitted to proceed on the basis of an "escape," the state has, in effect, improperly been allowed to elevate a pretrial failure to appear from a third degree felony to a second degree felony. I would reverse.

---

[1] Both the state and the trial court relied upon the provisions of Section 951.24. The information charging the offense of escape included the following allegation: ". . . and being released temporarily pursuant to Sections 951.24(2) and 951.24(a). . . ." In its judgment, the trial court specified those sections and Section 944.40 as the "offense statute numbers."

Appendix A at 7-8.

Petitioner moved for rehearing (Appendix B), arguing that because he was not a prisoner under sentence, his failure to return was not an escape from extended limits of confinement. The district court denied rehearing without comment October 9, Judge Nimmons again dissenting (Appendix C). Notice of discretionary review was timely filed November 6, 1987.

III SUMMARY OF ARGUMENT

Petitioner reviews definitions of prisoner, custody and confinement to demonstrate that he falls into no category necessary to conviction of escape. Because petitioner was not in custody and not confined, his conviction directly conflicts with Williamson, infra, which found prior confinement to be a prerequisite to conviction of escape. Further, the district court opinion announces a new rule of law, and improper extension of the escape statute, which absent the necessity of prior custody, effectively redefines all failures to appear in court and failures to report to jail as escape.

IV ARGUMENT

ISSUE PRESENTED

THE DISTRICT COURT'S DECISION IS IN DIRECT CONFLICT WITH WILLIAMSON v. STATE, INFRA, AND MUST BE REVIEWED BECAUSE IT IMPROPERLY EXTENDS THE ESCAPE STATUTE TO PERSONS NOT IN CUSTODY AND NOT CONFINED.

The district court held in the instant case that petitioner escaped when he failed to return timely to jail after he was released pretrial on his own recognizance for a 24-hour period.

In order to escape, a person must be a prisoner. To be a prisoner, a person must be either confined or in lawful custody. "Confinement" and "custody" are currently defined, both by statute and caselaw, quite expansively. A person is in custody for purposes of the escape statute when he is placed under arrest (section 944.02(5), Florida Statutes; State v. Akers, 367 So.2d 700 (Fla. 2nd DCA 1979)), even if he is not yet confined, placed in a police car, or even handcuffed (State v. Ramsey, 475 So.2d 671 (Fla. 1985)). A person is confined for purposes of the escape statute when he is in any prison, jail, or road camp, or working upon the public roads, or being transported to or from a place of confinement (section 944.40, Florida Statutes); when he is under sentence and permitted to go on work release or furlough (sections 945.091 and 951.24, Florida Statutes); or when he is escorted by the police to a

hospital from jail when he becomes ill (Johnson v. State, 357 So.2d 203 (Fla. 1st DCA 1978)).

Petitioner fit none of these categories. Not one. The First District's extension of the escape statute to a person not in custody and not confined is in express and direct conflict with the decision of the Third District in Williamson v. State, 388 So.2d 1345 (Fla. 3rd DCA 1980), in which that court affirmed the self-evident principle that a person must be in custody to escape. In considering whether Williamson's failure to report to the jail was a violation of his probation, the court said it was not,

> . . . because the defendant's failure to appear was simply not in violation of any particular statutory provision - certainly not, as the state suggests, the escape statute, Section 944.40, Florida Statutes (1977), which requires the prior confinement of a prisoner.

Id. at 1347, n.2. Further, it should be noted that while Williamson was actually under sentence when he failed to report, petitioner was not, but rather was an unsentenced, unadjudicated pretrial detainee.

By its decision in the instant case, the First District has adopted a new, and erroneous, rule of law. No court has ever extended the escape statute to a person in petitioner's circumstances. While petitioner's failure to return may have been an offense, it was not escape. If the district court's decision were allowed to stand, since it permits conviction of escape without prior custody, every failure to appear in court and every failure to report to jail could be defined as escape.

As Judge Nimmons said in his dissent:

> . . . the escape statute was never intended to encompass a pretrial failure to appear such as this.

Appendix A at 7.

The heart of the majority's misapplication of the law in the instant case is its disregard of the fact that petitioner had been released from jail. The majority said that petitioner was a prisoner in confinement when "furlough" was granted by the trial court. It is true that petitioner was a prisoner at the moment of his hearing, but what the majority overlooked or disregarded was that he was then released from confinement to go on the "furlough." Once released from jail, custody and confinement ceased, and petitioner was no longer a prisoner. He was not a prisoner when he failed to return to jail.

The majority relied on Johnson to find that petitioner could escape although he was not physically present in the jail. The crucial fact the majority thereby overlooked was, once again, that petitioner had been released, while by contrast, Johnson had never been released from custody. The majority went on to say that under the rationale of Johnson, petitioner's confinement extended to the area of his grandmother's house. This is not the rationale of Johnson, but rather of section 951.24, which extends the limits of confinement. By definition, however, section 951.24 applies only to prisoners who have been sentenced, and thus, expressly excludes petitioner.

Inasmuch as the majority relied on Akers', supra, assertion that "right to custody" was sufficient to convict of escape, the instant case presents an opportunity for this court to clarify whether the mere right to custody, absent actual custody (however expansively custody is defined), is sufficient to sustain conviction of escape.

The instant case is the first time a person not under sentence, not confined, not in custody, but in fact released from jail, has been convicted of escape. As such, it directly and expressly conflicts with the decision in Williamson, supra, and improperly extends the reach of the escape statute.

V CONCLUSION

Based upon the foregoing argument, petitioner urges this Court to accept review and proceed to decide the case on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Royall P. Terry, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. Joseph Pumphrey, #B-051724, Post Office Box 699-W, Sneads, Florida 32460, on this 16th day of November, 1987.

KATHLEEN STOVER