IN THE SUPREME COURT OF FLORIDA

JOSEPH PUMPHREY,

Petitioner,

v.

CASE NO. 71,459

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the circuit court and the appellant in the district court. He will be referred to by name or as petitioner. Respondent will be referred to as the state.

The opinion of the district court of September 1, 1987, is attached hereto as the appendix. The record on appeal will be referred to as "R."

II STATEMENT OF THE CASE AND FACTS

The facts of the case are 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.

During the escape trial, petitioner objected to the court's proposed jury instruction that failure to remain within the extended limits of confinement is escape. Petitioner also objected to reading to the jury only that portion of section 951.24, Florida Statutes, dealing with escape from the extended limits of confinement without also reading the portion which applies the statute only to persons who have been sentenced (R-177-83). The trial disallowed any argument that section 951.24 applied only to persons under sentence (R-185-86). Counsel for the parties and the court discussed the instructions

at length (R187-229). The jury found petitioner guilty as charged.

In the majority opinion, the district court said:

> 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.

Appendix at 7-8.

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[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."

Petitioner moved for rehearing, which was denied without comment October 9, Judge Nimmons again dissenting. This court accepted jurisdiction February 18, 1988.

III SUMMARY OF ARGUMENT

In order to escape, a person must be a prisoner. Petitioner was not a prisoner. He met no definition of prisoner, or custody, or confinement, and thus, fell into no category necessary to conviction of escape. Specifically, the provisions of section 951.24, Florida Statutes, which extend the limits of confinement cannot be used to categorize petitioner's failure to return timely to jail as escape because that section applies only to prisoners who are under sentence. Petitioner had been neither sentenced nor adjudicated when he "escaped," but rather, was released on his own recognizance from jail for a limited period.

Since the district court's decision herein would permit conviction of escape based on mere <u>right</u> to custody, without the prerequisite of prior physical custody, it effectively redefines as escape every failure to report to jail and every failure to appear in court on which a bench warrant is issued.

Petitioner was not a prisoner and he did not escape.

IV ARGUMENT

ISSUE PRESENTED

THE EVIDENCE BELOW WAS LEGALLY INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION OF ESCAPE, WHERE PETITIONER WAS A PRESENTENCING, PRECONVICTION DETAINEE WHO HAD BEEN RELEASED FROM JAIL FOR A LIMITED PERIOD AND FAILED TO RETURN TIMELY.

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.[2]

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. 2d 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

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[2]Petitioner's conviction is at least partly explained by the jury instructions. The trial court's instruction on the elements of escape materially deviated from the standard instruction, was an inaccurate statement of the law, and left the jury with no choice but to convict. An inaccurate or misleading jury instruction is in itself ground for reversal. See Ramadonovic v. State, 480 So. 2d 112 (Fla. 1st DCA 1985).

is under sentence even when he is 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 unwarranted, and expressly and directly conflicts with the decision of the Third District in Williamson v. State, 388 So. 2d 1345, 22 ALR 4th 750 (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 made him liable for some criminal offense, it was not escape. Were the

district court's decision 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 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 the 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, supra, 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 from custody, while Johnson had not. For the facts of Johnson to be analogous to the instant case, Johnson would have had to become ill at the jail, and the jail released him on his own recognizance to check into the hospital, on his promise that he would return to the jail when released by the hospital.

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. Sections 945.091 and 951.24, Florida Statutes, expressly expand the definition of confinement, which is otherwise limited to actual, physical confinement, by extending the limits of confinement to permit furloughs and work release to DOC prisoners and county and municipal prisoners, respectively. Criminal statutes are, of course, "to be strictly construed in favor of the person against whom a penalty is to be imposed." Reino v. State, 352 So. 2d 853 (Fla. 1977); see also State v. Waters, 436 So. 2d 66 (Fla. 1983); Ferguson v. State, 377 So. 2d 709 (Fla. 1979); Earnest v. State, 351 So. 2d 957 (Fla. 1977).

Prisoners come in two varieties - they are either serving a sentence or they are pretrial detainees. There is no other category. This means that someone who has not been sentenced can only be a pretrial detainee for purposes of the escape statute, even if he has already entered a plea and there will be no trial. In the instant case, it means that petitioner's release from jail is properly characterized as a form, albeit limited, of pretrial release. See Section 903.03, Fla. Stat.

The absence of physical custody is perhaps the most significant feature of this case. Absent physical custody or confinement, the state must rely on those statutes which extend the limits of confinement to define petitioner's failure to return to jail as escape. As already noted, however, Section 951.24, on

which the trial court relied, applies only to prisoners who have been convicted and sentenced, thus, expressly excluding pretrial, preconviction detainees such as petitioner. This is the factor which distinguishes Laird and Price from the instant case -- Laird and Price were serving sentences when they failed to return from furlough. Laird v. State, 394 So.2d 1121 (Fla. 5th DCA 1981); Price v. State, 333 So. 2d 84 (Fla. 1st DCA 1976). Petitioner was not under sentence but was, rather, a pretrial detainee. There are no extended limits of confinement which apply to pretrial detainees. For them, there is only pretrial release.

There is some troublesome language in the majority opinion regarding this court's reference in Ramsey, supra, to Akers's, supra, assertion that the "state need show only ... the right to legal custody" to prove escape. Ramsey went further even than Akers in holding that a person who had been placed under arrest, even if not yet transported to the jail, placed in a police car, or even handcuffed, could be convicted of escape for running away from the arresting officer. While both cases extended the escape statute somewhat further than it had gone before in terms of what was defined as constituting "in custody," both cases found the defendants to have been in custody. This means that the alleged escapes were not based on mere right to custody, but rather on actual custody, and both cases addressed far different factual circumstances than the one sub judice.

In his dissent in Ramsey, Justice Boyd said:

> An essential element of the crime of escape is the fact of lawful custody or confinement, the mere right to custody is not enough. (emphasis added)

Id. at 674. This is the far more reasonable approach to what constitutes the offense of escape. The Akers language should be limited to its holding that the "right to custody" attached at the time of arrest. Otherwise, taken to its logical conclusion, if mere right to custody were a sufficient ground for an escape conviction, then every failure to appear on which a capias is issued and every failure to report to jail would be transformed into an escape. See Williamson, supra.

Inasmuch as the district court majority relied on Akers' assertion that mere 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 physical custody (however expansively custody is defined), is sufficient to sustain conviction of escape.

While a prisoner under sentence may have the limits of his confinement extended and an arrestee is in custody for purposes of the escape statute, even where he is in the hospital or not yet at the jail, or even handcuffed, this is the first time in which a person not under sentence, not confined, not in custody, and in fact released from jail, has been convicted of escape.

Petitioner did not escape, and his conviction for escape must be discharged.

V CONCLUSION

Based on the foregoing argument, reasoning and citation of authority, appellant respectfully requests this court to order that his conviction of escape be discharged.

Respectfully submitted,

MICHAEL E. ALLEN
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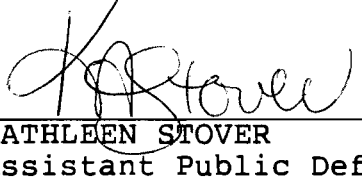
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Royall P. Terry, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Joseph Pumphrey, Route 2, Box 61-A, Quincy, Florida, 32351, this 8 day of March, 1988.

KATHLEEN STOVER