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IN THE SUPREME COURT OF FLORIDA

JOSEPH ORDEN PUMPHREY,

Petitioner, :

VS. : CASE NO. 71,459

STATE OF FLORIDA, :

Respondent. :

_____ :

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I SUMMARY OF ARGUMENT

Although the factual situation in the instant case is somewhat unusual, because it implicates the escape without custody issue, the court's decision herein will have far-reaching consequences. If mere right to custody, without actual physical custody, is sufficient to convict of escape, then every failure to appear in court and every failure to report to jail would be transformed into an escape.

Petitioner distinguishes his status from cases cited by the state which define escapees, and disputes the state's assertion that Ramsey, infra, overruled Williamson, infra, when Ramsey did not cite Williamson and the cases have no similarity of facts.

The appropriate charge in a situation such as the instant case is contempt of court, not escape.

A person must be in custody to escape. Petitioner's failure to return could be an escape only if extended limits of confinement applied to him, but those statutes apply expressly

only to prisoners who have been sentenced and must be strictly construed, thus petitioner is excluded and did not escape.

II 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 situation in the instant case is somewhat unusual. If they are released from jail, it is far more common for persons awaiting sentencing to be released indefinitely, rather than for a limited period, or ordered to return on a date other than the date set for sentencing. The court's decision in this unusual factual situation, nevertheless, could have far-reaching consequences because it implicates the escape without custody issue.

The state's position is an attempt to expand, without statutory foundation and beyond already quite expansive interpretations, the outer boundaries of what constitutes escape. While Akers and Ramsey have hinted that mere right to custody may be sufficient to sustain a conviction of escape, both cases involved actual physical custody, not mere right to custody. State v. Ramsey, 475 So.2d 671 (Fla. 1985); State v.Akers, 367 So.2d 700 (Fla. 2d DCA 1979). A defendant who was not in custody and not confined has never been convicted of escape. A ruling in the instant case that mere right to custody, without actual physical custody, was sufficient to convict of escape would transform every failure to appear and every failure to report to jail into an escape.

The state found it "peculiar" that petitioner could concede that a person who was merely told he was under arrest and then fled and a sentenced prisoner who overstays his furlough are escapees, while maintaining that petitioner himself, who had been arrested, booked into the jail, and entered a plea was not a prisoner (State's Brief, hereafter "SB," -3-4). The distinction is that of the three, only petitioner had been released from custody, even if only for a limited time.

The state attempted to avoid the custody requirement of the escape statute by arguing that "for all relevant purposes," "petitioner stood before the court as a convicted felon" (SB-4). This argument ignores or devalues the fact that petitioner had not been sentenced or even adjudicated at the moment the court permitted him to leave jail.

The state asked rhetorically why the legislature would intend someone who becomes a prisoner to cease to be a prisoner for a "brief and fleeting period" of 24 hours between the time his nolo or guilty plea was accepted by the court and the time he is required to resume his status as a jail inmate (SB-5). The answer is, again, that a prisoner ceases to be a prisoner when a court releases him from jail. Petitioner was released from jail and ceased to be a prisoner.

The state's emphasis on the fact that petitioner had entered a plea leads to the question whether the state's argument would be different if petitioner's case had been at a different stage when the court granted limited release. Yet,

inasmuch as the state's argument rests on the right to custody theory, that petitioner has entered a plea is of no significance whatever, since the state could argue right to custody of any pretrial detainee, who had not posted bond or been released on his recognizance, at any stage of the proceedings.

The state's bald assertion that Ramsey, supra, overruled Williamson v. State, 388 So.2d 1345, 22 ALR 4th 750 (Fla. 3d DCA 1980), is baseless (SB-4). Ramsey did not refer expressly to Williamson, and the two cases have virtually no factual similarity. Ramsey dealt with whether an arrestee who had not yet been handcuffed could be convicted of escape for fleeing, while Williamson dealt with whether a person could violate a probation which had not yet begun, and as a secondary issue, whether a person under sentence could be convicted of escape for not reporting timely to jail to begin serving his sentence.

Since the state took pains in its answer brief to explain why the instant offense could not have been charged as a failure to appear, it is important to note that this is not a transgression without a remedy, rather the appropriate inquiry is what the remedy is to be. It is true petitioner could not have been charged with failure to appear because he turned himself in to the jail before his next scheduled court appearance.

If he had not appeared at the sentencing hearing, he could have been charged with failure to appear, a third-degree felony. In the instant case, by turning himself in before the

hearing, that is, by causing presumably less disruption to the judicial system, he was convicted of a more serious crime, the second-degree felony of escape. This is an irrational result.

Even worse, and although it is not an issue sub judice, the state argued that even had petitioner returned to jail timely, if he had gone to a location other than the one specified by the court, he could have been convicted of escape (SB-7). This theory of the state is so far removed from the escape statute as to be a completely unreasonable application of the statute. What a person not under sentence, who fails to return timely to jail or goes to a place not authorized, has done is disobeyed an order of the court. Such a person could properly be convicted of contempt of court. That is the appropriate remedy for the offense in the instant case.

The bottom line for the instant case is that petitioner's failure to return can be defined as "escape" only if some extended limits of confinement apply to him, but the only statutes which extend limits of confinement apply expressly only to prisoners under sentence and must be strictly construed. Petitioner did not escape and his conviction should be discharged.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant requests that this Court discharge his conviction of escape.

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 Terry, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Joseph Pumphrey, Leon County Jail, Tallahassee, Florida, this 18 day of April, 1988.

KATHLEEN STOVER