

FILED
COURT OF APPEALS

06 MAY 25 AM 9:16

STATE OF WASHINGTON
BY CRM
COURT CLERK

NO. 33778-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARVIN ALLEN HOWELL,

Appellant.

APPELLANT'S BRIEF

James L. Reese, III
WSBA #7806
Attorney for Appellant

612 Sidney Avenue
Port Orchard, WA 98366
(360)876-1028

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR	Page
Assignments of Error	
No. 1- No. 2	1
Issues Pertaining to Assignments of Error	
No. 1- No. 2.....	1
B. STATEMENT OF THE CASE	2
C. ARGUMENT	8
I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF ESCAPE IN THE FIRST DEGREE.	8
II. THE DEFENDANT’S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE WAS CHARGED WITH ESCAPE IN THE FIRST DEGREE RATHER THAN ESCAPE IN THE THIRD DEGREE.	11
<i>Prosecutor’s Charging Discretion</i>	12
<i>Legislative Intent</i>	12
<i>Due Process Protection</i>	18
D. CONCLUSION	22
E. APPENDIX	
RCW 9A.76.110	A
RCW 9A.76.120	B
RCW 9A.76.130	C
Fourteenth Amendment	D
Wash. Const. Art. 1, sec. 3	E

TABLE OF AUTHORITIES

TABLE OF CASES

City of Bremerton v. Tucker, 126 Wn.App. 26,
103 P.3d 1285 (2005) 18

City of Richland v. Michel, 89 Wn.App. 764,
950 P.2d 10 (1998) 18

City of Spokane v. Douglass, 115 Wn.2d 171,
795 P.2d 693 (1990) 12

State v. Ammons, 136 Wn.2d 453,
936 P.2d 812 (1998) 10,13,21

State v. Baeza, 100 Wn.2d 487,
670 P.2d 646 91983) 9

State v. Becker, 132 Wn.2d 54,
935 P.2d 1321 (1997) 12

State v. Bourne, 90 Wn.App. 963,
954 P.2d 366 (1998) 17

State v. Brayman, 110 Wn.2d 183,
751 P.2d 294 (1988) 20

State v. Carter, 89 Wn.2d 236,
570 P.2d 1218 (1977) 20

State v. Coria, 120 Wn.2d 156,
839 P.2d 890 (1992) 19,20

State v. Danforth, 97 Wn.2d 255,
643 P.2d 882 (1982) 21

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980) 10

<i>State v. Frazier</i> , 82 Wn.App. 576, 918 P.2d 964 (1996)	12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	9,10
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993)	12,21
<i>State v. Hochhalter</i> , 131 Wn.App. 506, 128 P.2d 104 (2006)	11
<i>State v. Leech</i> , 114 Wn.2d 700, 790 P.2d 160 (1990)	13
<i>State v. Long</i> , 98 Wn.App. 660, 991 P.2d 102 (2000)	13
<i>State v. Perencevic</i> , 54 Wn.App. 585, 774 P.2d 558 (1989)	15,17
<i>State v. Shipp</i> , 93 Wn.2d 510, 610 P.2d 1322 (1980)	19
<i>State v. Solis</i> , 38 Wn.App. 484, 685 P.2d 672 (1984)	15
<i>State v. Tejada</i> , 93 Wn.App. 907, 971 P.2d 79 (1999)	18
<i>State v. Walls</i> , 106 WnApp. 792, 25 p.3d 1052 (2001)	14,15,16,17
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001)	11
<i>State v. Wilson</i> , 117 Wn.App. 1, 75 P.3d 573, <i>review denied</i> , 150 Wash.2d 1016 (2003)	19

<i>Bouie v. City of Columbia</i> , 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)	19
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	9
<i>Jackson v. Virginia</i> , 443 U.S. 307. 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	10
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, L.Ed.2d 39, (1979)	9

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment	1,8,12
Const Art. 1., sec. 3	1

STATUTES

RCW 9.95.130	15,16
RCW 9A.76.010(1)	10,20
RCW 9A.76.110(1)	1,10,13,21
RCW 9A.120(10(a)(b))	13
RCW 9A.76.130(1)	1,13
RCW 13.40.135	21

REGULATIONS AND RULES

RAP 2.5(a)(3)	11
---------------------	----

A. Assignments of Error

Assignments of Error

1. The trial court erred when it convicted the defendant of escape in the first degree where there was not sufficient evidence of the charge in violation of the due process clause of the Fourteenth Amendment.
2. The defendant's right to due process of law guaranteed by the Fourteenth Amendment and by Const. Art. 1, sec. 3 was violated when the prosecutor charged him with Escape in the First Degree instead of Escape in the Third Degree.

Issues Pertaining to Assignments of Error

1. Whether there was sufficient evidence that the defendant knowingly escaped from custody after being arrested by his Community Corrections Officer for violation of conditions of community placement and put in the back seat of "The DOC cage car"? Howell testified that he was never taken into custody because he left his residence before being contacted. (Assignment of Error 1).
2. Whether the defendant's rights to due process of law were violated when the prosecutor elected to charge him with Escape in the First Degree pursuant to RCW 9A.76.110(1)? This statute failed to provide fair notice of what conduct was prohibited and did not contain ascertainable standards so that the prosecutor had an inordinate amount of discretion to charge Escape

in the First Degree rather than Escape in the Third Degree pursuant to RCW 9A.76.130(1), which adequately covered the defendant's actions? (Assignment of Error 2).

B. Statement of the Case.

Tim Thompson testified that he was a community corrections officer for the State of Washington. 9 August 2005 RP 6. Part of his job duties included supervising felons who have been released to community custody. RP 8. He supervised Marvin Howell pursuant to a 1999 felony conviction in case No. 99-1-00632-0. *id.*

On June 1, 2005 Thompson prepared a warrant of arrest for Howell, titled "An order For Arrest And Detention". RP 9, Ex. 2. That document set forth specific "Violations of His community Supervision." RP 10.

On June 1, 2005 during "noon" time Thompson met with Tenille Howell "2 houses down from the residence where Marvin and her shared a home" at 320 Lafayette, Apartment Number 1, Bremerton, Washington. RP 12. Accompanied with his "Warrant of Arrest or Order for Arrest and Detention" Thompson entered the apartment. RP 13. Howell was lying on the floor. *id.*

Howell was advised of the violations, arrested and placed in handcuffs, "behind the back". *id.* In the presence of community

corrections officer Doug Butcher, Howell was uncuffed and recuffed . He was then escorted to “The DOC cage car”. RP 14. This was, “A Crown Victoria police type cruiser.” *id.* It had a plexiglass panel separating the front seat from the back seat. RP 15.

The plexiglass had a port that slid back and forth. “There is a power lock in the front that when pressed, locks all four doors.” *id.* Thompson testified: “You cannot open the door from the rear.” *Id.*

Howell was placed in the cage car in the back seat and he was still handcuffed. RP 16. Butcher returned to the apartment accompanied by Thompson to search, “A hobby room that Mr. Howell had locked...”. *id.* At that time Mrs. Howell was inside the residence in a bedroom. The officers searched the residence for, “approximately 10 minutes”. RP 17.

When the officers returned to the cage car, “Marvin is gone.” *id.* Nothing, including clip boards and Marvin’s file, had been disturbed in the front seat. RP 18. Thompson testified that the plexiglass port was hardly big enough for a “slight person” to fit through. *id.* No windows were broken.

Thompson further testified that when a subject is placed in the back seat of the cage car, “The two doors on the back of course they’re locked as soon as you place somebody...[in the back seat]...” RP 19. The vehicle is also capable of being locked from the outside. On this occasion,

Thompson did not lock the vehicle from the outside. *id.*

Thomson testified that when he returned to the apartment the vehicle could not be opened from the inside. But it could have been opened from the out side. *id.* The vehicle was parked on the street. Thompson and Butcher, assisted by the Bremerton Police Department, spent the next 3 hours searching for Howell to no avail. RP 21.

Fifteen days later on, “the evening of June 16th” Howell was arrested. *id.*

On cross-examination Thompson testified he had arrested Howell on “4 previous occasions for community supervision violations.” RP 26. He was described as not being easy to supervise. RP 27.

When he left Howell in the back seat, the plexiglass port, “was open”. RP 27. Thompson testified that the window is, “probable 2 feet by 3 feet when it’s fully open”. RP 28. The back seat area was undamaged and there was no indication of force being used inside the vehicle. RP 29. Thompson did not have any reason to believe that Mrs. Howell left the apartment, went out to the vehicle and opened the door. RP 30.

On re-direct examination Mr. Thompson testified that he thought he had, “pressed the inside power lock” to lock the vehicle from the outside. RP 31.

Thompson testified-after an offer of proof- that Howell had been

arrested on approximately four occasions for probations violations. RP 35. Thompson testified that Howell: "...has a number of violations for narcotics and alcohol use, not reporting, not doing treatment programs. Even though he's only been out of prison since January of '05, we've gone through a number of violation processes and hearings, and it's hard to get him through his supervision on a '99 cause." RP 35-6.

Thompson testified that even though in his opinion Howell was difficult to supervise, he did not consider fabricating a story about him. RP 36.

On re-cross examination Thompson testified that Howell would be facing more time being incarcerated if he was convicted from escaping from a Department of Corrections vehicle than if he ran out the back of a house. RP 39.

Doug Butcher testified that he was a Community Corrections Officer the past two years. RP 40. On June 1, 2005 he accompanied Officer Thompson to assist in a violation contact. RP 42. The cage car was parked, "right in front of the house." RP 43. He testified that, "...the doors are disabled from the inside in the back." RP 44. He and Thompson tested the subject vehicle the next morning. The back doors would not open from the inside. *id.*

Upon arrival at Howell's apartment, Butcher testified: "I went to

the side of the house, where there is a door and I was positioned in such a position I could watch the back of the house, as well as the front of the house.” RP 43. “After a few seconds I went to the front door...At that point that I saw that he had the offender on the ground, placing him in hand restraints.” RP 44.

Howell was cuffed behind the back. The cuffs were re-adjusted once he was stood up. Howell was walked out to the cage car, placed inside and “both doors” were shut. RP 46.

Butcher returned to the residence to look for, “some drugs or some paraphernalia”. *id.* They obtained a key to the room. Nothing was found in plain view in the hobby room and so the search was ended. RP 47. The officers searched the room for approximately 10 minutes.

They returned to the vehicle. RP 48. He testified: “The rear seat [was] empty, the offender was not in the vehicle.” *id.* Butcher described the plexiglass divider as being, maybe a foot, 14 inches, by maybe 20 inches.” *id.* Butcher pretended he was handcuffed and tried to squeeze through the plexiglass. Although he was able to get his shoulders through, “...but I wasn’t able to get all the way to the front door”. RP 49.

On cross-examination, Butcher testified that they parked right in front of the house in a residential area. RP 51. It did not appear that any force had been used to break out of the vehicle. RP 52.

A stipulation was read to the jury before the state rested. It stated:

“The person before the court who has been identified in the charging document as defendant Marvin Allen Howell, was convicted on July 12, 1999, of a felony in the State of Washington in the State of Washington versus Marvin Allen Howell, Kitsap County Superior Court Cause Number 99-1-00632-0. As a part of that sentence, the defendant was placed on community supervision with the Department of Corrections and the defendant was on community supervision from that conviction on June 1, 2005.” RP 55.

Marvin Allen Howell testified that he was 31 years old, that he was married and had one child. RP 56. He had been supervised by CCO Thompson since January of 2005". RP 57. Howell testified about Thompson: “ I feel that he’s out to get me.” RP 57. Previously, Howell had been found to be in violation of the conditions of his supervision on three occasions. RP 58. He previously served about 36-37 days in custody for these violations. *Id.*

Howell testified that he lived at 320 South Lafayette Street in Bremerton with his wife and daughter. RP 58. He lived in a residential neighborhood. Howell testified that he had been home since the following evening at midnight. He was sitting on the couch. He saw his wife and two CCO officers on his security camera as he was watching television. RP 61. He testified that he “Grabbed my shoes and ran out the house.” RP 63. Howell testified how he left the back of the house:

“ I ran towards my kitchen and my kitchen, there’s

a basement door that leads downstairs to the other apartment. The have a section of the stairs torn out. I jumped through there, went through the other apartment and went out the window.” *id.*

Howell climbed through a 5 by 5 window. He then ran away to a vacant area and stayed there. RP 64. Howell concluded his testimony by stating that he had never been inside a DOC cage car on June 1, 2005. RP 66.

On cross-examination, Howell testified that where he lived was a house that was converted into apartments. He lived in the upstairs area and the downstairs area was unoccupied. RP 67. He denied that he was ever in the custody of the Department of Corrections on the day of the incident. RP 71.

Thompson was recalled as a rebuttal witness by the state. RP 72. He testified that on June 1, 2005 Mrs. Howell opened the door and let him inside the residence. RP 73. After closing arguments the jury returned a verdict of guilty. RP 94. The defendant filed a notice of appeal on September 9, 2005. CP 54.

C. Argument

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF ESCAPE IN THE FIRST DEGREE.

The due process clause of the Fourteenth Amendment requires the State to prove all of the essential elements of the crime beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61

L.Ed.2d 39, (1979); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

The defense argued that Howell's alleged escape had not been proven by the state. Although "how" he escaped was not an element of the charge, it was indicative- it was argued- of whether or not Howell was ever placed in custody or detained in order to be charged with escape. RP 82. There was no direct or circumstantial evidence how or in what manner Mr. Howell may have emerged from the back seat area of the cage car. The defense argued: "There is no direct evidence that Mr. Howell escaped from custody." RP 83.

The defense further argued that based on circumstantial evidence they should infer that Mr. Howell did not escape from the cage car. *Id.* The defense argued that the state did not provide any reasonable explanation as to the manner in which Mr. Howell may have been able to escape from a locked and caged vehicle.

The standard of review on appeal for reviewing sufficiency of the evidence was stated in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

According to *State v. Green*:

"Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.”

State v. Green, at 221 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)); (see also, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); cf. *State v. Delmarter*, 94 Wn.2d 634,638, 618 P.2d 99 (1980): circumstantial evidence and direct evidence are equally reliable).

Here, the prosecutor’s explanation is that someone may have wandered by the subject vehicle and opened the door to let Mr. Howell emerge. RP 77. The state speculated: “...he had a friend that left 20 minutes before the Department of Corrections arrived.” *id.*

RCW 9A.76.110(1) states: “A person is guilty of escape in the first degree if he or she knowingly escapes from custody...while being detained pursuant to a conviction of a felony....” According to *State v. Ammons*, 136 Wn.2d 453, 456 n. 3, 963 P.2d 812 (1998) in order to be convicted of escape in the first degree, the State must prove that the defendant knew that his or her actions would result in leaving confinement without permission. In *Ammons* the court ruled that defendants who knowingly failed to appear to serve their sentences on a work crew can be found guilty of escape in the first degree.

“Custody” is defined in RCW 9A.76.010(1). That statute defines “custody” as “...restraint pursuant to a lawful arrest or an order of a court,

or any period of service on a work crew....” Although the state’s evidence was that CCO Thompson placed Howell under arrest and explained to him the reasons for his arrest, there was no direct evidence that Howell “knowingly escaped from custody.”

II. THE DEFENDANT’S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE WAS CHARGED WITH ESCAPE IN THE FIRST DEGREE RATHER THAN ESCAPE IN THE THIRD DEGREE.

According to RAP 2.5(a)(3):

“(a) **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.”

See generally, *State v. Hochhalter*, 131 Wn.App. 506, 522, 128 P.3d 104

(2006):

“The State suggests that Hochhalter lost his Sixth Amendment right to jury trial because he did not raise it before the trial court. The issue is of constitutional magnitude, however, so it may be raised for the first time on appeal.” (Notes omitted).

(citing RAP 2.5(a)(3) and *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591

(2001) (nothing in the record to show that Walsh “knew or intentionally relinquished the right to have a jury decide whether he was on community placement at the time of the alleged crimes).

The error in Howell's case was manifest. The court stated in *State v. Becker*, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997) the error that is manifest in this case:

“The Fourteenth Amendment due process clause requires fair warning of proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171,176, 795 P.2d 693 (1990). A statute is unconstitutionally vague if (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it forbids, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *id.* At 178.”

A statute is unconstitutionally vague if either of the requirements is not met. *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993). In *Becker* the defendants contended their rights to due process were violated because the special verdict was based on proximity to school grounds, the location of could not be determined “by any readily understandable or ascertainable means.” The state Supreme Court agreed. and reversed the enhancement in that case.

Prosecutor's Charging Discretion

Prosecutors have a wide discretion in deciding how to charge defendants. *State v. Frazier*, 82 Wn.App. 576, 587, 918 P.2d 964 (1996).

Legislative Intent

To begin with it is necessary to set forth what the intent of the legislature may be. A question of statutory interpretation is reviewed

de novo. *State v. Ammons*, 136 Wn.2d at 456. The legislature enacted three degrees of escape which are as follows:

1) Escape in the first degree states:

“A person is guilty of escape in the first degree if, he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.

RCW 9A.76.110(1).

2) Escape in the second degree states in pertinent part:

(1) A person is guilty of escape in the second degree if:

- (a) He or she knowingly escapes from a detention facility; or
- (b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody...

RCW 9A.76.120(1)(a)(b).

3) Escape in the third degree states:

A person is guilty of escape in the third degree if he escapes from custody.

RCW 9A.76.130(1).

It is conceded that an equal protection violation cannot be made:

“”[T]here is no equal protection violation when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements.” *State v. Leech*, 114 Wn.2d 700, 711, 790 P.2d 160 (1990).”

State v. Long, 98 Wn. App. 669, 675 n. 7, 991 P.2d 102 (2000).

The main premises of the appellant's argument is that it is not the legislature's intent, nor do notions of due process require, that a person resisting arrest in his home or on the street to avoid being detained by a community corrections officer for a violation- that the probation officer alleges has occurred- does not deserve the same punishment as a prisoner who escapes from a maximum security penitentiary while serving a felony commitment. The reasoning for this argument is obtained primarily from Justice Schultheis' dissenting opinion in *State v. Walls*, 106 Wn.App. 792, 25 P.3d 1052 (2001), a 2-1 decision on this issue.

In *Walls* a police officer was escorting Walls to his patrol car after arresting him on the basis of an outstanding warrant for violation of the conditions of his community placement related to a prior felony conviction. The defendant "bolted" and was then apprehended a short distance away. He was convicted of escape in the first degree. The court of Appeals affirmed the conviction and held that Walls was in detention pursuant to a felony conviction at the time he ran away from the police officer. *Id.* at 793.

Justice Schultheis observed in his dissenting opinion: "The three degrees of escape each carry a different penalty." *id.* At 799. These range from a class B and C felony to a gross misdemeanor respectively. "This shows that the Legislature intended to treat an offender who is detained

pursuant to a felony conviction more harshly than an offender not so detained.”*id.*

The slight majority decision in *State v. Walls* is based on two cases: *State v. Solis*, 38 Wn.App. 484, 685 P.2d 672 (1984) and *State v. Perencevic*, 54 Wn.App. 585, 774 P.2d 558 (1989). Both *Solis* and *Perenevici* are distinguishable.

In *Solis*, the defendant was paroled from a felony conviction. One year later his parole officer asserted that there was probable cause to believe that he was in violation of parole. He received authorization to suspend Solis’ parole and to have him arrested. The parole officer contacted the local police to have him arrested. Solis was eventually contacted by a police officer who had an arrest warrant for an alleged parole violation. Solis broke loose from the officer’s grasp and ran away.

Solis was convicted of escape in the first degree. In his case a statute provided: “From and after the suspension, cancellation, or revocation of the parole of any convicted person and until his return to custody shall be deemed an escapee...” RCW 9.95.130; *Solis* at 486.

The *Solis* court held in part:

“The issuance of the order and warrant immediately and effectively suspended Mr. Solis’ parole. The suspension of his parole effectively reinstated his prior felony conviction and upon arrest he would have been held pursuant to the conviction pending an on-site hearing. Until his

arrest, by virtue of RCW 9.95.130, he was an escapee until apprehended.” *id.* at 486.

This distinction was stated in the dissenting opinion in *Walls*:

“”Until his arrest, by *virtue of RCW 9.95.130*, [Mr. Solis] was an escapee until apprehended.” *Id.* At 486 (emphasis added). In other words, Mr. Solis was detained prior to his arrest because his parole officer had already suspended his parole status. Here, Mr. Walls was on probation-not parole. There has been no showing that his probation was suspended. And there was yet to be a judicial determination of whether Mr. Walls violated his probation.”

State v. Walls, dissenting opinion at 799.

In the case at bench, Howell’s circumstances are similar to the circumstances surrounding Mr. Walls’ apprehension. Howell was convicted of two concurrent counts on July 12, 1999: Felony Violation of a Court Order and Assault in Violation of a Court Order. CP 42. He was on probation in 2005, not parole. His status was not that of an escapee as in *Solis*. He was in a situation where his probation officer believed he was in violation of conditions of his probation.

There had been no judicial hearing whether Mr. Howell had committed any of the alleged probation violations. Howell testified that he had three previous probation violations confirmed by the court. His total sentences were 36-37 days in jail for those three violations. RP 57. Yet, as a result of being convicted of first degree escape in this case his sentence was 63 months. RP 101; CP 44.

State v. Perencevic is also distinguishable. Mr. Perencevic was previously convicted of shoplifting. He was booked under a false name. Two “no bail bench warrants” for probation violations for two prior felony convictions were outstanding. Mr. Perencevic tried to dig through the wall of the county jail’s TV room. *id.* at 586-87. He was charged and convicted of first degree escape.

The *Perencevic Court* upheld his conviction based on the following reasoning:

‘Because there was a casual relationship between the warrants and the prior felony convictions, we hold that Perencevic’s detention for his alleged supervision violations was “pursuant to a felony conviction.”

id. at 589. The dissent in *Walls* commented on this extended reasoning:

“Division One’s holding in *State v. Perencevic*, 54 Wn. App. 585, 774 P.2d 558 (1989) is too broad. A mere “causal relationship between the warrants and the prior felony convictions” is simply not sufficient to charge a defendant with first degree escape. *Id.* At 589. First degree escape requires detention *pursuant* to a felony conviction, not detention that is somehow *related* to a prior felony conviction. Interpreting the requirements of first degree escape in such a loose manner violates the Legislature’s overall intent, as evidenced by the varying levels of punishment for escape. Moreover, statutes should be interpreted in a way that provides lenity to defendants. See *State v. Bourne*, 90 Wn. App. 963, 969, 954 P.2d 366 (1998) (rule of lenity requires an ambiguous statute to be interpreted most favorably to the defendant).”

State v. Walls, 106 Wn. App. At 799- 800. Perencevic’s conduct should

be punished more severely because he was attempting to escape from a jail.

The same question that faced Walls also faces Howell. Should a person who avoids being arrested by a probation officer, at his home in Howell's case, "be subjected to the same punishment" as a convicted felon who escapes from a maximum security penitentiary? Is there a difference between escape by a convicted felon from a maximum security institution and an arrest of someone who is walking down a street as in Walls case? Should there be a difference between someone who is serving a current sentence and who has been previously convicted of a felony and a person who is now accused of violating a condition of community supervision where the penalties are measured in days instead of in months or years?

According to *State v. Tejada*, 93 Wn. App. 907, 911, 971 P.2d 79 (1999) appellate courts should interpret statutes in order to advance the legislative purpose and in order to avoid "a strained and unrealistic interpretation."

Due Process Protection

In *City of Bremerton v. Tucker*, 126 Wn.App. 26,30, 103 P.3d 1285 (2005) the court stated the general rule:

““Due process requires fair notice of proscribed criminal conduct and standards to prevent arbitrary enforcement.”
City of Richland v. Michel, 89 Wn.App. 764,770,

950 P.2d 10 (1998).”

(the court affirmed a conviction for a second Driving Under the Influence charge where “prior offense” included successful dismissal of a deferred prosecution).

In *State v. Wilson*, 117 Wn.App. 1, 11, 75 P.3d 573, *review denied*, 150 Wash.2d 1016 (2003) the court stated:

“Due process requires that criminal statutes be properly worded so that they give fair warning of the type of conduct they purport to criminalize.”

(The appellate court found that a no contact order did not deprive the defendant of due process of law for lack of statutory notice because the order complied with statutory and Seattle City Code requirements for notice of future violations) (citing *Bouie v. City of Columbia*, 378 U.S. 347,350-51, 84 S.Ct.1697, 12 L.Ed.2d 894 (1964) and *State v. Shipp*, 93 Wn.2d 510,515-16, 610 P.2d 1322 (1980)).

See also *State v. Coria*, 120 Wn.2d 156,164, 839 P.2d 890 (1992), which sets forth another test to be applied in this area: Does the statute forbid conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application? Another test is : Does the statute create a risk of arbitrary enforcement by the use of inherently subjective terms or by inviting an inordinate amount of police discretion?

In Howell's situation both of these questions are answered in the affirmative. "Being detained pursuant to a conviction of a felony..." is a vague phrase where persons of ordinary sense must guess at its meaning. The word "detained" is not defined. "Pursuant to conviction of a felony" is inherently subjective and invites unlimited discretion by the prosecutor. The first degree escape statute is especially subjective when it is compared to escape in the third degree, which states: "A person is guilty of escape in the third .if he escapes from custody" where custody is defined by statute. RCW 9A.76.010(1).

The rules in *Coria* were stated in a similar fashion in *State v. Brayman*, 110 Wn.2d 183,196, 751 P.2d 294 (1988):

"In determining whether a statute is unconstitutionally vague on its face, the court applies a 2-part test. First, does the statute " provide fair notice, measured by common practice and understanding, of that conduct which is prohibited, so that persons of reasonable understanding are not required to guess at the meaning of the enactment[?]", and second, does the statute "contain ascertainable standards for adjudication so that police, judges, and juries are not free to decide what is prohibited and what is not, depending on the facts in each particular case [?]." *State v. Carter*, 89 Wn.2d 236, 239-40, 570 P.2d 1218 (1977)."

(Supreme Court concluded that the breath standard used in the 1986 amendment gives fair notice and is not unconstitutionally vague).

In the case at bench, the escape statute does not provide fair notice,

measured by common understanding, that a person on community supervision in 2005, six years after a 1999 felony conviction, could be charged with escape in the first degree-compared to escape in the third degree-where the person escapes from the backseat of a police car parked on a public street. [The stipulation read to the jury stated in part: ‘As a part of that sentence, the defendant was placed on community supervision from that [1999] conviction on June 1, 2005.’ RP 55.] Nor do the facts show that Howell knew that leaving “The DOC cage car” could be feloniously charged as escape in the first degree.

Because RCW 9A.76.110(1) is vague it results in arbitrary enforcement. There are no standards against arbitrary, ad hoc or discriminatory enforcement. *State v. Halstein*, 122 Wn.2d 109, 857 P.2d 270 (1993) (held juvenile sexual motivation statute was not vague and overbroad). RCW 13.40.135.

The legislature has recognized a valid legislative distinction, “between going over a prison wall and not returning to a specified place of custody. *Danforth*, 97 Wn.2d at 258.” *State v. Ammons*, dissent at 466 (citing *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982) (defendants conviction for first degree escape for not returning to a work release center was dismissed because they could only be charged under the specific statute of willful failure to return to a work release facility). There, two

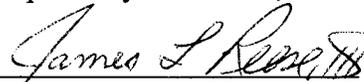
defendants became intoxicated, left Washington altogether and were apprehended in Kansas.

D. Conclusion

This court should reverse the defendant's conviction for escape in the first degree and remand the case for re-sentencing pursuant to the lesser included crime of escape in the third degree.

Dated this 25th day of May 2006.

Respectfully Submitted,



James L. Reese, III

WSBA #7806

Court Appointed Attorney for
Appellant

Research References

Treatises and Practice Aids

13A Wash. Prac. Series § 1801, Statutory Definitions-Rendering Criminal Assistance.

11A Wash. Prac. Series WPIC 120.12, WPIC 120.12: Rendering Criminal Assistance-Third Degree-Definition.

11A Wash. Prac. Series WPIC 120.13, WPIC 120.13. Rendering Criminal Assistance-Third Degree-Elements.

9A.76.100. Compounding

Research References

Treatises and Practice Aids

11 Wash. Prac. Series WPIC 19.11, WPIC 19.11. Compounding-Defense.

11 Wash. Prac. Series PT. IV INTRODUCTION, Introduction.

11A Wash. Prac. Series WPIC 120.20, WPIC 120.20. Compounding-Definition.

11A Wash. Prac. Series WPIC 120.21, WPIC 120.21. Compounding-Elements.

9A.76.110. Escape in the first degree

(1) A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the first degree is a class-B felony.

[2001 c 264 § 1; 1982 1st ex.s. c 47 § 23; 1975 1st ex.s. c 260 § 9A.76.110.]

Historical and Statutory Notes

Effective date—2001 c 264: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2001." [2001 c 264 § 9.]

2001 Legislation

Laws 2001, ch. 264, § 1, rewrote the section, which previously read:

"(1) A person is guilty of escape in the first degree if, being detained pursuant to a conviction of a felony or an equivalent juvenile offense, he escapes from custody or a detention facility.

"(2) Escape in the first degree is a class B felony."

Research References

ALR Library

76 American Law Reports 3rd 658, Failure Of Prisoner To Return At Expiration Of Work Furlough Or Other Permissive Release Period As Crime Of Escape.

Treatises and Practice Aids

13A Wash. Prac. Series § 1001, Statutory Definitions-Escape.

13A Wash. Prac. Series § 1004, Judicial Interpretation.

13A Wash. Prac. Series § 1006, Defenses.

13A Wash. Prac. Series § 1007, Practical Considerations.

11A Wash. Prac. Series WPIC 120.25, WPIC 120.25. Escape From Custody-First Degree-Definition.

institution, or authorized outing; (ii) tampers with his or her electronic monitoring device or removes it without authorization; or (iii) escapes from his or her escort.

(2) Sexually violent predator escape is a class A felony with a minimum sentence of sixty months, and shall be sentenced under RCW 9.94A.712 [2001 2nd sp.s. c 12 § 360; 2001 c 287 § 1.]

Historical and Statutory Notes

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application—2001 2nd sp.s. c 12 §§ 301–363: See note following RCW 9.94A.030.

Effective date—2001 c 287: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 14, 2001] except for section 4 of this act, which takes effect July 1, 2001." [2001 c 287 § 5.]

2001 Legislation

Laws 2001, 2nd Sp.Sess., ch. 12, § 360, rewrote the section, which formerly read:

"(1) A person is guilty of escape by a sexually violent predator if, having been committed to the department of social and health services as a sexually violent predator under chapter 71.09 RCW, he or she:

"(a) Escapes from custody;

"(b) Escapes from a commitment facility;

"(c) Escapes from a less restrictive alternative facility; or

"(d) While on conditional release and residing in a location other than at a commitment center or less restrictive alternative facility, leaves or remains absent from the state of Washington without prior court authorization.

"(2) Escape by a sexually violent predator is a class B felony."

Research References

Treatises and Practice Aids

13A Wash. Prac. Series § 1001, Statutory Definitions—Escape.

9A.76.120. Escape in the second degree

(1) A person is guilty of escape in the second degree if:

(a) He or she knowingly escapes from a detention facility; or

(b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody; or

(c) Having been committed under chapter 10.77 RCW for a sex, violent, or felony harassment offense and being under an order of conditional release, he or she knowingly leaves or remains absent from the state of Washington without prior court authorization.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the second degree is a class C felony.

[2001 c 287 § 2; 2001 c 264 § 2; 1995 c 216 § 15; 1982 1st ex.s. c 47 § 24; 1975 1st ex.s. c 260 § 9A.76.120.]

OBSTRUCTING GOVERNMENTAL OPERATION 9A.76.130

ent to a conviction of a felony, was that underlying felony conviction had not been proven beyond a reasonable doubt to be constitutionally valid, all elements required to convict defendant of second-degree escape were necessarily proven to jury. *State v. Thompson* (1983) 35 Wash.App. 766, 669 P.2d 1270, reconsideration denied.

Escapes by persons confined after conviction should be dealt with more severely than those occurring before conviction. *State v. Teaford* (1982) 31 Wash.App. 496, 644 P.2d 136, review denied.

6. Juvenile escapee

A juvenile offender can be guilty of escape in the second degree. In re *Frederick* (1980) 93 Wash.2d 28, 604 P.2d 953.

A committed delinquent who escapes from a detention facility has committed the crime of escape (subsec. (1)(a) of this section), not merely violated an order of the juvenile court. If such an escape is committed by a delinquent confined under post-majority disposition powers of the juvenile court (§ 13.04.260; recodified as § 13.40.300), the crime must be tried in the superior court. *State v. Binford* (1978) 90 Wash.2d 370, 582 P.2d 863.

7. Work release or furlough

For purposes of second-degree escape prosecution, two misdemeanor defendants "escaped" when one defendant failed to return to jail before expiration of temporary release to see neurologist and other defendant failed to return to jail from work release, even though both defendants left jail with permission, were not under direct physical control or custody, and did not flee from their place of confinement, where defendants departed from limits of custody without permission. *State v. Kent* (1991) 62 Wash.App. 458, 814 P.2d 1195, review denied 118 Wash.2d 1005, 822 P.2d 288.

Second-degree escape statute applied to any prisoner on work release or furlough who was not within area where he was authorized to be at particular time or who remained in authorized area beyond time permitted, despite contention that such interpretation rendered it superfluous to another statute which created felony for escape by furloughed prisoners; felony statute was specific and applied only to felons under control of Department of Corrections, not to misdemeanants or to felons under control of county. *State v. Kent* (1991) 62 Wash.App. 458, 814 P.2d 1195, review denied 118 Wash.2d 1005, 822 P.2d 288.

9A.76.130. Escape in the third degree

(1) A person is guilty of escape in the third degree if he escapes from custody.

(2) Escape in the third degree is a gross misdemeanor.

[1975 1st ex.s. c 260 § 9A.76.130.]

Historical and Statutory Notes

Source:

Laws 1854, pp. 89, 90, 98, §§ 76, 77, 126.
Laws 1859, p. 129, § 126.
Laws 1869, p. 229, § 135.
Laws 1873, pp. 200, 201, 213, §§ 85 to 87, 141.
Code 1881, §§ 881, 882, 957.
Laws 1905, ch. 46, § 1.

Laws 1909, ch. 249, §§ 9, 87, 88, 90 to 94, 125.
RRS §§ 2261, 2339, 2340, 2342 to 2346, 2377.
Former §§ 9.01.040, 9.31.010 to 9.31.100.
Laws 1951, ch. 182, § 1.
Laws 1955, ch. 320, §§ 1, 2.
Former § 9.31.005.

AMENDMENT (XIV)

ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE CONSTITUTION OF WASHINGTON

ARTICLE 1, ss. 3. Personal Rights

No person shall be deprived of life, liberty, or property, without
due process of law.

FILED
COURT OF APPEALS

06 MAY 26 AM 9:15

STATE OF WASHINGTON
BY CM
NOTARY

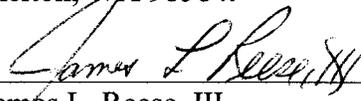
PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

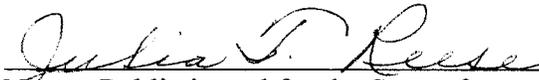
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 26th day of May, 2006, he filed the original and one (1) copy of Appellant's Brief in State of Washington v. Marvin Allen Howell, No. 33778-9-II, in the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, Washington 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Marvin Allen Howell, at his last known address: Marvin Allen Howell, DOC #994681, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.


James L. Reese, III

Signed and Attested to before me this 26th day of May, 2006 by James L. Reese, III.


Notary Public in and for the State of
Washington, residing at Port Orchard.
My Appointment Expires: 04/04/09