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OCTOBER 31, 2016
Court of Appeals
Division III
State of Washington

NO. 34399-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TREVOR MCCLURE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to sustain appellant's conviction for first degree escape.

Issues Pertaining to Assignment of Error

1. First degree escape requires that the defendant escaped from custody or a detention facility while being detained pursuant to a conviction of a felony. Because Mr. McClure was not in custody, American Behavioral Health Systems was not a detention facility, and Mr. McClure was not being detained, should appellant's conviction be reversed for lack of sufficient evidence?

2. Was there also insufficient evidence presented for a jury to find beyond a reasonable doubt that the State proved the identity of Mr. McClure?

3. Did the trial court err when it overruled defense hearsay objections under ER 801 and 802?

B. STATEMENT OF THE CASE

1. Procedural Facts

On October 27, 2015, the Spokane County Prosecutor's office charged Trevor McClure with one count of First Degree Escape, alleging that he escaped while being detained on a conviction for possession of a controlled substance. CP 1. A

defense motion to dismiss the charge for insufficient evidence, made at the close of the prosecution's case, was denied. CP 13-20, 83-84; 1RP¹ 165-178. On March 1, 2016, a jury convicted Mr. McClure. CP 37. The Honorable John O. Cooney imposed a standard range sentence of 53 months. CP 67-79.

2. Substantive Facts

Steven Lowe worked as transport van driver for American Behavioral Health Systems (ABHS). 1RP 126. In September 2015, he transported three people, whose names he could not recall, and whom he could not identify, from the Spokane County Jail to ABHS. 1RP 128-129. Two of the people he transported ran off before entering ABHS and one person entered the facility. 1RP 128-129. He did not testify as to the exact date that this occurred, but he did notify someone inside ABHS about what happened. 1RP 126-129.

The transport van did not have child locks on the doors, it had no bars on the windows, and passengers were not handcuffed or restrained in any way when they were in the van. 1RP 126-128. Mr. Lowe used the van to take ABHS clients to places like doctor's

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – February 29, 2016 and March 1, 2016; 2RP – March 1, 2016, March 31, 2016, and April 22, 2016.

appointments, grocery stores, and the bus station. 1RP 131-132. If someone he was transporting left the van, there was nothing he could do about it. 1RP 133.

Sheila Norris, the ABHS transportation manager, received an email in September 2015 about three people not coming in to treatment. 1RP 136. She did not recall receiving an order to take Mr. McClure to ABHS. 1RP 139-140. Ms. Norris recalled Mr. McClure entering treatment at ABHS before September 27, 2015, but was not aware of him entering treatment after September. 1RP 141-142. The name McClure was familiar to her, and she recalled that a Mr. McClure did not arrive at ABHS. 1RP 138. Ms. Norris was not present at ABHS on September 27, 2016 and any information she received was through email. 1RP 143.

ABHS is not a lockdown facility, they do not detain people, there were no police officers or security guards, there were no guns or handcuffs, and there was nothing in the facility to restrain people. 1RP 143-144. Ms. Norris described it as "not a detention center," not affiliated with the jail, not a facility for the court system, and she confirmed that people who participate in ABHS are there on their own volition. 1RP 144-145.

Tonya Wick was Trevor McClure's community corrections officer from May 19, 2015 through November 20, 2015. 1RP 148. She was familiar with an order modifying sentence that ordered a Mr. McClure to go to treatment at ABHS. 1RP 151; exhibit 6. Ms. Wick did not witness Mr. McClure sign the order modifying sentence. 1RP 147-163. She was told that he did not arrive at ABHS. 1RP 152. Ms. Wick issued a warrant for Mr. McClure's arrest because he was directed to check in with her if he left ABHS for any reason and she had not had any contact with him. 1RP 153.

The order modifying sentence did not include a warrant of commitment, and it did not revoke the Drug Offender Sentencing Alternative (DOSA) that Mr. McClure had received for his prior drug conviction. 1RP 156, 158; exhibit 6. In order to be sentenced to confinement, the "revoke DOSA sentence order of confinement" box on the order must be checked, and a person is not confined until there is no more DOSA. 1RP 156. As a sanction for McClure's violation of the terms of his DOSA, the order required a period of confinement of 18 days with credit for 16 days, but the period of confinement was over when the person ordered to treatment went to treatment. 1RP 158; exhibit 6. There was

nothing in the order that warned that failure to comply with treatment would result in a first degree escape charge. 1RP 158-159; exhibit 6.

C. ARGUMENT

1. FAILURE TO REPORT TO INPATIENT TREATMENT PURSUANT TO A DOSA SENTENCE DOES NOT CONSTITUTE ESCAPE FROM CUSTODY WITHIN THE MEANING OF RCW 9A.76.110(1).

The crime of first degree escape requires that a person “knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony.” RCW 9A.76.110(1). Custody is defined as “restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew.”² RCW

² The jury in Mr. McClure’s case was instructed that:

To convict the defendant of the crime of escape in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the September 27, 2015, the defendant escaped from custody;
- (2) That the defendant was being detained pursuant to a conviction of Possession of a Controlled Substance;
- (3) That the defendant knew that his actions would result in leaving confinement without permission; and

9A.76.010(2). The interpretation of these statutes is a question of law, which is reviewed de novo. State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). In this case, it was error for the trial court to find that failure to participate in inpatient treatment could constitute escape, and the evidence presented is insufficient to sustain Mr. McClure's conviction.

What constitutes custody was discussed in State v. Ammons, where the court held that two defendants who did not show up to serve their work crew sentences committed first degree escape. 136 Wn.2d at 458. In Ammons, the state argued that "as of the date [the defendants] were to have reported, they were restrained pursuant to an order of court and, additionally, in custody because 'custody' includes any 'period of service on a work crew.'" Id. The court pointed out that restraint is not defined in the escape statute, and relied on the dictionary definition of restraint as "a: an act of restraining, hindering, checking, or holding

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- (4) That any of these acts occurred in the State of Washington.

CP 32. The instructions defined custody as "restraint pursuant to a lawful arrest or an order of a court or any period of service on a work crew." CP 33.

back from some activity or expression . . . b: a means, force, or agency that restrains, checks free activity, or otherwise controls.” Id. at 457 (quoting Webster’s Third New International Dictionary 1937 (1986)). Without any additional analysis of the meaning of “restraint” under the statute, the court held that defendants “were in custody on the date they were to report to work crew both because they were in restraint pursuant to an order of the court and because custody includes any period of service on a work crew.” Id. at 460. The Ammons court did not address the question of what it meant for a person to be “detained” pursuant to a conviction of a felony.

After Ammons, the Court of Appeals addressed a similar issue in State v. Breshon, 115 Wn. App. 874, 63 P.3d 871 (2003). In that case, two defendants were sentenced to six months and 150 days respectively in the Breaking the Cycle Program (BTC), which is an alternative to total confinement under RCW 9.94A.680(3). “Both were told that the program was an alternative to total confinement and that failure to report would subject them to escape charges.” Id. at 876. Both defendants initially reported to the program but subsequently failed to report. Id. at 876-77. The Breshon defendants argued that they should not have been found guilty of escape because they were not being “detained” pursuant

to a felony conviction. Id. at 874. The Breshon court speculated as to why the Ammons majority did not address the prong of the statute requiring that a defendant be “detained” pursuant to a felony and ultimately found that the failure to report to the BTC program did constitute escape. In finding that the defendants committed first degree escape, the court addressed the Breshon defendants’ concerns that “the Ammons definition of restraint is too broad,” and that “under Ammons, if a defendant fails ‘to appear at the county drug assessment agency for an evaluation,’ he or she could be charged with escape.” Id. at 880 (quoting App. Br. at 28). The court noted that

First, Brashon and Simmons were ordered to physically appear daily at BTC; there, staff could require a urine sample; Breshon and Simmons were required to keep a daily log, including their current addresses; *they were told that failure to report meant the prosecutor could file escape charges*; the jail considered them to be in community custody; they received credit for their BTC time against their jail sentences and earned good time credits; and a deputy sheriff monitored their reporting and went out to pick them up when they failed to report. Second, and most importantly, the BTC program was a substitute for total jail confinement. *These characteristics distinguish the order directing Breshon and Simmons to report to BTC from the usual community custody or placement conditions.*

Id. at 880-81 (emphasis added).

Mr. McClure's case is distinguishable from both Ammons and Breshon based on the factors the Breshon court stated. First, in Ammons and Breshon, the defendants were given jail sentences and those sentences were to be served on work crew or in the BTC program, respectively. Ammons, 136 Wn.2d at 454-55; Breshon, 115 Wn. App at 876-77. Neither of them were sentenced under the DOSA program, like Mr. McClure was. A DOSA sentence is the very type of court order that the Breshon court noted as different from the defendant's sentences. It is "the usual community custody or placement conditions."

The DOSA program provides an alternative to a sentence of any confinement where a residential DOSA is imposed. RCW 9.94A.660(3). Under the program, "[i]f the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall *wave* imposition of a sentence within the standard range and impose a sentence consisting of . . . a residential chemical dependency treatment-based alternative under RCW 9.94A.664." RCW 9.94A.660(3) (emphasis added). A period of confinement is not imposed unless a violation of the terms of the

sentence is found following a hearing. RCW 9.94A.664(4); 1RP 156.

The order at issue in this case imposed a period of confinement of 18 days on Mr. McClure following a finding that he violated his DOSA by, among other things, “fail[ure] to complete cd treatment since 9-8-15.” CP 54-57; exhibit 6. He was given credit for 16 days in custody, id., which meant that his period of confinement would be over when he left to enter treatment. 1RP 158. His period of confinement ended when he left the jail. Additionally, nothing in the order warned Mr. McClure that if he left treatment he would face first degree escape charges. 1RP 158-159; exhibit 6. In contrast to Breshon, no representative of law enforcement checked on Mr. McClure’s attendance at treatment. 1RP 137-138.

The requirement that Mr. McClure report to ABHS was not a substitute for an order of total confinement that had already been made, like the orders in Ammons and Breshon were. The defendants in Ammons were both given jail sentences and ordered to serve all or part of them on work crew. Ammons, 136 Wn.2d at 454-55. One of the defendants failed to appear on the day he was set to begin work crew and the other attended the orientation

session but failed to report on the day he was to begin. The completion of work crew was not a condition of sentence that they were required to complete in order to avoid a jail commitment, it was directly in place of the jail commitment. Id. This is a key distinction between failure to serve a work crew sentence and failure to attend treatment pursuant to a DOSA sentence.

Moreover, in Ammons, the defendant was warned that “work crew was just like being in jail and that if he didn’t show up for work crew, he would be considered to have escaped from custody.” Id. at 455. Had the defendants completed all or part of their work crew obligation, they would have been given credit toward the completion of their sentence. In contrast, the treatment component pursuant to a DOSA sentence is not “just like being in jail.” If the treatment component of a DOSA is not completed, the court may modify the sentence and impose confinement as a sanction or the court may revoke the DOSA and impose a period of confinement, but the treatment component does not fulfill a period of commitment that is already ordered, as in Ammons and Breshon.

The van used to transport people to treatment at ABHS could be opened by the passengers. 1RP 127. It did not have bars on the windows, 1RP 127, people were not shackled or

restrained, 1RP 130-131, and the driver of the van has no power to keep people from leaving the van, 1RP 133. ABHS is not a lockdown facility. 1RP 143. People are not detained, there are no police or security guards, none of the staff are armed, people are not required to go to appointments, and it is not affiliated with the jail or a facility of the court system. 1RP 144-145.

Because a residential DOSA is not detention pursuant to a felony and because ABHS was not a facility that detained or restrained people, this court should find that the trial court erred in finding that failure to complete inpatient treatment pursuant to a residential DOSA could constitute escape.

Based on that finding, this Court should also find that the evidence is insufficient to sustain Mr. McClure's escape conviction.

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v.

Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Based on the proper interpretations of “custody,” “detention facility,” and “detained pursuant to a conviction,” no reasonable jury could have found Mr. McClure guilty based on the evidence presented at his trial. Therefore, his conviction should be reversed and dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853-854, 72 P.3d 748 (2003).

2. EVEN IF FAILING TO COMPLETE INPATIENT TREATMENT CAN CONSTITUTE ESCAPE, THERE WAS INSUFFICIENT EVIDENCE THAT MR. McCLURE ESCAPED

In order to support a conviction with proof beyond a reasonable doubt on the elements of the charge of first degree escape, the State must present a “fact witness with personal knowledge of the facts necessary.” State v. Green, 157 Wn. App. 833, 851, 239 P.3d 1130 (2010). Hearsay testimony cannot provide sufficient evidence to support a conviction absent other facts based on personal knowledge. Id. at 852. And, importantly, when “criminal liability depends on the accused’s being the person to whom a document pertains—as, for example, in most if not all prosecutions for first degree escape . . .—the State must do more

than authenticate and admit the document; it must also show beyond a reasonable doubt 'that the person named therein is the same person on trial.'" State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (quoting State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)). The fact that people often have identical names requires that the State present evidence independent from mere identity of names in order to prove identity beyond a reasonable doubt. Id.

In this case, the State failed to present fact witnesses with sufficient personal knowledge of the defendant's identity to establish that the Mr. McClure on trial was the individual who signed the order modifying his DOSA sentence and failed to show up for treatment at ABHS.

The first piece of evidence presented to prove that on or about September 27, 2015, Mr. McClure escaped from custody was that sometime in September, Mr. Lowe recalled picking up three men from the Spokane County jail and driving them to ABHS, where two men fled and one went inside the building. 1RP 128-129. Mr. Lowe reported this to the lead, but he did not give the name of the person he spoke with. 1RP 129. He testified that Mr. McClure did not look familiar to him. No one from the jail testified

regarding who was released from jail on September 27, 2015. There was no evidence presented that any of the three people who Mr. Lowe picked up from the jail was the Mr. McClure on trial.

The second witness to testify about the events of September 27, 2015 was Sheila Norris, who testified that in her position as transportation supervisor for ABHS, she received an email in September that three people did not come in to treatment. 1RP 136. She testified that the name "Mr. McClure" "sounds familiar," 1RP 138, although she did not recall receiving an order to take Mr. McClure to ABHS. 1RP 139-140. She also testified, over a hearsay objection, which was overruled as a "basis-of-knowledge question," that a Mr. McClure did not arrive at ABHS. 1RP 138. But she did not identify the defendant as that Mr. McClure. 1RP 134-147. She testified that she was not present at ABHS on September 27, 2016 and that all the information she had about that date was from an email from another unnamed person. 1RP 143. Norris' testimony, based on someone else's email and regarding a Mr. McClure, should have been excluded as hearsay under ER 801 and 802.³ But even considering her testimony for its truth, she

³ Under ER 801(c), hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible under ER 802.

did not identify the defendant as the person about whom she had information.

Mr. McClure's former community corrections officer, Tonya Wick, also testified; however, her testimony similarly failed to provide sufficient evidence that the defendant seated in court committed the crime of first degree escape. She was able to identify the defendant as Trevor McClure based on meeting him approximately four times when he was on her caseload. 1RP 148. She testified that she was familiar with the Order Modifying Sentence and that she was told that Mr. McClure did not arrive at ABHS. 1RP 152. This answer drew a hearsay objection, which was overruled because "[t]here was testimony previously about that." RP 152. The only previous testimony about that was from Ms. Norris, who confirmed that "any information [she had] is derived from an e-mail." 1RP 146. Therefore, this testimony also should have been excluded under ER 801 and 802.

Ms. Wick provided a significant amount of testimony about the order modifying sentence in general, but she did not testify that she witnessed the defendant sign it. 1RP 147-163. No other witness testified that they saw the defendant sign the order. See 1RP 120-163. And Wick, like Norris, admitted that any information

about Mr. McClure not entering treatment on September 27 came from what others told her. 1RP 159.

The only testimony regarding the defendant's failure to report to ABHS was the hearsay testimony of Ms. Norris and the hearsay testimony of Ms. Wick. This testimony is of the same evidentiary quality as the testimony given in State v. Green, 157 Wn. App. at 852. In that case, general counsel for a school district testified that he was aware that the defendant had been trespassed for allegedly acting in a disruptive fashion, although he had no personal knowledge of the events. Id. at 852. "The state had the burden to prove that [the defendant] acted unlawfully when entering the school property" in order to prove a key element of the crime of criminal trespass. Id. at 850. The Green court held that because the evidence was only admitted to explain the witness's understanding of why the trespass notice was issued, it was not substantive evidence supporting the lawfulness of the trespass order and therefore the State had not met its burden. Id. at 852. Because Ms. Norris' and Ms. Wick's testimony that Mr. McClure did not enter ABHS was only based on an email from another unnamed person and not on personal knowledge, that testimony is

hearsay and insufficient to support a finding beyond a reasonable doubt that Mr. McClure committed the crime of first degree escape.

Because the State did not establish by a competent witness with personal knowledge of events that Mr. McClure was the person who signed the Order Modifying Sentence, that he was the person Mr. Lowe picked up on September 27, 2015, or that he ever failed to appear at ABHS, Mr. McClure's conviction for first degree escape must be dismissed with prejudice. See DeVries, 149 Wn.2d at 853-854.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Mr. McClure to be indigent and entitled to appointment of our office's services at public expense. CP 93-94. Mr. McClure's affidavit of indigency reveals that he has no income or assets. CP 90-91. Moreover, he is serving a 53-month prison sentence. CP 71. His prospects for paying appellate costs are poor. Therefore, if he does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (instructing defendants on appeal to make this argument in their opening briefs), review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, McClure’s ability to pay must be determined before discretionary costs are imposed. Without a basis to determine that McClure has a present or future ability to pay, this Court should not assess discretionary appellate costs against him in the event he does not substantially prevail on appeal.⁴

D. CONCLUSION

Failure to comply with the treatment pursuant to a DOSA does not satisfy the elements of first degree escape. Additionally, the State failed to present sufficient proof of Mr. McClure’s identity.

Therefore, Mr. McClure's conviction for first degree escape should be vacated.

DATED this 31st day of October, 2016.

Respectfully submitted,

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⁴ Pursuant to this Court's general order, entered June 10, 2016, McClure will file a report as to continued indigency in the next 60 days.

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No. 34399-5-III

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Re: McClure
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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10-31-2016
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Done in Seattle, Washington