

NO. 38913-4-II
COURT OF APPEALS, DIVISION II

COMM. DIVISION
SUPERIOR COURT
CLERK
JUL 11 2008
11:00 AM
COURT OF APPEALS
DIVISION II
CLERK

STATE OF WASHINGTON,

Respondent

vs.

NATHAN A. BROOKS,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 08-1-01944-0

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Brooks to be convicted of escape in the first degree where the plain language of the escape in the first degree statute unambiguously does not apply to fleeing from custody where the detention was based on an arrest warrant for a probation/community custody violation, or in the alternative, the statute is ambiguous as to whether it applies to fleeing from custody where the detention was based on an arrest warrant for a probation/community custody violation and under the rule of lenity Brooks should have prevailed.
2. The trial court erred in failing to take the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Brooks to be convicted of escape in the first degree where the plain language of the escape in the first degree statute unambiguously does not apply to fleeing from custody where the detention was based on an arrest warrant for a probation/community custody violation, or in the alternative, the statute is ambiguous as to whether it applies to fleeing from custody where the detention was based on an arrest warrant for a probation/community custody violation and under the rule of lenity Brooks should have prevailed? [Assignment of Error No. 1].
2. Whether, there was sufficient evidence to find Brooks guilty of escape in the first degree beyond a reasonable doubt? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Nathan A. Brooks (Brooks) was charged by first amended information filed in Thurston County Superior Court with one count of escape in the first degree. [CP 13].

Prior to trial no motions regarding CrR 3.5 or CrR 3.6 were made or heard.

Brooks was tried by a jury, the Honorable Gary R. Tabor presiding. The State proposed an instruction stating:

“Detention pursuant to a conviction of a felony” includes a detention based upon a warrant for an alleged violation of probation and/or community custody when the probation and/or community custody followed a felony conviction.

[CP 14-18]. The court gave the State’s proposed instruction, Instruction No. 8 [CP 25], over Brooks’s objection. [RP 86-87]. The jury found Brooks guilty as charged. [CP 30; RP 92-96].

The court sentenced Brooks to a standard range sentence of 72-months based on an undisputed/acknowledged offender score of 9. [CP 32-42, 58-59; 2-24-09 RP 3, 9-12].

A notice of appeal was timely filed on February 24, 2009. [CP 43-54]. This appeal follows.

2. Facts

On October 25, 2008, at approximately 1 AM, Washington State Patrol Trooper MaKayla Morgan (Morgan) was on patrol northbound on Marvin Road approaching Martin Way in Thurston County. [RP 22]. She noticed a car in her rearview mirror with its headlight out. [RP 23]. She let the car pass her then activated her emergency lights. [RP 23]. The car pulled into a gas station around behind the pumps and stopped. [RP 24]. Morgan approached the driver, the only occupant of the car, asking for his license and registration. [RP 24-25]. The driver appeared nervous and took along to produce the requested information. [RP 25-26]. Morgan identified the driver as Brooks. [RP 22-23, 26-27]. Morgan ran Brooks's license and was advised over the speaker radio she was wearing that Brooks had an outstanding felony arrest warrant. [RP 26-28, 30]. Morgan placed Brooks under arrest handcuffing him. [RP 28-30]. As Morgan was patting Brooks down before placing him in her patrol car, Brooks suddenly "took off" (ran away). [RP 31]. Brooks was eventually found and arrested by the Thurston County Sheriff's Office. [RP 35]. The State admitted Exhibits Nos. 1 and 2, regarding a prior conviction of Brooks for the limited purpose "as to the State's burden of proving a particular element of the charge of escape in the first degree...." [CP 28-29; Supp. CP Exhibits Nos. 1 and 2; RP 40-42].

Brooks testified in his own defense. He explained that on October 25, 2008, he had been at a friend's house and had gone to the store in the early morning hours for milk for his daughter. [RP 48]. He acknowledged that he was stopped by the police because a headlight was out on his car. [RP 48-49]. Brooks explained that he handed Morgan his insurance and registration but his identification had fallen out of his pocket and slid between the seats of his car and he could find it. [RP 49-50]. When he told Morgan this, she immediately opened his car door and handcuffed him. [RP 50-51]. Brooks denied hearing anything over Morgan's radio and denied knowing why he was being arrested (that he had an outstanding felony warrant). [RP 52-53]. He admitted to being scared and running away from Morgan. [RP 53]. Brooks acknowledged that he was on community custody/probation based on a prior felony conviction when stopped by Morgan. [RP 53-54]. In fact, Brooks acknowledged having eight prior felony convictions. [RP 54].

D. ARGUMENT

- (1) THE PLAIN LANGUAGE OF THE ESCAPE IN THE FIRST DEGREE STATUTE, RCW 9A.76.110, DOES NOT PROVIDE FOR FLEEING FROM CUSTODY WHERE THE DETENTION WAS BASED ON AN ARREST WARRANT FOR A PROBATION/COMMUNITY CUSTODY VIOLATION TO BE SUBJECT TO THE STATUTE, OR IN THE ALTERNATIVE THE ESCAPE IN THE FIRST DEGREE STATUTE IS AMBIGUOUS AS TO WHETHER SUCH ACTIONS ARE SUBJECT TO THE STATUTE WITH THE RESULT THAT BROOKS'S CONVICTION FOR ESCAPE IN THE FIRST DEGREE MUST BE REVERSED AND DISMISSED.

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. State v. Radan, 98 Wn. App. 652, 657, 990 P.2d 962 (1999). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the Legislature's intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (*citing State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial

interpretation. Id. When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

RCW 9A.76.110, the statute under which Brooks was charged and convicted, provides in pertinent part:

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 equivalent juvenile offense.

[Emphasis added].

The plain language of RCW 9A.76.110 indicates two conditions necessary for a person to be guilty of escape in the first degree to-wit: 1) a person must knowingly escape from custody, and 2) that the person was being detained pursuant to a felony conviction. In other words, a person must be being detained based on a felony conviction (post-verdict) such as when a person flees custody before or after sentencing for a felony, or during any transport, or from any jail/prison, or from any furlough/work crew all while the sentence is being served. There is no language in the statute that indicates a person can be guilty of escape in the first degree, after having served his sentence for a felony conviction—thus being free

from detention pursuant to a felony conviction, and a warrant issues for a probation/community custody violation as is the case here.

This unambiguously seems to be the legislative intent, which appellate courts must give effect, when considering that the legislature has divided escape charges into three degrees.

RCW 9A.76.120, escape in the second degree, provides 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.
 - (b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody.

Under this statute the legislature has created a less severe crime than escape in the first degree which crime covers escape from jail or prison without having to have been convicted of a felony, i.e. gross misdemeanors, misdemeanors, infractions, etc., or from escaping from custody after having been charged with a felony, again these circumstances do not apply here.

Moreover, RCW 9A.76.130, escape in the third degree, provides in pertinent part:

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

Under this statute the legislature has created an even more less severe crime than either escape in the first or second degree which crime is the “catch all” in that this crime covers escape in any circumstance including those where there is no felony charge pending, there is no fleeing from a detention facility, and includes circumstances where there is probable cause to arrest and flight as well as, like here, there is an outstanding arrest warrant from which the person has fled custody. Given this statutory scheme and its unambiguous language, Brooks was not and should not have been found guilty of escape in the first degree where all he did was flee custody after his arrest on a warrant for a probation/community custody violation. He was no longer serving a felony sentence nor was he charged with a new felony—a probation violation, while related to an underlying felony is not a felony. Given the statutory language and the facts of this case this court should reverse and dismiss Brooks’s conviction for escape in the first degree as his actions did not constitute the crime of escape in the first degree.

In the alternative in reading RCW 9A.76.110 it becomes apparent that an ambiguity exists in that there are two possible meanings as to what constitutes escape in the first degree. Brooks’s position is as set forth above that his actions do not constitute escape in the first degree. The State disagrees as evidenced by the fact that it sought and obtained an

instruction (Instruction No. 8, [CP 25], set forth in its entirety above), over Brooks's objection which would make Brooks's actions subject to an escape in the first degree charge pursuant to State v. Perencevic, 54 Wn. App. 585, 774 P.2d 558 (Div. I 1989) and State v. Walls, 106 Wn. App. 792, 25 P.3d 1052 (Div. III 2001). [CP 14-18; RP 86-87]. However neither of these cases conclusively resolves the issue presented herein.

Perencevic did not involve analysis of statutory construction presented herein, and Walls, while discussing statutory construction and holding against Brooks's argument, it is not "settled" law in that the case included a dissent and, more importantly, the issue was not and has not been decided by our State Supreme Court. In other words, there is some authority for the State's reading of the statute but it is not decisive—particularly in this Division which has not spoken on the issue. More importantly, there is an ambiguity in the statute as addressed above and under the rule of lenity Brooks should prevail.

- (2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT BROOKS WAS GUILTY OF ESCAPE IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Brooks was charged and convicted of escape in the first degree and as instructed by the court in Instruction No. 6, the State bore the burden of proving the following beyond a reasonable doubt:

- (1) That on or about October 25, 2008, the defendant escaped from custody;
- (2) That the defendant was being detained pursuant to a conviction of a felony;
- (3) That the defendant knew that his actions would result in leaving confinement without permission; and
- (4) That this act occurred in the State of Washington.

[CP 25].

The State bore the burden of proving beyond a reasonable doubt that Brooks knowingly fled custody while being detained for a conviction of a felony. The sum of the State's evidence to prove these elements is the testimony of Morgan that she determined that Brooks had an outstanding felony warrant (for probation/community custody violations—Exhibits Nos. 1 and 2) and that he ran away from her after he was handcuffed only to be captured by Thurston County Sheriffs later. Morgan also testified that she was notified of Brooks's outstanding warrant on her radio speaker which was on her shoulder and Brooks should have heard this.

However with regard to the knowledge element, Brooks testified and emphatically denied knowing why he was being arrested—he had no idea about an outstanding warrant—he had been stopped for a broken headlight a non-arrestable offense—and only fled because he was scared. Absent conclusive evidence that Brooks was aware of his outstanding warrant and that he fled Morgan's custody knowing this, Brooks's conviction cannot be sustained.

In addition, as argued above in section (1), as a matter of law, Brooks's detention for an arrest warrant for a probation/community custody violation is not detention pursuant to a felony conviction and thus Brooks's actions were not subject to a charge of escape in the first degree.

Thus, the State has failed to elicit sufficient evidence to prove beyond a reasonable doubt that Brooks was guilty of escape in the first degree. This court should reverse his conviction.

E. CONCLUSION

Based on the above, Brooks respectfully requests this court to reverse and dismiss his conviction for escape in the first degree.

DATED this 28th day of July 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 28th day of July 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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(and the transcript)

Signed at Tacoma, Washington this 28th day of July 2009.

Patricia A. Pethick
Patricia A. Pethick

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