71323-0 71323-0

Court Of Appeals (Division One)
Statement Of Additional
Grounds For Review

State Of Washington )
) No. 71323-0-I
Respondent, )
) Statement of
v. ) Additional Grounds
)
Joshua Mason-Webb )
)
Appellant. )

I, Joshua Mason-Webb, have recieved and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

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A. Assignment Of Error

1.) The trial court erred when it denied Mr. Mason-Webb relief for his Knapstad motion when weighing the evidence of the charge.

2.) Trial counsel's assistance in requesting a lesser included jury instruction and allowing prosecutorial misconduct during closing arguments was ineffective due to incompetence.

B. Issues Pertaining To Assignments Of Error

1.) A trial court must resolve an ambiguous statue in favor of the defendant when two reasonable interpretations of the law are presented. Here, the rule of lenity was to be applied and charges dismissed, yet the Court determined it was obligated to denie the motion based on a Division One ruling's interpretation of the law. Was the trial court's determination an abuse of discretion and erroneous application of the law?

2.) A trial counsel's assistance must be effective to ensure a fair trial. Here, counsel did not properly investigate his line of defense in requesting a lesser included jury instruction and failed to object to the prosecutors statements during closing argument. Was counsel's assistance effective?

C. Statement Of The Case

On March 22, 2012, Joshua Mason-Webb was arraigned for Violation of the Uniform Controlled Substance Act - Delivery of Methamphetamine under cause number 12-1-02351-SEA. On July 30, 2012, he was convicted by way of plea agreement of Conspiracy to Commit a Violation of the Uniform Controlled Substance Act - Delivery of Methamphetamine and sentenced to 10 months to be done in Work Release on July 30, 2012.

On November 8, 2012, Mr. Mason-Webb was authorized a 'Pass for Release' for the purpose of applying for employment. Mr. Mason-Webb failed to return and was arrested on November 18, 2012.

On February 6, 2013, charge of Escape in the First Degree were filed. On October 29, 2013, counsel Jeffrey Goldman presented a Knapstad motion to dismiss the charge and the motion was denied.

During the course of trial, counsel requested a lesser included jury instructions for Second and Third Degree Escape. The Court denied the instructions on the grounds it did not meet the Workma test.

On or about November 18, 2013, Mr. Mason-Webb was convicted of First Degree Escape following a jury trial.

D. Argument

## The Finding That The Term Escape Is Not Ambiguous And Not Applying The Rule Of Lenity

1.) The Court is required to construe a statue strictly against the State in favor of the defendant where two possible constructions are permissible. State v. Breaux, 273 P.3d 447, 167 Wn. App. 166.

Escape is not defined. Absent a statutory definition, words in a statue are given their common law or ordinary meaning and a non-technical term may be given its dictionary definition. State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1347 (1997). Mr. Mason Webb presented the Merriam-Webster definition in the Knapstad motion that escape means "to get away (as by flight) esp. escaped from prison." Merriam-Webster (1993).

The State charged Mr. Mason-Webb with escape from a detention facility and defined escape as "A person who while on work release or furlough, is not within the area where he is authorized to be at a particular time, or a person who has remained in an area where he was authorized to go beyond the time permitted him, has escaped 'from a detention facility.'" State v. Peters, 35 Wn. App. at 431

Mr. Mason-Webb argues he did not escape from a detention facility and did not interpret that he was confined at the place he was authorized to go, but the physical boundaries of the work release facility he was sentenced to serve his term.

Common usage of the word 'escape' imports leaving physical confinement without permission. State v. Brown, 29 Wn. 2d App 77[illegible] 780, 630 P.2d 1378, review denied, 96 Wn. 2d 1013.

The evidence defendant and the State are using to support their claim is the escape form defendant signed listing the escape statue and acknowledging that if I walk away from, leave without permission fail to return to, or abscond from, my approved residence or person to whose charge I have been committed, I will be charged with Escape as provided for under the above RCW's and will be prosecuted for said crime.

RCW 9A.76.110 (Escape in the 1st Degree)
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.76.120 (Escape in the 2nd Degree)
A person is guilty of Escape in the 2nd 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, violen 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.

RCW 9A.76.130 (Escape in the 3rd Degree)

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

The work release escape form does not include the definitions of the elements, however, of detention facility, custody, or escape. The only clarity the form shows are the actions that can constitute as an escape are a) if I walk away from; b) leave without authorization; c) fail to return to or abscond from my approved residence or any facility or person to whose charge I have been committed.

Mr. Mason-Webb's caseworker, John Markholt, testified that he basically explains what the expectations are and what the result of an escape could be. (11/14/2013 CP page 13 at 14-16). He informs clients that if they leave the facility without an authorized pass they are looking at a potential escape charge. (11/14/2013 CP page 18 at 16-25). He stated it carries a one to five year sentence if it is filed by the prosecutor and if they are late beyond their return time an escape charge could be filed. (11/14/2013 CP page 18-19 at 1-4), but later testifies that he did not know that somebody could actually face three to eighty-four months and he does not read the escape form in it's entirety, but actually paraphrases it. (11/14/2013 CP page 71 at 20-25, CP page 72 at 1-7)

Mr. Mason-Webb asserts that by the plain language of the escape form, he interpreted the only way to 'escape' from a detention facility. This rationale is further explained in State v. Hall. There, the Court settled an equal protection claim on the mens rea of the two escape statues at the time but rationalized the act defining escape; "while the culpability elements of the statues differ, so do the crimes. This distinction is blurred by

the Courts use of the term 'escape' when it is actually refering to the willful failure to return to confinement." State v. Hall, 104 Wn.2d 486, 706 P.2d 1074 (1985).

The U.S. Supreme Court has recognized this distinction as well in Chambers v. U.S. The Illinois escape statue defined escape as 1) escape from a penal institution; 2) escape from the custody of an employee; 3) failing to return for peciodic imprisonment; 4) failing to return from furlough 5) failing to return from work or day release; 6) failure to return to a penal institution; and 7) failing to return or abide by the terms of home confinement. Unlike lower courts, we believe that a failure to report (as described in the statutory provisions 3rd, 4th, 5th, 6th, and 7th phrase) is a separate crime, different from escape (the subject matter of the statues 1st and 2nd phrase). Chambers v. U.S., 555 U.S. 122, 129 S.Ct. 687 (2009).

The State used a judicial construction made by this Court in Peter's supra, of escape. In Peter's, a juvenile was celebrating her graduation from a rehab class at a Bellevue pizza parlor with a group when on their way out of the parlor, she ran away from her counselor and was later recaptured. The State charged her with second degree escape from a detention facility. Peters argued that she did not run or flee from confinement or a detention facility because she was not confined at the time of the alleged escape. The State responded that the term "detention facility" entails a broader meaning than a building or place where a person is confined because it includes "any work release, furlough, or other such facility or program. The State

contended defendant escaped while on furlough. The term "place" thus encompass any area in which a person is permitted to go or remain according to the terms of his work release, furlough, or comparable program.

This Court has interpreted that any place a person is authorized to go is a detention facility. This Court clearly over-reads and add new heights to the term "place" and over-looks the critical phrase "used for the confinement of a person" in the detention facility definitio

Work release is a program of "partial confinement" as defined by the SRA, RCW 9.94A.030, and consist of part of your sentence inside the work release facility "for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, work crew, and home detention." RCW 9.94A.030(3 Therefor, when you are authorized to leave from work release, you are released from confinement to the community on an honor system to come back on time and continue to do so until you fulfill your legal obligation to complete your sentence.

Mr. Mason-Webb did not leave without proper authorization, his caseworker granted him permission to leave the work release facility. (11/14/2013 CP page 77 at 24-25, page 76 at 1,2). He was not "in any work release, furlough or comparable program" at the time of the escape, but on a authorized pass. Mr. Mason-Webb was not on "furlough." Furlough is "an authorized leave of abscence for an eligible resident without any requirement that the resident be accompanied by, or be in the custody of any law

enforcement or correctional official while on such leave."
RCW 72.66.010(3)

A resident is "a person convicted of a felony and serving a sentence for a term of confinement in a state correctional institution or facility, or a state approved work or training release facility."
RCW 72.66.010(5)

Mr. Mason-Webb was not a resident of a state institution under the jurisdiction of the Department of Corrections, thus does not qualify for a furlough.

This Courts attempt at "broadening" the meaning of the term place violates the rule of strict construction that penal statues be strictly construed. State v. Rinkes, 49 Wash. 2d 664, 306 P.2d 205 (1957).
The term 'place' in the phrase "any place used for the confinement of a person" of the detention facility definition would reasonably mean any facility or institution operated or utilized under contract by the state or any other government or unit for person's arrested for, charged with, or convicted of an offense, ie a jail or prison. The escape definition, supra, and the detention facility definition as a whole does not encompass failing to return to confinement as escaping from confinement.

This court's interpretation in Peter's that a person escapes from a detention facility by remaining in or at the 'place' they are authorized to go beyond the time permitted leads to absurd and unlikely results. Such reasoning would mean that any 'place' in the community is a place of confinement for persons on a work release pass. It is highly unlikely the Legislature intended the escape statue to be person-specific when defining a detention facility of where a person escapes from. The court's are not to adopt an interpretation of a statue that leads to strained, absurd, or unlikely results. Double D Hop Ranch v. Sanchez, 133 Wash. 2d 793, 799, 947 P.2d 727 (1997), 952 P.2d 590 (1998)

Mr. Mason-Webb signed the escape form with the knowledge as to the common understanding of the circumstances of escaping from a detention facility, leaving the physical boundaries of the work release facility without permission.

The State, using Peters, reasons that failing to return to the physical boundaries you are confined at while on pass are the circumstances that Mason-Webb did to escape.

These two interpretations make the term escape ambiguous, for there are two acts that constitute escaping from a detention facility, failing to return to confinement and leaving the actual facility without permission.

"If the statues meaning is plain on its face, then the court must give effect to that plain meaning as an expression of Legislative intent." The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statue in which that provision is found, related provisions, and the statutory scheme as a whole. If after that examination, the provisions still subject to more than one reasonable interpretation, it is ambiguous. If a statue is ambiguous, the rule of lenity requires us to interpret the statue in favor of the defendant absent legislative intent to the contrary. State v. Jacobs, 154 Wash.2d 600-01, 115 P.3d 281 (2005) (quoting Dept. of Ecology v. Campbell and Gwinn, L.L.C., 146 Wash. 2d 1, 9-10, 43 P.3d 4 (2002)

The Court in Mr. Mason-Webb's motion hearing discretion was limited to interpret and apply the common understanding of the term escape as defined in the Knapstad motion. The State introduced a judicially construed definition of detention facility by way of Peters and counsel introduced the Yallup definition. The Court concluded that Division One has decided the definition of detention facility and therefor escape is not ambiguous. (10/29/2013 CP page 13 at 21-25)

The detention facility definition is not ambiguous and the court is to adopt and apply the plain meaning by the language alone since Mr. Mason-Webb was not informed of the statutory or judicial definition.

"Absent ambiguity, we derive a statues meaning from the wordin of the statue itself without resorting to judicial construction or interpretation." Fray v. Spokane County, 134 Wn. 2d 637, 649, 952 P.2d 601 (1998).

The detention facility definition explains what a person escapes from, not how a person escapes, so the act of escape is separate to the object of escape. Here, the court abused its discretion by not adhering to the principles and rules of statutory construction that a common law / dictionary definition of escape be adopted and the plain meaning of detention facility be applied. The Court ignored the rule of lenity. that an ambiguous statue be construed and ruled in favor of the defendant, denying Mr. Mason-Webb due process of the law.

2) To show ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

Counsel violated his duty to investigate a potential line of defense for a lesser offense jury instruction on his lack of preparation, causing him to overlook obvious legal issues and argument Counsel requested lesser included offenses of second and third degree escape, allowing the court to put defense's request under the Workman test. Counsel should have requested an inferior degree offense jury instruction for second and third degree escape.

Lesser included offense anaylsis require that 1) all essential elements of the lesser included must be the same as the charged offense; and 2) there must be an inference that only the lesser included was commited. WPIC 4.11

Lesser degree crime is inferior degree of another when 1) statues for both charged offense and proposed inferior degree offense prescribe but one offense; 2) information charges offense that is divided into degrees, and offense is inferior degree of charged; and 3) there is evidence that defendant commited only the inferior offense. State v. Patterson, 948 P.2d 381, 133 Wn.2d 885

RCW 10.61.003 - Degree Offenses / Inferior Degree / Attempt
Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of an degree inferior thereto, or of an attempt to commit the offense.

Had counsel requested a lesser degree instruction, it would have been only subjected to the inferior degree legal component, not the Workman legal component, rendering the courts anaylsis improper that the charged offense of escape in the first degree has a felony conviction and escape in the third degree does not. "Unlike a lesser included offense, a lesser degree offense may have an element that is not an element of the greater offense. For example, second degree assault (by tortue) is an inferior degree offense for first degree assault (by inflicting great bodily harm), even though the lesser degree offense has an element that is not a part of the greater degree

offense and thus does not qualify as a lesser included offense."
State v. Peterson, supra.

Under the lesser degree anaylsis, was defendant entitled to an inferior degree jury instruction?

1) Statues for both charged offense and proposed inferior degree offense proscribe but one offense (Escape);

2) Information charges offense that is divided into degrees, and offense is inferoir degree of charged offense (Escape 1, Escape 2, and Escape 3)

The first two prongs make up the legal component of a lesser degree instruction. Having met the legal component, the inquiry turns to the last prong that make up the factual component;
3) that there is evidence that defendant committed only inferior offense.

Mr. Mason-Webb was charged with escape in the first degree from a detention facility. Defendants theory that without escape being defined, the strict reading of the detention facility definition, the Court Ordered Conditions of Conduct form, the authorized Work Release Pass, and Mr. Mason-Webb's caseworker testifying to paraphrasing the escape form, the jury could infer from the evidence that defendant was not in confinement at the time of the escape and did not escape from a detention facility, but violated the terms of his court order to be in work release.

Defendants counsel presented the relevant facts to support the giving of a lesser degree jury instruction, but he requested a lesser included instead.

Lesser offense instructions play a critical role in our criminal justice system, for they allow the jury to more correlate the verdict to the act committed and thus arrive at the "true verdict The jury should be allowed to have access to all varying degrees of escape that allow the defendant to present his theory of the case at least to the extent his theory is compatible with the commision of the lesser crime." Failure to give lesser instruction where the evidence such instruction puts the jury to an impermissible choice This fear of a Hobson's choice is substantial enough that erroneous failure to give a lesser instruction is reversible error."
State v. Warden, 133 Wash. 2d 559, 562, 947 P.2d 708 (1997)

"Where offense consist of different degrees, lesser crime must be submitted to jury along with greater, unless evidence positively excludes any inference that lesser crime was committed, and it is not incumbent on jury, before instruction to that effect be given to show facts from which jury might draw conclusion that lesser crime and not greater was in fact committed." Voight v. Webb, E.D. Wash. 192, 2, 47 F. Supp. 743.

Counsel is presumed competent, however, "this presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial."
State v. White, 500 P.2d 1242, 81 Wn.2d 223 (1972)

The record at trial clearly reflects counsel's unpreparedness on the facts pertaining to lesser included jury instructions. Counsel requested second and third degree lesser includeds of first degree escape. The Court asked counsel what evidence would support the giving of the instructions and counsel responded that a juror could find a person guilty of second degree escape if they found him guilty of first degree escape, since they both are encompassed in the lesser included definition of a crime that require the same or additional elements. (11/14/2013 CP page 104 at 7-21). Counsel then withdraws his request for instructions on Escape in the Second Degree and only requests instructions for Escape in the Third Degree

Escape in the Third Degree has an element that is not an element of the charged crime, custody, and not a detention facility or a felony conviction. The State responded that there was no affirmative evidence to disprove defendant was being detained pursuant to a conviction of a felony and third degree escape has a different element than the charged offense. (11/14/2013 CP page 108 at 3-16). The Court granted counsel time to come up with some law to support the giving of the third degree instructions. (11/14/2013 CP page 108 at 23-25)

On the following day of trial, counsel presented lesser included instructions for Escape in the Third Degree using the legal component of the Workman test, not the Peterson test, to support the factual component. Had counsel did proper research, he would and should have discovered the different anaylsis of the jury instructions, presented the proper legal component against the State's, and corrected the Court to implement it. Counsel's failure to propose correct jury instructions denied appellant a plausible line of defense for a lesser offense being presented to the jury. Counsel's incompetence denied appellant due process due to ineffective assistance of counsel.

3. Counsel did not object to improper conduct of the prosecutor.

During closing argument, the prosecutor showed a slide of the to-convict jury instructions defining each element to the jury. In the slide, the prosecutor presented a judicial construction of detention facility from State v. Peters, supra, to the jury. (11/14/20 CP page 31 at 10-13).

This was improper as that construction became the law of the case, allowed the jury an impermissible inference to draw from on an undefined element (escape), and impermissibly shifted the burden to the defense to disprove that inference and allow the defens to argue its theory of their case. Counsel should have objected and requested a curative instruction.

The prosecutor's comment was improper that the jurors apply their common sense that the work release program rules must be enforced and if the defendant is allowed out for a period of time and expected to return and fails to, it is an escape. The prosecutor tells the jury "how else would we keep people in work release programs if not for the rules that require them to return?" (11/14/2013 CP page 51 at 4-10).

"It's improper for the prosecutor to argue that the jury should convict to protect the community or deter future law breaking." United States v. Solivan, 937 F.2d 1146) "However, prosecutorial misconduct requires a new trial only if the misconduct was prejudicial." State v. Graham, 59 Wash. App. at 426, 798 P.2d 314.

Here, the prosecutor's comment appealed to the passion and prejudice of the jury that it must convict appellant to further legislative policy that if you do not return to work release, they must convict him to discourage future escapes. The jury's verdict must be based on the evidence, not implanted inferenc from mistatements of the law. "Automactic reversal is required "when an omission or mistatement in a jury instruction relieves the State of its burden of proving every element of a crime." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889

## E. Conclusion

For the above reasons, Mr. Mason-Webb requests this Court to reverse and remand for trial

Dated this 22nd day of October 2014.

Respectfully submitted,
Joshua Mason-Webb
Joshua Mason-Webb

DECLARATION OF SERVICE BY MAIL
GR 3.1(c)

St. v. Mason-Webb
No. 71323-0-I

I, Joshua Mason-Webb, declare that, on this 23rd day of October, 2014 I deposited the forgoing documents:

Statement of Additional Grounds

or a copy thereof, in the internal legal mail system of

U.S.A (Clallam Bay, WA)

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| | |
|---|---|
| Amy R. Meckling<br>King County Prosecutors Office<br>516 3rd Ave Ste W554<br>Seattle, WA 98101 | Division One (Court of Appeals)<br>One Union<br>600 University Street<br>Seattle, WA 98101 |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Clallam Bay, WA (City & State.) on 10/23/2014 (Date)

Joshua Mason-Webb
Signature

Joshua Mason-Webb
Type / Print Name