

RENDERED: May 8, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3468-MR

PAUL HAMM

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 96-CR-0928

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, HUDDLESTON, and KNOPF, Judges.

COMBS, JUDGE: Paul Hamm appeals his convictions of second-degree escape and second-degree persistent felony offender (PFO). Hamm was sentenced to one year for escape, enhanced to five years for PFO. We affirm.

On August 1, 1996, Hamm, who was being housed at the Fayette County Detention Center, was scheduled to engage upon his first day of work-release. The evidence presented at trial indicated that Hamm had been instructed that his release was for the sole purpose of reporting to work; that he was to travel

directly to and from his worksite; that he was to travel via the quickest route, without any stops; that he was not to contact family or friends; and that he was not to drink alcohol or take drugs. He was told that his failure to return directly to the jail would result in an escape charge.

Hamm was released from the detention center at 6:30 a.m. Donald Newman, Hamm's employer and stepfather, testified at trial that he had arrived outside the jail to pick Hamm up at about 7:35 or 7:40 a.m. While en route to the jobsite, the two men decided to stop for coffee. Newman testified that Hamm had been delivered to the worksite by 8:15 a.m. Newman left the site but returned between 10:30 and 11:00 a.m. and found Hamm and other workmen present. Newman testified that he had treated the crew to a long lunch; then at 2:00 p.m., he decided to call it a day. On the way back to the jail, Newman stated that Hamm asked to be dropped off at a friend's house. Hamm assured Newman that he would return to the jail at 5:30 p.m. Newman last saw Hamm at about 2:45 p.m.

Ann Siller Hamm, the appellant's estranged wife, testified that she lives only six or seven blocks from the detention facility. She explained that Hamm had barged into her bedroom near 7:30 on the morning of August 1, 1996. She testified that although she had ordered the appellant to leave, she was ultimately forced to call the police. Appellant was in her home from five to ten minutes. Mrs. Hamm testified that the

appellant then telephoned her several times, begged her not to press charges against him, and made threats against her life.

Debbie Dennis, the appellant's sister-in-law, testified that at 11:00 or 12:00 p.m., on August 1, 1996, she brought Hamm's children to visit him at a public park. She stated that Hamm began making threats against her sister. She remained in the park with the appellant for forty-five minutes to an hour.

Lieutenant Jeff Coleman, a Fayette County deputy sheriff, testified that at approximately 3:30 p.m. on August 1, 1996, he served two warrants on Hamm -- one for terroristic threatening and one for escape. At this time, Hamm was returned to the detention facility.

In this appeal, Hamm contends that he was entitled to a directed verdict of acquittal because the Commonwealth failed to establish criminal intent. We disagree.

According to KRS 520.030, one is guilty of escape in the second degree "when . . . he escapes from custody." "Custody" has recently been defined by the Kentucky Supreme Court as a very elastic term meaning actual imprisonment, physical detention, mere power (legal or physical) of imprisoning, or of taking manual possession. Persons on probation, on parole, released on bail, or on their own recognizance have been held to be "in custody." Stroud v. Commonwealth, Ky., 922 S.W.2d 382 (1996), citing Black's Law Dictionary, 6th ed., 1990, p. 384.

KRS 520.010(5) defines "escape" as:

departure from custody . . . with knowledge that the departure is unpermitted, or failure

to return to custody or detention following a temporary leave granted for a specific purpose or limited period.

In light of the circumstances of this case, we hold that Hamm was properly charged with escape.

The United States Supreme Court has held that the mental state, or *mens rea*, for the crime of escape is "knowledge." Unites States v. Bailey, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). In prosecuting a case pursuant to KRS 520.020, the Commonwealth meets its burden if it proves beyond a reasonable doubt that an escapee acted "knowingly,"; i.e., he knew that his actions were unauthorized under the rules of the work-release program.

Hamm argues that he could not rightfully have been charged with escape because he was arrested some two hours before he was due to return to the facility. Hamm also contends that he always intended to return at the appointed hour and told others he would return to the facility at 5:30 p.m.; he maintains that these facts make it apparent that the Commonwealth could not prove any culpable mental state.

This argument is contradicted by the testimony presented at trial indicating that while Hamm was aware that he was released from the detention center for a specific purpose (to report to an approved worksite) and for a limited period (the duration of the workday), he nonetheless improperly intruded upon his estranged wife instead of reporting directly to work; made an unauthorized stop en route to the worksite; made unauthorized

telephone calls to family; left the worksite to visit with his children; and failed to return directly to the facility.

We hold that the Commonwealth introduced sufficient evidence to establish that Hamm departed from the facility knowing that the departure was unpermitted and failed to return to detention following a leave which he knew had been granted for a specific purpose and a limited period. Therefore, we cannot say that it was "clearly unreasonable" for the jury to find Hamm guilty as charged. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). The trial court did not err by denying Hamm's motion for directed verdict.

Next, the appellant argues that the trial court erred in its instructions to the jury. We disagree.

The court instructed the jury, in pertinent part, as follows:

You will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about August 1, 1996, the Defendant escaped from the custody of the Fayette County Detention Center by failing to abide by the conditions of his work release. . . .

The jury was also instructed as to the definitions of the pertinent terms in Instruction 4, including the following:

"Escape" -- Means departure from custody or the detention facility in which a person is held or detained with knowledge that the departure is unpermitted, or failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period.

Contrary to Hamm's contentions, the jury instructions did not permit the jury to convict him for the offense of escape for having merely violated the conditions of his work-release. Hamm was convicted because the jury found that he had knowingly departed from the lawful custody of the detention facility. This unauthorized departure also violated the terms of his work-release.

Based upon the foregoing, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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