

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003307-MR

JIMMY DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 97-CR-02309

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, EMBERTON AND GARDNER, JUDGES.

GARDNER, JUDGE. Jimmy Davis (Davis) brings this direct appeal from a conditional plea of guilty to escape in the second degree pursuant to Kentucky Rule of Criminal Procedure (RCr) 8.09. We affirm.

In July 1997, Davis was serving a twelve-month sentence at the River City Correctional Center (RCCC) on a misdemeanor conviction for assault in the fourth degree. Upon arrival at RCCC, Davis was given and signed a document stating that failure to return to the facility after an authorized temporary leave

could constitute escape in the second degree in violation of Kentucky Revised Statute (KRS) 520.030. On July 15, 1997, Davis left the facility on authorized work release and was scheduled to return early the next morning. After Davis did not return to the facility as scheduled, officers at RCCC swore out a warrant for escape. On August 2, 1997, Davis was arrested on the arrest warrant.

In September 1997, the Jefferson County Grand Jury indicted Davis on one felony count of escape in the second degree (KRS 520.030).¹ On December 16, 1997, Davis entered a conditional plea of guilty to the charge under RCr 8.09 pursuant to a plea agreement with the Commonwealth, which recommended a sentence of four years. The trial court sentenced Davis to serve four years in prison for escape in the second degree with Davis reserving a right to appeal two legal issues under the conditional guilty plea. This appeal followed.

The two legal issues reserved for appeal as stated in the judgment of conviction on the conditional plea are as follows:

[(1)] whether an inmate incarcerated at River City Corrections can be charged with and convicted of Escape in the Second Degree by walking away from work release and not returning to River City; and 2) whether a Defendant serving a misdemeanor sentence, with work release, who fails to return to the detention facility, can be indicted as PFO [persistent felony offender] and with felony escape.

¹“(1) A person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody.”

On the first issue, Davis argued before the trial court that failing to return to a private jail facility such as RCCC from work release did not fall within the statutory requirements for escape in the second degree. As the trial court correctly held, Kentucky case law clearly contradicts Davis's position.

In Phipps v. Commonwealth, Ky. App., 933 S.W.2d 825 (1996), the court held that a privately owned facility such as River City Correctional Center fell within the definition of a "detention facility" in KRS 520.010(4)² for purposes of escape in the second degree under KRS 520.030(1). The court also held that Phipps could be convicted of second-degree escape for failing to return to RCCC following a temporary, approved leave from RCCC.

In addition, in Commonwealth v. Johnson, Ky. App., 615 S.W.2d 1 (1981), the court specifically held that a person who fails to return to a "detention facility" after being released temporarily on work release while serving a misdemeanor sentence can be convicted of the felony offense of escape in the second degree. The court stated that failure to return to a detention facility clearly fell within the definition of escape in KRS

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- (4) 'Detention facility' means any building and its premises used for the confinement of a person:
- (a) Charged with or convicted of an offense;
 - (b) Alleged or found to be delinquent;
 - (c) Held for extradition or as a material witness: or
 - d) Otherwise confined pursuant to an order of court for law enforcement purposes[.]

520.010(5)³ involving "failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period." On appeal, Davis does not dispute the applicability of Phipps and Johnson to his case. These cases are dispositive and render his appeal on both issues without merit.

We note that Davis was not indicted for being a persistent felony offender even though he was eligible, so this aspect of issue two is irrelevant, but it necessarily follows that the felony charge of escape in the second degree could have served as a basis for a PFO charge under KRS 532.080.

Finally, on appeal, Davis asserts that KRS 520.030 is unconstitutional because it violates equal protection. This argument was raised for the first time on appeal and was not presented to the trial court. It is axiomatic that as an appellate court, we cannot consider issues or arguments not raised in or decided by the trial court. See, e.g., Commonwealth v. Lavit, Ky., 882 S.W.2d 678, 680 (1994) (appellate court only reviews errors of trial court so "if such court has had no opportunity to rule on a question, there is no alleged error before us to review."); Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989). Moreover, a defendant must notify the Attorney General of a constitutional challenge to a statute,

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- (5) '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[.]

so this issue is not ripe for appellate review. See KRS 418.075(1); Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416, 419 (1997) (notice requirements of KRS 418.075(1) are mandatory). Thus, we need not review Davis' equal protection argument.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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