

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2001-KA-0352**
VERSUS * **COURT OF APPEAL**
JAMAL HOWARD * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 405-427, SECTION "L"
Honorable Terry Alarcon, Judge
* * * * *
Chief Judge William H. Byrnes III
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(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Terri F. Love)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

On March 3, 1999 the State filed a bill of information charging the defendant with simple escape, a violation of La. R.S. 14:110(A). On March 22, 1999 he pleaded not guilty. On August 18, 1999 after trial the jury found the defendant guilty as charged. On August 26, 1999 he was sentenced to two and one-half years at hard labor with credit for time served from the date of arrest, to run consecutively with the sentence in 398-965; the court recommended the defendant for the Impact Program. The State then filed a multiple bill, and the defendant pleaded guilty to being a double offender (prior case 347-971). The trial court vacated the previous sentence and sentenced the defendant under La. R.S. 15:529.1 to two and one-half years at hard labor with credit for time served from the date of arrest, to run consecutively with the sentence in 405-427.

STATEMENT OF THE FACTS

At trial Officer Ike Sterling testified that on January 29, 1999 at around 6:30 p.m. he and his partner, Officer Johnny Carter, were patrolling

in a marked unit in the area of Gentilly and Caton. They were both in uniform. The officers had received numerous complaints about armed robberies in the area. They were traveling on Caton headed toward Frenchman when they observed the defendant, who was wearing dark clothes and carrying a sack, running northbound on Frenchman Street. By the time that the officers made eye contact with the defendant, he had crossed the street into the parking lot behind the Subway station. The defendant reached inside the bag with his right hand and pulled out a silver automatic pistol and placed it on the dumpster on a side ledge. He then continued running. The defendant dropped the sack and a knit cap. The officers used their police unit to cut off the defendant, who was arrested and handcuffed. The officers then advised him that he was under arrest for illegal carrying of a handgun.

Officer Sterling said that he was about fifteen feet from the defendant when he placed the gun on the dumpster and about twenty feet away from Officer Carter when the defendant broke away from him. The officer stated that he was driving the car that night. Immediately after double locking the handcuffs on the defendant and informing him of his arrest for the illegal carrying of handgun. Officer Sterling went back to retrieve the gun, the pillow case, and the knit cap discarded by the defendant. As he was

retrieving first the handgun, the officer turned and observed: “the subject literally pushed back on Officer Carter just so causing Officer Carter to fall [sic] the ground injuring I believe it was his wrist.” The defendant then fled. Officer Sterling put down the handgun and chased the defendant for two and one-half blocks before apprehending him. The defendant was still in handcuffs. The officer identified the gun and the magazine, but conceded that another officer placed the evidence on the books.

On cross-examination Officer Sterling said that his partner wrote the police report, but he wrote the gist. After apprehending the defendant, the officer charged him with flight from an officer. It was rather dark that evening. The officer conceded that he did not include in the report that he had picked up the handgun, and then put it back down when he saw the defendant knock down his partner, and then give chase. Officer Sterling admitted that he had not so testified at the earlier hearing. He had testified that another officer retrieved the gun. When the officer was questioned about whether the defendant was under arrest when no gun had yet been retrieved, he stated that he arrested the defendant and then went back to pick up the gun that he saw the defendant discard. He had not picked up the weapon prior to the defendant running away.

On redirect the officer stated that he recognized the object that the

defendant discarded to be a handgun. He witnessed the defendant back up and knock down his partner before running away. On recross-examination Officer Sterling admitted that the report did not include a statement that he picked up the handgun from the dumpster and placed it back down.

Officer Carter testified that the defendant, who was running, took from the sack he was carrying a silver object “immediately recognized to be a handgun.” He saw the defendant place the gun on the dumpster. The officers then exited the car and advised the defendant that he was under arrest for possession of a handgun. They handcuffed the defendant. Officer Carter began to search the defendant while Officer Sterling relocated to the dumpster to retrieve the gun. He had put the defendant up against the car in order to conduct a simple pat down search. The defendant then pushed him and he became unbalanced. Officer Sterling looked over to see Officer Carter falling backwards. He injured his wrist in an attempt to catch himself. Officer Sterling pursued the defendant. The first charge had been possession of the handgun, and the second charge was flight from a police officer. The officers never charged simple escape. The officer said that Officer Sterling had picked up the gun from the dumpster prior to the defendant’s decision to run away, but he put it down in order to assist Officer Carter. He conceded that he did not include in his report a statement

that Officer Sterling had picked up the gun and then placed it back down. Officer Sterling had left the gun in order to help his fellow officer and apprehend the defendant.

On redirect Officer Carter answered affirmatively when he was asked if the defendant intentionally departed from his custody.

ERRORS PATENT

A review of the record reveals no errors patent.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

The defendant argues that evidence was insufficient to convict him of simple escape because at the time the police officers had not effected his legal arrest. He states that it was “undisputed” that the defendant fled before the officers had retrieved the gun from the dumpster. Although the officers testified that they knew that the object he discarded was a handgun and had arrested and handcuffed the defendant, he claims that an arrest was premature until the gun had been retrieved. He argues in brief that he was “not actually arrested, or if he was, that arrest was not lawful as it was unsupported by probable cause.” Accordingly, he was not “in lawful detention” at the moment he fled; therefore, an element of simple escape was not proven. The State counters that the officers saw the defendant with the

handgun and watched him discard it; they had probable cause to arrest him on that charge. In his reply brief the defendant claims that the officers had the right to stop him to investigate, but that the State did not have probable cause to arrest; without the legal arrest, there was no escape.

La. R.S. 14:110(A) provides in pertinent part:

A. Simple escape shall mean any of the following:

(1) The intentional departure, under circumstances wherein human life is not endangered, of a person imprisoned, committed, or detained from a place where such person is legally confined, from a designated area of a place where such person is legally confined, or from the lawful custody of any law enforcement officer or officer of the Department of Public Safety and Corrections

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Rosiere, 488 So.2d 965 (La.1986). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La.1988). Also, the reviewing court is not called upon to decide whether it believes the

witnesses or whether the conviction is contrary to the weight of the evidence. *Id.* The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Crockharn, 99-2367 (La.App. 4 Cir. 2/7/01), 780 So.2d 1079.

The Historical Notes-Reporter's Comments to 1986 volume relating to La. R.S. 14:110 provide:

The words "lawful custody" are to be noted. As long as the arrest and commitment are "legal" any attempt to escape is a crime, despite the guilt or innocence of the culprit.... But if the warrant of arrest or commitment is void, the prisoner is not liable for escaping.... However an informality or irregularity in the process of commitment is not justification to escape. (Citations omitted.)

In State v. Bullock, (La. 1991), 576 So.2d 453, the police officers responded to a call of a burglary in progress. When they arrived and looked inside the building, the officers saw the defendant attempting to hide. When the police ordered the defendant to halt, he ran away and crashed through a plate glass window. The defendant was apprehended after a brief chase, arrested, and handcuffed. The officers took him directly to Charity Hospital for treatment of his lacerations. Pursuant to the doctor's instructions, the officers removed the defendant's handcuffs and placed them in front so that he could be treated. The defendant then jumped off the stretcher and fled. The Louisiana Supreme Court noted the defendant relied on State v. Foster,

509 So.2d 47 (La.App. 1st Cir.1987), for the proposition that the legislature intended the term "lawful custody" to apply only to persons who have been already placed in a jail facility, and not to persons like him who have been arrested but not yet confined. The Court noted that La. R.S. 14:110 was written in the disjunctive and applied to two different categories of persons.

The Court stated:

In reaching the conclusion that "lawful custody" did not apply to persons lawfully arrested but not yet confined, Foster relied on section D of the statute. The court found this section contemplated a situation where the defendant had already been convicted and sentenced, and thus modified the term "lawful custody" as used throughout the statute. The fallacy of the Foster court was its failure to recognize that La.R.S. 14:110 is written in the disjunctive, and applies to two different categories of persons. The first category focuses on prior confinement and deals with an intentional departure by a person "imprisoned" or "committed" from a place where such a person is legally confined. Since this category includes persons in rehabilitational, furlough or work release programs who may not be physically confined, section D deems such persons to be in the lawful custody of a law enforcement officer and legally confined for purposes of the statute. The second category, totally distinct from the first, involves the intentional departure of a detained person from the lawful custody of any law enforcement officer. Clearly, there is no requirement of prior confinement in this category. The error of the Foster court was to use section D, which applies to the first category only, to explain the term "lawful custody" as applied to the second category. In doing so, the court ignored the

disjunctive scheme set up by the legislature.
[Footnote omitted.]

Id. at 455-6. In discussing the defendant's request for a jury instruction on resisting arrest, the Court discussed the difference between the two offenses:

The language of La.R.S. 14:108 clearly indicates the legislature did not intend to cover the same conduct covered under La.R.S. 14:110. In section A of 14:108, the legislature defines resisting an officer as "intentional opposition or resistance to or obstruction of" an officer. In section (B)(1)(a), "obstruction of" is additionally defined as "flight," but only by one who has not yet been restrained. Section (B)(1)(b), dealing with actions which are post-arrest but pre-incarceration, again refers to "resistance or opposition," making no mention of "flight." We interpret the use of these terms as signifying the legislature did not believe "flight" was encompassed within "resistance or opposition," and that it intended to address flight only in the narrow instance of one not yet restrained. Thus, section (B)(1)(b), while dealing with post-arrest conduct, prohibits only resistance and opposition, but not flight. Presumably, the legislature felt no need to address post-restraint flight in section (B)(1)(b), since such conduct would amount to an intentional departure by a person detained from the lawful custody of a law enforcement officer and would be covered by La.R.S. 14:110. [Footnote omitted.]

Id. at 457. The Court noted that the defendant's actions did not fall under section La. R.S. 14:108(B)(1)(a), because he was restrained at the time of his flight. The defendant's actions did not fall under section R.S. 14:108(B)(1)(b) because his actions did not involve resistance or opposition. The Court

concluded: Therefore, since the evidence clearly indicates defendant was restrained and under arrest at the time he fled from the emergency room, it follows the jury could not have reasonably inferred he was guilty of resisting arrest instead of simple escape.” Id.

Like Bullock, the defendant in the instant case had been arrested and restrained prior to his flight. In his brief the defendant cites State v. Smith, 96-0222 (La.App. 1 Cir. 12/20/96), 686 So.2d 137 (citing Bullock), after the statement that an “essential element of the crime under this definition is the requirement that the ‘lawful custody’ arise from a completed and valid arrest.” However, the State correctly points out that Smith supports its position that the defendant was in fact under arrest at the time of his flight and that the arrest was valid. In Smith the defendant, a police officer, was at the station when the arrest warrant was presented. He claimed that the internal affairs officers informed him of the warrant, but did not state the charges or inform him that he was under arrest. The arresting officers testified that the defendant was told that he was under arrest, and the defendant had even placed his hands behind his back to be handcuffed. However, he was not handcuffed immediately because he was being escorted to his car to retrieve his badge. As he and the internal affairs officers neared his car, the defendant ran and was not apprehended for an

hour. The defendant argued that he was fleeing to avoid arrest. The First Circuit concluded that taking the evidence in this case in the light most favorable to the State, any rational trier of fact could have found that the defendant was under arrest at the time he fled, and thus the evidence was sufficient to support a conviction for simple escape. The court continued:

It is undisputed defendant was escorted to the police chief's office, where he was relieved of his duties as a police officer, and Collins and Stewart [internal affairs officers] then showed him a warrant for his arrest. Defendant even placed his hands behind his back so he could be handcuffed. Collins and Chapman testified Collins told defendant he was under arrest and advised him of the charges. But even if the jury believed defendant's testimony that he was not so advised, the totality of the circumstances evidence a restraint on defendant's liberty to an extent that any reasonable person would have believed he was in custody.

Id. at 141-42.

Here the officers observed the defendant suspiciously running down a street in the dark. They observed him discard a handgun and place it on the ledge of a dumpster. At that point they had probable cause, exited the police car, and arrested the defendant for illegal carrying of a weapon. The defendant had been handcuffed before he pushed down one of the officers and ran. Taking the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that the defendant was in lawful

custody at the time that he fled

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant argues that the trial court failed to instruct the jury on the elements of “lawful custody” and “legitimate arrest.” The defendant concedes that defense counsel failed to lodge an appropriate objection, but argues that counsel’s inaction should not be determinative of the issue. He contends that no contemporaneous objection was necessary because the error was of such importance and significance that it violated the fundamental requirements of due process. The State notes that there was no objection and no request for the recitation of definitions of the two terms. It argues that the defendant is precluded from raising the claim on appeal. Additionally, it argues that the jury instructions were sufficient to instruct the jury on the elements of simple escape.

During voir dire examination defense counsel stated that the defendant had been overcharged. The State’s objection was sustained. Counsel then stated that the statute was intended for persons who had already been convicted and sentenced and incarcerated. The trial court sustained the State’s objection and advised the prospective jurors that what was being said was the attorneys’ impressions and that they would be charged as to the law

and the elements of the crime of simple escape if they were chosen as jurors in the case. Defense counsel then referenced subsections B and C, which related to convicted persons serving sentences, and the State objected. The court told defense counsel that the defendant had been charged under La. R.S. 14:110(A), and the other subsections were irrelevant.

In his opening statement defense counsel declared that the police officers had arrested the defendant on the proper charge, resisting an officer and flight. However, the State had charged the defendant with simple escape because it had a mandatory minimum sentence of two years. The State objected, and the court overruled the objection.

After trial out of the presence of the jury the trial court noted that defense counsel had filed a request for jury instructions and had submitted jury instructions. In his request counsel asked that “the instructions on simple escape as per *State v. Foster* be given.” Counsel claimed that the legislature intended for the simple escape statute to apply to persons already placed in jail facilities. He then added a notation “lawful custody” and State v. Foster. The trial court denied the defendant’s request under Foster for instructions relating to R.S. 14:108, resisting arrest, because Foster had been overruled in State v. Bullock. The court gave the following instruction:

Simple escape is the intentional departure of a person from the lawful custody of any law enforcement officer. So, to find the defendant

guilt [sic] of simple escape [sic] you must find that at the time of the offense the defendant had been detained by law enforcement official[sic]. That his detention was lawful custody. That is the result of a legitimate arrest and that the defendant departed from this custody without release or permission.

After the court had completed the instructions to the jury, it asked if there were any questions or problems with the instructions other than those already noted. Defense counsel responded:

I have one objection as relate [sic] to the jury instruction that a person have a right to resist an unlawful arrest. That one and I object to the prejudicial aspect of how you continue to talk about the weapon even after the motion was sustained. That is prejudicial. The weapon and some of the other items were more prejudicial than the issue itself.

The defendant did not request an instruction defining “lawful custody” or “legitimate arrest.” His unclear reference to “lawful custody” on his written request was followed by State v. Foster. The defendant’s objection relating to the instruction that a person has a right to resist an unlawful arrest is far from clear, especially in light of the fact that State v. Bullock, 576 So.2d at 453 (discussed above), overruled Foster. Based on his request for jury instructions, the defendant does not appear to have clearly set out the instruction he was requesting. The trial court was correct in its decision to deny the

defendant's request for jury instructions, relying upon a First Circuit case that had been overruled by the Louisiana Supreme Court.

The defendant did not object to the court's instruction as to simple escape and did not ask for additional definitions or explanations of terms in the statute to be given. This is not a situation where the trial court instructed the jury on the elements of the crime under prior law that was no longer in effect, as in State v. Williamson, 389 So.2d 1328 (La. 1980), cited by the defendant. This jury was not provided with an incorrect definition of the crime. Obviously, this does not involve an error of such importance and significance as to violate fundamental requirements of due process and to require an exception to the contemporaneous objection rule.

This assignment lacks merit.

DECREE

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED