STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2007
v	No. 272217 Kent Circuit Court
MARQUIS DESHAUNE JENKINS, Defendant-Appellant.	LC No. 06-001490-FH

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for attempting to escape from jail while awaiting arraignment for a felony, MCL 750.197(2).[1] He was convicted on May 12, 2006, following a jury trial and was subsequently sentenced as an habitual offender, second offense, MCL 769.10, to 12 to 24 months' imprisonment, to be served consecutively to his sentence for armed robbery, the felony for which he was awaiting arraignment at the time he committed the instant crime. We affirm.

Defendant first asserts that the evidence was insufficient to convict him of attempting to escape from jail. We disagree.

We review a claim of insufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Viewing the evidence in the light most favorable to the prosecution, we determine whether a rational jury could find "that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). To resolve the issue raised in this appeal, we must also interpret the jail escape statute. The interpretation of a statute is a question of law that we review de novo. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999). The goal of statutory interpretation is to discern the intent of the legislature from the plain language of the statute. *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). Where the

[1] Defendant claims an appeal as of right from his conviction for armed robbery in Kent Circuit Court case number 06-000908-FC. However, defendant makes no arguments on appeal pertaining to that conviction, so we likewise do not address it.

plain language of the statute is unambiguous, the presumption is that the Legislature intended that plain meaning and judicial construction is not permitted. *Morey, supra* at 330.

Defendant essentially contends that under MCL 750.197(2), a number of different kinds of "escape" are prohibited, but some of them are punishable for mere attempts, and others must be fully accomplished. Defendant then argues that his actions constitute only an attempt to complete a kind of "escape" that is not punishable unless successful. MCL 750.197(2) provides as follows:

> A person lawfully imprisoned in a jail or place of confinement established by law, awaiting examination, trial, arraignment, or sentence for a felony; or after sentence for a felony awaiting or during transfer to or from a prison, who breaks the jail or place of confinement and escapes; who breaks the jail, although no escape is actually made; who escapes; who leaves the jail or place of confinement without being discharged from the jail or place of confinement by due process of law; who breaks or escapes while in or being transferred to or from a courtroom or courthouse, or a place where court is being held; or who attempts to break or escape from the jail or place of confinement is guilty of a felony. A term of imprisonment imposed for a violation of this subsection shall begin to run at the expiration of any term of imprisonment imposed for the offense for which the person was imprisoned at the time of the violation of this subsection.

Defendant does not dispute that he was lawfully imprisoned in the Kent County jail at the time of the incident or that he was awaiting arraignment on a felony charge of armed robbery. Defendant also admits that he "attempted to leave custody by inducing jail personnel to release him by mistake." Defendant argues that this did not legally constitute an attempt to "escape" under the statute.

Defendant's argument turns on the statute prohibiting five things: (1) actually breaking and escaping; (2) breaking irrespective of actually escaping; (3) actually escaping or actually leaving without being discharged; (4) actually breaking or escaping while in the process of being transported; or (5) attempting to break or escape. Defendant argues that he attempted to "leave without being discharged," not to "escape." He further argues that the plain language of the former prohibition requires that he *actually* "leaves the jail or place of confinement without being discharged from the jail or place of confinement by due process of law." The only portion of this argument that we need to address is defendant's conclusion that the definition of "escape" must therefore *exclude* leaving without permission. We disagree.

Most "courts and commentators are in general agreement that [escape] means absenting oneself from custody without permission." *United States v Bailey*, 444 US 394, 407; 100 S Ct 624; 62 L Ed 2d 575 (1980). In the context of Michigan's escape from prison statute, MCL 750.93, escape occurs when "[a] prisoner . . . removes himself from the imposed restraint over his person and volition with knowledge of, and the intent to remove himself from, the restraints imposed." *People v Benevides*, 204 Mich App 188, 192; 514 NW2d 208 (1994), quoting *People v Marsh*, 156 Mich App 831, 834; 402 NW2d 100 (1986).

Here, defendant admitted in his signed statement that he tried to "get out for free," and that he intended to leave the jail to go home. He planned his departure and purposely hid until he

could blend in with a group of prisoners who were being released. He tried to disguise himself and pretended to be someone else. The prosecution presented additional evidence that defendant knew that he was not authorized to leave. He had been asked his clothing sizes and was aware that he would be moved out of the intake area and into the residence area of the jail. A reasonable jury could conclude that defendant knew he was wrongly removing himself from the restraint of jail. He did not use force, and so did not "break" from the jail, but a reasonable jury could find, beyond a reasonable doubt, that he attempted to depart from legal custody or remove himself from the restraint imposed by being held in the jail. *Benevides*, *supra* at 192. He attempted to escape and the evidence sufficiently supported his conviction. The fact that defendant might *also* have been guilty of "leaving without being discharged" had he actually been successful is irrelevant because he was not charged with an attempt to violate that prohibition in the statute.

For the same reason, we also find meritless defendant's argument that his counsel was ineffective for failing to request a jury instruction informing the jury that it could not convict defendant based upon an attempt to be mistakenly released.

Defendant failed to raise the issue below or file a motion for a new trial or evidentiary hearing; thus, this Court considers the issue only to the extent that counsel's claimed mistakes are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient under an objective standard of reasonableness, and that, but for counsel's error, the result of the proceeding would have been different and therefore, he was denied a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). "Counsel is not ineffective for failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). "To give a particular instruction to a jury, it is necessary that there be evidence to support the giving of that instruction." *People v Lonnie Renee Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

Again, defendant was not charged or convicted under the portion of the statute that proscribes leaving without being discharged from the jail by due process of law. That portion of the statute was not at issue in the trial court. Therefore, if counsel had requested an instruction regarding an alternate circumstance for which the defendant was not charged, the trial court would have denied counsel's request. Further, defendant's claim that his attempt to be mistakenly released is merely an attempt to leave without being discharged by due process of law is a novel legal argument, and counsel is not ineffective for failing to raise a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto