# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>NATHAN ALLEN BROOKS,<br><br>Appellant. | No. 38913-4-II<br><br><br><br><br>PART PUBLISHED OPINION |

Bridgewater, P.J. — Nathan Allen Brooks appeals his conviction for first degree escape. We hold that RCW 9A.76.110 is not ambiguous and applies to escape from custody following arrest on a warrant for a probation or community custody violation because the custody is based on a felony conviction, not merely a sentence for a felony conviction. We affirm.

On October 25, 2008, at approximately 1:00 am, a Washington State Patrol trooper pulled Brooks over for driving with a non-functioning headlight. The officer took Brooks's driver's license and, while standing next to Brooks, used a radio device on her shoulder to check if Brooks had any outstanding warrants. When dispatch reported that Brooks had an outstanding felony arrest warrant, the trooper placed Brooks under arrest. But as the trooper began to perform a pat down search, Brooks ran off. Brooks was eventually found and rearrested.

The State charged Brooks with one count of first degree escape pursuant to RCW 9A.76.110(1). At trial, the State admitted a copy of the Department of Correction's felony warrant and Brooks's prior felony judgment and sentence.

Brooks testified and acknowledged that he was on community custody for a prior felony conviction when the trooper stopped him. He also admitted that he ran from the trooper. But he denied knowing why the trooper arrested him. The jury found Brooks guilty.

ANALYSIS

I. First Degree Escape, RCW 9A.76.110(1)

Brooks contends that the plain language of RCW 9A.76.110(1) does not apply where a person escapes custody pursuant to an arrest warrant for a probation or community custody violation. We disagree.

Statutory construction is a legal question that we review de novo. *State v. Martin*, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999). We interpret statutes so as to advance the legislative purpose and avoid a strained and unrealistic interpretation. *State v. Walls*, 106 Wn. App. 792, 795, 25 P.3d 1052 (2001). We do so by giving statutes a sensible construction. *Walls*, 106 Wn. App. at 795. We give undefined statutory terms, absent contrary legislative intent, their common meaning. *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000).

A person is guilty of first degree escape if "being detained pursuant to a conviction of a felony or an equivalent juvenile offense", he escapes from custody or a detention facility. RCW 9A.76.110(1). First degree escape then has two elements the person must have (1) been detained pursuant to a felony conviction and (2) escaped from either custody or a detention facility. What "detained" means is a question of law. *Walls*, 106 Wn. App. at 795.

Brooks contends that "detained pursuant to a conviction of a felony" applies only to detention for postconviction confinement, and not after an individual has served his or her

sentence on that felony. Br. of Appellant at 6 (emphasis omitted). This is a strained and unrealistic interpretation of RCW 9A.76.110(1).

RCW 9A.76.110(1)'s plain language shows that the legislature intended to include escape from arrest for a community custody violation. An arrestee's confinement due to an arrest for a community custody violation grows out of an earlier felony conviction. Confinement results from both the original conviction and the subsequent violation. In interpreting "pursuant to a conviction of a felony," there is no reason to disassociate the community custody confinement from its underlying cause, the felony conviction. RCW 9A.76.110(1). Each instance of the defendant's confinement must be considered. Community custody is a result of the felony conviction, not merely a condition of sentence.

In addition, disregarding confinement due to community custody violations would render superfluous the requirement that the defendant escape from "custody." RCW 9A.76.110(1). RCW 9A.76.010(1) defines "'[c]ustody'" as "restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew." Thus, a person is in "custody" when restrained pursuant to a lawful arrest, as was Brooks. A person need not be serving postsentence confinement to be under "arrest." But if we adopted Brooks's interpretation of RCW 9A.76.110(1), conduct would satisfy that statute only if the person escaped from postsentence confinement and not the preconfinement arrest. Such an interpretation would essentially strike "from custody" from RCW 9A.76.010(1), leaving only escape from a detention facility. Adopting Brooks's interpretation would render superfluous portions of RCW 9A.76.110(1), and we avoid doing so. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

RCW 9A.76.110(1)'s plain language includes escape from detention due to a community custody violation because those violations arise out of a felony conviction.

In addition, Washington courts have long rejected the notion that first degree escape applies only to escape from postsentence confinement. Washington courts have found a defendant detained pursuant to a felony conviction where the defendant escapes from (1) presentence confinement, *State v. Bryant*, 25 Wn. App. 635, 637, 608 P.2d 1261 (1980); (2) postsentence confinement where the defendant had not yet been transferred to prison, *State v. Snyder*, 40 Wn. App. 338, 339, 698 P.2d 597, *review denied*, 104 Wn.2d 1004 (1985); and (3) arrest after the defendant's parole was revoked. *State v. Solis*, 38 Wn. App. 484, 486-87, 685 P.2d 672 (1984).

Even more relevant, other divisions of this court have at least twice held that "detained pursuant to a conviction of a felony" includes arrest for a community custody violation. *Walls*, 106 Wn. App. at 797-98; *State v. Perencevic*, 54 Wn. App. 585, 588-89, 774 P.2d 558, *review denied*, 113 Wn.2d 1017 (1989).

In *Walls*, when law enforcement detained Walls pursuant to an outstanding felony warrant arising out of a community custody violation, he "bolted." *Walls*, 106 Wn. App. at 794. Walls was charged with and convicted of first degree escape. *Walls*, 106 Wn. App. at 794. On appeal, Walls argued that at the time of his arrest he was not detained pursuant to a felony conviction. *Walls*, 106 Wn. App. at 797. Examining RCW 9A.76.110(1)'s plain language, Division Three of this court rejected his argument and held that there need be only a "causal relationship" between the warrants and the prior felony convictions. *Walls*, 106 Wn. App. at 797-98. The court

reasoned that a causal relationship existed because Walls was on community supervision for the prior felonies and he was arrested based on a violation of those community custody conditions. *Walls*, 106 Wn. App. at 798. The court concluded that Walls was therefore detained pursuant to a felony conviction. *Walls*, 106 Wn. App. at 798.

In *Perencevic*, the defendant was being held in jail for misdemeanor convictions and "'probation' warrants" that arose out of felony convictions. *Perencevic*, 54 Wn. App. at 586. Perencevic was convicted of attempted first degree escape after trying to tunnel through the jail wall. *Perencevic*, 54 Wn. App. at 586-87. On appeal, Perencevic argued that he had not been detained pursuant to a felony conviction because he had finished serving his felony sentences. *Perencevic*, 54 Wn. App. at 587. Division One of this court rejected this argument. *Perencevic*, 54 Wn. App. at 589. The court reasoned that the warrants "also related to the punishment or sentence [Perencevic] received on his felony convictions because they were issued due to his failure to complete certain requirements of community supervision which are as much a part of the punishment and sentence as detention time." *Perencevic*, 54 Wn. App. at 589. The court found a causal relationship between the warrants and prior felony convictions and held that Perencevic had been detained pursuant to a felony conviction. *Perencevic*, 54 Wn. App. at 589.

As in *Walls* and *Perencevic*, Brooks's detention arose out of a felony conviction, not merely a sentencing condition. A jury had found Brooks guilty of felony violation of a court order. He served his sentence and was released with community custody conditions. A warrant issued because Brooks allegedly violated those community custody conditions. The officer arrested Brooks because of that warrant. Brooks's detention thus arose out of a felony

conviction and he was detained pursuant to a felony conviction.

Brooks argues that *Walls* and *Perencevic* are not binding on us because they were decided by other divisions of this court and because the Supreme Court has not ruled on the issue. Those decisions, however, are persuasive and Brooks gives no reason not to follow those holdings. Further, we reject Brooks's contention that *Walls* is not settled because one judge dissented. A majority opinion is settled law.[1]

II. Sufficient Evidence

Brooks next argues that insufficient evidence supports his conviction because the State failed to prove that he knowingly fled custody while being detained for a felony conviction. Brooks argues that the State failed to prove that he knew from which crime he was fleeing because he never heard the radio report on his outstanding warrant. The State responds that it had to prove that Brooks knowingly fled from detention, not that he knew the basis for his detention.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970 (2004). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Thomas*, 150 Wn.2d at 874. We defer to the fact finder on issues of witness credibility, conflicting testimony, and persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

[1] Because we hold that under the RCW 9A.76.110(1)'s plain language, Brooks was detained pursuant to a felony conviction, we do not reach his arguments on ambiguity.

For first degree escape, the State must show that the defendant knowingly fled from detention. *State v. Descoteaux*, 94 Wn.2d 31, 35, 614 P.2d 179 (1980). The State does not have to show that the defendant acted with an intent to avoid confinement. *Descoteaux*, 94 Wn.2d at 34 (citing *United States v. Bailey*, 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980)). Both the Washington and United States Supreme Courts have rejected a "heightened standard of culpability" above "proof that defendant acted knowingly." *Descoteaux*, 94 Wn.2d at 34-35. There is no requirement that an arrestee know the basis of his detention before he or she flees.

Even if such a requirement existed, the State met its burden. The arresting officer testified that she received a report about Brooks's outstanding community custody warrants through her shoulder radio. She also testified that Brooks was within hearing range of her shoulder radio when the report came back. While Brooks testified that he did not hear that report, this is a matter of conflicting testimony and credibility which we do not review. *Thomas*, 150 Wn.2d at 874.

Brooks also argues that insufficient evidence supports his conviction because he was not in custody due to a felony conviction. As stated above, he was in custody due to a felony conviction. Sufficient evidence supports Brooks's conviction for first degree escape.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## III. Statement of Additional Grounds (SAG)

### A. Pretextual Stop

Brooks argues in his SAG that the traffic stop was a pretextual stop used to conduct a criminal investigation.

A traffic detention is a seizure and must be justified in its inception to be lawful. *State v. Tijerina*, 61 Wn. App. 626, 628-29, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991). The detention must be based on a "well-founded suspicion based on objective facts" that the person is violating the law. *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). An officer's suspicions will justify a search only if he can articulate facts and rational inferences that reasonably warrant the stop. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Officers need only a reasonable suspicion to stop a vehicle in order to investigate whether the driver committed a traffic infraction. *State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002).

It is a traffic infraction to drive a vehicle on a highway without lighted headlights at any time from a half hour after sunset to a half hour before sunrise, or at any other time persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet ahead. RCW 46.37.020; RCW 46.37.010(1)(b). Brooks was driving at 1:00 am without a headlight illuminated. It was nighttime when the trooper stopped him. The trooper had a reasonable suspicion that Brooks was violating the law. *Sieler*, 95 Wn.2d at 46. The stop was not pretextual.

Brooks argues that the officer did not arrest him for an outstanding warrant, but for a minor traffic offense. He argues that enough time did not pass between his providing the officer with his identification and her arresting him for her to have checked his information with dispatch.

The trooper testified that she arrested Brooks for an outstanding warrant. To the extent that Brooks disagrees, this is a matter of conflicting testimony and witness credibility that we do not review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).[2]

B. Amended Information

Brooks next argues that the trial court abused its discretion by allowing the State to amend the information on the first day of trial.[3]

The day trial started, the State moved to amend the information, changing the language from "escape from a detention facility" to "escape from custody." VRP (Feb. 11, 2009) at 5. Brooks did not object to the amendment, only the way the State phrased the knowledge requirement. Brooks did not request a continuance.

CrR 2.1(d) permits the State to amend the information at any time before verdict or finding if substantial rights of the defendant are not prejudiced. Whether to allow an amendment is within the trial court's sound discretion. *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). To prove abuse of discretion, the defendant must show prejudice. *State v. Guttierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998). Prejudice exists if the amendment misled or surprised

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[2] Brooks cites to two documents he has procured since his trial that he claims support his argument that the officer did not check for outstanding warrants; these documents were not before the trial court. "If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[3] Brooks also appears to allege "malicious prosecution, violation of Washington State Constitution Art. I sec. 22 and constitutional due process violation [sic]." SAG at 3. He does not explain how any of his constitutional rights might have been violated, and naked castings into the constitutional sea are insufficient to warrant review. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

the defendant. *State v. Brisebois,* 39 Wn. App. 156, 163, 692 P.2d 842 (1984), *review denied*, 103 Wn.2d 1023 (1985).

The State's amendment did not mislead or surprise Brooks. As the State pointed out, the parties had discussed all along Brooks's alleged escape from custody, not a detention facility, and the original charging document reflected that. In addition, the State had notified defense counsel of the proposed change the week before trial. Brooks was not misled or surprised by the State's amended information. Further, Brooks could have requested a continuance, but he did not. *State v. Laureano*, 101 Wn.2d 745, 762, 682 P.2d 889 (1984). His failure to do so waived his claimed error. *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010 (1990); *see also State v. Schaffer*, 63 Wn. App. 761, 767, 822 P.2d 292 (1991) (failure to seek continuance raises presumption that there was no prejudice), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993). The trial court did not abuse its discretion in permitting the State to amend the information.

C. Motion to Admit Videotape

Finally, Brooks argues that the trial court abused its discretion by denying his motion to admit the videotape from the officer's onboard video camera, which he claims would have shown that the officer did not run his information through dispatch. He claims that this interfered with his Sixth Amendment right to effectively cross-examine witnesses.

After the defense rested, Brooks himself requested that the trial court admit the video taken from the trooper's dashboard camera. The trial court denied his motion because Brooks had an attorney and what evidence the defense admitted was between Brooks and his attorney.

We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). At the time of Brooks's motion, he was represented by counsel, who rested without trying to introduce the video. Whether to introduce evidence was within counsel's discretion. The trial court did not abuse its discretion by denying Brooks's motion.

Affirmed.

Bridgewater, P.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.