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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002226-MR

MAURICE WEST

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NOS. 03-CR-000092 AND 03-CR-000324

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

JOHNSON, JUDGE: Maurice West has appealed from the October 6,
2003, final judgment and sentence of the Jefferson Circuit

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Court. Having concluded that West was in custody and properly convicted of escape in the second degree,² we affirm.

The facts in this case are undisputed. In November 2002 West was participating in the home incarceration program (HIP)³ as a condition of his bond in three pending criminal cases in the Jefferson Circuit Court.⁴ On October 29, 2002, West's bond was released in Case Nos. 01-CR-000068 and 01-CR-001323, but he was not removed from the HIP.⁵

On November 24, 2002, West removed his monitoring bracelet and left his residence without receiving permission from the supervisor of the HIP. West surrendered himself on December 1, 2002, at the HIP office. He was subsequently indicted on January 13, 2003, by a Jefferson County grand jury for escape in the second degree. Based on prior felony offenses, West was indicted on January 30, 2003, by a Jefferson County grand jury as being a persistent felony offender in the first degree (PFO I).⁶

On September 26, 2003, the second day of his jury trial, West filed a motion to enter a guilty plea pursuant to

² KRS 520.030.

³ West entered the HIP on August 16, 2002.

⁴ Case Nos. 01-CR-000068, 01-CR-001323, and 01-CR-002236.

⁵ Case No. 01-CR-002236 was dismissed.

⁶ KRS 532.080(3).

RCr⁷ 8.09.⁸ His plea was based on the Commonwealth's offer of one year in prison on the escape charge, with no objection to probation, the dismissal of the PFO I charge, and the Commonwealth's statement that it would not use the escape conviction as a basis for seeking to increase West's bond in any pending indictments he had in Jefferson County. The trial court accepted the plea and on October 6, 2003, sentenced West to one year in prison, probated for five years. West's plea allowed him to appeal the issue of "whether a person placed on the [HIP] as a condition of pretrial release can be guilty of Escape II if he leaves the [HIP], or whether the act of leaving only constitutes a violation of the conditions of release." This appeal followed.

The sole issue on appeal, as preserved under RCr 8.09, is whether West was in custody on November 24, 2003, while participating in the HIP while awaiting trial, making it possible to charge him with an escape charge. KRS 520.030 states as follows:

- (1) A person is guilty of escape in the second degree when he escapes from a detention facility or, being charged

⁷ Kentucky Rules of Criminal Procedure.

⁸ RCr 8.09 states, in pertinent part, as follows:

With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. . . .

with or convicted of a felony, he escapes from custody.

- (2) Escape in the second degree is a Class D felony.

For purposes of this statute, custody is defined as "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or constraint incidental to release on bail[.]"⁹

Our Supreme Court in Stroud v. Commonwealth,¹⁰ stated that KRS 520.030 provides that "[v]iolation of the [HIP] could result in a second-degree escape." West argues that because this case does not specify whether the defendant was in the HIP as a part of his jail sentence, or as a condition to pretrial release, it is impossible to apply its holding to his case. The defendant in the case of Weaver v. Commonwealth,¹¹ made the same argument. West further argues that while participation in the HIP is clearly custodial if it is in lieu of serving jail time, that such is not true if the circumstances are a part of the conditions of pre-trial release. Our Supreme Court in Weaver stated as follows:

⁹ KRS 520.010(2).

¹⁰ 922 S.W.2d 382, 384 (Ky. 1996).

¹¹ 156 S.W.3d 270, 272 (Ky. 2005).

We find this distinction to be of no consequence, as the Court's underlying reasoning is relevant to the present matter: 'a narrow technical reading of the term 'custody' is not appropriate for the purposes of determining escape" [citation omitted].¹²

When West originally entered the HIP, he was on bail in connection with his pre-trial release. West argues that "any restraint which is incidental to release on bail is plainly excluded from the statutory definition of custody." However, a close review of the record shows that at the time West violated the conditions of the HIP, his bond had been released and thus his participation in the HIP was no longer incidental to release on bail. The Supreme Court has given clear instructions as to the custodial status of one such as West in Weaver. Weaver was placed in the HIP as a condition of being released on his own recognizance, while awaiting trial on assault and criminal abuse charges. Weaver removed the electronic monitoring device and left his home, and was subsequently indicted for escape in the second degree.¹³ The Court found that participation in the HIP alone was not a "constraint incidental to release on bail," but rather "[a]ppellant was released to the home incarceration program instead of being released on bail" [emphasis original].¹⁴

¹² Id.

¹³ Weaver, 156 S.W.3d at 271.

¹⁴ Id.

The Court went further to state that there was a distinction between release on bail and other forms of pre-trial release.¹⁵

West argued in his reply brief that his case is distinguishable from Weaver, because West was originally released on bail when he entered the HIP program. However, West fails to acknowledge that his bond was released almost one month prior to November 24, 2003, when he removed the electronic monitoring devices and fled his residence. Thus, at this time, he was essentially released on his own recognizance, making his circumstances identical to Weaver's, upon terminating his involvement in the HIP. Therefore, West was in custody on November 24, 2002.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael C. Lemke
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky

¹⁵ Id.