[Cite as *State v. Duncan*, 2011-Ohio-1399.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio	Court of Appeals No. H-10-016
Appellee	Trial Court No. CRI-2009-1153
v.	
Stacey L. Duncan	**DECISION AND JUDGMENT**
Appellant	Decided: March 25, 2011

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney,
for appellee.

Timothy H. Dempsey, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Stacey Duncan, appeals her conviction and sentence on the offense of escape. She raises two assignments of error:

{¶ 2} "I. The trial court erred when it denied the defendant-appellant's motion for a jury instruction on the affirmative defense of irregularity of detention.

{¶ 3} "II. The sentence of 12 months is excessive and an abuse of discretion."

{¶ 4} Finding no merit to either assignment of error, we affirm the judgment of the Huron County Court of Common Pleas.

{¶ 5} The alleged escape in this case occurred during the investigative aftermath of a bar fight in the village of Greenwich, Ohio on Thanksgiving eve in 2009, when appellant departed the confines of a locked police cruiser subsequent to her arrest. On January 20, 2010, appellant was indicted on one count of escape in violation of R.C. 2921.34(A)(1), a felony of the fifth degree. She entered a plea of not guilty to the charge, and the case proceeded to a jury trial on April 29, 2010. The following evidence was adduced by the state at trial.

{¶ 6} In the early morning of November 26, 2009, Greenwich police officers Jeremy Rising and Robert Workman responded to a report of an assault by three female patrons at the Hunter's Brew Tavern. Officer Rising was the first to respond. He arrived at the tavern at approximately 2:19 a.m. Officer Rising was taking the bartender's statement outside of the bar when Officer Workman arrived at the scene. At the same time, a gray SUV operating without headlights drove past the bar. The bartender and several of the patrons identified the occupants of the SUV as the assailants. Both officers returned to their cruisers, gave chase, and stopped the SUV within a short distance. Appellant's older sister, Bobbi Ruff, was driving the SUV; appellant and her aunt, Candy McCoy, were passengers.

{¶ 7} After administering a field sobriety test, Officer Rising placed Ms. Ruff under arrest for operating a vehicle while intoxicated. Meanwhile, Officer Workman went back to the bar and confirmed with the bartender that appellant and her aunt matched the description of the assailants. Officer Rising then instructed appellant to exit the vehicle and placed her under arrest for assault.

{¶ 8} Officer Workman handcuffed appellant behind her back, put her in the back-seat caged area of his cruiser, shut and locked the doors, rolled up the windows, and told her to "hang tight, we'll be back with you in a second, don't go nowhere." He then went to assist Officer Rising with appellant's aunt, who was being unruly. When Officer Workman returned to his cruiser approximately 10 to 12 minutes later, appellant was gone. Eventually, appellant was found by Deputy Tod Wagner of the Huron County Sheriff's Office approximately a mile out of town at the intersection of US 224 and Lane Road.

{¶ 9} In her defense, appellant testified that after she was handcuffed and placed in the back of the cruiser, Officer Workman told her to "sit tight or whatever, and then he just walked away from the car." She stated, "I'm not saying I didn't know I was under arrest. I guess, I would put it as I didn't know that I was under arrest to where I was going to like get charged, go to jail or anything like that."

{¶ 10} Appellant further testified that she was "basically sitting there [in Officer Workman's cruiser] for at least 20, 25 minutes * * * and I like didn't know when they were ever coming back." Appellant explained that she "was really upset, because I didn't

feel like I * * * should have been arrested in the first place" and that she "was kind of getting bored also, because I was sitting there for so long, and I noticed that the handcuffs on my left hand was pretty loose. I just like slipped it right off. I stuck it on my other hand, and then, I was like messing with the [divider] window [between the front and back seat], and I kept looking back and no one was coming * * *." She explained further:

{¶ 11} "I noticed that on the left side [of the divider] that the sliding glass or plexiglas, whatever it is, it was sticking on just the head rest of the front seat on the driver's side, so since my hands were free, I stuck my hands through the front seat. I pushed the headrest forward. I opened the window all the way, and then, I crawled into the front seat and looked back again. I was contemplating whether I should even do it or whatever, and I was just like very intoxicated, and by that time, I had to use the restroom also, and I was like just sitting there. Then I opened the front door and closed it, and then just walked away * * *."

{¶ 12} At the conclusion of the evidence, defense counsel requested a jury instruction on the affirmative defense of irregularity of detention. The trial court denied the request, ruling as a matter of law that the evidence did not justify such an instruction. On April 30, 2010, the jury found appellant guilty of escape as charged. On July 1, 2010, the trial court sentenced appellant to two years of community control, ordering that she serve 30 days in the county jail. The court also imposed a 12-month prison sentence in the event appellant were to violate the conditions of her community control. Appellant now appeals that judgment.

{¶ 13} In her first assignment of error, appellant argues that the trial court erred when it denied her request for a jury instruction on the issue of irregularity of detention. According to appellant, the evidence warranted such an instruction because "[t]he police officer and the defendant gave conflicting versions of how well he detained the defendant and placed the handcuffs on her." Essentially, appellant reasons that the purported ineffectiveness of her detention evinces its own irregularity. Thus, appellant queries, "How else does the prosecutor explain how a person * * * allegedly detained properly [is] able to get out of a police cruiser without any damage to the cruiser or the handcuffs?"

{¶ 14} In *State v. Scott* (1986), 26 Ohio St.3d 92, 101, the Supreme Court of Ohio explained:

{¶ 15} "This court has held that it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge. * * * However, * * * the court may refuse to give an instruction as to a matter which is not applicable to the facts governing the case." (Citations omitted.)

{¶ 16} R.C. 2921.34(A)(1) provides that "[n]o person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention * * *." R.C. 2921.34(B) recognizes the following affirmative defense to a charge of escape:

{¶ 17} "Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under

this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:

{¶ 18} "(1) The escape involved no substantial risk of harm to the person or property of another.

{¶ 19} "(2) The detaining authority knew or should have known there was no legal basis or authority for the detention."

{¶ 20} The defense of irregularity of detention is not applicable in every case involving a nonviolent escape. The absence of a substantial risk of harm to person or property is a necessary, but not sufficient, precondition to the applicability of the defense. As explained by the Fifth District Court of Appeals in *State v. Blankenship* (Mar. 20, 1981), 5th Dist. No. 1484, a defendant is not entitled to an instruction on irregularity of detention "even if * * * his escape involved no substantial risk of harm to the person or property of another, unless he produces evidence that his detention was irregular." R.C. 2921.34(B) provides detainees with protection from an irregular detention; it does not grant them a general license to execute a peaceful escape.

{¶ 21} In this case, Greenwich police arrested appellant upon probable cause, handcuffed appellant behind her back, put her in the back caged area of a police cruiser, locked the doors, rolled up the windows, made sure the vehicle was heated, and told appellant to stay put while they attempted to establish control over her unruly aunt. Rather than constituting an irregularity in detention, these actions form the very meaning

of "detention," which is specifically defined by R.C. 2921.01(E) to include "confinement in any vehicle subsequent to arrest." Although appellant now claims in her appellate brief that her trial testimony was to the effect that "she did not think she was under arrest based on what the officer told her," she actually testified, "I'm not saying I didn't know I was under arrest."

{¶ 22} The fact that appellant managed to slip out of her handcuffs and maneuver her way out of the rear caged area of a locked police cruiser, an event that her trial counsel described as a "Houdini stunt," does not render the detention irregular. Irregularity for purposes of R.C. 2921.34(B) is properly defined as a lack of conformity to law or practice. It relates to the propriety of the manner and method by which custody or control is achieved and maintained under the circumstances. Irregularity cannot reasonably be measured by assessing the effectiveness of the method of detention. Otherwise, every manner and mode of detention would be rendered irregular merely by virtue of the fact that an escape occurred without incident.

{¶ 23} Thus, in *In re Roux* (Aug. 24, 1998), 7th Dist. No. 238, the defendant was handcuffed to an eye bolt that was fastened to a desk. The defendant unscrewed the bolt and left the police station. The court held that this method of detention did not constitute an irregularity within the meaning of R.C. 2921.34(B). In *State v. Blankenship*, supra, the court found no error in the refusal to provide a jury instruction on the defense of irregularity where the defendant, who was not handcuffed, ran out of the police station after the arresting officer instructed him to sit on a couch while the charges were typed.

In *State v. Davis* (1992), 81 Ohio App.3d 706, the court found no irregularity in detention where the defendant, who was standing at the passenger side of a police cruiser unrestrained by handcuffs, fled when the arresting state trooper went to unlock the doors electronically from the driver's side of the vehicle. The court explained that detention for purposes of R.C. 2921.34 is not limited to physical restraint, but is "'merely the state or status of being detained in some form of legal custody.'" Id. at 720, quoting *State v. Shook* (1975), 45 Ohio App.2d 32, 35. "Thus, as physical restraint is not a required element of detention, its absence, as occurred in the facts of this case, does not constitute an irregularity in detention." Id. at 721. See, also, *State v. Carson*, 8th Dist. No. 909975, 2009-Ohio-2027, ¶ 23, 33.

{¶ 24} Certainly, the defense of irregularity of detention is no more applicable where an arrestee manages to slip off her handcuffs and depart from a locked police cruiser than where an arrestee succeeds in unscrewing an eye bolt to which he is handcuffed, gets off a couch to which he is not restrained and runs out of a police station, or flees from a police cruiser in which he is not yet secured. Moreover, we find that a stint of 20 to 25 minutes in a heated police cruiser on a 40 degree night does not constitute an irregular detention under the present circumstances. Greenwich police were confronted with the prospect of quelling multiple intoxicated assault suspects at a single location and chose to arrest them one at a time. There is nothing in the record or the case law to suggest that successive apprehension and interim detention of suspects is legally or procedurally anomalous under these circumstances.

{¶ 25} Since the evidence in this case did not support an instruction on the defense of irregularity of detention, we find that the trial court did not err in refusing to provide the jury with such an instruction.

{¶ 26} Appellant also argues, albeit indirectly, that her escape was justified or excusable because she needed to urinate and was too intoxicated to appreciate her situation. These arguments actually relate to the distinct defenses of necessity and intoxication. We find insufficient evidence to warrant an instruction on these defenses as well.

{¶ 27} In *State v. Harkness* (1991), 75 Ohio App.3d 7, this court recognized that necessity is an affirmative defense to escape separate and distinct from the defense of irregularity of detention. We explained:

{¶ 28} "In order to establish the defense of necessity, five elements must be established:

{¶ 29} "'1. the defendant was faced with a specific threat of death, forcible sexual attack, substantial bodily injury, or substantial health impairment in the immediate future;

{¶ 30} "'2. there was no time for complaint to the authorities or there existed a history of futile complaints or complete inaction which made any result from such complaints illusory;

{¶ 31} "'3. there was no time or opportunity to resort to the courts;

{¶ 32} "'4. there was no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape, and;

{¶ 33} "'5. the defendant reported to the authorities when he obtained a position of safety from the immediate threat * * *.'" Id. at 11, quoting *State v. Cross* (1979), 58 Ohio St.2d 482, 484.

{¶ 34} In applying the first element, courts are quite adamant that the impending harm must rise to a level comparable to imminent death or grave bodily injury. See *State v. Jordan*, 11th Dist. No. 2009-T- 0110, 2010-Ohio-5183, ¶ 26; *State v. Lawson*, 2d Dist. No. 22155, 2008-Ohio-1311, ¶ 19; *State v. Stiles* (June 12, 1998), 2d Dist. No. 16588. Appellant has not cited, and our research fails to disclose, any case from any court in which the alleged need to urinate was held to meet that threshold. Moreover, appellant did not produce any evidence to establish the second and fifth elements of the defense. Appellant never testified that she informed the officers of her pressing need to urinate; she never explained why she fled a mile away from town instead of walking across the street to complain; she did not state when or where in the course of her mile-long journey she opted to relieve herself; and nowhere in her testimony does it appear that appellant did, in fact, urinate in the course of her escape.

{¶ 35} Intoxication has also been recognized as an affirmative defense to a charge of escape. The defense applies where the defendant was too intoxicated to form the necessary specific intent required for the offense of escape. It does not apply where the defendant was fully aware of the surrounding facts and circumstances. See *State v. Davis*, supra, 81 Ohio App.3d at 713-715. In this case, appellant's testimony reveals that she was fully aware of the essential facts and circumstances supporting the charge. By

her own account, appellant knew she was handcuffed, was aware of how much time had elapsed, remembered the specific content of Officer Workman's instructions, was conscious and perceptive enough to finagle her way out of handcuffs and through the safety divider, appreciated the necessity of having to look back to see if anyone was coming, and understood that driving off in the police cruiser would have made matters worse. Indeed, before departing the cruiser, appellant sat in the front seat "contemplating whether I should even do it."

{¶ 36} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 37} In her second assignment of error, appellant maintains that the imposition of a twelve month sentence is excessive and constitutes an abuse of the trial court's discretion. While conceding that her sentence is within the permissible statutory range for a fifth degree felony, appellant argues that the trial court failed to give proper consideration to the relevant statutory factors for felony sentencing. She contends in particular that the trial court's perception of a lack of remorse on her part is contrary to her allocution at sentencing. We disagree.

{¶ 38} Our review of the record makes eminently clear that the trial court expressly and properly considered the purposes and principles of sentencing under R.C. 2929.11, gave careful and deliberate consideration to the relevant statutory factors of seriousness and recidivism under R.C. 2929.12, and acted well within its discretion in finding a lack of remorse on the part of appellant pursuant to R.C. 2929.12(D)(5). See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912; *State v. Donald*, 6th Dist. No.

S-09-027, 2010-Ohio-2790, ¶ 7; *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 45 et seq.; *State v. Jones*, 6th Dist. No. S-09-018, 2010-Ohio-2624, ¶ 13-15.

{¶ 39} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 40} The judgment of the Huron County Court of Common pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE