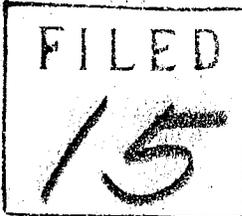


JAIL BREAKING:

CITY ORDINANCE:

A person who escapes from a city jail wherein he was confined after conviction for violation of a city ordinance, may not be prosecuted under Sections 557.380 or 557.390 RSMo 1949.



June 17, 1955

Honorable Larry J. Casey
Assistant Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Potosi, a City of the fourth class, maintains its own City Jail for the detention of persons convicted of violating City Ordinances. One such prisoner, convicted of the violation of an Ordinance, has effected his escape from the jail.

"The President of the Board of Aldermen and the City Marshal have requested that they be allowed to sign a complaint, through this office, charging the escaped prisoner with breaking jail. A question thus arises, under Chapter 557 of the Missouri Revised Statutes, 1949, and more particularly Sections 557.380 and 557.390, as to whether these sections, or any other statutes are applicable to escape from a City Jail."

Section 557.380, RSMo 1949, to which you first refer, reads:

"If any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, shall break such prison or custody, and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in a county jail not less than six months, to commence at the expiration of the original term of imprisonment."

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In regard to the above we direct attention to the case of State v. Owens, 268 Mo. 481. The fact situation in that case is thus stated in the opinion (l.c. 482):

"Under an indictment attempting to charge the defendant with a violation of section 4381, Revised Statutes 1909, defendant was tried in the circuit court of Howell County, found guilty and his punishment assessed at two years in the penitentiary. Defendant has duly perfected an appeal to this court.

"Due to the conclusion which we have reached in this case, it will only be necessary to consider the indictment, which, omitting caption and formal parts, was as follows:

"The grand jurors for the State of Missouri, summoned from the body of Howell County, impaneled, sworn and charged to inquire within and for the body of the county of Howell, now here in court, upon their oath present and charge that at the March term, 1915, at and in the county of Howell and State of Missouri, one Ted Owens was then and there duly convicted and found guilty by a jury, of the offense of felonious assault and his punishment fixed at a fine of one hundred dollars, in default and failure to pay which in accordance with said conviction, he, the said Ted Owens, was by the said court duly committed to the county jail of said county, and it was ordered by the court that he, the said Ted Owens, be placed in custody of the street commissioner of the city of West Plains, a city of the third class, and required to work on the streets of the said city, until said fine and costs of said action be paid and he be discharged by due course of law; and that in accordance with the orders of said court the said Ted Owens was so committed to the custody of one N. F. Webster who was then and there duly qualified and acting street commissioner and guard, to be worked as a prisoner on the streets of the city of West Plains, as aforesaid, and that afterwards, to-wit, on the day of May, 1915, at and in the said city of West Plains, in the county of Howell and State of Missouri, the said Ted Owens, while then and there in the custody of the said N. F. Webster, street commissioner and guard aforesaid, did then and there unlawfully, willfully and felon-

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iously break custody, run away and escape from the said N. F. Webster, street commissioner and guard aforesaid, and that the said N. F. Webster was then and there duly authorized and empowered to act and was then and there acting as such officer, street commissioner and guard under and by authority of law; and that the said Ted Owens did then and there unlawfully and feloniously break away, run and escape from the custody of the said N. F. Webster, street commissioner, officer and guard as aforesaid; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

At l.c. 484 the court stated its conclusion thus:

"Section 4381, Revised Statutes 1909, upon which this prosecution was based, reads as follows:

"'If any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, shall break such prison or custody, and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in a county jail not less than six months, to commence at the expiration of the original term of imprisonment.'"

"It will be noted that the above section limits the violation to a breaking and escaping from a 'county jail' or from 'custody going to jail,' and the statute in no manner undertakes to prescribe a penalty for escaping from a street commissioner into whose custody he is placed for the purpose of being worked upon the streets, as charged in the present indictment. Our attention has not been called to a statute nor have we been able to find one making the acts charged in the present indictment a criminal offense. As much is virtually conceded by the brief of the learned Attorney-General. This being true, we need not determine whether the information sufficiently charges a lawful custody in said street commissioner.

"It is a well established rule that criminal statutes must be strictly construed. Very appropriate to the discussion here is the language used by the Kansas Supreme Court in discussing a section (182) of the Kansas Code which appears to be almost an exact duplicate of Section 4381, Revised Statutes

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1909. The court said:

"Section 182 has reference to persons confined in a county jail or held in custody going to such jail. As a rule, penal statutes must be strictly construed, and they cannot be extended beyond the grammatical and natural meaning of their terms, upon the plea of failure of justice. (Remington v. State, 1 Ore. 281; State v. Lovell, 23 Iowa, 304; Gibson v. State, 38 Ga. 571.)"

"We are not at liberty to interpolate into the statute "city prison" nor can we judicially determine that a "city prison" is a "county jail." It is therefore our opinion that the matters charged in the information do not constitute any offense within the statute. The omission is one for which the Legislature is responsible. It is probably a casus omissus, which the Legislature may, but the court cannot, supply." (State v. Chapman, 33 Kan. 134.)

"The judgment is reversed and the defendant discharged."

It appears to us that the situation of the defendant in your case is far stronger than that of the defendant--appellant in the Owens case, supra. In the Owens case the defendant had been convicted of a graded felony and was regularly confined in the county jail. In your case the conviction was for violation of a city ordinance and confinement was in the city jail. Since the court held that in the Owens case prosecution could not be had under what is now Section 557.380, supra, which is identical in wording with Section 4381, RSMo 1909, I do not believe that prosecution will lie in your situation.

You next ask about Section 557.390, RSMo 1949. We have previously construed this section in an opinion rendered September 6, 1951, to Honorable Weldon W. Moore, Prosecuting Attorney of Texas County, a copy of which opinion is enclosed. You will note that the fact situation in the Moore opinion is very similar to your own, and that the opinion holds that prosecution under Section 557.390, supra, will not lie.

CONCLUSION

It is the opinion of this department that a person who escapes from a city jail wherein he was confined after conviction

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for violation of a city ordinance, may not be prosecuted under Section 557.380 or 557.390, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

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