ESCAPE FROM COUNTY JAIL

Prisoner given jail liberties by sheriff or jailer who leaves without legal authority is guilty of escape.

October 13, 1949

10/27/49

FILED
97

Hon. Homer Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

Your letter of recent date requesting an opinion of this department reads as follows:

> "A few days ago our jailer, who is also the sheriff of the county, had in jail a prisoner, who was serving out a sentence in jail given him by a jury and pronounced by the court on a charge of operating a motor vehicle while intoxicated.
>
> "At times the sheriff permitted him to remain outside the jail, mostly while in company with the sheriff, and on this particular occasion, while he was playing with the sheriffs children, and while the sheriff had walked away to another part of the town, the prisoner just walked off, but just a few days later, was retaken at his home, and is now back in jail serving on his original term which was a one year term.
>
> "Is he guilty of breaking jail or custody under the provisions of Section 4309 or is he guilty of any offense under any other section for leaving?
>
> "Thanking you for your opinion in this matter as I have found no Missouri case directly in point."

Referring to Section 4309, R. S. Mo. 1939, which 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."

specifically provides two conditions, breaking prison or custody and escaping therefrom.

Notice should be taken of Section 4306, R. S. Mo. 1939, which reads as follows:

> "If any person confined in the penitentiary for any term less than life, or in lawful custody going to the penitentiary, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding five years, to commence at the expiration of the original term of imprisonment."

Comparing the two sections it will be noticed that the only difference between these two is that one refers to the penitentiary while the other refers to the county jail.

In our search for an interpretation of Section 4309, supra, we are unable to find wherein the Supreme Court of our state has placed an interpretation upon this section but we do find where they have interpreted Section 4306, supra, and which provides an analogous situation. In interpretating Section 4306, supra, the Supreme Court held in the case of Ex parte Rody, 152 SW (2d) 657, l.c. 659, in the following quotation that a convict confined in a penitentiary escaping while outside under guard was at least constructively confined in the penitentiary, as stated in the following quotation:

> "We are unable to agree that State v. Betterton, supra, and Ex parte Carney, supra, support petitioner's first contention. On the contrary, the Betterton decision is against him. The concluding lines of the opinion held Sec. 4307 (then Sec. 3161, R.S. 1919) did apply to a prisoner escaping from a prison <u>farm</u>, and there is no difference in principle between escaping from a prison farm and a prison sawmill. Sec. 4307 is grouped with two other statutes, Sec. 4306 and Sec. 4308, all opening with the same

> clause and containing the same phrase 'confined in the penitentiary.' Sec. 4306 applies to convicts in lawful custody going to the penitentiary, and to those who break the prison walls and escape after they are in. Sec. 4307, supra, specially applies to convicts who escape from the custody of the officers while out under guard (the section invoked by the Warden in this case). And Sec. 4308 deals with convicts who escape from within the prison 'without breaking such prison.' That was the section upon which the information in the Betterton case was based, for escaping from a prison farm. But, as already stated, the decision held the prosecution should have been under Sec. 4307.
>
> "These three sections and Sec. 9086, supra, are in pari materia and should be construed together. There can be no question about the fact, we think, that under their provisions any convict held in custody under a commitment for the service of a penitentiary sentence is at least constructively 'confined in the penitentiary,' whether he be going to the penitentiary, or in the penitentiary, or outside under guard.* * *"

In Volume 50, C. J. Section 56, p. 351, the writers thereof state that: "There is a negligent escape when a prisoner has gone out of sight and control of the officer in whose custody he was, without the knowledge or consent of such officer, but by reason of his careless or negligent conduct."

Section 57 of the same Volume, p. 351 reads: "An escape occurs when acts are done which are incompatible with custody, or when a relaxation of confinement is permitted so that the prisoner is not at all times in the control of the sheriff or keeper.* * *"

Wharton's Criminal Law, Vol. 2, Sec. 2025, p. 2337, says:

> "A distinction is taken by the old writers between breach of prison and escape. To breach of prison some force is necessary;

> some breaking of the continuity of the prison, some tearing away from custody. But if this element be not present, e.g., if the doors be left open and the prisoner walk out without interruption, the indictment must be for an escape, and is under no circumstances more than a misdemeanor. Nor is a confinement within prison walls an essential condition of the offense. A prisoner's voluntary departure from bounds out of prison assigned him by the jailer is a 'voluntary escape.' He is under arrest if he is ordered to be subject to arrest."

A prisoner in jail given liberty of the jail yard is comparable to a convict sentenced to confinement in the penitentiary and being out of the penitentiary on a prison farm or at a prison sawmill. The fact that he is in custody outside of the penitentiary proper does not change or alter his legal status, and if he leaves without legal authority this constitutes an escape.

In this instance the fact that the prisoner was confined in jail and given liberty by the sheriff of going into the jail yard to play with the sheriff's children does not relieve the prisoner from the legal liability attached and imposed upon such prisoner who is legally confined in jail on conviction of a criminal offense. If such person has not been discharged from the jail sentence in due course of law, he is guilty of escape if he leaves the premises without legal authority.

CONCLUSION

Therefore, it is the conclusion of this department that a prisoner legally confined in the county jail on a criminal charge who, while out in the jail yard with permission of the sheriff or jailer, leaves without authority, but later is apprehended and returned to the jail, is guilty of an escape from jail under Section 4309, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

GORDON P. WEIR
Assistant Attorney General

J. E. TAYLOR
Attorney General