IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ROBERT GORDON DAVIS, Defendant-Appellant, Petitioner on Review.	Clatsop County Circuit Court No. 131084 CA A154382 SC S063216

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Clatsop County
Honorable PHILIP NELSON, Judge

Opinion Filed: April 1, 2015
Affirmed Without Opinion
Before: Ortega, Presiding Judge, and
DeVore, Judge, and Garrett, Judge

Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

For purposes of the crime of third-degree escape, ORS 162.145, a person escapes from "custody" when the person has been actually or constructively restrained by an officer in the course of carrying out an arrest and subsequently escapes from that actual or constructive restraint. Here, defendant assaulted two people outside a store. The police arrived at the location and—with the intent to arrest him—chased defendant on foot and in a patrol car with its emergency lights and siren activated, and repeatedly yelled, "Stop, police." The officers' conduct placed defendant under constructive restraint and, accordingly, defendant was in "custody." When defendant fled, he escaped from custody, thereby committing third-degree escape. Contrary to defendant's argument, a proper construction of the third-degree escape statute demonstrates that defendant escaped from "custody" under the facts of this case. Therefore, the trial court correctly denied defendant's motion for a judgment of acquittal.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question presented

A person commits third-degree escape if the person unlawfully departs from the "custody" of a peace officer pursuant to an arrest. Is the "custody" element satisfied if the person has been only constructively,

rather than actually or physically, restrained by the officer prior to a formal arrest?

Proposed rule of law

"Custody" is defined as the imposition of "actual or constructive restraint" by a peace officer pursuant to an arrest or court order. "Constructive restraint" means control that is inferred or assumed as a matter of law, even if the control does not exist in fact. Thus, a person commits third-degree escape if the person unlawfully departs from the constructive restraint of an officer in the course of carrying out an arrest.

SUMMARY OF ARGUMENT

Defendant threatened and assaulted two people outside a store, and two uniformed police officers were separately dispatched to the area. (Tr 38-40, 47-49, 55). Upon arrival, one officer saw defendant—whom the officer believed to be the perpetrator—and identified himself as a police officer; defendant began to run away. (Tr 55-56, 88). The officer repeatedly called out, "Stop, police," and ran after him on foot. (Tr 55-56, 88). Another officer pursued defendant in his police car, activating its overhead emergency lights and siren. (Tr 56). Defendant did not stop, but was ultimately apprehended and charged with third-degree escape pursuant to ORS 162.145. He moved for a judgment of acquittal, asserting that the evidence was insufficient to prove that he had been in the

actual or constructive restraint of the police. (Tr 111-12). The trial court denied the motion. (Tr 124).

ORS 162.145(1) provides that a "person commits the crime of escape in the third degree if the person escapes from custody." In turn, ORS 162.135(4) defines "custody," in part, as "the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order." Under the plain language of ORS 162.145 and ORS 162.135(4), a person can commit third-degree escape when the person flees from a police officer after the person has been actually or constructively restrained by the officer in the course of carrying out an arrest. Here, when the police identified themselves as police officers and demanded that defendant stop, the officers placed defendant under constructive restraint, thereby placing him in "custody." Thus, the evidence was sufficient for the jury to find that, when defendant ran away from the officers despite their commands, he committed third-degree escape.

Though defendant argues that a person is in "custody" only after the person is actually or constructively restrained following a "formal" arrest, defendant's interpretation of "custody" is not consistent with the text, context, or legislative history of the escape statutes. Accordingly, the trial court correctly denied defendant's motion for judgment of acquittal, and this court should affirm the Court of Appeals' decision upholding that judgment.

ARGUMENT

When construing a statute, this court's "paramount goal" is to discern the legislature's intent by examining the text of the statute in context, relevant legislative history, and, if necessary, canons of construction. *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Id.* (internal quotation marks omitted). As a result, the first step in analyzing a statute is to examine the statutory text, giving terms of common usage their "plain, natural, and ordinary meaning." *Id.* at 171, 175. The court also "considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). Applying that methodology here, ORS 162.145, by its terms, imposes criminal liability on defendant, who fled after police officers constructively restrained him in the course of carrying out an arrest.

A. Statutory text and context demonstrate that the definition of "custody" in the third-degree escape statute includes constructive restraint imposed in the course of carrying out an arrest.

In this case, the statutory text and context demonstrate that a person can commit third-degree escape by escaping from constructive restraint. As noted above, ORS 162.145(1) provides that a person commits third-degree escape "if

the person escapes from custody." ORS 162.135(4) defines "custody" as "the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a correctional facility, youth correction facility or a state hospital." By using both "constructive" and "actual" to describe distinct forms of restraint sufficient to constitute "custody," the legislature demonstrated its intent to make escape from "constructive restraint" sufficient to violate the statute.

Although the legislature did not define "constructive restraint," the meaning is plain. The relevant definition of "constructive" is "INFERRED—often used in law of an act or condition assumed from other acts or conditions which are considered by inference or by public policy as amounting to or involving the act or condition assumed." *Webster's Third New Int'l Dictionary* 489 (unabridged ed 2002); *see also Black's Law Dictionary* 356 (9th ed 2009) (defining "constructive" as "[l]egally imputed; existing by virtue of legal fiction though not existing in fact"). "Restraint" is "an act of restraining, hindering, checking, or holding back from some activity" and "the condition of being restrained, checked or controlled: Deprivation of liberty." *Webster's* at 1937. Thus, "constructive restraint" means control that is inferred or assumed as a matter of law, even if the control does not exist in fact. *See also Black's* at 441 (defining "constructive custody" as "Custody of a person (such as a parolee or

probationer) whose freedom is controlled by legal authority but who is not under direct physical control.").

The statutory text and context also demonstrate that, to convict a person of third-degree escape, the restraint must be imposed in the course of carrying out an arrest or court order. ORS 162.135(4) provides that any "actual or constructive restraint" must be imposed "pursuant to" either an arrest or court order. As defendant concedes, (Pet Br 7), "pursuant to" means "in the course of carrying out." *Webster's* at 1848;[1] *see also Black's* at 1356 (defining "pursuant to," in relevant part, as "[i]n carrying out."). Thus, the purpose of the restraint must be to carry out or to effectuate an arrest or court order. *See State v. McVay*, 313 Or 292, 294, 833 P2d 297 (1992) (defendant was not in "custody" under ORS 162.135(4) when the police tried to take him to a detoxification center because he was not "restrain[ed] * * * pursuant to an arrest").

Finally, ORS 162.135(5) defines "escape" as "the unlawful departure of a person from custody or a correctional facility." A person "unlawfully departs" from custody the moment the person is no longer under an officer's actual or constructive restraint. *See State v. Lonergan*, 344 Or 15, 21, 176 P3d 374

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[1] Other definitions include "in conformance to or agreement with : according to." *Webster's* at 1848. Defendant does not argue that either of those definitions applies.

(2008) (the defendant, who had been arrested and placed against the trunk of a patrol car, committed third-degree escape when he "stood up and ran").

In sum, under ORS 162.145, when the police actually or constructively restrain a person in the course of carrying out an arrest or court order, the person commits third-degree escape if he or she flees from that restraint.

Notwithstanding the plain meaning of the statutory text, defendant argues that by using the phrase "pursuant to arrest," the legislature intended to incorporate into the definition of "custody" an interpretation of the term "arrest" that would require "actual restraint" of the defendant. In support of that claim, defendant looks to statutes and case law defining "arrest"—such as *former* ORS 133.210 (1969), repealed by Or Laws 1973, ch 836, § 358 ("the taking of a person into custody so that he may be held to answer for a crime," and *former* ORS 133.250 (1969), repealed by Or Laws 1973, ch 836, § 358 ("[a]n arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the officer")—and argues that those statutes require a conclusion that, as used in the escape statute, "the phrase 'pursuant to arrest[]' refers to restraint *after* a formal arrest." (Pet Br 8-11) (emphasis added). But defendant's argument ignores the fact that the legislature specifically defined "custody" in ORS 162.135(4). Because that is the definition that squarely applies to the crime of escape, this court need not—and, in fact, may not—seek a different definition elsewhere. Indeed, the legislature did not incorporate the

definitions of "arrest" provided in *former* ORS 133.210 or *former* ORS 133.250 (1969) into the escape statutes. Or Laws 1971, ch 743, §§ 190-192. Thus, even if, in other contexts, an arrest under those statutes required actual restraint, the legislature unambiguously provided that, under the escape statutes, constructive restraint was enough.

Moreover, defendant's interpretation—that "pursuant to arrest" refers to restraint *after* a formal arrest—means that "custody" would be defined as "actual or constructive restraint pursuant to [*i.e.*: after] actual restraint." But by the plain words of the statute, "custody" does not require actual restraint. Defendant's interpretation thus renders the phrase "constructive restraint" irrelevant, violating ORS 174.010, which instructs courts to construe statutes so as to "give effect to all" provisions. *See also State v. Clemente-Perez*, 357 Or 745, 755, __ P3d __ (2015) ("As a general rule, we also assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.").

B. Legislative history demonstrates that the legislature intended to criminalize escape from "custody," including flight from constructive restraint imposed in the course of carrying out an arrest.

Legislative history further demonstrates that the legislature intended that "custody" include constructive restraint in the course of carrying out an arrest and not, as defendant argues, formal arrest and actual restraint. *See Gaines*, 346 Or at 172 (court considers pertinent legislative history proffered by the

parties when interpreting statutes). The legislature enacted the escape statutes as part of the revision of the criminal code in 1970. Or Laws 1971, ch 743, §§ 190-192. The legislature's discussion of the escape and resisting arrest statutes demonstrates that it understood that third-degree escape was analogous to resisting arrest without force, and that both resisting arrest and escape could occur while an officer was attempting to carry out the arrest of a defendant, including constructive restraint.

During a Revision Commission meeting concerning the resisting arrest statute, for example, in response to a question whether flight from arrest was "covered elsewhere," the following discussion occurred: "[Legislative research counsel] Mr. Wallingford replied that if an arrest had been made, flight would be escape in the third degree in that the person would be in constructive custody. Judge Burns asked what the situation would be if an arrest had not been made and was told by Mr. Wallingford that flight would not be a crime in that circumstance. Mr. Knight asked when the arrest was actually made and was told by Mr. Wallingford that *it was made at the moment the officer verbally or physically made it known that the individual was under arrest*." Minutes, Criminal Law Revision Commission, Jan 23, 1970, 20 (emphasis added).

Other legislative history further demonstrates that the legislature understood that the third-degree escape statute would include non-violent escape from constructive restraint. During a subcommittee meeting of the

Criminal Law Revision Commission regarding the escape statutes, the members discussed whether it was appropriate to provide a defense to third-degree escape when the underlying arrest was unlawful. Legislative research counsel noted that, "The question to consider then, is whether a person can resist an unlawful arrest if he can do so without the use of force." Minutes, Subcommittee No 1, Criminal Law Revision Commission, Nov 6, 1969, 12. Project Director Donald Paillette noted that "he did not advocate providing a defense for resisting arrest by a person who is being unlawfully arrested by a police officer. As to whether the same considerations should apply to a 'peaceable' escape, he said, he was not sure." Minutes, Subcommittee No 1, Criminal Law Revision Commission, Nov 6, 1969, 13; *see also* Minutes, Subcommittee No 1, Criminal Law Revision Commission, Nov 6, 1969, 14 ("If the subcommittee considers allowing no defense for resisting an unlawful arrest, he said, it seemed grossly unfair to him that a person could then be charged with escaping from that custody."); Minutes, Subcommittee No 1, Criminal Law Revision Commission, Nov 6, 1969, 14 ("[T]his section indicates there is a defense to escape when the arrest is unlawful and when the escape is made without the use of force; but if a person uses force, he could be charged with escaping in the second degree as well as resisting arrest[.]"); Minutes, Subcommittee No 1, Criminal Law Revision Commission, Nov 6, 1969, 15 ("If the defendant uses force, he will be covered under one of the other sections. If

it is simply a matter of escape in the third degree, this provides some protection for the individual against an unlawful arrest if he can escape from it without the use of force or violence.").

Finally, the commentary to the escape statutes shows that the legislature intended the third-degree escape statute to criminalize non-violent flight from an impending or completed arrest. The commentary analogized first- and second-degree escape to forcibly or violently resisting arrest, but distinguished third-degree escape by providing a defense for a person who simply "ran away" from an illegal arrest:

> "The proposed section on resisting arrest (see § 206) denies a person the right to resist by force or violence an arrest he believes to be illegal. In the judgment of the Commission the same rationale does not apply to escape in the third degree. The use of force or violence in effecting an escape will be punishable under first and second degree escape. If an arrest and subsequent custody is illegal, a person should not be deprived of the defense if he merely 'runs away' from the detaining officer. Subsection (2) of § 190 therefore gives the escapee a defense if he was in custody pursuant to an illegal arrest."

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 192, 195 (July 1970).[2]

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[2] Defendant argues that the legislature "never intended to criminalize nonviolently 'running away.'" (Pet Br 13-14). Defendant cites commentary to the resisting arrest statute, which states that "[n]either flight from arrest nor passive resistance should be made crimes in themselves." Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 206, 204 (July 1970). But that

Footnote continued…

Given that legislative history, which demonstrates that the legislature intended that "custody" include constructive restraint in the course of carrying out an arrest, this court should reject defendant's contention that the legislature intended third-degree escape to criminalize only flight from formal arrest and actual restraint.

C. Defendant's interpretation of "custody" would lead to absurd results.

If the legislature's intent "remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or at 172. Under one such maxim, this court will assume that the legislature did not intend an absurd result. *See State v. Vasquez-Rubio*, 323 Or 275, 282, 917 P2d 494 (1996) (explaining "the statutory maxim that [the court] should avoid a literal application of the statutory text if it will produce an absurd result"). Here, defendant's interpretation of the meaning of "custody"—that custody "is the condition of being restrained *after* an arrest"—would lead to such absurd results.

(…continued)
statement is directly contrary to the third-degree escape statute, which in fact criminalizes flight from arrest. Because the statement appears in the commentary to the resisting arrest statute, and not in the escape statutes, it is clear that the legislature meant those actions should not be criminalized as *resisting arrest*.

Defendant argues that an arrest—and therefore custody—occurs only when an officer takes physical control of a person's body to formally charge that person with a crime, or the person acquiesces or submits to the authority or control of the arresting officer. Under that interpretation, an officer could *never* take constructive custody of a person *unless* the person acquiesced or submitted to the officer's authority, disregarding the legislature's apparent intention to include constructive restraint. *See* Minutes, Criminal Law Revision Commission, Jan 23, 1970, 20 (arrest is "made at the moment the officer verbally or physically made it known that the individual was under arrest"). In addition, under defendant's interpretation, a person who acquiesces or submits to an officer's commands to stop pursuant to an arrest is in custody. If that person flees after one second of submission, he or she is guilty of third-degree escape. But a person who ignores the officer's commands and never stops at all does not violate the statute. It is unlikely that the legislature intended to punish the first person and not the second. Likewise, as noted above, it is unlikely that the legislature intended to incorporate an "actual restraint" requirement by use of the phrase "pursuant to arrest," when the legislature expressly allowed constructive restraint as to a court order. For those reasons also, this court should reject defendant's interpretation of "custody."

In sum, proper construction of the third-degree escape statute demonstrates that, as applied below, defendant escaped from "custody" under the facts of this case.

D. Sufficient evidence established that, under the totality of the circumstances, defendant was under constructive restraint by the police.

"In ruling on the sufficiency of the evidence in a criminal case, the relevant question is whether, after viewing the evidence in the light most favorable to the state, any rational [factfinder] could have found the essential elements of the crime beyond a reasonable doubt." *State v. King*, 307 Or 332, 339, 768 P2d 391 (1989). In making that determination, the reviewing court resolves any conflicts in the evidence in favor of the state, giving the state the benefit of all reasonable inferences that properly may be drawn, and accepting all reasonable credibility choices. *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995); *State v. Cervantes*, 319 Or 121, 125, 873 P2d 316, 318 (1994). In addition, when analyzing the sufficiency of the evidence, this court makes no distinction between direct and circumstantial evidence. *State v. Hall*, 327 Or 568, 570, 966 P2d 208, 209 (1998).

As noted above, ORS 162.145(1) provides that a "person commits the crime of escape in the third degree if the person escapes from custody." "Custody" is defined as the imposition of "actual or constructive restraint" by a peace officer in the course of carrying out an arrest or court order.

ORS 162.135(4). "Constructive restraint" means control that is inferred or assumed as a matter of law, even if the control does not exist in fact. Here, the evidence entitled a rational factfinder to find that defendant escaped from the constructive restraint of peace officers as they were carrying out an arrest.

Defendant threatened and assaulted two people outside a store. (Tr 38-40, 47-49). Two police officers, Seaside Police Officers Brandon Petersen and Yohannis Korpela, were dispatched to the store with a report "that there was a male with his shirt off, wanting to fight people." (Tr 55). The two officers arrived in separate vehicles. (Tr 55). Upon arrival, Officer Petersen saw defendant—whom Peterson believed to be the male identified by the report—walk away. (Tr 88). Petersen identified himself as a police officer and defendant began to run away. (Tr 55-56, 88). Peterson repeatedly commanded defendant to "stop, police," and ran after him on foot. (Tr 55-56, 88). Officer Korpela pursued defendant in his police car, activating its overhead emergency lights and siren. (Tr 56). Defendant did not stop, but did look back at the officers as he ran. (Tr 56). Ultimately, defendant stopped by jumping into the bed of a pickup truck, and was later arrested. (Tr 56).

That evidence entitled a rational factfinder to find that, when the officers commanded defendant to "stop, police," and pursued him on foot and by police car, the officers had constructively restrained defendant in the course of

carrying out an arrest.[3] A rational factfinder could also find that, at the moment defendant ran away from the officers, he unlawfully departed from custody. Because the evidence was sufficient to allow a jury to find defendant guilty of third-degree escape, the trial court correctly denied defendant's motion for judgment of acquittal, and the Court of Appeals correctly affirmed the trial court's judgment.

CONCLUSION

This court should affirm the trial court's judgment and the Court of Appeals' decision affirming that judgment.

Respectfully submitted,

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[3] Defendant does not dispute the fact that Officer Peterson intended to arrest him. (Pet Br 20).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 9, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Rond Chananudech, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,657 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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