

**1770 ESCAPE FROM THE CUSTODY OF A PEACE OFFICER AFTER
LEGAL ARREST FOR A FORFEITURE OFFENSE¹ — § 946.42(2)(a)and
(3)(e)**

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(2) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody when that custody resulted from legal arrest for a forfeiture offense.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was in custody.²

"Custody" means that a person's freedom of movement is restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which the person has submitted.³

2. The custody resulted from legal arrest for a forfeiture offense.

An arrest for a forfeiture offense is legal when the officer making the arrest⁴
(CHOOSE THE FOLLOWING WHICH APPLIES)

(has reasonable grounds to believe that the person is committing or has committed a forfeiture offense).

(has a warrant commanding that the person be arrested, where that warrant is fair on its face, notwithstanding unsubstantial irregularities).

(believes on reasonable grounds that a warrant for the person's arrest has been issued in this state).

AT THE REQUEST OF THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:

[Evidence that the defendant was in custody as the result of being arrested is an essential element of this offense. However, the fact that the defendant was suspected of illegal activity must not be considered proof that the defendant is likely to have committed the offense of escape as charged in this case.]⁵

3. The defendant escaped from custody.

Escape means to leave in any manner without lawful permission or authority.⁶

4. The escape from custody was intentional.

This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.⁷

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING⁸ IF DEFENDANT HAS BEEN CHARGED UNDER § 946.42(3)(e): LEAVING THE STATE TO AVOID APPREHENSION.

If you find the defendant guilty of escape, you must consider the following question:

"Did the defendant leave the state to avoid apprehension?"

If you are satisfied beyond a reasonable doubt that the defendant left the state to avoid apprehension you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1770 was originally published in 1980 and revised in 1988, 1993, and 1997. This revision combined JI 1770 and 1771. It also involved adoption of a new format and nonsubstantive editorial changes and was approved by the Committee in October 2007.

The Wisconsin escape statute, § 946.42, divides escape offenses into two classifications: offenses under § 946.42(2) are punished as Class A misdemeanors; offenses under § 946.42(3) are Class H felonies. The severity of the penalty is dependent upon the seriousness of the underlying reason for the accused being in custody.

This instruction is drafted for those violations of subsection (2)(a) involving escape from the custody of a police officer. These basic offenses are punished as Class A misdemeanors. The penalty is increased to that for a Class H felony if the defendant leaves the state to avoid apprehension. See § 946.42(3)(e). This instruction includes a special question to be used when the felony offense is submitted to the jury.

Escape charges under § 946.42(2) apply to persons who were jailed for nonpayment of a municipal forfeiture and failed to return to jail from work release. *State v. Smith*, 214 Wis.2d 541, 571 N.W.2d 472 (Ct. App. 1997).

Former § 946.42(4), which required that sentences imposed for escape be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he escaped, was repealed by 2001 Wisconsin Act 109.

1. Section 946.42(2) deals with escape from custody resulting from arrest for, charge of, or conviction of a statutory traffic regulation, statutory forfeiture or municipal ordinance violation, from civil arrest or body execution, or from custody under § 938.19 resulting from a traffic regulation, etc. This instruction is drafted for only one of the types of custody possible under § 946.42(2) – custody resulting from legal arrest for a forfeiture offense. For cases involving the other types of custody, the second element will have to be modified throughout the instruction.

2. This instruction is drafted for cases involving escape from the actual custody of a police officer after arrest. The definition of "custody" is based on recent decisions of the Wisconsin appellate courts. See note 3, below.

For cases involving escape from an institutional setting after arrest for or conviction of a forfeiture offense, defining "custody" in the following manner may be helpful:

Custody means physical control of a person by (an institution) (a peace officer) (an institution guard). (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)

The sentence in parentheses should be read to the jury only when the accused was lawfully outside the institution when the alleged escape took place. Prisoners may be taken from jails or other institutions for "rehabilitative and educational activities. . . . While away from the institution grounds, an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject to its rules and discipline." Wis. Stat. § 302.15.

3. The definition of "custody" is adapted from decisions of the Wisconsin Supreme Court and Court of Appeals. These decisions held that the proper definition of custody was broader than being in the "physical control" of a police officer or institution guard, which had been the definition in the previous versions of this instruction. Rather, it is enough if freedom of movement has been restricted. State v. Adams, 152 Wis.2d 68, 447 N.W.2d 90 (Ct. App. 1989); State v. Hoffman, 163 Wis.2d 752, 472 N.W.2d 558 (Ct. App. 1991); State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 437 (1991). See footnote 4, Wis JI-Criminal 1772 for complete discussion of these cases.

4. What constitutes a legal arrest is defined in subsection (1)(c) of § 946.42 as follows: "Legal arrest" includes without limitation an arrest pursuant to process fair on its face notwithstanding insubstantial irregularities and also includes taking a juvenile into custody under s. 938.19." The question of an arrest's legality can become complicated; the instruction has not attempted to deal with each of the individual problems that can arise. The material in parentheses is based on the description of arrest authority provided in s. 968.07.

As far as the "privilege" to escape from an unlawful arrest is concerned, the comment to the Judiciary Committee's 1953 Report on the Criminal Code states at page 191:

A prisoner in custody pursuant to an illegal arrest has a privilege to escape without the use of deadly or excessive force and so has a defense to a prosecution under this section. See § 339.48 Self-defense and defense of others. (Note, now § 939.48.) What is a legal arrest is partially set out in subsection (5) of this section. See also, Restatement, Torts § 124 (1934). If the illegality

of the original arrest has been overcome by subsequent events making the custody lawful, the privilege to escape no longer exists. The actor's innocence of the crime for which he is in custody is, of course, no defense to the crime of escape.

5. This cautionary instruction is intended to advise the jury that the fact of arrest is a necessary element of the escape offense but must not be used to find that the defendant is probably guilty of the escape charge simply because the defendant has been arrested. It should be given only at the request of the defendant, since it may serve to highlight the arrest.

6. This is the definition of "escape" found in § 946.42(1)(b).

7. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."

8. Section 946.42(3)(e) provides for an increased penalty (from a Class A misdemeanor to a Class H felony) if the defendant leaves the state to avoid apprehension. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant leave the state to avoid apprehension?