1772 ESCAPE FROM CUSTODY RESULTING FROM LEGAL ARREST FOR A CRIME — § 946.42(3)(a)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(3) 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 crime.

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.

   SELECT THE APPLICABLE DEFINITION OF "CUSTODY."[1]

   [Custody means the physical control of a person by (an institution) (a peace officer) (an institution guard).[2] (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)[3]]

   ["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.[4]]

2. The custody resulted from legal arrest for a crime.

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An arrest for a crime is legal when the officer making the arrest[5]

CHOOSE THE FOLLOWING WHICH APPLIES

(has reasonable grounds to believe that the person is committing or has committed a crime. __________ is a crime.)[6]

(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).

(believes on reasonable grounds that a felony warrant for the person's arrest has been issued in another 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.][7]

3. The defendant escaped from custody.

Escape means to leave in any manner without lawful permission or authority.[8]

ADD THE FOLLOWING IF THE CASE INVOLVES FAILURE TO REMAIN WITHIN THE LIMITS OF A HOME DETENTION PROGRAM UNDER § 302.425.

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[Escape includes the intentional failure to remain within the limits of a home detention program.][9]

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.[10]

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.

COMMENT

Wis JI-Criminal 1772 was originally published in 1980 and revised in 1988, 1993, and 1997. This revision combined JI 1772 and 1773. 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.

Section 946.42(3) deals with escapes from custody that result from the following circumstances:

(a) Pursuant to a legal arrest for, lawfully charged with or convicted of or sentenced for a crime.

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(b) Lawfully taken into custody under s. 938.19 for or lawfully alleged or adjudged under ch. 938 to be delinquent on the basis of a violation of a criminal law.

(c) Subject to a disposition under s. 938.34(4d), (4h), or (4m), to a placement under s. 938.357(4) or to aftercare revocation under s. 938.357(5)(e).

(d) Subject to an order under s. 48.366.

(e) In custody under the circumstances described in sub. (2) and leaves the state to avoid apprehension. Leaving the state and failing to return is prima facie evidence of intent to avoid apprehension.

(f) Pursuant to a legal arrest as a fugitive from justice in another state.

(g) Committed to the department of health and family services under ch. 971 or 975.

This instruction is drafted for violations of subsection (3)(a) involving escape from the custody of a police officer or from the actual physical control of an institution or officer. [Escape from an officer at the time of arrest was formerly addressed in Wis JI Criminal 1773; that instruction has been combined in this version of Wis JI Criminal 1772.] The first element provides alternative definitions of "custody" for the two types of cases.

Wis JI Criminal 1774 is drafted for violations of subsection (3)(a) involving escapes following conviction or sentence. Wis JI Criminal 1770 is drafted for violations of subsection (3)(e) involving escapes under sub. (2) where the defendant leaves the state to avoid apprehension. For any of the other alternatives in § 946.42(3)(b) through (g), the second element of the instruction would need to be modified (along with corresponding changes in the opening and concluding paragraphs).

Note that the statute does not distinguish between arrests for felonies and misdemeanors or between custody resulting from arrest or conviction or sentence.

A note on the defense of necessity or coercion follows the Comment to Wis JI Criminal 1774.

A probationer or parolee, taken into custody for violating terms of release by a probation or parole agent, is not "in custody" for purposes of § 946.42 when being transported to jail. State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864.

1. This instruction is drafted for those violations of subsection (3) involving escape from the actual physical control of an institution or officer or from the custody of a police officer at the time of arrest. The applicable definition should be selected.

2. The definition of "custody" is based on the one provided in § 946.42(1)(a).

"Custody" was discussed at length in State v. Schaller, 70 Wis.2d 107, 233 N.W.2d 416 (1974), where it was held that it was not escape when a person committed to the county jail during nonworking hours as a condition of probation failed to return at the close of the working day. The court discussed "actual" and "constructive" custody and determined that a probationer was not in the constructive custody

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of the sheriff during the periods of release and therefore his elopement did not constitute escape under § 946.42.

In State v. Rosenberg, 208 Wis.2d 191, 560 N.W.2d 266 (1997), the Wisconsin Supreme Court reaffirmed the holding in Schaller, at least as it applied to offenses charged under the 1994 version of § 946.42. The statute was again amended in 1996; the court "decline[d] to rule on the impact the 1996 amendments have on Schaller." Wis.2d 191, 193n.1. The Committee concluded that the plain language of the statute after the 1996 amendments covers a probationer who does not return to jail as required. The relevant portion is the last sentence of § 946.42(1)(a) which provides that custody does not include a probationer "unless the person is in actual custody or is subject to a confinement order under s. 973.09(4)." The underlined portion was added by 1995 Wisconsin Act 154. Rosenberg noted that the Legislative Reference Bureau analysis of the bill that was enacted as 1995 Wisconsin Act 154 stated: "This bill makes a probationer subject to the escape law at all times when he or she is subject to an order of confinement as a condition of probation."

A probationer or parolee, taken into custody for violating terms of release by a probation or parole agent, is not "in custody" for purposes of § 946.42 when being transported to jail. State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864.

3. 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. Also, see note 2, above, regarding the custody status of prisoners confined to the county jail as a condition of probation.

4. 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. The Committee modified this definition in light of recent decisions dealing with "seizures" under the 4th Amendment to develop the definition used here.

In State v. Adams, 152 Wis.2d 68, 447 N.W.2d 90 (Ct. App. 1989), police stopped the suspect on suspicion of drunk driving and he failed the field sobriety tests. While the officer was running a license check, the suspect ran away but was chased down by the officer. The suspect and his companion then overwhelmed the officer, locked him up in his own handcuffs, and got away. They later turned themselves in. The defendant challenged his escape conviction on the ground that he was never in "custody." He argued that "custody" should be defined (as in Wis JI-Criminal 1772) as "in physical control" of the officer. Since they successfully resisted the arrest, so the argument goes, the defendants were never in the officer's control. The court of appeals rejected the argument, holding that "custody" means "ability or freedom of movement had been restricted."

In State v. Hoffman, 163 Wis.2d 752, 472 N.W.2d 558 (Ct. App. 1991), an officer went to Hoffman's house with a warrant for his arrest. He found Hoffman in his driveway and told him he had a warrant and was placing him under arrest. Hoffman moved toward the house but the officer positioned himself in his way. The officer refused Hoffman permission to go to the house to get clothing. While discussing this,

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Hoffman's brother executed a "basketball pick" type of maneuver, blocking the officer while Hoffman ran away through the garage. The trial court modified the escape instruction to use the Adams definition of custody instead of the "physical control" definition from the standard instruction. Hoffman argued that Adams was wrong and the standard instruction was right. He conceded he may have been under legal arrest, but said he was never in the officer's control. The court rejected the argument, holding that "custody" is broader than the "physical control" definition used in the former instruction. It is satisfied by the restraint on freedom of movement that is required as the first element of the "three elements of arrest" test that has traditionally been used in Wisconsin. Everyone who is under legal arrest is in custody. A footnote establishes that there was enough restraint to satisfy what is required for an arrest: a reasonable jury could find that Hoffman submitted to the officer's assertion of authority. [This relates to the definition of "seizure" adopted by the U.S. Supreme Court for 4th Amendment purposes, see Hodari D., discussed below.]

In State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 437 (1991), officers observed an automobile drive onto the sidewalk in the city of Prescott at 2:00 a.m. They made contact with Swanson, the driver, who could not produce a driver's license and smelled of intoxicants. The officers began to conduct field sobriety tests and did not detect slurred speech or difficulty in standing. Before completing the field sobriety test, the officers conducted a patdown and discovered a bag of marijuana. At that point the officers received a call for backup assistance at a domestic disturbance. They put Swanson in the police car and drove to the site of the disturbance. When they got there, Swanson was left alone and he escaped. The Wisconsin Supreme Court reversed Swanson's escape conviction because he was not "in custody." The court focused on the 4th Amendment test for arrest, holding that the suspect was not under arrest on the street because field sobriety tests are not "custody." Probable cause did not exist until after the marijuana bag was discovered, and it was discovered by an unlawful search - one that exceeded the scope of a lawful frisk. Thus, Swanson was not lawfully arrested and not covered by the escape statute. In the course of its decision, the court overruled the "three elements of arrest" test previously used in Wisconsin and relied on in Adams and Hoffman. In its place, the court adopted the "objective" test, under which the question is: would a reasonable person in the suspect's position have considered himself to be under arrest? The court mentioned neither Adams nor Hoffman and referred to escape only at the very end of the opinion:

> As Swanson was not "in custody" at the time he eluded police he cannot be considered as to have escaped from custody under sec. 946.42(3)(a), Stats.

164 Wis.2d 437, 455

The Committee concluded that the result of these three decisions is that "custody" for the purposes of the escape statute is to be defined in a manner consistent with the definition of "seizure" employed for 4th Amendment purposes. The United States Supreme Court addressed the issue in California v. Hodari D., 499 U.S. 621 (1991). Hodari D. involved police pursuit of a young man who ran away when he saw police approaching. Just before the officers caught him, he threw away a bag that turned out to have cocaine in it. The question was whether the man had been "seized" before he tossed the bag aside. For the purpose of determining when there is a 4th Amendment "seizure," the U.S. Supreme Court equated "seizure" with "arrest" and defined it as follows:

> An arrest requires either physical force (laying on of hands or application of physical force to restrain movement) or, where that is absent, submission to the assertion of authority.

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499 U.S. 621, 626

The definition of "custody" used in the instruction is based on this formulation.

5. 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.

6. Misdemeanor traffic violations are punishable by imprisonment and therefore are "crimes" under § 946.42. State v. Beasley, 165 Wis.2d 97, 477 N.W.2d 57 (Ct. App. 1991).

7. This cautionary instruction is intended to advise the jury that the fact of arrest is a necessary element of the escape offense but should 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.

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

9. Section 302.425 provides that the sheriff or superintendent of a house of correction may place a prisoner in a home detention programs to be monitored by an electronic monitoring system. Subsection (6) of the statute provides:

> Any intentional failure of a prisoner to remain within the limits of his or her detention or to return to his or her place of detention, as specified in the terms of detention under sub. (3), is considered an escape under s. 946.42(3)(a).

The Committee concluded that offenses involving electronic monitoring under sec. 302.045 are best handled by adding the recommended statement to the regular escape instruction. Electronic monitoring is also authorized by sec. 973.03(4)(a), which provides that "in lieu of a sentence of imprisonment to the county jail, a court may impose a sentence of detention at the defendant's place of residence . . ." Subsection (4)(c) provides that if the defendant fails to comply with the terms of the detention, the court may order that the remainder of the sentence be served in the county jail. Subsection (4)(d) provides that

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a sentence under sec. 973.04 is not a sentence of imprisonment, and lists exceptions that do not include the escape statute. Because sec. 973.04 apparently provides a specific remedy for failure to abide by the terms of the detention and because it does not reference the escape statute as sec. 302.045 does, the Committee concluded that violations of detention conditions under sec. 973.04 are not punishable as escape.

10. 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."

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