1774 ESCAPE FROM CUSTODY: JAIL OR PRISON ESCAPE — § 946.42(3)(a)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(3)(a) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody when that custody resulted from being sentenced 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.

   "Custody" means the physical control of a person by (an institution) (a peace officer) (an institution guard).[1] (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)[2]

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

   [Escape includes the intentional failure to remain within the limits of a home detention program.][3]

2. The custody was the result of being sentenced[4] for a crime.[5]

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

[While evidence that the defendant was in custody as the result of a prior criminal conviction is an essential element of this offense, it must not be used for any other purpose (than determining the weight and credit to be given to testimony).[6] Particularly, you should bear in mind that conviction of the defendant of a crime at some previous time is not proof that the defendant is guilty of the offense which is now charged.][7]

3. The defendant escaped from custody.

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

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.[9]

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 1774 was originally published in 1980 and revised in 1988, 1993, and 1997. This revision 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.

(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.

Subsection (3)(a) of § 946.42 prohibits escape from custody "pursuant to a legal arrest for, lawfully charged with or convicted of or sentence for a crime." This instruction is drafted for violations of subsection (3)(a) involving escapes following conviction or sentence. There is a technical distinction in Wisconsin to the effect that one placed on probation is not serving a sentence. If that distinction is implicated in a case for which this instruction might be used, the text should be changed to refer to custody that "resulted from being convicted of a crime." Also see note 1, below.

The penalties provided in the escape statute do not distinguish between escapes from county jail and escapes from prison. All escapes from custody resulting from conviction for a crime are treated the same. They are also treated the same as escapes following arrest for a crime but before conviction. Wis JI Criminal 1774 is drafted for escapes following conviction and can be used if escape is from a jail or a prison. The place of imprisonment is no longer significant. What is significant is the cause of the custody – conviction of a crime.

For violations of subsection (3)(a) involving escapes after lawful arrest, see Wis JI Criminal 1772. 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).

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.

A note discussing the defense of duress, necessity, or coercion follows these footnotes.

1. 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 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."

In State v. Sugden, 143 Wis.2d 728, 422 N.W.2d 624 (1988), the Wisconsin Supreme Court held that "custody" refers to secure custodial facilities within the general geographical boundary of a particular penal institution. Thus, Sugden's conviction for escape was affirmed where he left the locked cottage in which he was confined but was apprehended before he progressed beyond the outer fence defining the outer boundaries of the institution.

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.

2. 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.

3. 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 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.

4. Although there apparently is no Wisconsin law on the subject, the Committee is of the opinion that the legality of the underlying conviction and sentence is not an issue where the charge is escape after conviction or sentence. Thus, it should be no defense that the defendant's underlying conviction is subject to challenge. See cases cited in 27 Am.Jur.2d Escape, Prison Breaking, and Rescue, §§ 1, 7, 14, and 16, for the general rule that where imprisonment is under color of law, the prisoner is not entitled to resort to self-help but must challenge the validity of the conviction through legal channels.

5. 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).

6. Include the phrase in parentheses when the evidence of a prior conviction has been admitted as relevant to credibility under § 906.09. Subsection (2) of § 906.09 provides for the exclusion of such evidence if its probative value is outweighed by the danger of unfair prejudice. The trial judge must make a prior determination that such evidence is admissible (see §§ 906.09(3) and 901.04).

7. This cautionary instruction is suggested to deal with the fact that evidence of a prior conviction will be before the jury in most escape cases. It is intended to advise the jury that the prior conviction 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 he has been convicted before. It should be given only at the request of the defendant, since it may serve to highlight the prior conviction.

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

9. 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."

NOTE ON DURESS, COERCION, OR NECESSITY DEFENSE

A commonly raised defense in escape cases is that the prisoner had no choice but to escape because of threats of violence or homosexual attacks by other inmates, unbearable conditions of confinement, or mistreatment by prison authorities. The Wisconsin Supreme Court has not specifically rejected or recognized such a defense to a charge of escape, although the court has recognized the defense of coercion for other criminal offenses, see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). Wis. Stat. § 939.47 defines the defense of coercion and § 939.46 defines the related defense of necessity. See Wis JI-Criminal 790 and 792.

Several states have recognized that coercion, necessity, or duress may be a defense to an escape charge, although relatively strict limits are usually placed on its availability. See, for example: People v. Lovercamp, 118 Cal. Rptr. 110, 43 Cal.App.3d 823 (1974); People v. Harmon, 220 N.W.2d 212 (Mich. 1974); People v. Unger, 362 N.E.2d 319 (Ill. 1977). Also see, 69 A.L.R.3d, "Duress, Necessity or Conditions of Confinement as Justifications for Escape from Prison."

Often the cases are not clear in distinguishing between coercion and necessity as the basis for the defense. In Wisconsin the two are theoretically distinct in the sense that coercion refers to threats or force from a third person and necessity refers to threats from natural physical forces. See §§ 939.46 and 939.47. (Also see Gardner, "The Defense of Necessity and the Right to Escape from Prison," 49 S. Cal. L. Rev. 110, 115 (1975); and Note, Duress – Defense to Escape, 3 Am. J. Crim. L. 331, 332 (1975).)

Some of the uncertainty regarding the scope and viability of the defense has been resolved by the decision of the United States Supreme Court in United States v. Bailey, 444 U.S. 394, (1980). In Bailey, the Court analyzed the applicability of the duress or necessity defense to a charge of escape under 18 U.S.C. § 751(a), a federal statute that is similar to Wis. Stat. § 946.42. The Court recognized that this type of defense could be available to one charged with escape but restricts its availability to cases where the defendant "demonstrates that, given the imminence of the threat, violation of [the escape statute] was his only reasonable alternative." Further, "in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."

The Committee recommends that Bailey's reasoning be applied in Wisconsin. Before an instruction on coercion (or necessity) is given, there must be evidence, either offered by the defendant or presented as part of the state's case, that shows a justification for the defendant's initial departure from custody and an effort to surrender or return when the alleged coercive force ceased to exist.

