

Year 2004 Case Summaries

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There was a fatal variance when the petition charged escape from arrest custody but the proof showed escape from court-ordered custody [In re B.P.C.] (04-2-07).

On May 27, 2004, the Austin Court of Appeals withdrew its earlier opinion in this case and held that when the petition charged that respondent escaped from custody while under arrest but the proof showed escape while in custody under court order, that was a fatal variance.

04-2-07. In the Matter of B.P.C., UNPUBLISHED, No. 03-03-00057-CV, 2004 WL 1171670, 2004 Tex.App.Lexis ____ (Tex.App.-Austin 5/27/04) Texas Juvenile Law (5th Ed. 2000).

Facts: Appellant's motion for reconsideration en banc is overruled as to en banc consideration and granted as to panel consideration only. The opinion and judgment in this cause dated March 25, 2004, are withdrawn.

Appellant B.P.C., a minor, was adjudicated as having engaged in delinquent conduct for committing the offense of escape. See Tex. Pen.Code Ann. § 38.06 (West 2003). He appeals, contending that (1) there is a material variance between the allegations in the State's petition and the proof produced at the hearing, (2) the evidence is legally and factually insufficient to support the trial court's determination, and (3) the State erred in charging him with escape instead of failure to appear and bail jumping. See *id.* § 38.10 (West 2003). We agree that there is a material variance between the allegations and the proof. As a consequence, the evidence is legally insufficient to sustain the adjudication of delinquency.

Appellant was first placed on probation in June 2001. [FN1] His probation was extended several times, and in April 2002 he was taken into custody for probation violations. Following a hearing on May 28, 2002, appellant's probation was extended until May 2003, and he was ordered to attend the Leadership Academy. Because no beds were immediately available at the Academy, appellant was ordered to begin his probation under confinement at the Gardner Betts Detention Facility. The detention order was signed by a juvenile court referee on May 29 and by the trial court on June 5. At 11:00 a.m. on May 31, appellant was released into his uncle's custody under a furlough order providing that appellant was released until 7:00 p.m. that same day. That night, appellant's uncle reported that appellant had run away, and when appellant did not return at 7:00 p.m. as ordered, sheriff's deputies were summoned to find him. Appellant was taken into custody at about 11:30 p.m. on May 31.

FN1. Although it is not entirely clear from the record, it appears that appellant was initially adjudicated delinquent based on proof he possessed marihuana.

On June 13, the State filed an original petition alleging appellant had engaged in delinquent conduct by "intentionally and knowingly escape[ing] from custody of Estella Medina,[[FN2]] when [appellant] was under arrest for an offense." In October, appellant was adjudicated delinquent and placed on probation until December 2003 at the Kerr County Juvenile Facility.

FN2. Estella Medina is the Chief Juvenile Probation Officer for Travis County and has authority over Gardner Betts.

Held: Reversed and dismissed with prejudice.

Opinion Text: Charge of Escape

In his fourth issue, appellant urges that he should have been charged with commission of bail jumping and failure to appear instead of

escape. A person commits bail jumping and failure to appear if he is released from custody under the condition that he appear at a later court proceeding and intentionally or knowingly fails to do so as ordered. Tex. Pen.Code Ann. § 38.10(a) (West 2003); see *Doucette v. State*, 774 S.W.2d 88, 91 (Tex.App.-Beaumont 1989, pet. dismissed) (Brookshire, J., dissenting) ("The gravamen of the offense of felony bail jumping is the failure to appear. Whether the underlying felony offense is proven is immaterial. The state is merely required to show that the charges for the felony offenses were then pending against the defendant. ") (emphasis in original); *Richardson v. State*, 699 S.W.2d 235, 238 (Tex.App.-Austin 1985, pet. refused) ("in a prosecution under [former bail jumping statute], proof the defendant was free pursuant to an instanter bond constitutes a prima facie showing that he had notice of the proceeding at which he failed to appear"). The bail jumping statute would be a strange fit for this case, in which appellant was released by the temporary furlough order for only a few hours to pick up some of his possessions. The detention order provided that appellant was to remain in the State's custody until he had successfully completed the Leadership Academy's program, and his confinement was suspended only briefly, to be resumed as soon as the leave was over. Appellant was not released and ordered to appear at a later proceeding as envisioned by the failure to appear/bail jumping statute. See Ed Kinkeade & S. Michael McColloch, *Texas Penal Code Annotated* 398 (1999-2000 ed.) (commentary to section 38.10) (bail jumping "offense occurs when a court appearance is missed"); *Black's Law Dictionary* 97, 675 (6th ed.1990) ("appear" defined as "[t]o be properly before a court ... [c]oming into court by a party to a suit"; "appearance" defined as "coming into court as party to a suit, ... [t]he formal proceeding by which a defendant submits himself to the jurisdiction of the court"; "furlough" defined as a "leave of absence"). Further, if a prosecutor has probable cause to believe that a person committed a statutory offense, the prosecutor generally has discretion in deciding what charges to file. See *Roise v. State*, 7 S.W.3d 225, 243 (Tex.App.-Austin 1999, pet. refused). Appellant has not shown that the State erred or abused its discretion in charging him with the offense of escape instead of failure to appear. We overrule appellant's fourth issue.

Sufficiency of the Evidence

In his first three issues, appellant contends the evidence is legally and factually insufficient to establish that he committed the offense of escape as alleged in the petition. An adjudication of delinquency is based on criminal standards of proof. See Tex. Fam.Code Ann. § 54.03(f) (West Supp.2004); *In re M.C.L.*, 110 S.W.3d 591, 594 (Tex.App.-Austin 2003, no pet.). Therefore, we review the sufficiency of the evidence in an adjudication of delinquency under the same standards used in criminal cases. *M.C.L.*, 110 S.W.3d at 594.

Appellant makes two basic arguments. First, he contends the State failed to prove that he escaped from custody within the meaning of the penal code. Second, he urges that even if an escape from custody is shown, there is a material variance between the offense proved and the offense alleged in the petition. Although we find the second argument to be dispositive, we will briefly discuss the first in order to give context to the variance issue.

Did appellant escape from custody?

A person commits an offense if he escapes from custody when: (1) he is under arrest for, charged with, or convicted of an offense, or (2) he is in custody pursuant to a lawful court order. Tex. Pen.Code Ann. § 38.06(a). "Escape" is defined as the unauthorized departure from custody or the failure to return to custody after temporary leave. Id. § 38.01(2) (West 2003). "Custody" means under arrest by a peace officer or under restraint by a public servant pursuant to a court order. Id. § 38.01(1)(A).

Under the trial court's order modifying appellant's disposition, appellant was ordered placed at the Leadership Academy until successfully discharged. Because there was no space immediately available at the Academy, appellant was ordered confined to Gardner Betts. Medina is the chief juvenile probation officer of Travis County and is in charge of Gardner Betts. The evidence is legally and factually sufficient to prove that appellant was in "custody" because he was under restraint of a public servant pursuant to a valid court order. See id. §§ 38.01(1)(A), .06(a)(2); see *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (test for legal sufficiency); *Griffin v. State*, 614 S.W.2d 155, 158-59 (Tex.Crim.App.1981) (same); *Zuniga v. State*, No. 539-02, 2004 Tex.Crim.App. LEXIS 668, at *20 (Tex.Crim.App. Apr. 21, 2004) (test for factual sufficiency).

Appellant was released from Gardner Betts into his uncle's care for several hours on May 31 pursuant to a furlough order and ordered to return by 7:00 p.m. He failed to do so. The penal code does not require a person to physically wrest himself out of a public servant's control to have committed escape. Instead, a person can commit escape by simply failing to return as ordered when released from custody for temporary leave. See id. § 38.01(2); *Martin v. State*, 654 S.W.2d 473, 474-75 (Tex.App.-Waco 1982), rev'd on other grounds, 652 S.W.2d 777 (Tex.Crim.App.1983) (defendant on work release committed escape when he failed to return to sheriff's custody at end of work day). The evidence is legally and factually sufficient to support a finding that appellant's failure to return to his court-ordered custody after temporary leave amounted to "escape" as defined by section 38.01(2). See Tex. Pen.Code Ann. § 38.01(2).

Is there a material variance between the pleading and the proof?

The State's petition alleged that appellant escaped from custody when he was under arrest for an offense. See id. § 38.06(a)(1). But as we have discussed, the evidence shows that appellant escaped when in custody pursuant to a court order. See id. § 38.06(a)(2).

Appellant contends this is a material variance that renders the evidence legally insufficient to sustain the adjudication. [FN3]

FN3. The State asserts that there is no variance because when appellant was arrested for the probation violation, he was in effect rearrested for the offense that led to his being placed on probation in the first place. On May 31, 2002, however, when appellant escaped by failing to return to the detention facility, he was not in custody because he was under arrest for an offense. He was in custody pursuant to the trial court's order confining him in Gardner Betts while awaiting placement in the Leadership Academy.

A variance issue arises when the State proves the defendant guilty of a crime, but the evidence shows that the crime was committed in a manner that varies from the allegations in the charging instrument. *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex.Crim.App.2001). A variance between the allegations in the charging instrument and the evidence adduced at trial is a legal sufficiency issue. *Id.* at 257. If the variance is material, the evidence will be deemed legally insufficient. *Id.* A variance is material if the charging instrument, as written, did not give the defendant adequate notice of the charge against him or if the charging instrument, as written, subjected the defendant to the risk of a second prosecution for the same crime. *Id.*

When a penal statute defines two or more alternative methods of committing an offense but the charging instrument alleges only one of those methods, the method alleged must be proved. *Curry v. State*, 30 S.W.3d 394, 405 (Tex.Crim.App.2000). *Curry* discussed this issue in terms of "surplusage," a concept later abandoned in *Gollihar*. See *Curry*, 30 S.W.3d at 405; *Gollihar*, 46 S.W.3d at 256-57. Nevertheless, *Gollihar* cited *Curry* repeatedly and discussed it with approval. *Gollihar*, 46 S.W.3d at 254-56. We conclude that under *Curry* and *Gollihar*, when a charging instrument alleges some but not all of the alternative statutory methods of committing an offense, the State must prove the method or methods alleged and any variance in this regard is material. See *id.* at 259 (Keller, P.J., concurring).

To be guilty of escape, a person must be in custody under one of four statutorily prescribed circumstances: when under arrest for an offense, when charged with an offense, when convicted of an offense, or pursuant to a lawful court order. Tex. Pen.Code Ann. § 38.06(a). These four alternatives are separate and distinct elements of the offense; they are not interchangeable. 6 Michael B. Charlton, *Texas Practice: Texas Criminal Law* § 22.6 (2d ed.2001) (citing *McWilliams v. State*, 782 S.W.2d 871, 872-73 n.1 (Tex.Crim.App.1990)). Having alleged that appellant was in custody when under arrest for an offense, the State was required to prove this specific circumstance. We hold that there is a material variance between the allegation that appellant was in custody when under arrest for an offense and the proof that he was in custody pursuant to a court order. [FN4] Appellant's first issue is sustained.

FN4. Although this Court has noted that a juvenile adjudication proceeding is a quasi-criminal proceeding, see *In re M.S.*, 940 S.W.2d 789, 790-91 (Tex.App.-Austin 1997, no writ), juvenile proceedings generally are governed by the rules of civil procedure and the family code. Tex. Fam.Code Ann. § 51.17 (West Supp.2004); *In re R.J.H.*, 79 S.W.3d 1, 6 (Tex.2002); see *In re L.M.*, 993 S.W.2d 273, 280 n.3 (Tex.App.-Austin 1999, pet. denied); *In re O.C.*, 945 S.W.2d 241, 243 (Tex.App.-San Antonio 1997, no writ). Under the rules of civil procedure, an alleged variance between the pleadings and proof is evaluated by considering whether the variance is substantial, misleading, and prejudicial. *O.C.*, 945 S.W.2d at 243 (citing *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex.1980)); *In re A.B.*, 868 S.W.2d 938, 942 (Tex.App.-Fort Worth 1994, no writ). But see *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex.1987) (indictment did not allege transferred intent; variance violated child's rights). Application of the civil rule would not change the result here. By definition, a material variance under *Gollihar* is substantial, misleading, and prejudicial.

The evidence is legally insufficient to prove that appellant engaged in delinquent conduct as alleged in the petition. Therefore, we reverse the judgment of delinquency and remand the cause to the district court with the instruction to dismiss the case with prejudice. See Tex. Fam.Code Ann. § 54.03(g) (West Supp.2004).

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