

Summary of SC90125, *State of Missouri v. Michael Moore*

Appeal from the Montgomery County circuit court, Judge Kelly Broniec
Argued and submitted Sept. 29, 2009; opinion issued Jan. 26, 2010

Attorneys: Moore was represented by Nancy A. McKerrow of the public defender's office in Columbia, (573) 882-9855; and the state was represented by Dora A. Fichter of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man challenges his conviction for felony failing to return to confinement. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the conviction. At the time the man was booked into the county jail and then temporarily was permitted to go at large without a guard, he was serving a sentence to the department of corrections under the applicable criminal statute. In addition, the trial court's error in permitting the sentencing judge to offer a legal opinion in his testimony did not result in prejudice, manifest injustice or a miscarriage of justice.

Facts: Michael Moore had two previous convictions for driving while intoxicated, for which he was sentenced to four- and seven-year prison terms. Execution of these sentences were suspended, and he was placed on probation. He subsequently violated the terms of his probation. At a December 2006 hearing, the trial court revoked Moore's probation, ordered execution of his previous sentences to the department of corrections, and ordered that he be held in the Warren County jail pending transport to the department. Moore requested a stay of his sentence so he could spend Christmas with his family. Instead of granting the stay, the sentencing judge granted Moore a "furlough," ordering that Moore be booked into custody on December 7 then released the same day with orders to return to confinement by noon 20 days later. The judge warned Moore that if he did not return to the jail at the designated time, he could be charged with the crime of failing to return to confinement. Despite the judge's warning, Moore returned to the jail six days late and subsequently was charged with felony failure to return to confinement. At his trial, the state called as a witness the sentencing judge who had granted the furlough. Over Moore's objection, the sentencing judge testified it was his opinion that Moore began serving his sentence to the department when he was booked into the county jail December 7, that Moore was in custody at the time of the booking and that the sheriff simply was holding Moore on behalf of the department. A defense witness employed by the department testified that an inmate begins his sentence in the department when the department physically receives and accepts him and that, in Moore's case, the department's records showed his sentence began in March 2006, even though it did not receive him until January 2007. Ultimately, the jury returned a verdict finding Moore guilty of felony failure to return to confinement, and the trial court sentenced him to four years in prison to be served concurrently with his other sentences. Moore appeals.

AFFIRMED.

Court en banc holds: (1) There was sufficient evidence on which a reasonable juror could have found Moore guilty beyond a reasonable doubt of felony failure to return to confinement.

(a) Under section 575.220, RSMo 2000, such a crime is committed if a person serving a sentence “to the Missouri department of corrections” temporarily is permitted to go without guard and purposely fails to return to confinement when required to do so. The legislature did not define what it means to “serve a sentence” for the purposes of section 575.220, but giving the words their plain and ordinary meaning from the dictionary, it means to put in a term of imprisonment pursuant to a court order imposing punishment on a person found guilty of a crime; it does not require people to be incarcerated physically in a particular place before they can begin serving their sentence. Further, the statute says the sentence is “to” the department, not “in” the department. Its choice to use “to,” especially given its use of “in” in a different subsection of the same statute, is presumed to be intentional and for a particular purpose: that inmates sentenced to the department who are being held in a county jail while awaiting transfer to the department still can be prosecuted for failing to return to confinement. This Court will not read into section 575.220 the technical definition in section 558.031.1, RSMo 2000, of “commencement of a sentence” to require that the department physically receive an inmate before the inmate will be deemed to be serving a sentence under section 575.220. This latter section is clear, and there is no need to resort to statutory construction to create an ambiguity where none exists. The plain language of section 575.220 recognizes the practical reality that all prisoners sentenced to the department are held in temporary custody by local law enforcement before being transported to the department.

(b) Here, Moore was serving a sentence to the department of corrections under the plain language of section 575.220 when he was permitted temporarily to go at large without a guard. Pursuant to the sentencing court’s order that Moore’s previously imposed sentences be executed, Moore was taken into custody, transported to a county jail and booked into custody. Although the sentencing judge lacked authority under section 217.425, RSMo 2000, to grant a “furlough,” section 575.220 requires only that a defendant be permitted temporarily to go at large without a guard. Regardless of how the release was labeled, Moore was permitted to go temporarily at large without guard. Further, Moore cannot challenge the validity of the judge’s order granting him a furlough because he already accepted the benefits of that order by going temporarily at large without a guard.

(2) No prejudice resulted from the trial court’s error in permitting the sentencing judge to testify about his legal opinion during Moore’s trial. Review is for plain error only because Moore failed to preserve his objections properly by objecting at trial and raising them in his brief to the court of appeals. The issue of whether Moore was serving a sentence to the department at the time he was furloughed concerns the interpretation of section 575.220, which is an issue of law rather than fact. An expert witness may not testify about an issue of law. Because the legal conclusion to which the sentencing judge testified was a correct statement of law, however, Moore was not prejudiced, nor did a manifest injustice or miscarriage of justice result.