



# In the Missouri Court of Appeals Eastern District

## DIVISION FIVE

STATE OF MISSOURI,	)	No. ED91056
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	Montgomery County, Missouri
v.	)	Cause No. 07BB-CR00017-02
	)	Honorable Kelly Broniec
MICHAEL MOORE,	)	
	)	
Appellant.	)	Filed: March 17, 2009

### Introduction

This is an appeal from a conviction for failure to return to confinement pursuant to RSMo. § 575.220. Our inquiry concerns whether there was sufficient evidence for finding a class D felony of failure to return to confinement. We find the evidence lacking and therefore reverse.

### Factual and Procedural Background

On 7 December 2006, Michael Moore ("Moore") appeared before the Circuit Court of Warren County for a probation revocation hearing for felony driving while intoxicated. Moore's probation was revoked and Moore's previously imposed prison sentence was executed. Moore was ordered to complete a 120-day treatment program and had a bed date for February 2007. Moore was ordered to be held in the Warren County jail until the Sheriff could deliver him to the Department of Corrections. Moore requested that he be allowed to spend Christmas with his family. Moore requested a stay of his sentence, but instead of a stay the court granted Moore a

"furlough"<sup>1</sup> until 12 P.M. 27 December 2006. Moore was warned that if he did not return by 27 December the prosecuting attorney could file a felony charge of failing to appear.

Moore was processed at the Warren County Sheriff's Department on 7 December 2006 and was released with orders to return on 27 December 2006. Moore did not return on 27 December 2006, instead he returned on 2 January 2007. Moore was delivered to the Department of Corrections on the following day, 3 January 2007. He was later charged by amended information as follows:

The Prosecuting Attorney of the County of Warren, State of Missouri, charges that the Defendant, in violation of Section 575.220, RSMo, committed the **CLASS D FELONY OF FAILURE TO RETURN TO CONFINEMENT**, punishable upon conviction under Sections 558.011(4), 560.011, RSMo, in that on or about the **27TH DAY OF DECEMBER, 2006**, in the County of Warren, State of Missouri, the defendant, while under sentence to the Missouri Department of Corrections for driving while intoxicated, a felony, was serving a sentence wherein he was temporarily permitted to go at large without guard, and was at large without guard, under a requirement that he return to confinement by 12 p.m. on said date, and knowing that he was required to return to the Warren County Jail at said time and date, purposely failed to do so.

Defendant is a prior offender under Section 558.016, RSMo. Defendant is also a persistent offender and is punishable by sentence to an extended term of imprisonment under Sections 558.016 and 557.036 in that he has pleaded guilty to two or more felonies committed at different times. The felonies are as follows:

1. On or about May 2, 2001, defendant pleaded guilty to the felony of receiving stolen property in the Circuit Court of Warren County, Missouri.
2. On or about October 2, 2003, defendant pleaded guilty to the felony of driving while intoxicated in the Circuit Court of Warren County, Missouri.

A change of venue was granted to Montgomery County, Missouri.

At trial the sentencing Judge testified; read the statute § 575.220 to the jury; offered his opinion on the meaning of § 575.220; and had a copy of § 575.220 entered into evidence and passed to the jury. All of these actions were specifically objected to by Moore's counsel; and were one of the bases of a motion for judgment of acquittal, and were set out in the motion for a

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<sup>1</sup> We can find no statute which authorizes a circuit judge to grant a "furlough" in these circumstances.

new trial.

At trial, Moore called Stewart Epps ("Epps"), a warden at the Fulton Reception and Diagnostic Center, to testify on his behalf. Epps testified that the Reception Center received all prisoners for the central region of Missouri and that an inmate begins to serve his sentence in the Department of Corrections when he is received and accepted by the Department of Corrections, i.e., when the Department has physical custody of him.<sup>2</sup>

At the close of the evidence, Moore moved for a Judgment of Acquittal and his motion was denied. The jury returned its verdict finding Moore guilty of the class D felony of failure to return to confinement. Moore's motion for new trial was overruled and the trial court sentenced him to a term of four years imprisonment, concurrent to the term he was serving. Moore appeals the case to this Court.

### **Discussion**

Moore raises one point on appeal, arguing there was insufficient evidence to support a finding of a class D felony of failure to return to confinement.

#### **Standard of Review**

We review the denial of a motion for a judgment of acquittal to determine whether the State adduced sufficient evidence to make a submissible case. *State v. Barnes*, 888-889 (Mo. App. E.D. 2008). To make this determination, we view all of the evidence, all reasonable inferences that may be drawn therefrom, in the light most favorable to the verdict, and disregard all contrary evidence and inferences. *Id.* We then determine whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002).

#### **Evidence of Class D felony of failure to return to confinement**

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<sup>2</sup> Which testimony comports with RSMo § 558.031.

Moore contends the State failed to present sufficient evidence to support a finding of class D felony of failure to return to confinement because there was no evidence that Moore was serving a sentence to or in the Department of Corrections when he was granted furlough. We agree.

The State has the burden to prove each and every element of its case beyond a reasonable doubt. *State v. Taylor*, 126 S.W.3d 2, 4 (Mo. App. E.D. 2003). The pertinent statute in this case is RSMo. §575.220, which reads as follows:

1. A person commits the crime of failure to return to confinement if, while serving a sentence for any crime under a work-release program, or while under sentence of any crime to serve a term of confinement which is not continuous, or while serving any other type of sentence for any crime wherein he is temporarily permitted to go at large without guard, he purposely fails to return to confinement when he is required to do so.
2. This section does not apply to persons who are free on bond, bail or recognizance, personal or otherwise, nor to persons who are on probation or parole, temporary or otherwise.
3. Failure to return to confinement is a class C misdemeanor unless:
  - (1) The sentence being served is to the Missouri department of corrections and human resources, in which case failure to return to confinement is a class D felony; or
  - (2) The sentence being served is one of confinement in a county jail on conviction of a felony, in which case failure to return to confinement is a class A misdemeanor.

According to this statute, a person commits the crime of failure to return to confinement if . . . while serving any other type of sentence for any crime wherein he is temporarily permitted to go at large without guard, he purposely fails to return to confinement when he is required to do so. Failure to return to confinement is a class C misdemeanor unless the sentence being served is to the Missouri Department of Corrections and Human Resources, in which case, failure to return to confinement is a class D felony.

Thus, the State must prove (1) that Moore was serving a sentence for D.W.I., (2) that he was temporarily permitted to go at large without guard, and (3) that he purposely failed to return

to confinement when he was required to do so.

The record reveals that the State failed to prove the first element, that Moore was serving a sentence in the Department of Corrections, or indeed, serving a sentence in any other place of confinement. According to RSMo. § 558.031.1, "A sentence of imprisonment shall commence when a person convicted of a crime in this state is received into the custody of the department of corrections or other place of confinement where the offender is sentenced." There is no evidence that Moore was ever received into the custody of the Department of Corrections before 4 January 2007. Accordingly, his sentence of imprisonment could not have commenced until then. Further, Moore was sentenced to the Department of Corrections, not "any other place of confinement." Thus it is irrelevant that Moore was in the custody of the Warren County Sheriff's Department because Moore was not sentenced to serve his time there.

The State disagrees, arguing that Moore began serving his sentence to the Department of Corrections on 7 December 2006, when he was processed at the Warren County Sheriff's Department. In support of this argument the State cites the cases of *State v. Dailey*, 53 S.W.3d 580 (Mo. App. W.D. 2001) and *State v. Mobley*, 267 S.W.3d 776 (Mo. App. S.D. 2008).

In *State v. Dailey*, 53 S.W.3d 580 (Mo. App. W.D. 2001), the defendant, while serving a sentence in the Department of Corrections, did not return to confinement after he was permitted to proceed to a different detention center without guard. The defendant was charged and convicted for failure to return to confinement under RSMo. § 575.220. On appeal, the defendant argued that it was error to convict him of the offense because since he had never been confined at the Kansas City Community Release Center, he could not be guilty of failure to return to confinement there; that he "could not have failed to return to a place he had never been." *Id.* at 587. The Western District observed that § 575.220.1 states only that the prisoner must fail to

return to confinement - not that he must fail to return to the same institution in which he was originally confined - in order to be guilty of failure to return to confinement. *Id.*

The present case is distinguishable from *Daily*. First, in *Daily*, it is undisputed that the defendant was already servicing a sentence in the Department of Corrections when he failed to return to confinement. *Id.* at 583. Here, Moore argues that he was not serving a sentence when he was "furloughed" because he was never in the physical custody of the Department of Corrections. *Daily* does not support the State in this case.

In *Mobley*, the defendant had been sentenced to 27 years imprisonment for drug charges and was remanded to the county Sheriff's office for transfer to the Department of Corrections. *State v. Mobley*, 267 S.W.3d 776, 778 (Mo. App. W.D. 2008). After sentences had been imposed, the judge granted the defendant "furlough" for six days so that defendant could spend time with his grandchildren. *Id.* The defendant failed to return to confinement within the six days and was charged and found guilty on three counts of failure to return to confinement. *Id.*

In his first point on appeal, defendant in *Mobley* argued that the State failed to prove that defendant had ever been confined in the county jail, and thus could not be convicted of failing to return to that confinement. *Id.* The Southern District denied defendant's point on appeal, reasoning that defendant "was remanded to the custody of the sheriff of Lawrence County *for the purpose of serving those sentences.*" *Id.* (emphasis added). The court continued, "Defendant was placed in confinement for purposes of serving the sentences imposed on him at that time. Following imposition of sentences in the drug cases and placement of defendant in the physical custody of the sheriff, the trial court temporarily permitted defendant to go at large without a guard for a period of six days at the end of which defendant was to return to confinement. By failing to return to the specified location, the Lawrence County Jail, defendant violated §

575.220.1." *Id.*

We find *Mobley* unpersuasive. Section 575.220 is clear that in order to be guilty of failure to return to confinement, one must already be serving a sentence. Section 558.031 states that "A sentence of imprisonment shall commence when a person convicted of a crime in this state is *received into the custody of the department of corrections or other place of confinement where the offender is sentenced . . .*" The Southern District did not consider § 558.031 in its opinion - we must as Moore objected at trial and made the argument in his motion for a new trial. We find that § 558.031 compels that Moore had to be received into the custody of the Department of Corrections to be convicted under the charge of the amended information.<sup>3</sup>

In regard to the State's argument that Moore began serving his sentence on 7 December 2006 because he was given credit for time served, we are unpersuaded. Section 558.031 requires that any offender sentenced to the Department of Corrections be given credit for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense. If the sentence were to commence on 7 December 2006, as the State argues, then pursuant to § 558.031, Moore would not be entitled to credit because the credit must come from time served before the commencement of the sentence.

### **Conclusion**

Here, it is clear that Moore was sentenced to the Department of Corrections, but was never received into the custody of the Department until 3 January 2007. Moore began serving his sentence to the Department on that date. Because he was not serving his sentence on 27 December 2006, he can not be guilty of the class D felony of failure to return to confinement on that date. We therefore reverse and order Moore discharged from the conviction of failure to

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<sup>3</sup> We note the deviation from MAI-CR 329.76 in instruction #5, the verdict director, which deviation was objected to.

return to confinement.

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Kenneth M. Romines, Judge

Nannette A. Baker, C.J., and Kurt S. Odenwald, J., concur.