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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MICHAEL PATRICK JENNINGS,)

)

Defendant-Appellant.

Filed January 30, 1981

0-296
64339

Appeal from Black Hawk District Court - L. John Degnan, Judge.

Defendant appeals from his conviction for felony escape in violation of section 719.4(1), The Code, and from the adjudication that he is an habitual criminal as defined in section 902.8, The Code. - REVERSED AND REMANDED.

Joseph Moothart, of Mershon, Snow & Knock, Cedar Falls, for defendant - appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General of Iowa, for plaintiff - appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Michael Jennings, appeals from his conviction for felony escape in violation of section 719.4(1), The Code 1979, and from habitual criminal adjudication pursuant to section 902.8, The Code 1979 We reverse and remand.

Jennings had been incarcerated at the Fort Madison penitentiary pursuant to an earlier felony conviction. On January 30, 1979, he was transferred to a residential work-release facility in Waterloo. On January 31, he was given permission to leave the residential facility for the purpose of attending four specified job interviews. He was required to return to the facility within two hours. He did not do so. He was arrested in Colorado on March 29, 1979.

The state one day prior to trial amended the trial information to additionally charge Jennings as an habitual criminal defined in section 902.8, The Code 1979. Jennings was convicted upon trial to the court of felony escape in violation of section 719.4(1), The Code 1979, and was adjudicated to be an habitual criminal. Jennings appeals his conviction and adjudication. Our review is on errors assigned. Iowa R. App. P. 4.

Many of Jennings arguments raise the constitutionality of current escape statue. Since his conviction and Notice of Appeal, the supreme court clarified and resolved these allegations in State v. Burtlow, No. 64423 (Iowa Dec. 17, 1980). Specifically they found the felony offense in section 719.4(1) applies only to unauthorized departures from physical restraint. When the offense is a failure to return from an authorized release or furlough, as in the case here, subsection (3) applies, violation of which constitutes a serious misdemeanor. As Jennings was erroneously charged, his conviction must be set aside. The adjudication for habitual criminal status must also fail as no class C or D felony is involved. See §902.8, The Code 1979.

II. Jennings raises additional arguments concerning venue and unnecessary delay in initial appearance. Venue is proper in the county in which the crime is commited except as otherwise provided by law. §803.2, The Code 1979. There is no longer a separate venue statue for escape upon which Jennings relies in his argument. Since defendant failed to return to the residential facility located in Black Hawk County, venue is proper there.

Jennings was arrested on March 29th and was brought before the magistrate on April 16. Iowa R. Crim. P. 2 requires an arrested person be brought before a committing magistrate without unnecessary delay. Unnecessary delay is defined in Rule 1 as any unexcused delay longer than twenty-four hours. A hearing on Jennings pre-trial motion seeking dismissal on these grounds evoked the following ruling from the trial judge.

> In view of the fact the defendant was in lawful custody under a previous conviction, there was no "unnecessary delay" within the scope of the Rules of Criminal Procedure.

We agree with the ruling, Jennings was not a "free" man prior or subsequent to his arrest. No matter when the initial appearance took place on this new charge, Jennings could only expect to be in the custody of the penal system. See e.g. Parsons v. Brewer, 202 N.W.2d 49 (Iowa 1972). We find no basis to dismiss.

Finding error in the charges brought, we reverse and remand for new proceedings consistent with this opinion.

REVERSED AND REMANDED.