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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

MICHAEL W. REESE,

Appellant.

Filed June 30, 1978

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Appeal from Des Moines District Court - David B. Hendrickson, Judge.

Defendant appeals his conviction for escape from the penitentiary, a violation of § 745.1, The Code, asserting that trial court erred in refusing to instruct the jury on defense theories of necessity and compulsion. Reversed.

Gordon Liles and Kent Hutcheson, Fort Madison, for appellant.

Richard C. Turner, Attorney General, Lona Hansen, Assistant Attorney General, and J. E. Tobey, Assistant Attorney General, for appellee.

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

ALLBEE, C.J.

Michael W. Reese appeals his conviction for escape, a violation of § 745.1, The Code. He argues that trial court erred in declining to instruct the jury on defense theories of necessity and compulsion.

I. The Facts.

Where there is evidence to support a theory, the court must submit the issue to the jury. State v. Willis, 250 N.W.2d 428, 430 (Iowa 1977). We therefore recite the facts as defendant presents them.

On March 29, 1977, defendant departed from the Iowa State Penitentiary at Fort Madison, where he was serving sentences for larceny and breaking and entering. At trial, he testified in his own behalf. He admitted leaving the penitentiary without authorization, but claimed that his departure was due to a fear of further homosexual attacks and possible death.

During his testimony, defendant described difficulties he had been having with another inmate whom defendant declined to identify, except to call him "the lifer." According to defendant, the lifer had established a scheme whereby he offered new inmates protection from homosexual attack in exchange for voluntary homosexual liaisons with the lifer. When defendant attempted to disrupt the lifer's "little game" the lifer threatened to kill Reese. Defendant is five feet, nine inches tall and weighs 150 pounds. The lifer stood six feet, two inches and carried 225 pounds.

After the lifer's initial threats, Reese twice contacted his counselor, Rusty Rogerson, by note, but received no response. He also informed the penitentiary psychiatrist, Irwin Smallheiser, of the problem. This too failed to obtain any results. On March 26, 1977, the lifer renewed his threats against defendant and carried out a homosexual attack. Reese made no further attempts to contact prison officials but accomplished an escape three days later. When apprehended near the penitentiary on March 30, defendant offered no resistance and cooperated with the arresting officers. He testified that he had considered contacting an attorney to see what he could work out, but had had no opportunity to do so.

During the times in question, the penitentiary was being operated with eighteen employees less than its full complement; the approximately 300 prisoners in the defendant's cellhouse, cellhouse 19, were supervised by five guards.

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II. The Parties' Contentions.

Defendant's contentions on this appeal are all directed to the proposition that, under the facts which he has presented, the courts of this state ought to recognize the defense of necessity, or the defense of compulsion, in an escape prosecution. He relies primarily upon People v. Unger, 66 Ill.2d 333, 362 N.E.2d 319, 5 Ill. Dec. 848 (1977) which he characterizes as representative of a trend, initiated by People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, 69 A.L.R.3d 668 (1974), to recognize either necessity or compulsion (duress) as such a defense. Cases from several other states are cited as part of this trend.[1] He reminds us that the supreme court has adopted the duress defense, in different circumstances, in State v. Clay, 220 Iowa 1191, 264 N.W. 77 (1935).

The State's response is that recognition of either defense would require that State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923) be overruled.[2] It also argues that such defenses would be disruptive of prison discipline, and that the facts of this case do not allow Reese to avail himself of the defenses in any event.

[1] Some care in the use of the cases from sister states is required, due to the fact that some are based on general statutory necessity or duress defenses, while others are common law developments. For example, People v. Unger is based upon the statutory defense of necessity as defined in Ill. Rev. Stat., ch. 38, § 7-13 (1971). That statute appears to simply codify the common law of necessity, so that Unger's consideration of the defense's limits is useful here. California has a duress statute, Cal. Penal Code § 26 (West 1970), but that defense was not used in Lovercamp, the court favoring common law necessity instead. Gardner, The Defense of Necessity and the Right to Escape from Prison - A Step Towards Incarceration Free From Sexual Assault, 49 S. Cal. L. Rev. 110, 130 (1975). The Michigan duress cases, cited below, depend upon the common law. See People v. Luther, 394 Mich. 619, 622, 232 N.W.2d 184, 186-87 (1975). The power of this court to allow use of a common law defense is taken up hereafter.

[2] Cahill, of course, finds a great deal of support in the law of other states. See, e.g., People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969); People v. Miller, 196 Cal. App. 2d 171, 16 Cal. Rptr. 498 (1961); People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929); State v. Palmer, 45 Del. 308, 72 A.2d 442 (Gen. Sess. 1950); State v. King, 372 S.W.2d 857 (Mo. 1963); State v. Davis, 14 Nev. 439, 33 Am. R. 563 (1880).

III. Whether this court is foreclosed from considering the defenses.

State v. Cahill does not control the disposition of this cause. In Cahill the prisoner complained of being placed in solitary confinement with an inadequate amount of food and in unsanitary conditions. The court held those conditions could not justify an escape. 196 Iowa at 490, 194 N.W. at 193. A justified fear of imminent great bodily harm or death, however, was not involved. Because the evil which defendant sought to avoid here is substantially greater than that involved in Cahill, the cases are different and require different analyses. See State v. Whisman, 575 P.2d 1005, 1007 (Or. Ct. App. 1978) (the defense there being based on statute, Or. Rev. Stat. § 161.200); cf. People v. Brown, 70 Misc. 2d 224, 333 N.Y.S.2d 342 (Sup. Ct. 1972). The precise question has never before been decided in this state; therefore, we are obligated to give consideration to the competing interests involved in light of the tangentially relevant existing case law.

Both proposed defenses, necessity and duress, have been recognized in this state. Necessity was allowed as a defense to the unlawful killing of a deer in State v. Ward, 170 Iowa 185, 152 N.W. 501 (1915). And, as noted above, duress was recognized in State v. Clay, 220 Iowa 1191, 264 N.W. 77 (1935). It is thus clear that the courts of this state have the power to recognize such common law defenses. The question of the propriety of their application to any particular set of circumstances remains, however, to be answered. In part, that propriety depends upon whether the reasoning behind either defense fits into the conceptual basis of the offense charged.

IV. Theoretical bases of the defenses.

The cases and the commentaries appear to be in some discord as to the effect of the defenses of necessity and duress and what reasoning supports each. One commentator, in a carefully considered article, contends that necessity, because it involves a choice between two evils, goes not to the question of mens rea, but to the requirement of an actus reus. Gardner, The Defense of Necessity and the Right to Escape from Prison - A Step Towards Incarceration Free From Sexual Assault, 49 S. Cal. L. Rev. 110, 120 (1975). Duress, on the other hand, is usually seen as negativing the mental element of the crime. Id. at 122. An apparently contrary view is taken by Professor Perkins in his text. Perkins, Criminal Law (2d Ed. 1969). He seems to

theorize that the actus reus requirement is affected only by a physical compulsion, id. at 949, and that both necessity and duress depend upon compulsion of the will. Id. at 956 (necessity) and 951 (duress). Therefore both would go to the mental element.

Finally, Professors LaFave and Scott take the view that neither necessity nor duress affect any mens rea requirement. LaFave and Scott, Handbook on Criminal Law 382, 374-75 (1972). Rather, in both cases the defense arises because the defendant was put to a choice of evils and chose the lesser of the two. Id. at 382 (necessity) and 374 (duress).

All seem to agree that the primary traditional difference between the two defenses is that the compelling circumstances for necessity must arise from the forces of nature, while those providing duress arise by human agency. Gardner, supra, 49 S. Cal. L. Rev. at 122; LaFave and Scott, supra at 381; Recent Developments, 1975 Ill. L.F. 271, 274. But this generally agreed upon distinction has been the subject of criticism. See, e.g., State v. Green, 470 S.W.2d 565, 570, n.2 (Mo. 1971) (Seiler, J., dissenting) citing 1 Burdick, Law of Crime 260-61 (1946); Recent Developments, 1975 Ill. L.F. 271, 274; Perkins, supra at 960 ("[A]ny threatened harm, whether by man or by the elements, which would have induced a person of reasonable firmness to do what [defendant] did, should be recognized as an excuse.")

This variety of theories and distinctions, which probably have arisen out of imprecise or variant uses of the terms in appellate cases, would be of little importance to us, except for the fact that the escape statute which defendant has been convicted of violating does not require intent as an element. State v. Wharff, 257 Iowa 871, 134 N.W.2d 922 (1965). Therefore, any defense theory based upon negating intent cannot be applied in the present case.[3]

[3] Wharff refused to allow an intoxication defense to an escape charge. Whether the court intended to hold that escape requires no intent whatsoever, or merely that no specific intent is required is uncertain. The court makes references to "specific intent," to "criminal intent," and simply to "intent." This question is not one which we need to resolve, however. In the law of Iowa, as will be seen, necessity does not bear on an intent element.

The Iowa definition of escape presents defendant with no special difficulties, however, because State v. Ward, 170 Iowa 185, 152 N.W. 501 (1915) demonstrates that, in Iowa at least, necessity is not tied to a mental element. In Ward, the defendant was permitted to raise a necessity defense to the charge of unlawfully killing a deer. Examination of the statute involved, and of the case's discussion of the statute, make it apparent that intent was not an element in that prosecution. Contemporaneous commentary seems to have taken the same view. Recent Cases, 1 Iowa L. Bull. 194 (1915).

Our conclusion finds support in the fact that the rationale relied upon in Ward is similar to that stated by LaFave and Scott. Both the case and the text take the position that necessity is determined by balancing the two evils with which defendant is confronted. A greater evil being avoided will excuse a greater breach of the criminal law, while a relatively minor evil will excuse only a less serious crime. The single authority upon which Ward relies, Aldrich v. Wright, 53 N.H. 398, 16 Am. R. 339 (1873), gives extended consideration to the balancing involved, albeit in somewhat different terms than those which we use here. The position taken by LaFave and Scott appears to describe the current status of Iowa law on necessity.

Thus, while the law of necessity in Iowa cannot be considered well developed, it appears that such development as there is permits the application of the necessity defense to escape. The defense does not negate any element of a crime. Rather, the question of necessity arises only after it has been determined that a crime has occurred, as an entirely independent inquiry. People v. Condley, 69 Cal. App. 3d 999, 1012-13, 138 Cal. Rptr. 515, 522 (1977); cf. People v. Luther, 394 Mich. 619, 622, 232 N.W.2d 184, 186 (1975) (Duress acknowledges the will to do the act complained of, but seeks to excuse it.). The requirement that the compelling force be one of nature, while met in Ward, does not appear to be an essential part of that case. Therefore, on the authority of the criticisms noted above and because other courts do not appear to have been hindered by this problem in the escape context, we decline to accept or adopt that limitation.

Duress, however, is not applicable to the crime of escape. In this state, duress appears to be a defense which goes to the defendant's state of mind. See State v. Clay, 220 Iowa 1191, 1202-03, 264 N.W. 77, 83 (1935); State v. Xanders, 215 Iowa 380, 383, 245

N.W. 361, 362 (1932). See also People v. Luther, 394 Mich. at 622, 232 N.W.2d at 186-87, relying upon People v. Repke, 103 Mich. 459, 61 N.W. 861 (1895). (Repke was cited in support of Clay. 220 Iowa at 1202, 264 N.W. at 83.) Because, as we have said, intent is not an element of the offense charged here, the defense cannot apply. In light of the close relationship between the two theories, we do take guidance as to the dimensions of necessity by considering the duress cases.

V. The elements of necessity.

Having determined that there is a sound basis for recognizing the defense of necessity in this case, the requirements and limits of that doctrine remain to be considered.

In State v. Ward, the killing of the deer was justified because it was necessary to prevent substantial injury to defendant's property. The likelihood of such injury was imminent, and, as noted by the court, the killing was "wholly defensive and preventive." 170 Iowa at 189, 152 N.W. at 502. By analogy with State v. Clay, threats of injury in the distant future are not sufficient to raise the defense.

Two approaches to the definition of the defense have found exemplification in other opinions. The first approach is that of the seminal case, People v. Lovercamp, 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115, 69 A.L.R.3d 668, 676 (1974). There the court held that "a limited defense of necessity is available if the following conditions exist:

(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat." (Footnotes omitted.)

The approach of adopting specific and carefully defined limitations has been rejected by other courts, however; those courts have held that the Lovercamp conditions go to the weight and credibility of defendant's testimony. Esquibel v. State, 576 P.2d 1129, 1132 (N.M. 1978) (the defense being based upon N.M. U.J.I. Crim. 41.20);

People v. Unger, 66 Ill.2d 333, 342, 362 N.E.2d 319, 323, 5 Ill. Dec. 848 (1977); People v. Luther, 394 Mich. 619, 623-24, 232 N.W.2d 184, 187 (1975). We are inclined to follow the second approach. But see People v. Wheeler, 68 Cal. App. 3d 1056, 1058, 137 Cal. Rptr. 791, 792 (1977) (reaffirming the necessity for showing each of Lovercamp's elements).

A defendant is entitled to have the jury instructed upon the defense of necessity when: (1) The threatening conduct or coercive force (whether human or natural) would create in the mind of a reasonable person the fear of an evil arising in the immediate future which is greater than that occasioned by the proposed breach of the criminal law. In cases of escape, the evil threatened must be death or great bodily injury. (2) Such fear is actually aroused in the mind of the defendant. (3) The defendant committed the criminal act to avoid the threatened harm. (4) The damage which is actually done by the defendant's breach of the criminal law is less than the harm which would have been otherwise occasioned. That is, while a simple escape may be excused as an attempt to avoid death or serious bodily injury, an escape which results in death or serious injury to another would not be so excused.

Were we to follow Lovercamp, defendant would be confronted with two difficulties. First, because his escape occurred three days after the last encounter with the lifer, he might have difficulty meeting the imminent threat requirement. Whether that criterion is met, however, depends on the circumstances of each case. Esquibel v. State, 576 P.2d at 1132-33; People v. Harmon, 394 Mich. 625, 626, 232 N.W.2d 187, 188 (1975).

Second, defendant failed to turn himself in to the authorities after leaving the penitentiary. But, he did claim to consider getting an attorney to help smooth the way for his return. See People v. Unger, 66 Ill.2d at 343, 362 N.E.2d at 323. Undoubtedly, both of these factors will weigh against the jury's acceptance of defendant's tale. So, too, will his refusal to name his assailant. Cf. People v. Luther, 394 Mich. at 620, 232 N.W.2d at 186 (defendant attacked by "unknown assailants"). Nonetheless, those weaknesses should not bar the necessity defense as a matter of law.

VI. The burden of proof.

Having established that the defense of necessity is available, it remains for us to determine where the burden of proof of the defense lies. Judicial opinion from other states is split. Compare People v. Condley, 69 Cal. App. 3d 999, 1009, 138 Cal. Rptr. 515, 520 (1977) (burden on defendant to show necessity by preponderance of the

evidence) with People v. Field, 28 Mich. App. 476, 184 N.W.2d 551 (1971) (state must convince jury beyond a reasonable doubt that defendant's escape was not under duress) and People v. Brown, 70 Misc. 2d 224, 226, 333 N.Y.S.2d 342, 345 (Sup. Ct. 1972) citing People v. Riordan, 117 N.Y. 71, 74-75, 22 N.E. 455 (1889) (state must disprove defendant's assertion of justification beyond a reasonable doubt). We are persuaded, by analogy to the defenses of entrapment and self-defense, that the burden should rest upon the state, after defendant interposes the defense.

The analogy with entrapment is persuasive because that defense, like necessity, is a question which arises after a showing of defendant's guilt has been made out; in spite of such showing, as a matter of public policy, a conviction cannot be tolerated. State v. Mullen, 216 N.W.2d 375, 381 (Iowa 1974). In entrapment cases, defendant has the burden of generating a fact question on the defense, but the state has the burden to disprove entrapment beyond a reasonable doubt. State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976).

The analogy with self-defense has already been drawn for us. See State v. Ward, 170 Iowa at 189, 152 N.W. at 502. The rule in self-defense cases is the same as that described for entrapment. See State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976). Therefore, upon remand, trial court shall apply that standard to this case.

REVERSED.

SNELL and OXBERGER, JJ., concur; DONIELSON and CARTER, JJ., each dissent.

DONIELSON, J. (dissenting)

I agree with the views expressed by Carter, J., especially as they relate to the "broad generalizations espoused by the majority" with regard to the requirements for the submission of the defense of necessity to the jury. I am particularly disturbed about the possibility of an escapee being apprehended in the act of escape and subsequently securing the testimony of fellow prisoners which would corroborate some imaginative tale concocted by defendant concerning the necessity of escape.

In light of this possibility, the burden of proof that the majority imposes upon the State once the defendant raises the defense of necessity may be an impossible one to meet. Consequently, it is highly possible that the State may be unable to avoid a directed verdict.

In deciding that the burden of proof shifts to the State once the defendant interposes the defense of necessity, the majority analogizes to the burdens of proof imposed in the self-defense and entrapment contexts. However, I see no similarities between necessity and self-defense and entrapment as it relates to matters of proof. As I see it, self-defense and entrapment are matters reasonably susceptible to contradiction by the State. Such is not the case where the defense of necessity is injected into a prison escape case. Not only is it virtually impossible for the State to produce any evidence to counter a claim of necessity, but, as alluded to earlier, the opportunities for fabrication of necessity-based justifications for escape are virtually limitless.

I see the majority opinion as having the unforeseen effect of making many prosecutions under § 745.1, The Code, extremely difficult, if not impossible. If the defense of necessity is to be recognized in this state, the supreme court and not this court should be the appellate court to do so, preferably on the basis of a more appropriate factual setting than the one before us. I would affirm the trial court.

CARTER, J. (dissenting)

I dissent. The majority opinion considers and analyzes most thoroughly and with extraordinary perception the difficult considerations involved in fashioning a doctrine involving the defense of necessity, compulsion, or duress, as the same may apply to a criminal prosecution for escaping from custody by one imprisoned under sentence of the court. I believe it is inevitable that some such defense must eventually be recognized and sanctioned under our criminal statutes. But, the establishment of such a doctrine should await the time when a proper case for adjudicating the issue reaches the appropriate appellate court. I do not believe that this is the appropriate court or that this is a proper case to decide the issue.

As to which court should properly decide this issue, I find the majority's assertion that the result reached in the present case is not inconsistent with the decision of the supreme court in State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923), to be unpersuasive. In Cahill there was a factual dispute in the evidence as to claimed unsanitary conditions. There was no dispute as to the inadequate diet and the court so recognized. It stated (196 Iowa at 490; 194 N.W. at 193):

> The quantity of bread furnished appellant was inadequate if the confinement was protracted over many days; but neither this nor the other matters complained of [the alleged unsanitary conditions] afforded him the slightest justification for escaping from the cell or attempting to secure his liberty from confinement.

The majority seeks to distinquish this pronouncement on the basis that "the evil which the defendant sought to avoid here is substantially greater than that involved in Cahill." I find this point to be fairly debatable. Apart from the immediacy of the danger presented to the defendants in the two cases, reasonable minds could differ as to which of the two situations presented the greatest potential for injury, illness, or death. As to the immediacy of the risk presented, however, the risk to the defendant in Cahill was present and actual at the time the escape was committed whereas, in the present case, there was a three-day interval between the alleged homosexual attack and the escape. I believe the issues presented in the two cases are close enough in principle that we should afford the supreme court the opportunity, in the first instance, to fashion such doctrine of duress or necessity as that court may feel is consistent with the Cahill case or, in the alternative, to overrule Cahill if it is disposed to do so.

In addition, even if Cahill is not to be considered as a restraint upon this court's decision in the present case I cannot conclude that defendant's conviction should be reversed. This is because of my disagreement with the rules adopted in division V of the majority opinion concerning the elements of necessity. I choose not to decide in this opinion where I would draw the line between the limited defense recognized in People v. Lovercamp, 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115, 69 A.L.R.3d 668, 676 (1974) and the broad generalizations espoused by the majority in the present case. Wherever I would choose to draw this line, and regardless of the burden of proof, I would sufficiently exclude defendant's situation so as to present no submissible jury issue on the claimed defense in the present case. This is because I view the lack of immediacy with respect to defendant's peril, if any, as shown by the record in the present case, to be inconsistent with the theory of necessity which the majority adopts. I would affirm the trial court.