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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed February 5, 1980
vs.)
KENNETH RAY SHEFFEY,) 293
Defendant-Appellant.) 63423

Appeal from Lee District Court at Fort Madison - Thomas E. Tucker, Judge.

Defendant appeals jury verdict finding him guilty of escape in violation of section 745.1, The Code 1975, alleging trial court erred in refusing to instruct the jury on the defense of compulsion in his trial for escape commencing after January 1, 1978, pursuant to sections 704.10and 801.5(2)(a), supplement to the Code 1977. AFFIRMED.

Ray Sullins, of Roehrick, Lavorato, Schuster, Sullins & Hassel, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and E. Dean Metz, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant, Kenneth Ray Sheffey, appeals jury verdict finding him guilty of escape in violation of section 745.1, The Code 1975. Relying upon sections 704.10 and 801.5(2)(a), supplement to the Code 1977, he asserts trial court erred in refusing to instruct the jury on the statutory defense of compulsion in his trial for escape commencing after January 1, 1978. We affirm.

I. The Facts. On March 29, 1977, defendant departed from the Iowa State Penitentiary at Fort Madison where he was serving sentences for murder, attempted murder, and breaking and entering.[1] Testifying in his own behalf, defendant admitted leaving the institution without authorization. Defendant stated he left due to threats by inmate Cunningham he (defendant) would be "dead within five days," the death of Cunningham three days later,[2] and threats by other inmates, both named and unnamed, which continued until the evening of his departure. Prior to his departure, defendant made no effort to inform the warden, his counselor, or any guard at the penitentiary about the threats on his life because he felt notification would have been futile. He made no request for protective custody.[3]

Despite efforts of law enforcement officials to locate defendant, he was not apprehended until June 1978, some fifteen months after his escape. During this period, however, defendant claims he attempted to contact both prison authorities at Fort Madison and the FBI to negotiate protection in exchange for his voluntary return.[4]

II. The Parties' Contentions. Defendant contends on this appeal the defense of compulsion, based on duress and coercion due to fear of great bodily injury or death, applies in trials for escape commencing after January 1, 1978. He relies primarily on

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[1] Defendant was first admitted to the penitentiary November 5, 1974.

[2] Defendant testified his fears increased following Cunningham's death because both he and Cunningham had served as prison-informants ("snitches") for the prison security director.

[3] Defendant testified he did not request protective custody due to fear he would be burned to death by another inmate throwing flammable chemicals into his cell.

[4] Defendant testified to many efforts on his part (he allegedly attempted to personally contact the FBI approximately twelve times) and other relatives (he directed his mother to call the Iowa State Penitentiary and the FBI and his brother to call the FBI) to contact law enforcement and prison officials. Defendant feared he would be killed by inmates if returned to the same conditions at the penitentiary.

sections 704.10 and 801.5(2)(a), supplement to the Code 1977.[5] Defendant further asserts once he raised a jury question with respect to the defense of compulsion, it was the State's burden to disprove the same beyond a reasonable doubt. As a final assignment of error, defendant argues he was entitled to a jury instruction on the defense of compulsion since substantial evidence was presented at trial to support it.

In response, the State submits: 1) compulsion is not a proper defense to the charge of escape under section 745.1, The Code 1975; and 2) even if it were, defendant failed to generate a jury question on the statutory defense of compulsion under section 704.10, supplement to the Code 1977.[6]

III. Defense of Compulsion. Despite defendant's challenging assertions in oral argument that the historical roots of the defense of both compulsion and necessity are really centered on whether defendant's acts were products of duress or free will, it is well settled in this state that unauthorized departure is the gravamen of the offense of escape under section 745.1, The Code 1975, and a showing of intent is not required to establish an offense of the statute. State v. Gowins, 211 N.W.2d 302, 306 (Iowa 1973); State v. Leckenbey, 260 Iowa 973, 976, 151 N.W.2d 567, 569 (1967); State v. Wharff, 257 Iowa 871, 875, 134 N.W.2d 922, 925 (Iowa 1965).

While the applicability of the common law defense of compulsion to a charge of escape was not addressed by the court in State v. Reese, 272 N.W.2d 863, 865 (Iowa 1978), because the parties presented only the issue of the defense of necessity, we conclude the law of Iowa is that compulsion (duress) goes to the state of the defendant's mind and serves as an excuse by negativing the mental element of criminal responsibility. 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); 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, 116 (1975). See generally Dailey v. Cogdell, 48 U.S.L.W. 4104 (U.S. Jan. 22, 1980) (No. 78-990). Because intent is not an element of the offense charged here, the common law defense of compulsion is not applicable.[7]

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[5] Section 80.15(2)(a), in pertinent part, provides:

> In any case pending on or commenced after the effective date of this Act,* involving an offense committed before that date:
>
> a. Upon the request of the defendant a defense or mitigation under this Act,* whether specifically provided for herein or based upon the failure of the Act* to define an applicable offense, shall apply; . . .

[6] Now section 704.10, The Code 1979.

[7] Section 719.4, The Code 1979, includes intent as an element of escape. See also Reese, 272 N.W.2d at 866 n. 1.

Further, the defense of compulsion appears to contemplate circumstances where an accused is coerced to perform the specific act charged (i.e. escape). See People v. Unger, 66 Ill.2d 333, 362 N.E.2d 319 (1977). In this case, defendant was not forced to escape because he feared for his life if he refused to do so. "Rather, if defendant's testimony is believed, he was forced to choose between two admitted evils . . .," physical harm or escape, i.d. at 340, 362 N.E.2d at 322, for which the defense of necessity is available.[8] Reese, 272 N.W.2d at 866.

We next must determine, despite our conclusion defendant was not entitled to an instruction on the common law defense of compulsion, whether the new statutory defense applies. Section 704.10 provides:

> 704.10 COMPULSION. No act, other than an act by which one intentionally or recklessly causes physical injury to another, is a public offense, if the person so acting is compelled to do so by another's threat or menace of serious injury, provided that the person reasonably believes that such injury is imminent and can be averted only by his or her doing such act.

In Clay, the court held compulsion which will excuse a criminal act must be present, imminent, impending, of such a nature to induce a reasonable apprehension of death or serious bodily harm if the act is not done, and must not have arisen due to the negligence or fault of the person who insists on it as a defense. 220 Iowa at 102-03, 264 N.W. at 83. These elements are essentially the same as the language of section 704.10. We conclude the legislature simply incorporated the common law elements of compulsion into section 704.10 and consequently find defendant's allegations of error based on trial court's refusal to recognize the statutory defense of compulsion are without merit.

IV. Burden of Proof. Defendant also argues the burden of proof on an affirmative defense of compulsion shifts to the State once it has been properly raised. Because of our disposition in Division III, we do not address this issue.

Judgment of trial court is affirmed.

AFFIRMED.

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[8] Defendant received an instruction on necessity.