

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000347-MR

EDWARD WEBSTER

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CR-00482

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

COMBS, CHIEF JUDGE: Edward Webster appeals from a conviction for second-degree escape in the Kenton Circuit Court. After our review, we affirm.

The Kenton County Detention Center occupies several floors (3, 5, 8, 9, and 10) of an office building in downtown Covington. The recreation yard is an

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

enclosed area on the tenth floor. It has three secured doors, numerous windows, and is canopied by a chain-link fence. Beyond the fence is the building's roof.

Early on May 28, 2007, which was Memorial Day, Deputy Jailer Jim Browning took ten inmates to the recreation yard and left them there. A fellow inmate hoisted Webster up in the southwest corner of the recreation area where Webster cut a hole in the chain-link fence. He used a piece of steel that he had removed from the top of his cell door. He then slipped through the hole, and the other inmates watched him run across the roof. Jail officers later discovered that Webster went into the rooftop mechanical room of the public elevator, removed a grating, and entered the elevator shaft. The elevators were locked because of the holiday. Once inside the elevator shaft, Webster fell to the bottom, where he was later found and retrieved.

A grand jury indicted Webster on July 26, 2007, charging him with second-degree escape. The jury trial commenced on January 16, 2008. The jury returned a guilty verdict and recommended a sentence of five years' incarceration. This appeal follows.

Webster argues that the trial court erred by ruling as a matter of law that Webster was outside the detention facility when he was found. He also cites as error its failure to give the jury an attempt instruction. He claims that because he was found inside the elevator shaft and not outside the building, the crime of escape was not completed. A similar case, *Johnson v. Commonwealth*, 875

S.W.2d 105 (Ky. App. 1994), involved a burglary. At issue was whether a screened-in porch was part of a house for purposes of the burglary statute. This court held that determining whether a porch is part of a dwelling place is a matter of statutory interpretation reserved for the court, not the jury.

In Kentucky, “a person is guilty of escape in the second degree when he escapes from a detention facility, or being charged with or convicted of a felony, he escapes from custody.” KRS 520.030. A detention facility is defined as “any building and its premises *used for the confinement of a person.*” KRS 520.010. (Emphasis added).

Relying on *Cope v. Commonwealth*, 645 S.W.2d 703 (Ky. 1983), and on *Fulton v. Commonwealth*, 859 S.W.2d 553 (Ky. App. 1992), the trial court held as a matter of law that Webster was outside the detention facility. *Fulton* held that a detention center “encompasses any area in which the prisoner can *permissively* go.” 849 S.W.2d at 556. (Emphasis added.) The facts of *Cope* are more similar to the case before us. It involved a prisoner who sawed his cell bars, went through a locked steel door, and entered a television lobby within the building. Our Supreme Court held that the lower court correctly denied an instruction of attempt because once the prisoner entered the lobby, he had escaped.

Similarly, Webster was outside any area in which he was permitted when he cut a hole in the fence and entered the roof. He was not allowed to be in the elevator mechanical room or the elevator shaft. The roof, mechanical room, and elevator shaft were all areas where Webster lacked any permission to enter or

to remain. Furthermore, the elevator shaft services the nonsecure side of the building. But for the holiday, offices would have been open, and Webster could have endangered members of the public. As the Sixth Circuit has explained:

Every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so.

U.S. v. Lancaster, 501 F.3d 673, 676-77 (6th Cir. 2007), quoting *U.S. v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999).

We are persuaded that Webster satisfied Kentucky's definition of second-degree escape and that the trial court did not err in not providing an attempt instruction. Therefore, we affirm the judgment of Kenton Circuit Court.

ALL CONCUR.

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