No. 122891

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate
	)	Court of Illinois, Third District,
Plaintiff-Appellant,	)	No. 3-14-0987
	)	
	)	There on Appeal from the Circuit
v.	)	Court of the Fourteenth Judicial
	)	Circuit, Whiteside County, Illinois,
	)	No. 14 CF 201
	)	
ELIZABETH M. CLARK,	)	The Honorable
	)	Stanley B. Steines,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

ARGUMENT

Following felony convictions for burglary and unlawful use of a debit card, defendant twice violated her probation. During the second probation violation proceeding, defendant admitted the truth of the allegations and was released on bond with the following two conditions: that (1) she attend a specified substance abuse treatment center and (2) upon release or discharge, she immediately return to the Whiteside County Jail. Defendant left the center but did not return to the jail and, as a result, she was convicted of failure to report to a penal institution under 720 ILCS 5/31-6(a). The appellate court reversed, holding that section 31-6(a) did not apply because defendant was not "in custody" at the halfway house.

The People's opening brief demonstrated that defendant was guilty of failure to report to a penal institution because she violated the plain meaning of section 5/31-6(a), which contains no custody requirement. Peo. Br. 5-7.[1] Defendant concedes that custody appears nowhere in the failure to report clause of subsection (a) but contends that this Court should *add* a custody requirement based on "a close look at how the legislature has amended the escape statute over time." Def. Br. 9. But such legislative history cannot override the statute's plain and ordinary meaning, and the sequence of amendments merely confirms that custody is irrelevant to failure to report.

[1] "C_," "R_," "Peo. Br. _", and "Def. Br." refer to the common law record, the report of proceedings, the People's opening brief, and defendant's brief, respectively.

The opening brief also established that even if custody is required under section 31-6, defendant was in custody in the relevant sense, which includes constructive custody and legal limitations on liberty. Peo. Br. 7-11. Defendant's counter-arguments, centering around the fact that she was released on bail bond, are factually and legally incorrect.

I. The Evolution of 720 ILCS 5/31-6(a)'s Failure to Report Clause Provides No Reason to Depart from its Plain Language, which Defendant Concedes Does Not Mention Custody.

The People's opening brief established that custody is nowhere to be found in the relevant failure to report clause, which governs when a person "knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement." 720 ILCS 5/31-6(a). Peo. Br. 5-7. Section 31-6(a) is divided into two independent clauses separated by a semicolon. "Custody" appears only in the first clause, which involves escape from a penal institution or the custody of such an institution, and is completely absent from the failure to report clause that appears after the semicolon. This distinction between escape and failure to report is repeated in subsection (b) and even in the statute's title: "Escape; failure to report to a penal institution or to report for periodic imprisonment." Thus, escape from custody is distinct from failure to report.

Defendant concedes that "custody" does not appear in the relevant clause. *See* Def. Br. 11 ("the exact word 'custody' is not contained in that subsection"). But defendant asks this Court to read a custody requirement into this clause, based on "a close look at how the legislature has amended the escape statute over time." Def. Br. 9. Defendant cites no precedent holding that the Court may rely upon amendment history to override the plain and ordinary meaning of a statute. In any event, the sequence of amendments confirms that this Court should not depart from the statute's plain language.

As defendant describes, in *People v. Simmons*, 88 Ill. 2d 270, 271-72 (1981), this Court held that a defendant committed escape under section 31-6(a) when he failed to return to the correctional center following six hours of independent release at a shopping mall.[2] This Court rejected Simmons's argument that he could not be charged under section 31-6(a) because at that time it encompassed only those who escaped "from any penal institution," explaining that he was still absent from required custody. *Id.* at 272-73.

Subsequently, the General Assembly twice amended subsection (a), extending and clarifying the holding of *Simmons*. First, Public Act 83-248

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[2] After transferring from a high-security prison to a community correctional center, Simmons was allowed six hours of independent day release to go shopping. 88 Ill. 2d at 271. A correctional center employee drove him to the shopping center and left him, unaccompanied. *Id.* Simmons was required to phone in every two hours, and his brother was to drive him back to the correctional center. *Id.* Simmons called in once, but not again, and never returned to the center. *Id.*

added the semicolon and the first version of the second independent clause. This version made it a Class 3 felony to fail to return from furlough or a release program (distinct from the Class 2 felony escape described in the clause preceding the semicolon). Second, Public Act 84-1083 amended the second clause to provide that it applied to a person "who knowingly fails to report to a penal institution or to report for periodic imprisonment *at any time*." (Emphasis added). The amendment thus left no doubt that the second clause covers a failure to report at any time, and not just when a defendant was in physical custody.

The statute's evolution makes clear the General Assembly's intent that subsection (a) apply in two distinct circumstances. The first involves escapes from custody and constitutes the more serious crime. The second clause, which includes failure to report, has no custody requirement and constitutes the less serious crime. Thus, rather than supporting defendant's argument here, the series of amendments instead confirms the statute's plain and ordinary meaning: that custody is irrelevant to the crime of failing to report to a penal institution.

II. Defendant Was in Custody in the Relevant Sense.

Even assuming that some form of custody is required, the People's opening brief established that defendant was "in custody" in the relevant sense both because she was required to report to jail and because she was legally required to be in a treatment facility during the duration of her bond.

Peo. Br. 7-9. This Court has explained that the law recognizes "'physical custody,'" where "'freedom is directly controlled and limited,'" as well as "'constructive custody,'" where "'freedom is controlled by legal authority but [the defendant] is not under direct physical control.'" *People v. Campa*, 217 Ill. 2d 243, 253-54 (2005) (quoting *Black's Law Dictionary* 412, 1183 (8th ed. 2004)).

Even under defendant's reading, the statute applies when a person "has breached constructive custody of law enforcement by failing to return or report in connecti[on] to her sentence under its second clause." *See* Def. Br. 11; *see also id.* ("Indeed, each of the terms listed in the second clause of the escape statute is a type of detention involving constructive custody."). But defendant attempts to avoid this result, arguing that even though she would otherwise have been in constructive custody, the fact that she was "released on bail bond" meant that she (1) was not in custody on her burglary conviction, (2) was not in custody at all, and (3) was at most guilty of a bail bond violation. *See* Def. Br. 11. These arguments are factually and legally incorrect.

A. Defendant was on probation and her status was tied to her probation violation proceedings.

Defendant assumes that her bail bond was unrelated to her burglary conviction, writing that her "probation was terminated but [she] was never resentenced." Def. Br. 3 (citing C24). That is incorrect. According to the stipulated facts, the People filed a petition alleging a probation violation, and

defendant admitted the truth of the allegations. C24. Bail was set at $10,000 with other bond conditions, and the matter was continued for resentencing. C31 (docket entries for 8/16/2013 and 9/6/2013). Subsequently, bail was raised to $50,000, and the court ordered the bond conditions to include substance abuse treatment and that upon release or discharge from such treatment defendant immediately return to the Whiteside County Jail. C24, C32 (docket entries for 1/9/2014 and 2/25/2014). The court continued the resentencing hearing multiple times. C32-33 (docket entries for 1/2/2014, 2/5/2014, 2/28/2014, 3/28/2014, 5/7/2014). Before resentencing, defendant left the treatment center but did not return to the Whiteside County Jail as required. After her failure to return to the Whiteside County Jail, she was resentenced to three years in prison for burglary and two years of mandatory supervised release, plus one year in prison for unlawful use of a credit card. C33 (docket entry for 6/17/2014).

Thus, at the time she failed to report to the Whiteside County Jail, defendant was still serving her probationary sentence for burglary and unlawful use of a credit card, although the People had initiated revocation proceedings. Indeed, as she had not yet failed to report or been charged in this case, there existed no other basis that could have required her to report to jail. She was thus also under the supervision of a probation officer. *See* 725 ILCS 5/102-18 ("'Probation' means a sentence or adjudication of

conditional and revocable release under the supervision of a probation officer.").

Bail is a statutory part of the hearing for parole violations. *See* 730 ILCS 5/5-6-4 (b) ("The court shall conduct a hearing of the alleged violation. The court shall admit the offender to bail pending the hearing unless the alleged violation is itself a criminal offense in which case the offender shall be admitted to bail on such terms as are provided in the Code of Criminal Procedure of 1963, as amended."). Thus, defendant was still on probation and her bail bond was tied to her probation violation proceedings.

B. Defendant was in constructive custody.

As noted above, in "'constructive custody,'" "'freedom is controlled by legal authority but [the defendant] is not under direct physical control.'" *Campa*, 217 Ill. 2d at 253-54 (2005) (quoting *Black's Law Dictionary* 412 (8th ed. 2004)). The "'term [custody] is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical.'" *Campa*, 217 Ill. 2d at 254 (quoting *Black's Law Dictionary* 347 (5th ed. 1979)). The People's opening brief demonstrated that the Court should not import into section 31-6(a) a narrow reading of "custody" based on cases involving presentencing credit, because the statutes there served different purposes. *See* Peo. Br. 7-10.

Defendant's citation of *People v. Beachem*, 229 Ill. 2d 237 (2008), Def. Br. 15, only confirms that she was in custody here. *Beachem* explained that

the "definition of 'custody' is very expansive" and "may encompass varying degrees of state control." *Id.* at 245. Indeed, the "dictionary definition of 'custody' is broad enough to incorporate virtually any degree of state control." *Id.* at 252. Citing *Simmons*, this Court explained that it was "the legal duty to submit to custody and not the actual physical confinement, or lack thereof, which defined a defendant's custodial status." *Id.* *Beachem* found that the defendant was entitled to sentencing credit for time spent in the Sheriff's Day Reporting Center program because he "was not free to come and go as he pleased"; "was not free to structure his day as he saw fit"; "was obligated to report at an established time" to a program; "was not given the ability to decline attending on any given day." *Id.* at 253. Those descriptions apply equally to defendant here.

The most relevant precedent is *Simmons*, which involved escape. This Court held that Simmons was in custody on an independent day release program because he "was still legally in the custody of the Center, and had a legal duty to submit to that custody." 88 Ill. 2d at 273. "When he exceeded the lawful limits of his liberty, . . . he escaped from the Center." *Id.* at 273-74. Just so here, where defendant had a legal duty to report to the jail and exceeded the lawful limits of her liberty.

C. That defendant was also guilty of a bail bond violation is irrelevant.

Finally, it is true but irrelevant that defendant was also guilty of a bail bond violation. In *Simmons*, upon which defendant relies, this Court

explained that the same conduct may be criminalized under two statutes, even two distinct escape statutes. 88 Ill. 2d at 276-77; *see also id.* ("To vindicate all the interests that must be protected, the State must be able to prosecute under either statute as it chooses."). That defendant is also guilty of violating her bail bond does not render her innocent of failing to report to a penal institution.

When a defendant's conduct may constitute both a bail bond violation and failure to report, various factors may influence which crime prosecutors choose to pursue. For instance, both crimes are continuing offenses under 720 ILCS 5/3-8, but the limitations periods may differ if, for instance, there is a final order following a trial in absentia or a probation violation hearing, which might affect the limitations period of a charge of bail bond violation but not one of escape. *See People v. Casas*, 2017 IL 120797, ¶ 43. Similarly, a bail bond violation includes a thirty-day grace period, *see* 720 ILCS 5/31-10(a), while a failure to report does not. Prosecutors have discretion to pursue whichever charge best vindicates the most pressing interests.

As a general rule, a person who commits a bail bond violation will not also be guilty of failing to report. Defendants released on pre-trial bail bond will not have been convicted of a felony, nor will most be required as a condition of their release to report to a penal institution or for periodic imprisonment. Conversely, people required to report to penal institutions or for periodic imprisonment will not necessarily be released on bail bond. But

the same conduct may occasionally result, as here, in both crimes being committed, and the mere fact that the defendant's conduct violates one criminal statute does not mean that it does not also violate another.

* * *

When defendant failed to report to Whiteside County Jail, as she was legally obligated to do, she violated the plain meaning of 720 ILCS 5/31-6(a). The statute's failure to report clause, which appears after the semicolon, contains no custody requirement. Peo. Br. 5-7. Contrary to defendant's argument, legislative history cannot override the statute's plain and ordinary meaning. Moreover, the statute's evolution confirms that custody is irrelevant to failure to report. And even if custody is required under section 31-6, defendant was in custody in the relevant sense, which includes constructive custody and legal limitations on liberty.

CONCLUSION

This Court should reverse the judgment of the appellate court.

May 31, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, is eleven pages.

/s/ Eldad Z. Malamuth
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 31, 2018, the foregoing **Reply Brief of Plaintiff-Appellant** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

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