

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000847-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 01-CR-002431

JASON WEAVER

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, KNOPF, AND TACKETT, Judges.

COMBS, JUDGE. The Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court dismissing the charge of second-degree escape lodged against Jason Weaver following violation of the terms of his participation in the home incarceration program. We reverse and remand for further proceedings.

Weaver, the appellee, was indicted for assault and criminal abuse. He had been arrested and was awaiting trial on

these charges when the Jefferson Circuit Court committed him to the custody of the Jefferson County Department of Corrections. Under the terms of the commitment, Weaver was to return to court for trial on August 29, 2001. In the meantime, as a participant in the Home Incarceration Program, he was ordered to wear an electronic monitoring device and to remain in his home as outlined in the pretrial release plan. Weaver's bond was described by the clerk as AROR [released on own recognizance] w/speical (sic) conditions H.I.P. [home incarceration program] w/work release . . . .@

In July 2001, Weaver failed to report on time to work. As a result, an officer supervising Weaver's participation in the Home Incarceration Program arranged for Weaver to report to the program's offices. Weaver failed to appear and could not be located for several weeks. He was subsequently indicted for escape.

Before trial, Weaver filed a motion to dismiss the escape charge. In an order entered March 28, 2002, the Jefferson Circuit Court concluded that Weaver's participation in the Home Incarceration Program was Anot the sort of custody required for a charge of Second Degree escape.@ Order at 3. We disagree.

The single issue presented by this appeal is whether Weaver's commitment to the custody of the Jefferson County

Department of Corrections and participation in the Home Incarceration Program constitutes custody within the meaning of KRS 532.010(2). We conclude that it does.

Custody is defined as "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes . . . ." KRS 520.010(2). Custody does not include supervision of probation or parole or constraint incidental to release on bail. Id. One is guilty of escape in the second degree "when . . . being charged with or convicted of a felony, he escapes from 'custody.'" KRS 520.030(1). As it relates to escape, "custody" must be interpreted more broadly than in other situations. Stroud v. Commonwealth, 922 S.W.2d 382 (1996).

Weaver was arrested on felony charges and was incarcerated. Pursuant to a court order, he was then released into the custody of the Jefferson County Department of Corrections.<sup>1</sup> Weaver was informed of the conditions of his release. He was required to wear an electronic monitoring device at all times and to remain in his home except as clearly designated by the release form. He was subject to constant surveillance by law enforcement officials. He was specifically

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<sup>1</sup>KRS 431.517 provides that home incarceration may be ordered as a form of pretrial release subject to the conditions imposed by the provisions of KRS 532.200 to 532.250. See also Kentucky Rules of Criminal Procedure (RCr) 11.42(1). "Home incarceration" is defined at KRS 532.200(2) as "use of a person's home for purposes of confinement." (Emphasis added.)

advised that violation of the conditions of his home incarceration might result in prosecution for escape.<sup>2</sup> Although Weaver was no longer housed in the county jail at the time of his unauthorized departure from his home, he undoubtedly remained in "custody" as contemplated by the order of the trial court.

We are not persuaded that Weaver's participation in the Home Incarceration Program amounted to a "constraint incidental to release on bail." The restraint and surveillance described here are qualitatively different from the incidental "constraint" involved in a release on bail. Weaver's restraint and surveillance were not "incidental" to his pretrial release; they were integral to it and required meticulous compliance in order to avoid a charge of escape.

Weaver's removal of the electronic monitoring device and unauthorized departure from his home constituted an escape from custody as defined by KRS 520.030. The record indicates that Weaver had a clear understanding that he was not permitted to remove the monitoring device or to leave his residence outside the specified periods for specified purposes. Therefore, we conclude that the trial court erred by dismissing the escape charge.

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<sup>2</sup>KRS 532.220(2) specifically provides that violation of the conditions of home incarceration may subject the home incarcerated to prosecution for escape under the provisions of KRS 520.030.

The order of the Jefferson Circuit Court granting  
Weaver's motion to dismiss is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

A.B. Chandler III  
Attorney General of Kentucky

Teresa Young  
Special Assistant Attorney  
General  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael C. Lemke  
Louisville, Kentucky