

Dismissed and Opinion filed April 13, 2000.



In The
Fourteenth Court of Appeals

NO. 14-99-00552-CR

HEATH SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 34,553**

OPINION

Pending before the court is the State's motion to dismiss this appeal. The latter was perfected by Heath Smith, appellant, who was released on bond pending appeal. According to the motion and affidavit attached thereto, appellant has disappeared. Furthermore, his bond was surrendered on November 17, 1999, and the court issued an alias capias for his arrest on that day. Thus, the State argues that dismissal is appropriate under Rule 42.4 of the Texas Rules of Appellate Procedure. We agree.

According to Rule 42.4, an appellate court "must dismiss an appeal on the State's motion, supported by affidavit, showing that the appellant has escaped from custody pending appeal and that to the affiant's knowledge, the appellant has not, within ten days after

escaping, voluntarily returned to lawful custody.” Though escape can be a criminal offense, the Texas Court of Criminal Appeals has made it clear that the penal offense does not necessarily establish the parameters of “escape from custody” contemplated under Rule 42.4. *See Luciano v. State*, 906 S.W.2d 523, 524-25 (Tex. Crim. App. 1995). In other words, the definition of escape found in the Penal Code is not necessarily the definition of escape under the aforementioned rule. Rather, we are to afford the concept (as it exists in the appellate rules) its “commonly-accepted meaning.” *Id.* at 524. The *Luciano* court, in describing “commonly-accepted meaning,” stated that escape connoted an unauthorized departure from custody. *See id.* at 524. Moreover, custody, according to the court, was an elastic term that included not only actual physical detention or imprisonment, but also the power to actually imprison or take into physical possession. *See id.* at 524-25. Implicit within each example given by the court is the notion that the individual is not free to exercise his liberty or that his liberties are being restrained via legal process.

Here, appellant was on bond when he departed to places unknown. Being on bond, his liberties were obviously restrained. *See Ex parte Robinson*, 641 S.W.2d 552, 553-54 (Tex. Crim. App. 1982) (holding that, for purposes of habeas relief, one’s liberties are restrained while released on bond); *Pfeffer v. State*, 683 S.W.2d 64, 65-66 (Tex. App.–Amarillo 1984, pet. ref’d) (same). Furthermore, his limited freedom was susceptible to utter curtailment by legal process should he breach the conditions of his bond. Given this, and the fact that the court did not approve his absconding, as illustrated by the surrender of the bond and issuance of an arrest warrant, we conclude that he escaped from custody per Rule 42.4. *See Moreno v. State*, 544 S.W.2d 398, 399 (Tex. Crim. App. 1976) (when appellant was mistakenly released and his whereabouts were unknown to defense counsel and the court, his appeal was dismissed because he had the status of an escapee) *Prince v. State*, 169 Tex. Crim. 559, 336 S.W.2d 140, 141 (1960) (appeal dismissed when appellant had been released on bail when he was not entitled to bail and had the status of an escapee).

Accordingly, the State’s motion to dismiss is granted and the appeal is dismissed.

PER CURIAM

Judgment rendered and Opinion filed April 13, 2000.

Panel consists of Justices Amidei, Anderson, and Frost.

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