Tape No. 88

825 to end of Side 1
1 to 305 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-fourth Meeting, December 11, 1969

Members Present: Chairman John Burns
Mr. Robert Chandler

Members Absent: Mr. Bruce Spaulding
Rep. Tom Young

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

Others Present: Mr. Frank Knight

Agenda: Escape and Related Offenses; P.D. No. 2; October 1969 (Sections 8, 9 and 10) (Article 23)

The meeting was called to order by Chairman John Burns at 7 p.m. in Room 319 of the Capitol Building, Salem, Oregon.

Mr. Chandler moved to approve the minutes from the last meeting and the motion carried unanimously.

Mr. Chandler moved to reconsider the vote by which the subcommittee previously defeated the section on endless chain schemes under the draft on Business and Commercial Frauds. Chairman Burns explained the proposal to Mr. Knight and said that approval of Mr. Chandler's motion would put the section back on the agenda for the next subcommittee meeting but that the section would not be reconsidered until the regular members were present. The motion carried unanimously.

ESCAPE AND RELATED OFFENSES

Section 8. Bail jumping in the second degree. Mr. Wallingford explained that both sections 8 and 9 are bail jumping statutes which restate present Oregon law.

Chairman Burns asked Mr. Wallingford if he intended to include the material witness under section 8 as well as the misdemeanant. Mr. Wallingford replied that that was not his intention because he had not thought of the possibility of a material witness being released on bail. However, he said, since section 8 applied to misdemeanors, there was no reason why the material witness on bail should not be covered also.

Mr. Chandler pointed out that the language seemed broad enough to cover a person other than the one who committed the crime and he wondered if that was the intention of the subcommittee.

Chairman Burns observed that sections 8 and 9 would give a district attorney enough flexibility to charge bail jumping in the second degree rather than the more serious crime of bail jumping in the first degree, even in the case of a person accused of a felony.

Mr. Knight pointed out that district attorneys presently have discretion to charge a lesser offense when they consider it more practical.

Chairman Burns advised that if he were defending a person charged for failing to appear under section 9 (bail jumping in the first degree), he would file a demurrer. He stated that he could name three judges in Multnomah County who would grant that demurrer, probably on the basis of Pirkey. Even though one might argue that Pirkey is irrelevant and does not govern, he said, he would raise the constitutional issue and he felt sure that these judges would grant the demurrer. The state would then be put in the position of appealing the judgment on the demurrer, which more than likely, would go to the Supreme Court. It seemed to him that the Commission had a responsibility to protect against that type of situation, he said.

Mr. Wallingford mentioned that in State v. Powell, 212 Or 684, 321 P2d 333 (1958), a woman obtained a narcotic drug by use of a false name and address. At that time there were two separate statutes in ORS chapter 474 -- one a misdemeanor and one a felony -- both prescribing the same elements for obtaining a drug by use of a false name and address. The woman was prosecuted under the felony statute and convicted but the Supreme Court reversed the decision with instructions that she be sentenced under terms of the misdemeanor.

Mr. Paillette stated that the Court had specifically held in that case that there was no Pirkey problem. They indicated that the mere fact that one act could have violated more than one statute did not fall within the definition of Pirkey. They held that the penalty imposed exceeded that which was authorized by statute.

Mr. Knight pointed out that section 9 requires the additional element that the person must fail to appear in connection with a charge against him of having committed a felony. Bail jumping on a misdemeanor would clearly fall under section 8, he said, and bail jumping on a felony, under section 9. Because of the wording in these sections, he warned, there could be close situations where, for instance, a person is released on his own recognizance without counsel. Where a person has an attorney, it is often possible to get the attorney to testify that he

has tried and failed to reach the defendant and thus the court could assume that the defendant realizes that he will have to appear at some time in the future. In response to a question by Chairman Burns on whether a person charged with a felony would be released without counsel, Mr. Knight related that there were presently two cases going before the Grand Jury in which persons had waived counsel and preliminary hearing at the same time. This presents a problem if either of the persons has moved from the address given on the recognizance agreement, he noted.

Mr. Paillette asked if the court did not advise the person of the law when he was being released on his own recognizance. Mr. Knight replied that it did but added that the language in sections 8 and 9, "without lawful excuse" presents a problem. Suppose, he said, a person in such a case moved from Corvallis to one of the nearby towns without notifying the court of his change of address. In that event, there is no way to notify the person that he is to appear in court on a certain day for arraignment.

Chairman Burns asked what would happen in that case if, after failing to contact this person for arraignment, a bench warrant was issued for his arrest which led to evidence that he had not made any affirmative effort to escape. Mr. Knight agreed that he would not prosecute a person in that case if it appeared he simply did not realize that he was to have notified the court of his change of address. This is a problem in small counties, he said, because the grand jury may meet only once a month and a person cannot know in advance which day he will be advised to appear. Therefore, the person is usually notified through his attorney since there is no set date for arraignment. When a case in continued, it is continued until further notice by the court and the attorney is notified when the court sets a date. There is usually no problem, he reported, when the attorney is unable to locate the person immediately and asks for additional time.

Chairman Burns said he thought it should be made clear whether the subcommittee intends that section 8 applies only to misdemeanors and material witnesses while section 9 applies only to felonies. If section 8 is to apply to both misdemeanors and felonies, he advised, that also should be made clear. He proposed that section 8 be redrafted in connection with "a charge against him of having committed a misdemeanor or violation." This section then would apply only to misdemeanors or violations and the material witness would be covered when the Commission considers procedure.

Mr. Paillette asked if Chairman Burns wanted to make a specific amendment so that the draft could be prepared in accordance with the wishes of the subcommittee. Mr. Chandler said he understood the proposal would read the same as section 9 with the exception that it would state "misdemeanor or violation" in place of "felony." Chairman Burns stated the motion: In section 8, delete "criminal action or proceeding" and insert "charge against him of having committed a misdemeanor or violation". The motion carried unanimously.

Chairman Burns asked Mr. Wallingford where he had found the term, "without lawful excuse." Mr. Wallingford referred to the commentary on p. 30 of the draft:

> "An intentional failure to appear must also be without 'lawful excuse.' This permits resort to the defenses available under the legal Justification Article, e.g., duress, physical impossibility."

He explained that the difference this would make is that the prosecution would have to plead that the failure to appear was without lawful excuse. If this section were deleted, it would simply be a matter of defense and the defendant could introduce evidence showing lawful excuse under one of the Justification sections, he said.

Mr. Knight said it seemed to him that "intentionally fails to appear" would allow a defendant who had an excuse enough latitude to provide a jury question.

Chairman Burns expressed the opinion that it was wrong to put an undue burden on the prosecution in this particular type of situation.

Mr. Chandler moved to strike the words, "without lawful excuse" and the motion carried unanimously. He then moved to approve section 8 as amended and that motion also carried unanimously.

Section 9. Bail jumping in the first degree. Mr. Chandler moved to amend section 9 by deleting the words, "without lawful excuse" and to approve section 9 as amended. The motion carried unanimously.

Section 10. Failing to respond to an appearance citation. Mr. Knight questioned the need for this section noting that it uses the language, "based upon his alleged commission of a misdemeanor." Under the new statute in chapter 244, he stated, a citation can be issued on a felony. Mr. Wallingford remarked that in re-examining chapter 244, passed by the Legislature this year, he found it covers the appearance citation and he was therefore, recommending that section 10 be deleted.

Mr. Chandler referred to p. 19 of the minutes of the last meeting for previous discussion on this section. If the points made in that discussion are met by chapter 244, he said, he would have no objection to deletion of section 10. But he pointed out that there was a real problem in municipal government with enforcement of the appearance citation due to the inability to issue a bench warrant beyond the limits of the jurisdiction of the court. He noted that the citation authorized by chapter 244 is not in lieu of arrest; it is in lieu of continuing custody after an arrest has been made.

Mr. Wallingford explained that under chapter 244, when an arrest is made under a municipal ordinance in which a citation is issued in lieu of bail or in lieu of an appearance before a magistrate, and when the party fails to appear as instructed, he is subject to prosecution under section 9 of that statute which makes it a misdemeanor for failure to appear:

> "If any person wilfully fails to appear before a court pursuant to a citation issued and served under authority of this Act and a complaint or information is filed, he is guilty of a misdemeanor."

Mr. Chandler noted that if a person fails to appear in court in response to a citation, and a criminal complaint or information is filed, the magistrate must issue a warrant for his arrest. Chapter 244 makes it a misdemeanor if a cited person wilfully fails to appear in court and a complaint or information is filed.

Chairman Burns wondered if it would be appropriate in the commentary to refer to chapter 244. He asked Mr. Paillette how he would suggest the reference be handled. Mr. Paillette replied that if the subcommittee agreed to delete section 10 with the understanding that chapter 244 covers the situation, he would confer with Legislative Counsel for their advice.

Mr. Knight suggested noting under section 10 a reference to chapter 244, Oregon Laws of 1969 and waiting until it is clear just where those laws will be in ORS before being more specific.

Chairman Burns asked if it was the consensus of the subcommittee that since chapter 244 covers the same situation as section 10, the subcommittee wishes to delete section 10 as drafted. Mr. Chandler said it was his opinion that chapter 244 covers a great deal more than what is covered

in section 10. He was of the opinion that leaving section 10 in the draft would not hurt anything. Also, he pointed out, it would get away from the problem of cross referencing.

Chairman Burns suggested amending subsection (1) of section 10 to read: "Having been personally served with an appearance citation, as defined by _____, he intentionally fails to appear personally in the court in which such citation is answerable on the date designated thereon." This would incorporate section 9 of chapter 244 by reference into this draft and eliminate the necessity for the definitional section at the same time, he said.

In response to a question by Mr. Knight, Mr. Wallingford said this statute would not cover motor vehicle violations or game and fishing violations.

Mr. Knight asked what would happen if a person wanted to forfeit bail rather than appear in court. Mr. Wallingford noted that subsection (3) of this section covers that situation by authorizing an alternative response to the citation where the actor complies with such alternative procedure.

Mr. Paillette explained that the problem this section attempted to solve was that faced by municipalities. He reported that Mr. Wallingford had contacted the League of Oregon Cities as he was working on this draft but had little response. Apparently the League was satisfied that the new law (chapter 244) adequately covered the situation of people failing to appear in municipal court. Mr. Paillette pointed out that these new laws are in the arrest chapters which will not be affected by the revision until the Commission considers procedure. He suggested deletion of section 10 since there will be a chance to deal with this question again as part of the procedural revision. Mr. Chandler moved to delete section 10 and the motion carried unanimously.

Amendments. The subcommittee considered the amendments prepared by Mr. Wallingford which reflected the changes suggested at the last meeting. Mr. Chandler asked about the order of the definitions and Mr. Wallingford explained that they were now in alphabetical order.

Mr. Knight asked how escape from a juvenile training school was classed. Mr. Wallingford replied that escape of an inmate from a juvenile training school would not be a crime but that it would be a crime for a person who was not an inmate to aid or assist in that escape. Detention facility does not include a juvenile training school, he pointed out. A juvenile could commit the crime of escaping from custody, however, since he is protected from the crime of escape only while he is actually an inmate of the school.

Mr. Knight wanted to know why there was no provision for escape from a juvenile training school. Mr. Wallingford explained that it was not treated as a crime under present law and that there were adequate procedures for apprehending runaways from MacLaren and Hillcrest. Chairman Burns said that he did not think it was possible to provide a crime of escape from a state hospital or a juvenile training school when the person is there under a civil commitment. He asked Mr. Wallingford if he had found any instances of where it was made a crime to escape when the person was under a civil commitment. Mr. Wallingford noted that New York, under its section on escape from a detention facility, has defined detention facility to include a place used for the confinement of persons "charged with being or adjudicated a youthful offender, wayward minor or juvenile delinquent." Under that definition, a juvenile could be charged with escaping from a detention facility.

In explaining other changes in the definitions, Mr. Wallingford pointed out that in the definition of "custody," "public servant" has been replaced by "peace officer" which is also defined in subsection (7).

Mr. Wallingford called attention to the change in the definition of "detention facility." As originally drafted, he said, it did not apply to a state hospital so that it would not have covered a person confined to a state hospital who had been charged with a crime. It was changed by adding the language, "and applies to a state hospital only as to persons detained therein charged with or convicted of a crime."

Chairman Burns recalled that the Responsibility draft provides that a person cannot be released from the state hospital until a hearing is held before a judge. Since there is nothing provided there so far as escape in concerned, he wondered if because of that peculiar provision, this subcommittee could rely on that to make escape apply to persons who had been committed under the provisions of the Responsibility Article.

Mr. Knight agreed that there were definitely people who should be kept in the state hospital until they were released. Chairman Burns thought probably the greatest problem was that there is presently no way to extradite persons who escape from the state hospital and go beyond the borders of the state. Mr. Wallingford added that if a person had been adjudicated insane, there was not much point in charging him with escape since he would be taken right back to the state hospital. Mr. Knight was of the opinion that it would depend on whether he was still insane at the time he was apprehended.

Chairman Burns stated that the charge of escape would be more a vehicle for getting a person back than it would be for charging him with the crime. Mr. Paillette said he would hate to have to try a person for escape when that person was already considered insane. Mr. Wallingford thought a person would surely raise the defense to the charge of escape that he was insane since the court had already told him he was.

Chairman Burns thought a question would arise if, for instance, a person, having escaped to California, were arrested there and came up for extradition. A smart defense attorney would file for a writ of habeas corpus and Oregon might never get him back. Mr. Chandler remarked that perhaps the state would not care whether the person ever came back. However, Chairman Burns said he suspected that had Brudos been acquitted by reason of insanity, and escaped, the state would make an effort to get him back.

Chairman Burns suggested the following amendment: "Detention facility" ...applies to a state hospital only as to persons detained therein: (a) charged with or convicted of a crime; or (b) found not guilty by reason of mental disease or defect pursuant to Article _____of this Act.

Mr. Knight asked if all persons covered by this definition were presently confined at the state hospital. Chairman Burns answered that they are presently housed in the psychiatric security ward at the Oregon State Penitentiary. He supposed, technically, the ward would be considered part of the penitentiary but actually it would be part of the Oregon State Hospital.

Mr. Paillette questioned what would happen if a dangerous person were to be committed to the state hospital but confined at the state penitentiary. He thought his escape would be from a detention facility rather than a state hospital. It was concluded that the person would be a patient of the Oregon State Hospital and would, therefore, be considered to be under their jurisdiction. However, Mr. Paillette noted that "detention facility" is simply defined as "any place used for the confinement of persons charged with or convicted of a crime or otherwise confined pursuant to court order." That definition does not mean that people in a detention facility have to be confined pursuant to a court order. So, he theorized, the person would be covered without involving the insanity defense.

Mr. Knight disagreed. There is another statute, he reminded, for purposes of venue, which provides that someone who escapes from a "farm" or "forest camp" is deemed to be in the constructive custody of the sheriff of the county from which he was committed and therefore, is subject to prosecution in that county. However, he thought escapees from the penitentiary were still prosecuted in Marion County. Chairman Burns reminded that there was a Supreme Court decision early this year which

directed that an escapee from a farm or forest camp is to be tried in Marion County because he is considered to be in constructive custody of the executive head of the institution. Mr. Knight noted, however, that there is presently a statute providing that a county prisoner can be boarded out to a farm or forest camp and if he escapes, he escapes from the county from which he was sent. Therefore, he said, it would seem that a person who escapes from the facility within the penitentiary would probably be considered as escaping from the state hospital.

Mr. Knight moved to amend subsection (4) of section 1 as suggested by Chairman Burns (see p. 8 of these minutes) and the motion carried unanimously.

Mr. Wallingford noted that the definition of "escape" had also been changed from the previous draft to exclude the broad definition imposed by use of "public servant."

In response to a question by Chairman Burns, Mr. Wallingford said he saw no problem with the term "unlawful departure" because there could be lawful departures as well. Mr. Knight wondered about the defense being used that a person was not being lawfully held and therefore he could not be charged with an unlawful departure. Mr. Wallingford said that existing law provided that irregularity in effecting confinement in a detention facility was no defense and the policy question had been discussed at the last subcommittee meeting (November 6, 1969) but had not been resolved.

In discussion of subsection (7) which defines "peace officer," Mr. Knight brought up the question of the "campus cop" who, though not considered a police officer, is nevertheless a "peace officer." He explained that the Oregon State Board of Higher Education has authority under ORS 352.360 to appoint peace officers who shall have the same authority as other officers as defined in ORS 133.170. Chairman Burns directed Mr. Wallingford to write to the Oregon State Board of Higher Education pointing out the statute cited by Mr. Knight and to request the Board's views on the matter. Mr. Chandler moved to adopt section 1 as amended. The motion carried unanimously.

Mr. Wallingford explained that section 2 was changed to provide a defense for a person who escapes or attempts to escape from custody pursuant to an illegal arrest. Mr. Knight referred to what seemed to be an inconsistency. In the Justification Article, he pointed out, it is said that a person cannot resist an illegal arrest and yet this Article indicates that a person can escape from an illegal arrest. After further discussion, it was decided that the two Articles were not inconsistent in that they both prohibit the use of force in resisting or escaping from an illegal arrest.

Mr. Wallingford advised that the change in section 5 reflected Rep. Young's concern that it would have applied to an inmate in the school or hospital and that was not the intention of the subcommittee. Therefore, the words, "not an inmate therein" were added by amendment to eliminate that possibility. Mr. Knight suggested that subsection (2) of section 5 be amended further to end at the word, "hospital" thus deleting "who is not charged with or convicted of a crime." He pointed out that all other persons would be charged under the draft on Parties to Crime. Mr. Chandler moved the suggested amendment and the motion carried unanimously. He then moved to approve section 5 as amended. That motion also carried without opposition.

With no further business before the subcommittee, the meeting adjourned at 10:15 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission