

**COURT OF APPEALS
DECISION
DATED AND FILED**

OCTOBER 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-3581-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. WARE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Christopher L. Ware appeals from a judgment of conviction of felony escape under § 946.42(3)(a), STATS.¹ He argues that the

¹ Ware was also convicted of battery to a law enforcement officer and possession of cocaine. His appeal does not challenge these convictions.

complaint failed to charge a known crime because, as a parolee, he was not in actual physical custody of a police officer and thus could not be guilty of escape. He also claims that the jury instruction misinformed the jury as to the definition of actual custody. We conclude that because Ware was under lawful arrest his status as a parolee is of no consequence to the custody requirement and that the jury instruction accurately stated the law. We affirm the judgment.

¶2 Ware was released on parole in March 1996. On June 7, 1996, his parole agent filed a parole violation warrant. On August 7, 1996, three Kenosha police officers were dispatched to an address to apprehend Ware. The officers were admitted to the second-floor apartment and found Ware and another man sitting on a bed in a small bedroom. One officer conducted a pat-down search of Ware and the officers accompanied Ware through the rear door of the apartment. As the four men stood on the second story porch, one officer contacted the dispatcher to confirm that there was an outstanding warrant for Ware's arrest. Ware rushed the officer standing in front of the stairway, knocked the officer off balance and proceeded down the stairway. The officers gave chase and upon capturing Ware placed him in a squad car.

¶3 To be guilty of escape, Ware must be found to be in custody. *See* WIS J I—CRIMINAL 1773. Section 946.42(1)(a), STATS., defines custody to include, “without limitation actual custody of an institution ... or of a peace officer or institution guard.” Custody “does not include the custody of a ... parolee ... unless the person is in actual custody.” Ware argues that because § 946.42(1)(a) distinguishes between actual custody and constructive custody and makes

constructive custody inapplicable to a parolee, he had to be physically restrained by the officers to be found in “actual custody.”²

¶4 Ware’s reliance on *State v. Schaller*, 70 Wis.2d 107, 233 N.W.2d 416 (1975), is misplaced. *Schaller* decided whether a probationer confined in a county jail as a condition of probation may be convicted of escape when he or she fails to return from work release. See *id.* at 110, 233 N.W.2d at 418. This is not a case like *Schaller*, which involved the meaning of “actual custody” with regard to a probationer. See *id.* at 111, 233 N.W.2d at 418. Here, Ware was placed under arrest pursuant to a lawful warrant. Ware’s status as a parolee only caused the warrant to be issued. Once the warrant was executed and a legal arrest made, Ware’s status as a parolee dropped out of the picture. Ware’s status as an arrestee trumps his parolee status.³

² The State reads Ware’s argument to only challenge the sufficiency of the evidence to bind him over for trial and argues that the claim is waived by an error-free trial. See *State v. Wolverson*, 193 Wis.2d 234, 254, 533 N.W.2d 167, 174 (1995). We construe Ware’s claim to be that, as a matter of law, he could not be convicted of escape under the exception contained in the last sentence of the definition in § 946.42(1)(a), STATS. See *State v. Schaller*, 70 Wis.2d 107, 109, 233 N.W.2d 416, 417 (1975).

³ Even applying an actual custody requirement applicable to parolees, Ware’s arrest was sufficient to constitute actual custody. As used in § 946.42(1)(a), STATS., “actual custody” means actual imprisonment or physical detention. See *State v. Adams*, 152 Wis.2d 68, 74, 447 N.W.2d 90, 92 (Ct. App. 1989). In addressing the physical detention requirement, the *Adams* court rejected Ware’s notion that physical detention requires hands-on physical control. See *id.* at 74-75, 447 N.W.2d at 92-93. Rather, a person is in actual custody once the ability or freedom of movement is restricted—the same level of restraint required to constitute an arrest. See *id.* at 75, 447 N.W.2d at 93.

¶5 Ware only seeks to impose a hands-on requirement to his custody and does not challenge that he was under lawful arrest.⁴ A person cannot be under legal arrest without being in custody for purposes of the escape statute. *See State v. Hoffman*, 163 Wis.2d 752, 762, 472 N.W.2d 558, 562 (Ct. App. 1991). The trial court was not required to dismiss the criminal complaint as a matter of law.

¶6 Ware's claim that the jury instruction did not properly state the law is based on his belief that he had to be in the physical grasp of the officers to be guilty of escape. Specifically, he objects to that portion of the instruction given that "custody means that a person's freedom of movement is restricted ... by the assertion of authority by a peace officer to which the person has submitted." We have determined that Ware's arrest is the determinative fact of his custody. The stated portion of the jury instruction is a proper statement of the law as to when a person is under arrest. *See id.* at 761 n.6, 472 N.W.2d at 562. Because the instruction did not misstate the law or mislead the jury, no relief is warranted. *See State v. Foster*, 191 Wis.2d 14, 28, 528 N.W.2d 22, 28 (Ct. App. 1995).

¶7 Ware challenges the trial court's instruction that the second element of escape "requires that the defendant was in custody as a result of an arrest after conviction for a crime." Ware claims that the instruction diverted the jury's inquiry from whether actual physical custody was established to whether an arrest

⁴ The three elements of arrest are: the suspect's ability or freedom of movement is restricted; the arresting officer intends, at that time, to restrain the person; and the person under arrest believes or understands that he or she is in custody. *See State v. Hoffman*, 163 Wis.2d 752, 761 n.6 472 N.W.2d 558, 562 (Ct. App. 1991). The officers found Ware in a bedroom of the apartment and informed him that they had an arrest warrant, that he was under arrest and that he had to come with them. Ware accompanied the officers to the back porch. One officer blocked the stairwell. We conclude that Ware's freedom of movement was restricted and by accompanying the officers he submitted to the officers' authority. That the officers intended to arrest Ware was the whole reason for going to the apartment. Ware was informed of the apprehension request. Ware knew he was in custody.

was made. Again, the instruction properly stated the law. Although Ware is correct that an arrest is not the only manner in which one can be placed in custody, the arrest is the operative fact here. The State correctly notes that the element of legal arrest “was a necessary bridge between [Ware’s] status as a convicted parolee and his actual custody at the time of his alleged escape.” The instruction given did not relieve the State of its burden of proof and correctly stated the law.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

