

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 57

In the Matter of Dylan C.

(Anonymous),

Respondent;

Presentment Agency,

Appellant.

Deborah A. Brenner, for appellant.

Marcia Egger, for respondent.

LIPPMAN, Chief Judge:

Respondent Dylan C. ran out the door of the non-secure juvenile detention facility to which he had been remanded pending his adjudication upon a juvenile delinquency petition. For absconding, he was charged in a second juvenile delinquency petition with the commission of acts which, if performed by an adult, would constitute the crime of escape in the second degree (Penal Law § 205.10 [1]), a class E felony. Family Court granted respondent's motion to dismiss the petition alleging escape upon the ground that elopement¹ from a non-secure facility did not fall within the proscription of the felony escape statute relied upon by the presentment agency (20 Misc 3d 942 [Fam Ct, Kings County 2008]). The Appellate Division in a thorough and thoughtful opinion affirmed, essentially upon the same ground (69 AD3d 127 [2d Dept 2009]), and we, having agreed to review the Appellate Division's decision and order (14 NY3d 710 [2010]), now, also affirm.

The felony escape statute setting forth the offense presently alleged against respondent, Penal Law § 205.10 (1), provides in relevant part that "[a] person is guilty of escape in the second degree when: 1. [h]e escapes from a detention facility." "Detention [f]acility" is, in turn, pertinently defined in Penal Law § 205.00 (1) as "any place used for the confinement, pursuant to an order of a court, of a person (a) charged with or convicted of an offense, or (b) charged with being or adjudicated a youthful offender, person in need of supervision or juvenile delinquent."

It is clear from the just quoted language that
¹While the dissent finds the use of this term amusing in this decidedly non-romantic context, it is a term more widely used and specifically with reference to the act of leaving a facility without permission (see e.g. 10 NYCRR 405.8 [6][5];

respondent escaped from a "detention facility" within the literal description of Penal Law § 205.00 (1) (a) and (b), and, if that language were to be considered in isolation, it would dictate the conclusion that the conduct of which respondent is accused is proscribed by Penal Law § 205.10 (1). However, article 3 of the Family Court Act, the body of law specifically governing the disposition and treatment of juveniles, such as respondent, detained while awaiting adjudication of delinquency charges (see Family Court Act § 301.1), does not equate detention with confinement, as does the Penal Law, but rather defines it for purposes of the article more broadly as "the temporary care and maintenance of children away from their own homes" (Family Court Act § 301.2 [3]). And, in that connection, article 3 has, since the enactment of the above-quoted Penal Law provisions, introduced a distinction, not articulated in the Penal Law, between secure detention facilities, i.e., "facilit(ies) characterized by physically restricti(ve) construction, hardware and procedures," (Family Court Act § 301.2 [4]), and nonsecure detention facilities, i.e., "facilit(ies) characterized by the absence of physically restricti(ve) construction, hardware and procedures" (Family Court Act § 301.2 [5]). The distinction is, we believe, crucial in judging the reach of the subject second degree escape statute, not simply because it is no small measure anomalous to speak of "escaping" from a facility "characterized by the absence of physically restricti(ve) construction, hardware

and procedures," but because we have specifically held in *People v Ortega* (69 NY2d 763 [1987]) that "a nonsecure facility does not constitute a detention facility within the meaning of Penal Law § 205.00 (1)" (*id.* at 764), and, accordingly that one may not commit the crime of escape in the second degree by leaving such a facility without permission (*id.*).²

There is, of course, a tension between the literal significance of the relevant Penal Law provisions and *Ortega's* carve-out for nonsecure facilities. *Ortega* involved an alleged escape from a nonsecure psychiatric hospital, and its carve-out was explained as warranted by the very different objectives of secure and nonsecure psychiatric commitment. Secure commitment, we recognized, had as a principal objective the protection of the public, a purpose obviously frustrated by escape and vindicated by subjecting an escapee to serious criminal sanction. The dominant purposes of nonsecure commitment, therapy and rehabilitation (69 NY2d at 764), however, would not have been similarly advanced, and could in fact have been significantly impaired, if on every occasion that a psychiatric patient

²Contrary to the dissent, we were necessarily aware at the

time Ortega was decided that Bronx Psychiatric Center, the facility from which Ortega absconded, was, while nonsecure in contrast to Mid-Hudson Psychiatric Center (the secure psychiatric facility at which Ortega had initially been hospitalized following his insanity acquittal), nonetheless a facility at which involuntarily committed individuals, among them Ortega, were detained. We expressly noted that, notwithstanding Ortega's transfer to the nonsecure facility, he remained in the custody of the Commissioner of Mental Health (69 NY2d at 764).

If one wandered off the grounds of the nonsecure facility to which he or she had been committed, there arose the possibility of a felony prosecution. The question now posed is whether there is some sensible, statutorily relevant distinction to be made between a nonsecure psychiatric facility and a nonsecure juvenile detention facility. Inasmuch as both are designed to detain but not imprison, and to rehabilitate rather than punish, and neither has as a principal end the protection of the public -- that objective being present in both cases but necessarily subordinate to the creation of a salutary therapeutic milieu for troubled but presumably not particularly dangerous persons (see *Sebastian v State of New York*, 93 NY2d 790, 795 [1999]) -- it is difficult to discern for present purposes any cogent distinction between the two types of facilities. It would moreover be entirely incongruous to treat an adult acquitted of rape upon a plea of insanity with impunity for his escape from a nonsecure psychiatric facility, as we did in *Ortega*, but to deem a child awaiting adjudication upon a juvenile delinquency petition answerable to a felony grade charge for taking his leave of the nonsecure detention facility to which he had been remanded, through its evidently unlocked door.³ Having with good reason

³The door, we note, cannot be supposed to have been left unlocked by accident, since, as the Department of Juvenile Justice explains on its website, "[w]hile locks on the doors and other hardware distinguish Secure Detention, [nonsecure detention] is characterized by the absence of such restrictions. and humane purpose read the second degree escape statute as we did some twenty-four years ago, it would not be prudent now to apply the statute in the evidently disparate manner proposed by petitioner.

Although petitioner protests that there will be untoward consequences if second degree escape is not made available as a charge whenever a juvenile detained pending adjudication of juvenile delinquency charges leaves a nonsecure detention facility without permission, there appears little

reason to suppose that that is so. It may well be desirable that some significant consequence attach to a child's noncompliance with the conditions upon which a nonsecure remand is made, but the filing of a new petition alleging felony escape is demonstrably inessential to that purpose. In the event of noncompliance, a child may without the need of a new juvenile delinquency petition, but in accordance with a provision in the order detaining him or her, be directly transferred to a secure facility, as indeed respondent was.

Residents are staff-supervised and may leave the NSD group homes to attend community programs if escorted by staff"

(<http://www.nyc.gov/html/djj/html/faq.html> [accessed March 18, 2011]; see also Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Court Act § 301.2, at 371-372 [(t)he essential distinction [between secure and nonsecure facilities for juveniles] is that a non-secure facility is 'open' or not locked. In a sense, the term is an oxymoronic phrase; the usual non-secure setting, a community group home or open campus-like structure, would not be deemed to be 'detention' by most lay persons"]).

Accordingly, the order of the Appellate Division should be affirmed.

* * * * *

Order affirmed, without costs. Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo and Jones concur. Judge Smith dissents and votes to reverse in an opinion in which Judges Read and Pigott concur.

Decided April 5, 2011