

HUGHES *vs.* THE STATE.

It is a rule, founded alike in humanity and good policy, designed for the protection of the citizen, and never to be departed from, that penal statutes must be strictly construed.

It is no violation of sec. 7, art. 3d, div. 5, chap. 44, of the Rev. Stat., p. 269, prohibiting the conveying to any person lawfully imprisoned, any instrument, arms, or other thing calculated to aid his escape, for a person to convey to such prisoner an instrument of writing, informing him that he has a friend, and can be released from confinement.

The design of that statute was, to prohibit the conveying to a prisoner any substantial thing, which might be used, or handled by him, in facilitating or effecting his escape.

*Writ of error to the circuit court of Pulaski county.*

THIS was an indictment against George W. Hughes, for attempting to aid the escape of a prisoner from the Penitentiary, determined in the circuit court of Pulaski county, at the May term, 1844, before the Hon. J. J. CLENDENIN, one of the circuit judges. The indictment charged that:

“Hughes, on the 30th day of March, 1844, conveyed into the jail and penitentiary house of this State, a certain instrument of writing, being a thing proper and useful to aid one John Pence, a prisoner confined therein, to escape, with the intent thereby to facilitate the escape of the said Pence, who, before that time, had been convicted of a felony, and lawfully sentenced to undergo confinement in said jail and penitentiary house, and was then, in pursuance of such conviction and sentence, lawfully confined and detained therein, contrary,” &c.

To which the defendant pleaded not guilty, the case was submitted to a jury, who found him guilty, awarded him one year's imprisonment, and assessed a fine upon him of one hundred dollars. The judgment of the court was rendered accordingly. The defendant moved for a new trial, on the ground that the verdict was against law and evidence, and in arrest of judgment, on the ground that the indictment set forth no offence against the statute, and was insufficient in law. Both of which motions the court overruled, and the defendant excepted. From his bill of exceptions it appears:

The State proved, by James McVicar, that Hughes was an under keeper in the penitentiary—had been faithful in the discharge of his duty, until the above offence was charged to him. He kept

the key of Pence's cell. About the last of March, 1844, witness found in the cell of Pence, rolled together and sowed up in a feather-pillow, two papers written upon with a pencil, the following of which he believed to be in the hand-writing of Hughes, viz:

“Know O friend on Expected know note fear note tell not ceap dark and be as secret as the Gloomy tombstone and you can be relieved of your unhappy situation. this is a nuff for you to know at present. A friend is hard to find no I her is paper and pensil put down your notions about this without eney fear yours &c (Eye)”—(On the back) “Destroy this as soon as the contents is got never let any one know what is within.”

Witness was the agent of the penitentiary, was familiar with the hand-writing of Hughes, and knew the above paper to be in his hand-writing from the character of the writing and spelling.

W. W. Stevenson, an inspector of the Penitentiary, stated that he presented the above paper to Hughes, and asked him if he had ever seen it—Hughes appeared much excited—replied that he could not tell until he examined it—took the paper, read it, and returned it—witness was afraid from the manner in which he handled it that he would tear it, and let it go himself when Hughes took hold of it, lest it should be torn. There were other witnesses examined, and a number of little circumstances shown, which had some bearing on the case, but the view which this court have taken of the case, renders it unnecessary to set out the evidence more fully.

The defendant appealed to this court, and assigns as error—that the court below erred in overruling his motion in arrest of judgment, and for a new trial, &c.

CUMMINS & HAYDEN, and TRAPNALL & COCKE, for plaintiff. The act charged, even if done, is no offence under the statute. Penal statutes must be construed *strictly*, 1 *Black. Com.* 88. Penal statutes, though not to be construed so strictly as to defeat the obvious intention of the legislature, must not be so construed as to embrace anything which was not clearly and unquestionably intended to be embraced by the legislature. *U. S. vs. Wittberger, Wheaton*, 76, 96. If the language of the statute is uncertain, the

construction must be in favor of life and liberty. *Paine's C. C. R.* 32. *U. S. vs. Sheldon*, 2 *Wheaton*, 119. *The Industry*, 1 *Gallis C. C. R.* 114. *Daggett vs. The State*, 4 *Conn. R.* 60. *Commonwealth vs. Loring*, 8 *Pick.* 376, 394. *Reed vs. Davis*, 8 *Pick.* 514, 517. *Melody vs. Reab*, 4 *Mass.* 471, 473. *Commonwealth vs. Macomber*, 3 *Mass.* 254, 257. *Commonwealth vs. Barlow*, 4 *Mass.* 439, 440. *Commonwealth vs. Martin*, 17 *Mass.* 359, 362. *Commonwealth vs. Keniston*, 5 *Pick.* 420. *Rex vs. Hervey*, 1 *W. Black.* 20.

A statute must be strictly construed even when it is only in derogation of private rights. *Smith vs. Spooner*, 3 *Pick.* 229, 230.

WATKINS, ATT'Y GEN'L, contra.

OLDHAM, J., delivered the opinion of the court.

This was a proceeding by indictment in the circuit court, under the 7 sec., art. 3d, 5 div. of the 44 chapter of the Revised Statutes, which prohibits, under penalty of fine and imprisonment, any person from "conveying into any jail or place of confinement any disguised instrument, arms, or other thing, proper or useful to aid any prisoner in his escape, with the intent thereby to facilitate the escape of any prisoner lawfully committed," &c. The indictment charges that Hughes "conveyed into the jail and penitentiary house of the State of Arkansas a certain instrument of writing, a thing proper and useful to aid one John Pence to escape," &c.

It is a rule, never to be departed from, that criminal statutes must be strictly construed. This rule is founded alike upon policy as well as humanity, designed for the protection of the citizen, unless he is clearly charged, and proven guilty, of a violation of a positive enactment of law. By the application of this rule we cannot possibly see how the defendant below violated the statute in question, by the means charged against him. How the instrument of writing could be proper and useful to aid the prisoner in his escape we cannot conceive. The paper produced in evidence upon the trial advised Pence that he "could be relieved from his unhappy situation," but the mode and means of escape are not stated. It also led him to expect and hope for aid and assistance to effect his escape.

The paper itself could be of no possible advantage to the prisoner; the information which it conveyed to him might have been conveying information to a prisoner, but does not come within the prohibition of the enactment. If it does, there is no distinction made between transmitting it by writing and communicating it verbally. Had Hughes verbally conveyed the information to Pence, which he did by means of the written instrument, it would not be contended, for a moment, that he had violated the statute in question, and yet it would have been of the same advantage to the prisoner. The design of the act was to prohibit the conveying to prisoners in confinement any substantial, tangible thing, which might be used or handled by them in facilitating or effecting their escape; but conveying information to a prisoner, by which he is led to expect aid, or that he could be released, or conveying to him any substance, which could in itself be in nowise useful or of advantage to him in making his escape, does not come within the prohibition.

The act proven upon Hughes is certainly a great offence against public justice, and most strongly addresses itself to the legislative department of the State for a remedy, but until a remedy is provided by proper authority, such offenders must be suffered to go at large unwhipt of justice. Let the judgment be reversed.

