

FILED
Nov 05, 2018
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint)	No. 35750-3-III
of:)	
)	
JAMES DOUGLAS KELLY,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	
Petitioner.)	

James Douglas Kelly seeks relief from personal restraint in the form of community custody imposed for his 2013 Spokane County conviction of possession of methamphetamine. Mr. Kelly is currently serving a prison term in Idaho for aggravated battery and has a parole eligibility hearing scheduled for January 2019. The Washington Department of Corrections (DOC) issued a detainer to Idaho authorities and is tolling Mr. Kelly's remaining community custody pending his prison release and return to Washington.

Mr. Kelly initially filed this petition in the superior court under the 2013 Spokane County cause number as a motion to dismiss his remaining community custody term, or

No. 35750-3-III
PRP of Kelly

to receive credit towards that term for time served in Idaho. The superior court transferred the motion to this court for consideration as a personal restraint petition. CrR 7.8(c)(2).

Mr. Kelly was convicted of aggravated battery in Kootenai County, Idaho in 2004. In 2008, while on parole for that conviction, he was convicted of second degree unlawful possession of a firearm and possession of methamphetamine in Spokane County cause no. 08-1-02439-4. He was sentenced to 54 months of confinement and a variable term of community custody. He was released to community custody on October 26, 2011. He subsequently committed several violations of community custody, including possession of methamphetamine in Spokane County on August 11, 2013. He subsequently was charged and convicted of that crime in superior court cause no. 13-1-02876-1. The court sentenced him to 12 months of confinement and 12 months of community custody. He was released to community custody on April 2, 2014.

Within six days of his release, Mr. Kelly failed to report to his community corrections officer (CCO) and the DOC issued a Secretary's warrant for his arrest. On April 30, 2014, Kelly contacted the DOC to inquire about his pending community custody violations and sanctions and to inform the DOC that he also had pending parole violation charges in Idaho. He told his CCO that he would contact his attorney and work on turning himself in. His CCO advised that with the pending Idaho charge, the DOC would likely address his violations with a negotiated sanction for credit for time served so

No. 35750-3-III

PRP of Kelly

he could be moved to Idaho to address his charges there. But Mr. Kelly did not report to the DOC. He instead went to Idaho and was apprehended there on May 9, 2014. Idaho officials revoked his parole for the aggravated battery sentence and returned him to prison. On July 15, 2014, the DOC sent a detainer to the Idaho Department of Corrections, advising that Mr. Kelly has a pending community custody violation in Washington and the DOC will extradite him back to Washington State upon his release from prison.

On January 28, 2018, Mr. Kelly contacted the DOC and requested that his detainer be cancelled. The DOC responded that while his CCO had previously indicated willingness to address the outstanding violations by stipulated agreement with credit for time served, Kelly instead chose not to report to the DOC to resolve those violations. Consequently, he will be required to return to Washington following completion of his Idaho sentence. His next Idaho parole hearing is in January 2019. Meanwhile, the DOC is tolling his unserved community time for both the 2008 and 2013 Spokane County cause numbers.

In this petition, Mr. Kelly contends the DOC is violating his due process rights by not affording him any hearing on the alleged community custody violations that give rise to the detainer. He states that because of the detainer, Idaho prison officials are restricting his liberty interests regarding programs, early parole, minimum custody accesses, and work release. He thus contends that under “Washington’s new tolling

No. 35750-3-III

PRP of Kelly

mandates” he is entitled to credit towards his 2013 community custody term for all time served under since his apprehension in Idaho. (Motion at 3) In the alternative, he seeks credit towards his community custody term for all time served since from the date of the Washington detainer while he awaits the due process that he claims the DOC is denying him. (Motion at 3, 4)

Since Mr. Kelly is challenging a DOC community custody tolling decision for which he has had “no previous or alternative avenue for obtaining state judicial review,” he must show that he is under restraint and that the restraint is unlawful. *See In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4(a)-(c). A petitioner may obtain relief by showing a federal or state constitutional violation or violation of the laws of the State of Washington. RAP 16.4(c)(2). To avoid dismissal, the petition must be supported by facts and not merely bald or conclusory allegations. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). A petition will be dismissed as frivolous if it “fails to present an arguable basis for relief in law or in fact, given the constraints of the personal restraint petition vehicle.” *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

First, RCW 9.94A.171(3)(a) plainly defeats Mr. Kelly’s claim that he should receive credit towards his Washington community custody term for time served in the Idaho Department of Corrections on his Idaho conviction for aggravated battery. The statute provides in relevant part:

No. 35750-3-III

PRP of Kelly

[F]or offenders other than sex offenders serving a sentence for a sex offense as defined in RCW 9.94A.030, *any period of community custody shall be tolled during any period of time the offender is in confinement for any reason unless the offender is detained pursuant to RCW 9.94A.740 or 9.94A.631 for the period of time prior to the hearing or for confinement pursuant to sanctions imposed for violation of sentence conditions, in which case, the period of community custody shall not toll. . . .*

(Italics added). RCW 9.94A.171(3)(a). Mr. Kelly’s Idaho imprisonment is “confinement for any reason,” which tolls his unserved Washington community custody terms under the statute.

Mr. Kelly’s claim that the DOC has denied him due process by failing to address his community custody violations prior to his Idaho release on parole is without merit. The DOC indicated willingness to address and resolve the violations, but Kelly chose not to report and instead left for Idaho. Consequently, the DOC issued the detainer and Mr. Kelly must be returned to Washington to complete his remaining community custody once he is paroled from his Idaho sentence. Upon his return, he will receive the due process attendant to community custody violation hearings. *See Morrissey v. Brewer*, 408 U.S. 471, 478-79, 92 S.Ct. 2593, 33 L. Ed. 2d 484 (1972); *In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 628–29, 994 P.2d 890 (2000); RCW 9.94A.737. Meanwhile, his complaints about current restrictions to his liberty interests are best addressed to Idaho prison officials.

No. 35750-3-III
PRP of Kelly

Mr. Kelly makes no showing that he is under unlawful restraint. He fails his burden under *Cashaw* and RAP 16.4. His petition does not present an arguable basis for relief in law or in fact.

Accordingly, the petition is dismissed as frivolous pursuant to RAP 16.11(b). The court also denies Mr. Kelly's request for appointed counsel. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).



REBECCA L. PENNELL
ACTING CHIEF JUDGE

Renee S. Townsley
Clerk/Administrator

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*The Court of Appeals
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November 5, 2018

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CASE # 357503
Personal Restraint Petition of James Douglas Kelly
SPOKANE COUNTY SUPERIOR COURT No. 131028761

Dear Counsel and Mr. Kelly:

Enclosed is a copy of the Order Dismissing Personal Restraint Petition filed by this Court today in the above-referenced case.

In accordance with RAP 16.14(c) and RAP 13.5 A, review of this Order may be obtained only by filing a Motion for Discretionary Review in the Washington State Supreme Court within 30 days after the filing of this Order. A copy must be filed with the Court of Appeals.

The address for the Washington State Supreme Court is Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:bls
Hon. Michael P. Price **E-MAIL**
Enclosure