IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 76889-1-I
JESS R. SMITH,	)	ORDER OF DISMISSAL
Petitioner.	)	

Jess Smith filed this personal restraint petition challenging the decision of the Department of Corrections (DOC) to change his custody classification. In order to obtain relief in this setting, Smith must demonstrate that he is being "restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c)." In re Pers. Restraint of Grantham, 168 Wn.2d 204, 227 P.3d 285, 290 (2010) (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004)). Because Smith fails to meet this burden, his petition is dismissed.

On March 17, 2017, Smith was overhead making an offensive and derogatory statement about another offender. He was infracted for violating WAC § 137-25-030 (896) (harassing, using abusive language, or engaging in other offensive behavior directed to or in the presence of another person(s) or group(s) based upon race, creed, color, age, sex, national origin, religion, sexual orientation, marital status or status as a state registered domestic partner, disability, veteran's status, or genetic information). Smith received a demotion in his maximum custody level from level 4 to level 2.[1]

[1] Offenders on maximum custody, as Smith was in March 2017, participate in a program management level system that rewards positive behavior by promotion through a system of levels. Four program management levels are available, with the lowest level of privileges available at level 1 and the highest level of privileges available at level 4.

Smith was ultimately found not guilty of the infraction. Smith appealed the demotion. The Correctional Program Manager (CPM) denied the appeal, finding that Smith was exhibiting negative behavior contrary to appropriate level progression. Smith subsequently was promoted to level 3 on April 15, 2017, and to level 4 on May 27, 2017. Smith was transferred out of maximum custody to the general population on August 21, 2017.

Smith contends that DOC Policy 320.250 deprives him of due process because it permits a demotion in custody level without a finding of guilty at a disciplinary hearing.[2] But "[t]he threshold question in every due process challenge is whether the challenger has been deprived of a protected interest in life, liberty, or property." In re Pers. Restraint of Pullman, 167 Wn.2d 205, 211-12, 218 P.3d 913 (2009). And it is well established that offenders do not have a protected liberty interest in a favorable custody classification, nor in general population housing. In re Pers. Restraint of Dowell, 100 Wn.2d 770, 674 P.2d 666 (1984); see also Meachum v. Fario, 427 U.S. 215, 225, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) (transfer from general population to maximum security is "within the normal limits or range of custody which the conviction has authorized the State to impose," even when the conditions in maximum security are "substantially more burdensome").[3]

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[2] DOC Policy 320.250 governs placement in and release from maximum custody. It provides that offenders may be promoted or demoted to different custody levels based on various criteria including "acceptable communication, cooperation, and interaction with employees/contract staff and other offenders." A unit sergeant "may immediately demote an offender's level based on offender behavior." An offender may appeal a demotion to the Correctional Program Manager (CPM)/Correctional Mental Health Program Manager or designee.

[3] Smith also contends that DOC Policy 320.250 violates due process because it is unconstitutionally vague. This court need not address this argument because the policy does not impact a protected liberty interest.

Smith next argues that DOC Policy 320.250 violates his First Amendment right to free speech. But offenders have limited First Amendment rights. Shaw v. Murphy, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). And prison regulations may restrict an offender's speech where such restrictions are rationally related the legitimate penological interest of security. In re Pers. Restraint of Parmelee, 115 Wn. App. 273, 282, 63 P.3d 800 (2003) (offender's First Amendment rights not violated by punishment for using "insolent language" in written grievances).

Finally, Smith contends that, in changing his custody classification, DOC violated WAC 137-28-350(1), which provides that "[i]f the hearing officer finds the offender not guilty of a violation, disciplinary sanctions shall not be imposed on the offender for that violation." But it is clear that Smith did not receive a disciplinary sanction as a result of the infraction, nor does the infraction appear on Smith's infraction record.

Because Smith makes no showing that he is unlawfully restrained, now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 28th day of February, 2018.

Trickey, ACJ
Acting Chief Judge

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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CASE #: 76889-1-I
Personal Restraint Petition of Jess R. Smith

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5A."

This court's file in the above matter has been closed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

SSD

enclosure