COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**No. 35407-5-III**
KEVIN ALLEN ANDERSON,	)	**ORDER DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	)	

Kevin Anderson is currently in Airway Heights Corrections Center serving an exceptional 120-month sentence comprised of two consecutive statutory maximum 60-month sentences for his 2010 Spokane County convictions upon plea of guilty to third degree assault with sexual motivation and unlawful imprisonment. He challenges the Department of Corrections (DOC) calculation of his prison maximum sentence expiration date.[1]

Mr. Anderson began serving his prison sentence on December 16, 2010.

[1] The prison maximum expiration date is the date of release from prison if the offender serves the entire sentence imposed by the trial court without any reduction for early release time.

Accounting for 277 days of county jail credit, the DOC calculated prison maximum sentence expiration dates of March 13, 2015 for the count one (assault) sentence and March 11, 2020 for the consecutive count two (unlawful imprisonment) sentence. This correctly reflected the 120-month statutory maximum sentence imposed by the trial court.

Mr. Anderson is an offender sentenced under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, who is eligible for community custody in lieu of earned early release based upon early release or "good time" credits earned. RCW 9.94A.729(5). He earned credits such that his earned early release date for count one was December 8, 2013. On that date, he started serving the total confinement portion of the count two sentence. He earned additional good time credits and his overall earned early release date was April 7, 2017. But the DOC has not released him to community custody because he has not provided an approved residence and living arrangement as required under RCW 9.94A.729(5)(b), and because he is eligible for civil commitment as a sexually violent predator pursuant to chapter 71.09 RCW.

In this petition, Mr. Anderson claims the DOC has erroneously calculated March 11, 2020 as the prison maximum sentence expiration date for his count two unlawful imprisonment sentence.[2] He contends his 60-month sentence for count one was "maxed out" or expired on the earned early release date of December 8, 2013, and because he

[2] Mr. Anderson does not claim that he is currently unlawfully confined beyond his April 7, 2017 earned early release date.

commenced serving the consecutive count two sentence on that date, count two must automatically expire with the passage of 60-month statutory maximum on December 7, 2018.

Since Mr. Anderson is challenging a DOC decision for which he has had no prior opportunity for judicial review, he must show that he is under restraint and the restraint is unlawful. RAP 16.4(a), (c); *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). A petitioner under restraint may obtain relief by showing a constitutional violation or violation of the laws of the State of Washington. *Cashaw*, at 148; RAP 16.4(c)(2). 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).

In support of his claim that the maximum sentence expiration date for count two is December 7, 2018, Mr. Anderson theorizes that the DOC has erroneously structured his sentences as one distinct 10-year sentence by "saving" the good time he earned on the "expired" count one sentence and applying it to the count two sentence, such that he accrues 35 months of earned release credit for count two. He contends this "accrual" violates RCW 9.94A.729(3)(e), which plainly authorizes a maximum of one-third early release time (20 months) for his count two sentence. The result, he concludes, is that the DOC has unlawfully extended the 5-year statutory maximum for count two to 6 ¼

years—the period from December 8, 2013 to March 11, 2020. His arguments fail.

First, Mr. Anderson's count one sentence did not expire on the earned early release date of December 8, 2013. Community custody is a component of the sentence. RCW 9.94A.030(18); RCW 9.94A.505. It cannot begin until he is released from total confinement. RCW 9.94A.707(1)(a) (community custody shall begin upon completion of the term of confinement); RCW 9.94A.589(5) (in the case of consecutive sentences, all periods of total confinement shall be served before any community supervision). Consistent with these statutes, RCW 9.94A.171(3) provides that "[a]ny period of community custody shall be tolled during any period of time the offender is in confinement for any reason." The broad language of this provision clearly covers Mr. Anderson's situation such that his term of community custody for count one tolls, and is not expired, during his confinement on count two. *See State v. Cameron*, 71 Wn. App. 653, 657, 861 P.2d 1069 (1993) (period of community supervision tolled while offender remains incarcerated on another sentence that is being served concurrently); *see also State v. Acrey*, 97 Wn. App. 784, 787-88, 988 P.2d 17 (1999) (same). Absent tolling, Mr. Anderson would effectively serve part of the sentence concurrently, contravening RCW 9.94A.589(5) and the judgment and sentence.[3]

[3] The sanction provision of RCW 9.94A.633(2) further illustrates that a sentence does not expire on the earned early release date. The statute provides that "[i]f the offender was transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.728, the offender may be transferred to a more restrictive

Mr. Anderson's cited case *In re Pers. Restraint of Paschke*, 61 Wn. App. 591, 811 P.2d 694 (1991), for the proposition that maximum expiration dates must be adjusted by earned early release credits is inapposite. *Paschke* involved crimes sentenced under the pre-SRA indeterminate sentencing statute, chapter 9.95 RCW, in which the Board of Prison Terms and Paroles had the authority to release an inmate from confinement to parole prior to expiration of the maximum term sentence. The *Paschke* court interpreted RCW 9.92.080(1)—a statute not applicable to SRA sentences—to mean that the maximum term expiration date for each consecutive sentence is calculated as commencing from the date the inmate would otherwise have been released from confinement to parole under the first term. *Id*. at 594.

Mr. Anderson contends *Paschke* controls and requires his second 60-month sentence to start on the December 8, 2013 earned early release date for the count one sentence. But the indeterminate/parole system applicable in that case did not include the SRA equivalent of RCW 9.94A.171(3)'s community custody tolling provision or RCW 9.94A.589(5)'s requirement that all consecutive periods of total confinement must be served before any community supervision. Those SRA provisions govern here.

Given the SRA tolling provisions, Mr. Anderson's contention that the sentence for

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confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation." *Id.* In other words, an offender who violates community custody conditions may be returned to prison to serve up to the remainder of the sentence.

count one expired on December 8, 2013, and its community custody term was unlawfully added to the count two sentence is without merit. The maximum prison expiration date of March 11, 2020 for count two is unaffected by earned early release credits while Mr. Anderson remains in total confinement, and is correct. If never released to community custody prior to that date, he will have served the total 120-month sentence imposed by the trial court and no more.

Mr. Anderson makes no showing that the DOC is subjecting him to unlawful restraint. He fails his burden under RAP 16.4 and *Cashaw*. His petition fails to 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. Anderson's request for appointed counsel. *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
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April 30, 2018

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CASE # 354075
Personal Restraint Petition of Kevin Allen Anderson
SPOKANE COUNTY SUPERIOR COURT No. 091028622

Dear Counsel and Mr. :

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,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:bls
Enclosure