

**FILED**  
**Aug 08, 2018**  
Court of Appeals  
Division III  
State of Washington

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

<b>In the Matter of the Personal Restraint</b>	)	<b>35860-7-III</b>
<b>of:</b>	)	
	)	
	)	
<b>ABRAN LEE GIBSON,</b>	)	<b>ORDER DISMISSING PERSONAL</b>
	)	<b>RESTRAINT PETITION</b>
<b>Petitioner.</b>	)	
	)	
	)	

Abran Lee Gibson was convicted on a guilty plea in 2017 of second degree taking a motor vehicle without permission. The Spokane County Superior Court imposed a prison-based drug offender sentencing alternative (DOSA) sentence of 12.75 months of confinement and 12.75 months of community custody. During the two months that Mr. Gibson was enrolled in the substance abuse treatment program, he was sanctioned for four serious infractions and then was administratively terminated from the treatment program. Due to his termination from the treatment program, the Department of Corrections (DOC) revoked his DOSA. He seeks relief from personal restraint, contending (1) only the superior court had authority to revoke his DOSA, and (2) the

DOC hearing officer violated his constitutional right to counsel at the DOSA revocation hearing.

A petitioner who challenges a decision from which he has had “no previous or alternative avenue for obtaining state judicial review” need only show that he is under restraint and that the restraint is unlawful. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4(a), (c). This review standard applies to petitions challenging the results of DOSA revocation hearings. *See In re Pers. Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005). Mr. Gibson is under restraint and has not been afforded a previous or alternative avenue for obtaining state judicial review of his DOSA revocation.

An individual facing revocation of a DOSA is entitled to the procedural protections established in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and the evidentiary burden at a revocation hearing is a preponderance of the evidence. *McKay*, 127 Wn. App. at 168-170. The minimum requirements for due process in a prison-based DOSA revocation hearing are the same as the requirements for revocation of a community-based DOSA:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of

which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

*In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 628-29, 994 P.2d 890 (2000) (quoting *Morrissey*, 408 U.S. at 489); *In re Pers. Restraint of Boone*, 103 Wn.2d 224, 231, 691 P.2d 964 (1984); *McKay*, 127 Wn. App. at 168-70.

Mr. Gibson first contends that only the sentencing court—not a DOC hearing officer—has authority to revoke his DOSA and to remand him to custody for the balance of his sentence. It is well-settled, however, that under RCW 9.94A.662(3), the DOC is authorized to hold a hearing and revoke a DOSA sentence. *In re Pers. Restraint of Price*, 157 Wn. App. 889, 909, 240 P.3d 188 (2010) (applying former RCW 9.94A.660); *State v. Roy*, 126 Wn. App. 124, 128, 107 P.3d 750 (2005) (applying former RCW 9.94A.660). This prison-based DOSA statute directs that if the DOC finds that the offender willfully violated the conditions of community custody, the DOC may reclassify the offender to serve the remaining balance of the original sentence, and if the offender fails to complete treatment or is administratively terminated from the treatment program, the DOC is required to reclassify the offender to serve the unexpired term of the sentence that was ordered by the court. RCW 9.94A.662(3). Under the plain terms of the statute, the DOC properly exercised its authority to hold a hearing and revoke Mr. Gibson’s DOSA. *Price*, 157 Wn. App. at 909.

Mr. Gibson additionally argues that the hearing officer violated his right to counsel at the DOSA revocation hearing. The record does not support his assertion.

Individuals facing DOSA revocation may request appointment of counsel, which may be granted on a case-by-case basis in the exercise of the DOC's sound discretion. *In re Pers. Restraint of Schley*, --- Wn.2d ---, --- P.3d ---, 2018 WL 3582964 at ¶ 28 (2018); *Grisby v. Herzog*, 190 Wn. App. 786, 798, 362 P.3d 763 (2015) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)); *State v. Ziegenfuss*, 118 Wn. App. 110, 116, 74 P.3d 1205 (2003). The record here shows that the hearing officer asked Mr. Gibson if he wanted to request counsel, and Mr. Gibson answered that he did. The hearing officer then went through a screening checklist to determine if appointed counsel was advisable. This screening presented a series of questions to determine Mr. Gibson's understanding of the hearing process. The hearing officer asked Mr. Gibson what he understood to be the reasons for the hearing, the role of the hearing officer and witnesses, his right to ask questions or to make a statement, and the sanctions he faced.

After this discussion, the hearing officer asked Mr. Gibson if there were any complex matters he faced in preparing for the hearing. Mr. Gibson responded that there were not. Finding that Mr. Gibson appeared to understand the hearings process and his rights, the hearing officer concluded that he could ably represent himself and did not need

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*PRP of Gibson*

appointed counsel. The hearing officer's screening complied with the directive in *Schley* to consider a request for counsel on a case by case basis, and was a sound exercise of discretion.

On balance, the record shows that Mr. Gibson received the minimum due process rights granted to those who face revocation of a DOSA, and that the hearing officer conducted the proper review of his request for appointed counsel. He thus fails to show unlawful restraint. RAP 16.4.

His petition is dismissed as frivolous. RAP 16.11(b). The court also denies his request for appointment of counsel. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150.



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**REBECCA L. PENNELL**  
**ACTING CHIEF JUDGE**

Renee S. Townsley  
Clerk/Administrator

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*The Court of Appeals  
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August 8, 2018

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CASE # 358607  
Personal Restraint Petition of Abran Lee Gibson  
SPOKANE COUNTY SUPERIOR COURT No. 171004457

Dear Counsel and Mr. Gibson:

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  
Enclosure