

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

IN THE MATTER OF THE)	
PERSONAL RESTRAINT OF:)	No. 82813-4-I
)	
JOSEPH GLEN BLUE,)	ORDER DISMISSING
)	PERSONAL RESTRAINT
Petitioner.)	PETITION
_____)	

Joseph Blue is serving an indeterminate sentence imposed on his conviction of first degree rape in Island County Superior Court Cause No. 07-1-00200-7. Blue filed a personal restraint petition challenging the March 2021 decision of the Indeterminate Sentencing Review Board extending his minimum sentence by 24 months. In order to obtain relief by means of a personal restraint petition, a petitioner bears the burden of showing that he or she is under restraint and that the restraint is unlawful. RAP 16.4; see also In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

In 2008, a jury convicted Blue of first degree rape and one count of second degree assault for a violent attack on his girlfriend which involved Blue beating the victim over the head, gouging her eyes with his thumbs, biting her until she bled, hitting and kicking her, and urinating on her. On direct appeal, this court upheld the rape conviction but held that Blue's assault conviction should have merged into the

No. 82813-4-I/2

rape conviction. See State v. Blue, No. 62229-3-I, noted at 155 Wn. App. 1001, rev. denied, 169 Wn.2d 1022 (2010). On remand, the trial court vacated the assault conviction and sentenced Blue under former RCW 9.94A.712 (2006), recodified as RCW 9.94A.507, to an indeterminate sentence of 123 months to life.

After conducting a hearing under RCW 9.95.420 in 2017, the Board found Blue releasable, subject to a number of conditions in addition to those imposed by his judgment and sentence. However, within months of his release, the Board revoked Blue's community custody based on violations of several conditions of community custody and conditions of release, including engaging in substance use, participating in an undisclosed relationship, and possessing sexually suggestive materials.

The Board reviewed the case again in 2019, determined Blue was not releasable, and added 24 months to his minimum term. Blue filed a personal restraint petition challenging the Board's 2019 decision, which this court dismissed. See No. 80464-2. The Supreme Court denied discretionary review. See No. 98817-0.

In February 2021, the Board held another hearing under RCW 9.95.420. The Board considered all the information in Blue's file, and testimony from a Department of Corrections Classifications Counselor, a psychology associate, and Blue. In a March 2021 written decision, the Board found by a preponderance of the evidence that Blue is more likely than not to reoffend if released on conditions. Therefore, the Board added 24 months to Blue's minimum term. The Board's ruling set forth three bases for its decision: (1) Blue failed to complete chemical dependency treatment

despite the fact that substance use was a basis for revocation of release and is an “identified high risk for him,” (2) Blue’s risk classification is level III, as determined by the End of Sentence Review Committee (ESRC) and he has a high or moderate/high risk of re-offense according to the Static 99-R actuarial tool; and (3) an ESRC subcommittee recommended that Blue should not be released until he undergoes a forensic psychological evaluation to determine if he meets civil commitment criteria under RCW 71.09.020.

A Board decision setting a new minimum term is reviewed for an abuse of discretion, and the appellate court gives substantial deference to the judgment of the Board. In re Pers. Restraint of Locklear, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992). An abuse of discretion may be found where the Board fails to follow its own procedural rules for parolability hearings or where the Board bases its decision on speculation and conjecture only. In re Pers. Restraint of Dyer (Dyer I), 157 Wn.2d 358, 363, 139 P.3d 320 (2006). The petitioner bears the burden to prove the Board abused its discretion. In re Pers. Restraint of Addleman, 151 Wn.2d 769, 776, 92 P.3d 221 (2004).

In the case of a sex offender serving an indeterminate sentence, prior to the end of the minimum term, the Department of Corrections provides a recommendation about whether to release the offender. RCW 9.95.420(3)(a). The Board then conducts a hearing “to determine whether it is more likely than not that the offender will commit sex offenses if released on conditions to be set by the board.” RCW 9.95.420(3)(a); WAC 381-90-050(3). The Board “shall” order the offender released unless it determines by a preponderance of the evidence that it is

No. 82813-4-I/4

more likely than not that the offender will commit sex offenses if released. RCW

9.95.420(3)(a). In making a release decision, the Board may consider:

- (a) The length of time necessary for the offender to complete treatment and programming;
- (b) The offender's failure to participate in required evaluations;
- (c) The offender's proposed release plan; and
- (d) Other pertinent information.

WAC 381-90-050(4). All relevant information is admissible, and the factors that the

Board may consider include but are not limited to:

- (1) Refusal to participate in available programs or resources designed to assist an inmate to reduce the risk of reoffense (e.g., stress and anger management, victim awareness, substance abuse treatment, sex offender treatment).
- (2) Serious and repetitive disciplinary infractions during incarceration.
- (3) Evidence of an inmate's continuing intent or propensity to engage in sex offenses.
- (4) Statements or declarations by the inmate of intent not to comply with conditions of community custody.
- (5) End of sentence review determination based on actuarial assessments identifying risk to sexually reoffend.

WAC 381-90-140; 150.

Blue appears to allege that (1) by extending his minimum term, the Board imposed an unlawful "exceptional" sentence; (2) a referral for a forensic psychological evaluation is not a valid basis to find him not releasable; and (3) the ESRC did not conduct the required forensic evaluation. But this court already addressed and rejected each of these arguments when it dismissed Blue's petition challenging the 2019 Board decision. See No. 80464-2-I. As previously explained, Blue is subject to indeterminate sentencing provisions based on his conviction of rape in the first degree. The court did not impose an exceptional sentence and his challenge to the Board's jurisdiction is without merit. The Board did not deny release

merely based on possibility that Blue may qualify for civil commitment. And the ESRC is entitled to refer an offender to the sexually violent predator (SVP) subcommittee based on a finding that the offender “appears to meet” the statutory criteria for civil commitment. DOC Policy 350.500.

This court generally will not review issues that were raised and rejected on direct appeal or in a prior personal restraint petition unless the interests of justice require relitigation. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); In re Pers. Restraint of Haverty, 101 Wn.2d 498, 502-03, 681 P.2d 835 (1984). Blue does not acknowledge or distinguish his prior petition. RCW 10.73.140 provides in relevant part: “If...the petitioner has previously raised the same grounds for review...the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.” RAP 16.4(d) also provides: “No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.” Blue seeks relief on the same grounds that were addressed on the merits in a prior petition and fails to establish that the interests of justice require relitigation of these issues.

Blue also claims the Board abused its discretion in finding him not releasable, in part, because he has not satisfactorily addressed his chemical dependency issues. The Board is authorized to consider the offender’s lack of participation in programs designed to assist or reduce the risk of re-offense. WAC 381-90-150(1). Blue claims that such treatment does not relate to his risk of re-offense. But to the contrary, there is significant evidence in the record of drug and alcohol use connected to Blue’s 2007 crime. When released in 2017, the Board identified sexual

deviancy and chemical dependency as two of Blue's highest risks. Blue abused alcohol and drugs during his brief release to community custody. As noted in the Board's decision, Blue was terminated from chemical dependency treatment before the hearing because he demonstrated a lack of interest in the structure of and participation in treatment. Because Blue's chemical dependence is well documented as a contributing factor to his offenses and unlawful sexual conduct, the Board did not abuse its discretion in relying on his failure to participate in treatment as one of the reasons supporting the denial of release.

As he argued at the Board hearing, Blue also challenges the reliance on his level III risk classification and Static-99R scoring, primarily because he disagrees with the ESRC's designation of several prior offenses as "sex offenses." Blue's argument is based on the fact that, apart from the 2007 rape, he has not been criminally convicted of any other sex offense. But for purposes of the Static-99R scoring and risk classification, whether or not the conduct resulted in a conviction for a sex offense is not dispositive. As the Board points out, according to the Static-99R coding rules, charges or convictions are treated as sex offenses if the underlying conduct involves illegal sexual behavior and the conduct results in some manner of criminal justice intervention, such as an arrest or the filing of charges. See www.static99.org/pdfdocs/Coding_manual_2016_InPRESS.pdf.

Here, Blue's pre-2007 Arizona and Colorado offenses both involved allegations of rape. The Arizona offense resulted in a conviction. And Blue's former spouse alleged that he raped her in 2017 while he was released on community custody. These offenses were therefore properly scored as three sex offenses and

No. 82813-4-I/7

one prior conviction. Blue points to no evidence that refutes the record indicating that illegal sexual behavior was a part of these prior incidents. Blue fails to demonstrate an abuse of discretion in the Board's reliance on the ESRC's risk classification and the actuarial assessment.

Blue also claims he was denied the right to counsel at the 2021 Board hearing. No authority supports the claim of a right to counsel in the context of releasability hearings. The Washington Supreme Court has determined that the limited procedural rights required at hearings under RCW 9.95.420 before the Board do not include the right to counsel, absent exceptional circumstances such as severe disability that prevents an offender from engaging in meaningful discussion with the Board. See In re Pers. Restraint of McCarthy, 161 Wn. 2d 234, 245, 164 P.3d 1283 (2007).

Finally, Blue contends that the Board violated his rights by failing to refer him to the prosecuting attorney or attorney general. But the statute he cites, RCW 71.09.025(1)(a), requires such referral three months before the anticipated release date. Blue does not have an anticipated release date because he is serving an indeterminate sentence and was found not to be releasable by the Board. See RCW 71.09.025 (authorizing filing of civil commitment petition when individual is "about to be released from total confinement.")

Blue has not met his burden of demonstrating that the Board abused its decision in finding him not releasable and extending his minimum term. He has not demonstrated that his restraint is unlawful.

Now, therefore, it is hereby

No. 82813-4-I/8

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

Andrus, A.C.J.
Acting Chief Judge