FILED
10/7/2021
Court of Appeals
Division I
State of Washington

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF: RONALD W. BUZZARD, JR., Petitioner.	No. 82441-4-I ORDER OF DISMISSAL

Ronald Buzzard files this personal restraint petition challenging the Indeterminate Sentence Review Board's (ISRB) 2020 decision revoking his release to community custody, the conditions that the ISRB imposed upon his June 2016 release, and other issues. He seeks reversal of the revocation and remand with instruction to the ISRB to release him from custody. To prevail, Buzzard must show that he is under restraint and that the restraint is unlawful. RAP 16.4; In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). Because he fails to meet this burden and his claims are frivolous, this petition must be dismissed.

BACKGROUND

Buzzard pleaded guilty in 2002 to first degree rape of a child in King County Superior Court No. 02-1-02656-3 KNT. The trial court imposed an indeterminate sentence, consisting of a minimum term of 123 months confinement and a maximum term of life. The court suspended the sentence under the special sex offender

sentencing alternative but, in 2003, it revoked the suspended sentence and ordered Buzzard to serve his term of imprisonment.

On direct appeal, this court affirmed Buzzard's conviction and the revocation of his suspended sentence. State v. Buzzard, No. 52274-4-I, review denied, 153 Wn.2d 1015, 106 P.3d 762 (2005). The mandate terminating review was issued in 2006.

In the years since, ISRB has extended Buzzard's minimum sentence several times. He has filed numerous collateral attacks to his guilty plea, sentence, the calculation of his release date, and the extensions of his minimum term.[1]

In June 2016, the ISRB released Buzzard to community custody and imposed several conditions in addition to those imposed by his judgment and sentence, including: (1) a prohibition against possessing sexually explicit materials; (2) not accessing the internet without a written safety plan approved by a Community Corrections Officer (CCO) and therapist; and (3) submit to a search of his "person, residence, vehicle, and/or possessions" upon request, including his "computer, cell phone, and any other electronic devices."

In July 2020, Buzzard was arrested after reports of his unapproved contacts with minor females. The CCO received information that Buzzard used a fake name to convince women and their children to go hiking with him. The CCO also searched Buzzard's mobile phone and discovered that he had visited a bar and had a video

[1] Buzzard's prior petitions include: No. 53829-2-I, No. 56789-6-I, No. 57412-4-I, No. 64685-1-I, No. 65500-1-I, No. 67082-4-I, No. 68255-5-I, No. 69399-9-I, No. 69491-0-I, No. 70185-1-I, No. 74780-1-I, No. 77341-1-I, and No. 82236-5-I.

of a minor female taking a shower and exposing her genitalia. He then received notice of the following alleged violations: (1) contacting minor children; (2) accessing social media platforms without CCO approval; (3) possessing sexually explicit materials; and (4) entering a bar where alcohol is the primary beverage served.

At the August 2020 violation hearing, Buzzard pleaded guilty to the contacting minor children charge, but not guilty to the remaining charges. Witnesses testified, evidence was submitted, and arguments were lodged at the hearing, where Buzzard was represented by counsel. In its written decision, the ISRB found Buzzard guilty of accessing social media without approval, guilty of possessing sexually explicit materials, and not guilty of the entering a bar charge. It revoked his community custody based on his lack of accepting responsibility for his high-risk behaviors, lack of insight and transparency, and possessing child pornography. The ISRB ordered that Buzzard be returned to confinement.

DISCUSSION

In March 2021, Buzzard filed this petition asserting numerous arguments. The ISRB filed a response. Upon review of the submissions, Buzzard's challenges do not raise any non-frivolous issues.

A. Constitutionality of the ISRB

Buzzard asserts that the ISRB's existence is unconstitutional, but he does not cite any authority to support this position. Claims unsupported by citation of authority, references to the record, or persuasive reasoning fail "to meet the evidentiary threshold required to warrant collateral review on the merits," In re Pers.

Restraint of Cook, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). Therefore, this unsupported assertion fails to warrant further review.

B. Community Custody Conditions

Buzzard challenges the community custody conditions that the ISRB imposed upon his release from confinement as unconstitutional, not crime-related, and beyond the ISRB's authority. But he raised these same arguments in a prior petition. See No. 77341-1-I (dismissing Buzzard's petition upon concluding that he failed to demonstrate that the conditions imposed were unlawful). Under RCW 10.73.140, this court will not consider a petition that raises the same grounds for review as were raised in a previous petition or other collateral attack. A new petition "must raise new points of fact and law that were not or could not have been raised in the principal action." In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). A petitioner cannot create a "new" ground for relief by recasting the same issue, or by merely supporting a previous ground for relief with different factual allegations or different legal arguments. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004).

C. Notice of Indeterminate Sentence

Buzzard argues that he was not given notice at the time he pleaded guilty that he would receive an indeterminate sentence under the jurisdiction of the ISRB. But this argument was rejected in one of his prior petitions. See No. 71988-2-I. And to the extent that he is attempting to challenge the voluntariness of his guilty plea, the challenge is both time-barred and successive.

D. Ex Post Facto Violations

Next, Buzzard says his "punishment was increased when numerous community custody conditions were added that were not law in effect" at the time he was initially sentenced by the trial court. But he has previously raised this claim and it was rejected in petition No. 71988-2-I (dismissing ex post facto violation claim). Thus, RCW 10.73.140 precludes Buzzard from again raising this claim.

E. Equal Protection Violation

Buzzard contends that the ISRB's sanction of return to confinement violates the equal protection clause, as similarly situated offenders are sanctioned 3 days or 30 days for community custody violations pursuant to WAC 137-104-025(3)(a), (b). However, WAC 137-104-025 concerns community custody violations under the jurisdiction of the DOC, not the ISRB. The regulations governing the ISRB's community custody violation proceedings are found in chapter 381-100 WAC. And the pertinent subsection reads:

> If the presiding officer concludes that the alleged violations of conditions of community custody have been proven by a preponderance of the evidence, the presiding officer may impose sanctions in accordance with an adopted sanction grid. If the sanction is revocation of the offender's community custody, the board shall enter an order of community custody revocation and return the offender to prison.

WAC 381-100-290(4). Because the ISRB was not bound by the provisions of WAC 137-104-025, his contention fails.

F. Violation Hearing Procedure

At the August 2020 violation hearing, according to Buzzard, the ISRB failed to follow its own administrative rules by not following WAC 137-104-025 to sanction

him. This argument is frivolous for the reasons set forth above and because the record clearly shows that the ISRB gave Buzzard the required minimum due process. Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (discussing minimum due process requirements for violation hearings). Here, the ISRB provided Buzzard with written notice of the claimed violations, a list of the evidence against him, an opportunity to be heard and to present witnesses and documentary evidence, a neutral and detached hearing officer, and a written statement by the hearing officer referring to the evidence relied upon to justify its decision to revoke community custody. WAC 381-100-140, -150.

G. Mobile Phone Search

Buzzard also complains that the CCO's search of his mobile phone after his arrest in July 2020 was unlawful because it was done without a warrant. Here, one of the conditions permitted the CCO to conduct a search of his "person, residence, vehicle and/or possessions" included his "cell phone and any other electronic devices." So long as the CCO had a "reasonable suspicion" of Buzzard violating his conditions, no search warrant was needed.

Under Article 1, section 7 of the Washington State Constitution, a person under community supervision has a lesser expectation of privacy "and may be searched on the basis of a well-founded or reasonable suspicion of a probation violation." State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); RCW 9.94A.631(1) (permitting a CCO to conduct a warrantless search of an offender's "person, residence, automobile, or other personal property" "[i]f there is reasonable

cause to believe that an offender has violated a condition or requirement of the sentence").

Here, the record establishes that the CCO had reasonable suspicion to search Buzzard's mobile phone. The CCO reported that, prior to arresting Buzzard, she communicated with an adult who claimed Buzzard went on a hike with minors (around age 9), swam with them, and asked the adult "if her daughter needed a father figure." Buzzard reportedly used the name "Scott Evans" as an alias when he engaged with the minors and in several social media postings. Buzzard was not allowed to contact minors or access the internet without the CCO's approval. Buzzard was arrested for violating these conditions. The CCO searched Buzzard's mobile phone only after his arrest. Because the CCO had a reasonable suspicion that Buzzard violated his conditions, the warrantless search of the mobile phone was not unlawful.

H. Jury at the Violation Hearing

Finally, Buzzard contends that he was entitled to have a jury decide whether he violated his community custody conditions beyond a reasonable doubt, relying solely on U.S. v. Haymond, --- U.S. ---, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019) (plurality holding that 18 U.S.C. § 3583(k), which imposes a mandatory minimum sentence for violations of supervised release, was unconstitutional). But, as Division Three recently concluded in a published opinion, Haymond does not abrogate long-standing Washington case law establishing that:

> Even in the case of adult offenders, the Washington Supreme Court has held when the State seeks revocation of probation, it is not required to prove an offender's breach of a condition of his probation

> beyond a reasonable doubt. "A revocation or modification proceeding under our statutes is not a criminal prosecution within the contemplation of Const. Art. I, § 22 (amendment 10) entitling a defendant, as a matter of right, to the privileges therein accorded."

State v. M.N.H., No. 37207-3-III, at *13-14 (Wash. Ct. App. Sept. 21, 2021), http://www.courts.wa.gov/opinions/pdf/372073_pub.pdf, (quoting State v. Shannon, 60 Wn.2d 883, 888, 376 P.2d 646 (1962) (emphasis in original).[2] It also noted that the Haymond "plurality went to great lengths to make clear its holding was based on § 3583(k)'s mandatory minimum sentence." Id. at *10.

Thus, it is clear that Haymond did not entitle Buzzard to a jury at his community custody violation hearing before the ISRB.

Buzzard has not demonstrated that his restraint is unlawful and "fails to present an arguable basis for collateral relief either 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). His petition is frivolous and must be dismissed.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).[3]

Andrus, A.C.J.
Acting Chief Judge

[2] Division Three also cited these opinions standing for the same proposition: Standlee v. Smith, 83 Wn.2d 405, 408, 518 P.2d 721 (1974) ("It is clear that there is a different level of proof applicable to revocation hearings than criminal proceedings."); City of Aberdeen v. Regan, 170 Wn.2d 103, 113, 239 P.3d 1102 (2010) ("The burden in probation revocation hearings is reasonable satisfaction," even when the condition of probation that is violated is a requirement to commit "[n]o criminal violations of law."). M.N.H., No. 37207-3-III, at *14.

[3] Buzzard's motions for accelerated review are denied as moot.