

Hoyt, Trina (ATG)

From: ATG MI COR Oly CE Reader
Sent: Monday, September 14, 2015 9:18 AM
To: Hoyt, Trina (ATG)
Subject: FW: COURT OF APPEALS 73374-5-I Personal Restraint Petition of Bobby Darrell Colbert
Attachments: 73374-5 Colbert - 9.11.15 letter.pdf; 73374-5 Order Dismissing.pdf
Importance: High

From: Larson, Ronda (ATG)
Sent: Friday, September 11, 2015 4:04 PM
To: ATG MI COR OLY LA EF; ATG MI COR Oly CE Reader
Subject: FW: COURT OF APPEALS 73374-5-I Personal Restraint Petition of Bobby Darrell Colbert
Importance: High

From: Wise, Laurel
Sent: Friday, September 11, 2015 4:03:49 PM (UTC-08:00) Pacific Time (US & Canada)
To: Larson, Ronda (ATG); ATG MI COR Oly CE Reader
Subject: COURT OF APPEALS 73374-5-I Personal Restraint Petition of Bobby Darrell Colbert

RICHARD D. JOHNSON
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
One Union Square
600 University Street
Seattle, WA
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The attached order is being transmitted to counsel electronically. No hard copy will follow.

*Pending
Server*

RICHARD D. JOHNSON,
Court Administrator/Clerk

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September 11, 2015

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CASE #: 73374-5-1
Personal Restraint Petition of Bobby Darrell Colbert

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

law

enclosure

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

In the Matter of the Personal)	
Restraint of:)	No. 73374-5-1
)	
BOBBY DARRELL COLBERT,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	
Petitioner.)	
_____)	

Bobby Colbert is confined pursuant to convictions for second degree rape and third degree rape in Skagit County No. 04-1-00497-6. Colbert has filed a personal restraint petition challenging the 2014 decision of the Indeterminate Sentence Review Board (ISRB) adding 24 months to his minimum term. In order to obtain relief by means of a personal restraint petition, Colbert must demonstrate that he 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). Because Colbert fails to meet this burden, his petition must be dismissed.

On November 12, 2014, prior to the expiration of Colbert's minimum term, the ISRB conducted a hearing under RCW 9.95.420(3). In a decision issued on December 10, 2014, the ISRB found that Colbert would likely reoffend if released, observing that he has at least two convictions for sex offenses and at least two additional allegations of illegal sexual behavior, he was assigned a "high/moderate

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and moderate" risk of reoffense, and he had not participated in sex offender treatment.

Colbert contends that the Board's reliance on his lack of treatment effectively mandated his participation in sex offender treatment. He further claims that his convictions are still in the "appellate process" which precludes his participation in the sex offender treatment program offered by the Department of Corrections (DOC). Therefore, he argues that the requirement imposed by the Board infringes on his right to appeal his convictions. He claims that the Board imposed an unconstitutional condition by conditioning his release on the surrender of his right to appeal.

An ISRB decision denying release and setting a new minimum term is reviewed for an abuse of discretion, and this court gives substantial deference to the judgment of the ISRB. In re Pers. Restraint of Locklear, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992). The ISRB may abuse its discretion by failing to follow its own procedural rules or where the ISRB 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 ISRB abused its discretion. In re Pers. Restraint of Addleman, 151 Wn.2d 769, 776, 92 P.3d 221 (2004).

Colbert's convictions are no longer subject to appeal. Colbert's appeal was resolved years ago and his convictions are final. This court affirmed Colbert's convictions in 2006. See State v. Colbert, noted at 134 Wn. App. 1007 (2006), review denied, 160 Wn.2d 1004 (2007). The mandate issued on May 30, 2007.

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Since then, Colbert has collaterally attacked his convictions in both state and federal court and it appears that some of his petitions for post-conviction relief are still pending.¹ However, the sex offender treatment program does not exclude offenders who appeal or otherwise challenge their convictions. To be eligible for the program, an offender must “acknowledge/recall having committed a sex offense(s)” at some point. See DOC Policy 570.000.

And the ISRB maintains broad discretion over the decision of whether to transfer an offender under its jurisdiction to early release or community custody, with public safety as its paramount concern. In re Pers. Restraint of Dyer (Dyer II), 175 Wn.2d 186, 198-99, 283 P.3d 1103, 1108 (2012). Our Supreme Court has held that the ISRB may exercise its discretion to consider a sex offender’s lack of treatment when making decisions about release. Dyer II, 175 Wn.2d at 198-99 (ISRB “may consider an offender’s lack of sex offender treatment in determining whether he or she is paroleable”; finding lack of treatment “an appropriate consideration” and that ISRB did not abuse its discretion in basing its decision, in part, on an inmate’s refusal to take responsibility for his crime, which prevented him from obtaining treatment).

¹ Colbert does not address the substance of any of his pending matters, but it appears that he has petitions in this court raising issues with respect to conditions of community custody, a jury instruction on the affirmative defense of consent, and a pending matter in federal court district court involving the propriety of joinder of the rape counts. See Nos. 71388-4, 72770-2 and C11-076-RSM.

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Colbert argues that the Board's decision requiring him to participate in sex offender treatment prior to release conflicts with his judgment and sentence. The sentencing court imposed, as a condition of community custody, that Colbert complete a sexual deviancy evaluation and treatment. The Board's consideration of Colbert's lack of treatment and failure to take responsibility for any illegal sexual behavior does not conflict with this condition of sentence imposed by the court.

Finally, Colbert claims that the ISRB failed to adhere to applicable procedural rules. Specifically, he contends that the Board failed to consider the trial court's sentencing recommendations when making its release decision under RCW 9.95.009(2) and did not follow the requirements of RCW 9.94.820 mandating certain criteria for sex offender treatment providers. However, RCW 9.95.009(2) is applicable only to those sentenced prior to July 1, 1986, for crimes committed before the legislature enacted the Sentencing Reform Act in 1984. See RCW 9.95.040. And RCW 9.94.820 pertains to sex offender treatment imposed as a condition of community custody. Neither provision is applicable to the Board's .420 releasability hearing.

Colbert fails to establish that the Board's decision constitutes an abuse of discretion.

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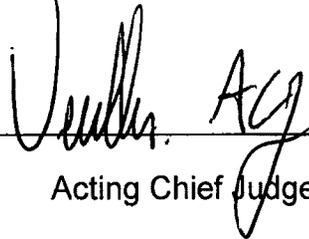
Accordingly, the petition must be dismissed.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP

16.11(b).

Done this 11th day of September, 2015.



Acting Chief Judge

FILED
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STATE OF WASHINGTON
2015 SEP 11 PM 4:01