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*The Court of Appeals
of the
State of Washington
Division III*



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February 22, 2017

Richard Allen Counts, Jr.
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CASE # 345637
Personal Restraint Petition of Richard Allen Counts, Jr.
YAKIMA COUNTY SUPERIOR COURT No. 141007685


Dear Counsel and Mr. Counts:

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
Clerk/Administrator

RST:ko
Enclosure

FILED
FEBRUARY 22, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint)	34563-7-III
of:)	
)	
)	
RICHARD ALLEN COUNTS, JR.,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
Petitioner.)	
)	

Richard Allen Counts, Jr. is currently in the custody of the Department of Corrections (DOC) serving a sentence for his 2014 Yakima County conviction of felony violation of a protection order. The trial court sentenced him to a Drug Offender Sentencing Alternative (DOSA), which was revoked after he violated conditions of his community custody. In this petition, Mr. Counts argues that the DOC improperly considered risk to officers' safety as one of the factors supporting the DOSA revocation and that the DOC did not provide him with treatment.

FACTS

Upon release from his DOSA prison confinement in January 2016, Mr. Counts' community custody officer (CCO) reviewed the conditions of Mr. Counts' community

custody with him. *See Exhibit 1, Attachment B.* One of the conditions of the DOSA was that Mr. Counts enter and complete substance abuse treatment after his release. The CCO submitted a chemical dependency referral for Mr. Counts in late January 2016. On February 8, 2016, Mr. Counts started chemical dependency treatment at Yakima Community Justice Center. *See Exhibit 2, Attachment E.* Several days later, Mr. Counts used methamphetamine. The CCO ordered Mr. Counts to attend his next chemical dependency appointment. Mr. Counts later claimed he forgot about the appointment and complained that going to treatment was a “big pain.” *See Exhibit 1, Attachment B.* Over the next few weeks, Mr. Counts failed to report to his CCO, tested positive for methamphetamine, and was arrested for using methamphetamine. Mr. Counts was eventually terminated from his drug treatment program for failure to attend. *See Exhibit 2, Attachment D.*

On March 15, 2016, DOC officers attempted to arrest Mr. Counts at his residence for his multiple community custody violations. Mr. Counts refused to leave his house despite officers repeatedly ordering him to do so. *See Exhibit 2, Attachment E.* Eventually, a United States Marshall and a Yakima Sheriff’s Deputy came to the officers’ assistance. They identified themselves and told Mr. Counts to surrender. He refused. The officers forced entry into Mr. Counts’ residence and began clearing the house. Mr. Counts refused to come out of a locked bedroom. When the officers kicked open the

door, Mr. Counts did not follow commands and they were forced to subdue him. During the search, officers found a knife in his pocket. It took Mr. Counts nearly an hour to surrender.

On March 24, 2016, Mr. Counts entered guilty pleas to four violations (failing to report to DOC upon release from prison, two allegations of using a controlled substance, and getting discharged from drug treatment). He did not stipulate to the fifth allegation – failing to follow the officers’ verbal directives on March 15. The DOC hearing officer found Mr. Counts guilty of all five violations and revoked the DOSA. *See Exhibit 2, Attachment B.*

ANALYSIS

Mr. Counts challenges the revocation of his DOSA, arguing the hearing officer improperly relied on “officer safety” as a basis for revocation. He also maintains that he was not offered drug treatment.

Where, as here, an inmate in a PRP challenges a decision from which he has had “no previous or alternative avenue for obtaining state judicial review,” RAP 16.4(a) requires the petitioner to show that he has been unlawfully restrained. A restraint is unlawful if the challenged action is unconstitutional or violates the laws of the State of Washington. *In re Pers. Restraint of Reifschneider*, 130 Wn. App. 498, 501, 123 P.3d 496 (2005); RAP 16.4(c)(2),(6). The petitioner must state facts on which he or she bases

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PRP of Counts

his or her claim of unlawful restraint and the evidence supporting the allegations; conclusory statements alone are insufficient to do this. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

Mr. Counts' arguments fail. The standard of proof at a DOSA revocation hearing is a preponderance of the evidence. *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005). Mr. Counts' CCO summarized the allegations and supporting evidence in a report for the DOC hearing officer. *See* Exhibit 2, Attachment E. He detailed Mr. Counts' failures to report to DOC, show up for drug treatment, multiple uses of methamphetamine, and his failure to follow the directives of the arresting officers during the March 15 incident. *Id.* The CCO concluded:

It is this Officer's opinion that DOSA sentences are for individuals who show the desire to lead a conventional life and do whatever it takes to remain clean and sober. This is obviously not the case with Mr. Counts. All of Mr. Counts' erratic behavior on 03/15/16 show he is an obvious officer safety and community safety risk.

Attachment E at p. 4.

Mr. Counts appears to take issue with this last sentence. However, whether the DOC hearing officer considered "officer safety" in revoking the DOSA is immaterial here. Mr. Counts entered guilty pleas to four of the five alleged violations, including his failure to complete the offered drug treatment. The one allegation he contested - failure to respond to the directives of the arresting officers - is amply supported by the CCO's

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report. Moreover, in view of Mr. Counts' stipulation that he failed to complete drug treatment, his claim that DOC failed to offer treatment fails. Mr. Counts' CCO arranged chemical dependency treatment at Yakima Community Justice Center.

Mr. Counts fails to establish unlawful restraint within the meaning of RAP 16.4. Accordingly, his petition is dismissed as frivolous pursuant to RAP 16.11(b). The court also denies his request for appointed counsel. *In re Gentry*, 137 Wn.2d at 390; RCW 10.73.150(4).


ROBERT LAWRENCE-BERREY
ACTING CHIEF JUDGE