

FEB 28 2012

COURT OF APPEALS
DIVISION III
CLALLAM COUNTY

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint)	30157-5-III
of:)	
)	
)	
AMEL W. DALLUGE,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
Petitioner.)	
)	

Amel W. Dalluge seeks relief from personal restraint imposed in the Department of Corrections (DOC) condition of community custody requiring him to submit to polygraph tests. Mr. Dalluge was serving a 61-month prison term for a 2007 Grant County conviction of second degree assault when was released from DOC custody on May 27, 2011. On that same date, he was transferred to the Clallam County jail, where he continues to reside while awaiting trial on new charges.

Because Mr. Dalluge has had no alternative opportunity for judicial review of the DOC condition of community custody, he need only show that he is unlawfully restrained. RAP 16.4; *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010). Restraint is unlawful if it is the result of a constitutional violation or a

violation of state law. *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 832, 129 P.3d 827 (2006).

Mr. Dalluge contends the DOC violated the Fifth Amendment prohibition against self-incrimination by requiring him to submit to polygraph tests while he is on community custody from his 2007 conviction. Under former RCW 9.94A.720(1)(a) (2003), all offenders serving community custody are under the supervision of the DOC “and shall follow explicitly the instructions and conditions” of the DOC. The DOC “may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed.” Former RCW 9.94A.720(1)(a). Polygraph exams are recognized procedures for monitoring compliance with sentencing conditions. *State v. Riles*, 135 Wn.2d 326, 343, 957 P.2d 655 (1998), *abrogated on other grounds in State v. Valencia*, 169 Wn.2d 782 (2010).

The court first notes that this issue is not yet ripe for review. *See State v. Autrey*, 136 Wn. App. 460, 470, 150 P.3d 580 (2006) (the claimed unconstitutionality of a community custody condition is not ripe for review unless the person has been harmfully affected by the unconstitutional condition). Mr. Dalluge contends the issue is ripe because the DOC can impose its conditions even when an offender is confined (as he is, in the Clallam County jail), citing *In re Personal Restraint of Dalluge*, 162 Wn.2d 814, 177 P.3d 675 (2008). But as *Dalluge* indicates, the DOC retains supervisory power over an offender while he or she is actually on community supervision. *Id.* at 819. If an

offender is confined during the period of community custody, the DOC retains the power to impose its relevant conditions. *Id.* Here, however, Mr. Dalluge was immediately transferred to Clallam County after he completed his 2007 prison term and before he began serving community custody for the 2007 conviction. He does not contend he has been required to submit to a polygraph yet.

Moreover, Mr. Dalluge's argument is without merit. The Fifth Amendment prohibits compelled testimony that is self-incriminating. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 189, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004); U.S. Const. amend. V. A polygraph condition of community custody does not violate Fifth Amendment rights because it does not require the offender to answer incriminating questions. *United States v. Lee*, 315 F.3d 206, 212 (3d Cir. 2003). If a question is asked during a polygraph exam that calls for an answer that could incriminate Mr. Dalluge in a future criminal proceeding, he retains the right to invoke his Fifth Amendment privilege and remain silent. *Id.* at 212-13.

The petition is dismissed. RAP 16.11(b). The court also denies Mr. Dalluge's 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.

DATED: February 28, 2012



KEVIN M. KORSMO
ACTING CHIEF JUDGE