IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of JOHN F. FLYNN, III, Petitioner.	No. 45713-0-II ORDER DISMISSING PETITION

John Flynn, III, seeks relief from personal restraint imposed following his 1994 convictions for first degree rape and first degree robbery. Based on an offender score of 13, he was sentenced to 280 months of confinement for the rape conviction. His early release date was September 24, 2013. His sentence maximum expiration date is February 26, 2017.

First, Flynn argues that his offender score was miscalculated because it included a 1975 second degree assault conviction and a 1990 second degree robbery conviction, which he denies having committed. RCW 10.73.090(1) requires that a petition be filed within one year of the date that the petitioner's judgment and sentence becomes final. Flynn's judgment and sentence became final on January 23, 1997, when this court issued its mandate following Flynn's direct appeal. RCW 10.73.090(3)(b). He did not file his petition until December 4, 2013, more than one year later.[1] Unless he shows that one of the exceptions contained in RCW 10.73.100 applies or that his judgment and sentence is facially invalid, his petition is time-barred. *In re Personal Restraint of Hemenway,* 147

[1] Flynn filed his petition with the Washington State Supreme Court. That court transferred his petition to this court.

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Wn.2d 529, 532-33, 55 P.3d 615 (2002). Flynn argues that his judgment and sentence is facially invalid. But his claim that his judgment and sentence includes crimes of which he was not convicted cannot be determined from the face of his judgment and sentence, so it is not facially invalid. Nor does he show that any of the exceptions in RCW 10.73.100(1) applies to his petition. As to this issue, his petition as to this issue is time-barred.

Second, Flynn argues that the Department of Corrections erred in not releasing him to his term of community custody. Before a sex offender can be released to community custody, he must provide an approved residence and living arrangement plan to the Department. RCW 9.94A.729(5)(b). The Department may deny a proposed release plan if it places the offender at risk to violate the conditions of his sentence, at risk to reoffend or if it presents a risk to victim or community safety. RCW 9.94A.729(5)(c). Under Department policy, upon an offender's submission of a proposed release plan, the Department examines the offender for commitment as a sexually violent predator. If the Department's evaluator finds that the offender meets the criteria for commitment as a sexually violent predator under chapter 71.09 RCW, then the release plan is reviewed to determine if it ensures community safety. The Department also evaluates the proposed residence.

Flynn has twice submitted a release plan listing his mother's residence. Flynn's evaluation found that he met the criteria for commitment as a sexually violent predator, although the commitment proceedings were not commenced. The Department determined that Flynn's mother's home was not suitable as his residence because of his mother's age and fragility, the dense nature of the neighborhood, the presence of victim-age women and the presence of establishments selling alcohol. It therefore denied Flynn's release plan.

Flynn makes two assertions. First, he contends that the Department improperly determined that he met the criteria for commitment as a sexually violent predator because it did not follow the procedures set forth in chapter 71.09 RCW. But there is a difference between an evaluation to determine if an offender meets the criteria for commitment as a sexually violent predator and actually being civilly committed as a sexually violent predator. Only the latter requires the procedures set forth in chapter 71.09 RCW. Flynn does not show that the Department erred in using his evaluation to determine his suitability for release to community custody.

Second, he contends that the Department erroneously denied his release plan. But he does not have a protected liberty interest in early release to community custody. *In re Personal Restraint of Mattson*, 166 Wn.2d 730, 733, 214 P.3d 141 (2009). He only has the right to have the Department follow its own policy as to early release to community custody. *Id.* at 741. The Department followed its policy in evaluating, but ultimately denying, Flynn's release plan. Thus, his continued confinement is not unlawful.

Part of Flynn's petition is time-barred. As to the other part, Flynn fails to demonstrate grounds for relief from restraint. Accordingly, it is hereby

ORDERED that Flynn's petition is dismissed under RAP 16.11(b).

DATED this 6th day of January, 2015.

Maxa, J.

Acting Chief Judge Pro Tempore

Cc: Joseph A. Correia
Alex Kostin
Department of Corrections