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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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| In the Matter of the Personal Restraint |) | No. 39412-3-III |
| of: |) | |
| |) | |
| LOUIS VICTOR KUSTER, III, |) | ORDER DISMISSING PERSONAL |
| |) | RESTRAINT PETITION |
| |) | |
| Petitioner. |) | |

Louis Kuster seeks review of an Indeterminate Sentence Review Board (ISRB) decision to revoke his community custody and return him to total confinement with the Department of Corrections (DOC).

Facts

When Mr. Kuster was 21 years old, he met a 16-year-old female at a park. After conversing for a short period of time, the female got up to leave and Mr. Kuster approached her from behind as if he was going to give her a hug. Instead, he grabbed her from behind, placed one hand over her mouth, pushed her to the ground, and sexually assaulted her.

Based on those events, a jury found Mr. Kuster guilty of second degree rape on November 10, 2011. The Spokane County Superior Court sentenced Mr. Kuster to an indeterminate sentence with a minimum term of 114 months and a maximum term of life in prison. The court also sentenced Mr. Kuster to community custody “for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.” Judgment and Sentence at 6. In addition to a lifetime term of community custody, the court imposed conditions of community custody, which included: “Not consume controlled substances except pursuant to lawfully issued prescriptions” and “obey all laws.” Response to Personal Restraint Petition (Resp.), Ex. 1, Att. A (Appendix H to Judgment and Sentence).

On September 3, 2019, the ISRB ordered Mr. Kuster released from prison to serve the community custody portion of his sentence. In addition to the conditions imposed by the court, the ISRB granted Mr. Kuster’s release to community custody subject to additional conditions. One of those conditions required that Mr. Kuster “obey all laws and court orders, including any conditions set forth in [his] Judgment and Sentence.” Resp., Ex. 1, Att. D.

Just over a year and a half after being released to community custody, in March 2021, Mr. Kuster tested positive for methamphetamine. One month later, in April 2021, Mr. Kuster was arrested for first degree burglary after he assaulted a woman in her

apartment. The police reports alleged that on the night of April 13, 2021, the female victim left her apartment and went downstairs to get her laundry. Mr. Kuster was in the laundry room. The victim stated she recognized Mr. Kuster but knew Mr. Kuster did not live in the apartment complex. She grabbed her laundry, began walking up the stairs back to her apartment, and then she saw Mr. Kuster running up the stairs at her. The victim ran into her apartment and tried to close the door but Mr. Kuster ran into her apartment, pushed her down, and attacked her. The victim stated she believed Mr. Kuster was trying to cover her mouth so she could not scream. After approximately 45 seconds, Mr. Kuster left the apartment. The victim shut her apartment door and armed herself with a knife until police arrived. Police observed that the victim had a bloodied lower lip due to Mr. Kuster's assault.

In October 2021, Mr. Kuster pleaded guilty to one count of first degree burglary for the incident that occurred on April 13. Because he was on community custody at the time he committed the burglary, Mr. Kuster's offender score included an additional point.¹ He was sentenced to 36 months in prison and 18 months of community custody. In his Statement of Defendant on Plea of Guilty, Mr. Kuster checked the box that stated "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual

¹ RCW 9A.525(19).

basis for the plea.” PRP, Att. C, at 11. Mr. Kuster was transferred to DOC custody to begin serving his sentence on his first degree burglary conviction.

In July 2022, the ISRB held a “Violation/Revocation” hearing to address Mr. Kuster’s community custody violations. The ISRB alleged:

On April 13, 2021 community custody was suspended for allegedly committing the following violations of supervision:

1. Consuming a controlled substance, methamphetamine, on or about 3/2/2021
2. Louis Kuster failed to obey all laws on April 13, 2021, as evidenced by a Judgment and Sentence for Cause No. 21-1-01031-32, resulting in a conviction on 10/1/2021, for First Degree Burglary

Resp., Ex. 1, Att. C.

At the hearing, Mr. Kuster pleaded guilty to using methamphetamine. He also agreed that he failed to obey all laws as evidenced by his conviction for first degree burglary, although he explained that he was at the apartment complex because someone who lived there owed him money. Mr. Kuster told the ISRB that he admitted to following the victim but only went into her apartment because she had dropped some of her laundry. He described the victim as being startled and overacting and stated he tried to calm her down by pushing her up against the wall with his forearm. Mr. Kuster denied pushing the victim down and stated she tripped. He then admitted to being on a five-day meth binge when the incident occurred.

Mr. Kuster’s Community Corrections Officer (CCO) recommended that Mr.

Kuster's supervision be revoked. Mr. Kuster's attorney pointed out that Mr. Kuster was not arrested or convicted of a sex offense.

At the conclusion of the hearing, the ISRB revoked Mr. Kuster's community custody based on the following:

- He has been assessed as a high risk to sexually reoffend on the Static 99-R.
- He has been convicted of a new felony while on supervision, which involved an assault on a young adult female in which he knocked her down and grabbed her by her face in which she felt like he was "continually trying to cover her mouth." This is similar to his index offense which involved a young female which he also pushed down, covered her mouth and sexually assaulted her. He also told the officers investigating the Burglary that "he wasn't trying to rape her."
- It does not appear Mr. Kuster is amenable to supervision at this time, due to his new criminal conduct.
- Conditions of supervision will not mitigate his risk as he violated several of them when he was most recently out.

Resp., Ex. 1, Att. C. The ISRB concluded revocation "would be in the best interest of the public and for the best welfare of Mr. Kuster." Resp., Ex. 1, Att. C.

The ISRB imposed a new minimum term of 36 months of total confinement on Mr. Kuster's rape conviction. Despite the fact that Mr. Kuster was already in DOC custody serving his sentence for his burglary conviction, the ISRB determined the new minimum term set on his rape conviction should be served first. Mr. Kuster's new earned release date on his rape conviction is June 25, 2024. He will then resume serving his sentence on his burglary conviction. His earned release date for that conviction is set for December 23, 2025.

Analysis

Mr. Kuster filed the instant PRP with this court on December 20, 2022. The ISRB responded. Since Mr. Kuster is challenging an ISRB decision for which he has had “no previous or alternative avenue for obtaining state judicial review,” he must show that he is under restraint and that the restraint is unlawful. *See In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 817, 177 P.3d 675 (2008); RAP 16.4(a)-(c). A petitioner may obtain relief by showing a federal or state constitutional violation or violation of the laws of the State of Washington. RAP 16.4(c)(2). A petition will be dismissed as frivolous under RAP 16.11(b) if it “fails to present an arguable basis for relief 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). “A petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay.” *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). Bald assertions, conclusory allegations, and arguments made only in broad general terms are insufficient. *In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 327, 394 P.3d 367 (2017); *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Community custody is “that portion of an offender’s sentence subject to controls including crime-related prohibitions and affirmative conditions from the court, the [ISRB], or the department of corrections based on risk to community safety, that is served

under supervision in the community, and which may be modified or revoked for violations of release conditions.” RCW 9.95.0001(2). Under an indeterminate sentence, any violation of community custody conditions subjects the offender to arrest, detention, and further sanctions, including possible revocation of community custody and return to prison. RCW 9.94A.507(6)(b); RCW 9.95.425(1); RCW 9.95.435(1)-(2). The ISRB may “transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody.” RCW 9.95.435(1). In other words, if the petitioner violates any of the conditions imposed, he may be reincarcerated. RCW 9.95.435.

Mr. Kuster raises two grounds for relief related to the ISRB’s decision to return him to full custody. First, he argues having to serve a sentence on his first degree burglary conviction consecutive to the new minimum term on his second degree rape conviction violates double jeopardy principles. Mr. Kuster contends the punishment for violating community custody was already baked into his sentence on the burglary conviction since his offender score increased by one, making his standard range higher. He argues that by additionally imposing a new minimum term on his rape conviction subjects him to double punishment for violating community custody. Second, Mr. Kuster contends the ISRB abused its discretion when it based its decision to revoke his community custody solely on a recharacterization of judicially found facts to support a

perceived intent for a sexual assault. Each of Mr. Kuster's claims is addressed in turn.

1. Double Jeopardy

"[T]he Fifth Amendment to the United States Constitution and Washington Constitution article I, section 9 protect a defendant against multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). This double jeopardy clause "protects against multiple punishments for the same offense imposed in a single proceeding." *State v. Miller*, 159 Wn. App. 911, 923, 247 P.3d 457, 462 (2011). When analyzing multiple punishments, the double jeopardy clause is limited to ensuring the total punishment does not exceed the punishment authorized by the legislature. *Id.* at 924. "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

"A double jeopardy violation does not occur simply because two adverse consequences stem from the same act." *In re Pers. Restraint of Mayner*, 107 Wn.2d 512, 521, 730 P.2d 1321 (1986). Revocation of community custody² is not a part of a criminal prosecution. *See Standlee v. Smith*, 83 Wn.2d 405, 407, 518 P.2d 721 (1974). "Parole is revoked for violation of the terms and conditions of parole and as part of the continuing consequences of the crime for which parole was granted. Parole revocation is not

² In Washington, community custody is the same as parole. *In re Pers. Restraint*

punishment for the subsequent events which violate the parole and which may also constitute a separate crime.” *Id.*; *see also Mayner*, 107 Wn.2d at 521.

In this case, as the State points out, the ISRB’s revocation of Mr. Kuster’s community custody and setting of a new minimum term was not a criminal punishment. It was a remedial sanction. The new minimum term was part of the continuing consequences of Mr. Kuster’s second degree rape conviction because Mr. Kuster is subject to punishment for that conviction for a term of up to life. The ISRB did not violate double jeopardy by revoking Mr. Kuster’s community custody and returning him to total confinement based, in part, on Mr. Kuster’s new criminal conviction.

Furthermore, double jeopardy was not violated when Mr. Kuster was more severely punished for his subsequent first degree burglary conviction. Mr. Kuster contends the superior court already punished him for his community custody violations by adding a point to his offender score on the new burglary conviction and by running the sentences consecutively. But the Legislature intended cumulative punishments in this scenario. RCW 9.94A.525(19) requires an additional point added to a defendant’s offender score if the present conviction is for an offense committed while the offender was under community custody. And under RCW 9.94A.589(2)(a), “[w]henever a person while under a sentence for conviction of a felony commits another felony and is

of McMurtry, 20 Wn. App. 2d 811, 516 n.4, 502 P.3d 906 (2022).

sentenced to another term of confinement, the latter term of confinement shall not begin until expiration of all prior terms of confinement.” Thus, the superior court did not violate double jeopardy by imposing a standard range sentence that included an additional point in Mr. Kuster’s offender score. And the DOC did not violate double jeopardy by running Mr. Kuster’s two sentences consecutively. Mr. Kuster is not entitled to relief on this claim.

2. *Abuse of discretion*

An offender who has been accused of violating conditions of community custody is entitled to a hearing prior to the imposition of sanctions. RCW 9.95.435(3). The ISRB is required to provide the offender with findings and conclusions that include the evidence relied upon, and the reasons the particular sanction was imposed. RCW 9.95.435(4)(b). “The decision to revoke community custody is based primarily on factual determinations about whether the individual violated the conditions of community custody.” *In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 635, 994 P.2d 890 (2000); *State v. Dahl*, 139 Wn.3d 678, 688, 990 P.2d 396 (1999) (holding that a finding of a parole violation must be based on verified facts and the exercise of discretion must be based on an accurate knowledge of the parolee’s behavior).

In addition to factors that are case specific, some of the factors the ISRB considers when making a revocation decisions are: the relationship of the parole violations behavior

to the committing offense and the nature of the violation; the length of time the parolee has been on parole as well as time previously serviced on the conviction; the recommendation and supporting reasons offered by the community corrections officer, the parolee, and the assistant attorney general; and the level of risk to the community posed by the parolee. WAC 381-70-030.

Following a hearing addressing community custody violations wherein sanctions are imposed, the offender may appeal the decision. RCW 9.95.435(5); RCW 9.94A.737(6)(d). A decision will be affirmed unless the sanction was not reasonably related to (1) the crime of conviction; (2) the violation committed; (3) the offender's risk to reoffend, or (4) the safety of the community. RCW 9.95.435(5); RCW 9.94A.737(6)(d). The sanction need only be reasonably related to one of the four criteria. *See* RCW 9.95.435(5); RCW 9.94A.737(6)(d).

We review ISRB decisions for an abuse of discretion. *In re Pers. Restraint of Dyer*, 175 Wn.2d 186, 196, 283 P.3d 1103 (2012). The ISRB abuses its discretion when it fails to follow its own procedural rules or acts without consideration of and in disregard of the facts. *In re Personal Restraint of Addleman*, 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004). A reviewing court must find the ISRB acted willfully and unreasonably in order to find a parole revocation arbitrary and capricious. *Ben-Neth v. Indeterminate Sentence Review Board*, 49 Wn. App. 39, 42, 740 P.2d 855 (1987).

Mr. Kuster contends the ISRB abused its discretion when revoking his community custody term by alleging that “[t]he ISRB’s only reason for revoking Mr. Kuster’s community custody term was based in whole on recharacterizing judicially found facts to support a perceived intent for a sexual assault.” PRP at 11. But his argument is without merit.

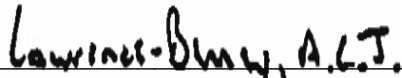
Here, there is no question Mr. Kuster violated the conditions of his community custody. He entered a guilty plea to a new felony conviction even though he was required as a condition of community custody to obey all laws. He also admitted to using methamphetamine when he was prohibited from using controlled substances. As such, the ISRB was authorized to impose sanctions for those violations as long as the sanction was reasonably related to one of the four criteria set forth in RCW 9.95.435(5) and RCW 9.94A.737(6)(d).

The ISRB’s decision to revoke Mr. Kuster’s community custody and return him to prison was reasonably related to his risk to reoffend and the risk Mr. Kuster posed to community safety. Under WAC 381-80-030, the ISRB was permitted to consider Mr. Kuster’s behavior during the commission of the burglary when determining Mr. Kuster’s risk to the community. Even though the ISRB characterized Mr. Kuster’s behavior when committing the burglary as similar to his behavior in his index offense—second degree rape—the ISRB’s decision to revoke his community custody was not wholly based on

those facts. The ISRB found that Mr. Kuster was not amenable to community custody supervision and that conditions of community custody would not mitigate his risk because he violated “several” of his conditions. Resp., Ex. 1, Att. C. The ISRB’s decision to revoke Mr. Kuster’s community custody was made with consideration and regard of all the facts, not just that Mr. Kuster’s behavior during the commission of the burglary was similar to his behavior in his index offense. Thus, the ISRB did not abuse its discretion. As such, Mr. Kuster is unable to show he is entitled to relief on this claim.

Conclusion

Mr. Kuster presents no arguable basis in law or fact showing he is entitled to relief; thus, his claims are dismissed as frivolous. RAP 16.11(b). The court waives the filing fee based on Mr. Kuster’s indigence. RAP 16.8(a). Mr. Kuster’s request for appointed counsel is denied. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).



ROBERT LAWRENCE-BERREY
ACTING CHIEF JUDGE