

FILED
Jun 12, 2023
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint)	No. 39286-4-III
of:)	
)	
TRAVIS SHANE LEE,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	
Petitioner.)	

Travis Lee seeks relief from unlawful personal restraint imposed following his 2004 conviction for second degree rape. He also 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).

Background Facts

In 2004, a jury found Mr. Lee guilty of second degree rape. Following that verdict, the Benton County Superior Court sentenced Mr. Lee to an indeterminate sentence with a minimum term of 78 months and a maximum term of life in prison. The court also sentenced Mr. Lee to community custody “for any period of time the defendant

is released from total confinement before the expiration of the maximum sentence.”

Judgment and Sentence at 6. The superior court also imposed several conditions of community custody. The conditions relevant here were as follows:

- 1) Report to and be available for contact with the assigned Community Corrections Officer [CCO] as directed;
....
- 3) Not consume or be in possession of controlled substances except pursuant to lawfully issued prescriptions;
- 4) While in community custody not unlawfully possess controlled substances;
....
- 9) Remain within geographic boundary, as set forth in writing by the [CCO].
....
- 13) Do not purchase, possess or use alcohol . . .
....
- 16) Defendant shall obey all laws.

Response to Personal Restraint Petition (Resp.), Ex. 1, Att. A.

On September 28, 2010, Mr. Lee was released into the community to serve the community custody portion of his sentence. Mr. Lee was subject to the court’s conditions of community custody as well as conditions imposed by the Indeterminate Sentencing Review Board (ISRB).

Prior to the violation hearing at issue in this petition, Mr. Lee had accumulated five violation processes since his release in 2010. In February 2012, he signed a stipulated agreement for violations such as failing to attend a polygraph exam, leaving the county without permission, and changing living arrangements without prior approval. In

April 2013, Mr. Lee tested positive for opiates. In August 2014, he consumed “Spice,” punched his wife, and resisted arrest. In July 2019, Mr. Lee entered a guilty plea on two assault charges, one which resulted in a felony conviction. And, at the end of September 2021, Mr. Lee absconded from supervision, failed to participate in a polygraph test, possessed methamphetamine, failed to submit to a urinalysis, and displayed aggressive and/or assaultive behavior. On all five occasions, the ISRB reinstated Mr. Lee’s community custody with additional conditions. Some of the conditions were as follows:

- “Upon release from the Correctional Facility, you must report within one business day to your CCO, or any other person designated by DOC. Thereafter, you must report as directed.”
- “Remain within or outside of geographical boundaries as specified.”
- “You shall not participate in any aggressive or assaultive behavior.”
- “You must obey all laws and court orders, including any conditions set forth in your Judgment and Sentence, and abide by all conditions imposed by the ISRB.”
- “You must not use, possess, or control any mind or mood-altering substances, drugs, narcotics, controlled substances, or drug paraphernalia without a valid prescription from a licensed physician.”
- “You must not use, possess, or control any alcohol.”
- “You must not use, possess, or control any Marijuana/THC or enter any establishments whose primary purpose is the sale of Marijuana/THC.”
- “You must submit to periodic and random drug and/or alcohol monitoring through an agency approved by your CCO and sign a full release of information allowing the treatment or monitoring agency to release information to your CCO.”

Resp., Ex. 1, Att. E., Att. F.

On November 17, 2021, Mr. Lee was released from confinement with another

updated list of conditions. Mr. Lee's CCO emphasized the need for Mr. Lee to engage in required mental health treatment, and directed Mr. Lee to report weekly, beginning on December 2.

Mr. Lee did not report to his CCO on December 2. Instead, his CCO visited Mr. Lee's house and explained to him that he needed to report within the designated timeframe. The CCO also told Mr. Lee to report the next day, December 3, to provide a urinalysis test. Mr. Lee did so and the test returned a positive result for THC.¹ The CCO gave Mr. Lee until December 16 to be clear from any THC. Mr. Lee failed to report on December 16 and his CCO could not locate him. Later that day, Mr. Lee was arrested for disorderly conduct in Auburn, Washington. Among other allegations, the police report alleged Mr. Lee had exposed his penis to employees of a Burger King restaurant, walked into oncoming traffic, appeared intoxicated, and attempted to lick one of the officer's arms during his arrest. The State charged Mr. Lee with one count of disorderly conduct.²

The ISRB suspended Mr. Lee's release to community custody on December 17. It alleged Mr. Lee committed the following violations of his community custody conditions:

1. Absconding from supervision by failing to report to DOC Sequim PD

¹ Tetrahydrocannabinol.

² The matter is still pending in King County District Court under Cause No. 1A0635584.

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Outpost Station since on/about 12/16/2021.

2. Failure to be available for drug/alcohol urinalysis testing since on or about 12/16/2021.

3. Consumption of marijuana on/between 12/03/2021 and 12/10/2021.

4. Failure to comply with geographical boundaries by traveling outside of Clallam/Jefferson county without CCO approval since on or about 12/16/2021.

5. Consumption of Alcohol and/or Mind-Mood altering substances since on or about 12/16/2021.

Resp., Ex. 1, Att. B.

The ISRB held a hearing to address the violations on January 21, 2022. Mr. Lee pleaded guilty to all five violations, and the hearings officer found him guilty of the same. At the hearing, Mr. Lee's CCO reported he had received numerous calls from the Kitsap County Sheriff's office about officers being sent out to Mr. Lee's home due to arguments between Mr. Lee and his wife. The CCO also testified he consistently received calls from law enforcement regarding Mr. Lee's erratic behavior in the community, and that the behaviors were consistent with Mr. Lee's most recent arrest for disorderly conduct and reports that he was exposing his penis. Additionally, the CCO reported that Mr. Lee does not appear to take his supervision seriously and does not follow conditions. Mr. Lee's CCO recommended revocation of Mr. Lee's community custody.

The Assistant Attorney General pointed out at the hearing that Mr. Lee had prior violation processes and, despite being given an opportunity to comply with supervision,

Mr. Lee had not changed his behavior.

Mr. Lee also provided a statement. He explained that he had taken accountability for his actions and he realized he cannot use any marijuana or alcohol. Mr. Lee said he was committed to doing 90 alcoholics anonymous meetings within 90 days and stated that he would go to a private mental health provider and attend marriage counseling.

Mr. Lee's appointed counsel argued that, instead of revocation, it would be more appropriate for Mr. Lee to access an inpatient dual diagnosis mental health and substance abuse treatment facility. Mr. Lee and his counsel both argued that Mr. Lee's community custody should be reinstated.

At the conclusion of the hearing, the ISRB revoked Mr. Lee's community custody and returned him to prison based on the following:

- He was arrested for the current Violations one month after being re-instated following an in-custody Board Hearing.
- He is an End of Sentence [Review] [Committee] Level Two who continues to be noncompliant with supervision despite being given multiple opportunities to comply.
- He has demonstrated he is not safe to be back in the community by continuing to participate in high risk behavior including being arrested for new criminal charge of Disorderly Conduct, allegations of exposing his penis in public (Auburn Police Department report), using alcohol/marijuana and failing to report.
- He has had numerous law enforcement contacts for arguments with his wife and loud/erratic behaviors in the community, which are concerning.
- He does not appear to be willing to follow his conditions of supervision, be transparent with his CCO regarding his struggles, and avoid participating in ongoing repetitive high risk behaviors.

- His risk can no longer be managed with supervision and treatment, as such, he is no longer safe to be in the community.

Resp., Ex. 1, Att. B. Mr. Lee's new earned release date is set for October 5, 2023.

Analysis

Mr. Lee filed the instant PRP with this court on November 2, 2022. Since Mr. Lee 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).

Mr. Lee raises 11 claims for relief. He challenges the ISRB's decision to revoke

his community custody, arguing the ISRB abused its authority when it imposed sanctions based on violations that are not related to his risk to reoffend or his risk to the community. He also contends the ISRB abused its authority when it failed to consider mitigating factors and sent him back to prison instead of imposing a lesser restrictive sanction. In his last claim for relief, Mr. Lee asserts the DNA “rape kit” collected from the victim related to his underlying conviction has never been tested although testing would have changed the verdict in his case.

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 jail. 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.

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 Petition 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 to a panel of three reviewing officers.

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, other than those regarding minimum term determinations, for an abuse of discretion. *In re Personal Restraint of Whitesel*, 111 Wn.2d 621, 628, 763 P.2d 199 (1988); *In re Personal Restraint of Myers*, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). 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).

Here, there is no question Mr. Lee violated the conditions of his community custody—he pleaded guilty to all five violations. 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. Lee's community custody and return him to

prison is reasonably related to the risk Mr. Lee posed to community safety. The ISRB concluded Mr. Lee was “not safe to be back in the community,” and this conclusion is supported by substantial evidence. Resp., Ex. 1. Att. B. This is so because Mr. Lee had several contacts with law enforcement throughout his supervision. The last contact resulted in a criminal charge of disorderly conduct. The police report for that charge also included allegations that Mr. Lee had exposed his penis to employees at a Burger King and that he was walking into oncoming traffic, all of which impact community safety. It is also evident from the record that Mr. Lee had been using controlled substances, using alcohol, and failed to report to his CCO.

Mr. Lee also contends the ISRB abused its discretion by not using a return prison as a last resort. But the evidence belies Mr. Lee’s contention. The ISRB concluded that Mr. Lee’s risk could no longer be managed by supervision and treatment. As stated, Mr. Lee had accumulated five violation processes since his release in 2010. In all five instances, Mr. Lee’s community custody was reinstated with additional conditions. But Mr. Lee continued engaging in high risk behaviors and violating the conditions of release. The ISRB gave Mr. Lee multiple attempts to prove he could abide by the conditions of his release but he could not do so. A return to prison was a reasonable sanction in light of these circumstances.³

³ Mr. Lee also argues his CCO refused to put him on an electronic ankle monitor

Next, Mr. Lee asserts the ISRB abused its discretion by failing to consider mitigating circumstances before returning him to prison, i.e., his 11 years in the community and the impact a return to prison would have on his pregnant wife and children. The record reflects the ISRB did consider Mr. Lee's time in the community. In the ISRB's Findings and Conclusions, the presiding board member stated she considered the Probable Cause sheet, which provided that in November 2021:

The [ISRB] determined that Mr. Lee would be reinstated, [citing] that his mental health and lack of mental health medication while in the community was part of his problematic behavior, that he had stabilized during confinement, and that he has historically shown (11 years in the community) that *when he takes his medication and is involved in mental health treatment, and clean and sober he can do well in the community.*

. . . .

Mr. Lee has been out in the community for several years. He has had consecutive years of success, however, that has always been reliant on his ability to maintain his mental health, to include taking his meds and participating in mental health counseling.

Resp., Ex. 1., Att. B., Att. D.

The record also reflects that the ISRB considered Mr. Lee's family when making its revocation decision. It was noted in the Probable Cause sheet that, in August 2021, Mr. Lee's wife reported she had kicked Mr. Lee out of the house and stated she might file

as directed by the ISRB, but he provides no evidence that the CCO did, in fact, fail to connect Mr. Lee to the ankle monitor. In any event, his claim fails because his argument is unclear regarding the correlation between the CCO's alleged refusal to hook him up to

for legal separation. A week later, on August 17, Mr. Lee's wife called the CCO stating she was getting a temporary restraining order against Mr. Lee. By considering these facts, there is little doubt the ISRB considered Mr. Lee's family (and their safety) when making its decision. In fact, the ISRB listed Mr. Lee's frequent law enforcement contacts due to arguments with his wife as one of its reasons for returning Mr. Lee to total confinement.

The ISRB's decision to revoke Mr. Lee's community custody was made with consideration and regard to the facts; thus, the ISRB did not abuse its discretion. As such, Mr. Lee has not provided a basis in law or fact for his claims and he is unable to show he is entitled to relief on these claims. *See Khan*, 184 Wn.2d at 686-87.

Lastly, in Mr. Lee's 11th claim for relief, he contends he "should be given a new trial or released from confinement because the DNA 'rape kit' in [his] case has never been tested despite the fact that testing would change the verdict in [his] case." Pers. Rest. Pet. at 14. Mr. Lee does not support his argument with any facts, evidence, law, or legal analysis. This bald and general assertion is insufficient to warrant review; thus, we do not consider it. *See Rhem*, 188 Wn.2d at 327; *Rice*, 118 Wn.2d at 886.

Conclusion

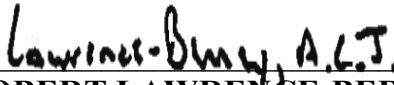
Mr. Lee presents no arguable basis in law or fact showing he is entitled to relief;

an ankle monitor and the ISRB's decision to return Mr. Lee to prison.

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thus, they are dismissed as frivolous. RAP 16.11(b). The court waives the filing fee based on Mr. Lee's indigence. RAP 16.8(a). Mr. Lee'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