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



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June 24, 2015

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CASE # 330681
Personal Restraint Petition of Robert L Macomber
YAKIMA COUNTY SUPERIOR COURT No. 121017871
consolidated with CASE # 330699
Personal Restraint Petition of Robert L. Macomber
YAKIMA COUNTY SUPERIOR COURT No. 121017935

Dear Counsel and Mr. Macomber:

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

Saved

FILED
JUNE 24, 2015
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)	
of:)	No. 33068-1-III
)	(consolidated with No. 33069-9-III)
)	
ROBERT L. MACOMBER,)	
)	
Petitioner.)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	

Robert L. Macomber seeks relief from personal restraint, arguing that he is unlawfully restrained as a result of the Department of Corrections (DOC) decision to revoke his Drug Offender Sentencing Alternative (DOSA) sentence. In this timely personal restraint petition (PRP), Mr. Macomber contends that his due process rights were violated during the revocation hearing because (1) he was not allowed to call crucial witnesses and (2) the DOC hearing officer applied the wrong standard of proof. Specifically, Mr. Macomber argues that the hearing officer employed a “some evidence” standard of proof, instead of the “preponderance” standard enunciated in *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005).

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Mr. Macomber pleaded guilty, under two separate cause numbers, to one count of felony violation of a domestic violence protective order and one count of residential burglary. Exhibits 1 and 2. The trial court imposed prison-based DOSA sentences for both convictions. *Id.*

Mr. Macomber started a substance abuse treatment program at the Olympic Corrections Center (OCC) on September 30, 2013. Exhibit 6. Conflicts soon developed between Mr. Macomber and staff. On October 1, 2013, Mr. Macomber received an infraction for throwing his identification tag at a staff member. Exhibit 7. Shortly thereafter, he wrote a letter complaining about staff, other inmates, and the program, stating "I will not be part of this cult like syndicate established on failed beliefs and based on false pride." Exhibit 8. The letter also included insulting and offensive comments about staff. *Id.* DOC subsequently infringed him for the use of abusive/offensive language directed at staff. Exhibit 9. On November 18, 2013, Mr. Macomber received another infraction for food theft. Exhibit 13. DOC terminated Mr. Macomber from the OCC treatment program due to his lack of progress in treatment and failure to respond to behavior interventions. Exhibits 16 and 17.

At the revocation hearing on January 9, 2014, Mr. Macomber pleaded guilty to the charge of "failure to complete or administrative termination from a DOSA substance

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abuse [treatment] program”. Exhibit 18. The hearing officer found him guilty and revoked the DOSA. *Id.*

Mr. Macomber appealed his sanction, claiming in part that he was not allowed to call all of his witnesses. Exhibit 22. The DOC appeals panel denied his appeal, explaining:

Regarding witness testimony, during the hearing you pled guilty to the only allegation and acknowledged during adjustment and general discussion that you had behavioral problems in Therapeutic Community. At one point you explicitly stated ‘I’m not going to call witnesses, not relevant’. Shortly thereafter, when the hearing’s officers double-checked with you and directly asked whether you were sure you did not wish to call witnesses, you stated, ‘No, I don’t.’

Exhibit 23.

Where, as here, an inmate in a PRP challenges a decision from which he has “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 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. Macomber's arguments disregard the crucial fact that he voluntarily pleaded guilty to the alleged violation at the DOSA revocation hearing. As such, he waived his right to appeal most issues, with exceptions that do not apply here. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). However, even if we address his arguments, they fail.

First, nothing in the record before us indicates that the hearing officer applied an incorrect standard of proof. The standard of proof at a DOSA revocation hearing is a preponderance of the evidence. *McKay*, 127 Wn. App. at 170. "Preponderance of the evidence means evidence that is more probably true than not true." *In re Welfare of Sego*, 82 Wn.2d 736, 739 n.2, 513 P.2d 831 (1973). During the revocation hearing, Mr. Macomber admitted that he had not adequately participated in the substance abuse treatment program and pleaded guilty to failing to complete the program. Exhibit 18. The hearing officer also relied on the testimony of two corrections officers. *Id.* Although the record does not detail the substance of the corrections officers' testimony, we find that Mr. Macomber's admission, standing alone, was sufficient to establish by a preponderance of the evidence that he was guilty of the violation.

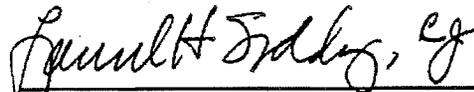
Finally, Mr. Macomber's claim that he was not allowed to call all of his witnesses is undermined by the record. During the hearing, he stated that he had no intention of calling witnesses. Exhibit 23. When the hearing officer specifically questioned Mr.

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Macomber about the issue, Mr. Macomber reiterated that he did not need to call witnesses. *Id.* Mr. Macomber's bald assertion that he was denied the right to call witnesses is insufficient to merit relief. *In re Pers. Restraint of Rice*, 118 Wn.2d at 876, 886, 828 P.2d 1086 (1992).

The petition is dismissed. RAP 16.11(b).

DATED: June 24, 2015



LAUREL H. SIDDOWAY
CHIEF JUDGE