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The Court of Appeals
of the
State of Washington
Division III

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July 11, 2016

Freedom T J Morganflash
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CASE # 339670
Personal Restraint Petition of Freedom T. J. Morganflash
GARFIELD COUNTY SUPERIOR COURT No. 121000054

Dear Counsel and Mr. Morganflash:

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

Renee S. Townsley
Clerk/Administrator

RST:ko
Enclosure

7-11-16 Sent 16:11

FILED
July 11, 2016
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:	)	**33967-0-III**
FREEDOM T.J. MORGANFLASH,	)	**ORDER DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	)	

Freedom T.J. Morganflash seeks relief from personal restraint imposed after his Drug Offender Sentencing Alternative (DOSA) was revoked by the Department of Corrections (DOC). He contends (1) revocation of his DOSA violated principles of res judicata and collateral estoppel; (2) he did not receive due process at his revocation hearing; and (3) the revocation of DOSA constituted double jeopardy.

A petitioner who challenges a decision from which he has had "no previous or alternative avenue for obtaining state judicial review" need only show that he is under restraint and the restraint is unlawful. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4(a), (c). This review standard applies to petitions challenging the results of DOC community custody hearings. *See In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Mr. Morganflash is under unlawful

restraint and has not been afforded a previous or alternative avenue for obtaining state judicial review of his DOSA revocation.

In 2010, Mr. Morganflash began serving a DOSA community custody term under a Benton County cause. His DOSA was revoked in 2011. While serving a post-revocation DOSA community custody term (still under the Benton County cause), he was sentenced to a prison-based DOSA for new crimes he was convicted of in Garfield County. Mr. Morganflash served his prison-based DOSA under the Garfield County cause until February 2014, at which time he was released to a DOSA community custody term.

When Mr. Morganflash was released in February 2014 he began serving his DOSA community custody term under the Garfield County cause, and also resumed serving his DOSA community custody term under the Benton County Cause. Upon his release, Mr. Morganflash was given a boilerplate form called "Conditions, Requirements, and Instructions" (conditions form) containing a list of all the standard conditions DOC has imposed, including a condition that he obey all laws. He also spoke with a community corrections officer (CCO) who assisted him with paperwork, discussed the forms and court conditions, and answered his questions regarding all of his sentences.

In April 2014, Mr. Morganflash's CCO learned that he had been arrested for driving with his license suspended and possession of marijuana. Mr. Morganflash was still under supervision for both the Benton County and Garfield County causes at this

time. His supervision for the Benton County cause ended in October 2014. In December 2014, Mr. Morganflash was convicted of the crimes he was arrested for in April 2014. Based on his conviction for a new felony while under supervision, DOC began the process of revoking his Garfield County DOSA.

In January 2015, the DOC served Mr. Morganflash with a notice of violation, but the notice contained the Benton County cause number, not the Garfield County cause number. A revocation hearing was held that same month, and Mr. Morganflash argued that his DOSA should not be revoked because he was no longer under supervision for the Benton County cause. Despite the typographical error, the hearing officer revoked Mr. Morganflash's DOSA because he was convicted of a new felony. Mr. Morganflash then appealed to the DOC appeals panel, arguing that there was never a Conditions Form containing the Garfield County cause. The appeals panel reversed the revocation on procedural grounds because the documents at the hearing did not relate to the Garfield County cause.

The DOC then scheduled a second hearing for May 2015. Mr. Morganflash was again served with a copy of the documents to be used at the hearing, including a Conditions Form with the Benton County cause number crossed out and the Garfield County cause number written in its place. At the second hearing, Mr. Morganflash asserted that he believed he was given a conditions form related to the Garfield County cause, but that he apparently never received one. However, his testimony at the hearing

indicates that he was given a separate form, and was aware of the DOSA conditions he had to abide by. Mr. Morganflash was also provided with an opportunity to call witnesses on his behalf.

The ultimate result of the second hearing was that Mr. Morganflash's DOSA was revoked. He appealed that decision, but the DOC appeals panel affirmed. Mr. Morganflash then sought a second level appeal, but the DOC rejected it as untimely. He attempted to explain why his second level appeal was untimely, but provided no documentation showing why his appeal was late. This petition followed.

Mr. Morganflash first argues that the revocation of his DOSA in May 2015 violates the principles of res judicata and collateral estoppel. He asserts that the reversal of his January 2015 DOSA revocation has preclusive effect, and the DOC is now barred from seeking to revoke his DOSA on the same grounds.

When a prior adjudication takes place before an administrative body, several factors must be considered to determine if the administrative decision has preclusive effect. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987). These factors are: (1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations. *Id.* If there is no conclusive determination on the merits, the prior decision has no preclusive effect. *See State v. Dupard*, 93 Wn.2d 268, 274-76, 609 P.2d 961 (1980).

Here, the reversal of Mr. Morganflash's January 2015 DOSA revocation was on procedural grounds. It was not a factual determination on the merits. Since there was no factual determination, his January 2015 DOSA revocation does not have preclusive effect. *See Bremerton*, 109 Wn.2d at 508; *Dupard*, 93 Wn.2d at 274-76. The revocation of his DOSA in May 2015 did not violate the principles of res judicata or collateral estoppel.

Mr. Morganflash next contends he did not receive sufficient notice of the "obey all laws" condition in relation to the Garfield County cause. He also argues that the DOC's rejection of his second level appeal was improper. He appears to assert that these actions violated his due process rights.

An individual facing a DOSA revocation is entitled to the procedural protections established in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and the evidentiary burden at a revocation hearing is a preponderance of the evidence. *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 168-170, 110 P.3d 856 (2005). The minimum requirements for due process in a revocation hearing are:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

In re Pers. Restraint of McNeal, 99 Wn. App. 617, 628-29, 994 P.2d 890 (2000) (quoting *Morrissey*, 408 U.S. at 489); *In re Pers. Restraint of Boone*, 103 Wn.2d 224, 231, 691 P.2d 964 (1984).

Mr. Morganflash received a notice of violation on several occasions prior to his May 2015 hearing, and was provided with the conditions form multiple times. Further, the DOSA conditions were the same for the Benton County cause and the Garfield County cause. Mr. Morganflash was aware that one of the DOSA condition was to obey all laws. He was also allowed to call witnesses during the hearing, and to cross-examine any witnesses for the DOC. The hearing was before a neutral hearing officer, who provided an explanation why Mr. Morganflash's DOSA was being revoked, and also clearly explained the basis for the DOSA revocation during the hearing. The second hearing did not violate Mr. Morganflash's due process rights.

In regard to the denial of his second level appeal, Mr. Morganflash did not provide any documentation to support his assertions that his second appeal was actually timely. Bare assertions and conclusory allegations are insufficient to support a personal restraint petition. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Mr. Morganflash's last argument is that the reversal of the January 2015 DOSA revocation prevents revocation of his DOSA for the same violations at a second hearing. He argues that allowing the DOC to proceed with a second hearing based on the same

DOSA violations violates double jeopardy. *See* U.S. CONST. amend. V. The double jeopardy clause "protects against a second prosecution for the same offense after conviction." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *See also U.S. v. Ursery*, 518 U.S. 267, 273, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996) (double jeopardy is a protection against the imposition of successive punishments). But when a defendant successfully vacates a conviction, double jeopardy does not bar retrial on the same offense. *See State v. Hall*, 162 Wn.2d 901, 909, 177 P.3d 680 (2008); *State v. Ervin*, 158 Wn.2d 746, 758, 147 P.3d 567 (2006).

Here, Mr. Morganflash's DOSA was revoked in January 2015 because of his April 2014 convictions, but that revocation was reversed on appeal for procedural reasons. Mr. Morganflash's successful appeal vacated any punishment that was imposed for his April 2014 convictions. The DOC then sought a new DOSA revocation hearing for Mr. Morganflash's April 2014 convictions. This is akin to an appeals court reversing a defendant's conviction on a technicality, and the State subsequently deciding to seek a retrial for the same offense. The rationale from *Smith* and *Ervin* applies here. If this were a criminal prosecution, double jeopardy would not bar the state from retrying Mr. Morganflash for the original offense. Similarly, double jeopardy does not bar the DOC from seeking a new DOSA revocation hearing for Mr. Morganflash's April 2014 convictions when the first revocation was reversed for procedural insufficiency. The second revocation hearing in May 2015 did not violate double jeopardy.

To summarize, the court concludes: (1) the revocation of Mr. Morganflash's DOSA in May 2015 does not violate res judicata or collateral estoppel; (2) Mr. Morganflash's due process rights were not violated at the May 2015 hearing; and (3) the second revocation hearing in May 2015 did not violate double jeopardy. His petition is dismissed. RAP 16.11(b). The court also denies his 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.

Lawrence-Berrey J.

ROBERT E. LAWRENCE-BERREY
ACTING CHIEF JUDGE