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



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April 13, 2016

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CASE # 334376
Personal Restraint Petition of Santiago Vasquez
YAKIMA COUNTY SUPERIOR COURT No. 111014733

Dear Counsel and Mr. Vasquez:

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

FILED
April 13, 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:)
)
SANTIAGO VASQUEZ,)
)
Petitioner.)

No. 33437-6-III

**ORDER DISMISSING PERSONAL
RESTRAINT PETITION**

Santiago Vasquez seeks relief from claimed unlawful personal restraint after a Department of Corrections (DOC) hearing officer revoked the Drug Offender Sentencing Alternative (DOSA) sentence he received for his 2012 Yakima County assault and drug possession convictions and sanctioned him to serve the remainder of his community custody term in prison.

Mr. Vasquez pleaded guilty to two counts of third degree assault of a law enforcement officer and one count of possession of methamphetamine committed on October 13, 2011. He committed the crimes while serving community custody for 2005 Douglas County convictions. On December 4, 2012, the court imposed a prison-based

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DOSA sentence of 27.5 months incarceration and 27.5 months of community custody.

Mr. Vasquez was released from prison to DOSA community custody on April 17, 2014.

(DOC Response, Exhibit 2, at 9) At that time, he signed a Conditions, Requirements, and Instructions document acknowledging that he understood his community custody obligations for both his Yakima County and Douglas County matters and would comply with the conditions. (Exhibit 5) Within four days of his release, he committed a violation by possessing a controlled substance. He received a swift and certain stipulated sanction. Over the ensuing five months, he had five more hearing processes for numerous community custody violations including failure to report, failure to complete substance abuse treatment as directed, failure to abide by UA/BA monitoring, using a controlled substance, absconding from supervision, and failure to pay LFOs. (Exhibit 7 at 2-3) In October 2014, he again absconded from supervision and remained at large until he was arrested on April 13, 2015. (Exhibit 4 at 2; Exhibit 6 at 2)

On April 21, 2015, Mr. Vasquez's community corrections officer (CCO) submitted a violation report recommending that his DOSA be revoked. The report alleged he violated conditions of supervision by (1) absconding from supervision since on or about October 10, 2014; (2) failure to comply with court ordered DOSA treatment since on or about October 10, 2014; (3) failure to pay LFOs on the Yakima County cause since October 2014; (4) failure to pay LFOs on the Douglas County cause since October 2014; and (5) failure to pay cost of supervision fees from October 2014 to the present.

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(DOC Response, Exhibit 7 at 3) The DOC served him with a Notice of Allegations, Hearing, Rights and Waiver on April 22. (Exhibit 8 at 2)

The violation hearing was held on April 23. Mr. Vasquez pleaded guilty to the first two allegations of absconding from supervision and failing to enter drug treatment. He pleaded not guilty to the allegations of failure to pay LFOs and supervision fees.

(DOC Response, Exhibit 4 at 1; Exhibit 9 at 4-5) The hearing officer found him guilty of all five allegations. (Exhibit 4 at 1; Exhibit 9 at 10) The hearing officer revoked his DOSA and ordered him to serve his remaining community custody term in prison.

(Exhibit 4 at 3; Exhibits 10, 11) The hearing officer's oral ruling and written decision each reflect that the decision to revoke Mr. Vasquez's DOSA was based on his absconding from supervision and his failure to enter drug treatment. The written disposition, decision and reasons states:

The DOSA option is afforded to drug offenders that are willing to address their issues. In exchange for a reduction in confinement time, they are to report and participate in chemical dependency treatment. Since Mr. Vasquez's prison release he has not done those things. In September 2014, he released from confinement and immediately absconded again. This is his sixth violation process. Although he testifies he is doing better, there is no evidence to support this statement. What is known is that Mr. Vasquez knowingly and willingly made himself unavailable for supervision yet again. Due to all the above stated reasons, Mr. Vasquez's DOSA was revoked.

(Exhibit 4 at 3; Exhibit 9 at 19-21)

Mr. Vasquez timely appealed to the DOC regional appeals panel, which affirmed the hearing officer's decision. (DOC Response, Exhibits 12, 13) This petition followed.

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Since Mr. Vasquez is challenging a DOC 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).

Individuals serving the community custody portion of a DOSA sentence have the same liberty interests as a parolee. *See In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 628, 994 P.2d 890 (2000). Thus, an individual facing a community custody violation hearing is entitled to the following minimum due process protections:

(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.

Id. at 628-629 (citing *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The preponderance of the evidence standard applies in community custody hearings. *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005).

Mr. Vasquez first claims that the hearing officer denied his due process right to

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confront witnesses by relying exclusively on hearsay evidence to revoke his DOSA sentence without a showing of good cause to forgo live testimony at the hearing. The claim lacks merit.

The minimal due process right to confront and cross-examine witnesses is not absolute. *State v. Dahl*, 139 Wn.2d 678, 686, 990 P.2d 396 (1999). Under *Morrissey* (and its progeny) affidavits, reports, and other documentary materials that would otherwise not be admissible as hearsay in an adversarial criminal trial may be considered in a parole revocation proceeding. *Id.*; *State v. Abd-Rahmaan*, 154 Wn.2d 280, 288-89, 111 P.3d 1157 (2005). Hearsay should be considered only if there is good cause to forgo live testimony. *Dahl*, at 686 (citing *State v. Nelson*, 103 Wn.2d 760, 765, 697 P.2d 579 (1985)). Good cause is defined in terms of “difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ hearsay evidence. *Id.* Unreliable hearsay evidence may not be the sole basis for revocation of community custody. *Nelson*, at 765.

Mr. Vasquez pleaded guilty to the first two allegations of absconding from supervision and failing to enter drug treatment. At the hearing, he admitted to the factual basis for these violations. The hearing officer accepted the plea and did not rely on hearsay evidence in finding him guilty. As for the allegations of failure to pay LFOs and supervision costs, the testifying community corrections officer did rely on hearsay from DOC reports that Mr. Vasquez had failed to pay on those obligations. But Mr. Vasquez

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voiced no objection. He thus waived his claim that use of hearsay violated his due process rights. *State v. Robinson*, 120 Wn. App. 294, 300, 85 P.3d 376 (2004). And he admitted in his own testimony that he had made no payments, thus corroborating the DOC's allegations. The hearing officer did not rely solely on hearsay in finding him guilty. In any event, it is clear from the hearing officer's oral ruling and written decision and reasons that it was the absconding and failure to enter drug treatment violations that were the basis for revoking the DOSA. The hearing officer made no mention of failure to pay LFOs as a reason for the revocation.

Mr. Vasquez next claims the hearing officer failed to consider his ability to pay and made no finding that his nonpayment was willful when finding him guilty of the failure to pay violations. He thus concludes the DOC failed to prove the allegations by a preponderance of the evidence and the DOSA revocation order must be vacated.

Incarceration for nonpayment of LFOs cannot occur unless the State proves that failure to pay is willful, i.e., the accused has the means to pay and has intentionally failed to do so. *See State v. Ziegenfuss*, 118 Wn. App. 110, 115, 74 P.3d 1205 (2003).

Mr. Vasquez testified he was broke and had no income to pay towards his financial obligations due to health problems that keep him from working. He said he just recently filed for SSI and was told he could get back pay for an L & I claim, but that he did not apply for any type of assistance while he was on abscond status because he had given up on life at that time. (DOC Response, Exhibit 9 at 9-10) He explained, "I wasn't

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planning to live, alright? So I didn't make no payments, no effort to do that, that if I'm dead, whose [sic] going to care what I owe, you know? . . . [T]hat's why I haven't been able to pay it. I don't got no income, period." (*Id.*)

In finding Mr. Vasquez guilty of the three failure to pay violations, the hearing officer acknowledged his mitigating reasons for nonpayment, but ultimately reasoned:

[I] have no reason to question you as to things that are going on, but if you were doing what you were supposed to do you would have the means to pay that through L & I or SSI or something or GAX. There's lots of options. Okay, the other thing is that you can't apply for any of those things when you are on warrant status. So that really prevents you from moving forward. So I am going to enter guilty findings on those, although I will note that there may be extenuating circumstances.

(DOC Response, Exhibit 9 at 10)

Thus, in essence, the hearing officer found that Mr. Vasquez would have had the ability to pay but for his own willful actions in not applying for public benefits. The findings of guilt are supported by a preponderance of the evidence. In any event, as noted above, the hearing officer clearly did not use the failures to pay as the basis for the decision to revoke the DOSA sentence and return Mr. Vasquez to prison. There is no showing that he received incremental punishment for these violations.

Finally, Mr. Vasquez claims the DOC violated his due process rights by not providing adequate advance notice that it was seeking revocation of his DOSA.

Due process requires that the offender be given notice of the claimed violations. *Morrissey v. Brewer*, 408 U.S. at 488. Due process does not require that the offender be

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given notice that the DOC will seek revocation. The DOSA statute sufficiently notifies an offender that if he violates his conditions, the DOC can revoke his DOSA. RCW 9.94A.662(3). In any event, the record shows that Mr. Vasquez timely received the violation report as part of his hearing discovery packet over 24 hours in advance of the April 23 hearing. The violation report states that the CCO recommended DOSA revocation because Mr. Vasquez made no effort to comply during supervision and address his chemical dependency issues. (Exhibit 7 at 5; Exhibit 8 at 2) Mr. Vasquez received proper notice of the proceedings. There is no due process violation.

Mr. Vasquez makes no claim in this petition that presents a debatable issue of fact or law. He fails his burden under *Dalluge* and RAP 16.4.

Accordingly, the petition is dismissed as frivolous pursuant to RAP 16.11(b). The court also denies Mr. Vasquez's motion for appointed counsel. *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