NO. 95423-2

SUPREME COURT OF THE STATE OF WASHINGTON

IKEIM VASTER, ALBERT REEVES, and TRISTAN BEEMAN,

Appellants,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,
DICK MORGAN, DAN PACHOLKE, and BERNIE WARNER,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' unpublished decision recognized a longstanding principle of law: the Department of Corrections' authority to return individuals to prison under RCW 9.94A.633(2)(a) is "separate and distinct" from the community custody sanctioning scheme in RCW 9.94A.737. It further ruled that the Department acted properly when it returned Vaster and his co-plaintiff-appellants to prison for violating their community custody conditions while on supervision subject to RCW 9.94A.633(2)(a). Lower courts routinely reach the same conclusion when ruling on personal restraint petitions regarding this provision, and the superior court had no trouble reaching this conclusion in the initial matter, even under the generous Civil Rule 12(b)(6) pleading standards. Vaster does not satisfy any of the review requirements under RAP 13.4(b). Moreover, the Court of Appeals ruled that Vaster's claims are barred by collateral estoppel and the statute of limitations, which Vaster does not challenge. This Court's review is unnecessary because the Court of Appeals decision does not conflict with other court decisions, there is no confusion among the lower courts, and this case does not present an issue of substantial public interest.

II. ISSUE PRESENTED FOR REVIEW

This Court should deny review because this matter does not meet any of the RAP 13.4(b) criteria. However, if the Court were to accept discretionary review, the following issue would be presented:

1. Did the Court of Appeals correctly determine that the Department of Corrections lawfully returned Vaster to prison pursuant to its authority under RCW 9.94A.633(2)(a)?

III. STATEMENT OF THE CASE

Vaster was convicted of a felony and sentenced to total confinement in prison. CP 14. State law, RCW 9.94A.728, provides that "[n]o person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except" for certain situations, including when an offender earns "early release time as authorized by RCW 9.94A.729." RCW 9.94A.728(1)(a). Under RCW 9.94A.729(5)(a), "[a] person who is eligible for earned early release as provided in this section and who will be supervised by the department pursuant to RCW 9.94A.501 or 9.94A.5011, *shall be transferred to community custody in lieu of earned release time.*" (emphasis added). Vaster was subject to RCW 9.94A.729 and the Department transferred him from prison to community custody in lieu of

earned early release in accordance with this statute. CP 15. Vaster then admittedly violated the conditions of community custody and, following a violation hearing, the Department returned him to total confinement in accordance with RCW 9.94A.633(2)(a). CP 15-16.

Vaster filed a personal restraint petition on this issue, raising his claims challenging the Department's decision to return him to prison for the community custody violations. Both Division Three of the Washington Court of Appeals and this Court's Commissioner rejected these claims, denying the personal restraint petition. *See Matter of Vaster*, No. 90352-2 (March 13, 2015); *In re Pers. Restraint of Vaster*, Washington Court of Appeals No. 32068-5-III (May 20, 2014); CP 35-52.[1]

Approximately one year later, Vaster filed a complaint against the Department, alleging violations of his Fourth, Fifth, and Fourteenth Amendment rights, and unlawful imprisonment. CP 1-11. Vaster also sought class certification. The Department moved to dismiss. Vaster filed an amended complaint[2] alleging the same claims and adding two

[1] When considering a Civil Rule 12(b)(6) motion, the courts may take judicial notice of matters of public record. *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187, 192 (1977).

[2] In his Petition for Review, Vaster cites repeatedly to the original complaint he filed, which his amended complaint superseded and which is not in the appellate record. Such factual allegations were not considered by the trial court or the Court of Appeals, and should not form any basis of this Court's review. *See, e.g.*, *McDonough v. Foster*, 47 Wn.2d 229, 231, 287 P.2d 336, 337 (1955) (prior complaint "abandoned" once amended complaint filed); *Ward v. Ward*, 14 Wn. 640, 643, 45 P. 312, 313 (1896).

additional plaintiffs. CP 12-22. The Department moved to dismiss the amended complaint under Civil Rule 12(b)(6). The court dismissed the matter with prejudice, specifically noting that the sanctions imposed by the Department "are authorized by RCW 9.94A.633(2)(a)," and that nothing in RCW 9.94A.737 precluded the Department from exercising its authority under RCW 9.94A.633(2)(a). CP 121-22. The trial court denied the plaintiffs' motion for reconsideration. CP 128.

On appeal, the Court of Appeals affirmed, specifically holding that: "DOC does maintain [the authority to order their return to total confinement] for offenders such as the petitioners, who are serving a portion of their term of confinement on community custody. This authority remains separate and distinct from RCW 9.94.737. A contrary interpretation would render RCW 9.94A.633(2)(a) meaningless and would defy common sense." *Vaster v. Washington State Dep't of Corr.*, No. 76172-2-I, 2017 WL 5569213, at *2 (Wash. Ct. App. Nov. 20, 2017). The lower courts routinely decide this issue in personal restraint petitions and the Court of Appeals decision is consistent with those rulings. *See, e.g.*, *In re Pers. Restraint of Layer*, Washington Court of Appeals No. 50034-5-II (Sep. 29, 2017). Such decisions affect a limited number of incarcerated individuals in this state. The Court should deny review.

IV. ARGUMENT

There is no basis for this Court's review under RAP 13.4(b). The Legislature has granted DOC the authority it exercised under RCW 9.94A.633(2)(a) and the notification scheme described in Vaster's Petition does not implicate due process concerns. The Court of Appeals' decision is not in conflict with a decision of this Court or any published Court of Appeals decision. *See* RAP 13.4(b)(1)-(2). Nor does this matter present a significant question of law under the Washington or United States Constitutions. *See* RAP 13.4(b)(3). Vaster concedes as much in his Petition by not arguing for review under any of these provisions.

Vaster's only argument in favor of review is that this case presents "an issue of substantial public interest" under RAP 13.4(b)(4). Vaster does not satisfy this standard. Moreover, the Court of Appeals determined that Vaster's claims are barred by collateral estoppel and he does not challenge that determination in his Petition. The Court should deny review.

A. The Court Should Deny Review Because the Court of Appeals Correctly Determined That Collateral Estoppel Bars Vaster's Claims and He Does Not Challenge That Determination

This Court should deny review because Vaster does not challenge the determination that his claims are procedurally barred. The Court of Appeals ruled that Vaster's claims were barred by collateral estoppel and that his false imprisonment claim was barred by the statute of limitations.

Vaster has not moved for review of these issues and does not otherwise challenge these rulings. In his unsuccessful personal restraint petition, Vaster asked Division Three of the Court of Appeals and this Court to consider his argument that his return to prison pursuant to RCW 9.94A.633(2)(a) was unlawful. Both courts reviewed the legal and factual circumstances of this claim, and both issued rulings that the Department's actions were lawful. *See* CP 35-52. Collateral estoppel precludes re-litigation of this issue. *See Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979); *Hanson v. City of Snohomish*, 121 Wn. 2d 552, 564, 852 P.2d 295, 301 (1993). Vaster has not and cannot demonstrate otherwise. The Court should deny review on this basis.[3]

B. This Issue is Not of Such Substantial Public Interest That This Court's Review is Warranted

This matter does not present an issue of substantial public interest. Courts consistently recognize that the Department has authority to return individuals in Vaster's situation to prison under RCW 9.94A.633(2)(a). While it is true that "[a] decision that has the potential to affect a number

[3] Vaster's claims also fail because he cannot bring a 42 U.S.C. § 1983 claim against the Department or a 42 U.S.C. § 1983 damages claim against its official-capacity employees. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45 (1989); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 285-86, 4 P.3d 808 (2000). He has never addressed this argument.

of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue," *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 414 (2016), that is not the case here because the lower courts are in agreement. A decision of this Court is unnecessary to clarify the issue because the lower courts consistently reach the correct conclusion. Vaster argues that this case presents an issue of significant public interest because the Court of Appeals ruling condones "misleading or deceptive conduct by the State." Petition for Review, at 8. Yet that argument presupposes a conclusion that the Department overstepped its broad authority, which no court has ruled it has and which is unsupported by the facts and laws at issue in Vaster's complaint. The Court should deny review.

C. Individuals Subject to RCW 9.94A.633(2)(a) Have Sufficient Notice that They May be Returned to Prison for Violating Their Community Custody Conditions

Individuals, like Vaster, who are only released to community custody in the first place in lieu of earned early release are on notice that, pursuant to RCW 9.94A.633(2)(a), they may be returned to prison for violating the conditions of this community supervision. Vaster apparently no longer contests the Department's authority to revoke his community supervision, but rather now claims only that the notice of the RCW 9.94A.737 "swift and certain" process rendered the Department's

decision to act under RCW 9.94A.633(2)(a) unfair, and that "more restrictive confinement" does not include prison. Both arguments fail and do not merit further judicial review.

First, nothing in the Legislature's enactment of RCW 9.94A.737's "swift and certain" process eliminated the Department's authority under RCW 9.94A.633(2)(a) to revoke the community custody of offenders transferred to community custody in lieu of earned early release. Instead, in RCW 9.94A.633(2)(a)-(f), the Legislature left community custody revocation and return to prison for the remainder of a sentence as an option for certain classes of offenders, such as those like Vaster, who were serving community custody in lieu of early release time under RCW 9.94A.728. *See* RCW 9.94A.633(2)(a). A contrary interpretation would render RCW 9.94A.633(2)(a) meaningless. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts attempt to interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous). As the Court of Appeals pointed out, RCW 9.94A requires notification of the "swift and certain" sanction scheme but there is no notice requirement for sanctions under RCW 9.94A.633(2)(a). In fact, Vaster concedes that he was not entitled to written notice of a potential return to prison under 9.94A.633(2)(a). Pet. Review at 8.

Moreover, individuals subject to this provision are specifically released from prison to community custody in lieu of earned early release. RCW 9.94A.728 and .729 allow for early release, but only under the strict requirements of the statute, and in cases such as Vaster's, only to release to community custody. *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 740, 214 P.3d 141, 146 (2009). And, "the statutes make clear that the [Department of Corrections] program allowing community custody in lieu of earned early release is administered by [the Department of Corrections]." *Blick v. State*, 182 Wn. App. 24, 30, 328 P.3d 952, 955 (2014); *see also Mattson*, 166 Wn.2d at 739-40. The fact that Vaster did not believe the Department would return him to prison for violating community custody conditions did not eliminate the Department's authority to do so. As the Court of Appeals noted, individuals are presumed to know the law. *See State v. Spence*, 81 Wn.2d 788, 792, 506 P.2d 293 (1973). This seems particularly obvious when the law they are presumed to know is the one that has allowed their release from prison.[4] Notice that Vaster was also subject to "swift and certain"

[4] Additionally, the Department's Earned Release Time policy specifically states: "If an offender has not completed his/her maximum term of total confinement and is subject to a violation hearing for any violation of community custody and is found to have committed the violation, the Department may return the offender to total confinement to serve the remainder of the Prison term." DOC Policy 350.100, *available at* http://www.doc.wa.gov/information/policies/files/350100.pdf.

sanctions for his community custody violations did not change the nature of his community supervision or nullify the other laws that applied to him.

Second, Vaster's continued argument that prison does not qualify as "a more restrictive confinement status" for an offender "to serve up to the remaining portion of the sentence" is baseless. The term "more restrictive confinement" also occurs in RCW 9.95.435(1) and courts have accepted the plain meaning of that term as including confinement in prison. *See In re Hudgens*, 156 Wn. App. 411, 422, 233 P.3d 566, 571 (2010); *see also In re Flint*, 174 Wn.2d 539, 551, 277 P.3d 657, 663 (2012). While it is possible that this term may allow for multiple confinement placements more restrictive than community custody, such as work release, it certainly does not rule out prison simply because prison is more restrictive than other confinement options within the Department. The fact that the statute limits the Department's response to revocation or a return to total confinement in other situations does not suggest that total confinement was excluded from the "more restrictive confinement" options the Legislature provided for in RCW 9.94A.633(2). The portion of Vaster's sentence that was "remaining" was his unexpired prison term. It is appropriate that the Department would require individuals such as Vaster to serve "the remaining portion" of their prison sentences in a prison facility. Such application of law does not implicate due process

concerns. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845-49, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). The Court of Appeals' determination on this point does not warrant review.

V. CONCLUSION

This case does not meet the criteria for review under RAP 13.4(b). The Department requests that the Court deny Vaster's Petition for Review.

RESPECTFULLY SUBMITTED this 23rd day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing RESPONDENTS' ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 23rd day of February, 2018, at Olympia, Washington.

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