

COURT OF APPEALS No. 37753-5-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

IN RE THE PERSONAL RESTRAINT OF BRUCE DEYMON PRICE

Respondent/Appellant

PETITIONER'S SUPPLEMENTAL BRIEF

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
09 JUL 2009 11:50
BY _____
DEP/11

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98406
email: slarnold2002@yahoo.com
(253)759-5940**

TABLE OF CONTENTS

	<u>Page(s)</u>
A. ASSIGNMENTS OF ERROR RELATING TO SUPPLEMENTAL BRIEF.....	1
B. ISSUES PRESENTED.....	1-2
C. STATEMENT OF THE CASE.....	2-6
1) Procedural History.....	2-4
2) DOSA Revocation Hearing.....	
D. ARGUMENT.....	6-22
I. MR. PRICE IS UNLAWFULLY RESTRAINED AND IS ENTITLED TO RELIEF BY WAY OF A PERSONAL RESTRAINT PETITION.....	6-9
a. <u>Mr. Price is unlawfully restrained</u>.....	6-7
b. <u>Mr. Price need not show prejudice has resulted from his unlawful restraint</u>.....	7-9
II. MR. PRICE’S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY DOSA REVOCATION WHERE HE WAS DENIED HIS RIGHT OF CONFRONTATION AND HIS RIGHT TO THE ASSISTANCE OF COUNSEL.....	10-19

TABLE OF CONTENTS (continued)

	<u>Page(s)</u>
a. <u>The federal and state constitutions require the state to provide at a minimum the <i>Morrissey</i> due process requirements to an offender facing revocation of a DOSA sentence.</u>	11-14
b. <u>Mr. Price was denied his right to confront and cross-examine adverse witnesses.</u>	14-16
c. <u>Mr. Price was entitled to the assistance of counsel at his DOSA revocation hearing under the specific facts of his case.</u>	16-19
III. THE SANCTION OF DOSA REVOCATION WAS IMPROPER.	19-22
E. CONCLUSION.	22
APPENDIX:	
A. Hearing and Decision Summary (10-3-07)	
B. Community Custody Hearing Report (10-4-07)	

Table of Authorities

Page(s)

Washington Cases

<u><i>Dillenberg v. Morris</i></u> , 84 Wn.2d 353m525 P.2d 770 (1974).....	17
<u><i>In re Personal Restraint of Boone</i></u> , 103 Wn.2d 224,691 P.2d 964 (1984).....	12
<u><i>In re the Personal Restraint Petition of Cashaw</i></u> . 123 Wn. 2d 138, 866 P.2d 8 (1994).....	7,8,9
<u><i>In re the Personal Restraint Petition of Burton</i></u> , 80 Wn.App. 573,910 P.2d 1295 (1996).....	8
<u><i>In re Personal Restraint Petition of Cook</i></u> , 114 Wn.2d 802, 792 P.2d 506 (1990).....	7
<u><i>In re Personal Restraint of McKay</i></u> , 127 Wn.App. 165, 110 P.3d 856 (2005).....	13,17,19
<u><i>In re the Personal Restraint Petition of McNeal</i></u> , 99 Wn.App. 630-31,994 P.2d 890 (2000).....	13,17
<u><i>In re Personal Restraint of McNeal</i></u> , 99 Wn.App. 617, 994 P.2d 890 (2000).....	9,19
<u><i>In re the Personal Restraint Petition of Mines</i></u> , 146 Wn.2d 279,45 P.3d 535 (2002) (reaffirming <u><i>Cashaw</i></u>).....	7
<u><i>In re Personal Restraint of St. Pierre</i></u> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	12
<u><i>State v. Abd-Rahmaan</i></u> , 154 Wn.2d 280,111 P.3d 1157 (2005).....	13,16
<u><i>State v. Dahl</i></u> , 139 Wn.2d 678,400,990 P.2d 396 (1999).....	13
<u><i>State v. Nelson</i></u> , 103 Wn.2d 760,697 P.2d 579 (1985).....	12

Table of Authorities(continued)

Page(s)

Federal Cases

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756,
36 L.Ed.2d 656 (1973)..... 12-14,16,17,19

Goldberg v. Kelley, 397 U.S. 254,267, 90 S.Ct. 1011,
25 L.Ed.2d 287 (1970).....11

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893,
47 L.Ed.2d 18 (1976).....11

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593,
33 L.Ed.2d 484 (1972).....10-13,16,17

Washington Court Rules, Statutes, and Administrative Codes

RAP 16.4.....6,7

RCW 9.94A.660(2).....19

WAC 137-24-040(7).....18

United States Constitution and Washington Constitution

United States Constitution, Fourteenth Amendment.....10

United States Constitution, Fifth Amendment.....10

Washington Constitution, Article 1 § 3.....10

A. ASSIGNMENTS OF ERROR RELATING TO SUPPLEMENTAL BRIEF.

1. Mr. Price is entitled to relief via a Personal Restraint Petition because his DOSA sentence revocation occurred in violation of his constitutions rights, and resulted in a forty-five(45) month prison term.

2. Mr. Price's right to due process was violated when DOC revoked his DOSA sentence at a hearing where he was denied his right to confront and cross-examine adverse witnesses.

3. Mr. Price's right to due process was violated when DOC re-revoked his DOSA sentence at a hearing where he was not provided counsel.

4. The hearing officer's departure from DOC's sanction guidelines was improper.

B. ISSUES PRESENTED

1. Whether Mr. Price is entitled to relief under RAP 16.4 where the unlawful DOSA revocation resulted in a prison term of forty-five(45) months? (Assignment of Error Number One)

2. Whether Mr. Price was denied due process at his DOSA revocation hearing where the hearing examiner relied upon documentary

and hearsay evidence that Mr. Price could not confront? (Assignment of Error Number Two)

3. Where Mr. Price denied the violation allegations and contested the propriety of the sanction imposed, and where the alleged violations were multiple and criminal in nature and the recommended sanction was the harshest possible, was he entitled to counsel to effectively advocate on his behalf at the DOSA revocation hearing? (Assignment of Error Number Three)

4. Was DOSA revocation, which is presumed unreasonable for a first violation, justified where the “aggravating” factors given by the hearing officer were not supported by the record? (Assignment of Error Number Four)

C. STATEMENT OF THE CASE

1. Procedural History

On January 10, 2006, the petitioner, Bruce Deymon Price, entered a guilty plea to one count of second degree escape under Pierce County Superior Court No. 04-1-05697-9. Additionally, Mr. Price pleaded guilty to unlawful possession of a controlled substance with intent to deliver and attempting to elude a pursuing police vehicle

under Pierce Court Superior Court No. 04-1-01555-5. CP 26-27; RP 1-10-06 p. 1-14.¹ Mr. Price's total sentence for both cases, run concurrently, was forty-five (45) months confinement in the Department of Corrections (DOC) and forty-five (45) months community custody under the Special Drug Offender Sentencing alternative (DOSA). *Id.*

Mr. Price was released to his community custody term on May 1, 2007. Following a revocation hearing, his DOSA sentence was revoked on October 3, 2007. Appendix A, Hearing and Decision Summary.

On December 28, 2007, Mr. Price filed a Motion to Modify or Correct Judgment and Sentence. CP 38-39. On February 15, 2008, the trial court entered an Order Transferring Case to Court of Appeals for consideration of Defendant's Motion for Relief from Judgment.² CP

1

The VRPs are unnumbered and will, therefore, be referred to by indicating the date of the proceeding followed by the page number. The transcript of the Community Custody Violation/DOSA Revocation Hearing will also be referenced by date (10-3-07), followed by the page number.

2

The trial court noted that Mr. Price's pro se motion to modify or Correct Judgment and Sentence would be treated as a Motion for Relief from Judgment and Sentence.

44.

On April 24, 2008, Mr. Price filed a pro se Personal Restraint Petition. The Department of Corrections filed a Response on August 1, 2008. On November 19, 2008, this Court entered an Order Referring Petition to Panel, Appointing Counsel, and Setting Briefing Schedule.

2) DOSA Revocation Hearing

Hearing Officer Linda Hooper found Mr. Pierce guilty of the following violation allegations: 1) Fail to obey all laws by assaulting Vaessa Campeau on August 19, 2007, and 2) Fail to obey all laws by harassing Vanessa Campeau on August 19, 200. Appendix B, Community Custody Hearing Report. A summary of the evidence relied upon by Ms. Hooper to support her guilty findings was stated thusly:

“testimony of CCO who viewed video tape of [Price] leaving scene of assault. [Price] admits to being there. [Vanessa] testified [Price] grabbed her + then went to her mthr’s house.”

Appendix A, Hearing and Decision Summary.

In her Community Custody Hearing Report Ms. Hooper wrote

that she relied on the following evidence to support her guilty finding as to alleged Violation 1: 1) police reports, 2) the telephonic testimony of CCO Carillo, and 3) the telephonic testimony of Vanessa Campeau. Appendix B, p. 2-3.

A police report contained a statement written by Jason Peterson, who was a security guard for the Great American Casino. Mr. Peterson's statement indicated that he had seen Mr. Price grab Ms. Campeau by her shirt, slam her against a wall, and throw her on the ground. Neither Mr. Peterson nor any police officer testified. 10-3-07, 6-8.

The telephonic testimony of CCO Carillo consisted of the acknowledgment that Ms. Carillo had viewed a video tape (without audio) which depicted Mr. Price walking away from the casino on the date in question. 10-3-07, p. 9-11.

In her telephonic testimony, Vanessa Campeau recanted her prior statement to the police, and denied that Mr. Price had assaulted her. Further, she testified that she was drunk at the time. 10-3-07, p. 13-20.

The evidence Ms. Hooper reportedly relied on to support her

guilty finding of alleged Violation 2 included: 1) police reports, and 2) the telephonic testimony of Vanessa Campeau.

The police report indicated that Mr. Price was at Ms. Campeau's mother's house when Ms. Campeau arrived to pick up their children. Mr. Price allegedly brandished a knife, waived it in the air, and threatened to slash Ms. Campeau's tires.

Ms. Campeau testified, however, that Mr. Price had not threatened or harassed her with a knife or in any other manner. She further testified that the entire incident had been blown out of proportion. 10-3-07, 13-20.

D. ARGUMENT

I. MR. PRICE IS UNLAWFULLY RESTRAINED AND IS ENTITLED TO RELIEF BY WAY OF A PERSONAL RESTRAINT PETITION

a. Mr. Price is unlawfully restrained.

A person is entitled to relief by way of a PRP where the person is unlawfully restrained as defined in RAP 16.4. RAP 16.4(2) provides restraint is unlawful if:

The . . . sentence or other order entered in a criminal proceeding . . . was imposed or entered in violation of the Constitution of

the United State or laws of the State of Washington.

As discussed at length below, Mr. Price's sentence as altered by DOC's actions was contrary to the federal and state constitutions, and the laws of the State of Washington State. Thus, his restraint is unlawful under RAP 16.4(2).

b. Mr. Price need not show prejudice has resulted from his unlawful restraint.

RAP 16.4(d) limits relief via a PRP to those situations where there are inadequate alternative remedies available to the petitioner. In other contexts the reviewing court evaluates a PRP by finding that either (1) a petitioner raising a constitutional error demonstrates actual prejudice; or (2) a petitioner raising a nonconstitutional issue demonstrates the "error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *In re Personal Restraint Petition of Cook*, 114 Wn.2d 802,812,792 P.2d 506 (1990).

This threshold requirement for relief by way of a personal restraint petition does not apply in the context of parole revocation proceedings. *In re the Personal Restraint Petition of Cashaw*, 123 Wn. 2d 138, 149,866 P.2d 8 (1994), see also, *In re the Personal Restraint Petition of Mines*, 146 Wn.2d 279,288,45 P.3d 535 (2002) (reaffirming

Cashaw). However, the requirement continues to apply to personal restraint petitions which challenge prison disciplinary actions. In re the Personal Restraint Petition of Burton, 80 Wn.App. 573,581-82,910 P.2d 1295 (1996).

The rationale for Cashaw was that other than a personal restraint petition, a person challenging a parole decision “generally has had no previous or alternative avenue for obtaining state **judicial review.**” (Emphasis added.) 123 Wn.2d at 149. Burton, on the other hand, found prison disciplinary actions were substantially different in at least three important respects. First, prison disciplinary actions are substantially more numerous than parole hearings. Id. Second, prompt and fair disciplinary actions are a critical component of the day-to-day operation of secure and safe prisons, and thus have a far greater need for finality. Id. By contrast, the concern for finality regarding parolability issues is “substantially less compelling” when balanced against the interests involved. Id.

A decision to revoke a DOSA is more akin to a decision revoking probation or parole than a prison disciplinary sanction. The revocation of a DOSA is a revocation of community custody. See,

RCW 9.94A.660. Because community custody permits early release from confinement subject to compliance with conditions, community custody is the equivalent of parole. *In re the Personal Restraint Petition of McNeal*, 99 Wn.App. 617,630-31,994 P.2d 890 (2000). Thus, the revocation of community custody by way of DOSA revocation is the equivalent of the parolability determination at issue in *Cashaw*. As in *Cashaw*, Mr. Price need not show prejudice from DOC's decision. 1233 Wn.2d at 149.

Mr. Price's confinement is contrary to the United States Constitution and the laws of the State of Washington. Thus, Mr. Price is entitled to relief by way of a PRP. RAP 16.4(d); *Cashaw*, 123 Wn.2d at 149.

In any event, Mr. Price was and continues to be actually prejudiced by DOC's actions, and is thus entitled to relief. The actions of DOC have resulted in a doubling of the time he must serve in confinement from forty-five (45) months (less earned early release time) to ninety (90) months (less earned early release time). Because he has suffered actual prejudice as a result of DOC's unconstitutional actions Mr. Price is entitled to relief by way of the present petition.

II. MR. PRICE'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY DOSA REVOCATION WHERE HE WAS DENIED HIS RIGHT OF CONFRONTATION AND HIS RIGHT TO THE ASSISTANCE OF COUNSEL

The federal and state constitutions prohibit the deprivation of liberty or property without due process of law.³ U. S. Const. Amend. 5, 14, Washington Const., Art. § 3. As a result of the hearing examiner's decision, Mr. Price's prison term was increased from forty-five (45) to ninety (90) months. This was a clear loss of liberty, and Mr. Price was, therefore, entitled to due process. *Morrissey v. Brewer*, 408 U.S. 471,481-82, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Mr. Price's due process rights were violated because he was denied his right to confront and cross-examine adverse witnesses at the DOSA revocation hearing. Furthermore, he was entitled to the assistance of counsel who could have presented argument as to why his DOSA

3

The Fourteenth Amendment of the United States Constitution provides in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Fifth Amendment provides in part that "No person . . . shall be . . . deprived of life, liberty, or property, without dues process of Law. Article 1 § 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

should not have been revoked.

a. The federal and state constitutions require the state to provide at a minimum the *Morrissey* due process requirements to an offender facing revocation of a DOSA sentence.

The “fundamental requisite” of due process under the Fourteenth Amendment is the “opportunity to be heard . . . in a meaningful time and in a meaningful manner.” *Goldberg v. Kelly*, 397 U.S. 254,267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (quoting *Grannies v. Ordean*, 234 U.S. 385,394, 34 S.Ct. 779, 58 L.Ed 1363 (1914), and *Armstrong v. Manzo*, 380 U.S. 545,552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Due process is a flexible concept, and the procedural requirements may be tailored to the nature of the issues at stake. *Morrissey*, 408 U.S. at 481. Determining the appropriate level of procedural protections requires balancing of the interests of the individual and the government. *Id.*, see *Mathews v. Eldridge*, 424 U.S. 319,335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (court must consider: (1) the private interests affected by the government action, (2) the risk or erroneous deprivation of that interest through the procedures used, (3) the probable value, if any of substitute procedural safeguards, and (4)

the government's objectives and interest, including the burdens entailed by additional or different procedural requirements).

When the government seeks to revoke an individual's parole or probation and thus take away his liberty, he is not entitled to the same due process protections as at trial, but minimal due process requirements must be followed. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (probation); *Morrisey*, 408 U.S. at 483-87 (parole). It is well settled that the following due process requirements are required for the revocation of probation or parole:

- (1) written notice of the claimed violations;
- (2) disclosure to the parolee of the evidence against him;
- (3) the opportunity to be heard;
- (4) the opportunity to confront and cross-examine witnesses unless there is good cause for not permitting confrontation;
- (5) a neutral and detached hearing body; and
- (6) a statement by the hearing body as to the evidence relied upon and the reasons for the revocation.

Morrisey, 408 U.S. at 488-89; see *Scarpelli*, 411 U.S. at 782; *State v. Nelson*, 103 Wn.2d 760,763,697 P.2d 579 (1985); *In re Personal Restraint of Boone*, 103 Wn.2d 224,691 P.2d 964 (1984), overruled on other grounds, *In re Personal Restraint of St. Pierre*, 118 Wn.2d

321,328,823 P.2d 492 (1992).

These due process protections apply when a court revokes a DOSA sentence. *In re Personal Restraint of McKay*, 127 Wn.App. 165,167-68, 110 P.3d 856 (2005); *State v. Abd-Rahmaan*, 154 Wn.2d 280,111 P.3d 1157 (2005) (revocation of community placement); *State v. Dahl*, 139 Wn.2d 678,682083,400,990 P.2d 396 (1999) (SOSSA revocation). When a statute gives DOC authority to hold a hearing and sanction an offender for community custody violations, the statute “does not authorize DOC to afford less due process than is constitutionally required.” *In re Personal Restraints of McNeal*, 99 Wn.App. 617,625,994 P.2d 890 (2000).

In *McKay*, a DOC hearing officer revoked a prison inmate’s DOSA sentence for failing to participate in chemical dependency treatment utilizing the “some evidence test.” As a result of the hearing officer’s decision to revoke the petitioner’s DOSA sentence, she was required to serve the balance of the sentence in custody, adding three years to her prison term. *McKay*, 127 Wn.App. at 168. The Court accepted DOC’s concession that *Morrissey* and *Scarpelli* required the higher preponderance of the evidence standard. *McKay*, 127 Wn.App.

at 168-69. The Court reasoned that an inmate serving a DOSA sentence “has a significant liberty interest in the expectation of community custody, as opposed to incarceration, including the ability to be with family and friends, be employed or attend school, and to live a relatively normal life.” *Id.* at 170. In addition, society has an interest in the rehabilitation of offenders, and thus, the State had an interest in “ensuring DOSA revocations are founded upon verified facts and accurate knowledge.” *Id.*

Mr. Price, therefore, was entitled to federal and state due process protections at his DOSA revocation hearing.

b. Mr. Price was denied his right to confront and cross-examine adverse witnesses.

At a DOSA revocation hearing, the offender has the right to “disclosure . . . of evidence against him.” *Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 489. In addition, the offender has “the right to confront and cross-examine adverse witnesses” unless the hearing examiner finds good cause for not allowing the confrontation. *Id.* The hearing examiner in Mr. Price’s case resolved numerous factual issues based upon police reports containing hearsay information, without

finding good cause for not allowing Mr. Price to confront and cross-examine these witnesses.

The hearing officer specifically noted that her findings of guilt for both alleged violations were based upon information and statements contained in the police reports. The guilty finding for alleged Violation 1 was based largely on the eye-witness statement of the Casino Security Officer, Jason Peterson. Nonetheless, Mr. Price was given no opportunity to confront or cross-examine Mr. Peterson or the police officer who took his statement, or any of the other police officers involved.

The guilty finding for alleged Violation 2 was also based primarily on information contained in police reports, including information from LESA Dispatch. Again, Mr. Price was given no opportunity to confront or cross-examine police personnel, or any other person associated with the incident except Vanessa Campeau.

Absent the uncontroverted hearsay statements, the only evidence relied on to convict Mr. Price was the testimony of Ms. Campeau, who had recanted and denied that Mr. Price has either assaulted or harassed her.

As noted above, before basing revocation of a sentence upon hearsay testimony, the court or hearing officer must find good cause to deny confrontation and admit the evidence and there must also be a showing the hearsay is demonstratively reliable. *Abd-Rahmaan*, 154 Wn. 2d at 291. The hearing officer made no such findings here, and Mr. Price is entitled to a new hearing. *Id.*

c. **Mr. Price was entitled to the assistance of counsel at his DOSA revocation hearing under the specific facts of his case.**

The minimal due process protections available at a DOSA revocation hearing may include the right to counsel, but DOC specifically forbids an inmate from being assisted by an attorney. Under the federal constitution, the due process rights available at probation and parole revocation hearings do not necessarily include the right to counsel. *Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 790. Instead, the government may determine on a case-by-case basis whether counsel is required. *Id.*

The *Scarpelli* Court explained that counsel should be provided in cases where the probationer or parolee requests counsel to challenge the alleged violation or if he wishes to present complex or difficult-to-

develop mitigating evidence to explain the violations. *Scarpelli*, 411 U.S. at 790.

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Id. Also relevant is the offender's ability to speak effectively for himself. *Id.* at 790-91.

The revocation of a DOSA sentence involves a significant loss of liberty that requires the same due process protections provided to those on probation and parole by *Scarpelli* and *Morrissey*. *McKay*, 127 Wn.App. at 170; *McNeal*, 99 Wn.App. at 630-34. Washington parolees and probationers have long been afforded counsel as provided by statute or court rule. RCW 9.95.122; CrR 7.6(b); *Boone*, 103 Wn.2d at 229-30. (court rule "unequivocally provides that a defendant at a probation revocation hearing has the right to be represented by counsel"); *Dillenberg v. Morris*, 84 Wn.2d 353, 525 P.2d 770 (1974) (right to appointed counsel at parole revocation).

Nonetheless, DOC denies DOSA offenders the right to counsel at every revocation hearing and will not even permit an offender to hire his own attorney to assist him. WAC 137-24-040(7).

In Mr. Price's case, counsel should have been provided due to the number and nature of the alleged violations, and the recommendation that his DOSA sentence be revoked. Additionally, given the questions surrounding Mr. Price's competency history, his ability to speak for himself was at issue. See Order of Commitment for Ninety Days. CP 4-5.

Mr. Price denied the allegations against him. Although he was found guilty of only 2 alleged violations, Mr. Price was originally accused of 4 violations. The nature of the violations was alleged criminal conduct, each of which separately could have given rise to a filing of criminal charges. Moreover, prior to the DOSA revocation hearing, the state was aware that DOSA revocation was recommended, and thus, Mr. Price was facing an additional forty-five(45) month prison term. See DOC - Report of Alleged Violation, Attachment E of DOC's Response to PRP.

Petitioner is aware that Division One of this Court has ruled an

offender is not entitled to counsel at a community custody revocation hearing. *McNeal*, 99 Wn.App. at 635. Division One distinguished *Scarpelli* because parole and probation have a rehabilitative goal, whereas community custody in Washington is primarily punitive. *Id.*

The *McNeal* analysis, however, demonstrates that counsel should be provided at a DOSA revocation hearing. A DOSA sentence is specifically designed to provide rehabilitation to certain offenders with substance abuse problems who the trial Court has determined are good candidates for rehabilitative efforts. RCW 9.94A.660(2); *McKay*, 127 Wn.App. at 170.

Mr. Price was clearly unable to effectively represent himself at the revocation hearing given the complexities his hearing presented. Under the facts and circumstances presented here, the denial of counsel constitutes an error of constitutional magnitude.

III. THE SANCTION OF DOSA REVOCATION WAS IMPROPER

In support of Mr. Price's PRP the Department of Corrections concedes that: "the Hearing Officer's decision to revoke Mr. Price's DOSA sentence at his first hearing did detour from the presumptions for DOSA sanctions." Response at p. 18. The hearing officer's

justification for the upward departure is stated thusly:

I consider him an eminent threat to Ms. Campeau's safety. Although he has complied with supervision up until this incident, he took no responsibility for his behavior and showed no remorse.

Appendix B, p. 4 of DOC's Response.

DOC's Guidelines list the following as aggravating and mitigating factors relevant to a departure from presumptive DOSA sanctions:

- The risk that the offender poses to the community.
- The severity of the offender's violation.
- The offender's assessed community risk level.
- The offender's programming/treatment needs.
- The offender's performance while on supervision.
- Previous violations by the offender while under supervision.
- The offender's receptiveness to supervision.
- The relationship of the violation to the offender's crime of conviction.
- The availability of other intervention means and the anticipated affect on the offender.

Exhibit 3, Attachment B, of DOC's Response.

To reiterate, the hearing officer's justification for imposing the exceptional sanction was: 1) that the hearing officer considered Mr. Price an "eminent threat" to Ms. Campeau's safety, and 2) that Mr. Price had not accepted responsibility or demonstrated remorse.

Notably, neither of these two "aggravating factors" are listed in DOC's guidelines. Additionally, neither is supported by the record. The record shows that Ms. Campeau had a long term relationship with Mr. Price. The couple have children together, according to the police report. See Attachment H, of DOC's Response. No evidence was presented that Mr. Price had ever harmed Ms. Campeau in the past. Furthermore, Ms. Campeau testified favorably for Mr. Price at the DOSA revocation hearing, and denied that he had harmed her.

Mr. Price indicated that he was not guilty of the alleged violations. Logic dictates, therefore, that remorse of the type sought by the hearing officer would be inappropriate. Mr. Price did, however, state that he "got himself in a bad situation," and "asked for another chance." Appendix B, at p. 3-4.

There is no dispute that Mr. Price had previously been "totally compliant and consistent with reporting." He had also "successfully

completed chemical dependency treatment with Civigenics and did not submit positive urine samples.” He “testified he was trying to do everything he was supposed to do while on supervision. He wants to live a better life. He planned to start school at Bates college learning to be a barber beginning this September.” Following his release, he had been providing care for his invalid aunt with whom he resided. *Id.* at p. 3.

In short, Mr. Price had completed all of his requisite DOC programs, and was in full compliance with the terms of his DOSA sentence.

Also noteworthy is that Mr. Price was not criminally convicted of any of the alleged violations.

The hearing officer’s justification for imposing the most severe sanction possible was plainly subjective, biased, and not supported by the evidence. The decision represents an improper modification of the sentence imposed by the trial court; it must be reversed.

E. CONCLUSION

Based on the foregoing reasons and conclusions, Mr. Price respectfully requests that this Court reverse the decision revoking his DOSA sentence.

Respectfully Submitted this 20th day of July, 2009.

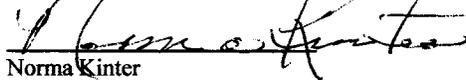


Sheri L. Arnold
WSBA No. 18760
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
09 JUL 20 11:50
STATE OF WASHINGTON
BY DK DEPUTY

CERTIFICATE OF SERVICE

The undersigned certifies that on July 20, 2009, she delivered by U.S. Mail to: the Attorney Generals Office, Donna Mullen, Assistant Attorney General, Post Office Box 40116, Olympia, Washington 98504, and appellant, Bruce Deymon Price, DOC # 964159, McNeil Island Corrections Center, Post Office Box 881000, Steilacoom, Washington 98338. true and correct copies of this Supplemental Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 20, 2009.



Norma Kinter

APPENDIX A

Hearing and Decision Summary (10-3-07)



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

DOSA(3)

HEARING AND DECISION SUMMARY

RELEASE FROM DOC CUSTODY/CONFINEMENT: YES NO (See Confinement Order DOC 09-238)

OFFENDER NAME (LAST, FIRST) <u>Price, Bruce</u>	DOC # <u>964159</u>	FOS #	DATE OF BIRTH <u>11-11-71</u>
CAUSE NUMBER(S) <u>Purch 04-1-0555-5, 04-1-0555-5, 04-1-05097-9</u>			
OFFENDER STATUS <input type="checkbox"/> CCI <input checked="" type="checkbox"/> CCP <input type="checkbox"/> CCJ <input type="checkbox"/> CCM <input type="checkbox"/> FOS <input type="checkbox"/> PRE - OAA <input type="checkbox"/> OAA			
DATE OF HEARING <u>10-3-07</u>		LOCATION OF HEARING <u>MCC</u>	
CCO NAME		WAIVED APPEARANCE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
OTHER PARTICIPANTS <u>L Johnson</u>		COMPETENCY CONCERN <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
		WAIVED 24 HOUR NOTICE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
		INTERPRET/COMM. ASSISTANT <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	

ALLEGATIONS	PLEA	FINDING Guilty/Not Guilty Probable Cause Found
1. #70 assault v. Complain 8-19-07	NG	G
2. " " " " " "	NG	G
3. FIOAL v. NCO 9-10-07 v. Complain	NG	NG
4. FIR 9-11-07	NG	NG

SUMMARY OF TESTIMONY/WITNESSES, RECOMMENDATION, REASONS FOR CONTINUANCE, HEARING OFFICER RECOMMENDATION (if Interstate/Compact Case), MISCELLANEOUS INFORMATION

Testimony of CCO who viewed video tape of P leaving scene of assault. P admits being there. Viet. testified P grabbed her & then went to her mother's house.

SANCTIONS AND DECISIONS

DOSA Rooker

Ref to sign
OFFENDER SIGNATURE

[Signature]
HEARING OFFICER SIGNATURE

10-3-07
DATE

Linda Hooper
HEARING OFFICER NAME (PRINTED)

APPENDIX ATTACHED

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.56, and RCW 40.14.

ATTACHMENT [Signature]

APPENDIX B

Community Custody Hearing Report (10-4-07)



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

COMMUNITY CUSTODY HEARING REPORT

OFFENDER NAME: Price, Bruce

DATE: 10-4-07

CRIME: Drugs – Delivery
Attempt to Elude
Escape 2nd

DOC NUMBER: 964159

COUNTY OF CONVICTION: Pierce

CAUSE #: 04-1-01555-5

04-1-01555-5

04-1-05697-9

A Community Custody Hearing was held on 10-3-07 at Monroe Corrections Center, regarding the following alleged violations of the conditions of supervision for Bruce Price. The hearing was conducted by Linda Hooper, Hearing Officer and parties present for the hearing were: Lindsay Johanson and Lori Black, Community Corrections Officers.

Upon convening the hearing, I determined that Mr. Price had received proper service of the Notice of Allegations, Hearing, Rights, and Waiver. I found that he had previously been provided with copies of all of the documentary evidence to be used against him during the hearing.

I provided Mr. Price with notice of the right to appeal, the address for filing the appeal and an optional form to be used to file an appeal. He acknowledged that he understood his hearing and appeal rights.

Preliminary Matters:

Violation 3 was amended to include the victim's name, Vanessa Campeau. Mr. Price waived notice and elected to proceed with the hearing.

The Department of Corrections alleged that the following **violations** were committed:

1. Fail to obey all laws by assaulting Vanessa Campeau on August 19, 2007.
2. Fail to obey all laws by harassing Vanessa Campeau on August 19, 2007.

ATTACHMENT 9

State law (RCW 70.02; RCW 70.24.105; RCW 71.05.390) and/or federal regulations (42 CFR Part 2; 45 CFR Part 164) prohibit disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law.

3. Fail to obey all laws by violating an active No Contact Order on or about September 10, 2007 (Vanessa Campeau).
4. Failing to report to the Department of Corrections as directed on September 11, 2007.

The offender entered the following **pleas** to each violation:

1. Not Guilty
2. Not Guilty
3. Not Guilty
4. Not Guilty

The hearing officer made the following **findings** as to each violation:

1. Guilty
2. Guilty
3. Not Guilty
4. Not Guilty

Evidence Relied Upon:

I verified that Mr. Price was placed on supervision by the court and had standard conditions to include obeying all laws and reporting as directed.

Violation 1

According to police reports, on 8-19-07 at about 12:30 a.m. Mr. Price was seen by security guard, Jason Peterson at the Great American Casino. Mr. Price was holding on to the front of Vanessa Campeau's shirt. He was seen slamming her against the wall, and then try to throw her to the ground. When Mr. Price saw the security officer, he stood and walked away from Ms. Campeau. He left, but attempted to return to the scene, but was refused by the officers. Ms. Campeau did request law enforcement help, and the Lakewood Police were called. Ms. Campeau had visible abrasions on her hand, marks on her arm, and her bra was broken. She signed a sworn statement which is included in the police reports.

Community Corrections Officer Carrillo was called to testify. She stated she saw the video tape of this incident. The actual altercation was not on the tape, but she did see several security people coming to Ms. Campeau's help. She saw Mr. Price walking away. She saw the victim with the staff and their actions centered on her bra. There was no audio on the tape. Community

Corrections Officer Carrillo also spoke with the head of security at the Casio. Community Corrections Officer Carrillo said she could positively identify Mr. Price as the man on the tape.

Mr. Price asked to call the victim, Ms. Campeau as a witness. She was called, and was willing to testify. Ms. Campeau said Mr. Price did not slam her against the wall, not did he try to throw her to the ground. She testified she was drunk, and does not have a full memory of the night, but she would remember if he slammed her against the car. She said she was trying to go her own separate way and Mr. Price did grab her by the shirt. She did not request that the security people call the police.

Mr. Price denied he struck Ms. Campeau.

I found Mr. Price guilty based on the testimony of Ms. Campeau that he did grab her when she tried to leave. While she down played the entire event, her description in many ways corroborates the statement of the security people.

Violation 2

According to a Tacoma Police Department report, they were sent to a domestic dispute on 8-19-07 at 10:22 in the morning. Ms. Campeau told the police she had been involved in an altercation earlier the same morning at the Great American Casino. She left the casino, went to pick up her children, and went to her mother's home. When she arrived, Mr. Price was inside. They got involved in an argument, and her mother intervened. They secured themselves (mother, grandmother and children) inside the master bedroom. They stayed there until about 7 a.m. at which time Mr. Price became persistent that they all return to Olympia. Ms. Campeau hid the car keys, and Mr. Price became angrier. He said, "I'm gonna show you what the fuck I'm gonna do". The two small children tried to call the police, but Mr. Price grabbed a knife yelling "you're not calling 911 ... get your ass in here". He was waving the knife in the air at the time. He also threatened to slash her tires. Eventually, Ms. Campeau was able to call for help at which time Mr. Price fled the residence.

Mr. Price asked the victim to explain what happened that night. Ms. Campeau testified that they were having an argument, and Mr. Price wanted to "talk it out before the situation got any worse". She said "nothing went down". She did spend the night in the bedroom with the kids. Mr. Price did not threaten her, but she did hide the keys. Ms. Campeau said she did see a knife, but he did not threaten her with it. She said no one was hurt, and she was not harassed. Ms. Campeau does admit she called the police.

Mr. Price denied he threatened or harassed Ms. Campeau, but did admit he was at the house.

I found Mr. Price guilty based on the testimony of the victim, which was only subtly different than the police report. The points of agreement are: a disagreement ensued, a knife was at least brandished, the family slept in the master bedroom away from Mr. Price, the police were summoned, and Mr. Price was gone when they arrived.

Violation 3

On 8-20-07 Mr. Price was ordered by his Community Corrections Officer to have no contact with Ms. Campeau. According to the Report of Alleged Violations, Mr. Price continued to contact Ms. Campeau via telephone and text message on 9-10-07. The Community Corrections Officer received this information from Mr. Price's aunt, Natalie Price.

Mr. Price testified he had no contact with the victim after 8-20-07.

Mr. Campeau testified she contacted Mr. Price's aunt, Natalie Price to ask about school supplies for the children. She denied speaking with Mr. Price after 8-20-07.

I found Mr. Price not guilty of this violation as there was no direct evidence of contact between the two people.

Violation 4

On September 10, 2007 Community Corrections Officer Carrillo left a message with Ms. Natalie Price to have her nephew contact Department of Corrections immediately. Ms. Price assured C.C.O. Carrillo that she would have him call right away. A second call was made to the residence, and a message was left on the answering machine. Mr. Price did not report.

Mr. Price testified he did not get either of the messages.

I found Mr. Price not guilty as there was no evidence he received either message to report.

Disposition:

The CCO provided the following information regarding the offender's **adjustment** on supervision:

Mr. Price is classified RMA with a LSI score of 45. He is on supervision for his 8th 9th and 10th felony convictions in Washington. This was his first hearing on these matters. He was released in May 2007.

He has been totally compliant and consistent with reporting. He has never failed to respond to inquiries and report until he was involved in the incident with Ms. Campeau. He was not working, but lived with his aunt who he assisted with rides to and from doctor's offices. He successfully completed chemical dependency treatment with Civigenics and did not submit and positive urine samples.

The Community Corrections Officer reports that there are 4 separate police reports documenting domestic violence related incidents with the current victim in his file. He has another domestic violence with a former girlfriend.

The offender provided the following information regarding their **adjustment** on supervision: Mr. Price testified he was trying to do everything he was supposed to do while on supervision. He wants to live a better life. He planned to start school at Bate's college learning to be a barber beginning this September. He does have a pending domestic violence charge for this event. The bail is \$5,000. He will live with his aunt upon release. He said he "got himself in a bad situation".

The disposition **recommendation** of the CCO:

The supervising Community Corrections Officer recommended revocation of his Drug Offender Sentencing Alternatives.

The disposition **recommendation** of the offender:

Mr. Price asked for another chance.

Hearing Officer **disposition**, decision, and reasons:

I did revoke Mr. Price's 3 Drug Offender Sentencing Alternatives. I consider him an eminent threat to Ms. Campeau's safety. Although he has complied with supervision up until this incident, he took no responsibility for his behavior, and showed no remorse.

10-4-07

DATE

Linda Hooper

HEARING OFFICER SIGNATURE

CCO/TYPIST/ 09-229CC.doc

DATE

- Distribution:
- Prosecutor
 - Offender
 - County Clerk
 - Central File
 - Field File
 - Hearing File
 - Hearings Program Manager
 - Hearings Officer 2
 - ESRB for CCM only