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COA No. 40669-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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SUPERIOR COURT
STATE OF WASHINGTON
2008 JUN 18 AM 8:11
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CLERK

STATE OF WASHINGTON, Respondent,

v.

WILLIAM SMITH, Petitioner.

MOTION FOR DISCRETIONARY REVIEW
RAP 13.5



William Smith 840758
Petitioner, Pro se
Airway Heights Corr. Ctr.
P.O. Box 2049
Airway Heights, WA 99001

I. IDENTITY OF PETITIONER

William Smith, the petitioner, onPro se, asks this Court to accept review of the decision designated in Part II of this Motion.

II. DECISION

Petitioner seeks review by the Supreme Court of an interlocutory decision of the Court of Appeals entered on June 15, 2010, to dismiss petitioner's 'Personal Restraint Petition' as being a mixed and/or successive petition to effect substantial prejudicial consequences of being deprived of an effective judicial review. A copy of the decision is attached as Attachment - 1.

III. ISSUES PRESENTED FOR REVIEW

- 3.1 Does the Court of Appeals decision conflict with those decisions by the Supreme Court or other Divisions of the Court of Appeals?
- 3.2 Does Petitioner Abuse the Writ?

IV. STATEMENT OF THE CASE

On May 09, 2002, Petitioner pled guilty to Second Degree Rape of a Child and Third Degree Child Molestation. Petitioner sought relief through a 'Personal Restraint Petition' from the Court of Appeals, but it was dismissed as being 'Time Barred', 'mixed', and 'Successive'. The Court of Appeals concedes to the invalidity of the prohibition on petitioner possessing pornography as being apparent from the face of the 'Judgment and Sentence'. Opinion p.2 ¶ 1. The Court of Appeals determined that former RCW 9.94A.700 allows the court to restrict an offender's alcohol consumption, and RCW 9.94A.715(2)(b) allows the court to order the offender to "participate in rehabilitative programs independently of the crime-related prohibition provision. The foregoing prohibition will be applied in Mr. Smith's case upon his release.

The petitioner argues the invalidity of the prohibition on petitioner possessing alcoholic beverages, as well as the conditions requiring petitioner to undergo substance abuse evaluation and treatment as also being apparent from the face of the 'Judgment and Sentence'.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The decision of the Court of Appeals conflicts with those decisions of the Supreme Court and other Divisions of the Court of Appeals.

5.1 The Supreme Court holds that "[c]rime related conduct may be prohibited in any sentence so long as the prohibition is directly related to the crime." State v. Armendariz, 160 Wn.2d 106, 114, 156 P.3d 201 (2007); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Because the Court of Appeals, Division II, holds in its decision in Mr. Smith's case that the trial court may order Mr. Smith to the prohibition on his possessing "alcohol" and 'participate in rehabilitative program' independently of the crime-related prohibition provision, the Court of Appeals, Division II, is in direct conflict with those decisions of the Supreme Court and other decisions of the Court of Appeals.

The Court of Appeals has already recognized the invalidity of the prohibition on Mr. Smith possessing pornography as being apparent from the face of the 'Judgment and Sentence', under RCW 9.94A.700(5)(c), (d), and (e). Opinion p.2 ¶ 1.

Mr. Smith argues that his being in possession of alcohol is not crime-related and does not violate RCW 9.94A.700(5)(c-e); 9.94A.715(2)(a), nor 9.94A.030(12).

RCW 9.94A.715(2)(b), provides that when sentencing for certain crimes ... a trial court may order the offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community". If reasonably possible it must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous, *State v. Seek*, 109 Wn. App. 876, 881-82; 37 P.3d 339 (2002), (Division I); *City of Kent v. Beigh*, 145 Wn.2d 33, 39-40, 32 P.3d 258 (2001).

Mr. Smith argues that the trial court abused its discretion to order Smith to participate in a rehabilitative program that also is unrelated to his crime, Division I held, "There must be some basis for the "crime-related" determination if the limitation is to have any meaning. For a sentencing judge to base the determination that conduct is "crime-related" upon belief alone, without some factual basis, would be to read the crime-related requirement out of the statute."

State v. Parramore, 53 Wn. App. 527, 531 (1989).

Mr. Smith is preparing for his release, and seeks a question of law as a preenforcement vagueness challenge to a condition of community custody prohibition on his possessing alcohol, and the order to participate in a rehabilitative program that is unrelated to his crime.

If this Court holds to its former ruling to the invalidity of the prohibition on Smith's possessing pornography, or alcohol and order to participate in rehabilitative programs independently of the crime-related prohibition as being apparent from the face of the 'Judgment and Sentence', are claims falling under RCW 10.73.090 and thus not subject to the restrictive language in RCW 10.73.100 based solely on one or more of the following grounds. Nor, under RCW 10.73.090, are such claims subject to the one-year time bar? See *In re Personal Restraint of Stoudmire*, 141 Wn.2d 342, 348, 5 P.3d 12 (2000).

**SUCCESSIVE PETITION
RCW 10.73.140**

It was noted in *Johnson*, "By its specific terms, RCW 10.73.140 relates only to the Court

of Appeals and does not apply to the Supreme Court." In re Personal Restraint of Johnson, 131 Wn.2d 558, 566, 933 P.2d 1019 (1997).

The State Supreme Court may grant relief on a successive PRP transferred from the Court of Appeals under RCW 2.06.030, that Court of Appeals was barred from considering under RCW 10.73.140. Washington State Const. Art. IV, § 4 vest Supreme Court with original jurisdiction in Habeas Corpus, including PRP proceedings. In re Personal Restraint of Perkins, 143 Wn.2d 261 (2001). Nevertheless, the issues presented by the petitioner were never heard on the merits. However, issues not "previously heard and determined" on their merits, may be dismissed upon a showing that a petitioner is abusing the Writ. In re Personal Restraint of Jefferies, 114 Wn.2d 485, 488, 789 P.2d 731 (1990); In re Personal REstraint of Perkins, 143 Wn.2d 261, 266 n.7 (2001) ("The emphasis in Jefferies: "Abuse of Writ" only occurs "if the petitioner was represented by counsel throughout postconviction proceedings"").

Mr. Smith was not represented by counsel throughout postconviction proceedings.

CONCLUSION

Because Mr. Smith's issues were not determined on their merits and State Laws supports his claims that the prohibitions imposed upon him are not lawfully permitted, and he only argues possession, (not consumption), and alcohol evaluation and treatment, he respectfully asks this Court to accept review and grant the relief sought in his Personal Restraint Petition.

Respectfully Submitted,


William Smith

Date: August 13, 2010

William Smith 840768
Unit M-B16
Airway Heights Corr. Ctr.
PO Box 2049
Airway Heights, WA
99001

ATTACHMENT

1

Decision of the
Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

WILLIAM J. SMITH,

Petitioner.

No. 40669-1-II

ORDER DISMISSING PETITION

10 JUN 14 PM 3:01
STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS
DIVISION II

William J. Smith seeks relief from personal restraint imposed after he pleaded guilty in 2002 to second degree child rape and third degree child molestation. In this, his fifth personal restraint petition, Smith challenges several of the community custody conditions included in his sentence on the grounds that they are not directly related to his offenses and are unconstitutionally vague.

Personal restraint petitions challenging a judgment and sentence generally must be filed within one year after the judgment becomes final. RCW 10.73.090(1). The one-year time bar does not apply, however, if the judgment and sentence is invalid on its face. RCW 10.73.090(1). "Invalid on its face" means that the judgment and sentence evidences the invalidity without further elaboration. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532 (2002). Documents signed as part of a plea agreement may be considered in determining facial invalidity. *Hemenway*, 147 Wn.2d at 532.

Smith contends that his judgment and sentence is facially invalid because the community custody conditions barring him from possessing or using drug paraphernalia

and alcoholic beverages, as well as the conditions requiring him to undergo substance abuse evaluation and treatment, are not crime related. *See* former RCW 9.94A.715(2)(a) (2000) and RCW 9.94A.700(5)(e) (2000) (allowing courts to impose crime-related prohibitions as part of community custody); former RCW 9.94A.030(12) (1999) (defining crime-related prohibition as court order prohibiting conduct that directly relates to circumstances of offender's crime). Smith also asserts that his judgment and sentence is facially invalid because the community custody condition prohibiting him from possessing or using pornographic material or equipment of any kind is unconstitutionally vague. *See State v. Bahl*, 164 Wn.2d 739, 758 (2008) (community custody restriction on accessing or possessing pornographic materials is unconstitutionally vague because it does not provide ascertainable standards for enforcement).

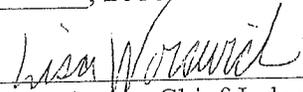
Although the invalidity of the prohibition on possessing pornography may be apparent from the face of the judgment and sentence, any defect in the remaining conditions about which Smith complains is not. Former RCW 9.94A.700 allows the court to restrict an offender's alcohol consumption independently of the crime-related prohibition provision, and it also allows the court to order a defendant to participate in crime-related treatment in addition to imposing crime-related prohibitions. Former RCW 9.94A.700(5)(c), (d). Former RCW 9.94A.715(2)(a) further allows the court to order an offender to participate in affirmative conduct reasonably related to the circumstances of the offense, his risk of reoffending, or the community's safety. Smith has not provided this court with any plea documentation describing the circumstances of his offenses. Consequently, the inclusion of community custody conditions that must be crime related does not render his judgment and sentence facially invalid.

Accordingly, we must dismiss this petition.¹ Where some of the issues in a petition are timely and others are not, this court must dismiss the entire petition. *See In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 704 (2003) (if at least one of multiple grounds for relief in petition is time barred, entire petition must be dismissed).

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 15 day of June, 2010.



Acting Chief Judge

cc: William J. Smith
Clark County Clerk
County Cause No. 02-1-00234-0
Arthur D. Curtis, Clark County Prosecuting Attorney

¹ Even if Smith's petition were timely, we would dismiss it as successive. RCW 10.73.140.