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Washington State
Court of Appeals
Division Two

January 5, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of:	No. 54265-0-II
CANDICE BAUGHMAN,	
Petitioner.	UNPUBLISHED OPINION

CRUSER, J. – In this timely personal restraint petition (PRP), Candice R. Baughman challenges the revocation of her prison-based drug offender sentencing alternative[1] (DOSA) sentence. She argues that the revocation of her DOSA sentence violated her due process rights because it was based on prison disciplinary infractions that were not proved by a preponderance of the evidence. Because the hearing officer applied the preponderance of the evidence standard to the infractions it considered, Baughman fails to establish unlawful restraint. Accordingly, we deny this PRP.

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[1] Former RCW 9.94A.660 (2016).

FACTS

I. BACKGROUND

A. DOSA SENTENCE AND ENTRY INTO DRUG TREATMENT PROGRAM

After entering guilty pleas under two separate cause numbers, Baughman was given two concurrent prison-based DOSA sentences. On November 27, 2018, Baughman entered into a prison-based drug treatment program.

Upon entering the treatment program, Baughman signed a chemical dependency DOSA agreement and a treatment participation requirements form. The DOSA agreement notified Baughman that she could be terminated from the treatment program and her DOSA revoked based several grounds, including (1) "[a] continual pattern of behavioral issues and unsuccessful responses to interventions," (2) "[a] lack of progression towards the goals of a treatment plan," or (3) "[a]ny major infraction that causes a change in custody level." Br. of Resp't Ex. 6 at 1.

The treatment participation requirements form advised Baughman that she had to "[r]efrain from any and all . . . behaviors that may result in an infraction." Br. of Resp't Ex. 7 at 1. This form also advised Baughman that she could be terminated from treatment if she failed to comply with the expectations stated in the form and that she would be terminated from treatment if she received an infraction that resulted in a transfer or change in custody level.

B. CLINICAL INTERVENTION CONTRACT

Prior to entering the treatment program on November 27, 2018, Baughman had been found guilty of four general infractions and one serous infraction. In the short time between her entry into the program and January 4, 2019, Baughman was found guilty of four more general infractions and five more serous infractions.

As a result of the infractions based on violations between November 27, 2018 and January 4, 2019, Baughman was subject to a clinical intervention (CI).[2] On January 4, as part of the CI, Baughman signed a CI contract stating that if she did not remain "infraction free" her further participation in the treatment program could be terminated and that any future violations of the DOSA program rules could result in the revocation of her DOSA status. Br. of Resp't Ex. 8 at 3.

C. ADDITIONAL INFRACTIONS AND TERMINATION FROM TREATMENT PROGRAM

Baughman was subsequently notified that she was being accused of two more serious violations that occurred on January 10, six days after she had signed the CI contract. These violations were for telephoning or sending written or electronic communications to an offender in a correctional facility without permission and for using the facility's phones or related equipment without authorization. Baughman pleaded guilty to these violations, but she asserted that the violation related to her passing notes to another prisoner occurred before January 4.

On January 31, Baughman was terminated from the treatment program. The treatment termination report stated that: (1) Baughman had failed to "[r]efrain from . . . behaviors that may result in an infraction," (2) Baughman had failed to "[a]ttend all regularly scheduled individual and group treatment sessions," (3) Baughman engaged in "[a] continual pattern of behavioral issues" and her responses to interventions were "unsuccessful," (4) Baughman showed "[a] lack of progression towards the goals of a treatment plan," and (5) Baughman accrued "major

[2] A "[c]linical [i]ntervention is the highest level of therapeutic intervention." Resp't Br. Ex. 5 at 4. "Referral to a clinical intervention is the result of [a] failure to demonstrate progress" through the normal treatment process or the result of a violation of program rules. *Id.*

infraction[s] that cause[d] a change in custody level or the violation of conditions per [the] agreement." Br. of Resp't Ex. 5 at 9.

II. 762 Infraction Hearing and DOSA Termination

A. 762 Infraction

After her termination from the treatment program, Baughman was infracted for being terminated from the DOSA-required treatment program (the 762 infraction).[3] The 762 infraction report stated that Baughman had been terminated from treatment because she "demonstrated a continual pattern of behavior issues after unsuccessful interventions and failed to make progress toward her treatment goals." *Id.* at 4. The infraction report further stated that Baughman had violated the following program requirements: "Refrain from any and all criminal activity, including behaviors that may result in an infraction; Attend all regularly scheduled individual and group treatment sessions; failure to abide by the expectations outlined." *Id.*

B. 762 Infraction and DOSA Termination Hearing

A hearing to consider the 762 infraction and to consider whether Baughman's DOSA sentence should be revoked was conducted before a Department of Corrections (DOC) hearings officer (HO). RCW 9.94A.662(3) ("An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court."); WAC 137-25-030(1)(762) (762 violations are "heard by a community corrections hearing officer in accordance with chapter 137-24 WAC." (Emphasis omitted)).

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[3] Former WAC 137-25-030(1)(762) (2016) allows for an inmate to be charged with a serious infraction based on "[n]oncompliance with the DOSA program."

As to the January 10 violations, Baughman admitted that she had been in constant contact with someone from the general prison population in violation of the rules and the CI contract, that she had engaged in one or more three-way calls with this person, and that she had also been communicating with this person by passing notes. Baughman asserted, however, that the note passing had occurred before she entered into the CI contract. But Michelle Thrush, a correctional unit supervisor, testified that in one of the notes Baughman referred to being under the CI contract, so, although Baughman had asserted otherwise, the note passing occurred after January 10.

Throughout the hearing, the HO stated that the level of proof that applied to the 762 infraction was a preponderance of the evidence. The HO also emphasized that she was considering only the "behavior" resulting in the infractions that led the treatment termination and that those the infractions were proved by a preponderance of the evidence. Br. of Resp't Ex. 9 at 38. The HO further emphasized that she was not considering infractions or behavior that occurred before Baughman entered into the CI contract because those infractions and behaviors were not the basis for the treatment termination. The HO noted that the pre-CI contract "infractions were dealt with when [Baughman] did the CI." Br. of Resp't Ex. 9 at 57.

The HO concluded that the evidence had proved by a preponderance of the evidence that Baughman had engaged in behavior that violated the CI contract and revoked Baughman's DOSA sentence based on her treatment termination. Baughman subsequently filed this PRP.

ANALYSIS

Baughman argues that the HO "did not base [her] decision to revoke [the] DOSA on a preponderance of the evidence" because the new infractions and the infractions that were the basis of the evaluation of her "overall behavior" were adjudicated under the some evidence standard. PRP at 7. She argues that the use of this lesser standard violated her due process rights. We disagree.

I. LEGAL PRINCIPLES

Because Baughman has not had a prior opportunity for judicial review, to obtain relief through a PRP she must demonstrate unlawful restraint under RAP 16.4. *In re Pers. Restraint of Pierce*, 173 Wn.2d 372, 377, 268 P.3d 907, 909 (2011). "Under [RAP 16.4(c)(2)], the [petitioner] is entitled to relief if [the petitioner] can show that a decision 'was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.'" *In re Pers. Restraint of Lopez*, 126 Wn. App. 891, 895, 110 P.3d 764 (2005) (quoting RAP 16.4(c)(2)).

In *In re Personal Restraint of Schley*, 191 Wn.2d 278, 292, 421 P.3d 951 (2018), our Supreme Court held

> . . . that at DOSA revocation hearings, if revocation is based on the clinical staff administratively terminating a person from treatment, *the [DOC] has the burden to prove the facts that served as a basis for that decision by a preponderance of the evidence*. This construction of the DOSA statute ensures the due process protections at the revocation hearing have effect and avoids absurd results. In the event that the [DOC] fails to prove an infraction underlying the treatment termination decision by a preponderance of the evidence, then the treatment termination is invalid and treatment should be reinstated.

(Emphasis added).

II. Preponderance Standard Applied

Baughman argues that the revocation of the DOSA sentence violated her due process rights because the infractions that occurred after the January 4 CI contract were not established by a preponderance of the evidence. Baughman further argues that she was denied due process because the decision to revoke her DOSA sentence was based on her "overall behavior determined by past infractions" and those past infractions were not proved by a preponderance of the evidence.[4] PRP at 7. We disagree.

The HO clearly stated that she was applying the preponderance of the evidence standard when determining whether Baughman had committed the post-January 4 violations. And the evidence given at the hearing supports the HO's conclusion that these violations occurred because Baughman admitted to the phone contact and to passing notes, and Thrush testified that at least one of the notes referred to the January 4 CI contract.

The HO also clearly stated that she was not considering any pre-January 4 violations and was limiting her consideration to only those violations that occurred after January 4. Because the HO was considering only the post-contract behavior, the HO did not have to find that any pre-contract infractions were proved by a preponderance of the evidence.

[4] Baughman also claims that the revocation decision was "based, in part, on past conduct already adjudicated." PRP at 2 ("Ground"2). This claim appears to be another way of asserting that the HO relied on pre-CI contract infractions that were decided under the some evidence standard.

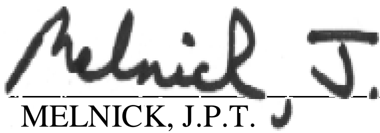
Baughman fails to demonstrate that her restraint was unlawful because she does not show that her DOSA was revoked without proof by a preponderance of the evidence. Accordingly, we deny this PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

MAXA, P.J.


MELNICK, J.P.T.