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SUPREME COURT
STATE OF WASHINGTON
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NO. 79841-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

AMEL DALLUGE,

Petitioner.

REPLY TO RESPONSE
TO MOTION TO
DISMISS PETITION

I. IDENTITY OF MOVING PARTY

The Respondent, the Department of Corrections, by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and JOHN J. SAMSON and DONNA H. MULLEN, Assistant Attorneys General, replies to Dalluge's response to the motion to dismiss petition as moot.

II. REPLY ARGUMENT

The Department moved to dismiss as moot the petition challenging the Department's authority to sanction Dalluge for violations of community custody. In response, Dalluge argues the petition is not moot because the petition challenges not only the sanction, but also the violation finding. In the alternative, Dalluge contends the petition presents issues of substantial and continuing public interest. The Court should dismiss the petition because it is moot.

To pursue a personal restraint petition, the petitioner must be under a “restraint” as defined in RAP 16.4(b) since the only relief available in a personal restraint petition proceeding is relief from the challenged restraint. *In re Sappenfield*, 138 Wn.2d 588, 595, 980 P.2d 1271 (1999). A person is under a “restraint” if he or she “has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b).

Dalluge does not dispute that he has served the sanction of confinement imposed by the Department, but contends he is restrained by the violation finding itself. Dalluge fails to show a restraint.

Dalluge points out that he must report to a community corrections officer within one day of his release (and must report weekly for one month thereafter). However, Dalluge would have to report regardless of the violation finding. The reporting requirement flows not from the violation finding, but from the term of community custody, and the statutes governing community custody. Even prior to the commission of the violations at issue in this action, Dalluge had to report within one day of his release. *See* Exhibit 13, at 3. Even if the Court were to grant relief on the merits of the petition, and invalidate the violation finding, Dalluge

still must report as directed by the Department since he still has a term of community custody. RCW 9.94A.720. The fact that Dalluge must report does not place him under a restraint, and any ruling in his favor in this case would not relieve him of the duty to report.

Dalluge is correct that the violation finding will be considered in future assessments of his risk, but this fact does not constitute a restraint for purposes of RAP 16.4. This is especially true where the violation finding itself pales in comparison to the convictions underlying the violation finding –Dalluge’s 2006 convictions for assault and malicious mischief. Even if the Court were to grant relief, and invalidate the violation finding, the underlying convictions would still exist, and the Department would still consider the convictions in assessing risk.

Dalluge is also correct that the violation finding will factor into determining the severity of any sanction he might receive if he violates a condition of community custody in the future. However, speculation that Dalluge might violate community custody sometime in the future is not sufficient to demonstrate present restraint. Dalluge could simply avoid future sanctions, and therefore any increase in sanctions, by not violating the conditions of community custody. *See Dremann v. Francis*, 828 F.2d 6, 7 (9th Cir. 1987) (potential confinement does not satisfy custody requirement where the petitioner “holds the keys to the jailhouse door”).

Citing *Monohan v. Burdman*, 84 Wn.2d 922, 530 P.2d 344 (1975), Dalluge argues the potential collateral consequences flowing from the violation finding are enough to prevent his petition from being moot. However, there is key distinction between *Monohan* and Dalluge's case – the timing of the filing of the petition. Monohan filed his habeas corpus petition while he was still confined in prison as a result of the allegedly unlawful decision to cancel his parole release date. *Id.* at 924-25. Monohan was under a restraint (confined in prison) as a result of the challenged state action (recalculation of parole date) when he filed his petition, and the Court found that Monohan's subsequent release from that restraint (his release on parole) did not render the petition moot. *Id.* Dalluge on the other hand did not file his petition while under the restraint of the challenged violation hearing since Dalluge did not file his petition while confined on the 60-day sanction. Dalluge waited until after he finished serving the sanction before filing his petition. Since Dalluge was not under a restraint when he filed his petition, the collateral consequences flowing from the violation finding do not prevent dismissal of the petition. See *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1997); *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990); *Lefkowitz v. Fair*, 816 F.2d 17, 19 (1st Cir. 1987); *Harts v. Indiana*, 732 F.2d 95, 96 (7th Cir. 1984).

Finally, Dalluge argues the petition presents issues of significant public interest. However, Dalluge's argument on this point is simply that, because there are thousands of offenders under supervision by the Department and the Department continues to assert that it had authority to sanction Dalluge for his violations of community custody, the Department will likely hold hearings for other offenders who commit violations while in confinement. This conclusory allegation is not sufficient to demonstrate that this case is of such public significance that it falls within the exception to the rule that the Court will generally not rule on moot issues. The Court should dismiss the petition.

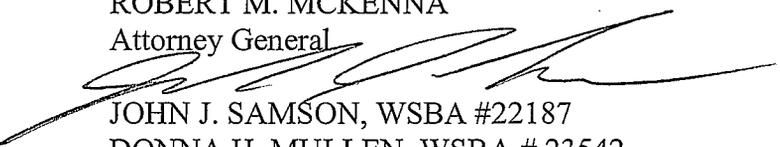
III. CONCLUSION

For the reasons set forth above and in its motion, the Department respectfully request that the Court dismiss Dalluge's petition as moot.

DATED this 2nd day of October, 2007.

Respectfully submitted,

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