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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.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

A. NATURE OF THE CASE.

Amel Dalluge challenges the Department of Corrections' authority to conduct a hearing and to impose sanctions for violations of conditions of community custody that occurred while Dalluge was confined in the Grant County jail. Dalluge does not dispute that his actions in the jail violated the condition that he obey all laws. Instead, Dalluge argues the Department lacked jurisdiction to conduct the hearing and to impose sanctions because the violations occurred during confinement, which tolled the term of community custody under RCW 9.94A.625(3). Dalluge is not entitled to relief under RAP 16.4 because he has not shown an unlawful restraint.

B. STATEMENT OF FACTS.

In April 2002, while serving a term of community custody imposed for his 1998 rape convictions, Dalluge absconded from supervision. Dalluge was subsequently arrested, and he was convicted in June 2003 of the crime of escape from community custody. Exhibit 1.¹ As part of the sentence imposed for the escape conviction, Dalluge was ordered to serve a 12-month term of community custody. Exhibit 1, at 7.

¹ The Department submitted the referenced exhibits in the court of appeals along with the response to the personal restraint petition.

In November 2003, while serving the 12-month term of community custody, Dalluge was arrested and detained in jail for violating the conditions of his community custody. During the jail booking search, officers found that Dalluge possessed methamphetamine. Based upon these events, Dalluge was convicted in January 2004 on one count of Violation of the Uniform Controlled Substances Act. Exhibit 2. For this conviction, Dalluge was sentenced to a term of confinement, and to a term of 9-to-12 months of community custody. Exhibit 2, at 8.

In September 2004, Dalluge completed serving the term of confinement imposed for the possession conviction, and he was released to serve his terms of community custody. Exhibit 3, at 2; Exhibit 13. As authorized by RCW 9.94A.720 and 9.94A.715, the Department imposed a condition requiring Dalluge to "obey all laws." Exhibit 13. While on community custody, Dalluge was arrested on unrelated charges and detained in the Grant County jail. While in the jail, Dalluge committed acts in October 2005 that resulted in new convictions for assault in the third degree, malicious mischief in the first degree, and possession of a weapon by a person serving a sentence in a local correctional institution. Exhibits 4 and 5. Dalluge was sentenced to 35 months for the assault conviction, to 29 months for the malicious mischief conviction, and to 12 months for the weapon conviction. Exhibits 4 and 5.

After learning of the new convictions, the Department of Corrections charged Dalluge with having violated the "obey all laws" condition. Exhibits 7 and 14. The Department held a violation hearing pursuant to RCW 9.94A.737 on February 28, 2006. Exhibit 8. After considering the evidence, the hearing officer found Dalluge guilty of the violations. Exhibits 8 and 9. Acting pursuant to RCW 9.94A.737(2)(c), the hearing officer sanctioned Dalluge to 60 days of confinement, with eligibility for one-third off the sanction for good time. Exhibits 8 and 9. The hearing officer ordered the sanction to start on February 28, 2006, with credit for time served since that date. Exhibits 8 and 9. The sanction ran concurrently with the time Dalluge spent in jail in pretrial confinement for unrelated criminal charges in Adams and Grant counties. Dalluge finished serving the sanction while detained in jail pending trial on those criminal charges. Even without any reduction of the sanction for good time, the 60 day sanction would have expired on April 29, 2006.

Dalluge is not currently confined as a result of the violation sanction. Dalluge is now confined as a result of the sentence imposed for his conviction of assault in the third degree in *State v. Dalluge*, Grant County Cause No. 05-1-00755-1. Exhibit 4. Dalluge also has to serve a future sentence of confinement imposed for his assault conviction in *State v. Dalluge*, Grant County Cause No. 06-1-00012-1.

C. STATEMENT OF PROCEDURAL HISTORY.

In August 2006, after serving the 60 day sanction, Dalluge filed a personal restraint petition challenging the violation hearing and sanction. The petition essentially alleged that the Department does not treat all offenders equally, that the Department lacked authority to sanction Dalluge for violations that occurred while he was confined in jail, and that the Department failed to identify a specific policy that Dalluge violated. *See* Personal Restraint Petition. In response, the Department argued the allegations did not demonstrate unlawful restraint, and that the petition was moot since Dalluge had served the sanction during his pretrial confinement on an unrelated charge. *See* Response to Petition, at 8-13. The Chief Judge dismissed the petition. *See* Order Dismissing Personal Restraint Petition. Addressing Dalluge's claim that the Department lacked jurisdiction, the Chief Judge found that Dalluge cited no authority to support his claim, and that Dalluge's argument would lead to absurd results. *See* Order Dismissing Personal Restraint Petition.

Dalluge filed a motion for discretionary review, arguing the Department had no jurisdiction to hold him in violation of community custody based upon acts committed in jail. The Commissioner denied review. Dalluge filed a motion to modify the Commissioner's ruling. The Court granted the motion to modify and granted review on July 11, 2007.

II. ARGUMENT

A. THIS PETITION IS MOOT SINCE DALLUGE HAS SERVED THE SANCTION AND IS NO LONGER UNDER THE ALLEGEDLY UNLAWFUL RESTRAINT.

An appellate court may grant relief on a personal restraint petition where the petitioner is under a “restraint” as defined in RAP 16.4(b), and that restraint is unlawful for one or more reasons defined in RAP 16.4(c). RAP 16.4(a); *In re Burton*, 80 Wn. App. 573, 585, 910 P.2d 1295 (1996). The only relief available in a personal restraint petition proceeding is relief from the unlawful restraint. *In re Sappenfield*, 138 Wn.2d 588, 595, 980 P.2d 1271 (1999). Any remedy other than removal of the unlawful restraint is beyond the scope of relief of a personal restraint petition. *Id.* Given that the only remedy available under RAP 16.4 is relief from unlawful restraint, a personal restraint petition is necessarily moot when the petitioner is no longer under the challenged restraint since there is no longer any relief available. Since Dalluge is no longer under the allegedly unlawful restraint of the 60-day sanction, his petition is moot.

“Issues are moot when the court can no longer provide effective relief and only abstract questions remain.” *In re Williams*, 106 Wn. App. 85, 99, 22 P.2d 283 (2001) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)); *cf. In re Mines*, 146 Wn.2d 279, 283-84, 45 P.3d 535 (2002). *In Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct.

978, 140 L. Ed. 2d 43 (1998), the Supreme Court considered whether a petitioner's release from confinement rendered moot a federal habeas corpus petition that challenged a provision of the petitioner's sentence. The Court noted that a petition challenging a conviction does not become moot simply because the petitioner is released from confinement on that conviction. *Spencer*, 523 U.S. at 7-8. The collateral consequences of the petition are sufficient to prevent the petition from becoming moot. *Id.* However, the Court determined that this conclusion changes where the petition challenges only the sentence or a provision of the sentence (e.g., parole revocation). *Id.* at 8-16. If the petition challenges only the sentence, and does not challenge the underlying conviction, the petitioner's release from the challenged sentence moots the petition. *Id.*; see also *Burnett v. Lampert*, 432 F.3d 996 (9th Cir. 2005) (challenge to parole revocation rendered moot by subsequent parole and reconfinement).

Dalluge's petition is moot. Dalluge finished serving the 60-day sanction prior to filing his personal restraint petition. Any remedy this Court may grant on Dalluge's claim of error would be purely academic. See, e.g., *In re Myers*, 105 Wn.2d 257, 261, 714 P.2d 303 (1986) (petitioner's parole arguably rendered his petition moot, but finding an exception to mootness doctrine); *Lane v. Williams*, 455 U.S. 624, 102 S.

Ct. 1322, 71 L. Ed. 2d 508 (1982) (petition moot where only challenge was to sentence, and sentence expired during habeas corpus proceedings). Since the 60-day sanction expired, and Dalluge is not under the challenged restraint, there is no relief available to Dalluge in this personal restraint petition proceeding. *Sappenfield*, 138 Wn.2d at 595. Since the Court can no longer provide effective relief under RAP 16.4, the petition is moot. *In re Rebecca K.*, 101 Wn. App. 309, 313, 2 P.2d 501 (2000).

Although Dalluge is and will be confined in prison under separate judgments and sentences, his current and future confinement do not satisfy the restraint requirement for the purposes of the pending personal restraint petition because that confinement is not the subject of the personal restraint petition. “A personal restraint petition is an appropriate procedure only where the petitioner is under a ‘restraint’ resulting from the challenged decision.” *In re the Welfare of M.R.*, 51 Wn. App. 255, 257, 753 P.2d 986, *review denied*, 111 Wn.2d 1002 (1988). Dalluge’s petition does not challenge his current or future confinement in prison. Dalluge’s petition challenges only the 60-day violation sanction. Because Dalluge is no longer under the restraint challenged by his personal restraint petition, he cannot obtain relief under RAP 16.4. *See In re P.S.*, 75 Wn. App. 571, 574-75, 879 P.2d 294 (1994) (although civilly committed under Snohomish County order, P.S. could not challenge prior

Spokane County civil commitment order since P.S. was no longer detained as a result of prior Spokane County order); *In re Huffman*, 34 Wn. App. 570, 572, 662 P.2d 408 (1983) (petitioner could not challenge conditions at Western State Hospital following transfer to the penitentiary since petitioner was no longer under “restraint” of conditions at the hospital).

Even if the Court were to agree with Dalluge and determine the Department had lacked lawful authority to impose the 60-day sanction, the Court could not grant any effectual relief in this proceeding. The Court could not relieve Dalluge from the restraint of the sanction since Dalluge is no longer serving the sanction. In addition, any determination in Dalluge’s favor would not affect the duration of his current or future confinement. The 60-day sanction ran concurrently with, and not consecutively to, Dalluge’s pretrial confinement in 2006 on the unrelated felony charges. Any determination that the sanction was unlawful would not affect the validity or duration of the pretrial confinement in 2006, and it would not affect the duration of Dalluge’s current or future confinement. The Court simply cannot grant any effectual relief in this personal restraint petition proceeding.

Since Dalluge is not under the allegedly unlawful restraint challenged by his petition, there is no longer any relief available under RAP 16.4, and the personal restraint petition is moot.

B. DALLUGE CANNOT SHOW THE SANCTION FOR HIS VIOLATION OF A CONDITION OF COMMUNITY CUSTODY WAS UNLAWFUL.

Even if the Court chooses to reach the merits of Dalluge's petition, Dalluge is not entitled to relief. In order to obtain relief in a personal restraint petition, the petitioner must show the restraint was unlawful. RAP 16.4; *In re Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004). Dalluge cannot meet this standard because the Department of Corrections properly exercised its authority in sanctioning Dalluge for violating a condition of community custody.

1. The Department Had Statutory Authority To Sanction Dalluge For His Violations Of The Conditions Of Community Custody.

The superior court sentenced Dalluge to terms of community custody. Exhibits 1 and 2. Since Dalluge was sentenced to terms of community custody, the Department of Corrections had explicit statutory authority to supervise Dalluge, and to ensure his compliance with the conditions of community custody. RCW 9.94A.720. The Department properly exercised this statutory authority.

RCW 9.94A.720(1)(a) expressly declares that all offenders sentenced to terms involving community custody "shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department." Moreover, where the offenders have

committed crimes after June 6, 1996, and July 1, 2000, the statute expressly declares that the Department has authority to impose conditions beyond those imposed by the superior court, including a condition that the offender “obey all laws.” RCW 9.94A.720(1)(c), (d); *see also* RCW 9.94A.715; RCW 9.94A.545. The statute also authorizes the Department to impose and enforce these conditions “prior to or during an offender’s community custody term.” RCW 9.94A.720(1). Exercising this statutory authority, the Department in October 2004 imposed on Dalluge a condition that he “obey all laws.” Exhibit 13.

RCW 9.94A.737 expressly authorizes the Department to conduct a violation hearing and to sanction an offender to confinement when the offender violates the conditions of community custody. After learning that Dalluge had violated the “obey all laws” condition by committing the crimes of assault, malicious mischief and possession of a weapon, *see* exhibits 4 and 5, the Department exercised its statutory authority and conducted a violation hearing pursuant to RCW 9.94A.737. Exhibits 7-10.

Having conducted the hearing, and having found Dalluge guilty of the violations, the Department had statutory authority to sanction Dalluge for the violations by returning him to confinement for up to 60 days. RCW 9.94A.737(1), (2)(c). The Department exercised this authority and sanctioned Dalluge to 60-days confinement. Exhibits 8 and 9.

The Department's actions in conducting a hearing and imposing a sanction of confinement were authorized by statute. Dalluge fails to show unlawful restraint, and he is not entitled to relief under RAP 16.4.

2. The Tolling Statute Did Not Deprive The Department Of Its Statutory Authority To Enforce The Conditions Of Community Custody.

Dalluge alleges the Department lacked jurisdiction to sanction him for violations of community custody because he committed the violations while detained in county jail. The only authority Dalluge cites in support of his argument is the tolling statute, RCW 9.94A.625. However, the Legislature never intended the tolling statute to relieve an offender of the obligation to comply with conditions of community custody. Instead, the statute is intended to prevent offenders from being able to manipulate the system, and avoid the obligations of a sentence, through subsequent misdeeds that could result in confinement or unapproved absence from supervision. 2000 Wash. Laws c. 226, § 1. As the Court has recognized, the rehabilitative purpose of supervision is frustrated when a defendant eludes the obligations of supervision. *City of Spokane v. Marquette*, 146 Wn.2d 124, 133, 43 P.3d 502 (2002). For that reason, supervision tolls when an offender is either confined or voluntarily absent from supervision in order to prevent the offender from unilaterally avoiding the obligations of the judgment and sentence. *Id.*; RCW 9.94A.625.

Finding that supervision of offenders enhances public safety and strengthens the community, the 2000 Legislature expressly declared that the tolling statute is intended to ensure an offender complies with all the conditions of a sentence. The Legislature stated:

The legislature intends that all terms and conditions of an offender's supervision in the community, including the length of supervision and payment of legal financial obligations, not be curtailed by an offender's absence from supervision for any reason including confinement in any correctional institution. . . .

2000 Wash. Laws c. 226, § 1.

RCW 9.94A.625 is intended to prevent an offender from being able to escape the obligations of a sentence through actions that result in confinement or voluntary absence from supervision. No language in RCW 9.94A.625 indicates an intent to allow an offender to violate the conditions of community custody without consequences simply because the offender is confined or absent from supervision. To allow an offender to use the tolling statute to freely violate conditions of community custody without fear of consequence would lead to an absurd result not intended by the Legislature. RCW 9.94A.625 statute prevents an offender from escaping the obligations of a sentence; the tolling statute does not relieve an offender of the obligation to comply with conditions of community custody.

In fact, in the statute authorizing the Department to supervise offenders, the Legislature expressly granted the Department authority to impose and enforce conditions of community custody even where an offender is confined and not under supervision out in the community. RCW 9.94A.720 expressly directs that offenders sentenced to terms of community custody shall be under the supervision of the Department and shall comply with conditions imposed by the Department. The same statute further provides that in cases where the offender committed the crime on or after June 6, 1996, the Department may impose and enforce the conditions “prior to or during an offender’s community custody term.” RCW 9.94A.720. Thus, under RCW 9.94A.720, the Department may impose and enforce conditions of community custody even when an offender is confined. Nothing in RCW 9.94A.625 reduces the Department’s statutory authority under RCW 9.94A.720 to enforce conditions of community custody.

“A court will not enforce the literal words of a statute to the point of absurdity.” *City of Spokane v. Marquette*, 146 Wn.2d 124, 133, 43 P.3d 502 (2002). As the Chief Judge of the Court of Appeals recognized, construing the tolling statute in the manner advocated by Dalluge would lead to absurd results. *See Order Dismissing Personal Restraint Petition*. For example, as noted by the Chief Judge, Dalluge’s theory would allow a

jailed offender with a no-contact condition to freely contact the subject of the no-contact condition without any fear of consequence. *See* Order Dismissing Personal Restraint Petition. In addition, RCW 9.94A.625 also tolls community custody when an offender is absent from supervision without approval. Dalluge's theory would allow an offender who absconds to thereafter violate any number of conditions, and the Department could only sanction the offender for the initial violation of absconding since the community custody tolled. Under Dalluge's theory, since the community custody tolls, an offender who fails to report could freely consume drugs and alcohol, contact the victim and otherwise violate the conditions of sentence, and the Department could not sanction the offender for anything other than the initial failure to report. Dalluge's theory is not supported by authority, and it would lead to absurd results not intended by the Legislature.

Dalluge's theory is also contrary to public policy. Dealing with an analogous situation, the Tennessee Court of Criminal Appeals concluded a court could revoke a term of probation, even though the offender had not yet begun to serve the term of probation, where the offender violated a condition of probation by incurring a subsequent conviction. *State v. Conner*, 919 S.W.2d 48, 51 (Tenn. Cr. App. 1995); *State v. Stone*, 880 S.W.2d 746, 748-49 (Tenn. Cr. App. 1994). The Tennessee court noted

that the overwhelming majority of jurisdictions considering the issue have concluded that a court may revoke probation based on acts committed before the commencement of probation. *Conner*, 919 S.W.2d at 50. The Tennessee court noted a majority of jurisdictions allowed revocation of probation based upon criminal acts occurring prior to the commencement of probation, even if existing statutes referred to violations occurring during the probation period. *Stone*, 880 S.W.2d at 748-49. Agreeing with the majority of jurisdictions, the Tennessee court concluded that “sound public policy dictates that a defendant who has been sentenced, and is thereby on notice of any probationary terms, should not be granted free reign to violate those terms at will merely because the actual period of probation has not begun.” *Conner*, 919 S.W.2d at 51. The court recognized a contrary holding would lead to absurd results:

To suggest, as appellant does, that a defendant is free to commit unlimited additional crimes without in any way impairing or endangering a previously imposed sentence of probation merely because the probationary period has not commenced is to suggest an absurdity in the statute which this Court is not prepared to create. Indeed, such an interpretation would be contrary to the policy and the purposes to be served by probation. If a probationer’s criminal conduct, even if committed prior to commencement of the probationary period, discloses that probation will not be in the best interests of the public or the defendant, a court may revoke or change the order of probation.

Conner, 919 S.W.2d at 50-51.

The Third Circuit in *United States v. Camarata*, 828 F.2d 974 (3rd Cir. 1987), also considered a situation almost identical to the present case. Similar to Dalluge, Camarata was sentenced to a term of probation that would follow a sentence of confinement. *Camarata*, 828 F.2d at 975-76. One of Camarata's conditions of probation was that he would refrain from violation of any law (federal, state or local). *Id.* at 977 n.3. While still in custody, prior to beginning the term of probation, Camarata committed new crimes which led to new convictions. *Id.* at 976. Based upon these new convictions, the federal court revoked the term of probation. *Id.* Similar to Dalluge, Camarata argued that the court could not revoke his probation based upon actions committed in confinement, since he was not actually serving the term of probation. *Id.* at 977. A plurality of the Third Circuit rejected his argument. In doing so, Judge Sloviter reasoned:

Were we to accept Camarata's argument . . . we would provide incarcerated defendants with a grace period in which their activity, no matter how heinous, could not affect their probationary release into society.

Camarata, 828 F.2d at 980.

Other courts agree that an offender may be sanctioned for violations of supervision even though the violation occurred while the offender was confined and not in the community. *People v. Smith*, 69 Mich. App. 247, 249, 244 N.W.2d 433, 434 (1976) ("It is equally clear

that any acts committed by defendant during the period in which he was to be incarcerated may be acts in violation of that probation.”); *People v. Ritter*, 186 Mich. App. 701, 707 n. 1, 464 N.W.2d 919 (1991) (“where the defendant willfully removed himself from the court’s probationary supervision and then committed other probation violations, allowing him to escape without penalty would be contrary to the purposes of imposing probation.”); *Resper v. United States*, 527 A.2d 1257 (D.C. 1987) (“Some probationary terms, such as the prohibition on committing further crimes, can be violated even before the probation begins; others, such as reporting to a probation officer, cannot.”).

The Legislature enacted the tolling statute to ensure that offenders would be held fully accountable for complying with all of the conditions of sentence. Nothing in RCW 9.94A.625 relieves an offender of the obligations of complying with the conditions of community custody. Construing RCW 9.94A.625 to allow an offender to unilaterally avoid the obligation to comply with the conditions of community custody would lead to an absurd result contrary to public policy and the intent of the Legislature.

Even if the Court were to reach the merits of Dalluge’s personal restraint petition, Dalluge does not prove he was under an unlawful restraint. Consequently, Dalluge is not entitled to relief under RAP 16.4.

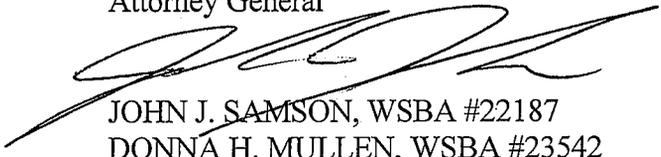
III. CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Court of Appeals denying the personal restraint petition.

DATED this 6th day of September, 2007.

Respectfully submitted,

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

EXECUTED this 7th day of September, 2007 at Olympia, WA.


KATHY JERENZ