

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

MARK MATTSON,

Respondent.

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Respondent's Answer to Motion for Discretionary Review

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A. ISSUE PRESENTED

RCW 9.94A.728 requires the Department of Corrections (DOC) to determine an inmate's eligibility for release to community custody based upon an individualized assessment of the merits of the release plan submitted by the inmate. The courts have repeatedly concluded this statutory requirement does not permit DOC to exempt a class of individuals from eligibility for transfer to community custody. Based upon its then-existing policy that it will not approve any plan submitted by inmates who have had evaluations finding they meet the criteria to be found a "sexually violent predator," and its current policy of refusing to release such inmates regardless of the merits of their release plan, DOC has refused Mark Mattson's proposed release plans. Does DOC's generalized policy exempting an otherwise eligible class of inmates from community custody violate RCW 9.94A.728?

B. SUMMARY OF CASE AND OPINION BELOW

Mr. Mattson was eligible for community custody in July 2005. DOC has refused to transfer Mr. Mattson to community custody based upon former DOC policy 350.200 which provided:

For those cases in which a forensic evaluation has been completed and an expert has concluded that the offender does meet the criteria for civil commitment

as defined RCW 71.09.020, no proposed community release plan will be deemed sufficiently safe to ensure community protection.

Mr. Mattson then filed the present Personal Restraint Petition (PRP).

Based on its prior decisions in In re the Personal Restraint Petition of Dutcher, 114 Wn.App. 755, 60 P.3d 635 (2002), and In re Personal Restraint Petition of Liptrap, 127 Wn.App. 463, 111 P.3d 1227 (2005), the Court of Appeals concluded DOC's continued reliance upon categorical exemptions to the deny release pursuant to RCW 9.94A.728 violates the plain language of the statute. Opinion at 10. Consistent with those decisions, The Court of Appeals said

If a forensic evaluation concludes an inmate meets the criteria of sexually violent predator, "24/7 prison-like monitoring and lock-down" can only be accomplished within the constraints of due process by means of of a civil commitment proceeding.

Opinion at 10.

DOC has never denied that it has relied upon a categorical exemption, instead it stubbornly insists that it is entitled to do so despite the plain language of RCW 9.94A.728 and the holdings of Liptrap, Dutcher, and now Mattson. See e.g., Motion for Discretionary Review (MDR) at 8 (contending Court of Appeals

wrongly “held that [DOC] cannot categorically exempt sex offender from community placement”). DOC continues this dogged ignorance filing the present motion for discretionary review.

C. ARGUMENT

DOC HAS FAILED TO IDENTIFY ANY BASIS WARRANTING REVIEW BY THIS COURT.

Where the State seeks review of a decision granting or a personal restraint petition, the Court will grant review:

. . . . only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4; RAP 13.5A(a)(1); RAP 16.4(c). None of these considerations are present here.

1. The decision of the Court of Appeals is not in conflict with any decision of this Court or any other court. DOC maintains the Court of Appeals wrongly found Mr. Mattson has a limited liberty interest in earned early release. MDR at 10-11.

Dutcher concluded:

An inmate’s interest in his earned early release credits is a limited, but protected liberty interest.

Likewise the department's compliance with the requirements of a statute affecting his release is a protected liberty interest.

114 Wn.App. at 758. Liptrap concluded "a decision by [DOC] that, in essence deprives an inmate of earned early release into community custody is an unlawful restraint." 127 Wn.App. at 469. Indeed, in Greenholtz v. Inmates of Neb. Penal & Corr. Complex, the United States Supreme Court recognized that that while an inmate does not have right to or liberty interest in early release or parole, a statute may create a liberty interest where the statute provides for release unless some specified finding is made warranting denial of release. 442 U.S. 1, 12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). This Court has recognized that

by enacting a law that places substantive limits on official decisionmaking, the State can create an expectation that the law will be followed, and this expectation can rise to the level of a protected liberty interest.

In re the Personal Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994); see also, In re the Personal Restraint Petition of McCarthy, 161 Wn.2d 234, 164 P.3d 1283 (2007) (finding liberty interest in procedures of RCW 9.95.420 pertaining to release from indeterminate sentence).

RCW 9.94A.728 provides in relevant part:

....
(2)(a) A person convicted of a sex offense . . . may become eligible, in accordance with a program developed by the department, for transfer to community custody status in lieu of earned release time pursuant to subsection (1) of this section;

....
(c) The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. All offenders with community placement or community custody terms eligible for release to community custody status in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community;

(d) The department may deny transfer to community custody status in lieu of earned release time pursuant to subsection (1) of this section if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody or community placement

In both Dutcher and Liptrap the Court of Appeals, relying on this Court's analysis in Cashaw, concluded the language of RCW 9.94A.728

require[s] the department to make its early release decision based upon plans proposed by inmates and reviewed by the department, and has (we believe wisely) not authorized any exemption from this process simply because [End of Sentence Review Committee] believes the offender qualifies for a civil commitment hearing.

Dutcher, 114 Wn.App. at 765-66 (quoted in Liptrap, 127 Wn.App. at 472).

This, is precisely what the Court of Appeals has concluded once again. Opinion at 10 (“neither the current nor former versions of RCW 9.94A.728 authorize DOC to categorically exempt offenders who meet the criteria of sexually violent predators.”) This conclusion is consistent with the decisions in Greenholtz, Cashaw, McCarthy, Dutcher and Liptrap. As such, the decision is necessarily consistent with the dictates of the Due Process Clause. Moreover, another in a long line of decisions requiring DOC to comply with a straightforward statute is not a matter of substantial public interest.¹

¹ Mr. Mattson agrees that DOC’s steadfast refusal to comply with the simple dictates of RCW 9.94A.728 might pose both a significant constitutional question and matter of substantial public interest. However, as the decision of the Court of Appeals adequately vindicates his interests, he does not agree nor contend that is a basis for this Court to consider granting review in this matter.

2. DOC has not changed its policy and continues to categorically refuse to release a class of individuals in violation of RCW 9.94A.728. DOC contends review is proper because it asserts it has changed its policy, and thus, DOC contends, the decision of the Court of Appeals wrongly expands the rule of Dutcher and Liptrap. MDR 14-16. Indeed DOC Policy 350.200 (Appendix 4 to MDR) was amended after DOC relied upon the former version to deny Mr. Mattson's release. The amended version of Policy 350.200, with its attachments, requires:

TO DETERMINE THE APPROPRIATENESS OF A PROPOSED PLAN

Counselor/facility Community Corrections Officer (CCO) will consider:

...
3. All End of Sentence Review Committee (ESRC) decisions, including referrals for Civil Commitment under 71.09

(Bold and underline in original.) "Transition Plan Procedure," Attachment 6 to DOC Policy Directive 350.200 revised December 25, 2006. Policy 350.500, in turn, provides in pertinent part:

Offenders who have been found by ESRC to meet the definition of an SVP shall not be:

...
2. Released to Community Placement.

Despite the Court's opinions in Dutcher, Liptrap, and the present case, DOC continues to apply categorical exclusions in its release of inmates to community custody in violation of RCW 9.94A.728. Thus, the fact that DOC amended Policy 350.200 after relying on it to refuse Mr. Mattson's release does not alter the correctness of the outcome reached by the Court of Appeals nor warrant review by this Court, especially in light of the continued existence of Policy 350.500.

D. CONCLUSION

DOC has not identified any basis under RAP 13.4 warranting review in this case. As such, this Court should deny the motion for discretionary review.

Respectfully submitted this 13th day of March, 2008.



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