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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint Petition of JOHN MILTON PINO, Petitioner.	No. 50876-1-II UNPUBLISHED OPINION

MAXA, C.J. – In this personal restraint petition (PRP), John Pino seeks relief from the Department of Corrections' (DOC) denial of his daughters' applications for in-person visitation with him while he is incarcerated.

Pino pleaded guilty in 2009 to three counts of first degree child molestation, and he currently is incarcerated at Stafford Creek Corrections Center (SCCC). His three daughters (then minors) were the victims of his crimes. Pino's judgment and sentence prohibited him for life from contacting his three daughters. Pino's daughters also were covered by three Sexual Assault Protection Orders (SAPOs) against Pino, which originally prohibited all contact for life. However, the superior court amended the SAPOs in 2016 to allow for in-person contact with Pino while he is incarcerated. Two of Pino's three daughters applied to DOC for visitation privileges after the amended SAPOs were entered, and DOC denied these applications.

We hold that DOC's denial of the applications for visitation (1) did not violate Pino's due process rights because he has no liberty interest in visitation while incarcerated, and (2) was not

arbitrary and capricious because the denial was supported by DOC's visitation policies. Accordingly, we deny Pino's PRP.

FACTS

In 2009, Pino pleaded guilty to three counts of first degree child molestation and received an indeterminate sentence of 150 months to life in prison.

His three minor daughters were the victims of his crimes. Pino's judgment and sentence states, "Defendant shall have no contact with: victims." Resp., Ex. 1, Attach. B at 7. In addition, a community custody condition incorporated in the judgment and sentence states, "No contact with the victims … for life, unless by future Court order." Resp., Ex. 1, Attach. B, App. H at 2. The superior court also entered a separate SAPO for each of the daughters that prohibited Pino from having any contact with them after his conviction.

In March 2016, the superior court amended the SAPOs with respect to two of Pino's daughters such that Pino was permitted "to have in person contact while he is incarcerated with DOC." Resp., Ex. 1, Attach. D at 3, 5. In November 2016, the court amended the SAPO relating to Pino's third daughter to include substantially the same exception.

On March 10, 2016, one of Pino's daughters, SP, submitted an application to DOC requesting permission to visit Pino in prison. SP was over the age of 18 at that time. DOC denied SP's application in a letter dated March 11 because she was "one of [Pino's] victims and there is an active no contact order." Resp., Ex. 2, Attach. E at 1. The denial letter also quoted former DOC Policy 450.300(VI)(A) (2015), which prohibited visitation by (1) minor-aged victims of the offender without written approval from certain people, (2) domestic violence victims of the offender, and (3) other adult victims of the offender to be determined on a case-by-case basis.

On July 15, another of Pino's daughters, AP, submitted an application to DOC requesting permission to visit Pino in prison. AP was over the age of 18 at that time. DOC denied AP's application in a letter dated July 20 for the following reason: "There is an active 'no contact' order. Victims of the offender are not allowed to visit." Resp., Ex. 2, Attach. E at 2. The letter then quoted former DOC Policy 450.050(I)(A)(3) (2015), which provided that an offender's contact with certain individuals can be restricted or disallowed when "[t]here is an active court order of 'no-contact' with [that] individual." Resp., Ex. 2, Attach. E at 2. AP did not appeal the denial.

SP filed a second application on December 28. DOC denied this application in a letter dated January 6, 2017. The only basis of the denial was that SP was Pino's minor aged victim and that minor aged victims could not visit offenders without certain written approval. As noted above, SP was not a minor at that time.

On January 10, SP emailed DOC to ask why her applications were both denied even though the SAPOs had been modified to allow visitation. DOC treated the email as an appeal of the denial of her visitation privileges. In an email response, DOC stated that the March 2016 denial letter outlined the reasons for the denial. The email also stated, "Court records indicate that there is still an active no contact order in place. Further, while the courts may modify no contact or restraining orders, individuals identified as victims do not meet policy requirements to be authorized visit privileges." Resp., Ex. 2, Attach. J at 1. DOC referenced former DOC Policy 450.300.

Pino also "appealed" the denial of his daughters' applications by writing to DOC. SCCC's Superintendent responded that under former DOC Policy 450.300, which allows adult

victims of the offender to visit on a case-by-case basis, DOC was denying his request "due to the seriousness of your offense against your children." Resp., Ex. 2, Attach. G.

Pino wrote a second time to ask "what verbage [sic] needs to be on the [a]mended order for you to consider possibly allowing visitation with all three of my daughters[?]" Resp., Ex. 2, Attach. H. SCCC's Associate Superintendent replied that "[t]he court would need to instruct that you are allowed UNRESTRICTED contact with all of [your daughters] and that all previous court-ordered restrictions are removed." Resp., Ex. 2, Attach. I.

Pino seeks relief from DOC's denial of the applications for in-person visitation with his daughters while he is incarcerated.

ANALYSIS

A. PRP PRINCIPLES

To prevail on a PRP, a petitioner must show that he or she is under restraint as defined by RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). *In re Pers. Restraint of Dove*, 196 Wn. App. 148, 153-54, 381 P.3d 1280 (2016), *review denied*, 188 Wn.2d 1008 (2017). A petitioner is under "restraint" when he or she is confined. RAP 16.4(b). One of the ways that a petitioner's restraint can be unlawful is if the "conditions or manner of the restraint" violate the United States Constitution, Washington Constitution, or Washington law. RAP 16.4(c)(6).

Pino is under restraint because he currently is incarcerated. Family visitation privileges during incarceration are a condition or manner of the restraint under RAP 16.4(c)(6). *See In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 391, 20 P.3d 907 (2001). Therefore, to obtain relief Pino must show that DOC's denial of visitation with his daughters violated the United States Constitution, Washington Constitution, or Washington law. RAP 16.4(c)(6).

Generally, a petitioner seeking collateral review of a claimed constitutional error must establish that the error resulted in actual and substantial prejudice. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). However, where the petitioner has not had the opportunity to seek direct judicial review of a claimed error, we do not apply the heightened threshold requirements that ordinarily apply to a PRP. *Id.* at 299. Instead, the petitioner must show only that he or she is under unlawful restraint under RAP 16.4(b) and RAP 16.4(c). *Id.*

B. STATE'S MOTION TO DISMISS BASED ON ADEQUATE REMEDY

As a threshold matter, the State moves to dismiss Pino's PRP under RAP 16.4(d), arguing that a civil rights action under 42 U.S.C. § 1983 is an adequate remedy for Pino's claimed unlawful restraint. We disagree.

RAP 16.4(d) provides that we "will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances." The question here is whether a 42 U.S.C. § 1983 claim is an adequate remedy for DOC's refusal to allow Pino's daughters to visit him.

42 U.S.C. § 1983 provides a cause of action to citizens who have been deprived of their rights under the constitution and laws by a person acting under the color of state law. But a plaintiff may not file a § 1983 action against the state or against a state official acting in an official capacity because a state is not a "person" subject to suit within the meaning of § 1983. *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 285-86, 4 P.3d 808 (2000). Similarly, state agencies are not subject to § 1983 actions. *Hontz v. State,* 105 Wn.2d 302, 309, 714 P.2d 1176 (1986). A plaintiff may assert § 1983 claims only against government officials in their individual capacities for actions taken under color of state law. *Republican Party*, 141 Wn.2d at 286.

We hold that a § 1983 claim is not an adequate remedy for DOC's refusal to allow Pino to visit his daughters. First, any § 1983 action Pino filed against DOC would be dismissed because DOC is not subject to § 1983 liability. Second, although Pino could file suit against individual DOC officials, government officials are entitled to qualified immunity against § 1983 claims unless the official's action violated a clearly established right. *See, e.g.*, *Robinson v. City of Seattle*, 119 Wn.2d 34, 64-65, 830 P.2d 318 (1992). As discussed below, prison visitation is not a "clearly established right." *See Dyer*, 143 Wn.2d at 392. Third, a § 1983 action would not address any violation of Pino's rights under the Washington Constitution.

In *In re Personal Restraint of Arseneau*, Division One of this court held that the availability of a § 1983 claim did not preclude a PRP relating to DOC's restriction on an inmate's contact with his niece. 98 Wn. App. 368, 371-74, 989 P.2d 1197 (1999). We agree.

We hold that a civil action under 42 U.S.C. § 1983 is not an adequate remedy for Pino's claimed unlawful restraint.

C. DUE PROCESS CLAIM

Pino argues that DOC's denial of visits with his daughters violates his due process rights. We hold that due process does not apply because Pino does not have a liberty interest in visitation with his daughters.

The Fifth and Fourteenth Amendments to the United States Constitution and article I, section 3 of the Washington Constitution state that no person shall be deprived of life, liberty, or property without due process of law. Parents generally have a due process liberty interest in the companionship of their children. *See In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 597, 387 P.3d 1072 (2017). Pino claims that this liberty interest extends to visitation with his daughters while he is incarcerated.

The Supreme Court addressed this issue in *Dyer*, where an inmate claimed a liberty interest in extended visits with his family. 143 Wn.2d at 392. The court stated that "it is well settled that an inmate does not have a liberty interest in the denial of contact visits by a spouse, relatives, children, and friends." *Id.* The court noted, "The denial of a prisoner's access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence.' " *Id*. (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 461, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

In *Dyer*, the court acknowledged that apart from the due process clause itself, "state statutes or regulations can create a due process liberty interest where none otherwise would have existed." 143 Wn.2d at 392. "[T]o create a liberty interest, the action taken must be an atypical and significant deprivation from the normal incidents of prison life." *Id.* at 393. However, this rule is inapplicable here because Pino does not argue that DOC's regulations created a due process interest.

Accordingly, we hold that DOC's denial of Pino's visitation with his daughters did not violate his due process rights.[1]

D. ARBITRARY AND CAPRICIOUS CLAIM

Pino argues that we must grant his PRP because DOC's denial of his daughters' visitation applications was arbitrary and capricious. He emphasizes that DOC disregarded the fact that the amended SAPOs permitted Pino to have in-person visitation with his daughters while incarcerated. We disagree.

[1] DOC analyzes at length whether Pino's procedural due process rights were violated, concluding that they were not. But Pino emphasizes in his reply brief that his PRP is based on substantive, not procedural, due process. Therefore, we do not address procedural due process.

The general rule is that we will reverse a *prison disciplinary decision* only if that decision was arbitrary and capricious. *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 215, 227 P.3d 285 (2010). The court in *Dyer* noted that this rule applied to prison disciplinary proceedings, 143 Wn.2d at 391, 395, but also applied the same rule to DOC's denial of visitation privileges. *Id.* at 395-96. Therefore, we apply the arbitrary and capricious standard here.

An agency decision is arbitrary and capricious if it is willful, unreasoning, and disregards the facts or circumstances. *Id.* at 395. "An action can be depicted as arbitrary and capricious only if the agency's action is wholly unsupportable." *Id.*

However, we must apply this standard in light of the fact that visitation is a privilege granted only to inmates and visitors who meet the general guidelines set forth in DOC's policies. *Id.* at 393; *see also* RCW 72.09.470 (extended family visitation is a privilege for which inmates must contribute to related costs to the extent possible). In *Overton v. Bazzetta*, the United States Supreme Court reiterated that courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." 539 U.S. 126, 132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003).

DOC relied on its visitation policies to deny Pino's visitation with his daughters. Former DOC Policy 450.300(VI)(A) states that the following people may not visit prisoners:

> 1. Minor aged victims of the offender, unless they have written approval from the Children's Administration and/or sentencing court, the Superintendent, and the appropriate Deputy Director/designee.
> 2. Domestic violence victims of the offender, either in the offense for which the offender is currently incarcerated or any other adjudicated offense.
> 3. Other adult victims of the offender, determined on a case-by-case basis.
> . . .
> 5. Individuals restricted per the Judgment and Sentence, including conditions of community supervision that prohibit contact with an individual or category of individuals.

Resp., Ex. 2, Attach. A at 9. Former DOC Policy 450.050(I)(A) states that an offender's contact with specific individuals will be restricted or prohibited when:

> 1. His/her Judgment and Sentence prohibits contact with the individual or class of individuals during incarceration or upon release.
> …
> 3. There is an active No Contact Order with the individual.

Resp., Ex. 2, Attach. B at 2.

Here, DOC denied SP's first application because she was one of Pino's victims and there was an active no contact order. The response to SP's appeal stated the same grounds.[2] DOC's denial of AP's application also was based on these factors. Because Pino's daughters were his domestic violence victims and adult victims of his offense, former DOC Policy 450.300(VI)(A)(2)-(3) supported the denial of visitation. Because Pino was restricted from contact with his daughters under the judgment and sentence, former DOC Policy 450.050(I)((A)(1) and (3) supported the denial of visitation.

DOC's denial of visitation was based on established DOC policies. Pino does not challenge the adoption of these policies. Therefore, the decisions were not "willful and unreasoning" or "wholly unsupportable." *Dyer*, 143 Wn.2d at 395.

Pino argues that DOC's denial of visitation was arbitrary and capricious because it was inconsistent with the amended SAPOs. However, when DOC denied the applications Pino's judgment and sentence had not been amended and still prohibited contact with his daughters. And although the amended SAPOs may have allowed in-person visitation while Pino was

[2] DOC's denial of SP's second application referenced only former DOC Policy 450.300(VI)(A)(1), the rule regarding minor aged victims. Denial based on this policy was erroneous because SP was not a minor at the time. However, in the response to SP's appeal DOC correctly referred back to the reasons stated in the March 2016 denial.

incarcerated, they did not *require* visitation. In addition, DOC policies still prohibited visitation of an offender's domestic violence victims regardless of any no contact orders.

Pino also argues that DOC lacks the authority to deny visitation privileges to his daughters because DOC must abide by the final judgment and sentence, regardless of whether DOC agrees with its terms. Pino cites *Dress v. Department of Corrections*, 168 Wn. App. 319, 328, 279 P.3d 875 (2012), for the proposition that DOC had no authority to ignore the judgment and sentence. However, this argument fails because although the superior court amended the SAPOs regarding Pino's ability to have in-person contact with his daughters, the court did not amend the underlying judgment and sentence. The underlying judgment and sentence remained unchanged, and continued to prohibit Pino from contacting his daughters for life.

Finally, Pino argues that DOC disregarded former DOC Policy 450.300(VI)(A)(1), which suggests that minor aged victims can visit with the sentencing court's written approval. However, even though DOC twice referenced this provision in denying SP's applications, the provision was inapplicable because SP and AP no longer were minors. In any event, not only the approval of the sentencing court is required, but under former DOC Policy 450.300(VI)(A)(1) the "Superintendent" and the "appropriate Deputy Director/designee" also must give written approval. Resp., Ex. 2, Attach. A at 9. While Pino may be correct that the superior court's written approval was achieved through the amended SAPOs, the SCCC Superintendent denied approval in writing in response to Pino's appeal and there is no record of any written approval from the appropriate Deputy Director or designee.

We hold that DOC did not act arbitrarily and capriciously in denying Pino's daughters' applications to visit him while he was incarcerated.

CONCLUSION

We deny Pino's 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.

MAXA, C.J.

We concur:

LEE, J.

SUTTON, J.