IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JESSE ALAN McREYNOLDS, Appellant. --- In the Matter of the Personal Restraint Petition of: JESSE ALAN McREYNOLDS, Petitioner.	)	No. 27946-4-III (cons. with No. 28637-1-III) UNPUBLISHED OPINION

Sweeney, J. —This consolidated personal restraint petition and appeal follows pleas of guilty to attempted second degree kidnapping, luring of a child, and indecent exposure. The defendant was held in a county jail past his maximum jail term, transferred to the department of corrections, and ultimately confined awaiting trial in a sexually violent predator (SVP) proceeding. He petitions for relief despite the fact he has

served his complete sentence and the fact that he is now restrained pursuant to a different proceeding. We conclude that we can provide no effective relief and that the questions raised are therefore moot. We also conclude that he was not denied the effective assistance of counsel by his lawyer's failure to advise of the potential for a SVP proceeding. We do, however, remand for the court to delete a sentencing condition that is not "crime related."

FACTS

Jesse Alan McReynolds entered an *Alford*[1] plea to attempted second degree kidnapping, luring of a child, and indecent exposure. He approached an 11-year-old girl walking home from school, exposed himself, and tried to pull her into his car. Mr. McReynolds agreed to an exceptional 17-month prison sentence, community custody, and HIV[2] testing.

The court had the usual preliminary discussion with Mr. McReynolds on the record before his plea and then concluded that Mr. McReynolds knowingly, voluntarily, and intelligently entered into the plea agreement. It sentenced Mr. McReynolds to 17 months in prison. It also ordered that Mr. McReynolds get "credit to be determined by Yakima DOC [for] days served on this charge only" and "credit for good behavior as

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] Human immunodeficiency virus.

administered and computed by the Yakima County Department of Corrections." Clerk's Papers (CP) at 23. The Yakima County Department of Corrections gave Mr. McReynolds credit for 363 days already served and 181 days for good behavior—544 days total. Br. of Appellant Appendix A. Five-hundred forty-four days is about 18 months.

The court also ordered that Mr. McReynolds "shall serve the balance of confinement in a prison operated by the Washington State Department of Corrections because the term of confinement is over one year." CP at 23. The Yakima County Department of Corrections transferred Mr. McReynolds to a state prison.

Although Mr. McReynolds had credit for time exceeding his sentence, the Washington State Department of Corrections (DOC) refused to release him. It instead required that Mr. McReynolds create a "release plan" and then determined that his plan did not include suitable housing. He remained confined because DOC never approved any of Mr. McReynolds' proposed release plans. Mr. McReynolds was to be released from DOC confinement on August 20, 2008. But he was not released because, on August 19, 2008, the State petitioned to civilly commit him as a sexually violent predator.

Mr. McReynolds filed a notice of appeal in Yakima County Superior Court. The court transferred the motion to us as a personal restraint petition. We dismissed the

petition as untimely. The Supreme Court then granted discretionary review and remanded. It instructed us to consider Mr. McReynolds' personal restraint petition as a timely filed appeal because the trial court did not inform Mr. McReynolds of the deadline for filing a timely appeal.

DISCUSSION

I. Unlawful Restraint, Community Custody, and HIV Testing are Moot Issues

Mr. McReynolds contends that he is currently unlawfully restrained, that the court incorrectly imposed community custody, and that the court incorrectly ordered him to undergo HIV testing. We decline to address these issues because they are moot and not of continuing and substantial public interest.

An issue is moot "if a court can no longer provide effective relief." *In re Det. of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). We will decline review of a moot issue unless the issue involves "'matters of continuing and substantial public interest.'" *Id.* at 377 (quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). Three factors guide our analysis on this question: "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the problem will recur." *Dunner v. McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984).

Mr. McReynolds contends that this court should review his unlawful restraint petition because his current restraint is derived from his restraint by DOC, which was unlawful because he had already served his time. He cites to *Monohan v. Burdman* and *In re Cavitt* to support this argument; both are distinguishable. *See Monohan v. Burdman*, 84 Wn.2d 922, 530 P.2d 334 (1975) (holding that whether an inmate was entitled to due process at a parole hearing was not a moot issue when the inmate remained in custody after his parole was revoked); *In re Cavitt*, 170 Wash. 84, 87, 15 P.2d 276 (1932) (holding that whether the trial court lost jurisdiction over a man who had completed his sentence was not a moot issue when the court ordered that he serve more jail time because the sentence he already completed was not punishment enough). The defendants in those cases challenged restraint imposed in the proceeding in which they sought relief. Unlike those cases, Mr. McReynolds challenges restraint imposed in a proceeding other than the one he has appealed. His prison sentence in this case ended on August 20, 2008. He has already served his 17-month sentence. His current custody is the result of the SVP proceedings. And there is no showing on this record that the problem Mr. McReynolds complains of is one of continuing and substantial public interest.

The same is true for Mr. McReynolds' sentence to community custody. His

maximum release date from prison was August 20, 2008. If he served 18 months of community custody, his community custody would have been complete in February 2010. The issue is moot.

Again, there no showing that this issue is one of continuing and substantial public interest. Mr. McReynolds complains that the court erred by sentencing him to community custody for an attempt crime, but there is already an authoritative determination that provides guidance to public officers on this issue. *See In re Postsentence Review of Leach*, 161 Wn.2d 180, 163 P.3d 782 (2007). Moreover, the statute at issue, former RCW 9.94A.715 (2007), was repealed in 2008. Laws of 2008, ch. 231, § 57. The time for appealing or filing an unlawful restraint petition has passed in most cases. This issue is therefore unlikely to repeat itself.

The order that Mr. McReynolds undergo HIV testing is also moot. Mr. McReynolds has already been tested for HIV. And again, there is no showing that the issue is one of continuing and substantial interest. *See Dunner*, 100 Wn.2d at 838. Mr. McReynolds consented to the test. An opinion here would offer little guidance to public officers deciding whether a criminal defendant should be asked to consent to HIV testing. The precise issue here is whether the order for HIV testing is invalid because Mr. McReynolds' guilty plea was involuntary. There are already a number of cases on

whether guilty pleas are voluntary. *See State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011); *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004).

II. Involuntary Plea—Failure to Advise of the Possibility of an SVP Petition

Mr. McReynolds also contends that his guilty plea was involuntary because his lawyer did not advise him that the State could file a petition to have him committed as a sexually violent predator as a consequence. The State responds that the SVP petition is a collateral consequence of the plea and counsel did not have to advise Mr. McReynolds of that possibility.

A claim of ineffective assistance of counsel is a mixed question of fact and law that we review de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). We also review questions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). And it seems to us that whether an SVP petition is a collateral consequence or a consequence of a plea is a question of law. *See In re Pers. Restraint of Paschke*, 80 Wn. App. 439, 443-45, 909 P.2d 1328 (1996).

There are a couple of problems with Mr. McReynolds' contentions. First he makes no showing on what, if anything, his lawyer advised him and this is necessary for us to pass on his complaints. *Sandoval*, 171 Wn.2d at 169. Mr. McReynolds cannot then

show that his plea was involuntary because he received ineffective assistance of counsel.

Next, his lawyer must only advise him of the direct consequences of his plea, not the collateral consequences. *In re Det. of Campbell*, 139 Wn.2d 341, 360, 986 P.2d 771 (1999). A direct consequence is a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *State v. Ward*, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994) (internal quotation marks omitted) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). Washington courts have concluded that deportation and SVP proceedings are collateral consequences. *See State v. Jamison*, 105 Wn. App. 572, 20 P.3d 1010 (2001); *Paschke*, 80 Wn. App. at 444. But the Supreme Court recently changed course and concluded that failure to advise of immigration consequences was ineffective assistance in *Sandoval*, 171 Wn.2d at 176.

Mr. McReynolds argues that, because of *Sandoval*, the failure to advise of potential SVP proceedings should also be revisited and considered a direct consequence of pleading guilty. However, *Sandoval* narrowly addresses whether defense counsel was ineffective for failing to advise a defendant that pleading guilty would likely result in deportation. *See* 171 Wn.2d 166-67, 169-76. It did not address *Paschke*. There the court concluded that SVP proceedings are not direct consequences because they are not definite, immediate, or largely automatic. *Paschke*, 80 Wn. App. at 444. Indeed, filing a

SVP petition is discretionary, unlike the deportation proceedings at issue in *Sandoval*. *Compare* RCW 71.09.030(1) ("A petition *may* be filed alleging that a person is a sexually violent predator." (emphasis added)) *and* 8 U.S.C. § 1227(a) ("Any alien . . . in and admitted to the United States *shall*, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens." (emphasis added)).

The circumstances here are distinguishable from those in *Sandoval*. We then conclude that SVP proceedings are not a direct consequence of a guilty plea and Mr. McReynolds plea was not then involuntary.

III. Prohibited Contact with the Victim

Mr. McReynolds contends that, because there was no sexual assault or sex offense here, the court incorrectly signed a sexual assault no contact order. Former RCW 9.94A.030(42) (2006), which defines "sex offense," does not list attempted second degree assault, luring, or indecent exposure as sex offenses. The State agrees this was error.

The sentencing court may impose only crime-related prohibitions. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); RCW 9.94A.505(8). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." Former RCW

9.94A.030(13). The no contact order here, by its terms, may be imposed for: (1) sex offenses as defined in former RCW 9.94A.030, (2) violations of RCW 9A.44.096, (3) violations of RCW 9.68A.090, or (4) an RCW 9A.28.020 gross misdemeanor that is anticipatory of a sex offense. Mr. McReynolds' crimes do not meet this requirement. The prohibition is not crime-related and we therefore reverse the protection order.

We affirm the conviction but remand for resentencing to delete the condition prohibiting contact with the victim.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, J.

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Siddoway, J.