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Washington State
Court of Appeals
Division Two

January 5, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of RYAN DEE WHITAKER, Petitioner.	No. 54306-1-II UNPUBLISHED OPINION

LEE, C.J. — Ryan D.Whitaker seeks relief from personal restraint imposed as a result of his 2013 conviction for two counts of first degree child molestation.[1] We deny his petition.

FACTS

The trial court sentenced Whitaker to a minimum term of confinement of 89 months and a maximum term of confinement of life. Response to Petition, Exhibit 1, Attachment A at 4. On May 29, 2019, the Indeterminate Sentence Review Board (ISRB) held Whitaker's first releasability hearing, found him not releasable, and added 18 months to his minimum term, stating the following reasons:

- Assessed as a Risk Level Two by the End of Sentence Review Committee (ESRC), this was an aggravation due to using a position of trust to access the victim.
- Has not completed any risk related programming.
- Denies offenses and any culpability in the offenses.

[1] Because this petition does not challenge Whitaker's judgment and sentence, it is not subject to the one year time bar in RCW 10.73.090(1).

Response to Petition, Exhibit 1, Attachment B at 2 (boldface omitted). Whitaker challenges the ISRB's decision.

ANALYSIS

In reviewing the ISRB's decision, we are not a "super" ISRB. *In re Pers. Restraint of Whitesel*, 111 Wn.2d 621, 628, 763 P.2d 199 (1988). Rather, we review the ISRB's decision finding a prisoner not releasable and setting a new minimum term only for an abuse of discretion. *In re Pers. Restraint of Dyer*, 175 Wn.2d 186, 196, 283 P.3d 1103 (2012). The ISRB abuses its discretion if it "fails to follow its own procedural rules for parolability hearings or where the ISRB bases its decision on speculation and conjecture only." *Id.*

Whitaker argues that the ISRB failed to follow RCW 9.95.420(1)(a), which provides that as part of the end of sentence review process:

> [B]efore the expiration of the minimum term, as part of the end of sentence review process under RCW 72.09.340, 72.09.345, and where appropriate, 72.09.370, the department shall conduct, and the offender shall participate in, an examination of the offender, incorporating methodologies that are recognized by experts in the prediction of sexual dangerousness, and including a prediction of the probability that the offender will engage in sex offenses if released.

Whitaker contends that RCW 9.95.420(1)(a) requires an examination by "expert psychiatrists and psychologists," relying on *Vitek v. Jones*, 445 U.S. 480, 495, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). But *Vitek* addressed whether an inmate had a mental illness that could not be treated in prison, not an examination of the likelihood that a sex offender will reoffend if released.

Here, the ESRC conducted the examination of Whitaker by taking into consideration his record; his static-99R risk assessment; and his file, including police reports. Thus, the ESRC

conducted the examination required by RCW 9.95.420(1)(a), RCW 72.09.345,[2] and WAC 381-90-050.[3] Therefore, the ISRB complied with RCW 9.95.420(1)(a).

Whitaker also argues that the ISRB relied upon speculation and conjecture in finding him not releasable and ignored evidence supporting his releasability. While Whitaker did present

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[2] Requiring the ESRC to "assess, on a case-by-case basis, the public risk posed by . . . [o]ffenders preparing for release from confinement for a sex offense or sexually violent offense committed on or after July 1, 1984." RCW 72.09.345(3)(a)

[3] WAC 381-90-050 provides, in relevant part:

> (1) RCW 9.95.420 requires that any convicted person sentenced under the provisions of RCW 9.94A.507 shall be subject to a board hearing to determine releasability. The hearing must be held no later than ninety days before the expiration of the minimum term. However the hearing cannot be held unless the board has received:
>
> (a) The results from the end of sentence review process;
>
> . . . .
>
> (2) The end of sentence review committee report may include, but is not limited to:
>
> (a) A prediction based upon the administration of actuarial risk assessment instruments and the sexual and criminal history of the offender, of the likelihood that the offender will commit new sex offenses if released;
>
> (b) The institutional progress report(s) covering the inmate's adjustment, achievement, infractions and program participation during incarceration;
>
> (c) Psychiatric or psychological reports, such as IQ appraisals, personality inventories, actuarial risk assessments and sexual history polygraphs;
>
> (d) Behavioral details of the crime(s) of conviction, such as law enforcement reports, prosecutor's statements, court records, and presentence investigation reports;
>
> (e) Recommendations for conditions of community custody in addition to those set by the sentencing court;
>
> (f) The department's risk management level and the sex offender notification level;
>
> (g) Written confirmation that the inmate has had an opportunity to review the information the department is submitting to the board and an opportunity to make a written statement.

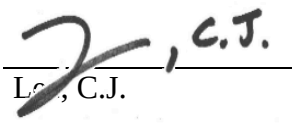
evidence supporting his releasability, he does not show that the ISRB abused its discretion in relying on the ESRC report and expertise rather than Whitaker's evidence of releasability.

Whitaker further argues that the ISRB should be collaterally estopped from basing the finding of non-releasability on his denial of the offenses because, during the releasability hearing, one of the ISRB members stated that his failure to admit the crime had no bearing on his likelihood of reoffending or his releasability. But the hearing transcript does not contain such a statement. And even if it did, the statement would have been one of law (albeit a mistaken one) to which collateral estoppel would not apply, especially as against the government. *State, Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

Finally, Whitaker argues that the Department of Corrections and the ISRB engaged in a conspiracy to ensure that he was found not releasable. But other than speculation, Whitaker presents no evidence to support his assertion.

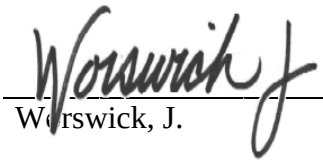
Whitaker does not show that the ISRB abused its discretion in finding him not releasable. Hence, Whitaker fails to establish any grounds for relief from personal restraint. Therefore, we deny his petition.

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.

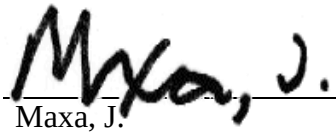


Lee, C.J.

We concur:



Worswick, J.



Maxa, J.