

June 25, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of:

JAMES KYLE PECK,

Petitioner.

No. 58635-5-II

UNPUBLISHED OPINION

CRUSER, C.J.—James Kyle Peck is serving an indeterminate sentence following his 2013 conviction for first degree rape of a child. He now seeks review of the Indeterminate Sentence Review Board’s (ISRB) decision finding that he was not releasable under RCW 9.95.420 (.420) and adding 36 months to his minimum term.

Peck argues that the ISRB abused its discretion by (1) failing to consider favorable evidence that he presented, and (2) relying on the Sexually Violent Predator (SVP) subcommittee of the End of Sentence Review Committee’s (ESRC) recommendation that Peck be referred for a forensic psychological evaluation to determine if he qualified as an SVP.

The ISRB concedes that the record is inadequate to demonstrate that it considered the favorable evidence that Peck presented. We accept the ISRB’s concession, grant this personal restraint petition (PRP), and remand this matter for a new .420 review hearing. We reject Peck’s remaining argument.¹

¹ We also deny Peck’s request for appointed counsel.

FACTS

I. BACKGROUND

Peck pleaded guilty to first degree rape of a child in 2013. The trial court sentenced Peck to an indeterminate sentence with a minimum term of 110 months and a maximum term of life. Following his first .420 releasability hearing in 2020, Peck was conditionally released in February 2021.

The ISRB revoked Peck's conditional release in October 2021, after a Florida detective who was part of a task force investigating internet crimes against children contacted Peck's community custody officer and informed him that Peck had been in contact with a minor. The ISRB determined that Peck had violated his supervision by having contact with a minor without the required approval, joining a public social media site, and possessing sexually explicit material. Peck admitted to contacting the minor, viewing child pornography, and erasing related information from his computer. But he "took little responsibility for his circumstance and blamed a variety of factors for his violation behavior." Resp. Ex. 1, Attach. E at 3.

The ISRB set a new minimum term of 30 months. The ISRB also recommended that Peck again participate in sex offender treatment.

In May 2022, Peck was rescreened for sex offender treatment. Peck was found not to be amenable to treatment because he asserted that "there [was] nothing wrong with his sexual offending and he [was] only requesting [treatment] in order to be convinced that sexual offending is wrong."² *Id.* at Ex. 2, Attach. A at 1.

² The ISRB notes in its response that Peck was subsequently found amenable to treatment as of August 29, 2023.

In May 2023, the ESRC reviewed Peck and classified him as a moderate to high risk under the Static-99R test. The committee also reclassified Peck from a “Level II” offender to a “Level III” offender because past interventions had failed to deter his sexually deviant behavior, there was documentation of an increasing risk of reoffense, and Peck had attempted to conceal or destroy evidence of ongoing deviance. *Id.* Ex. 1, Attach. F at 1.

The committee also recommended that Peck be referred for an SVP review by the committee’s SVP subcommittee. The subcommittee recommended that the ISRB request a forensic psychological evaluation from the Law Enforcement Notification Program to assess whether Peck met the SVP criteria.

II. JULY 2023 ISRB HEARING AND DECISION

In July 2023, the ISRB held a .420 hearing to determine whether Peck was once again releasable. At this hearing, the ISRB reviewed its file on Peck and considered the evidence presented at the hearing.³

In its decision, the ISRB listed the documents in the review file. This list did not include any release plans or other documentation submitted by Peck. The ISRB also listed the favorable evidence that it had reviewed. This list included only that Peck had completed his sex offender treatment program in 2019 and that he had not accrued any serious infractions—it did not mention any evidence that Peck had submitted.

The ISRB decision acknowledged that Peck was entitled to a presumption of release. But the ISRB concluded that this presumption had been rebutted by a preponderance of the evidence

³ The record does not contain a transcript of this hearing.

because the evidence demonstrated that Peck was more likely than not to commit sex offenses if released, even if subject to conditions of release.

Specifically, the ISRB found that any community custody conditions and any of the favorable evidence noted in the decision would not sufficiently reduce the likelihood that Peck would commit new sex offenses if released because, (1) the ESRC had referred Peck to the SVP subcommittee and the subcommittee had recommended that Peck receive a forensic psychological evaluation to assess whether he qualified as an SVP before finding him eligible for release, and (2) Peck failed to complete the sex offender treatment recommended in his revocation proceeding, so he had not acquired any “new skills and or interventions that would mitigate his risk.” *Id.* at Attach. B at 6 (boldface omitted).

Regarding the recommendation that the ISRB seek an evaluation, the ISRB emphasized that the ESRC selects only the highest-risk offenders to be reviewed for a forensic psychological evaluation and that this was “indicative of the risk Mr. Peck presents at this time” and “indicat[es] the community-based treatment and conditions with restrictions will be insufficient to mitigate his risk such that he is less likely to commit a sex offense if released on conditions.” *Id.* at 6 (boldface omitted).

The ISRB concluded that Peck was not releasable and added 36 months to his minimum term. Peck now challenges the ISRB decision.

ANALYSIS

Peck argues that the ISRB abused its discretion by (1) failing to consider favorable evidence that he presented, and (2) relying on the SVP subcommittee’s recommendation that Peck be referred for a forensic psychological evaluation. The ISRB concedes that its decision does not

sufficiently document its consideration of the favorable evidence in the record. We accept this concession, and we hold that the second issue is without merit.

I. LEGAL PRINCIPLES

To prevail on a PRP challenging an ISRB decision, the petitioner must show unlawful restraint. *In re Pers. Restraint of Dyer*, 175 Wn.2d 186, 195, 283 P.3d 1103 (2012) (*Dyer II*). Unlike PRPs that collaterally attack a conviction, a petitioner challenging an ISRB decision is not required to establish prejudice in order to be entitled to relief because the petitioner has not had a prior opportunity for judicial review of the decision at issue. *In re Pers. Restraint of Mines*, 146 Wn.2d 279, 286-87, 45 P.3d 535 (2002).

We review the ISRB's decision for abuse of discretion. *Dyer II*, 175 Wn.2d at 196. The ISRB abuses its discretion if it "fails to follow its own procedural rules" or it "bases its decision on speculation and conjecture only." *Id.*

II. FAILURE TO CONSIDER FAVORABLE EVIDENCE

Peck argues that the ISRB's failure to mention the evidence that he presented regarding his community support and his proposed release plan, any protective factors, and other favorable evidence in its decision demonstrates that the ISRB abused its discretion by failing to consider this evidence.⁴ The ISRB concedes that its decision does not adequately document its consideration of this positive evidence. We agree with the ISRB.

⁴ Peck also asserts that the evidence of his violations while on community custody only establishes "some evidence" that he is at risk of re-offending and that the ISRB cannot consider his violations without also considering the favorable evidence. PRP Br. 19. This appears to be an additional argument related to the ISRB's failure to consider the favorable evidence, so we do not address this argument separately.

Although the ISRB does not dispute that the evidence described by Peck was presented at the hearing, the ISRB's decision fails to mention any of this evidence in the list of the documents in the review file or in the list of favorable evidence reviewed. Because the ISRB's decision does not mention this favorable evidence, the record does not demonstrate that the ISRB considered it.

The ISRB cannot ignore evidence presented at the hearing. *In re Pers. Restraint of Dyer*, 157 Wn.2d 358, 369, 139 P.3d 320 (2006) (*Dyer I*). The ISRB's failure to demonstrate that it considered all favorable evidence in reaching its decision establishes an abuse of discretion. Accordingly, we accept the ISRB's concession.

III. RELIANCE ON FORENSIC PSYCHOLOGICAL EVALUATION RECOMMENDATION

Peck further contends that the ISRB improperly relied on the recommendation from the ESRC that Peck undergo a forensic psychological evaluation to determine if he qualified as an SVP. This argument fails.⁵

In making its releasability decision, the ISRB must consider the ESRC's report and other pertinent information. *See* WAC 381-90-050(1)-(2), (4)(d). And in Peck's case, the SVP subcommittee recommended that the ISRB seek an SVP evaluation from the Law Enforcement Notification Program to determine whether Peck is an SVP, a recommendation that is made only for the highest-risk sex offenders. The ISRB was required to consider the ESRC's report, and the fact that such recommendations are limited to only high-risk offenders is relevant to Peck's risk of reoffense, so the ISRB did not err by considering this evidence.

⁵ Although we remand on other grounds, we must still consider this issue to determine whether a the ISRB can consider this evidence on remand.

Peck also relies on *In re Personal Restraint of Parejo*, 5 Wn. App. 2d 558, 428 P.3d 130 (2018), for the premise that the referral for a forensic psychological evaluation cannot be grounds to deny conditional release. But *Parejo* addressed whether a forensic psychological evaluation concluding that an offender was an SVP *prohibited* the ISRB from granting parole under RCW 9.95.115.⁶ 5 Wn. App. 2d at 560. Here, the ISRB did not determine that it was prohibited from granting release based on the recommendation that the ISRB seek a forensic psychological evaluation. Instead, the ISRB considered only that the recommendation for the evaluation was an indicator that Peck was in a high-risk category of offenders. And, as discussed above, the ISRB was required to consider the information from the ESRC.⁷

Peck also argues that the fact Parejo was ultimately granted conditional release demonstrates that the forensic psychological evaluation recommendation does not necessarily prevent release. Parejo was paroled while his PRP was pending after he was determined not to be an SVP. *Id.* Although Parejo's parole suggests that a referral for a forensic psychological evaluation does not alone prohibit release, *Parejo* does not demonstrate that a referral for a forensic

⁶ RCW 9.95.115 provides:

The indeterminate sentence review board is hereby granted authority to parole any person sentenced to the custody of the department of corrections, under a mandatory life sentence for a crime committed before July 1, 1984, except those persons sentenced to life without the possibility of parole. No such person shall be granted parole unless the person has been continuously confined therein for a period of twenty consecutive years less earned good time: PROVIDED, That no such person shall be released under parole who is subject to civil commitment as a sexually violent predator under chapter 71.09 RCW.

⁷ Peck's concern that he was never adjudicated as an SVP and, therefore, cannot be considered an SVP for purposes of the ISRB review is not relevant because the ISRB considered only the circumstances resulting in the forensic psychological evaluation referral and did not presume that Peck was, in fact, an SVP.

psychological evaluation is not a relevant factor that the ISRB can consider, which is what occurred here.

We hold that Peck fails to show that the ISRB erred when it considered the fact that he was referred for a forensic psychological evaluation.

IV. REMEDY

Because there has already been a hearing, remand for a new decision based on the existing evidence could potentially be appropriate. But because, in this instance, the ISRB did not acknowledge the relevant evidence in its decision, it is unclear whether the ISRB understood the significance of this evidence and fully considered it at the hearing. *See In re Pers. Restraint of Dodge*, 198 Wn.2d 826, 845, 502 P.3d 349 (2022); *Dyer I*, 157 Wn.2d at 369; *In re Pers. Restraint of Lambert*, ___ Wn. App. 2d ___, 543 P.3d 836, 842 (2024) (remand for a new hearing is appropriate where the record demonstrated that the ISRB failed to meaningfully consider certain factors). Accordingly, we remand this matter for a new .420 hearing.⁸

⁸ In his brief in support of his PRP, Peck initially requested that we remand this matter back to the ISRB with directions to release him under appropriate conditions. He abandons this request in his reply.

CONCLUSION

We grant the PRP, reverse the ISRB's decision, and remand for a new .420 hearing.

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.

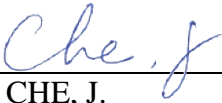


CRUSER, C.J.

We concur:



GLASGOW, J.



CHE, J.