

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BILLY CASTREJON

on

Habeas Corpus.

D060683

(San Diego County

Super. Ct. No. SCE266148

Super Ct. Habeas No. HC20637)

Original proceeding on a petition for writ of habeas corpus. Petition denied.

The petitioner in this habeas proceeding was convicted of lewd and lascivious behavior with his 13-year-old cousin, who he impregnated. At the time of the offense he was 18 years old and living with the victim and her parents. Petitioner was initially placed on probation but he failed to comply with the terms of his probation and he was imprisoned. At the time of his release from prison the Department of Corrections and Rehabilitation (DCR) required, as a condition of his parole, that he not have contact with minors.

For several months after his release the petitioner lived and worked on a relative's farm and complied with all the conditions of his parole. However, the owner of the farm sold it and petitioner moved to his parents' home. Petitioner's parents were able to arrange for petitioner's then 15-year old sister to live with friends and relatives so that petitioner could comply with the terms of his parole while he was living with his parents. On occasion petitioner's sister returned to the family's home and when she did petitioner spent the night at a motel.

Petitioner made a formal request to be relieved of the restriction on living with minors so that his sister could return permanently to the family home. His parole agent denied the request and the agent's supervisor reviewed the request and also denied it. The DCR then cancelled his appeal of the denial as untimely, but advised petitioner that he could appeal the cancellation administratively. Petitioner instead filed a petition for habeas corpus in the superior court which was denied on the merits. Petitioner then filed the instant petition. We issued an order to show cause. We now deny the petition.

The record shows that in failing to appeal the cancellation of his appeal petitioner failed to exhaust his administrative remedies.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Offense and Incarceration*

In 2006, petitioner Billy Castrejon was convicted of lewd and lascivious behavior with a minor under the age of 13. At the time of the offense Castrejon was 18 years old and had been living with the victim, his cousin Wendy L., and her parents. Castrejon impregnated Wendy L. before her 14th birthday. Initially Castrejon was granted

probation on the condition he obey all laws, perform community service, have no contact with the victim, register as a sex offender and provide his probation officer with his address. Later Castrejon was permitted to have visitation with his son and limited contact with the minor during the visitation.

In 2008, probation officers discovered Castrejon was cohabitating with Wendy L., had not completed his community service, used marijuana regularly, had not registered as a sex offender, and had not given his probation officer his true address. Castrejon's probation was revoked and in July 2008 he was sentenced to three years in prison.

2. Parole Conditions and Request for Relief

While Castrejon was in prison, his relationship with Wendy ended after she gave birth to a second child who was fathered by a second male. Castrejon was released from prison on parole in September 2010. As a condition of his parole Castrejon agreed he would not have contact with any minors. Following his release, he went to work on a relative's farm in a rural area of San Diego, taking care of the farm's herd of goats. However, in February 2011, the owner of the farm sold it and the livestock.

Castrejon, moved back to a home his parents occupy as caregivers for his mother's elderly aunt and uncle who suffer with significant health conditions. Castrejon lives in the garage at the home and is enrolled in a welding program and a diesel technology program offered by a local community college. He is also pursuing an online business administration study program. After Castrejon moved into the home with his parents, his parents arranged for his then 15-year-old sister, Krystal, to live with friends while she

completes high school. On those occasions when Krystal returns home, Castrejon's parents rent a motel room for Castrejon.

After living with his parents for three months, on May 24, 2011, Castrejon filed a written request for modification of the parole condition which prevented him from living with his sister. Castrejon's parole agent of record denied the request. The agent stated that "your request is being denied [at] this time" and noted that the victim of the underlying offense was 14 years old. Castrejon asked that the agent's supervisor review the request and the supervisor also denied it. The supervisor stated that Castrejon's parole was based on an offense in which Castrejon had a "sexual relationship with your 13-year-old first cousin, which resulted in a pregnancy. You were residing with her family at the time."

Castrejon then filed a "Request for Formal Level Review" of his request for relief from the conditions of his parole. On July 6, 2011, the request for formal level review was cancelled by the DCR appeals coordinator as untimely. The appeals coordinator noted that the challenged parole conditions had been imposed on September 23, 2010 and Castrejon did not file his appeal until June 28, 2011. The appeals coordinator found that this delay exceeded the 15-day limit on formal level review of parole conditions.

A footnote at the bottom of the form cancelling the formal level review stated in part: "Pursuant to CCR 3084.6(e), once an appeal has been cancelled, that appeal may not be resubmitted. However, a separate appeal can be filed on the cancellation decision. The original appeal may only be resubmitted if the appeal or the cancellation is granted."

Later in 2011 Castrejon was found to be using marijuana and was briefly reincarcerated. According to his mother's declaration, Castrejon suffers from leukemia, obtained a medical marijuana card and used the marijuana to alleviate joint pain. However Castrejon did not tell his parole agent he was using marijuana.

Castrejon filed a petition for habeas corpus relief in the superior court, which denied the petition on the merits. In particular, the superior court found that the condition of Castrejon's parole preventing him from having contact with minors, such as his sister, was reasonably related to his lewd and lascivious behavior with his 13-year-old cousin.

Castrejon then filed a habeas petition in this court. We issued an order to show cause. The DCR filed a return, Castrejon filed a traverse and we asked for additional briefing with respect to whether Castrejon exhausted his administrative remedies.

DISCUSSION

I

"It is well settled that inmates must exhaust available administrative remedies before filing a petition for habeas corpus in the courts. [Citation] "The exhaustion of administrative remedies requirement furthers several important societal and governmental interests. These include bolstering administrative autonomy, mitigating damages, giving agencies opportunity to make factual findings, encouraging settlement, filtering out frivolous claims, fostering better prepared litigation, and promoting judicial economy. [Citations.] In addition, the requirement ensures "the use of administrative agency expertise and capability to order and monitor corrective measures." [Citation.] [Citation.]

"It is also true, however, that 'the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma. [Citation.] It contains its own exceptions, as when the subject matter of the controversy lies outside the administrative agency's jurisdiction [citation], when pursuit of an administrative remedy would result in irreparable harm [citations], when the administrative agency cannot grant an adequate remedy [citations], and when the aggrieved party can positively state what the administrative agency's decision in his particular case would be.' [Citation.]"
(*In re Hudson* (2006) 143 Cal.App.4th 1, 7.)

The doctrine of exhaustion of administrative remedies is not merely a rule of state procedure but governs litigation of federal constitutional rights. In federal habeas proceedings the doctrine is denominated as a procedural default and operates to bar claims where the petitioner has not properly exhausted available administrative remedies. (See *Woodford v. Ngo* (2006) 548 U.S. 81, 92-93.)

Here the record is undisputed Castrejon did not exhaust his administrative remedies. The record shows that although formal level review of the decision denying Castrejon's request for permission to live with his sister was cancelled by the appeals coordinator as untimely, the cancellation itself was subject to further administrative review. We have not been able to identify any circumstance which would excuse Castrejon's failure to seek administrative relief from the cancellation.

Although we have serious concerns about rigid application of the 15-day limit on formal level review, the timeliness of Castrejon's request for a change of parole conditions is a matter which, in the first instance, is well within the expertise of the DCR.

Whether the department's time requirements should always run from the date a parole condition is imposed, or in some instances from a later event, are self-evidently matters which the department should have been given the opportunity to consider before Castrejon sought judicial intervention.

Contrary to Castrejon's argument, it is not at all clear that resort to the available administrative remedy would have been futile. It is quite possible the department might have accepted Castrejon's contention that its time limits should run from the time Castrejon and his family determined that the living arrangement required by his parole conditions was not workable. Moreover it is not clear that had the review reached the merits of Castrejon's request he would have received no relief. It is conceivable that rather than simply denying Castrejon's request, in reviewing the request on the merits the department might have suggested to Castrejon circumstances under which some relief from the condition would be possible. In this regard we note that in his initial denial of Castrejon's request, his agent stated that the request was "denied at this time."

We of course recognize Castrejon's living arrangements represent a hardship for his family. However the burden those arrangements impose on Castrejon's family do not represent the sort of irreparable injury which permit Castrejon to abandon the administrative remedies available to him. Given the fact Castrejon had been living with his parents for more than three months when he made his initial request for relief from the condition of his parole, the additional time it would have taken to administratively challenge cancellation of his formal level review did not represent a grave threat to him

or his family. In this regard we note that he filed his request for formal level review on June 28, 2011, and it was cancelled less than ten days later on July 6, 2011.

In sum, Castrejon's petition is defective because the record does not show that he exhausted his available administrative remedies.

DISPOSITION

The petition is denied.

BENKE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.