MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Derek Aguilar,
Appellant-Petitioner,

v.

Warden Vanihel,
Appellee-Respondent.

July 22, 2022

Court of Appeals Case No. 21A-MI-2513

Appeal from the Sullivan Circuit Court

The Honorable Robert E. Hunley, II, Judge

Trial Court Cause No. 77C01-2108-MI-471

Weissmann, Judge.

[1] Derek Aguilar petitioned for a writ of habeas corpus claiming he is illegally imprisoned on a discharged sentence. Aguilar is mistaken about the status of his sentence. Moreover, he misunderstands the habeas process, as his claims of procedural error hinge on the issuance of a writ which was never issued. Finding no error, we affirm.

Facts

[2] Aguilar pleaded guilty in Adams County to multiple counts of Class B felony burglary and Class D felony theft, along with one count of Class D felony receiving stolen property, in two different cause numbers: 01C01-0511-FB-10 (FB-10) and 01C01-0512-FB-12 (FB-12). The trial court sentenced Aguilar to 20 years of imprisonment in FB-10. In FB-12, the court sentenced him to 10 years of formal probation to start "following [Aguilar's] release from incarceration" in FB-10. App. Vol. I, p. 104.

[3] About 10 years later, in 2016, Aguilar was released on parole in FB-10. He also began serving probation for FB-12. Within months, Aguilar had violated the terms of both. The Adams County Circuit Court terminated Aguilar's probation and ordered him to serve 2,370 days—about 6 ½ years—in the Indiana Department of Correction. Shortly after, the Indiana Parole Board revoked his parole in FB-10.

[4] Aguilar petitioned for post-conviction relief in 2019, claiming his sentences in FB-10 and FB-12 constituted a non-divisible single sentence, rendering his simultaneous parole and probation terms improper. After a hearing, the petition

was denied at summary disposition. Aguilar appealed to this Court, which affirmed. *See Aguilar v. State*, 162 N.E.3d 537, 539 (Ind. Ct. App. 2020) (hereinafter "*Aguilar I*").

[5] In 2021, Aguilar petitioned for a writ of habeas corpus, arguing that because the sentences were consecutive, he could only start serving probation for FB-12 if FB-10 had been discharged. The trial court's "consecutive-concurrent sentences," he argued, were illegal. App. Vol. II, p. 17. The trial court again denied his petition, this time without a hearing.

Discussion and Decision

[6] Aguilar now appeals, advancing the same argument he did below.[1] He also challenges the procedure to which his petition was subjected.

I. Standard of Review

[7] "Every person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal." Ind. Code § 34-25.5-1-1. Although the Indiana Code administers habeas proceedings, "the privilege of the writ exists independent of the statute and flows from our constitution." *Fry v. State*, 990 N.E.2d 429, 437 (Ind. 2013). "A petitioner is

[1] Aguilar also raises issues with a third sentence out of Wells County. Because he does so for the first time on appeal, these issues are waived. *See Mills v. State*, 840 N.E.2d 354, 358 n.8 (Ind. Ct. App. 2006).

entitled to the writ only if he is entitled to be immediately released from unlawful incarceration." *Id.*

[8] We review the trial court's denial of Aguilar's petition for abuse of discretion but review any questions of law *de novo*. *See Hale v. State*, 992 N.E.2d 848, 852 (Ind. 2013). We do not reweigh evidence and consider only the evidence most favorable to the judgment. *Id.* We affirm on any basis sustainable by the record. *Willet v. State*, 151 N.E.3d 1274, 1278 (Ind. Ct. App. 2020) (citing *Benham v. State*, 637 N.E.2d 133, 138 (Ind. 1994)).

II. Procedure

[9] Aguilar alleges that the trial court violated the procedural statutory requirements laid out in Indiana Code § 34-25.5-1-1, *et seq.*: first, when the court directed his petition to the Attorney General's Office rather than the warden named in the petition; and second, when the court summarily rejected his petition without a hearing or opportunity to amend.

[10] Aguilar conflates a petition for a writ of habeas corpus with the issuance of the writ requested by that petition. The petition is the request for issuance of a writ, and the writ acts as the vehicle "employed to bring a person before a court." *Hale*, 992 N.E.2d at 853; *see also Habeas Corpus, Black's Law Dictionary* (11th ed. 2019).

[11] If a trial court issues a writ of habeas corpus, the warden must be served. *See* Ind. Code § 34-25.5-3-2. But Aguilar directs us to no statutory authority

requiring the court to serve the warden with a *petition* for writ of habeas corpus. Because the trial court never issued a writ, there was no writ to deliver to the warden. *See* App. Vol. I, p. 8.

[12] Aguilar next insists he was entitled to a hearing. But while the issuance of a writ of habeas corpus requires a hearing, the mere filing of the petition does not. Indeed, a trial court lacks jurisdiction to entertain a petition for a writ of habeas corpus when the "petitioner is serving time under a proper commitment, his sentence has not expired and he has not been denied good time or credit time, and he is not seeking a correction of the beginning or the end of his sentence." *Willet*, 151 N.E.3d at 1279 (cleaned up); *see also Young*, 271 Ind. 554, 394 N.E.2d at 125.

[13] As we detail in Part III, *infra*, Aguilar's commitment was not improper, his sentence had not expired, he had not been denied credit time,[2] and he was not seeking a correction of the beginning or end of his sentence. Rather, he incorrectly believed one of his sentences had been discharged. It is clear on the face of the record it had not been. Therefore, the trial court did not err in issuing a summary denial of Aguilar's petition without a hearing.

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[2] The parole board revoked Aguilar's previously accrued credit time when it revoked his parole. To the extent that Aguilar challenges this revocation as improper and the basis for his habeas petition, we cannot evaluate his claim, as he does not cite to authority. *See* Ind. Appellate Rule 46(8)(a). We do note, however, that credit time counts toward release on parole but does not reduce the date of discharge from a sentence. *Garrison v. Sevier*, 165 N.E.3d 996, 1000 (Ind. Ct. App. 2021). When parole is revoked, some portion of previously earned credit time is commonly revoked, too. *See Boyd v. Broglin*, 519 N.E.2d 541, 542-543 (Ind. 1988).

[14] Finally, Aguilar complains that he was not given time to amend his petition but does not direct us to any authority suggesting he had a right to amend. None of his procedural arguments persuade us to reverse the trial court's order.

III. Merits

[15] Aguilar argues that because his sentences were concurrent, his sentence in FB-10 was discharged as soon as he started serving probation for FB-12. Concluding that parole and resentencing in FB-10 was unlawful, Aguilar asks to be released from IDOC custody.

[16] Another panel of this Court addressed shades of this question in *Aguilar I*:

> Aguilar also directs us to caselaw for the proposition that " '[o]ne may not be simultaneously on probation and serving an executed sentence.' " *Hart v. State*, 889 N.E.2d 1266, 1271 (Ind. Ct. App. 2008) (alteration in original) (quoting *Thurman v. State*, 162 Ind. App. 576, 320 N.E.2d 795, 797 (1974)). In focusing on this language, Aguilar appears to rely on the principle that "parole ... is, in legal effect, still imprisonment." *Page v. State*, 517 N.E.2d 427, 430 (Ind. Ct. App. 1988), *trans. denied*. Thus, according to Aguilar, it was improper for him to simultaneously be on probation in FB-12 while still serving an executed sentence in FB-10. Aguilar also points out that the sentencing court had imposed consecutive terms. Aguilar seems to argue that, because the court had imposed consecutive terms, he could not have simultaneously been on probation and parole and, instead, should have been placed only on probation. Aguilar also implicitly argues that, even if parole was proper, he should not have been placed on probation in FB-12, so his probation in FB-12 should not have been revoked.

> Ultimately, Aguilar reads caselaw about simultaneous service too expansively. This line of caselaw stands for the proposition that one cannot be incarcerated while simultaneously receiving rehabilitative services associated with probation. *See, e.g.*, *Hart*, 889 N.E.2d at 1271 (noting that, "[g]iven the rehabilitative purpose of probation," that rehabilitative process "can only be accomplished outside the confines of prison"). We discern no legal impediment to a person simultaneously serving parole and probation in separate sentences, a scheme that would benefit a defendant by allowing him to expeditiously serve his time. *C.f., e.g., Mills v. State*, 840 N.E.2d 354, 360 (Ind. Ct. App. 2006) (involving circumstances where a person was on parole while serving a consecutive sentence); *Hannis*, 816 N.E.2d at 877 (involving similar circumstances).

Aguilar I, 162 N.E.3d at 543 (footnote omitted). In *Aguilar I*, Aguilar argued that his probation should not have been revoked. Here, he argues that he should no longer be serving a sentence for F-10.

[17] Because these questions are so similar, the State argues that Aguilar's argument is precluded by collateral estoppel. Collateral estoppel—also known as issue preclusion—"bars subsequent litigation of an issue necessarily adjudicated in a former suit if the same issue is presented in the subsequent suit." *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 968 (Ind. 1998). We need not decide whether collateral estoppel applies because Aguilar cannot prevail on his F-10 claim.

[18] A person serving a sentence imposed for a felony is in one of four stages: (1) waiting to start serving the sentence; (2) serving the sentence; (3) paroled on the sentence; (4) discharged from the sentence. *Hobbs v. Butts*, 83 N.E.3d 1246, 1250 (Ind. Ct. App. 2017). Aguilar argues that by beginning to serve probation for

FB-12, he had entered the fourth stage on FB-10. If he indeed had been discharged, his current incarceration for FB-10 would be unlawful.

[19] But Aguilar was never discharged on FB-10. "It is well settled that an offender may be on parole for one offense while incarcerated for another offense." *Arnold v. Butts*, 92 N.E.3d 1123, 1125 (Ind. Ct. App. 2018). This is true for consecutive sentences from a single judgment and those from unrelated convictions. *Hannis v. Deuth*, 816 N.E.2d 872, 877 (Ind. Ct. App. 2004) (holding that the first of two consecutive sentences was not discharged when appellant was paroled and serving the second sentence simultaneously); *Mills*, 840 N.E.2d at 360 (holding that *Hannis* applies where the two convictions are consecutive but unrelated). As stated in *Aguilar I*, "[w]e discern no legal impediment to a person simultaneously serving parole and probation in separate sentences, a scheme that would benefit a defendant by allowing him to expeditiously serve his time." 162 N.E.3d at 543. Beyond this argument which fails, Aguilar provides no evidence that his sentence in FB-10 was ever discharged.

[20] Because Aguilar was never discharged from FB-10, his continued imprisonment on that charge is not illegal. Aguilar also did not show that the trial court abused its discretion in denying his petition for writ of habeas corpus. The trial court is therefore affirmed.

Robb, J., and Pyle, J., concur.