ATTORNEY FOR APPELLANT

Kristina L. Lynn
Lynn Law Office, P.C.
Wabash, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caryn N. Szyper
Deputy Attorney General
Indianapolis, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Kennic T. Brown,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff,

June 24, 2021

Court of Appeals Case No. 20A-CR-2261

Appeal from the Miami Superior Court

The Honorable J. David Grund, Judge

Trial Court Cause No. 52D01-1903-F6-81

Robb, Judge.

Case Summary and Issue

[1] Kennic Brown is charged with battery against a public safety officer, a Level 6 felony. He moved to dismiss the charge against him on the basis that double jeopardy bars this criminal prosecution because he has already been subject to administrative sanctions by the Indiana Department of Correction ("DOC") for the same actions that give rise to this charge. The trial court denied the motion to dismiss, and this court granted Brown's motion for interlocutory appeal. On appeal, Brown raises a single issue: whether the trial court erred in denying his motion to dismiss because the criminal prosecution constitutes double jeopardy. Concluding the administrative punishment does not preclude a subsequent prosecution, we affirm the trial court's denial of Brown's motion to dismiss.

Facts and Procedural History

[2] In 2019, Brown was an inmate at the Miami Correctional Facility. Brown allegedly fought with and scratched an on-duty prison guard on February 9, 2019. In March, the DOC held a disciplinary hearing regarding the allegation that Brown violated conduct code A-102, assault/battery, a Class A offense, as a result of this incident. Brown was found to have committed the conduct violation and the following discipline was imposed: 360 days in the restrictive housing unit, a 45-day commissary restriction, deprivation of 180 days of credit time, and demotion of one credit class. His appeal to the warden was denied.

[3] Also in March, the State charged Brown with battery against a public safety officer based on the February 9 incident. In May 2020, Brown filed a motion to dismiss the charge, arguing that the prosecution is barred by state and federal principles of double jeopardy because he was already punished by the DOC through its administrative disciplinary proceedings for the same conduct. The trial court held a hearing on the motion in September.

[4] Brown testified that although there are certain prison offenses for which one can earn back deprived credit time, assault on staff is not one of them. *See* Transcript, Volume II at 10. He also testified that he had served his 360 days in the restrictive housing unit, which means that he was in a cell by himself for nearly a year and he was unable to communicate with other inmates except when he was in the recreational cage. DOC rules state that inmates in the restrictive housing unit are to get one hour outside the cell five days per week, *see* Appellant's Appendix, Volume II at 71, but Brown testified that he got that time only about two days a week, *see* Tr., Vol. II at 12. Other inmates "acting up" or short staffing can affect the recreational time. *Id.* Brown testified that his time in restrictive housing "messed with [his] mind" and "just sitting in there thinking about getting punished twice about something [he] didn't do" made him suicidal. *Id.* at 13. In support of his motion to dismiss, Brown also submitted several articles about the effects of solitary confinement and its restrictions. *See* Appellant's App., Vol. II at 74-101.

[5] Brown also submitted to the trial court sections of the DOC's Manual of Policies and Procedures, including section 02-04-101, the Disciplinary Code for

Adult Offenders, *see id.* at 31-66, and section 02-04-102, the Use and Operation of Adult Offender Disciplinary Restrictive Status Housing, *see id.* at 67-73. Specifically, Brown cited to section IX.E.9.a.3 of the Disciplinary Code for Adult Offenders that states a guilty finding on conduct code A-102 (or any Class A offense) "shall constitute the ineligibility of restoration with regard to any and all deprived credit time which occurred during the current commitment period." *Id.* at 55-56. And Brown argued to the trial court that "the D.O.C. itself in it's [sic] forms in the report of disciplinary hearing calls this *disciplinary* restrictive housing. It's clearly a discipline. It's clearly a punishment." Tr., Vol. II at 31 (emphasis added); *see* Appellant's App., Vol. II at 19.

[6] The trial court issued an order on October 2, 2020, concluding that "the administrative sanctions imposed by the [DOC] against Mr. Brown did not constitute double jeopardy barring criminal prosecution" and denied the motion to dismiss. Appealed Order at 1, ¶ 3. Brown now appeals that decision.

Discussion and Decision

I. Standard of Review

[7] Generally, we review a trial court's ruling on a motion to dismiss for abuse of discretion. *State v. Durrett*, 923 N.E.2d 449, 453 (Ind. Ct. App. 2010). However, whether a prosecution is barred by double jeopardy is a question of law, *State v. Allen*, 646 N.E.2d 965, 972 (Ind. Ct. App. 1995), *trans. denied*, and we therefore apply a de novo standard of review, *Austin v. State*, 997 N.E.2d 1027, 1039 (Ind. 2013).

II. Double Jeopardy

[8] Brown contends that the criminal prosecution for battery must be dismissed because otherwise, he will be subjected to multiple punishments for the same act due to the disciplinary action already taken by the DOC. *See* Appellant's Amended Brief at 15. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, a defendant has a constitutional right to not be put in jeopardy twice for the same offense.[1] But the United States Supreme Court has "long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could . . . be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense[.]" *Hudson v. U.S.*, 522 U.S. 93, 98-99 (1997) (citations omitted).

[9] Every United States Circuit Court to consider the issue has held that "prison discipline does not preclude a subsequent criminal prosecution or punishment for the same acts." *Garrity v. Fiedler*, 41 F.3d 1150, 1152 (7th Cir. 1994) (collecting cases), *cert. denied*, 514 U.S. 1044 (1995). Likewise, courts of this state have held that "[a]n administrative punishment by prison officials does not preclude a subsequent prosecution arising out of the same act." *Williams v.*

---

[1] Brown cites Article 1, section 14 of the Indiana Constitution as well, but does not advance a separate argument with respect to the state constitution. Any state constitutional argument is therefore waived. *See White v. State*, 772 N.E.2d 408, 411 (Ind. 2002) ("Because the defendant does not argue that the search and seizure provision in the Indiana Constitution requires a different analysis than the federal Fourth Amendment, his state constitutional claim is waived, and we consider only the federal claim.").

State, 493 N.E.2d 431, 432 (Ind. 1986); *State v. Mullins*, 647 N.E.2d 676, 678 (Ind. Ct. App. 1995). As explained in *Lyons v. State*:

> The [DOC] is authorized to administratively punish acts done within the prison walls by imposing disciplinary sanctions. The [DOC] may not, however, lengthen a convict's term in the prison. The [DOC] functions to insure [sic] peace and order inside the prison. On the other hand, the State is required to insure [sic] the safety and well-being of those outside the prison walls and has been authorized by statute to punish those who attempt [or commit a crime] by extending the length of their term.

475 N.E.2d 719, 723 (Ind. Ct. App. 1985), *trans. denied*.

[10] Nonetheless, Brown argues that the deprivation of good time credit and placement in restrictive housing are sanctions that are so punitive in nature they constitute a jeopardy. Brown relies heavily on the United States Supreme Court's decision in *United States v. Halper*, in which the Court applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature, instead focusing on the proportionality of the sanction. 490 U.S. 435, 448-49 (1989) (holding that "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment"). *Halper* raised the question of whether prison disciplinary sanctions "might ever be considered sufficiently excessive to constitute criminal punishment for double jeopardy purposes." *U.S. v. Mayes*, 158 F.3d 1215, 1220 (11th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999). But circuit courts distinguished *Halper* in this context and continued to reject

prisoners' double jeopardy challenges. *Id.* (collecting cases). And the Supreme Court subsequently disavowed *Halper* due to its "ill considered" and "unworkable" "deviation from longstanding double jeopardy principles[.]" *Hudson*, 522 U.S. at 95, 101. Instead, *Hudson* reaffirmed the previously established rule requiring the court to first ask whether the legislature indicated a preference that a particular sanction be civil or criminal and, in cases where the intent was to establish a civil penalty, to then consider whether the statutory scheme is so punitive either in purpose or effect as to transform what was intended as a civil penalty into a criminal penalty. *Id.* at 95 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). We will consider Brown's arguments in this context.

[11] As for the legislative intent, we look to Indiana Code chapter 11-11-5, which addresses conduct and discipline within the DOC. The chapter authorizes DOC to "adopt rules for the maintenance of order and discipline among committed persons." Ind. Code § 11-11-5-2. The chapter also clearly contemplates the possibility that violations of the conduct code could result in criminal prosecution, as it includes a provision regarding the admissibility in court of statements made by the prisoner during the course of a disciplinary investigation. Ind. Code § 11-11-5-5(d). Given the non-punitive purpose ("maintenance of order") of the disciplinary provisions, the clear acknowledgement that criminal prosecution could follow, and the delegation of disciplinary authority to an administrative agency, the statutory scheme indicates a preference that the sanctions be considered civil.

[12] We turn, then, to whether the authorized civil sanctions for violations of prison conduct rules are so punitive as to be transformed into criminal punishment.

A. Deprivation of Credit Time

[13] The DOC's authority to maintain order and discipline includes the authority to administratively punish conduct within the prison by imposing disciplinary sanctions. *Lyons*, 475 N.E.2d at 723. The range of disciplinary actions DOC is authorized to take includes as little as a report to be made part of the person's record or extra work to segregation from the general population for a fixed period of time and deprivation of good time credit. Ind. Code § 11-11-5-3.

[14] However, the DOC may not lengthen a prisoner's term in prison. *Mullins*, 647 N.E.2d at 678. In *Mullins*, the defendant argued that the DOC prolonged her incarceration by thirty days when it took administrative action to deprive her of thirty days of credit time and thus violated a fundamental liberty interest. We disagreed, noting that the receipt of credit time is conditional upon the continued good behavior of the prisoner and may be revoked. *Id.* (citing Ind. Code ch. 35-50-6). Credit time does not diminish a prisoner's fixed term or affect the date on which she will be discharged from her sentence; it only affects the date of release from prison. *Id.* (citing *Boyd v. Broglin*, 519 N.E.2d 541, 542 (Ind. 1988)).[2] The deprivation of credit time therefore did not and could not

---

[2] The State argues that the credit time deprivation "either [has] no impact on or merely delay's [sic] [Brown's] earliest possible release date[.]" Brief of Appellee at 9. Saying the credit time deprivation has "no" impact on Brown's earliest possible release date is clearly incorrect, especially since his particular conduct

lengthen the fixed term of her sentence and did not rise to the level of impinging on a fundamental liberty interest. *Id.*

[15] Brown contends that we should reconsider applying the holding in *Mullins* to him given that current DOC policies prohibit inmates found to have committed certain violations, including the A-102 violation Brown committed, from having their credit time restored. Indiana Code section 35-50-6-5(c) provides that "[a]ny part of the . . . good time credit of which a person is deprived [for a violation of one or more DOC rules] *may* be restored." (Emphasis added.) Therefore, the restoration of credit time is permissive, not mandatory. Accordingly, the DOC Manual of Policies and Procedures provides a procedure for restoration of earned credit time that was deprived as a result of disciplinary action, but with the caveat that "[n]o offender is *entitled* to the restoration of deprived earned credit time" unless he or she meets the criteria described therein. Appellant's App., Vol. II at 54-61. Brown argues that the loss of good time credit that cannot be restored "extends an inmate's sentence in the DOC" and is therefore punitive in effect, Appellant's Amended Br. at 16; but as discussed above, *supra* ¶ 14, although loss of credit time may extend a defendant's time *in the DOC*, it does *not* extend his *sentence*. Brown argued in the trial court that the DOC policy about eligibility for restoration of credit time has changed since *Mullins* was decided, but he provides no evidence of that,

---

violation precludes him from having that credit time restored, but the State is correct that it merely delays his release date.

only pointing out that the current DOC Manual of Policies and Procedures became effective in 2015 without introducing any earlier manuals for comparison. Moreover, there is no indication in *Mullins* that the decision that the deprivation of credit time was not a punishment was based on the defendant's ability to have it restored in the future. *See generally* 647 N.E.2d at 678. Brown has not convinced us that the rule announced in *Mullins* should not apply here.

[16] An inmate does not have a constitutional right to credit time, *Brown v. State*, 947 N.E.2d 486, 492 (Ind. Ct. App. 2011), *trans. denied*; rather, credit time "is a bonus created by statute and the deprivation of credit time does nothing more than take that bonus away[,]" *Mullins*, 647 N.E.2d at 678. Therefore, in the terms used in *Ward*, deprivation of credit time is not so punitive either in purpose or effect that it constitutes a criminal penalty that would subject a person to double jeopardy. 448 U.S. at 249.

B. Restrictive Housing

[17] Brown also argues that his 360-day confinement in the restrictive housing unit is punitive in nature because it was psychologically and physiologically detrimental to him. He testified that the conditions of his confinement did not comply with the conditions stated in the Manual of Policy and Procedures and that he had suicidal thoughts during his time in restrictive housing. He contends that the "intent of such a sanction is clearly to punish an inmate for behavior that violated DOC policies." Appellant's Amended Br. at 16.

[18] All disciplinary actions are to some extent intended to punish an inmate for violating DOC rules. And some disciplinary actions are more severe than others. As acknowledged in *Lyons*, that is how DOC ensures peace and order within its facilities. 475 N.E.2d at 723; *see also Mayes*, 158 F.3d at 1224 (noting that in this context, "a prison's remedial and punitive interests are inextricably related"). But the question when considering a double jeopardy claim is not whether the discipline is punitive, but whether it is *so* punitive as to essentially be a *criminal* punishment. *See Hudson*, 522 U.S. at 95.

[19] In *Williams*, the defendant escaped from the county jail and was both placed in administrative segregation in the jail for thirty-one days and prosecuted for escape. 493 N.E.2d at 432. He argued in a petition for post-conviction relief that by being administratively punished with confinement in segregated housing *and* being charged with escape, he was punished twice for the same offense. Our supreme court disagreed and held the trial court correctly concluded the defendant was not subjected to double jeopardy. *Id.* Thus, our supreme court applied the general rule that an administrative punishment does not preclude subsequent prosecution to discipline by placement in segregated housing. Although the defendant in *Williams* was only so confined for thirty-one days as opposed to Brown's 360-day confinement, Brown does not argue that the *length* of his confinement made it punitive, only that the *fact* of his confinement was punitive. *Williams* held otherwise. *See also Garrity*, 41 F.3d at 1152 ("Changes in the conditions of incarceration, such as [defendant's] placement in

segregation . . ., do not constitute a second punishment for the original offense.”).

Conclusion

[20] The disciplinary action taken by the DOC against Brown for his conduct violation does not preclude the State’s criminal prosecution of him for the same act. Accordingly, the trial court correctly denied Brown’s motion to dismiss the criminal charge against him on double jeopardy grounds.

[21] Affirmed.

Bailey, J., and May, J., concur.