IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CR-310

Jordan Allen Temme,
Appellant,

–v–

State of Indiana,
Appellee.

Argued: April 8, 2021 | Decided: June 21, 2021

Appeal from the Vanderburgh Superior Court
No. 82D03-1606-F1-3715
The Honorable Robert J. Pigman, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CR-275

Opinion by Justice David

Chief Justice Rush and Justices Massa, Slaughter, and Goff concur.

David, Justice.

In Indiana, persons convicted of certain crimes may earn credit time during incarceration for such things as good behavior and participation in educational and rehabilitative programming. State statute outlines the mechanism for awarding this credit during a person's imprisonment or confinement.

But what happens when the State erroneously releases a prisoner? Should that person receive credit for time spent at liberty, or must they resume their sentence where they left off, thereby extending their release date? May that person be recommitted at all?

We address those questions today and find that, while erroneous release may not short-circuit the entirety of a person's sentence, that person may, after the trial court holds a hearing, earn credit for time spent erroneously at liberty as if they were still incarcerated.

Facts and Procedural History

In 2017, Temme pled guilty to several charges under two different cause numbers. Temme was sentenced to a total of nine years executed in the Department of Corrections (DOC) with all sentences running consecutive to another. Two of the charges to which Temme pled guilty were felonies and accounted for five of the nine total years. All other offenses were pled as misdemeanors. Factoring in time served and day-for-day credit, Temme's projected release date was December 2020.

Upon intake into the DOC, Temme was erroneously awarded 450 days of jail credit, all of which were supposed to apply to his misdemeanor sentences. As a result, Temme was remanded to the custody of the Vanderburgh County Jail after serving only ten months of his felony sentences. Temme was also discharged from parole supervision.

After arriving at the Vanderburgh County Jail, Temme once again received 450 days of credit time. Although he raised questions that his release date was too early, Temme was released from custody on July 4, 2019, with 450 days left on his sentence. Post-incarceration, Temme

resumed his previous job and received favorable reviews from his project supervisor and a coworker.

On July 25, 2019, the State filed a Motion Requesting the Court to Re-Examine Defendant's Credit Time alleging that Temme was released without having served his full sentence. Accordingly, the State requested that Temme be readmitted to the DOC to serve the time owed on his felony sentences—time he did not serve as the result of the DOC's clerical error. The State acknowledged Temme did not contribute to his release, had good behavior while he was incarcerated, and had no violations after his release. However, the State argued Temme received the benefit of a plea bargain and should be held to those terms despite erroneous release.

For his part, Temme filed a motion arguing that he should receive credit time from the date of his erroneous release through his readmission to the DOC. As an alternative to the DOC, Temme urged the trial court to modify his sentence so he could be placed in a community corrections or work release program.

The trial court denied Temme's motion and ordered that he be returned to the DOC to finish serving his sentence. This order was stayed, however, if and until Temme filed a notice of appeal. Temme was to remain free on his own recognizance—subject to probation supervision during the pendency of appeal—until the matter was resolved.

The Court of Appeals affirmed. *Temme v. State*, 158 N.E.3d 423, 432 (Ind. Ct. App. 2020). In doing so, the court declined to adopt Temme's proffered common law doctrine of credit time for time erroneously at liberty because it found "the award of credit time is covered by statute." *Id*. at 430. Therefore, although the court "sympathiz[ed] with Temme's plight," it found the trial court did not err in ordering him to serve the remainder of his sentence. *Id*. at 431-32.

We now grant transfer, thereby vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

In accordance with this Court's duty to "say what the law is," we review questions of law *de novo*. *NIPSCO Industrial Group v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018) (citation omitted). To the extent this case involves a matter of statutory interpretation, we also review those "pure questions of law" *de novo*. *Rodriguez v. State*, 129 N.E.3d 789, 793 (Ind. 2019) (citation omitted).

Discussion and Decision

Neither party disputes Temme's erroneous dismissal. Rather, the parties dispute how to treat the time after Temme was released from prison. Although Temme asks us to adopt a theory known as Credit for Time Erroneously at Liberty—which would grant him credit time as if he were still incarcerated—he also requests that he be given full reprieve of the remainder of his sentence.

In contrast, the State believes this matter is governed by existing statute or, in the alternative, should be governed by a totality of the circumstances test. Either way, the State requests that we affirm the trial court and order Temme to serve the remainder of his sentence in the DOC.

We will examine each argument in turn.

I. While Indiana's credit time statutes are not directly on point, federal caselaw presents differing tests to determine credit time while erroneously at liberty.

Temme's arguments are based in common law tests articulated over decades of federal precedent. While the State focuses our attention on Indiana's statutory sentencing scheme and believes only the General Assembly may authorize credit time, it alternatively prefers that we choose a totality of the circumstances test were we to adopt a common law approach. Each argument informs our ultimate conclusion.

A. Under federal common law, stringent views on serving a sentence have given way to more equitable rules.

At its heart, Temme's argument is one of fairness—that re-incarceration would serve no rehabilitative purpose in his case because he bore no fault in his early release and because he has successfully reintegrated into society. He argues as a matter of public policy that if he were ordered to serve the entirety of his sentence despite erroneous release, it would degrade public confidence in the criminal justice system and ratify the negligent errors of government officials.

Examining the legal landscape of Temme's argument, early decisions from several courts drew a firm line: "[W]here the court's judgment is that the defendant be imprisoned for a certain term and for any reason, other than death or remission of sentence, time elapses without the imprisonment being endured, the sentence remains valid and subsisting in its entirety." *United States v. Vann*, 207 F.Supp. 108, 113 (E.D.N.Y. 1962); *see also U.S. ex rel. Mayer v. Loisel*, 25 F.2d 300, 301 (5th Cir. 1928) ("Mere lapse of time without the appellant undergoing the imprisonment to which she was sentenced did not constitute service of the sentence, which remained subject to be enforced"), *Leonard v. Rodda*, 5 App.D.C. 256, 274-75 (D.C. Cir. 1895) (finding a sixty-day sentence must be served despite inmate's erroneous release by the warden). Stated differently, this "harsh, unyielding" rule required that "a convicted person erroneously at liberty must, when the error is discovered, serve the full sentence imposed." *United States v. Martinez*, 837 F.2d 861, 864 (9th Cir. 1988); s*ee also* Danielle E. Wall, *A Game of Cat and Mouse--Or Government and Prisoner: Granting Relief to an Erroneously Released Prisoner in Vega v. United States*, 53 VILL. L.R. 385, 389 (2008).

Recent caselaw, however, has parted ways with the severity of this strict rule. The Seventh Circuit, for example, held:

> [U]nless interrupted by fault of the prisoner (an escape, for example) a prison sentence runs continuously from the date on which the defendant surrenders to begin serving it. The government is not permitted to delay the expiration of the

> sentence either by postponing the commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him. So, for example, if the sentence is five years and the defendant begins to serve it on July 1, 1990, the government cannot, by releasing him between January 1, 1992 and December 31, 1992, postpone the expiration of his sentence from June 30, 1995, to June 30, 1996…. The sentence expires on schedule even though the defendant will have served four years rather than five…. Punishment on the installment plan is forbidden.

Dunne v. Keohane, 14 F.3d 335, 336 (7th Cir. 1994) (citation omitted). Though "not a constitutional command," the Seventh Circuit observed that, as a matter of federal common law, this rule is one of interpretation, which is "an attempt laden with considerations of policy, to divine the will of the legislature." *Id*. at 336-37. In contrast to the harsh rule requiring absolute service of a sentence, *see Van*, 207 F.Supp at 113, *Dunne* instructs there is a finish line to a prisoner's sentence that, absent fault of the defendant, must end no later than when the prisoner's total sentence was set to expire. 14 F.3d at 337.

If *Dunne* declared the finish line of a defendant's sentence is set in stone, what happens when, through no fault of the prisoner, the State erroneously declares the race is over before all the laps are completed? One option advanced by Temme is to treat his time at liberty as if he were still incarcerated. This strategy would give Temme day-for-day credit in the same way he would receive credit during his incarceration.

This concept finds support in the vast majority of federal circuit courts where it is referred to as either the "rule" or the "doctrine" of credit for time at liberty. *See Vega v. United States*, 493 F.3d 310, 315 n.1 (3rd Cir. 2007) (recognizing it has been referred to as a "doctrine" but ultimately adopting the "rule" nomenclature); *see generally* Andrew T. Winkler, *Implicit in the Concept of Erroneous Liberty: The Need to Ensure Proper Sentence Credit in the Fourth Circuit*, 35 N.C. CENT. L. REV. 1, 11-13 (2012) (identifying ten circuit courts that have adopted some form of credit time for those erroneously at liberty). First established by the Tenth Circuit, the

rule dictates that "where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, [ ] his sentence continues to run while he is at liberty." *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). This rule "serves as a limit on the power of the marshals or ministerial officers engaged in imprisoning defendants, and encourages these same officials to take responsibility for the prisoners with whose custody they are charged." *Vega*, 493 F.3d at 320 (citing *Shelton v. Ciccone*, 578 F.2d 1241, 1245 (8th Cir. 1978)).

Circuit Courts that recognize this rule, however, have developed different tests to determine whether a prisoner is owed credit for time spent at liberty. The Ninth Circuit, for example, has found, "a convicted person is entitled to credit against his sentence for the time he was erroneously at liberty provided there is a showing of simple or mere negligence on behalf of the government and provided the delay in execution of sentence was through no fault of his own." *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (citation omitted). In that case, the court observed there was evidence that the defendant was willing to serve his sentence, had not tried to conceal his whereabouts, and that there was a ministerial error that contributed to his liberty. *Id*. Though it found the defendant's claim premature since he had yet to serve any time at all, the court nevertheless opined he would be entitled to full day-for-day credit for any time spent at liberty. *Id*. The Ninth Circuit's "categorical rule" would seemingly award credit for *any* government negligence. *See United States v. Grant*, 862 F.3d 417, 420 (4th Cir. 2017).

While the Ninth Circuit placed the burden on the defendant to show clean hands and the government's simple negligence, the Third Circuit has developed a burden shifting test. Reviewing a writ of habeas corpus, that court held:

> [I]n order for a prisoner to receive credit for time he was erroneously at liberty, the prisoner's habeas petition must contain facts that demonstrate that he has been released despite having unserved time remaining on his sentence. Once he has done this, the burden shifts to the government to prove either

> (1) that there was no negligence on the part of the imprisoning sovereign, or (2) that the prisoner obtained or retained his liberty through his own efforts.

Vega, 493 F.3d at 319. The court built this test on the foundation of three prevailing interests: showing fairness toward the prisoner that his sentence be served continuously and in a timely manner, limiting the capricious exercise of government power, and serving society's interest in holding convicted criminals accountable. *Id*. at 318.

The Fourth Circuit has taken a different approach and applies a totality of the circumstances test. Assuming without deciding that this federal common law rule has survived federal sentencing reforms, that court in *United States v. Grant* examined "the various [ ] interests implicated in a decision to award credit for time erroneously spent at liberty because of a premature release." 862 F.3d at 421. The court considered factors such as the nature of the underlying offense, whether the defendant notified the government of his erroneous release, the amount of time remaining on the sentence, the defendant's ability to reintegrate into society, and the government's promptness in rectifying its error. *Id*. at 422. On balance, the Fourth Circuit ultimately denied credit and found that the factors tipped in favor of requiring the defendant to fulfill the rest of his sentence. *Id*.

These decisions aside, Temme urges us to also consider his pending re-incarceration as a violation of his substantive due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. *See Martinez*, 837 F.2d at 864 (observing that cases involving the delay of execution of the sentence examine due process violations under waiver or estoppel theories, such as "when [the government's] agents' actions are so affirmatively improper or grossly negligent that it would be unequivocally inconsistent with fundamental principles of liberty and justice to require a legal sentence to be served in its aftermath") (internal quotation and citation omitted); s*ee also Vega*, 493 F.3d at 319. Under this theory, Temme argues a defendant should be excused from serving the rest of his or her sentence due to the government's gross negligence—acts that ultimately amount to waiver or estoppel. However, many federal courts have declined to apply substantive due process principles to time

spent erroneously at liberty. *See Vega*, 493 F.3d at 317, *Dunne*, 14 F.3d at 336-37. While some opinions keep the door open to claims alleging gross government misconduct, *see, e.g. Martinez*, 837 F.2d at 864-65, we need not wade into this debate because the present case was brought about by a calculation error at the DOC, which objectively does not rise to the level of gross negligence that would implicate substantive due process concerns.

Each of these federal decisions offer pros and cons. But before we answer whether Indiana *should* adopt any of these tests, we must ask whether we *could*. The State claims that all credit time scenarios must derive from statute and that we, the judiciary, lack authority to carve out additional credit-granting scenarios.

With this in mind, we next examine the State's arguments.

B. Indiana's statutory scheme regarding credit time is not as comprehensive as the State suggests.

The State argues against adopting a *Pearlman*-style rule, opining that defining the grant or denial of credit time is within the sole province of the General Assembly. *See* 42 F.2d at 789. In other words, the State believes that absent a specific legislative grant of credit time for those erroneously at liberty, a court as a coordinate branch of government cannot craft a stopgap measure.

To that end, the State directs us to Indiana Code chapter 35-50-6. That chapter defines and extends credit time to incarcerated individuals. There, "Credit time" is defined as "the sum of a person's accrued time, good time credit, and educational credit." Ind. Code § 35-50-6-0.5(2). Accrued time, good time credit, and educational credit are all terms that represent certain time earned during a person's term of imprisonment or confinement. *See* Ind. Code § 35-50-6-0.5(1), (3), (4). What this chapter says, according to the State, is that credit time scenarios only apply if a person is imprisoned or confined and, since Temme was "at liberty," he does not qualify for credit time.

We agree that Temme's time at liberty does not qualify for credit time **under the statute**. But we do not think the statute occupies as much space as the State would have us find.

"Our first task when interpreting a statute is to give its words their plain meaning and consider the structure of the statute as a whole." *ESPN, Inc. v. University of Notre Dame Police Dept.*, 62 N.E.3d 1192, 1195 (Ind. 2016) (citation omitted). In doing so, "[w]e avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results." *Id*. (quotation omitted). We consider what the statute says and what it doesn't. *Id*. (citation omitted). "We do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result." *Id*. at 1196 (quoting *Anderson v. Gaudin*, 42 N.E.3d 82, 85 (Ind. 2015)).

Read as a whole, we find the statute only covers what it says it covers. That is, Indiana Code chapter 35-50-6 only concerns credit time while an inmate is imprisoned or confined. We do not think the General Assembly has, by implication, excluded all other forms of credit time. *See generally Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394-95 (Ind. 2018) (applying the "presumption that when the legislature enacts a statute, it is aware of the common law and does not intend to make a change unless it expressly or unmistakably implies that the common law no longer controls" while examining federal precedent discussing the common law right of publicity). Rather, we suspect this is the rare case that does not neatly fit into any particular box. Trying to shoehorn Temme's quandary into the statute leads to an unworkable result that frustrates several purposes of our criminal code. *See, e.g.*, Ind. Code § 35-32-1-1(2) (legislative mandate to construe the criminal code in accordance with its general purposes, including to "insure fairness of administration…").

We do think, however, this statute serves as a useful guide for determining what credit an erroneously released inmate is due for his time spent at liberty.

II. Temme may be entitled to credit for time spent at liberty, but his erroneous release does not vacate the remainder of his sentence.

Temme urges us to craft a two-tiered rule that operates depending on the severity of the government's negligence. The State, as an alternative to its statutory argument, urges adoption of the Fourth Circuit's totality of the circumstances test. We think the test should be much easier for trial courts to apply.

As long as the defendant bears no active responsibility in his early release, he or she is entitled to credit while erroneously at liberty as if still incarcerated.

This straightforward rule, however, does not relieve the defendant of his or her sentence. The defendant's projected release date serves as a firm backstop. When it discovers an error, the State must petition a trial court to recommit the defendant to resume his or her sentence if, after calculating credit time, any sentence remains to be served.

Today's finding is grounded in the idea that the State may not play cat and mouse with a defendant so as to push back a prisoner's release date, particularly if the prisoner bears no responsibility for the State's error. *See Dunne*, 14 F.3d at 336. It also considers the prisoner's interest in serving a predictable sentence, places a limit on arbitrary use of government power, and fulfills society's expectation that a prisoner is held accountable for his or her actions.[1] *See Vega*, 493 F.3d at 319.

In the instant case, the "accrued time" clock has continued to tick from Temme's erroneous release date through the present appeal given his re-commitment to the DOC was stayed. Temme's good behavior and

[1] We think these interests are particularly salient where, as here, the State, Defendant, and trial court are all bound by a plea agreement. *See Rodriguez*, 129 N.E.3d at 794 (observing that "once a[plea] agreement is accepted by the court, a deal is a deal and the sentencing court possesses only that degree of discretion provided in the plea agreement with regard to imposing an initial sentence **or altering it later**") (quotation omitted) (emphasis in original).

successful reintegration into society is certainly commendable and would likely qualify as "good time credit" under the statute were he still incarcerated.[2] Additionally, Temme may qualify for educational credit if he had previously been enrolled in a program but could not participate due to his erroneous release.

It is within the trial court's discretion to make this calculation after hearing evidence from the State and defendant. After evidence is presented, the trial court should award credit time accordingly.

Conclusion

We hold that Temme is entitled to credit time as if he were still incarcerated during the period spent erroneously at liberty. We therefore reverse the trial court and remand this matter so that the trial court can calculate, consistent with this opinion, any credit time owed to Temme. If time remains to be served after credit time is awarded, Temme must be recommitted to the appropriate authority.

Rush, C.J., and Massa, Slaughter, and Goff, JJ., concur.

[2] Implicit in this observation is that a particular offender may accrue violations while erroneously at liberty. The State may present evidence of this nature and a trial court is within its discretion to consider these acts in its calculation of credit time.

ATTORNEYS FOR APPELLANT

Terry A. White
OLSEN & WHITE, LLP
Evansville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ian A. McClean
Deputy Attorney General
Indianapolis, Indiana