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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2156**

Dennis J. Moore, Jr., petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections, et al.,
Respondents.

**Filed October 14, 2008
Affirmed
Connolly, Judge**

Carlton County District Court
File No. 09-CV-07-2234

Dennis J. Moore, MCF-Moose Lake, 1000 Lake Shore Drive, Moose Lake, MN 55767
(pro se appellant)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, 1800
Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Minge, Presiding Judge; Lansing, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's denial of his petition for a writ of habeas
corpus. Because the district court's findings of fact are sufficiently supported by the

record and because appellant has presented no legally sufficient grounds upon which he is entitled to a writ of habeas corpus, we affirm.

FACTS

A complaint was filed by the state alleging that on May 5, 2003, appellant Dennis Moore was at the home of his then girlfriend, N.F., when the two mutually decided to end their relationship. The complaint alleged that appellant then struck N.F. twice in the face, and forced her into the basement, where he bound her hands with a clothesline. Appellant then tied the clothesline around her neck, forced N.F. to stand on a chair, and attached the clothesline to a beam in the ceiling. The complaint further alleged that N.F. lost consciousness and awoke on the floor of the basement, after which appellant removed her pants and underwear, put the end of a garden hose into her vagina, and turned the water on. Finally, the complaint alleged that appellant removed the hose and performed oral sex upon N.F., and then took N.F. upstairs to her bedroom and had sexual intercourse with her.

Appellant was charged with two counts of first-degree criminal sexual conduct and one count each of kidnapping, attempted first-degree murder, attempted second-degree murder, and first-degree assault. Appellant entered a plea of guilty to the charge of first-degree assault, and the state dismissed all remaining counts pursuant to a plea agreement. During the allocution for his plea, appellant admitted that “he intentionally placed a clothesline around N.F.’s neck and ‘at some point during the evening’ the clothesline tightened. The tightening of the clothesline caused blood vessels in N.F.’s eyes to burst, her eyes to hemorrhage, and scarring on her neck.” *State v. Moore*, 2005

WL 1153265, *2 (Minn. App. 2005), *review denied* (Minn. July 19, 2005). Appellant also admitted to tying N.F.'s wrists and neck and to performing oral sex on N.F., but argued that N.F. inflicted her own injuries and N.F. forced him to perform oral sex on her. *Id.* at *1. Appellant was sentenced to 135 months in prison, but this sentence was later reversed by this court. *Id.* at *6 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004)). After remand, the district court resentenced appellant to a term of 115 months. Appellant was also required to register as a predatory offender, pursuant to Minn. Stat. § 243.166 (2004).

After he began his prison sentence, appellant was directed by the Program Review Team (PRT) to “complete the treatment recommendations of a . . . sex offender treatment professional.” A Department of Corrections (DOC) therapist reviewed appellant’s file, and determined, based on the complaint and appellant’s own admissions, that he should undertake the sex-offender treatment program offered at the Minnesota Correctional Facility in Lino Lakes (MCF-Lino Lakes). On January 5, 2007, an incident report was filed by the DOC therapist, stating that appellant had not been accepted into treatment because he denied sexually abusing the victim. On January 11, 2007, appellant was given a notice of violation alleging a major violation of Offender Disciplinary Regulations promulgated by the DOC. A hearing was held on January 26, 2007. Following the hearing, appellant was found in violation of DOC rules and given an extended incarceration term of 45 days as a consequence. Appellant appealed this decision to the associate warden, who affirmed it. Appellant then applied for a writ of

habeas corpus and asked the district court to reinstate his original release date. The district court denied appellant's petition, and this appeal follows.

D E C I S I O N

A writ of habeas corpus is a statutory civil remedy available “to obtain relief from [unlawful] imprisonment or restraint.” Minn. Stat. § 589.01 (2006). It “may also be used to raise claims involving fundamental constitutional rights and significant restraints on a defendant’s liberty or to challenge the conditions of confinement.” *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26-27 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006). This court gives great weight to the district court’s findings in considering a petition for a writ of habeas corpus, and will uphold those findings on appeal if they are reasonably supported by the evidence. *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). But this court reviews questions of law de novo. *State ex rel. McMaster v. Benson*, 495 N.W.2d 613, 614 (Minn. App. 1993), *review denied* (Minn. Mar. 11, 1993).

I. The Department of Corrections was operating within its statutory authority when it ordered appellant into sex-offender treatment and when it disciplined appellant after finding he was unamenable to treatment.

Appellant claims that the DOC lacks the authority to order him to complete sex-offender treatment or to discipline him after he refused to admit that he sexually assaulted N.F. A party seeking appellate review of an agency decision “has the burden of proving that the agency has exceeded its statutory authority or jurisdiction.” *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996). When an agency such as the DOC makes a decision that is within its area of expertise, the decision “enjoy[s] a presumption of

correctness.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

Whenever a person is sentenced to an executed prison term, the sentence consists of two parts: a minimum term of imprisonment equal to two thirds of the total sentence, and a maximum supervised release term. Minn. Stat. § 244.101, subd. 1 (2006). The commissioner of corrections has authority “to prescribe reasonable conditions and rules for [persons committed to the commissioner’s care] . . . conduct, instruction, and discipline within or outside the facility.” Minn. Stat. § 241.01, subd. 3a(b) (2006). The commissioner must use this authority in order to establish rules by which an inmate may lose “good time” if the inmate commits any disciplinary offense. Minn. Stat. § 244.04, subd. 2 (2006). The commissioner must also create rules regarding sex-offender treatment programs. Minn. Stat. § 241.67 (2006). Nothing in the statute “requires the commissioner to accept or retain an offender in a program if the offender is determined by prison professionals as unamenable to programming within the prison system or if the offender refuses or fails to comply with the program’s requirements.” *Id.*, subd. 3(a). “The commissioner may impose disciplinary sanctions upon any inmate who refuses to participate in rehabilitative programs.” Minn. Stat. § 244.03 (2006).

No inmate who violates a disciplinary rule or refuses to participate in a rehabilitative program as required under section 244.03 shall be placed on supervised release until the inmate has served the disciplinary confinement period for that disciplinary sanction. . . .The imposition of a disciplinary confinement period shall be considered to be a disciplinary sanction imposed upon an inmate, and the procedure for imposing the disciplinary confinement period and the rights of the

inmate in the procedure shall be those in effect for the imposition of other disciplinary sanctions at each state correctional institution.

Minn. Stat. § 244.05, subd. 1b(b) (2006).

DOC Division Directive 203.013, promulgated by the commissioner in accordance with statutory mandates, authorizes the DOC to direct sex offenders to complete treatment recommendations. It defines a “sex offender” as “an offender who is subject to predatory offender registration, or has a prior charge or conviction for an offense that was sex related.” Unlike the designation of “predatory offender,” which follows a defendant once his term of incarceration ends, the designation of “sex offender” is a purely internal prison label. Refusal to enter or participate in treatment is considered a disciplinary offense subject to the Offender Discipline Regulations (ODR), also promulgated by the commissioner. ODR 510 states that no inmate ordered to enter into treatment may refuse to enter or participate in treatment. When an offender is denied treatment because he or she is unamenable to treatment, it is considered a violation of ODR 510.

Appellant fits within the definition of a “sex offender” as defined in directive 203.013. Appellant was charged with two counts of first-degree criminal sexual conduct and is subject to registration as a predatory offender under Minn. Stat. § 243.166, subd. 1(1), because he pleaded guilty to first-degree assault arising from the same set of circumstances.¹ Because he is subject to predatory-offender registration, and thus within the directive’s definition of a “sex offender,” the DOC has the statutory authority to

¹ Under appellant’s own version of the events, he had sex with N.F. on the same evening that he tried to strangle her with the clothesline. *Moore*, 2006 WL 1153265, at *1. Thus, his conviction was “sex related.”

direct appellant to undergo treatment.

Appellant argues that he did not refuse treatment, but simply refused to admit that he sexually assaulted N.F. Because of this refusal, DOC staff concluded that appellant was unamenable to treatment. The Minnesota Supreme Court has stated that we give deference when reviewing a DOC determination that sex-offender treatment is appropriate. *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 792 (Minn. 1999), *overruled on other grounds by Johnson v. Fabian*, 735 N.W.2d 295, 300-09 (Minn. 2007). Essentially, appellant's argument is that he did not sexually assault his victim; he just assaulted her and then had sex with her. We do not see how this fine distinction, even if accepted as true, undermines the DOC's determination that he is in need of sex-offender treatment.

Giving deference to the finding of the therapists, noting appellant's own admission that he choked the victim during a sexual encounter, and recognizing the DOC's authority to require such treatment programs and to implement rules for their administration, we decline to find error in the DOC's original determination that appellant is a sex offender in need of treatment, its subsequent determination that he was unamenable to treatment, and its ultimate decision to discipline appellant.

II. The Department of Corrections did compel appellant to provide testimony related to appellant's sexual assault of his victim, but because appellant did not face a substantial and real risk of incrimination, appellant's Fifth Amendment privilege was not violated.

Appellant argues that the DOC's requirement that he admit to sexually assaulting N.F. violated his Fifth Amendment right to remain silent. The Fifth Amendment

provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The privilege allows an individual to refuse to “answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Johnson*, 735 N.W.2d at 299 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136 (1984)) (other quotations omitted).

Respondents argue that *Johnson* does not apply retroactively because the time for direct appeal had ended when appellant brought this claim, and thus his case was final. *See State v. Lewis*, 656 N.W.2d 535, 537-38 (Minn. 2003) (holding that new rules of criminal law that do not apply retroactively nevertheless control cases pending review on direct appeal at the time the new rule was announced). In *Lewis*, our supreme court indicated it would have applied a rule of law adopted subsequent to Lewis’s direct appeal in order to avoid anomalous outcomes.² *Id.* at 538

Similarly, *Johnson* did not adopt a purely prospective application, as the new rule applied to the cases of Johnson and his co-appellant. It would likewise be anomalous if Johnson, whose 45-day extension was implemented in 2003, would benefit from the *Johnson* rule, but for Moore, whose 45-day extended supervision was ordered in 2007, to be barred from the benefit of the rule because his time for direct appeal had ended. We will apply the rule articulated in *Johnson* here.

² Referring to the rule regarding sentencing departures adopted in *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002), that departures must be supported by something more compelling than the plea agreement alone and that failure to apply the rule to Lewis’s appeal, though Lewis had been sentenced first, would create an anomalous result.

“In order for the [Fifth Amendment] privilege to apply, two distinct elements must be present—compulsion and incrimination. The privilege prohibits only statements that are compelled and that present a ‘real and appreciable’ risk of incrimination.” *Johnson*, 735 N.W.2d at 299-300 (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 190, 124 S. Ct. 2451, 2460 (2004)).

A. Appellant was compelled to provide testimony.

“The compulsion element of the privilege against self-incrimination is present when the state attaches sufficiently adverse consequences to the choice to remain silent that a person is compelled to speak. ‘[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment’” *Johnson*, 735 N.W.2d at 300 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S. Ct. 2132, 2135 (1977)). “[E]xtension of [an inmates’] incarceration time for [his] refusal to admit sexual offenses in sex offender treatment [does] rise to the level of compulsion for purposes of [his] Fifth Amendment privilege against self-incrimination.” *Id.* at 309.

B. Appellant faced no substantial and real threat of incrimination as a result of his testimony.

In order for the Fifth Amendment to apply, “the risk of incrimination faced by the claimant must be substantial and real, not trifling or imaginary.” *Id.* (citing *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S. Ct. 948, 956 (1980)). Whether a risk is real and substantial does not depend upon the likelihood that prosecution will occur. *Id.* at 311 n.5. Rather, “[a]nswers that would in themselves support a conviction or that would

furnish a link in the chain of evidence needed to prosecute the claimant are incriminating for purposes of the privilege.” *Id.* at 309.

The *Johnson* court held that the risk-of-incrimination element is satisfied when participation in a sex-offender treatment program requires an inmate to admit the offense for which he was convicted while the conviction is still on direct appeal. 735 N.W.2d at 310. It also held that the risk-of-incrimination element is satisfied when participation in a sex-offender treatment program required an inmate to admit, in contrast with his trial testimony, an offense for which he was convicted. *Id.* at 311. The *Johnson* court reasoned that this could lead to a future perjury charge. *Id.* at 311. It left open the question of what other circumstances may satisfy the risk-of-incrimination element.

Neither of *Johnson*'s two situations applies here. Appellant's case is not still on direct appeal. And, unlike either of the two appellants in *Johnson*, appellant here was not being asked to admit to facts of a crime for which he was convicted. His only conviction in this matter was for first-degree assault, and pursuant to his plea agreement, he only admitted placing a clothesline around N.F.'s neck, causing her to pass out. *Moore*, 2005 WL 1153265, *2. The question here is whether appellant's admission that he also sexually assaulted N.F. would cause him to face a real and appreciable risk of prosecution for another crime, such as criminal sexual conduct.

Appellant was charged with two counts of criminal sexual conduct, but both of those charges were dismissed pursuant to the plea agreement. Though Minnesota courts have not yet determined when a prosecutor may resurrect charges dismissed pursuant to a plea, “[i]n Minnesota, plea agreements have been analogized to contracts and principles

of contract law are applied to determine their terms.” *In re Ashman*, 608 N.W.2d 853, 858 (Minn. 2000). As such, when the prosecution makes a promise to induce a plea, those promises remain binding on the prosecution. *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005). Thus in Minnesota, as with other jurisdictions, the prosecution’s dismissal of charged offenses should be binding, and the state not allowed to resurrect charges it dismissed pursuant to a plea agreement. *See, e.g., State v. Comstock*, 485 N.W.2d 354, 368 (Wis. 1992) (“[P]rinciples of fairness, finality and repose prohibit the prosecutor from reprosecuting charges that a court dismissed as a result of a plea agreement.”); *see also People v. McMiller*, 208 N.W.2d 451, 454 (Mich. 1973) (holding that “upon the acceptance of a plea of guilty . . . the state may not thereafter charge a higher offense arising out of the same transaction [If proper plea procedure is not followed] the conviction will be set aside and the defendant ordered tried on the charge to which the plea was offered.”); *People v. Moquin*, 570 N.E.2d 1059, 1061-65 (N.Y. 1991) (holding, where district court accepted plea over state’s objection and dismissed first-degree murder charge, successful challenge by the state to the district court’s acceptance of plea on appeal did not allow state to revive dismissed charge); *State v. McAlear*, 519 N.W.2d 596, 599-600 (S.D. 1994) (holding resurrection of charges dismissed pursuant to plea barred for violating double jeopardy); *cf. Williams v. State*, 494 So.2d 819, 823-24 (Ala. Ct. App. 1986) (considering right to resurrect charges, and concluding that “it seems that, when the defendant withdraws his guilty plea or it is vacated for some other reason, then the State is free to pursue the charges which were dismissed as a result of the plea agreement”). As such, Moore would not have faced a real and appreciable risk of

prosecution if he admitted to sexually assaulting N.F., and his Fifth Amendment right against self-incrimination was not violated by the punishment imposed by the DOC.

III. Appellant's due-process rights were not violated either by the DOC's order that he complete sex-offender treatment or by the disciplinary hearing procedures.

Appellant also argues that his due-process rights were violated by the DOC's order that he complete sex-offender treatment and by the DOC's disciplinary hearing procedures. Appellant claims two distinct due-process violations. We will address each in turn.

A. Appellant was not deprived of his due-process rights when he was designated a sex offender in need of treatment.

Appellant argues that the DOC's order that he complete sex-offender treatment violated his rights to due process. To support this claim, appellant cites to the Thirteenth Amendment of the United States Constitution. The Thirteenth Amendment prohibits slavery and involuntary servitude in the United States. U.S. Const. amend. XIII, § 1. It is not applicable here. *See Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (“Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises.”).

As discussed previously, the commissioner has a statutory mandate to promulgate rules regarding sex-offender-treatment programs, as well as any disciplinary measures for failure to complete such programs. Appellant cites no authority to challenge these statutory directives. “We presume statutes to be constitutional. . . .” *Irongate*

Enterprises, Inc. v. County of St. Louis, 736 N.W.2d 326, 332 (Minn. 2007) (quotation omitted).

Moreover, we note that appellant was provided with a vehicle by which to challenge his initial designation as a sex offender and the subsequent order that he complete sex-offender treatment; appellant failed to avail himself of that vehicle.

Pursuant to ODR 510,

An offender who disagrees with the: 1) results of the [PRT] assessment, 2) treatment directive, 3) treatment placement, 4) denial of admission to a treatment program, or 5) termination from treatment must follow the grievance procedure outlined in Division Directive 303.100, "Offender/Staff Communication and Grievance Procedure." Such issues will not be addressed through the discipline process nor heard by a hearing officer.

Directive 303.100 outlines procedures for initiating a formal grievance, how those grievances are to be processed, and the procedure to appeal from the decisions made regarding those grievances. Appellant was not without recourse after he was designated as an individual in need of sex-offender treatment. He had a means through the grievance procedure by which to challenge the assessment that found he needed treatment, the directive ordering his treatment, and the denial of his admission into the treatment program. He simply failed to make such a challenge.

We decline to evaluate whether the grievance process available to appellant satisfied due process when he failed to avail himself of that process. Moreover, no binding authority has been brought before this court to demonstrate that appellant was due more process than that provided by directive 303.100. Any extension of process

beyond that provided for in the rules, absent guidance from the legislature or our supreme court, is beyond the function of this court. “The function of the court of appeals is limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). It is not the province of this court to “make . . . a dramatic change in the interpretation of the Minnesota Constitution” where the supreme court has declined to do so. *Minn. State Patrol ex rel. Pince v. State, Dep’t of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989) (quotation omitted), *review denied* (Minn. May 24, 1989). To extend to appellant and similarly situated inmates the right to a full evidentiary hearing for the purpose of challenging an agency determination that an inmate is in need of rehabilitative treatment is such a dramatic shift that is beyond the role of this court.

Nothing in the record before this court demonstrates that appellant availed himself of the process available to him for redress of grievances or that such process was insufficient to satisfy appellant’s due-process rights relative to his designation as a sex offender in need of treatment.

B. Appellant was not deprived of his due-process rights during the disciplinary hearing.

Appellant argues that the disciplinary hearing deprived him of his right to due process because the hearing panel “charged, tried, convicted, and sentenced [appellant] for failure to admit and give credence to the charge of criminal sexual conduct.” We note, however, that the procedure to which appellant was subject was a prison disciplinary procedure for failure to comply with a treatment recommendation, not a

criminal trial on a new charge. “Prison disciplinary proceedings are not part of a criminal prosecution. . . .” *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 2975 (1974).

The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965). Questions of procedural due process are addressed in two steps: (1) a determination whether the effected party had a liberty or property interest with which the state has interfered; and (2) if deprivation of such an interest has occurred, that the procedures leading to that deprivation were constitutionally sufficient. *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989).

1. *Liberty or Property Interest*

An inmate “has a protected liberty interest in his supervised release date that triggers a right to procedural due process [under the United States Constitution] before that date can be extended.” *Carrillo v. Fabian*, 701 N.W.2d 763, 773 (Minn. 2005).

2. *Procedural Sufficiency*

Where a person has been deprived of a liberty or property interest, the determination of whether sufficient procedures were followed requires three considerations: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

The private and government interests involved in this case have already been described by the Minnesota Supreme Court. The private interest is “in assuring that the loss of [appellant’s] good time credits is not imposed arbitrarily because such a loss threatens his prospective freedom from confinement by extending the length of imprisonment.” *Carillo*, 701 N.W.2d at 776. The government’s interest is “in assuring the safety of inmates and employees, as well as avoiding burdensome administrative requirements that might be susceptible to manipulation . . . [and] in promoting fair procedures.” *Id.*

The remaining consideration is whether the procedures used in the case risk an erroneous deprivation of the private interest. In a prison disciplinary proceeding, inmates are entitled to procedural-due-process requirements of (1) written notice of the violation 24 hours before the hearing, (2) the opportunity to present and call witnesses if it will not jeopardize institutional safety or correctional goals, and (3) a written statement from an impartial decisionmaker explaining the evidence and the reasoning relied on for the disciplinary action. *Wolff*, 418 U.S. at 563–67, 94 S. Ct. at 2978–80; *Hrbek v. Nix*, 12 F.3d 777, 780 (8th Cir. 1993).

Because appellant faced extended incarceration, his violation was deemed a “major penalty,” and he was afforded a “major disciplinary hearing” under DOC Directive 303.10. Pursuant to the rules that the DOC follows in major disciplinary hearings, appellant received (1) notice of his alleged violation, including a brief written summary of the facts of the incident and notice of his right to call witnesses; (2) the right to be present at his hearing; (3) representation provided by the DOC; (4) the right to call

witnesses on his own behalf; (5) the right to present relevant physical evidence; (6) written findings made available to him explaining, under a preponderance of the evidence standard, the hearing officer's decision and the penalty to be imposed upon him; and (7) the right to appeal the decision to the prison's warden or the warden's designee. These procedures more than satisfied the criteria of *Wolff* and *Hrbek*.

Appellant also argues that the DOC used the "some evidence" standard to find him in violation of ODR 510. In a disciplinary hearing, hearing officers are required to determine whether an inmate violated regulations by a preponderance of the evidence. *Carrillo*, 701 N.W.2d at 777. Although appellant contends otherwise, it is clear from the record that the appropriate "preponderance of the evidence" standard was used in this case.

IV. Appellant is not entitled to relief under his various collateral claims.

Appellant raises a number of other issues in his pro se brief. Each is without merit.

A. Appellant's prison disciplinary hearing did not violate the separation-of-powers doctrine.

Appellant argues that the disciplinary hearing conducted by the DOC violated the separation-of-powers doctrine because the members of the hearing board effectively tried, convicted, and sentenced him for a sexual offense. The legislature is vested with the "power to prescribe punishment for criminal acts" and the judiciary the power to "impose sentences within the statutory limits prescribed by the legislature." *State v. Pflepsen*, 590 N.W.2d 759, 764 (Minn. 1999). "[T]he [DOC's] statutory authority over

supervised and conditional release operates within and does not impede the court's sentencing authority.” *State v. Schwartz*, 628 N.W.2d 134, 140-41 (Minn. 2001); *see also Guth*, 716 N.W.2d at 28 (holding that DOC extension of an incarceration term does not violate the separation of powers). Appellant's disciplinary proceeding was not a criminal trial. The consequence of appellant's violation was not a criminal sentence. The DOC's actions do not represent an infringement of the separation of powers.

B. The actions of the members of the hearing panel did not constitute the unauthorized practice of law.

Appellant argues that the members of the DOC's hearing panel engaged in the unauthorized practice of law by referring to themselves as “prosecutor” or “judge” “and other officers of a legitimate court of law.” But the hearing held by the DOC in this case was an administrative hearing within the DOC's authority. *See* Minn. Stat. §§ 241.01, subds. 2, 3a(b), 241.67, 244.04, subd. 2 (granting the commissioner of corrections authority to establish rules for the discipline of incarcerated persons, including for the loss of “good time” and the treatment of sex offenders). The members of the hearing panel had the legal authority to conduct the hearing.

C. Appellant was not improperly denied the opportunity to present DNA evidence at his disciplinary hearing.

Appellant argues that the DOC kept him from submitting a DNA test from the BCA that, he claims, proved his innocence. He claims this violated his Sixth Amendment rights and DOC policy.

“Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.” *Wolff*, 418 U.S.

at 556, 94 S. Ct. at 2975. The protections of the Sixth Amendment do not apply to prison disciplinary proceedings. *Sash v. Zenk*, 439 F.3d 61, 63-64 (2d Cir. 2006); *see also Baxter v. Palmigiano*, 425 U.S. 308, 314-315, 321-23 96 S. Ct. 1551, 1556-57, 1559-60 (1976) (holding that the rights to counsel and to call and confront witnesses are not mandatory in prison disciplinary proceedings).

Because the Sixth Amendment does not apply, whether to allow physical evidence is within the discretion of the DOC hearing officer. *Baxter*, 425 U.S. at 322-23, 96 S. Ct. 1560; *see also* DOC Directive 303.10(G)(2)(e). We do not have the transcript of the DOC disciplinary hearing in this case. That transcript was the subject of a previous order of this court stating that because the district court also did not have the transcript, we would not consider it on appeal even if it had been provided. As such, the record lacks clear support for appellant's contention that he was not permitted to submit this evidence. Likewise, the record does not show why the hearing officer determined that it should be excluded. It is simply not possible based on the record before us to say whether appellant properly moved to admit the DNA evidence or that the hearing officer abused its discretion in excluding it.

D. Appellant's prison disciplinary proceeding did not subject him to double jeopardy.

Appellant argues that his extended incarceration period constitutes multiple punishments for the same crime, violating the double-jeopardy clause of the Fifth Amendment. “[P]rison discipline is not considered ‘prosecution’ and does not constitute double jeopardy.” *State v. McKinney*, 575 N.W.2d 841, 844 (Minn. App. 1998).

E. The district court's finding of fact that a therapist had reviewed results of tests appellant submitted to was erroneous, but that error was harmless.

Appellant challenges the district court's finding of fact that a "Corrections Program Therapist reviewed [his] case history and test results and concluded that he met the minimum criteria for referral [to a sex-offender-treatment program]." This court gives great weight to the district court's findings in considering a petition for a writ of habeas corpus and will uphold those findings on appeal if they are reasonably supported by the evidence. *Northwest*, 583 N.W.2d at 591.

The record contains no indication that appellant submitted to any tests. Rather, the evidence in the record shows that a DOC staff member reviewed file information regarding appellant's case and recommended treatment at the sex-offender treatment program located at MCF-Lino Lakes. But this error is harmless. There is no evidence that the therapist was required to test appellant or obtain previous test results before ordering appellant to attend sex-offender treatment. The erroneous finding is harmless.

With this one noted exception, the record supports the district court's findings of fact. The district court properly denied appellant's petition for a writ of habeas corpus.

Affirmed.