STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1231

Robert Eugene Holden, Jr.,
Appellant,

vs.

Lucinda Jesson,
Commissioner of Human Services,
Respondent.

Filed December 3, 2012
Affirmed
Hudson, Judge

Judicial Appeal Panel
File No. AP119051

David A. Jaehne, West St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Ricardo Figueroa, Assistant Attorney General, St. Paul, Minnesota (for respondent state)

Janelle P. Kendall, Stearns County Attorney, Lotte Rose Hansen, Daniel J. Conlin, Assistant County Attorneys, St. Cloud, Minnesota (for respondent county)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the judicial appeal panel's order denying his petition for provisional or full discharge from civil commitment as a sexually dangerous person

(SDP) and sexual psychopathic personality (SPP) or transfer to a nonsecure facility. Appellant argues that he has produced sufficient evidence to meet the statutory requirements for provisional or full discharge pursuant to Minn. Stat. § 253B.185, subds. 12, 18 (2010). Because the judicial appeal panel properly determined that appellant failed to establish a prima facie case for provisional or full discharge, we affirm.

FACTS

Robert Eugene Holden, Jr. was committed to the Minnesota Sex Offender Program as an SDP and SPP in August 2000 following his conviction in January 1998 of attempted first- and third-degree criminal sexual conduct. Holden's sexual offense history began with a series of indecent-exposure convictions when he was between the ages of 24 and 43. He was convicted seven times for exposing his genitals to ten different individuals, including adult women and children. In 1984, when Holden was 39 years old, he was convicted of sexually abusing his four minor children. The abuse lasted for a period of about eight years and consisted of rape, attempted rape, and forcing his children to watch the abuse inflicted on their siblings.

In 1998, when Holden was 53 years old, he pleaded guilty to attempted first- and third-degree criminal sexual conduct for the sexual assault of a 12- and 13-year-old boy. Holden lured the boys into his apartment by offering them alcohol and pornography. Holden offered the boys money for sex, and when they refused, he forcibly attempted to perform sex acts on them.

In addition to his sexual offense history, Holden has an extensive history of alcohol abuse and dependence. He was twice convicted for DWI. He has participated in chemical dependency treatment numerous times since 1978. Holden had difficulty completing these programs, and treatment providers noted that he was motivated by a desire to accomplish release from incarceration and not a desire to improve his condition. Alcohol abuse contributed to Holden's sexual offenses.

Following Holden's civil commitment in 2000, Holden was diagnosed as suffering from pedophilia, attracted to both genders, nonexclusive type; exhibitionism; alcohol dependence in a controlled environment; and personality disorder (not otherwise specified) with antisocial and narcissistic features. Following the extension of Holden's civil commitment for an indeterminate time, Holden appealed his commitment to this court, and we affirmed his commitment in an unpublished decision. *In re Holden*, No. C1-00-2229 (Minn. App. June 19, 2001), *review denied* (Minn. Aug. 15, 2001).

This case arises out of Holden's petition for transfer to a nonsecure facility or for provisional or full discharge. After a hearing, the special review board recommended that Holden's petition be denied. Holden requested rehearing and reconsideration before the judicial appeal panel, which held a hearing on May 18, 2012. At the hearing, Holden testified that he wanted to go to a halfway house in order to get a "sense of direction." Holden could not identify where he would go, but said he could go "any place possible," including Minneapolis, St. Cloud, or Brainerd. He testified that his brother had offered him a place to stay in Avon, but he added that he wanted to go to a halfway house first. Holden stated that he would participate in treatment at the halfway house and that he

would continue to follow his "lifetime plan" and attend AA meetings, support groups, and church. Holden testified that the relapse prevention plan he created addressed all of his risk factors. But Holden admitted that he frequently relapsed back into drinking while living in the community and attending AA meetings in the past.

On cross-examination, Holden admitted that he knew his treatment team does not believe he is ready for transfer or discharge. He remarked that, "maybe I'm not ready to go to a halfway house but I think a halfway house has the same treatment . . . ." Holden also agreed that he needs more treatment and more work on sexually deviant thinking. Holden further admitted to receiving nine behavioral expectation reports for rule violations between 2010 and 2011. He also admitted that he had not been accepted at any halfway house, nor had he investigated employment options in the community.

Dr. Thomas L. Alberg, a licensed psychologist appointed by the court to examine Holden, also testified at the hearing before the judicial appeal panel. Dr. Alberg testified that Holden has been making some progress in treatment, recently advancing from Phase I to Phase II of his treatment program. Dr. Alberg admitted that Holden had been through about four different versions of the program, causing Holden to have to repeat some of the program's curriculum. But Dr. Alberg added that it was unclear to him whether Holden has actually incorporated the concepts he was taught. Dr. Alberg testified that, although Holden prepared a relapse prevention plan, the plan was largely "boilerplate" and failed to address Holden's specific needs. Dr. Alberg stated that, in his opinion, Holden is not ready for transfer or discharge because he still needs to demonstrate that he

has incorporated all of the concepts from his treatment program, and because Holden's risk assessment scores indicate that Holden is still at a high risk to sexually reoffend.

At the close of appellant's case, the commissioner moved to dismiss the petition pursuant to Minn. R. Civ. P. 41.02(b). The judicial appeal panel denied Holden's petition and granted the commissioner's motion to dismiss. The panel concluded that Holden failed to meet his burden of production to establish a prima facie case for discharge and that he failed to show by a preponderance of the evidence that he was entitled to transfer to a nonsecure facility. This appeal follows.

D E C I S I O N

On a petition for provisional or full discharge, the petitioner bears the burden of going forward with the evidence. Minn. Stat. § 253B.19, subd. 2(d) (2010). The petitioner must "present[] a prima facie case with competent evidence to show that the person is entitled to the requested relief." *Id.* Merely filing the petition is not sufficient to establish a prima facie case for discharge. *Caprice v. Gomez*, 552 N.W.2d 753, 758 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Rather, the petitioner must present evidence such as "sworn competent testimony that would enable a fact-finder to determine the patient is ready to be discharged." *Coker v. Ludeman*, 775 N.W.2d 660, 664 (Minn. App. 2009) (quoting *Caprice*, 552 N.W.2d at 758), *review dismissed* (Minn. Feb. 24, 2010). The burden of persuasion remains with the party opposing the petition to prove, by clear and convincing evidence, that provisional or full discharge should be denied. *Braylock v. Jesson*, 819 N.W.2d 585, 591 (Minn. 2012).

A patient who is committed as an SPP or SDP shall not be provisionally discharged unless "the patient is capable of making an acceptable adjustment to open society." Minn. Stat. § 253B.185, subd. 12. The decision-maker must consider:

> (1) whether the patient's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the patient's current treatment setting; and
> (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the patient to adjust successfully to the community.

Id.

A patient who is committed as an SPP or SDP shall not be fully discharged unless "the patient is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. § 253B.185, subd. 18. The decision-maker must consider "whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community." *Id.* If these conditions do not exist, a discharge cannot be granted. *Id.*

The judicial appeal panel concluded that Holden failed to meet his initial burden of production to avoid dismissal of his petition. The judicial appeal panel denied Holden's petition for provisional discharge because (a) his present course of treatment and mental status indicate that he continues to need treatment in his current setting, and (b) his provisional discharge plan is not realistic. The judicial appeal panel denied Holden's petition for full discharge because (a) he is not capable of making an adjustment

to open society, (b) he continues to be a danger to the public, and (c) he continues to need inpatient treatment and supervision.

We will reverse the judicial appeal panel only if its decision is clearly erroneous. *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985). "This court will not weigh the evidence as if trying the matter de novo, but must examine the record to determine whether the evidence as a whole sustains the appeal panels' findings." *Id.* (quotations omitted). Findings of fact will not be reversed if the record as a whole sustains them. *Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004).

At the evidentiary hearing, the judicial appeal panel considered Holden's testimony as well as the testimony of Dr. Alberg and numerous exhibits. Based on the evidence, the judicial appeal panel's decision is not clearly erroneous. Dr. Alberg's testimony and Holden's risk assessment scores indicate that Holden is not ready to re-enter the community and is at a high risk to reoffend. Dr. Alberg also observed that Holden's relapse prevention plan was overly generic and lacked sufficient details to adequately support Holden's transition to open society. Furthermore, Holden himself testified that he might not be ready for life in a halfway house and that he needs to continue to work on his deviant thinking.

Holden argues that the twelve years he has spent at Moose Lake undergoing four different versions of the sex-offender treatment program shows that he is ready to transition out of confinement. However, this fact reflects Holden's impatience with his treatment program and does not reflect Holden's actual preparedness for life in open society. Holden's own testimony shows that he is afraid of encountering the factors that

caused him to offend while in the community, such as alcohol and pornography. Dr. Alberg testified that he doubts that Holden has effectively assimilated the treatment program's curriculum, agreeing with Holden that he needs additional time to work on deviant thinking in Phase II of the treatment program. And, despite Holden's many years in confinement, his risk assessment scores indicate he is still at a high risk to reoffend.

Given the evidence in the record, the judicial appeal panel's conclusion that Holden failed to meet his burden of production to establish a prima facie case for full or provisional discharge was not clearly erroneous. There is sufficient evidence to find that Holden continues to need inpatient treatment, would have problems adjusting to open society if discharged, and would be a danger to the public.[1]

Affirmed.

[1] We do not consider Holden's request for transfer to a nonsecure facility. That argument was waived because it was not briefed on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).