STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0874

Charles R. Stone, petitioner,
Appellant,

vs.

Lucinda Jesson, Commissioner of Human Services,
Respondent,

Hennepin County,
Respondent.

Filed November 5, 2012
Affirmed
Johnson, Chief Judge

Hennepin County District Court
File No. PP/01738

Ron Thorsett, Eden Prairie, Minnesota (for appellant)

Lori Swanson, Attorney General, Ricardo Figueroa, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

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Considered and decided by Johnson, Chief Judge; Stauber, Judge; and Cleary, Judge.

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

JOHNSON, Chief Judge

Charles R. Stone presently is committed to the Minnesota Sex Offender Program (MSOP) at Moose Lake. He seeks a transfer to a non-secure facility in the Community Preparation Services program at St. Peter. The Special Review Board recommended that his petition for transfer be denied, and the Judicial Appeal Panel denied his petition for reconsideration. We affirm.

FACTS

Stone was born in 1962 and currently is 50 years old. He has committed several sexual assaults and has spent approximately 29 years in prison or in commitment and treatment as a sex offender.

According to Stone, his parents abused him emotionally and physically during his childhood. Records indicate that he was sexually abused by a group of adolescent boys when he was nine years old and again when he was fourteen years old. He joined the Marines at age nineteen. In 1981, he sexually assaulted two girls, ages six and nine, who were daughters of military officers. He was incarcerated for ten months in a federal prison.

In 1983, Stone pleaded guilty in state court to two counts of second-degree criminal sexual conduct for sexually assaulting two girls, ages eight and ten. He was sentenced to 36 months of imprisonment. While incarcerated at MCF-Lino Lakes, Stone was diagnosed as a pedophiliac. *See In re Stone*, 376 N.W.2d 511, 512 (Minn. App.

1985). He participated in a treatment program called the "Transitional Sex Offender Program" or TSOP. *Id*.

In 1985, before his release from prison, a petition to civilly commit him as a psychopathic personality (PP) was filed. The district court granted the petition, and this court affirmed. *Id*. at 514. Stone has been a patient of the Department of Human Services ever since. It appears that he has petitioned for discharge or transfer at least twice, in 2002 and 2006, but he withdrew both petitions after they were denied by special review boards, before any consideration by the judicial appeal panel.

Stone commenced the present action by filing a petition for provisional discharge or full discharge. The petition was referred to the special review board, which scheduled a hearing for February 2011. At the hearing, Stone amended his petition to seek a transfer to a less restrictive setting, namely, MSOP's Community Preparation Services (CPS), instead of discharge or provisional discharge. CPS is part of MSOP's re-integration programming in which patients reside in facilities on the St. Peter campus that are outside the secure perimeter and are subject to ankle-bracelet monitoring devices at all times.[1]

In March 2011, the special review board recommended that Stone's petition for transfer be denied. The board found that Stone "continues to engage in his sexual reoffending pattern of contacting young girls," as evidenced by a letter he received in September 2010 from a girl who questioned why he was requesting information about her

[1]*See MSOP Reintegration Programming*, Minn. Dep't of Human Servs. (Feb. 2012), https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6316-ENG.

older sister. The board further found that Stone "demonstrates little understanding of the impact his abusive behaviors have had on his victims and shows little remorse" for his conduct and that he "continues to assert his victimization, resist the treatment program rules, and externalize blame, all of which interfere with his ability to make progress in the sex offender program." The board found that Stone "remains an untreated sex offender, having failed to participate effectively in treatment at the MSOP and elsewhere and continues to present a high risk of reoffending" and that he "needs to develop basic treatment skills and learn to manage his treatment interfering behavior," without which his "progress in treatment will be impaired and he will lack the basic skills to function successfully in a non-secure setting."

In April 2011, Stone filed a petition for rehearing and reconsideration by the judicial appeal panel. The panel appointed Dr. James Alsdurf to be an examiner. In his written report to the panel, Dr. Alsdurf concluded that Stone "is not appropriate for placement outside his current placement," "continues to represent an ongoing danger to himself or others," and "has not developed the necessary skills with which to function in a less secure setting."

The judicial appeal panel held an evidentiary hearing on the afternoon of February 10, 2012. The panel began the hearing by receiving exhibits, which the parties had stipulated were admissible. The commissioner introduced nine exhibits, consisting of a risk assessment, treatment and discharge plans, progress reports, incident reports, behavioral expectations reports, and an evaluation report. Stone introduced five exhibits, consisting of three documents he appears to have prepared to fulfill treatment-related

assignments, a document he entitles "pre-discharge plan," and a document in which he sets out his offense history in detail.

The judicial appeal panel received testimony from two witnesses, Stone and Dr. Alsdurf. Stone testified about his treatment history, stating that he had completed all the necessary assignments in the TSOP program without being terminated or suspended from that program. Stone testified that he has been in some form of treatment for 26 years since leaving TSOP, including a program called "Intensive Therapy Program for Sexual Aggressiveness" or ITPSA and another program called ADAPT, for which he had completed the inpatient programming. Stone testified that he made progress in those programs, that he advanced to a 4A security-level status at St. Peter, the highest security level, and that he did not have any disciplinary issues or setbacks until DHS terminated the ITPSA program in 1993 or 1994. Stone testified that he could have been in transition status within six months if the ITPSA program had continued.

Stone also testified about his difficulties in the MSOP program. He initially was awarded Phase IV. After approximately three months, he was demoted to Phase III based on a peer report that he claims was false. After approximately six more months, he was demoted to Phase II based on a roommate's allegation of misconduct. In 1996 or 1997, he was transferred to Moose Lake. Since then, he has not been able to advance beyond Phase I. When asked why, Stone testified that DHS frequently develops new programs, which requires him to start over, and that some staff members have interfered with his ability to make progress.

Stone's attorney asked him about reports that he continues to contact minor females. Stone denied the allegations and claimed that he has been "cleared" of them. He also denied that he ever sought pen-pal relationships with underage females, abused telephone or mail privileges, or possessed contraband or counter-therapeutic media, although he acknowledged that he has possessed cheerleading magazines with photos of college-age women.

Dr. Alsdurf, the court-appointed expert, testified that he agreed with the current diagnosis of "[p]edophilia, females, younger females and personality disorder with antisocial and narcissistic features." Dr. Alsdurf testified that, in 2006, Stone received a score of 15 on the PCL-R test, which suggests that Stone's sexual offenses "do[] not flow from psychopathy" and that he likely is "statistically less psychopathic than the average person at Moose Lake." Dr. Alsdurf agreed that the recidivism rate in Minnesota has been dramatically reduced over the past 20 years due to much better and closer supervision of sex offenders upon their release. Dr. Alsdurf also agreed that the recidivism rate for sexual offenses diminishes with age, though not until approximately age 50, and that age 60 appears to be a "fairly significant point of shifting."

When asked whether Stone could be securely transferred to a program such as CPS, Dr. Alsdurf testified that "it certainly is a possibility that he could be managed down there," that the CPS staff is "attentive to safety issues," but that Stone has not "gained nearly what he needs to gain to be able to fit into the purpose and intent of that program." Dr. Alsdurf testified that Stone's progress in the ITPSA program has diminished relevance because the MSOP program is "more detailed" and "more

rigorous" and "has a broader theoretical perspective." Dr. Alsdurf testified that Stone's behavior in the MSOP program is more significant than his behavior during the ITPSA program.

After Stone rested his case, the commissioner moved to dismiss Stone's petition pursuant to rule 41.02(b) of the Minnesota Rules of Civil Procedure. The commissioner's counsel argued that Stone "has not progressed through all three phases of the current program," that "[t]reatment records . . . indicate that he has recently shown countertherapeutic behavior involving minor females," and that "[a]ccording to Dr. Alsdurf's report his current placement is appropriate and he continues to represent a danger to himself and others." Respondent Hennepin County joined in the commissioner's motion, noting that Stone's testimony demonstrates that he "is not ready for any move at this time." The judicial appeal panel took the motion under advisement. On April 18, 2012, the panel issued its Findings of Fact, Conclusions of Law, and Order, which granted respondents' motion to dismiss Stone's petition for transfer. Stone appeals.

DECISION

A. Preliminary Matters

Before discussing the panel's findings and the evidence, it is necessary to clarify the procedural framework of our analysis.

First, Stone bears the burden of persuasion in proceedings before the judicial appeal panel. The statute governing a petition for a transfer provides, "A party seeking transfer under section 253B.18, subdivision 6, or 253B.185, subdivision 11, must

establish by a preponderance of the evidence that the transfer is appropriate." Minn. Stat. § 253B.19, subd. 2(d) (2010). Stone contends that he bears only a burden of production and that the respondents bear the ultimate burden of persuading the judicial appeal panel that his petition should be denied. In support of this argument, he cites *Coker v. Ludeman*, 775 N.W.2d 660 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010), in which this court held that the petitioner in that case bore only a burden of production. *Id*. at 664-65. But the legislature amended the relevant statute shortly after *Coker* to change the burden of a petitioner seeking a transfer. 2010 Minn. Laws ch. 300, § 27, at 764. As amended, the statute plainly states that Stone bears a burden of persuasion. *See* Minn. Stat. § 253B.19, subd. 2(d).[2] It may be noted that the same statute also provides that a person seeking discharge bears only a burden of production. *Id.*; *see also Braylock v. Jesson*, 819 N.W.2d 585, 589 (Minn. 2012). But Stone seeks transfer, not discharge. Thus, Stone bears a burden of persuasion.

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[2]The amendment to the statute did not provide for a specific effective date and, thus, became effective on August 1, 2010. *See* Minn. Stat. § 645.02 (2008). The supreme court recently stated that the 2010 amendment to subdivision 2(d) may be applied retroactively to a previously filed petition for discharge or provisional discharge because the amendment merely clarifies the burden for such a petitioner. *Braylock v. Jesson*, 819 N.W.2d 585, 586 (Minn. 2012). But the amendment works a substantive change for a petition for transfer, which means that the amendment to the statute may not be applied retroactively to a petitioner seeking a transfer before the effective date of the amendment. *See id*. In this case, however, Stone sought transfer after the effective date of the statutory amendment. He initially filed a petition on May 21, 2010, which sought only provisional discharge or full discharge. But he later amended his petition at the February 22, 2011, hearing before the special review board, withdrawing his request for discharge and substituting a request for transfer to CPS. Because Stone requested transfer after the statutory amendment became effective, we are not applying the amendment retroactively.

Second, we reject Stone's contention that, even if he bears the burden of persuasion, the commissioner should not be permitted to avoid her burden of proving by clear and convincing evidence that transfer is not appropriate. Stone contends that, after 26 years of confinement, due process requires meaningful periodic review, and meaningful review requires the commissioner to show that he should continue to be confined in the state's most-secure sex offender treatment facility at Moose Lake. In support of this argument, Stone cites *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994). In *Blodgett*, the supreme court held that civil commitment does not violate substantive due process as long as commitment is "programmed to provide treatment and periodic review." *Id*. at 916. Stone has been given opportunities for periodic review that are consistent with *Blodgett*. The *Blodgett* opinion does not provide that a civilly committed person has a constitutional right to any particular burden of proof in a periodic review. Thus, the burdens prescribed by chapter 253B apply.

Third, the procedural rule on which the panel's judgment is based allows the panel to weigh conflicting evidence and make findings of fact. "After the plaintiff has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief." Minn. R. Civ. P. 41.02(b). If a rule 41.02(b) motion is granted, the court must make findings of fact as provided in rule 52.01. *Id.* A court considering a rule 41.02(b) motion need not consider the evidence in the light most favorable to the plaintiff or petitioner; rather, the court may weigh the evidence as if the defendant or respondent had rested without introducing

further evidence. *See State ex rel. Burnquist v. Bollenbach*, 241 Minn. 103, 109-10, 63 N.W.2d 278, 282-83 (1954). In deciding the motion, the court may evaluate the credibility of witnesses. *Id.* at 109, 63 N.W.2d at 283.

Fourth, on appeal, this court applies a deferential standard of review. Findings of fact made pursuant to rule 52 "shall not be set aside unless clearly erroneous," and "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. Consequently, when reviewing the grant of a rule 41.02(b) motion to dismiss, this court will not reverse the panel's findings unless they are 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 will "determine from an examination of the record if the evidence as a whole sustains the appeal panel's findings." *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. Nov. 17, 1992); *see also Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004).

B. Merits of the Petition

A person committed as a SPP[3] or SDP cannot be "transferred out of a secure

[3]Stone was civilly committed as a psychopathic personality (PP) in 1985. In 1994, the legislature enacted the sexually dangerous person (SDP) statute and the sexual psychopathic personality (SPP) statute, which replaced the PP statute. *See In re Commitment of Lonergan*, 811 N.W.2d 635, 638 n.1 (Minn. 2012). The legislature also expressly stated that the SPP provisions did not make any substantive changes to the PP provisions. *Id*. Accordingly, even though appellant was committed as a PP, his request for transfer is governed by the SPP provisions. *Id*.; *see also* Minn. Stat. § 253B.185, subd. 1 ("For purposes of this section, "sexual psychopathic personality" includes any individual committed as a "psychopathic personality" under Minnesota Statutes 1992, section 526.10.").

treatment facility" unless the judicial appeal panel determines "that the transfer is appropriate." Minn. Stat. § 253B.185, subd. 11(a) (2010). The panel must consider the following five factors "in determining whether a transfer is appropriate":

> (1) the person's clinical progress and present treatment needs;
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> (2) the need for security to accomplish continuing treatment;
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> (3) the need for continued institutionalization;
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> (4) which facility can best meet the person's needs; and
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> (5) whether transfer can be accomplished with a reasonable degree of safety for the public.

Id., subd. 11(b) (2010). In this case, the judicial appeal panel made findings on Stone's diagnoses, his history of sexual offenses, his treatment failures, and his "countertherapeutic" behaviors over the years. The panel made a conclusion of law that Stone failed to prove by a preponderance of the evidence that transfer is appropriate. The panel also made findings of fact (which are denominated as "conclusions on law") in favor of respondents on each of the five statutory factors. Stone challenges the panel's findings with respect to each factor.

First, with respect to his clinical progress and treatment needs, Stone contends that he has made progress during his 26 years in treatment at TSOP, ITSPA, and MSOP. He argues that his exhibits and testimony demonstrate that he is accountable for his offense history, has insight into the harm he has caused his victims, has an understanding of his offense cycle, has identified coping strategies to interrupt his offense cycle before acting

on impulse, has a relapse prevention plan, and has a detailed pre-discharge plan. Stone testified that changes in treatment programs have interrupted his progress and prevented him from advancing beyond Phase I.

The panel found, however, that Stone still is appropriately in Phase I of a three-phase treatment program at MSOP. Stone's treatment team does not support his petition for a transfer to a non-secure facility. Dr. Alsdurf stated that Stone is not open to feedback and has failed to demonstrate that he is able to interrupt unproductive behaviors. Dr. Alsdurf contradicted Stone's claim that he has shown remorse and understands the impact of his behavior on his victims. Dr. Alsdurf also explained that the ITPSA program is not comparable to the MSOP program. And Dr. Alsdurf does not believe that Stone is likely to be successful at CPS. Thus, the judicial appeal panel did not clearly err in its finding concerning the first statutory factor.

Second, with respect to the need for security to accomplish continuing treatment, Stone contends that he no longer is so dangerous as to require the secure facility at Moose Lake. Stone asserts that his behavior can be readily managed and monitored at a supervised residential facility such as CPS. He points to actuarial and risk assessment data that place him at a low to moderate risk of reoffending. And he points to the commissioner's risk assessment, which states that his history is not that of a violent or impulsive predator. But the same risk assessment also concludes that Stone should remain in the same risk level and that he requires a moderate to high level of supervision. For this reason, the judicial appeal panel did not clearly err in its finding concerning the second statutory factor.

Third, with respect to the need for continued institutionalization, Stone contends that this factor is not at issue because he would continue to be in the custody of the commissioner of DHS and would be institutionalized at CPS on the campus of the St. Peter Regional Treatment Center. He agrees that he can benefit from ongoing sex offender treatment that is structured and supervised by DHS. Respondents did not respond to this argument. Nonetheless, for the same reasons stated above with respect to the second factor, there is a need for continued institutionalization. Thus, the judicial appeal panel did not clearly err in finding that there is a need for continued institutionalization.

Fourth, with respect to the question of which facility can best meet his needs, Stone contends that CPS might best meet his needs in light of his inability after 18 years to advance beyond Phase I at MSOP-Moose Lake. He states that his current treatment program is obviously not meeting his needs. The commissioner counters that, other than his own testimony, appellant did not introduce any evidence demonstrating that a non-secure DHS facility would meet his needs better than his current placement at MSOP. Dr. Alsdurf stated in his report that Stone is "not appropriate for placement outside his current placement" and testified that appellant is not ready for placement at CPS. The record as a whole supports a finding that transfer is not appropriate and that Stone's current placement best meets his needs at this time. Thus, the judicial appeal panel did not clearly err in its finding concerning the fourth statutory factor.

Fifth, with respect to whether transfer can be accomplished with a reasonable degree of public safety, Stone contends that CPS provides an adequate level of security

and supervision. Although Dr. Alsdurf acknowledged that CPS could manage Stone, he also warned in his report that Stone remains and continues to represent an ongoing danger not only to himself but to others. Thus, the judicial appeal panel did not clearly err in its finding concerning the fifth statutory factor.

In sum, the record as a whole supports the judicial appeal panel's findings and conclusion and its ultimate decision. Therefore, the judicial appeal panel did not clearly err by granting respondents' motion to dismiss Stone's petition pursuant to rule 41.02(b).

Affirmed.