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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0481**

In the Matter of the Civil Commitment of:
Curtis Marcell Smallwood.

**Filed September 17, 2018
Affirmed
Johnson, Judge**

Judicial Appeal Panel
File No. AP17-9061

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Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Curtis Marcell Smallwood is civilly committed as a sexually dangerous person. He petitioned for a transfer or a provisional discharge. The special review board denied his petition. On rehearing and reconsideration, the judicial appeal panel granted the commissioner of human services' motion to dismiss his petition. We conclude that

Smallwood did not produce evidence sufficient to establish a *prima facie* case of provisional discharge. We also conclude that the judicial appeal panel did not clearly err by concluding that Smallwood did not prove by a preponderance of the evidence that he is entitled to a transfer. Therefore, we affirm.

FACTS

Smallwood is a 57-year-old man who is civilly committed as a sexually dangerous person (SDP). When he was in his 20s and 30s, he repeatedly entered women's homes without consent and engaged in sexual assaults or attempted sexual assaults, sometimes while using a knife to threaten his victim. On three occasions, he was convicted of burglary and sentenced to terms of imprisonment. In 2010, Dakota County petitioned the district court to civilly commit him as an SDP. The district court granted the petition, and this court affirmed. *In re Civil Commitment of Smallwood*, No. A11-1971, 2012 WL 896439 (Minn. App. Mar. 19, 2012), *review denied* (Minn. June 27, 2012). Since being committed, Smallwood has received treatment in the Minnesota Sex Offender Program (MSOP) at Moose Lake.

In August 2016, Smallwood petitioned the special review board for a transfer to MSOP's Community Preparation Services program (CPS), a provisional discharge, or a full discharge. The special review board reviewed, among other things, a treatment report prepared by Smallwood's treatment team and a sexual-violence risk assessment prepared by a forensic psychologist, Jessica Scharf. The treatment report indicated that, although Smallwood "consistently attended his core groups, community meetings, psycho-educational modules, and vocational programming," he "continued to have difficulty

applying the feedback from his peers, perspective taking, and internalizing treatment” and was not “transparent in all areas including his sexuality.” The treatment report also described his intimate and sexual relationships with women, including an ongoing telephone relationship with a former MSOP clinician, who was his primary therapist before her employment was terminated. The treatment report recommended that Smallwood remain in his current treatment setting at MSOP.

Scharf’s sexual-violence risk assessment of Smallwood indicated many risk factors, including deviant sexual preference, a lack of capacity for relationship stability, negative emotionality, significant social influences, sex as coping, general social rejection, lack of concern for others, excessive sex drive and sex preoccupation, and a lack of cooperation with supervision. Scharf stated that Smallwood’s “needs are best met within the secure perimeter, as the environment will afford him the therapeutic support, safety, and structure required for his daily life.” Scharf concluded that Smallwood does not meet the criteria for a provisional discharge because he did not provide her with “a well-developed provisional discharge plan, with the support of reintegration specialists, tailored to his unique risk and need areas.” Scharf also concluded that Smallwood “does not meet criteria for a transfer at this time.” Based on these records, the special review board recommended that Smallwood’s petition be denied on the ground that both transfer and discharge are premature.

Smallwood petitioned for rehearing and reconsideration by the judicial appeal panel, which conducted an evidentiary hearing in December 2017. At the beginning of the hearing, Smallwood withdrew his request for a full discharge. Smallwood called three

witnesses: Robert Riedel, who is a court-appointed psychologist, and two employees of the vocational department of MSOP. Riedel testified that Smallwood has demonstrated significant improvement in his behavior in the last two or three years by “exhibiting a great deal of pro-social rather than anti-social behavior,” by participating in two groups that assist other clients, and by “vigorously” engaging in his treatment. Riedel testified that it would be appropriate to transfer Smallwood to CPS. Riedel testified that he was “not opposed to” Smallwood’s request for provisional discharge but did not support it.

Bryan Moe, a skills development specialist at MSOP, testified that Smallwood is easy to get along with and is “a model employee.” Steven Youngs, a security counselor at MSOP, testified that Smallwood works cooperatively with security staff and does not cause problems or behave inappropriately. Neither Moe nor Youngs testified about Smallwood’s clinical progress.

After Smallwood rested his case, the commissioner moved to dismiss his petition. The judicial appeal panel took the matter under advisement. In January 2018, the judicial appeal panel issued a written order in which it granted the commissioner’s motion to dismiss. Smallwood appeals.

D E C I S I O N

Smallwood argues that the judicial appeal panel erred by granting the commissioner’s motion to dismiss.

A person who is committed as an SDP may petition the special review board for a reduction in custody. Minn. Stat. § 253D.27, subd. 2 (2016). The term “reduction in custody” encompasses both provisional discharge and a transfer to CPS. *Id.*, subd. 1(b).

If a committed person files a petition for reduction in custody, “[t]he special review board shall hold a hearing” and, thereafter, “shall issue a report with written findings of fact and shall recommend denial or approval of the petition to the judicial appeal panel.” *Id.*, subds. 3(a), 4. If the special review board recommends denial of the petition, the committed person “may petition the judicial appeal panel . . . for a rehearing and reconsideration of” the special review board’s recommendation. Minn. Stat. § 253D.28, subd. 1(a) (2016). The judicial appeal panel generally must hold a hearing within 180 days. *Id.*, subd. 1(b).

If the commissioner wishes to challenge a petitioner’s entitlement to relief after the petitioner rests his case, the commissioner may move to dismiss the petition pursuant to rule 41.02(b) of the rules of civil procedure. *Coker v. Jesson*, 831 N.W.2d 483, 489-91 (Minn. 2013). That rule provides, in relevant part:

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).

I. Provisional Discharge

Smallwood first argues that the judicial appeal panel erred by granting the commissioner’s motion to dismiss with respect to his request for a provisional discharge.

A person who is committed as an SDP “shall not be provisionally discharged unless [he] is capable of making an acceptable adjustment to open society.” Minn. Stat. § 253D.30, subd. 1(a) (2016). The judicial appeal panel must consider two statutory criteria:

(1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person'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 committed person to adjust successfully to the community.

Id., subd. 1(b). A person who seeks a provisional discharge “bears the burden of going forward with the evidence, which means presenting a *prima facie* case with competent evidence to show that the person is entitled to the requested relief.” Minn. Stat. § 253D.28, subd. 2(d) (2016); *see also Coker*, 831 N.W.2d at 485-86; *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650-51 (Minn. App. 2017), *review denied* (Minn. June 20, 2017). If the committed person satisfies his burden of production, “the party opposing . . . provisional discharge bears the burden of proof by clear and convincing evidence that the . . . provisional discharge should be denied.” Minn. Stat. § 253D.28, subd. 2(d); *see also Coker*, 831 N.W.2d at 486; *Kropp*, 895 N.W.2d at 651.

If the commissioner moves to dismiss a petition for provisional discharge pursuant to rule 41, the judicial appeal panel “may not weigh the evidence or make credibility determinations.” *Coker*, 831 N.W.2d at 490. “Instead, the Appeal Panel is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person.” *Id.* at 491. This court applies a *de novo* standard of review to a judicial appeal panel's grant of a rule 41.02(b) motion to dismiss a request for provisional discharge. *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014).

In this case, the judicial appeal panel determined that Smallwood “failed to present a *prima facie* case with competent evidence to show that he is entitled to provisional discharge” because he “continues to need treatment and supervision in a secured environment.” The judicial appeal panel also determined that Smallwood’s proposed provisional-discharge plan was “insufficient to show that a provisional release would provide a reasonable degree of protection to the public or enable Petitioner to adjust successfully to the community.”

Smallwood contends that he presented a *prima facie* case that he is entitled to provisional discharge. He contends that Riedel’s testimony is sufficient to prove that he no longer needs treatment and supervision in his current setting. Riedel testified that Smallwood had made significant improvement in his behavior in the last two or three years by “exhibiting a great deal of pro-social rather than anti-social behavior,” by participating in two groups that assist other clients, and by “vigorously” engaging in his treatment. But Riedel did not testify that Smallwood no longer needs treatment and supervision in his current treatment setting. Rather, Riedel testified that Smallwood would receive better treatment in his current treatment setting or in CPS, which suggests that he is still in need of such treatment. Riedel’s testimony does not satisfy Smallwood’s burden to produce evidence that “there is no longer a need for treatment and supervision in [his] current treatment setting.” *See* Minn. Stat. § 253D.30, subd. 1(b)(1). Furthermore, the other evidence in the record indicates that Smallwood continues to need treatment and supervision in his current treatment setting. The treatment report states that Smallwood struggles with some aspects of his treatment and that he should stay with “his current Core

group with his current clinical team.” Moreover, the risk assessment indicates that Smallwood suffers from many risk factors and that his “needs are best met within the secure perimeter.”

Thus, the judicial appeal panel correctly determined that Smallwood did not present a *prima facie* case that he is entitled to a provisional discharge.

II. Transfer

Smallwood also argues that the judicial appeal panel erred by granting the commissioner’s motion to dismiss with respect to his request for a transfer to CPS.

A person who is committed as an SDP may be transferred to CPS only if “the transfer is appropriate.” Minn. Stat. § 253D.29, subd. 1(a) (2016). In determining whether a transfer is appropriate, a judicial appeal panel must consider five factors:

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

Id., subd. 1(b). If a committed person requests a transfer to CPS, he bears both “the burdens of production *and* persuasion . . . at the hearing before the judicial appeal panel.” *Foster v. Jesson*, 857 N.W.2d 545, 548 (Minn. App. 2014); *see also* Minn. Stat. § 253D.28, subd. 2(e). Because the committed person bears the burden of persuasion, the judicial

appeal panel is not required to view his evidence in a light most favorable to him when considering a motion to dismiss pursuant to rule 41. *Foster*, 857 N.W.2d at 548. Accordingly, this court applies a clear-error standard of review to a judicial appeal panel's grant of a rule 41.02(b) motion to dismiss a request for a transfer. *Id.* In applying that standard, we "examin[e] the record to determine whether the evidence as a whole sustains the appeal panel[']s findings." *Larson*, 847 N.W.2d at 534 (quotations omitted).

In this case, the judicial appeal panel discussed each of the five statutory factors. The judicial appeal panel reasoned that the first factor does not support transfer for the following reasons:

[Smallwood] has yet to pass a polygraph examination which is concerning to his treatment team. Recently, he has identified unhealthy dynamics of his relationship with his former primary therapist, but there is no indication this relationship has ended. He has made commendable strides in treatment but continues to need improvement surrounding this relationship, accepting peer feedback, and internalizing treatment.

The judicial appeal panel reasoned that the second factor does not support transfer because Smallwood "has a continuing need for security to accomplish his treatment" and "continues to have unmanaged dynamic risk factors." The judicial appeal panel reasoned that the third factor does not support transfer because "[t]he combination of Petitioner's sexual deviancy and anti-social personality disorder, generally create a high risk for recidivism" and because "[h]e continues to have unmanaged dynamic factors and tendencies indicating a need for institutionalization." The judicial appeal panel reasoned that the fourth factor does not support transfer because Smallwood "made no objective showing that his current facility does not meet his needs." The judicial appeal panel reasoned that the fifth factor

does not support transfer because Smallwood “presents a high risk of recidivism, and a transfer to CPS could not be made with a reasonable degree of safety to the public.”

Smallwood contends that the judicial appeal panel clearly erred on the ground that he would receive the same treatment in CPS as he currently receives at MSOP. Contrary to Smallwood’s contention, there is evidence in the record that indicates that Smallwood would receive more appropriate treatment and supervision in his current treatment setting and that he continues to need such treatment. The treatment report indicates that Smallwood has made progress but requires continued treatment for his lack of openness and transparency in acknowledging his sexual history and receiving feedback from peers as well as his “potential sexual deviancy, sexualized coping, or sexual preoccupation.” The treatment report recommended that Smallwood continue to receive treatment in his current setting because he would benefit from “continued work in his current Core group and with his current clinical team.” The sexual-violence risk assessment stated that Smallwood “has remaining work to do” and that his “needs are best met within the secure perimeter,” where he will receive “the therapeutic support, safety, and structure required for his daily life.” The sexual-violence risk assessment also suggested that Smallwood may have a “higher risk for sexual re-offense than average offenders” and concluded that Smallwood should not be transferred to CPS at this time. In light of this evidence, we conclude that “the evidence as a whole sustains the appeal panel[’s] findings.” *See Larson*, 847 N.W.2d at 534 (quotation omitted).

Thus, the judicial appeal panel did not clearly err by concluding that Smallwood did not satisfy his burden of persuasion on his request for a transfer to CPS.

In sum, the judicial appeal panel did not err by granting the commissioner's motion to dismiss Smallwood's petition.

Affirmed.