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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1212**

In the Matter of the Civil Commitment of:
Oliver Lenell Dority.

**Filed January 14, 2019
Affirmed
Johnson, Judge**

Judicial Appeal Panel
File No. AP17-9159

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and John P. Smith, Judge.*

UNPUBLISHED OPINION

JOHNSON, Judge

Oliver Lenell Dority is civilly committed as a sexually dangerous person. In 2016, he was granted a provisional discharge. But his provisional discharge was revoked in 2017 after he violated its conditions. Shortly thereafter, he petitioned the special review board

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for a “restructuring” of his provisional discharge. The special review board recommended that his petition be denied. He requested rehearing and reconsideration by the judicial appeal panel. After a first-phase evidentiary hearing, the judicial appeal panel granted a motion to dismiss his petition. We conclude that the judicial appeal panel did not err because Dority did not produce evidence during the first-phase hearing that is sufficient to establish a *prima facie* case that he is entitled to provisional discharge. Therefore, we affirm.

FACTS

Dority is a 53-year-old man who is civilly committed as a sexually dangerous person (SDP). Between the late-1980s and mid-1990s, Dority engaged in sexual assaults or attempted sexual assaults against four women. On two occasions, he was convicted of criminal sexual conduct and sentenced to terms of imprisonment. He has several other non-sexual criminal convictions, including two felony robbery convictions, which resulted in periods of incarceration. In 2009, Ramsey County petitioned the district court to civilly commit him as an SDP. The district court granted the petition.

In May 2015, Dority petitioned the special review board for a provisional discharge. The special review board recommended granting the petition. The judicial appeal panel set the matter on for a hearing on its own initiative. *See* Minn. Stat. § 253D.28, subd. 1(c) (2018). In January 2016, the judicial appeal panel filed an order granting Dority’s petition. Dority was provisionally discharged to a supervised transitional residence.

In December 2016, Dority violated a term of his provisional-discharge plan by making an unscheduled visit to a store. He also violated a term of his provisional-discharge

plan by adding data services to his cellular telephone. In June 2017, Dority violated a term of his provisional-discharge plan by meeting a female acquaintance at a hotel for the purpose of engaging in voluntary sex when his schedule indicated that he would be elsewhere.

Because of these violations, Dority was asked in July 2017 to voluntarily return to the Community Preparation Services (CPS) program at the Minnesota Sex Offender Program (MSOP). He did so. While at CPS, Dority was prompted to disclose several additional violations, including watching a pornographic movie, gambling, taking unapproved transportation, visiting unapproved locations, meeting female and male friends at approved locations without notifying his re-integration specialist, and lying to treatment providers about his behavior. On August 4, 2017, Dority's provisional discharge was formally revoked. On August 10, 2017, MSOP's executive director documented the revocation in a report in which she wrote that Dority's "lack of cooperation with rules and supervision while he was on provisional discharge and his ongoing inability to be transparent with his treatment providers continues to present as a risk for public safety." The revocation report informed Dority that he was permitted by statute to petition the special review board within seven days for a review of the revocation. *See* Minn. Stat. § 253D.30, subd. 6 (2018).

Five days later, Dority petitioned the special review board. He requested a "restructuring" of his provisional discharge. The special review board reviewed various records, including a treatment report prepared by Dority's treatment team and a sexual-violence risk assessment prepared by a forensic psychologist. The treatment report stated

that Dority's behavior while on provisional discharge "indicates he does not yet have the skills to independently manage his criminal offense related patterns" and that his "repeated violation behaviors, lack of transparency, and dependency on external controls for disclosure and challenging his cognitive distortions and maladaptive belief systems continue to be a concern and further areas of treatment need." The treatment report also indicated that the "most effective way for Dority to develop the necessary skills, and thus reduce his risk for recidivism, is through active participation in sex offender treatment." The treatment report recommended that Dority remain in his current treatment setting at MSOP. The sexual-violence risk assessment identified several risk factors, including general social rejection, negative emotionality, sex as coping, deviant sexual preference, and cooperation with supervision. The risk assessment also stated that Dority has "remaining treatment need areas." The forensic psychologist stated that Dority's provisional-discharge plan "lacked specificity," particularly with regard to management of his high-risk factors, and "could not be adequately assessed" and, thus, concluded that Dority did not meet the criteria for provisional discharge.

In October 2017, the special review board recommended that Dority's petition be denied. Dority petitioned the judicial appeal panel for rehearing and reconsideration. The judicial appeal panel conducted an evidentiary hearing in June 2018. Dority called three witnesses. He testified first, stating that he has made progress in treatment and that MSOP's new Client Provisional Discharge Management and Supervision policy, which was not available at the time of his first provisional discharge, would allow him to be more successful if he were provisionally discharged again. Dority also introduced five exhibits,

including his provisional-discharge-management-and-supervision plan and his relapse-prevention plan.

Dority's second witness was Shelby Clethen, a re-entry technician at the transitional residence where Dority resided while on provisional discharge, who testified to his observations of Dority but did not testify about Dority's clinical progress.

Dority's third witness was James H. Gilbertson, Ph.D., a court-appointed psychologist, who had prepared a detailed 22-page report, which was an exhibit at the hearing. Dr. Gilbertson's report noted that he first examined Dority several years earlier in conjunction with his initial commitment. His report questioned whether Dority "suffers from a paraphilic disorder" or, on the other hand, whether "his sexual behavior [is] a reflection of his antisocial/psychopathic personality traits." Dr. Gilbertson noted that Dority has "a high degree of psychopathy." He further noted that treatment records show some "positive changes in transparency, openness, and a willingness to discuss his difficulties" but also leave lingering questions about whether "these changes or his positive engagement is, yet, another facet of his ability to be charming; compliant, obedient to institutional rules, but without basic internal change." Dr. Gilbertson opined that Dority "is more likely, in the future, to be involved in criminal non-sexual behavior than in criminal sexual behavior." Dr. Gilbertson further opined that "simply 'retreading' [Dority] through the existing modules, with which he has had experience, is not addressing what I believe to be the critical issue." Dr. Gilbertson posed certain questions with respect to Dority's future treatment, including the question of "what specific treatment focus, tactics, or strategies can be utilized with a criminalist psychopath . . . that would allow him to be

available for provisional discharge?” Dr. Gilbertson opined that “continued life within the secure perimeter and ‘retreading’ the previous therapeutic modules may not advance Mr. Dority’s progress.” He stated, “The emphasis that I believe would serve Mr. Dority’s treatment progress, and also would be consistent with public safety, is a ‘tailored’ and specialized relapse prevention plan that would address the risk issues represented [in] Mr. Dority.” With respect to whether Dority should be provisionally discharged a second time, Dr. Gilbertson opined that Dority “does not have a sufficiently structured plan to be considered for placement in the community” and “any restructured provisional discharge plan would need to be carefully crafted and, perhaps, highly individually ‘tailored,’ i.e., specific physical site, specific escort supervision, more fine-tuned electronic surveillance, and the creation of ‘external controls’ to offset Mr. Dority’s faulty internal controls, to address Mr. Dority’s treatment risk/needs.”

At the first-phase hearing, Dr. Gilbertson testified, consistent with his report, that Dority does not have a sexual-deviance disorder or a paraphilia but that his sexual offenses “arose primarily from his antisocial personality” and “a criminalistic orientation.” Dr. Gilbertson explained that this type of sex offender “typically ha[s] far more violent criminal non-sexual offenses than they do sexual offenses, but [that] they take what they want when they want it.” Dr. Gilbertson testified that Dority needs to receive treatment and supervision in his current setting to address his antisocial personality disorder with psychopathic features but that he need not “retread” treatment specific to sexual deviance. Dr. Gilbertson expressed concern that Dority will “be unnecessarily held far longer than may be necessary” and opined that “there needed to be a look-ahead to a provisional

discharge plan” created with the help of professional staff that would allow him to be successful.

On examination by the commissioner’s attorney, Dr. Gilbertson was asked, “Do you think that at this time [Dority] continues to need additional treatment in his current setting?” He answered, “Yes.” The commissioner’s attorney established that Dr. Gilbertson stood by the statement in his written report that Dority does not have “a sufficiently structured [provisional discharge] plan.” The commissioner’s attorney also asked, “And overall, you would conclude today that Mr. Dority is not capable of making an acceptable adjustment to open society, correct?” Dr. Gilbertson answered, “That is correct.” The attorney for Ramsey County asked Dr. Gilbertson, “And there is not currently the provisional discharge plan that . . . has been identified to you that will provide a reasonable degree of protection to the public and enable Mr. Dority to adjust successfully to the community?” Dr. Gilbertson answered, “That is correct.”

After Dority rested his case, the commissioner moved to dismiss Dority’s petition on the ground that he had not stated a *prima facie* case that he is entitled to provisional discharge. The county joined in the motion. In June 2018, the judicial appeal panel filed an order in which it granted the motion to dismiss. Dority appeals.

D E C I S I O N

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 (2018). If a committed person files a petition for a reduction in custody, “The 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) (2018).

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) (2018). 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); *see also Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013); *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.

I.

Dority first argues that the judicial appeal panel erred on the ground that it “relied exclusively on the provisional discharge factors in Minn. Stat. § 253D.30” in considering his petition for “restructuring of his provisional discharge.” Dority does not flesh out this argument in his principal brief. At oral argument, his attorney clarified that Dority is challenging the fact that the judicial appeal panel did not review the decision to revoke his provisional discharge but, rather, analyzed his eligibility for provisional discharge as if he had petitioned for provisional discharge for the first time.

The parties agree that Dority is the first person who has been provisionally discharged from MSOP and then had his provisional discharge revoked. Consequently, he is the first person to have petitioned the special review board after having had his provisional discharge revoked. The judicial appeal panel was fully aware of the procedural history of Dority’s commitment and expressly determined at the outset of the first-phase hearing that it would treat the petition as any other petition for a provisional discharge.

Two statutory provisions are relevant to Dority’s argument. The fourth paragraph of subdivision 5 of section 253D.30, which is captioned, “Revocation,” provides, “An individual who is revoked from provisional discharge must successfully re-petition the special review board and judicial appeal panel prior to being placed back on provisional discharge.” Minn. Stat. § 253D.30, subd. 5(d). In addition, subdivision 6 of section 253D.30, which is captioned, “Appeal,” provides:

Any committed person aggrieved by a revocation decision or any interested person may petition the special review board within seven days, exclusive of Saturdays,

Sundays, and legal holidays, after receipt of the revocation report for a review of the revocation. The matter shall be scheduled within 30 days. The special review board shall review the circumstances leading to the revocation and shall recommend to the judicial appeal panel whether or not the revocation shall be upheld. The special review board may also recommend a new provisional discharge at the time of the revocation hearing.

Minn. Stat. § 253D.30, subd. 6.

The latter provision, subdivision 6, allows a person such as Dority to obtain review of a revocation of provisional discharge *by the special review board*. If a person requests a review of a revocation by the special review board, subdivision 6 requires the special review board to review the revocation and authorizes the special review board to recommend “a new provisional discharge.” *Id.* But subdivision 6 does not expressly authorize a person to obtain review of a revocation of provisional discharge *by the judicial appeal panel*. *See id.* Subdivision 6 implies that the judicial appeal panel may order a new provisional discharge if the special review board recommends a new provisional discharge. *See id.* But subdivision 6 neither requires nor authorizes the judicial appeal panel to review the revocation of a provisional discharge if the special review board does not recommend a new provisional discharge. *See id.*

In this case, the special review board did not recommend a new provisional discharge. Accordingly, it was necessary for Dority to “re-petition the special review board and judicial appeal panel” for a provisional discharge, as expressly permitted by subdivision 5(d). Minn. Stat. § 253D.30, subd. 5(d). The requirement that a person such as Dority “re-petition” the special review board and judicial appeal panel implies that he

must do so by following the usual requirements of a petition for a reduction in custody. *See* Minn. Stat. § 253D.27, subd. 2. Thus, the judicial appeal panel did not err by applying the criteria in subdivision 1 of section 253D.30, which applies to all petitions for provisional discharge. *See* Minn. Stat. § 253D.30, subd. 1. We review the judicial appeal panel's decision according to those criteria.

In connection with his first argument, Dority suggests that the judicial appeal panel erred on the ground that his continuing commitment is inconsistent with his constitutional rights. *See Foucha v. Louisiana*, 504 U.S. 71 (1992); *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995); *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994). But Dority did not preserve such an argument because he did not present it to the judicial appeal panel. This court will not consider an argument for the first time on appeal if it was not presented to the court or judicial tribunal whose decision is on review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 42-45 (Minn. App. 2014). Thus, the constitutional issues discussed in Dority's brief are not properly before the court.

II.

Dority also argues that the judicial appeal panel erred by granting the motion to dismiss his petition. He contends that he introduced sufficient evidence to state a *prima facie* case that he is entitled to provisional discharge.

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*, 831 N.W.2d at 489-91. 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). 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 490-91. “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 Dority “failed to sustain his burden of presenting a *prima facie* case with competent evidence” with respect to both statutory factors. Dority contends that he satisfied his burden of establishing a *prima facie* case. We will review the evidence concerning each statutory factor.

A.

The first factor relevant to a provisional discharge is “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.” Minn. Stat. § 253D.30, subd. 1(b)(1).

The judicial appeal panel analyzed the first factor as follows:

Viewing the evidence in the light most favorable to Petitioner, Petitioner has failed to provide any competent evidence that there is no longer a need for treatment and supervision in his current setting. Absent corroborating testimony, Petitioner's testimony alone is not competent evidence as to the elements for provisional discharge. . . . The only independent testimony capable of sustaining Petitioner's burden is that of Dr. Gilbertson. However, Dr. Gilbertson opined that Petitioner requires treatment and supervision in his current setting. Dr. Gilbertson favorably testified that Petitioner has gained sufficient knowledge in terms of sex offender specific treatment; nevertheless, Petitioner requires treatment focused on his criminal thinking.

Dority challenges this part of the judicial appeal panel's decision by contending that Dr. Gilbertson's testimony satisfied his burden of producing evidence capable of proving the first factor. Dr. Gilbertson's report and testimony were somewhat favorable to Dority, and Dr. Gilbertson testified that Dority did not need to "retread" his previous sex-offender treatment. But Dr. Gilbertson did not testify that Dority no longer needs treatment and supervision in his current treatment setting. Rather, Dr. Gilbertson testified that Dority "needed certainly to go back and do some treatment" at MSOP to address his anti-social personality disorder with psychopathic features. In addition, Dr. Gilbertson answered in the affirmative when asked, "Do you think that at this time [Dority] continues to need additional treatment in his current setting?" Thus, the only evidence in the record on the first factor indicates that Dority continues to need treatment and supervision in his current treatment setting.

B.

The second factor relevant to a provisional discharge is "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.” Minn. Stat. § 253D.30, subd. 1(b)(2).

The judicial appeal panel analyzed the second factor as follows:

Petitioner has not presented competent evidence that the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public or enable him to adjust successfully to the community. Dr. Gilbertson testified that Petitioner’s current provisional discharge plan is insufficient and would not allow Petitioner’s successful adjustment. In fact, Dr. Gilbertson testified that any provisional discharge plan would need to be restructured. Petitioner requires additional work on relapse prevention to reduce his risk and increase his chances of success in the community.

Dority challenges this part of the judicial appeal panel’s decision by contending that Dr. Gilbertson testified that he needs a different provisional-discharge plan and that he himself testified that he is willing to follow a more-structured provisional-discharge plan. Indeed, Dr. Gilbertson testified that Dority needs a provisional-discharge plan that will allow him to be successful and that he needs “the help of professional staff” to create one. Dority testified that he is willing to work with MSOP staff to restructure his previous plan and to incorporate MSOP’s provisional-discharge policy into his new plan. Although this evidence suggests that a satisfactory provisional-discharge plan is possible, Dority does not effectively challenge the judicial appeal panel’s determination that his proposed plan is insufficient.

Dority contends, however, that he “had no knowledge or resources to craft a provisional discharge [plan] that would address his needs” and that he “was willing to work with staff to create a plan that would be agreeable.” His contention implicates a statute

providing that “a provisional discharge plan shall be developed, implemented, and monitored by the executive director [of MSOP] in conjunction with the committed person and other appropriate persons.” Minn. Stat. § 253D.30, subd. 2. Dority does not directly contend that the executive director failed to perform her duty in the development of a provisional-discharge plan, and the record is not well-developed on that factual issue, although Dority testified that he prepared his proposed plan without assistance from MSOP staff. Another statute provides that the judicial appeal panel “may not grant a transfer or provisional discharge on terms or conditions that were not presented to the special review board.” Minn. Stat. § 253D.28, subd. 3. The latter statute indicates that the judicial appeal panel does not have unfettered authority to revise a provisional-discharge plan on rehearing and reconsideration of a recommendation of the special review board. *Id.* Rather, the judicial appeal panel may do so only if the terms and conditions of a provisional-discharge plan were considered by the special review board. *Id.* But if the executive director has not engaged in the requisite development of a provisional-discharge plan, no statute would prevent the judicial appeal panel from remanding the matter back to the special review board for further development of a satisfactory plan. *See Kropp*, 895 N.W.2d at 649 (noting that, after first-phase hearing, judicial appeal panel denied commissioner’s motion to dismiss and ordered MSOP executive director to work with petitioner to develop provisional-discharge plan).

In this case, Dority filed his petition only a matter of days after the revocation of his provisional discharge. It is not difficult to imagine that, in an effort to timely “appeal” from the revocation of his provisional discharge within the seven days permitted by statute,

see Minn. Stat. § 253D.30, subd. 6, Dority may not have had adequate time to develop a provisional-discharge plan on his own. The record does not reflect whether there was adequate time for collaboration with the executive director during that short period of time. Nonetheless, because the judicial appeal panel may not revise a petitioner’s proposed plan to add terms or conditions that “were not presented to the special review board,” *see* Minn. Stat. § 253D.28, subd. 3, this court also may not do so. Rather, we are limited to considering whether the plan or plans that are in the record “will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.” *See* Minn. Stat. § 253D.30, subd. 1(b)(2). Based on the evidence presented by Dority at the first-phase hearing, we must conclude that Dority’s proposed provisional-discharge plan will not “provide a reasonable degree of protection to the public [or] enable [him] to adjust successfully to the community.” *See* Minn. Stat. § 253D.30, subd. 1(b)(2).

Thus, the judicial appeal panel did not err by determining that Dority did not present a *prima facie* case that he is entitled to provisional discharge and did not err by granting the motion to dismiss Dority’s petition.

Affirmed.