STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0656

In the Matter of the Civil Commitment of: Jeremiah Jerome Johnson.

Filed September 3, 2019
Affirmed
Florey, Judge

Commitment Appeal Panel
File No. AP18-9119

Jeremiah Johnson, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Matthew M. Hart, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Ben Lindstrom, Cass County Attorney, Barbara J. Harrington, Assistant County Attorney, Walker, Minnesota (for respondent Cass County)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant Jeremiah Jerome Johnson challenges the commitment appeal panel's order denying his petition for discharge and granting respondent Commissioner of Human Services' (the commissioner's) motion to dismiss. We affirm.

FACTS

Appellant is a 33-year-old male who was indeterminately committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) in October 2009. The initial basis for appellant's commitment concerned two criminal-sexual-conduct offenses against minor females when he was 17 and 19 years old. Both offenses included the use of force and violence to gain compliance.

Since appellant's civil commitment in 2009, he has participated in treatment with varying consistency. In March 2017, appellant was committed to the custody of the department of corrections (DOC) after being convicted of fourth-degree assault of a MSOP staff member. Appellant returned to MSOP from the DOC in November 2017.

In August 2017, appellant petitioned the special review board (SRB) for a reduction in custody, including: (1) a transfer to a non-secure DHS facility, namely, a transfer to community preparation services (CPS) at St. Peter; (2) a provisional discharge; or (3) a full discharge from civil commitment. *See* Minn. Stat. § 253D.27, subd. 2 (2018). In June 2018, both a treatment report and sexual-violence-risk assessment were completed to assist the SRB and commitment appeal panel in their decision-making. Both reports recommended that appellant's petition be denied.

In August 2018, the SRB held a hearing on appellant's petition for a reduction in custody. *See* Minn. Stat. § 253D.27, subd. 3 (2018). Finding that appellant did not meet the statutory criteria for transfer to CPS, provisional discharge, or full discharge, and that appellant's "current risk of sexual violence [was] above-average," the SRB recommended that appellant's petition be denied.

Appellant petitioned the supreme court for a rehearing and reconsideration of the SRB's findings of fact and recommendation. *See* Minn. Stat. § 253D.28, subd. 1 (2018). The commitment appeal panel appointed Dr. James Gilbertson to conduct a mental examination of appellant. *See id.*, subd. 2(c) (2018). In March 2019, Dr. Gilbertson completed a mental examiner's report, concluding that appellant did not meet the statutory criteria for transfer to a less secure setting, provisional discharge, or general discharge.

Following the completion of Dr. Gilbertson's report, the commitment appeal panel held a first-phase hearing on appellant's petition. Appellant appeared personally and was represented by counsel. At the hearing, appellant withdrew his petition for transfer and provisional discharge and proceeded on the petition for full discharge only. Aside from reading a statement that he had prepared, appellant did not offer any evidence or testimony. At the close of appellant's case, the commissioner moved for dismissal of appellant's petition pursuant to Minn. R. Civ. P. 41.02(b) and Minn. Stat. § 253D.28, subd. 2(d) (2018).

The commitment appeal panel denied appellant's petition for discharge, and granted respondent's motion to dismiss. The panel found that appellant offered no evidence that he "satisfie[d] the statutory criteria for discharge," and that his "uncorroborated, conclusory statements [were] insufficient to meet his burden of production and withstand a motion to dismiss." This appeal follows.

D E C I S I O N

I. The commitment appeal panel did not err in denying appellant's petition for discharge and granting the commissioner's motion to dismiss.

Minnesota Statutes chapter 253D governs matters involving SDPs. *See* Minnesota Civil Commitment and Treatment of Sex Offenders, Minn. Stat. §§ 253D.01-.36 (2018); *In re Civil Commitment of Poole*, 921 N.W.2d 62, 65 (Minn. App. 2018), *review denied* (Minn. Jan. 15, 2019). Minnesota Statutes section 253D.31 provides:

> A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the special review board, that the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of treatment and supervision.
>
> In determining whether a discharge shall be recommended, the special review board and judicial appeal panel shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community. If the desired conditions do not exist, the discharge shall not be granted.

A. Appellant presented insufficient evidence to establish a prima facie case for discharge.

Pursuant to section 253D.28, subdivision 2(d), a committed person seeking discharge bears the burden of "presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." "The proceeding in which a committed person produces evidence is commonly referred to as a first-phase hearing." *Coker v. Jesson*, 831 N.W.2d 483, 486 (Minn. 2013) (quotation omitted). If the committed

person establishes a prima facie case, the burden then shifts to the opposing party to show by clear and convincing evidence that the discharge should be denied. Minn. Stat. § 253D.28, subd. 2(d). The proceeding in which the opposing party carries the burden is known as the second-phase hearing. *Coker*, 831 N.W.2d at 486.

A petitioning party's conclusory statements and uncorroborated assertions are insufficient to establish a prima facie case. *See Poole*, 921 N.W.2d at 69. At the close of the first-phase hearing, the commissioner may move to dismiss the petition on the basis that the committed person has shown no right to relief. *See* Minn. R. Civ. P. 41.02(b). If the commissioner moves to dismiss the petition under rule 41.02(b), the commitment appeal panel "may not weigh the evidence or make credibility determinations." *Coker*, 831 N.W.2d at 490-91. "Instead, the [a]ppeal [p]anel is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person." *Id.* at 491.

On appeal of a panel's dismissal of a petition under rule 41.02(b), "the appropriate standard of appellate review is de novo." *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014) (explaining that "the standards for directing a verdict under Minn. R. Civ. P. 50.01 apply to motions to dismiss under Minn. R. Civ. P. 41.02(b), and these standards require the determination of whether, as a matter of law, the evidence is sufficient to present a fact question for the jury's consideration" (quotation omitted)).

Appellant concedes that he did not present any competent evidence to the commitment appeal panel. Thus, appellant's contention that the panel failed to view the

evidence in the light most favorable to him is without any merit, given there was no evidence presented by appellant for the panel to consider.[1]

Appellant maintains that the reason he was unable to establish a prima facie case was because he was never provided with "a qualified assessment by a qualified expert," which would have allowed him to put forth competent evidence to the commitment appeal panel. Appellant's assertion is an inaccurate statement of the facts. As the record establishes, the commitment appeal panel appointed Dr. Gilbertson, a licensed psychologist and therapist, to examine appellant prior to the hearing. *See* Minn. Stat. § 253D.28, subd. 2(c). Dr. Gilbertson reviewed appellant's "social, psychological, offense, assessment and treatment history, and prepare[d] a report to provide an advisory clinical opinion on his request for discharge." As the panel stated in its order denying the petition for discharge, appellant's statement that he read at the hearing referenced

[1] While difficult to decipher, appellant appears to suggest that the statement he read at the first-phase hearing was sufficient evidence for the panel to consider. Referring to his statement, he argues on appeal that "[t]he evidence of the 'variance' was more than substantial evidence as it was authored by the Executive Director of the MSOP." "While an appellant acting *pro se* is usually accorded some leeway in attempting to comply with court rules, he is still not relieved of the burden of, at least, adequately communicating to the court what it is he wants accomplished and by whom." *Carpenter v. Woodvale, Inc.*, 400 N.W.2d 727, 729 (Minn. 1987). Not only is appellant's argument difficult to follow, but it is without any merit. The statement that he read was not supported by testimony of MSOP's executive director, or any witness testimony for that matter, nor did the statement, prepared by appellant himself, constitute competent evidence as required by statute. *See* Minn. Stat. § 253D.28, subd. 2(d).

Dr. Gilbertson's report, however, appellant "did not offer the report as an exhibit," and thus, the report "was not considered by the [p]anel."[2]

Appellant contends that Dr. Gilbertson "is a conspicuous fake expert." Because Dr. Gilbertson's report was not considered, his expertise is not relevant to the commitment appeal panel's decision to dismiss appellant's petition. Further, appellant's characterization of Dr. Gilbertson is a conclusory statement without any evidentiary support. Under Minn. Stat. § 253B.02, subd. 7(2) (2018), an examiner is defined as "a person who is knowledgeable, trained, and practicing in the diagnosis and assessment or in the treatment of the alleged impairment, and who is . . . a licensed psychologist who has a doctoral degree in psychology." Dr. Gilbertson is a licensed psychologist and licensed marriage/family therapist who holds a doctoral degree. Appellant provides no evidence to rebut these credentials.

Accordingly, appellant's argument that he was not provided with "a qualified assessment by a qualified expert" is an inaccurate statement of the facts and without any legal merit. And because appellant failed to produce competent evidence which, if proven, would entitle him to the relief sought, he did not satisfy his burden of establishing a prima facie case, and consequently, the panel did not err by dismissing his petition for discharge at the close of the first-phase hearing.

---

[2] Pursuant to this court's decision in *Poole*, because "[t]he question at a first-phase hearing is whether the committed person produces competent evidence," the commitment appeal panel must not call its own examiner nor admit the examiner's report in this stage of the proceedings. 921 N.W.2d at 66. As stated above, Dr. Gilbertson's report was not considered by the panel in its decision to dismiss appellant's petition, nor was the report admitted as evidence.

B. Appellant's claim that he has been denied the statutory right to periodic assessments is without merit.

Minnesota Statutes section 253B.03 (2018) provides certain rights for civilly committed patients. *See* Minn. Stat. § 253D.19 (explaining the application of statutory rights enumerated by section 253B.03 to persons civilly committed as SDPs). Section 253B.03, subdivision 5, provides that a civilly committed patient "has the right to periodic medical assessment, including assessment of the medical necessity of continuing care." The physical and mental condition of a civilly committed patient shall be assessed by the treatment facility "as frequently as necessary, but not less often than annually." *Id.* Further, section 253B.03, subdivision 7, provides that "[t]he treatment facility shall devise a written program plan for each [committed] person," reviewed on a quarterly basis, "which describes in behavioral terms the case problems, the precise goals, including the expected period of time for treatment, and the specific measures to be employed."

Appellant alleges that, while he has been provided with annual and quarterly treatment progress reports, "they are not to be considered 'qualified reports' by qualified experts as they are authored by MSOP staff which are not qualified experts." While somewhat difficult to decipher, appellant appears to argue that (1) he was unable to present competent evidence at the first-phase hearing, in part, because the treatment progress reports did not constitute a qualified assessment by a qualified expert and (2) the commissioner failed to provide appellant with periodic assessments as provided for in section 253B.03. Citing to *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994), appellant

contends that the commissioner's continuous disregard of the mandates of section 253B.03 constitutes a violation of his due-process rights.

First, appellant did not raise any due-process arguments before the commitment appeal panel at the first-phase hearing. An appellate court generally "may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

Second, even if appellant's due-process claim was properly before us, his argument that the commissioner failed to uphold his statutory right to periodic assessments is factually inaccurate. In *Blodgett*, the case cited by appellant, the supreme court held, "So long as civil commitment is programmed to provide treatment and periodic review, due process is provided." 510 N.W.2d at 916. Citing to section 253B.03, subdivision 7, the supreme court explained, "[C]ommitted persons have the right to an individualized written program plan; the right to periodic medical assessments; and the right to proper care and treatment, best adapted, according to contemporary professional standards, to rendering further confinement unnecessary." *Id.*; *see Call v. Gomez*, 535 N.W.2d 312, 318-19 (Minn. 1995) ("[O]nce a person is committed, his or her due process rights are protected through procedural safeguards that include periodic review and re-evaluation, the opportunity to petition for transfer to an open hospital, the opportunity to petition for full discharge, and the right to competent medical care and treatment."); *see also Karsjens v. Piper*, 845 F.3d 394, 410 (8th Cir. 2017) (concluding that the "extensive process and the protections to persons committed under [the Minnesota Civil Commitment and Treatment Act] are rationally related to the [s]tate's legitimate interest of protecting its citizens from sexually

dangerous persons," and because "[t]hose protections allow committed individuals to petition for a reduction in custody, including release[,] . . . the statute is facially constitutional").

Here, the record shows that appellant's treatment facility, MSOP, has provided appellant with annual treatment progress reports, quarterly treatment progress reports, behavioral expectation and incident reports, and an individual treatment plan. He has also been provided with opportunities, pursuant to Minn. Stat. § 253D.27, subd. 2, to petition for transfer to CPS, provisional discharge, and full discharge. Thus, appellant's assertions that the commissioner continues to violate the mandates of section 253B.03 and "the directives in *Blodgett*," that "[a]ppellant to date has never been given a qualified medical assessment by a qualified expert," and that, under the current system, he "will never be medically assessed for proper treatment," are inaccurate statements of the facts and meritless allegations.

C. Appellant's ineffective-assistance-of-counsel claim is not properly before this court.

Minnesota Statutes section 253D.20 provides a committed person with a statutory right to assistance of counsel in commitment proceedings. Pursuant to section 253D.20:

> A committed person has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the committed person if neither the committed person nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed. In all proceedings under this chapter, the attorney shall:
>
> (1) consult with the person prior to any hearing;
>
> (2) be given adequate time and access to records to prepare for all hearings;

> (3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and
>
> (4) be a vigorous advocate on behalf of the person.

Appellant argues that his counsel, "was grossly ineffective, untrained, unprofessional[,] and deliberately indifferent" to appellant's due-process rights. Appellant alleges that he has been "deprived of rights secured by the Constitution or laws of the United States, and these deprivations were committed under color of state law."

First, "neither the United States Supreme Court nor the Minnesota Supreme Court has held that the Due Process Clause of the Fourteenth Amendment confers a right to the effective assistance of counsel on a person who is the subject of a civil-commitment proceeding." *Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 549-550 (Minn. App. 2011), *aff'd*, 825 N.W.2d 716 (Minn. 2013); *see also In re Civil Commitment of Johnson*, __N.W.2d__, 2019 WL 2495668, at *3 (Minn. App. July 17, 2019). Accordingly, appellant's constitutional claim is without legal merit.

Second, for two reasons, appellant's statutory right-to-counsel claim is not properly before us. First, a person who has been civilly committed for an indeterminate period may raise an ineffective-assistance claim, but must do so by a motion pursuant to Minnesota Rule of Civil Procedure 60.02. *See In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 643 (Minn. 2012). This is because "the Commitment Act does not provide any procedures for a patient indeterminately committed as an SDP . . . to raise nontransfer, nondischarge claims such as ineffective assistance of counsel." *Id.* at 642. Appellant has failed to raise his ineffective-assistance-of-counsel claim in a civil proceeding under rule 60.02. Second,

appellant is raising the claim for the first time in a direct appeal, therefore, running afoul of the principles articulated in *Thiele*. 425 N.W.2d at 582-83.

Lastly, even if the issue of ineffective assistance of counsel was properly before this court, appellant's claim is without legal merit. "This court analyzes ineffective-assistance-of-counsel claims in civil-commitment cases under the *Strickland* standard that applies in criminal cases." *Johnson*, 2019 WL 2495668, at *5; *see also Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the *Strickland* standard, "a defendant 'must show that counsel's representation fell below an objective standard of reasonableness' (the performance factor) and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' (the prejudice factor)." *Johnson*, 2019 WL 2495668, at *5 (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "A party claiming ineffective assistance of counsel must provide adequate evidentiary and factual support for the claim." *Id.* at *6. On appeal, we review de novo a party's claim of ineffective assistance of counsel. *Id.* And, we apply "a strong presumption that an attorney's performance falls within the wide range of reasonable professional assistance." *Id.* (quotation omitted).

Aside from asserting that his attorney failed to submit any competent evidence at the first-phase hearing, appellant does not provide any evidentiary and factual support for his claim. "General assertions of error without evidentiary support are inadequate to establish ineffective assistance of counsel." *Id.* Because appellant's claim fails under the first *Strickland* prong, we need not analyze the other. *See Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016).

In sum, we affirm the commitment appeal panel's dismissal of appellant's petition. Appellant presented insufficient evidence to establish a prima facie case for discharge, his claim that he has been denied the statutory right to periodic assessments is factually inaccurate and without any legal merit, and appellant's ineffective-assistance-of-counsel claim is not properly before this court.

Affirmed.