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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0666

In the Matter of the Civil Commitment of:
Michael Dale Benson.

Filed October 21, 2019
Affirmed
Smith, Tracy M., Judge

Commitment Appeal Panel
File No. AP17-9137

Michael Dale Benson, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, R. J. Detrick, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Chad Michael Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent Douglas County)

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

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

SMITH, TRACY M., Judge

On appeal from the Commitment Appeal Panel's (CAP's) denial, without an evidentiary hearing, of appellant Michael Benson's petition for a discharge from his commitment to the Minnesota Sex Offender Program (MSOP) as a psychopathic personality, Benson argues that (a) he made a prima facie case that he does not have a sexual disorder; (b) using his newly diagnosed mental illness as a basis for continuing his

commitment violates res judicata; (c) the CAP failed to view the record in the light most favorable to appellant; and (d) his continued commitment to MSOP deprives him of due process of law. We affirm.

FACTS

In October 1989, Benson pleaded guilty to first-degree criminal sexual conduct and was incarcerated. As part of a presentence investigation, Benson acknowledged having committed at least five sexual assaults besides the offense to which he pleaded guilty. Benson also detailed an extensive sexual history. Later, Benson denied committing any sexual offenses and claimed a less extensive sexual history. In 1993, Benson was indeterminately committed to MSOP as what is now known as a sexual psychopathic personality (SPP).[1] Benson appealed, and this court affirmed. *In re Benson*, No. C0-93-1357, 1993 WL 459840 (Minn. App. Nov. 9, 1993).[2] Benson refused to participate in treatment throughout his incarceration and commitment.

In January 2017, Benson petitioned the Special Review Board (SRB) for, among other things, a full discharge from MSOP. As part of those proceedings, Dr. Jennifer Tippett interviewed Benson and prepared a Sexual Violence Risk Assessment (SVRA). The SVRA states:

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[1] Benson was committed as what was then known as a "psychopathic personality." The "psychopathic personality" is the predecessor to the current "sexual psychopathic personality." *See Call v. Gomez*, 535 N.W.2d 312, 317 & n.2 (Minn. 1995) (addressing evolution of the former "psychopathic personality" to "sexual psychopathic personality").

[2] Benson asks us to "vacate the Original Commitment Order and send it back to Douglas County for a hearing." This request is one that this court rehear the prior appeal. There is no petition for rehearing in this court. Minn. R. Civ. App. P. 140.01.

> [T]hroughout the record, [Benson's] self-report [of his sexual history] has changed to the extent that he is not considered a reliable historian. . . . Overall, the reader is cautioned given [Benson's] lack of credible reporting, and the lack of corroborating evidence (i.e. specialized assessments, treatment records, etc.) this report and the resulting opinion are based on the limited information available to the undersigned.

The SVRA does not diagnose Benson with a sexual disorder but does diagnose him with narcissistic personality disorder. The SVRA concludes:

> To the ultimate question of whether [Benson] meets all criteria needed for a [discharge], . . . there is much to suggest that he may meet criteria for a reduction in custody level. The certainty of such a statement is hindered by a lack of objective information concerning [Benson's] sexual risk. If [Benson] did in fact commit a string of legally undetected stranger rapes prior to his commitment at MSOP, this would ultimately alter his treatment needs, dynamic risk level, and weigh heavily in the opinion of this evaluator. In sum, absent any evidence or objective measure of sexual arousal or transparency it is exceedingly difficult to state whether [Benson] meets the criteria for a reduction in custody level. Such an objective measure, be it a polygraph, PPG, or other assessment would provide more information regarding [Benson's] overall risk level. . . . At this time, [Benson] does not meet criteria for a full discharge.

A majority of the SRB recommended denying Benson's petition. Benson sought review by the Commitment Appeal Panel (CAP) and, in doing so, also challenged the constitutionality of aspects of the MSOP system. At the first-phase hearing before the CAP, Tippett and Benson testified. At the end of that hearing, the commissioner moved, under Minn. R. Civ. P. 41.02(b), to dismiss Benson's petition because he failed to present a prima facie case for discharge. The CAP dismissed Benson's petition for discharge and

stated that it could not address his constitutional challenges to the MSOP system. Benson appeals.

D E C I S I O N

I. The CAP did not err by dismissing the petition for discharge.

Whether to discharge a person committed to MSOP as an SPP or as a sexually dangerous person (SDP) is addressed by Minn. Stat. § 253D.31 (2018). Construing a predecessor to that statute containing similar language to the current statute, the supreme court stated that a person can remain confined to MSOP "for only so long as he or she continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public." *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995); *see In re Commitment of Fugelseth*, 907 N.W.2d 248, 253 (Minn. App. 2018) (applying *Call* in a case involving the current statute), *review denied* (Minn. Apr. 17, 2018).

When addressing whether to grant a discharge from MSOP, the CAP "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." Minn. Stat. § 253D.31. Consideration of a petition has two phases:

> When appearing before [the CAP], the committed person 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. We have recently described that burden as a burden of production, which requires the committed person to come forward with sufficient, competent evidence that, if proven, would entitle the petitioner to relief. The proceeding in which a committed person produces evidence is commonly referred to as a first-

> phase hearing. If the committed person satisfies his burden of production, then the party opposing the petition bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied. The proceeding in which the opposing party attempts to prove that the discharge petition should be denied is commonly referred to as a second-phase hearing.

Coker v. Jesson, 831 N.W.2d 483, 485-86 (Minn. 2013) (footnote, citations, and quotations omitted); *see* Minn. Stat. § 253D.28, subd. 2(d) (2018) (addressing discharge).

After Benson's first-phase hearing, the commissioner moved, under rule 41.02(b), to dismiss Benson's petition.

> On a rule 41.02(b) motion to dismiss a discharge petition at the close of a petitioner's case-in-chief, the [CAP] may not weigh the evidence or make credibility determinations regarding discharge, and instead must view the evidence in a light most favorable to the committed person. [Appellate courts] therefore review the [CAP's] dismissal of the petition for discharge de novo.

Foster v. Jesson, 857 N.W.2d 545, 549 (Minn. App. 2014) (citation and quotations omitted). Also, this court has rejected the idea that, "by themselves, conclusory assertions by a committed person are sufficient to avoid dismissal of a petition for discharge from MSOP." *In re Civil Commitment of Poole*, 921 N.W.2d 62, 69 (Minn. App. 2018), *review denied* (Minn. Jan. 15, 2019).

A. Prima facie case

Benson argues that he established a prima facie case for discharge—in fact, that he is entitled to release immediately—because the evidence at the first-phase hearing showed that he does not have a sexual disorder.

We reject Benson's argument that the evidence establishes that he does not have a sexual disorder. Benson's argument assumes that, because Tippett did not diagnose him with a sexual disorder, he does not have a sexual disorder. When Tippett was asked whether she ruled out diagnosing Benson with a paraphilic disorder, she, consistent with the SVRA, testified that "with the dearth of the evidence that I possessed, I could not rule it in or out." Thus, Benson's argument misreads both the SVRA and Tippett's testimony. Tippett's failure to diagnose Benson with a sexual disorder does not mean that Benson does not have a sexual disorder; it simply reflects his refusal to participate in therapy.

In addition, Benson's argument misapprehends the two-phase hearing process. The question at a first-phase hearing is *not* whether confinement should continue but whether the patient made a prima facie case for the relief sought by "com[ing] forward with sufficient, competent evidence that, if proven, would entitle the petitioner to relief." *Coker*, 831 N.W.2d at 485-86 (quotation omitted); *see Poole*, 921 N.W.2d at 66 (quoting *Coker*, 831 N.W.2d 485-86). Thus, at a first-phase hearing, the MSOP patient has the burden to affirmatively produce competent evidence that could entitle the patient to the relief sought. *See Braylock v. Jesson*, 819 N.W.2d 585, 589 (Minn. 2012) (stating that "presenting a prima facie case" and going "forward with the evidence" are both "synonymous with a requirement that a party meet a burden of production" (quotation marks omitted)). Here, Benson's "evidence" was the combination of Tippett not diagnosing him with a sexual disorder with his otherwise unsupported assertion that he lacks a sexual disorder. But, as explained above, Benson misreads both Tippett's SVRA and her testimony, and his unsupported assertion runs afoul of *Poole*'s observation that, by themselves, conclusory

assertions by a committed person are insufficient to avoid dismissal of a petition for discharge from MSOP. 921 N.W.2d at 69.

Moreover, apart from Benson's failure to introduce any affirmative evidence making a prima facie case for discharge, the evidence that was introduced at the first-phase hearing indicates that Benson satisfies neither of the *Call* criteria for discharge. 535 N.W.2d at 319 (identifying the two criteria of no continued need for inpatient treatment for sexual disorder and no danger to the public). As to the first *Call* criteria—whether Benson needs inpatient treatment for a sexual disorder—the SVRA states:

> [D]ue to a dearth of information surrounding his arousal patterns, and past behaviors, it is unclear whether [Benson] necessitates treatment for disordered arousal . . . . Until more information is available, it is the undersigned's opinion [Benson] may benefit from treatment programming. At this time, [Benson] does not meet this criteria.

As to the second *Call* criteria—whether Benson is a danger to the public—Tippett testified that Benson continues to need treatment for his narcissistic personality disorder, that he remains a danger to the public, and that Benson's narcissistic personality disorder is correlated with, but does not necessarily cause, sexual offending. Explaining the relationship between Benson's personality disorder and sexual offending, Tippet said that "a large part of [Benson's] sexual offending had to do with his lack of ability to take into account the safety or experience of others. Essentially he's willing to hurt other people to get what he wants."

Benson asserts that his diagnosis of a narcissistic personality disorder is not independently sufficient to support his continued confinement at MSOP. Benson admits

that caselaw has treated an antisocial personality disorder as a sexual disorder for commitment purposes if that disorder required treatment to abate its tendency to make an MSOP patient sexually dangerous. This case is similar: Tippett testified that Benson's narcissistic personality disorder forms a "large part" of the basis for sexual offending,[3] is the reason Benson lacks the "ability to take into account the safety or experience of others," and makes Benson "willing to hurt other people to get what he wants."

Benson also asserts that his narcissistic personality disorder cannot be a basis for continued treatment at MSOP because he has not committed a sexual offense since his commitment. But, as Tippett noted, Benson has been in a "controlled," or "very controlled" or "very secure" environment at MSOP. Tippett also stated that "[g]iven that we don't have a clear understanding of how [Benson] would do in a less secure environment, vis-a-vis, he didn't do well in conventional treatment and acted out, and I can't opine he would do well in open society with absolutely no security."

In sum, Benson failed to establish a prima facie case for discharge and the record evidence from the first-phase hearing supports his continued confinement.

B. Res judicata

Benson asserts that Tippett's current diagnosis of him as a narcissistic personality "violates" the doctrine of res judicata because he was not diagnosed with a narcissistic personality disorder when he was first committed to MSOP. Res judicata and collateral estoppel are not rigidly applied and can be qualified or rejected if their application would

[3] If Benson's narcissistic personality disorder is not a "large part" of the basis for his sexual offending, that would suggest that Benson does, in fact, have a sexual disorder.

contravene public policy. *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984); *see Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (addressing res judicata); *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996) (addressing collateral estoppel). Discharging an untreated sex offender who "lacks" the "ability" to take into account the safety of others, and who is "willing to hurt other people to get what he wants," would contravene public policy. Thus, even if res judicata is not limited to judicial rulings and does apply to diagnoses in commitment proceedings, and even if Benson showed the existence of all the prerequisites for applying res judicata, it would be inappropriate, as a matter of public policy, to apply the doctrine here.

C. Application of rule 41.02(b)

Benson argues that the CAP misapplied rule 41.02(b) by weighing evidence and assessing witness credibility. To support this assertion, Benson quotes the portion of the CAP's order stating: "Overall, [Benson] presented his own uncorroborated testimony and the testimony and assessment of [Tippett], who does not believe he meets the criteria for discharge, . . . [Benson] has not met his burden of production. Therefore, the Commissioner's motion to dismiss the Petition must be granted." But the CAP's order, citing *Coker*, recognized that the CAP "is not allowed to weigh the evidence or make credibility determinations at this stage of the proceedings and is required to view the evidence produced in a light most favorable to the committed person." And Benson's quote of the CAP's order uses an ellipses to omit the portion of the order stating:

> Even when viewing the evidence in the light most favorable to [Benson], the evidence does not support a determination that [Benson] is capable of making an acceptable adjustment to

> open society, is no longer a risk to the public, or that he is no longer in need of treatment or supervision.

Thus, not only did the CAP acknowledge that *Coker* requires it to view the evidence in the light most favorable to Benson, it explicitly noted that it did exactly that. Accordingly, we reject Benson's argument that the CAP misapplied rule 41.02(b).

II. Benson's constitutional arguments lack merit.

Benson asserts that he was denied assessments of his condition, was denied proper placement within the MSOP system, and is subject to preventive detention. Therefore, Benson concludes, his commitment denies him due process of law.

A. Assessments

Both the Eighth Circuit Court of Appeals and the Minnesota Supreme Court have rejected the assertion that the MSOP procedures are defective because they do not provide periodic reviews. *Karsjens v. Piper*, 845 F.3d 394, 409-11 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 106 (2017); *Call*, 535 N.W.2d at 318-19. Moreover, Tippett assessed Benson for these proceedings, and the commissioner acknowledges both that an MSOP patient can file a new petition for a reduction in custody six months after a prior petition is resolved and that, when a petition reaches the CAP, an expert is appointed to assess the patient. Therefore, we reject Benson's argument on this point.

B. Placement

Benson asserts that he is constitutionally entitled to the least restrictive placement within MSOP. In *Karsjens*, the federal district court ruled Minnesota's Civil Commitment and Treatment Act (MCTA) facially unconstitutional for a series of reasons. 845 F.3d at

409. The Eighth Circuit Court of Appeals summarized one of those reasons by stating that the MCTA "did not provide less restrictive alternatives although the state indicated such would be available." *Id.* After detailing the procedures and evidentiary standards applicable to a committed person's petition for a reduction in custody or for a release from confinement, the Eighth Circuit Court of Appeals reversed the federal district court, reasoning:

> We conclude that this extensive process and the protections to persons committed under MCTA are rationally related to the State's legitimate interest of protecting its citizens from sexually dangerous persons or persons who have a sexual psychopathic personality. Those protections allow committed individuals to petition for a reduction in custody, including release; therefore, the statute is facially constitutional.

Id. at 410. Thus, the Eighth Circuit has rejected the assertion of a constitutional right to a least restrictive placement, and we see no reason to reach another result here.

By statute, a person found to be SDP or SPP "shall" be committed "to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the respondent under commitment, and is consistent with the person's treatment needs and the requirements of public safety." Minn. Stat. § 253D.07, subd. 3 (2018). Thus, even if Benson had clear and convincing evidence that a less restrictive facility is available and is consistent with public safety, he has no right to be placed at that less restrictive facility unless the facility is "willing" to accept him. Benson presented no evidence to establish that fact.

C. Preventive detention

Benson asserts that the alleged lack of assessments means that his continued confinement to MSOP constitutes an impermissible preventive detention. In *In re Blodgett*, a person who had refused a "litany" of treatment programs was committed as what is now an SPP appealed his commitment, arguing, among other things, that the commitment constituted a preventive detention. 510 N.W.2d 910, 912 (Minn. 1994). Rejecting that argument, the supreme court noted both that one purpose of commitment is treatment of the committed person and that it was "somewhat incongruous that a sexual offender should be able to prove he is untreatable by refusing treatment [and hence that he is subject to an impermissible preventive-detention.]" *Id.* at 915-16; *see Call*, 535 N.W.2d at 318 (citing this aspect of *Blodgett*). Here, because Benson refused treatment and is making a similar argument, we reject Benson's argument.

Affirmed.