STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0874

In the Matter of the Civil Commitment of:
Eugene Christopher Banks.

Filed November 18, 2019
Affirmed
Cochran, Judge

Commitment Appeal Panel
File No. AP18-9101

Eugene C. Banks, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Drew D. Bredeson, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

James Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent Dakota County)

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

COCHRAN, Judge

Appellant Eugene Christopher Banks challenges the commitment appeal panel's order denying his petition for discharge and granting respondent Commissioner of Human Services' motion to dismiss pursuant to Minn. R. Civ. P. 41.02(b). We affirm.

FACTS

Banks was indeterminately committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) in 1999 based on sexual offenses committed against three different minor females. Since his initial commitment in 1999, Banks has chosen not to participate in sex-offender treatment.

In October 2017, Banks petitioned the special review board (SRB) for a discharge from civil commitment. In preparation for the hearing on Banks's petition, MSOP staff prepared a treatment report and a sexual-violence risk assessment for the SRB. Both reports recommended denying Banks's petition.

In June 2018, the SRB held a hearing on Banks's petition for a reduction in custody. Although Banks requested a "discharge only," the SRB considered alternative reductions in custody including transfer, provisional discharge, and full discharge. Finding that Banks did not meet the statutory criteria for transfer, provisional discharge, or full discharge, and that Banks was "well above the average risk of re-offending," the SRB recommended denial of the petition.

In August 2018, Banks petitioned the supreme court for rehearing and reconsideration of the SRB's findings of fact and recommendation. The petition was referred to the commitment appeal panel for consideration. The commitment appeal panel appointed Dr. Linda Marshall to conduct a psychological evaluation of Banks pursuant to Minn. Stat. § 253D.28, subd. 2(c) (2018). In January 2019, Dr. Marshall completed the

evaluation report. The report concluded that Banks did not meet the statutory criteria for discharge.[1]

After completion of the evaluation report, the commitment appeal panel held a first-phase hearing on Banks's petition. At the hearing, Banks withdrew "any theoretical request" for transfer or provisional discharge. Instead, he proceeded solely on the petition for full discharge.

During the hearing, Banks testified on his own behalf. Banks, who was 47 years old at the time, testified that he would not reoffend due to his age. Banks maintained that he had "grown up" and "aged out of the system." Banks also testified that he does not believe in sex-offender treatment and acknowledged that he had not participated in sex-offender treatment at any time during his commitment. Banks expressed his belief that he would adjust well if discharged and discussed the steps he had taken to prepare for discharge, including contacting potential employers, establishing a credit history, looking into housing options, and communicating with his family.

Banks introduced several exhibits into the record, including a discharge plan and a series of scholarly articles. The discharge plan contained advice on how to contact potential employers, find housing, and integrate into society. The scholarly articles discussed sexual risk assessments, treatment of predatory offenders, and constitutional

[1] Although the SRB conducted evaluations for transfer, provisional discharge, and a full discharge, the panel and Dr. Marshall, based on Banks's request, only conducted evaluations for a full discharge.

issues related to civil commitment. The articles argue that courts should opt for longer prison sentences instead of shorter sentences followed by civil commitment.

Banks also called two MSOP security counselors to testify. The duties of a MSOP security counselor are similar to that of a prison guard. Neither security counselor offered an opinion about whether Banks met the statutory criteria for discharge. Instead, the security counselors testified about their interactions with and personal observations of Banks. The security counselors testified that Banks is polite and respectful and that he has not acted aggressively or violently while committed. Neither security counselor observed sexual behavior by Banks while committed. Both security counselors acknowledged not being qualified to give a professional opinion about Banks's risk of re-offense.

Banks called no other witnesses. Banks's attorney expressly stated on the record that Banks was not calling an expert to present testimony on the statutory criteria for discharge. Additionally, Banks did not request to have an expert appointed to present testimony on his behalf.

At the end of the hearing, the commissioner moved for dismissal of Banks's petition arguing that Banks failed to provide competent evidence to support a prima facie case for discharge. The commitment appeal panel granted the motion to dismiss and denied Banks's petition for discharge. The panel concluded that Banks had not presented any competent evidence to meet the statutory criteria for discharge, and that his "uncorroborated assertions that he is no longer dangerous and does not need treatment" are not enough to meet his burden of production.

Banks appeals.

D E C I S I O N

Banks argues that the commitment appeal panel erred in denying his petition for discharge because the evidence he presented was sufficient to establish a prima facie case. Banks also contends that the commitment appeal panel erred by making inappropriate credibility determinations. Finally, Banks claims a number of due process and statutory violations. We first address whether the commitment appeal panel erred in denying the petition based on the evidence in the record and then turn to the other challenges.

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

Minnesota Statutes chapter 253D governs matters involving SDPs. *See* Minn. Stat. §§ 253D.01-.36 (2018). Section 253D.31 sets forth the discharge requirements for SDPs:

> 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.

This statute includes a three-part test for discharge: that the person (1) is capable of making an acceptable adjustment to open society; (2) is no longer dangerous to the public; and (3) is no longer in need of treatment and supervision. Minn. Stat. § 253D.31.

Construing a predecessor to section 253D.31 containing similar language to the current statute, the supreme court concluded 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, 252-53 (Minn. App. 2018) (applying *Call* in a case involving Minn. Stat. § 253D.31 (2016)), *review denied* (Minn. Apr. 17, 2018). In *Call*, the supreme court essentially recast the statutory three-part test for discharge into a two-part test.

As a procedural matter, a committed person seeking discharge has the initial burden of going forward with evidence to demonstrate the person meets the criteria for discharge, "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). To establish a prima facie case, Banks is required to produce evidence demonstrating that he is no longer dangerous to the public, and is no longer in need of treatment and supervision. *See* Minn. Stat. § 253D.31; *Call*, 535 N.W.2d at 319.

A committed person produces evidence at what is commonly referred to as a first-phase hearing. *Coker v. Jesson*, 831 N.W.2d 483, 486 (Minn. 2013). 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 discharge should be denied. *Id.*; *see* 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.

At the close of the first-phase hearing, the commissioner may move to dismiss the petition on the basis that the committed person has not put forth sufficient evidence to establish a prima facie case for discharge. *See* Minn. R. Civ. P. 41.02(b). In determining whether the petitioner has established a prima facie case, the panel must view the evidence "in a light most favorable to the committed person." *Coker*, 831 N.W.2d at 491. The panel "may not weigh the evidence or make credibility determinations." *Id.* at 490.

We review de novo the panel's dismissal of a discharge petition at the close of a petitioner's case-in-chief. *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014).

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

Banks contends that the evidence he presented at the first-phase hearing was sufficient to meet his burden to establish a prima facie case for discharge. We disagree. Our independent review of the evidence confirms that the panel correctly concluded that Banks failed to establish a prima facie case for discharge. In other words, Banks failed to bring forth competent evidence showing that he is no longer dangerous to the public, and is no longer in need of treatment and supervision. *See* Minn. Stat. § 253D.31; *Call*, 535 N.W.2d at 319.

The evidence presented by Banks included the testimony of two MSOP security counselors, his own testimony, and several exhibits. Banks contends that the testimony of the security counselors, who are akin to prison guards, provides competent evidence

showing that he has met the requirements for discharge. Banks emphasizes that the security counselors are highly trained in observing and documenting behavior and asserts that experts rely upon information from security counselors when evaluating committed persons. But Banks's argument ignores that neither of the security counselors actually opined as to whether Banks met the criteria for discharge and also ignores that both testified that they are not qualified to provide such an opinion. Thus, the panel correctly concluded that the testimony of the security counselors was not competent because it did not support any of the elements of a prima facie case for discharge.

Similarly, Banks's testimony and exhibits are insufficient to establish a prima facie case for discharge. At the hearing, Banks testified that he has "grown up," "aged out of the system," and has no intention of reoffending. In *In re Civil Commitment of Poole*, this court held that a petitioning party's conclusory statements and uncorroborated assertions were insufficient to establish a prima facie case for discharge. 921 N.W.2d 62, 68-69 (Minn. App. 2018) (noting that if courts accepted personal assertions the threshold for obtaining second-phase hearings would rest on "committed persons uttering magic words"), *review denied* (Minn. Jan. 15, 2019). Accordingly, Banks's conclusory statements and assertions about his risk of re-offense are insufficient to show that he is no longer dangerous to the public and no longer in need of inpatient treatment.

The only other evidence in the record offered by Banks to support his petition is his testimony about his discharge planning efforts, a written discharge plan, and a series of scholarly articles. While this evidence shows that Banks has given serious thought to the steps he would take to adjust to open society if discharged, these considerations alone are

not sufficient to establish a prima facie case for discharge. *See* Minn. Stat. § 253D.31; *Call*, 535 N.W.2d at 319. And finally, the scholarly articles that Banks offered into the record do not provide any evidence as to whether Banks, as an individual, meets the criteria for discharge. As the panel correctly found, none of these articles provide any information specific to Banks.

Banks has failed to present sufficient evidence to establish a prima facie case that he meets the criteria for discharge under Minn. Stat. § 253D.31. *Call*, 535 N.W.2d at 319. Even viewing the evidence offered by Banks in the light most favorable to him, the evidence is not competent to show that Banks is no longer dangerous to the public, and is no longer in need of treatment and supervision. *See* Minn. Stat. § 253D.31; *Call*, 535 N.W.2d at 319.

B. The panel did not make credibility determinations or weigh evidence.

Banks argues that the panel erred by making credibility determinations and weighing the evidence when considering the commissioner's motion to dismiss the petition. During a first-stage hearing on a discharge petition, the supreme court has instructed that

> the Appeal Panel may not weigh the evidence or make credibility determinations when considering a motion to dismiss under Rule 41.02(b) made at the close of a first-phase hearing. 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.

Coker, 831 N.W.2d at 490-91.

We find no support for Banks's argument that the panel weighed the evidence or made any credibility determinations. The panel's order reflects that the panel considered all of the evidence offered by Banks and viewed that evidence in the light most favorable to Banks. There is no indication in the order that the panel weighed the evidence or made any credibility determinations. This conclusion is confirmed by our own de novo review. As discussed above, even viewing the evidence in the light most favorable to Banks, the evidence introduced by Banks during the first-phase hearing was not sufficient to establish a prima facie case for discharge. Consequently, we conclude that the commitment appeal panel appropriately considered the evidence when it dismissed Banks's petition for discharge.

In sum, because Banks did not meet his burden to establish a prima facie case for discharge and because the panel appropriately evaluated Banks's evidence in accordance with the supreme court's instruction, the panel did not err when it dismissed the petition under Minn. R. Civ. P. 41.02(b).

II. Banks's assertions that he has been denied due process are without merit.

Banks also argues that MSOP violated his right to due process because MSOP did not provide him with a qualified expert who could testify on his behalf at the hearing and because MSOP failed to provide adequate treatment.

Banks did not raise these or any other due-process arguments during the first-phase hearing. An appellate court generally must consider only those issues raised below. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

Even if Banks's due-process claims are properly before us, his arguments are not supported by the record. First, Banks argues that he has a right under Minn. Stat. § 253B.03, subd. 5 (2018), to a "qualified assessment by a qualified expert so that he has the opportunity to go forward with competent evidence to the [panel]." He maintains that he was denied this right and as a result he was not able to establish a prima facie case for discharge. Minnesota Statutes section 253B.03 (2018) provides certain rights for civilly committed patients. Civilly committed patients have the right to periodic medical assessments, at least annually, including assessment of the medical necessity of continuing care. Minn. Stat. § 253B.03, subd. 5.

Banks does not dispute that he received periodic medical assessments as required by Minn. Stat. § 253B.03, subd. 5. Rather, he contends that MSOP staff who performed the assessments were not qualified experts who could have provided testimony on his behalf in support of his petition for discharge. Banks's argument is based solely on an assertion. There is no evidence in the record to support Banks's claim that the staff who performed his assessments were not qualified to provide testimony on the criteria for discharge set forth in Minn. Stat. § 253D.31. Nor does he cite any precedent holding that due process requires that staff who perform the assessments be qualified to provide expert testimony at a hearing on a petition for discharge. Consequently, this argument lacks merit.

Banks also argues that he was deprived of due process because he cannot afford to hire his own qualified expert. Here, too, Banks makes an assertion without any support. Banks does not cite to any evidence in the record to demonstrate that he cannot afford to hire an expert. And, notably, while Banks was represented by counsel at the hearing, his

attorney did not request that the panel appoint an expert to testify on Banks's behalf or state that Banks could not afford an expert. Nor did Banks's attorney call Dr. Marshall, the licensed psychologist and therapist who examined Banks prior to the hearing, to testify regarding whether Banks met the criteria for discharge. Banks's attorney also did not call MSOP professionals who prepared the treatment report and the sexual-violence risk assessment for the SRB. The record lacks support for Banks's claim that he was denied access to an expert who could testify as to whether he meets the criteria for discharge. Accordingly, Banks's argument that he was denied due process because MSOP did not provide him with "a qualified assessment by a qualified expert" is without merit.

Finally, Banks contends that he was deprived of due process because MSOP has not provided him with adequate treatment as required by Minn. Stat. § 253B.03, subd. 7. The record establishes Banks has chosen not to participate in treatment. "[A] person may not assert his right to treatment until he is actually deprived of that treatment." *In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). Moreover, Banks presented no evidence that the treatment he was offered was actually inadequate. Ultimately, because Banks has declined to participate in treatment, he cannot claim a due-process violation based on inadequate treatment.

In sum, because Banks failed to establish a prima facie case for discharge, and because Banks's constitutional claims are not supported by the record, we affirm the decision of the commitment appeal panel to dismiss Banks's petition for discharge.

Affirmed.