STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1732

In the Matter of the Civil Commitment of:
Peter Gerard Lonergan

Filed May 4, 2020
Affirmed; motion denied
Smith, John, Judge[*]

Commitment Appeal Panel
File No. AP17-9163

David A. Jaehne, West Saint Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, Michael N. Leonard, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

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Considered and decided by Worke, Presiding Judge; Florey, Judge; and Smith, John, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SMITH, JOHN, Judge

We affirm the commitment appeal panel's (CAP) dismissal, following a first-phase hearing, of appellant's petition for a discharge or provisional discharge from his civil commitment because appellant did not establish a prima facie case with competent evidence that he is entitled to relief.

FACTS

Appellant Peter Gerard Lonergan is a 58-year-old man with a history of engaging in criminal sexual conduct. In 1985, Lonergan pleaded guilty to second-degree criminal sexual conduct for the sexual abuse of a relative's 8-year-old daughter. In 1992, Lonergan was convicted of first-degree criminal sexual conduct following a jury trial for the sexual abuse of a relative's 8-year-old son.

In January 2008, Lonergan was civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) under Minn. Stat. § 253B.02, subd. 18c (2006).[1] In May 2009, Lonergan's indeterminate commitment to MSOP was finalized. Lonergan has not participated in sex-offender treatment at MSOP since 2015 and has not progressed beyond the first phase of MSOP's three-phase treatment program.

[1] In 2013, the legislature amended the Minnesota Commitment and Treatment Act by removing provisions regarding SDP and what are now known as sexual-psychopathic-personality (SPP) commitments from chapter 253B and moving them to a new chapter, 253D, titled "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities." 2013 Minn. Laws ch. 49, §§ 1-22, at 210-31.

In July 2016, Lonergan petitioned the special review board (SRB) for full discharge from his civil commitment. In August 2016, MSOP's executive director submitted a petition on Lonergan's behalf that also included requests for transfer to community preparation services (CPS) or a provisional discharge.[2] Respondents Minnesota Commissioner of Human Services and Dakota County opposed Lonergan's petition. In September 2017, the SRB held a hearing regarding Lonergan's petition. The SRB considered transfer to CPS, provisional discharge, and full discharge, and recommended that all three requests be denied.

Lonergan petitioned CAP for rehearing and reconsideration regarding his requests for transfer to CPS, provisional discharge, and full discharge. A hearing before CAP was initially scheduled for March 2018. In January 2018, Lonergan moved to continue the hearing and asked CAP to appoint a new examiner. CAP granted Lonergan's motion.

In August 2018, CAP held a phase-one hearing on Lonergan's petition. At the hearing, Lonergan clarified that he was not seeking transfer to CPS. Lonergan testified on his own behalf and presented testimony from his friends K.M. and B.M. and from Dr. Thomas Alberg, a licensed psychologist and court-appointed examiner. Lonergan submitted his discharge plan and a summary of facts and legal positions regarding his petition, which were received into evidence without objection.

During Lonergan's attorney's questioning of Dr. Alberg, Lonergan interjected and stated that his attorney had not contacted him recently, that he and his attorney were

[2] For the purposes of this opinion, we refer to the July 2016 and August 2016 petitions collectively as "Lonergan's petition."

unprepared, and that his attorney was not asking the questions he wanted asked. Lonergan's attorney continued to question Dr. Alberg and then asked whether Lonergan could ask Dr. Alberg questions. CAP denied that request. Lonergan's attorney later stated that Lonergan wanted him partially dismissed so he could ask Dr. Alberg questions. After a brief recess, the parties agreed to continue the hearing to give Lonergan additional time to talk to his attorney.

In June 2019, CAP held the continued hearing. Lonergan testified on his own behalf and presented testimony from the executive clinical director of MSOP.[3] Dr. Alberg did not appear at the hearing, and Lonergan waived his appearance.[4] Lonergan submitted a copy of a request for a variance from the administrative rules regarding MSOP, which was received into evidence without objection. The commissioner and the county jointly moved to dismiss Lonergan's petition under Minn. R. Civ. P. 41.02(b). CAP granted the motion, reasoning that Lonergan had not presented sufficient evidence on the elements governing provisional discharge or full discharge to avoid judgment as a matter of law.

Lonergan appeals.

D E C I S I O N

Petitions for full discharge and provisional discharge from civil commitment as an SDP are authorized under sections 253D.31 and 235D.30 of the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities

[3] Lonergan was represented by counsel at the June 2019 hearing.

[4] CAP later discovered that Dr. Alberg was attending a CAP hearing at a different courthouse and was not aware that Lonergan's hearing was scheduled for the same time.

(MCTA: SDP/SPP), Minn. Stat. §§ 253D.01-.36 (2018 & Supp. 2019). A petitioner seeking discharge or 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). "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). If the petitioner meets his burden of production at the first-phase hearing, then the party opposing discharge must prove, by clear and convincing evidence, that the discharge or provisional discharge request should be denied. Minn. Stat. § 253D.28, subd. 2(d). "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*, 831 N.W.2d at 486.

CAP granted respondents' joint motion to dismiss under Minn. R. Civ. P. 41.02(b) at the end of the first-phase hearing. *See Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014) ("After the [petitioner] has completed the presentation of evidence, the commissioner may move to dismiss the petition under Minn. R. Civ. P. 41.02(b)."). Rule 41.02(b) provides, "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." When considering a motion to dismiss under rule 41.02(b), CAP "is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person" and "may not weigh the evidence or make

credibility determinations."[5] *Coker*, 831 N.W.2d at 484, 490-91. We review the dismissal of a discharge petition under rule 41.02(b) de novo. *Larson*, 847 N.W.2d at 532-33.

I.

A person who is committed as an SDP "shall not be [fully] discharged unless it appears to the satisfaction of the [CAP] . . . 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." Minn. Stat. § 253D.31. In determining whether to grant a full discharge, CAP must 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." *Id.* "If the desired conditions do not exist, the discharge shall not be granted." *Id.*

Lonergan contends that CAP erred by dismissing his petition for discharge under rule 41.02(b). Lonergan argues that he "submitted considerable documentary evidence" and testimony from five witnesses, three of whom supported release, in support of his assertion that he does not need treatment and supervision. Lonergan also argues that he "demonstrated through his discharge plan, through testimony of his societal supports, . . . through his current behavior, [and through] the considerable statistical evidence submitted in his" [summary of facts and legal positions and hearing exhibits], that he does not pose a danger to the public.

[5] Lonergan argues that CAP "improperly weighed evidence" in dismissing his discharge petition. Because this court's review of the dismissal of a discharge petition under rule 41.02(b) is de novo, *Larson*, 847 N.W.2d at 532-33, we need not address that argument.

Lonergan submitted three exhibits during the first-phase hearing: his discharge plan, a summary of facts and legal positions regarding his petition, and a copy of a variance request regarding MSOP. Lonergan's discharge plan includes information regarding potential discharge options, treatment needs, discharge conditions, employments services, and Lonergan's support system. In his summary of facts and legal positions, Lonergan argues that CAP improperly continued this matter beyond statutory limitations; that Dr. Alberg is not a qualified or credible witness; and that Lonergan does not have a currently valid mental illness. The variance request states that it is a request from MSOP for a variance from specific Minnesota Department of Human Services administrative rules. None of the exhibits provide information specific to Lonergan's treatment status or his risk to the public.

Dr. Alberg testified that he diagnosed Lonergan with pedophilic disorder. Dr. Alberg testified that a pedophilic-disorder diagnosis was appropriate because Lonergan has "engaged in sexual relations with prepubescent children that [went] on for a period of over six months," and because Lonergan has "obviously been aroused to children" and that has "obviously caused difficulty in his life." Dr. Alberg testified that Lonergan's pedophilic diagnosis "could be considered in remission in a controlled environment," but that "[h]e's only in remission because he hasn't had any access to children" and that "[w]e don't know what his behavior would be if he was in a place where he had access to children." Dr. Alberg testified that Lonergan "needs to participate in therapy . . . so we can understand what kind of thought process he has, so he can discuss what his arousal pattern is, [and] what he does to deal with his arousal pattern." Dr. Alberg further testified that Lonergan

"essentially is not giving any information that would help anybody ascertain what his level of arousal and fixation on children is at the present time." When Lonergan's attorney asked Dr. Alberg whether Lonergan's current presentation indicated that a pedophilic diagnosis was still accurate, Dr. Alberg testified that Lonergan told him "he didn't offend with [a] girl [victim] because it wasn't a sexual attraction to him, that it was a situation where he felt accepted and cared for by the child, and it just kind of somehow accidentally turned into a sexual event." Dr. Alberg testified that Lonergan's explanation for that incident was "something [he has] heard from pedophiles numerous . . . times over the years."

Lonergan testified that he participated in group treatment at MSOP for six-and-one-half years, but stopped participating in April 2015. Lonergan testified that he stopped participating in group treatment because there is "no way for [him] to progress in treatment under the MSOP rules" and because the facts on which his treatment is based are incorrect and he is not allowed to correct them. Lonergan testified that he continues to participate in individual therapy. Lonergan testified that he does not have a current diagnosis because it has been more than a year since he has received any diagnosis. Lonergan testified that he has shown no signs that he has a mental illness or that he is dangerous while at MSOP and that he has not shown "any pedophilic tendencies in the last 27 years." Lonergan testified that he does not "have deviant fantasies," that he has never been sexually attracted to children, and that he "never had pedophilic disorder." Lonergan testified that a belief that there is a correlation between sex-offender treatment and the risk of recidivism is "junk science." Lonergan further testified that Dr. Alberg was biased and that he made reports "that do not follow the professional rule of ethics for psychologists." Lonergan testified

that he is not a psychologist and has not been trained in risk assessment, that he did not need additional treatment, but that he would complete outpatient treatment, if necessary.

K.M. testified that she was familiar with Lonergan's treatment history and that he had improved over time. However, K.M. testified that she could not opine on Lonergan's treatment needs or assess his risk to commit another sexual offense. B.M. testified that Lonergan had "mellowed with age," but that he was not familiar with Lonergan's progress in treatment, could not opine on his treatment needs, and was not qualified to assess his risk to commit another sexual offense. MSOP's executive clinical director testified that she had never rendered a mental diagnosis for Lonergan, and that making such diagnoses is not part of her daily job. She acknowledged that she does not personally work with individual clients.

The only record evidence that supports Lonergan's assertion that he no longer needs treatment and supervision and no longer poses a danger to the public is his own testimony that he has not shown signs that he has a mental illness or is dangerous while at MSOP, that he does not have deviant fantasies, that he has never been sexually attracted to children, and that he "never had pedophilic disorder." "[C]onclusory assertions by a committed person," standing alone, are insufficient "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). Thus, Lonergan cannot meet his burden of production based solely on his own testimony regarding his treatment status and need for supervision.

Although Dr. Alberg testified that Lonergan's pedophilic disorder "could be considered in remission in a controlled environment," Dr. Alberg explained that it could

only be considered in remission because Lonergan lacked access to children and that because Lonergan was not participating in treatment, it was not possible to know his current "level of arousal and fixation on children." Moreover, Dr. Alberg testified that Lonergan continues to engage in thinking consistent with a pedophilic disorder, as evidenced by Lonergan telling him that he did not "offend with" a victim because he was sexually attracted to the victim but because he "felt accepted and cared for by the child, and it just kind of somehow accidentally turned into a sexual event."

Lonergan argues that "[i]t is clear that Dr. Alberg is not an independent expert," but is a "biased psychologist." Again, CAP "is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person" and "may not weigh the evidence or make credibility determinations." *Coker*, 831 N.W.2d at 484, 490-91. It is likewise not appropriate for us to weigh evidence or make such credibility determinations on appeal. And if we were to disregard Dr. Alberg's testimony, the only remaining relevant evidence would be Lonergan's self-serving testimony, which alone is insufficient to present a prima facie case.

In sum, viewing the record in the light most favorable to Lonergan, Lonergan's otherwise uncorroborated assertions do not meet his burden of production to show that he does not need treatment and supervision and does not pose a danger to the public. *See Poole*, 921 N.W.2d at 69 (concluding that a committed person's "otherwise uncorroborated assertions regarding the risk he poses to the public [were not] sufficient to establish a prima facie case that he [was] not a danger to the public"). Because Lonergan did not present a

prima facie case with competent evidence showing that he is entitled to full discharge, CAP did not err by dismissing his petition for discharge under rule 41.02(b).

II.

A person who is committed as an SDP "shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a). In determining whether to grant a provisional discharge, CAP 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).

Lonergan contends that CAP erred by dismissing his petition for provisional discharge under rule 41.02(b). Lonergan points out that he participated in six-and-one-half years of treatment at MSOP and argues that "[s]ince there is zero evidence of any sexual deviance by [him] in nearly three decades, this indicates [he] does not require treatment in the current setting." Lonergan argues that, "[a]s testified to by Dr. Alberg, [his] current mental status is Pedophilic Disorder, in remission in a controlled environment," and the respondents solely relied on "[his] criminal record in his examinations to support allegations of dangerousness and/or treatment."

Dr. Alberg testified that Lonergan's pedophilic disorder could only be considered in remission because Lonergan lacked access to children. Dr. Alberg also testified that because Lonergan was not participating in treatment, it was not possible to know his current "level of arousal and fixation on children," and that treatment was necessary to better understand his thought process and arousal pattern. However, as explained, Dr. Alberg did testify that "there's reason to think [Lonergan] has pedophilic thinking" based on Lonergan's explanation for his sexual abuse of a child victim. Dr. Alberg's testimony suggests that Lonergan needs continued treatment and supervision at MSOP to better understand and address his thought process and arousal pattern.

Lonergan further argues that "[i]t is only MSOP *employees* and Minnesota court contractors, who make their primary living by keeping [him] civilly committed," who believe he needs more sex-offender treatment at MSOP. But at the first-phase hearing, Lonergan only presented the following as evidence: (1) exhibits that do not provide information specific to Lonergan's treatment status or his risk to the public; (2) the testimony of K.M. and B.M., who testified that they could not opine regarding Lonergan's treatment needs; and (3) his own self-serving testimony. Again, Lonergan's uncorroborated assertions that he no longer needs treatment and supervision at MSOP are insufficient to meet his burden of production. *See Poole*, 921 N.W.2d at 69.

As to whether the conditions of Lonergan's provisional discharge plan will provide a reasonable degree of protection to the public and enable him to adjust successfully to the community, Lonergan did not present evidence regarding his discharge plan from anyone who was qualified to opine regarding whether those conditions were appropriate given his

current treatment needs or whether the plan provided a reasonable degree of protection to the public. Instead, he again relied on his own testimony and the testimony of K.M. and B.M., who testified that they were not qualified to express an opinion regarding Lonergan's treatment needs or his risk to commit another sexual offense.

In sum, viewing the record in the light most favorable to Lonergan, Lonergan did not present a prima facie case with competent evidence showing that he is entitled to provisional discharge. CAP therefore did not err by dismissing his petition for discharge under rule 41.02(b).

III.

Lonergan contends that CAP violated his due-process rights by not providing him a second-phase hearing. Lonergan argues that under United States Supreme Court and Minnesota Supreme Court caselaw, a committed person's due-process rights entitle the person "to periodic assessment and release from continued commitment once [the person] has recovered" from the person's mental illness. (Footnote omitted.) Lonergan argues that the record indicates that there is no medical justification for his continued civil commitment.

In re Blodgett, a case involving the psychopathic-personality statute, the predecessor statute to the MCTA: SDP/SPP, the supreme court stated that "[s]o long as civil commitment is programmed to provide treatment and periodic review, due process is provided." 510 N.W.2d 910, 916 (Minn. 1994). The supreme court held that the psychopathic-personality statute did not violate substantive due process because Minnesota's commitment system provided for periodic review and reevaluation of the need

for continued confinement, which provided a committed person an opportunity to "demonstrate that he has mastered his sexual impulses and is ready to take his place in society." *Id.* In that case, the supreme court concluded that if there was a remission of the committed person's sexual disorder and "his deviant sexual assaultive conduct [was] brought under control, he, too, [would be] entitled to be released." *Id.*

In *Call v. Gomez*, another case addressing the psychopathic-personality statute, the supreme court explained that "so long as application of the statutory criteria comports with the basic constitutional requirement that the nature of commitment bear some reasonable relation to the purpose for which the individual was originally committed, the statutory discharge criteria . . . should apply to persons committed as psychopathic personalities." 535 N.W.2d 312, 318 (Minn. 1995) (quotation omitted). The supreme court explained that confinement bears a reasonable relation to the original reason for commitment so long as a person subject to commitment as a psychopathic personality "is confined for only so long as he . . . continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public." *Id.* at 319. However, in *Caprice v. Gomez*, this court clarified that "[r]equiring the committed person in a discharge proceeding . . . to bear the initial burden of going forward with the evidence is not unconstitutional, where the state has the ultimate burden of persuasion to show commitment should be continued." 552 N.W.2d 753, 754-55 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

More recently in *Poole*, a person indeterminately committed as an SDP argued that the statutory discharge criteria deprived committed persons of due process. 921 N.W.2d at 69. We rejected that argument, reasoning that the Minnesota Supreme Court has upheld

the constitutionality of the SDP statute. *Id.* at 70. In doing so, we reiterated *Call*'s admonition that a person "can remain confined 'for only so long as he . . . continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public.'" *Id.* at 66, 69 (quoting *Call*, 535 N.W.2d at 319).

And in *Foucha v. Louisiana*, the United States Supreme Court explained that substantive due process permits a person who was civilly committed based on insanity to "be held as long as he is both mentally ill and dangerous, but no longer." 504 U.S. 71, 77-80, 112 S. Ct. 1780, 1784-86 (1992). The Supreme Court held that it was thus unconstitutional for Louisiana to continue to confine a person who was no longer considered mentally ill solely because he was deemed dangerous. *Id.* at 86, 112 S. Ct. at 1788-89.

Lonergan had the opportunity to "demonstrate that he has mastered his sexual impulses and is ready to take his place in society" by petitioning for discharge and provisional discharge under Minn. Stat. §§ 253D.30, .31. *See Blodgett*, 510 N.W.2d at 916. Lonergan took advantage of that opportunity. However, as detailed above, he failed to present a prima face case with competent evidence showing that he does not need further treatment and supervision at MSOP for his pedophilic disorder. CAP therefore did not violate his substantive due-process rights by not providing him a second-phase hearing.

IV.

Lonergan moved to strike the statement of facts in the commissioner's brief on the grounds that statements therein are not a part of the record on appeal and are "wholly irrelevant." Lonergan specifically objects to the commissioner's inclusion of statements

that originate from his civil commitment order, arguing that the "reasons of civil commitment are irrelevant to whether or not [he] should remain civilly committed as a sexually dangerous person." Because we did not consider the commissioner's statement of facts in deciding this case, we deny Lonergan's motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying as moot motion to strike where court did not rely on challenged materials).

Affirmed; motion denied.