STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0810

In the Matter of the Civil Commitment of:
Reginald Eddie McKinley.

Filed November 9, 2020
Affirmed
Segal, Chief Judge

Commitment Appeal Panel
File No. AP19-9114

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Keith Ellison, Attorney General, Molly Beckius, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

John J. Choi, Ramsey County Attorney, Timothy Carey, Assistant County Attorney, St. Paul, Minnesota (for respondent Ramsey County)

Considered and decided by Segal, Chief Judge; Hooten, Judge; and Gaïtas, Judge.

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

SEGAL, Chief Judge

Appellant challenges the denial of his petition for a provisional or full discharge from his indeterminate civil commitment to the Minnesota Sex Offender Program as a sexually dangerous person. Because appellant failed to make out a prima facie case to support his petition, we affirm.

FACTS

Appellant Reginald Eddie McKinley committed a series of violent sexual assaults. McKinley was committed in 2008 on an indeterminate basis to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP). McKinley appealed the commitment and this court affirmed.[1] *In re Civil Commitment of McKinley*, No. A08-2062, 2009 WL 1182545 (Minn. App. May 5, 2009), *review denied* (Minn. Jun. 30, 2009).

McKinley was transferred to the MSOP before he had completed his prison term. In March 2009, McKinley was sent back to prison for possessing homemade alcohol. He was returned to the MSOP in September 2009. By 2013, McKinley had advanced from Phase I to Phase II of the three phases of treatment. In November 2017, however, McKinley stopped meaningful participation in treatment. In December 2017, McKinley was accused of assaulting his roommate and, in January 2018, he was sent back to prison because he was not participating in treatment. McKinley's prison sentence expired six months later and he was returned to the MSOP where he, again, refused to participate in treatment.

In July 2018, McKinley petitioned the Special Review Board (SRB) for a transfer or a provisional or full discharge from the MSOP. McKinley provided the SRB with a written statement asserting that he did not have a sexual disorder, that the existing diagnoses of him were incorrect or stale or both, and that he was not dangerous to the

[1] In addition, this court had previously affirmed his most recent criminal conviction for the sexual assault of an eight-year-old victim. *State v. McKinley*, No. C7-00-1263, 2001 WL 506530 (Minn. App. May 15, 2001).

public. After a hearing, the SRB recommended denying McKinley's requests for relief. McKinley then sought review by the Commitment Appeal Panel (CAP).

The CAP-appointed psychologist who evaluated McKinley prepared a 37-page report diagnosing McKinley with five personality disorders: (a) other specified paraphilic disorder (rape/non-consensual females) in a controlled environment; (b) three "severe" disorders related to McKinley's abuse of chemicals, each of which is in sustained remission while he is in a controlled environment; and (c) other specified personality disorder with antisocial and narcissistic features. The report notes that McKinley has failed to participate in treatment since 2017 and "is adamant that he no longer is in need of any form of treatment, especially sex offender treatment." The report goes on to state that

> [McKinley] has . . . demonstrated and articulated that he is not open to additional sex offender or chemical dependency treatment despite clearly demonstrated continued treatment need areas; . . . failed to fully understand his sexual offense cycle and dynamics; and . . . failed to generate a relapse prevention plan or provisional discharge plan despite petitioning for release from MSOP and understanding the requirements of such, including the basic necessities of treatment participation, relapse prevention plans, and the importance and necessity of MSOP-approved relapse and discharge plans.

The evaluation concludes: "The undersigned does not support either a [t]ransfer to [Community Preparation Services, a less structured treatment program], provisional discharge, or discharge from Mr. McKinley's commitment as SDP. . . . [His] risk of sexual recidivism is in the Above Average to Well Above Average range."

At the hearing before the CAP, McKinley withdrew his request for a transfer. As exhibits, McKinley submitted the evaluation and the written statement he had previously submitted to the SRB. In his testimony, McKinley disputed the evaluator's diagnosis and claimed that he no longer needed treatment. He also argued that, at his age of 62, he was no longer dangerous. With regard to a provisional discharge plan, McKinley testified that he wanted to start a painting business and live with a sister or a friend. McKinley failed to provide any clinical opinions in support of his petition.

At the close of McKinley's case, the Commissioner of Human Services moved the CAP, under Minn. R. Civ. P. 41.02(b), to dismiss McKinley's petition on the grounds that he failed to make out a prima facie case. Ramsey County joined the motion. The CAP granted the joint motion to dismiss McKinley's petition, ruling that he failed to produce competent evidence sufficient to make out a prima facie case for either full or provisional discharge. McKinley appeals.

D E C I S I O N

In an appeal before the CAP, the Minnesota Supreme Court has made it clear that "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." *Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013) (quotations, citations, and footnote omitted); *see also Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014). The burden is one of production. *Coker*, 831 N.W.2d at 485-86. Only if the committed person satisfies this burden of production, does the party opposing

the petition need to come forward with clear and convincing evidence that the discharge or provisional discharge should be denied. *Id*.

If the committed person fails to make out a prima facie case, it is appropriate to dismiss the petition at the close of the committed person's case under Minn. R. Civ. P. 41.02(b). *Coker*, 831 N.W.2d at 488; *Larson*, 847 N.W.2d at 535. "[W]hen a judicial appeal panel dismisses a petition under Minn. R. Civ. P. 41.02(b), the appropriate standard of appellate review is de novo." *Larson*, 847 N.W.2d at 534.

I.

We turn first to the issue of a provisional discharge. The relevant factors to consider in evaluating a petition for a provisional discharge of a person committed as an SDP are:

> (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.

In re Civil Commitment of Kropp, 895 N.W.2d 647, 650 (Minn. App. 2017) (quoting Minn. Stat. § 253D.30, subd. 1(b) (2016)), *review denied* (Minn. June 20, 2017). To withstand a motion to dismiss a petition for failure to present a prima facie case, the committed person must provide competent evidence on both factors. *Coker*, 831 N.W.2d at 490-91.

On the first factor, the need for ongoing treatment, McKinley's evidence consisted only of his own opinion that his diagnoses were not correct and that he was not in need of

treatment. The CAP characterized McKinley's evidence, we believe correctly, as conclusory and unsupported. Conclusory allegations are insufficient to make out a prima facie case. *In re Civil Commitment of Poole*, 921 N.W.2d 62, 68-69 (Minn. App. 2018). Thus, the dismissal can be affirmed for failing to make out a prima facie case on the first factor.

We also conclude that McKinley failed to produce competent evidence with regard to the second factor, whether the committed person's proposed 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). Providing "a provisional discharge plan is a necessary step before [a CAP can] even begin to consider a provisional discharge." *Larson*, 847 N.W.2d at 536.

Similar to his evidence on the first factor, McKinley's evidence on this factor consisted only of his own testimony about starting a painting business and living with his sister or a friend. He put forward no evidence, clinical or otherwise, to address either public safety or a plan for successful adjustment. Moreover, as concluded in the evaluator's report, McKinley failed to participate in the very treatment that might allow him to better control his impulses. For example, the evaluator noted that the use of alcohol or drugs was a factor in the sexual assaults that caused his commitment. Yet, the records indicate that "he has yet to discuss the relationship of his chemical use with that of his sexual offending behavior" and "is not open to additional . . . chemical dependency treatment."

We thus conclude that McKinley failed to satisfy his burden of producing competent evidence on either factor to be considered in granting a petition for a provisional discharge and the CAP did not err in granting the motion to dismiss his petition.

II.

Because "the criteria for a provisional discharge are more lenient than the criteria for a [full] discharge," a failure to make out a prima facie case for a provisional discharge is fatal to a petition for a full discharge. *Larson*, 847 N.W.2d at 535-36. As such, we do not need to separately address McKinley's appeal of the dismissal of his petition for a full discharge.

Affirmed.