STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1613

In the Matter of the Civil Commitment of: Brian Lee Wilbur.

Filed May 2, 2022
Affirmed
Reyes, Judge

Commitment Appeal Panel
File No. AP20-9042

Brian Lee Wilbur, Moose Lake, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Carolyn Peterson, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Klaphake, Judge.[*]

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues that (1) the Commitment Appeal Panel (CAP) erred by dismissing his petition for provisional discharge or full discharge from civil commitment as a sexually dangerous person (SDP); (2) due process entitles him to release; and (3) he received ineffective assistance of counsel. We affirm.

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

FACTS

The district court indeterminately civilly committed appellant Brian Lee Wilbur to the Minnesota Sex Offender Program (MSOP) as an SDP in 2015 after his release from prison for the latest of several sex offenses committed between 1987 and 1997. *See In re Civ. Commitment of Wilbur*, No. A15-0550, 2015 WL 5511467 (Minn. App. Sept. 21, 2015), *rev. denied* (Minn. Nov. 25, 2015). In April 2019, appellant petitioned a Special Review Board (SRB) for provisional discharge or full discharge from civil commitment.[1] Respondents Minnesota Commissioner of Human Services and Hennepin County opposed appellant's petition. The SRB denied appellant's petition. Appellant petitioned for rehearing and reconsideration by the CAP. The CAP held a Phase I hearing on appellant's petition. With the assistance of counsel, appellant submitted written materials and called two witnesses at the hearing.

Appellant's written materials included documents in which appellant assessed his own progress; records of MSOP staff praising appellant's participation in various treatment modules; a provisional discharge plan provided by appellant; an April 28, 2021 mental-health assessment by William Halmon which diagnosed appellant with Other Specified Paraphilic Disorder In a Controlled Environment and Other Specified Personality Disorder with Antisocial Features; and a district court order for Intensive Supervised Release (ISR) that appellant is subject to until 2032.

[1] Appellant also petitioned for transfer to Community Preparation Services, but he withdrew that request at his CAP hearing.

Appellant called Dr. Wanda Berg and William Halmon to testify. Dr. Berg is a clinical staff member at MSOP and has experience with the ISR program through her past work as a probation agent with Olmstead County. Dr. Berg worked with appellant on one treatment module in 2018 and testified about his progress in that module. Dr. Berg also testified that she has never been appellant's primary therapist; their interactions outside the 2018 module were informal; she never assessed him; and she had not reviewed his treatment records. Halmon is a clinical-program therapist at MSOP. Halmon explained appellant's diagnoses but stated that he could not opine on whether appellant meets the criteria for discharge.

At the end of the hearing, respondents moved to dismiss appellant's petition under Minn. R. Civ. P. 41.02(b), arguing that appellant had not presented a prima facie case that he is entitled to provisional or full discharge. The CAP agreed with respondents and dismissed appellant's petition. This appeal follows. Although counsel represented appellant at the CAP hearing, he is self-represented on appeal.

DECISION

I. Standard of review

A person civilly committed as an SDP may petition for provisional discharge or full discharge. Minn. Stat. §§ 253D.30-.31 (2020). The committed person first files a petition with the SRB, which conducts a hearing and issues a recommendation to the CAP. Minn. Stat. § 253D.27, subd. 2 (2020). The petitioner may seek rehearing and reconsideration of the SRB's recommendation by petitioning the CAP. Minn. Stat. § 253D.28 (2020). The CAP holds a Phase I hearing at which the petitioner bears the burden of production of

"presenting a prima facie case with competent evidence to show that the [petitioner] is entitled to" provisional or full discharge. *Id.*, subd. 2(d); *Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014). To make a prima facie case, the petitioner must produce "sufficient, competent evidence that, if proven," would entitle him to relief. *See Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013). If the petitioner satisfies that burden, the CAP next holds a Phase II hearing at which the respondent has the burden of proving that provisional or full discharge should be denied. *See* Minn. Stat. § 253D.28, subd. 2(d).

After the Phase I hearing, the respondent may move to dismiss the petition under Minn. R. Civ. P. 41.02(b) if it believes that the petitioner has not made a prima facie case for relief. *Larson*, 847 N.W.2d at 535. When considering a motion to dismiss under rule 41.02(b), the CAP may not weigh evidence and must view the evidence in the light most favorable to the petitioner. *Id.* We review de novo the CAP's dismissal of a provisional- or full-discharge petition. *Id.* at 534.

II. The CAP did not err by dismissing appellant's petition for provisional discharge.

Appellant argues that he presented sufficient evidence to make a prima facie case that he is entitled to provisional discharge and that the CAP improperly weighed the evidence and failed to view the evidence in the light most favorable to him. We disagree.

A person civilly committed as an SDP "shall not be provisionally discharged unless [he] is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a). The CAP must consider two factors in determining whether to grant provisional discharge:

> (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).

On the first statutory factor, appellant primarily argues that he no longer needs treatment and supervision because he does not currently suffer from a mental disorder. That assertion is not supported by the record. Halmon testified that appellant's current diagnoses of Other Specified Paraphilic Disorder and Other Specified Personality Disorder with Antisocial Features were correct, and that appellant is not considered in remission for his paraphilic disorder. Appellant's only contrary evidence is his own assertion that he does not meet the criteria for those disorders, based on his reading of the DSM-5.[2] Appellant's own uncorroborated assertion is insufficient to establish a prima facie case that he is no longer in need of inpatient treatment. *See In re Civ. Commitment of Poole*, 921 N.W.2d 62, 68-69 (Minn. App. 2018), *rev. denied* (Minn. Jan. 15, 2019).

Similarly, although appellant provided evidence that he has participated in treatment and received praise from MSOP staff for his progress, nothing in the record suggests that he has progressed to the point that he no longer needs inpatient treatment or supervision. Although Dr. Berg testified that appellant did well on one treatment module in 2018,

[2] The Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2015) (DSM-5) is the most recently published edition of the American Psychiatric Association's manual providing diagnostic criteria for mental disorders.

neither Dr. Berg nor Halmon were familiar with appellant's overall progress. More importantly, both stated that they could not opine on whether appellant met the statutory discharge criteria. Appellant has therefore failed to meet his burden of production on the first statutory factor.

On the second statutory factor, appellant did not present evidence from anyone qualified to opine on whether his plan provided a reasonable degree of protection to the public. Both witnesses stated that they were not qualified to make a risk assessment or give an opinion on this factor.

Appellant argues that the ISR order provides adequate evidence to make a prima facie case that the public will be protected and that he will adjust successfully to the community. But the ISR order existed at the time of appellant's initial commitment, and the ISR order alone does not address whether the conditions *of his provisional discharge plan* "will provide a reasonable degree of protection to the public," and enable him to "adjust successfully to the community" as required by section 253D.30, subd. 1(b). Dr. Berg testified generally about the ISR process but did not discuss how appellant's ISR order would apply to the statutory criteria here. Appellant has therefore failed to meet his burden of production on this factor as well.

Finally, appellant argues that the CAP improperly weighed evidence and failed to view the evidence in the light most favorable to him. The CAP noted that it viewed the evidence in the light most favorable to appellant but that appellant had nevertheless produced no competent evidence to support his assertion that he does not have a mental disorder, that he could make an acceptable adjustment to open society, or that the ISR

conditions sufficiently protect the public. Our independent review of the evidence supports the CAP's analysis. We conclude that the CAP did not err by dismissing appellant's petition for provisional discharge.

III. The CAP did not err by dismissing appellant's petition for full discharge.

Because the provisional-discharge criteria are more lenient than the criteria for full discharge, appellant's failure to make a prima facie case for provisional discharge means that he also failed to make a prima facie case for full discharge. *See Larson*, 847 N.W.2d at 535-36. We therefore conclude that the CAP did not err by dismissing appellant's petition for full discharge.

IV. Due process does not require appellant's release from commitment.

Appellant argues that due process requires his release because he does not have a mental disorder and is not dangerous and so the basis for his commitment no longer exists. Appellant's argument fails.

There is a general constitutional requirement that "the nature of [a civil] commitment bear some reasonable relation to the purpose for which the individual was originally committed." *Call v. Gomez*, 535 N.W.2d 312, 318 (Minn. 1995) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992)). In addressing the predecessor statute to the current SDP statute, the supreme court held that

> [S]o long as the statutory discharge criteria are applied in such a way that the person . . . 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, continued commitment is justified because the confinement bears a reasonable relation to the original reason for commitment.

Id. at 319.

As discussed above, viewing the evidence in the light most favorable to him, appellant did not make a prima facie case that he no longer needs inpatient treatment and supervision or that he no longer poses a danger to the public. Accordingly, appellant has not been denied due process because his confinement bears a reasonable relation to the original reason for his commitment.

V. Appellant fails to show that he received ineffective assistance of counsel.

Appellant argues that he received ineffective assistance of counsel on his petition for provisional or full discharge. We are not persuaded.

A civilly committed person has a statutory right to be represented by counsel. Minn. Stat. § 253D.20 (2020). We analyze ineffective-assistance-of-counsel claims in civil-commitment cases under the *Strickland* standard that applies in criminal cases. *See Beaulieu v. Minn. Dep't of Hum. Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011), *aff'd on other grounds*, 825 N.W.2d 716 (Minn. 2013). Under this standard, appellant must show that (1) his counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Although we review a claim of ineffective assistance of counsel de novo, *see State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017), we apply "a strong presumption that an attorney's performance falls within the wide range of reasonable professional assistance," *In re Civ. Commitment of Johnson*, 931 N.W.2d 649, 657 (Minn. App. 2019) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2019).

Appellant fails to meet either prong of the *Strickland* test. Appellant argues that his counsel did not adopt appellant's preferred strategies and did not prepare for the CAP hearing consistent with the legal position appellant wanted to assert. Appellant also argues that his counsel should have moved for assistance from an independent forensic psychiatric expert who could have testified in support of appellant's theory that he does not suffer from a mental disorder. But appellant's disagreements with his counsel constitute matters of strategy, which we do not review. *See Andersen v. State*, 830 N.W.2d 1, 13 (Minn. 2013) (noting that trial strategy, which includes selection and presentation of evidence, which witnesses to call, and extent of investigation into particular theories, is not reviewable).

Additionally, on appellant's request, the CAP permitted appellant to ask the witnesses follow-up questions and to submit his own posthearing written summary of facts and his legal position. Appellant used those opportunities to advance his preferred arguments and strategies. The CAP considered his arguments and rejected them. Appellant has therefore also failed to establish that there is a reasonable probability that, but for his counsel's alleged errors, the result of the proceeding would have been different.

Affirmed.