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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1101

Michael Lee Gessell,
Appellant,

vs.

Lucinda E. Jesson,
Commissioner of Human Services,
Respondent,

Anoka County Social Services,
Respondent.

Filed November 28, 2011
Affirmed
Kalitowski, Judge

Judicial Appeal Panel
File No. AP109041

Michael C. Hager, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Anthony C. Palumbo, Anoka County Attorney, Janice M. Allen, Assistant County Attorney, Anoka, Minnesota (for respondent Anoka County Social Services)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Collins, Judge.[*]

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

KALITOWSKI, Judge

Appellant Michael Lee Gessell challenges the judicial appeal panel's order denying and dismissing his petition for transfer to a nonsecure facility or provisional or full discharge from his indeterminate commitment as a sexually dangerous person. We affirm.

D E C I S I O N

Appellant is 25 years old and has been civilly committed as a sexually dangerous person (SDP) since age 19. Appellant was adjudicated a juvenile delinquent at age 12 after pleading guilty to a charge of criminal sexual conduct in the fifth degree for sexually assaulting his eight-year-old sister. From the time of his offense until age 19, appellant was placed in at least four sex offender correctional and treatment programs, but was transferred or discharged because he failed to make progress in treatment and engaged in inappropriate sexual behavior. This repeated behavior included masturbation, voyeurism, making sexual gestures towards others, engaging in sexual contact with peers, and stalking others in treatment settings. Upon petition by respondent Anoka County, appellant was indeterminately committed as an SDP in 2006. He was committed to the Minnesota Sexual Offender Program (MSOP) in St. Peter and subsequently transferred to the Moose Lake facility.

On July 28, 2009, appellant petitioned the special review board (SRB) for full or provisional discharge from his commitment or transfer to a nonsecure facility. The SRB recommended denial of appellant's petition and appellant sought reconsideration by the

judicial appeal panel. On March 25, 2011, the appeal panel heard his petition. Appellant testified at the hearing, as did his grandfather and Dr. James Gilbertson, Ph.D., an independent court-appointed examiner. Respondents Anoka County and Lucinda Jesson, Commissioner of Human Services, moved to dismiss pursuant to Minn. R. Civ. P. 41.02(b) and the panel granted their motion, concluding that appellant did not establish a prima facie case for transfer to a nonsecure facility or full or provisional discharge. *See* Minn. R. Civ. P. 41.02(b) ("After the plaintiff has completed the presentation of evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief.").

In an appeal from the panel's order, this court reviews legal determinations as a matter of law. *Coker v. Ludeman*, 775 N.W.2d 660, 663 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010). Challenges to the appeal panel's findings of fact are reviewed under a clearly erroneous standard. *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985). This court will not weigh the evidence as if trying the matter de novo, but must determine from an examination of the record whether the evidence as a whole sustains the panel's findings. *Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004).

Appellant's burden in a petition for full or provisional discharge is 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. § 253B.19, subd. 2(d) (Supp. 2011). When this burden is met, the opposing party bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be

denied. *Id.* Appellant must proffer "some sworn competent testimony" that would enable a fact-finder to determine that he meets the statutory requirements for discharge. *Coker*, 775 N.W.2d at 664 (quotation omitted). As to his petition for transfer to a nonsecure facility, appellant is subject to a higher burden and "must establish by a preponderance of the evidence that the transfer is appropriate." Minn. Stat. § 253B.19, subd. 2(d). Appellant's requests for transfer and discharge will be addressed in turn.

Transfer to a nonsecure facility

An individual committed as an SDP may not be transferred out of a secure treatment facility unless the appeal panel determines that the transfer is appropriate. Minn. Stat. § 253B.185, subd. 11(a) (2010). The following factors must be considered: "(1) the person's clinical progress and present treatment needs; (2) the need for security to accomplish continuing treatment; (3) the need for continued institutionalization; (4) which facility can best meet the person's needs; and (5) whether transfer can be accomplished with a reasonable degree of safety for the public." *Id.*, subd. 11(b).

In addressing appellant's petition for transfer to a nonsecure facility, the appeal panel erroneously applied the lower burden of going forward with the evidence. But because the panel found that appellant failed to meet the lower burden of production, its error was not prejudicial to appellant and will be ignored on appeal. *See* Minn. R. Civ. P. 61 ("The court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

The appeal panel determined: (1) security is needed to accomplish appellant's treatment; (2) appellant presents a need for continued institutionalization; (3) MSOP is

the facility best suited to meet appellant's needs; and (4) transfer cannot be accomplished while providing a reasonable degree of safety for the public. The panel found that appellant was not engaging in treatment programs and presented a high risk of reoffense. The panel noted that treatment personnel and Dr. Gilbertson did not recommend transfer due to appellant's failure to progress in treatment, and noted appellant's history of problematic sexual behavior while in treatment.

Appellant first argues that transfer is appropriate because, since his juvenile delinquency adjudication, he has matured and undergone treatment for 12 years. He states that his home visits during precommitment outpatient treatment were successful and indicate that relaxed security is now appropriate. But the only evidence proffered to support these assertions is appellant's own testimony and that of his grandfather. And although appellant has been in treatment for years, the record establishes that he has not sufficiently progressed in treatment. Appellant's assertions about home visits are controverted by treatment notes in the record.

Appellant also argues that he poses a low risk of recidivism, based on the report of one of three psychologists involved in his commitment hearing and an article submitted as an exhibit about recidivism rates of intrafamilial sex offenders. But after considering appellant's most recent examination, as well as the article, Dr. Gilbertson concluded that appellant presented a high risk of reoffense.

Appellant argues that the level of security at MSOP is not necessary for his treatment or to protect the public and does not meet his needs, based on Dr. Gilbertson's testimony that a less-restrictive setting would be appropriate. But although Dr.

Gilbertson opined that appellant "may not require the high security as present in the current MSOP programming," Dr. Gilbertson also stated that a secure, inpatient treatment facility was necessary for appellant's treatment and public safety and determined that there were no reduced-security inpatient treatment facilities available. In addition, Dr. Gilbertson noted that appellant is in a young-adult treatment unit at MSOP, which is more tailored to his specific needs.

Finally, appellant argues that the support of his family reduces his risk to the public. But the record establishes that it is unlikely appellant would receive sufficient support from his family. The appeal panel found that appellant did not talk about his treatment with his family, his mother previously withdrew from his treatment, and his grandfather did not believe appellant is a sex offender.

Additionally, appellant argues in his reply brief that MSOP's failure to make less-restrictive programming available to him violates due process. But because he did not set forth this argument in his appeal brief it is waived. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990) (holding that claims not raised or argued in an appeal brief cannot be revived in a reply brief). Moreover, the supreme court has ruled that "even when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling. So long as civil commitment is programmed to provide treatment and periodic review, due process is provided." *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994); *see also In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999) (holding that the SDP statute complies with substantive due process). And Minnesota's commitment system provides for periodic

review and reevaluation of the need for continued treatment, as evidenced by appellant's current petition. *See Blodgett*, 510 N.W.2d at 916.

The panel's findings are supported by the record and are not clearly erroneous. Because appellant failed to provide sufficient evidence to raise a question of fact as to the statutory transfer factors, he did not satisfy his burden of persuasion and the appeal panel did not err in denying and dismissing his petition for transfer to a nonsecure facility.

Provisional or full discharge

In the alternative, appellant seeks a provisional or full discharge from commitment. An individual committed as an SDP "shall not be provisionally discharged unless . . . the patient is capable of making an acceptable adjustment to open society." Minn. Stat. § 253B. 185, subd. 12. The following factors are to be considered by the appeal panel:

> (1) whether the patient's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the patient'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 patient to adjust successfully to the community.

Id. The provisional discharge plan must be developed and implemented in conjunction with treatment-facility personnel. *Id.*, subd. 13.

A petitioner cannot be fully discharged unless the appeal panel determines that the individual is "capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." *Id.*, subd. 18. The appeal panel must consider whether "specific conditions exist to

provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community" and, if they do not exist, must not discharge the individual. *Id.*

The appeal panel found that, based on his course of treatment and mental status, appellant continues to need treatment and supervision at MSOP. The panel received a report from Dr. Gilbertson diagnosing appellant with conduct disorder, paraphilia, attention deficit hyperactivity disorder, rule out pedophilia and emergent antisocial trait manifestation. The panel also heard testimony as to appellant's risk of reoffense and treatment progress.

Appellant points to evidence that he has not been charged with any criminal offense since the initial sexual assault offense and has no history of flight or elopement. But the appeal panel was aware that appellant has been in custody for nearly all of the 12 years since his initial offense and heard evidence regarding his inappropriate behavior in treatment facilities.

Appellant argues that he will continue to attend treatment if provisionally discharged and, that at MSOP, he is subject to excessive security that does not promote his treatment. But Dr. Gilbertson opined that a secure, inpatient setting was necessary for appellant's treatment because he presents a high risk of reoffense.

Finally, appellant stated that he did not have a written provisional discharge plan but planned to live with his mother or grandfather. And although he claims that he developed a relapse prevention plan, he did not submit a plan to MSOP treatment personnel or the SRB. As noted above, the appeal panel found that it was unlikely

appellant would receive the requisite support from his mother or grandfather. Moreover, appellant's testimony as to his planned living arrangements and his failure to specify any treatment programs he could attend if discharged establish that he has not sufficiently planned for provisional discharge.

Because appellant failed to provide sufficient evidence to raise a question of fact as to the statutory factors for full or provisional discharge, the appeal panel did not err in denying and dismissing his petition.

Affirmed.