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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1817

Christopher R. Coker,
Appellant,

vs.

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

Filed March 19, 2012
Affirmed
Halbrooks, Judge

Hennepin County District Court
Judicial Appeal Panel File No. AP079007

Marilyn B. Knudsen, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Steven Alpert, Assistant Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Theresa Couri, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Collins, Judge.*

* 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

HALBROOKS, Judge

Appellant Christopher R. Coker challenges a decision of the judicial appeal panel, dismissing his petition for a provisional discharge from his indeterminate civil commitment, following this court's remand for a new hearing and application of the proper burden of production. *See Coker v. Ludeman*, 775 N.W.2d 660 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010). Because the appeal panel on remand did not abuse its discretion in its evidentiary rulings or err in determining that appellant failed to present a prima facie case for provisional discharge, we affirm.

FACTS

The facts of this case are partially set out in this court's decision in *Coker*, but will be briefly summarized here. *See id*. at 661-62. Appellant was indeterminately committed as a sexually dangerous person in 2000, based on a history of sex offenses involving 15- to 17-year-old girls that occurred between 1986 and 1992. *Id.* at 661. Appellant entered the Minnesota Sex Offender Program (MSOP) in 2001 and was transferred to MSOP's Supervised Integration (MSI) unit in 2006. *Id.*

After transferring to MSI, appellant petitioned the special review board for transfer to a nonsecure facility, provisional discharge, and discharge from civil commitment. *Id.* at 662. The petition was eventually dismissed by the judicial appeal panel pursuant to Minn. R. Civ. P. 41.02(b). On appeal, this court reversed and remanded the matter "for a new hearing before the appeal panel so that the correct burden of production can be applied to [appellant's] petition for relief[.]" *Id.* at 665. This court further explained that

"[a]t its discretion, the appeal panel may consider all evidence relevant to the relief requested and is not limited to the record from the previous proceeding and/or hearing before the appeal panel in January and April 2009." *Id.*

On remand, by orders issued in August 2010, the judicial appeal panel, acting on the recommendation of appellant's MSOP treatment team and the court-appointed examiner, transferred appellant to the Community Preparation Services (CPS) program, a non-secure sex-offender program operated by the MSOP. The judicial appeal panel also remanded appellant's request for a provisional discharge to the special review board for consideration of his updated discharge plan.[1]

At the February 2011 hearing before the review board, testimony was taken from appellant, the MSOP clinical supervisor, and an Assistant Hennepin County Attorney. The MSOP clinical supervisor discussed an MSOP evaluation report completed in November 2010 and updated in January 2011 and testified that since entering the CPS program, appellant had "shown some degree of regression" in his behavior and that provisional discharge would be premature because appellant "appear[ed] susceptible to stress and relapse." The assistant county attorney testified that the county opposed provisional discharge and believed that CPS continued to be the appropriate setting for appellant in light of his harassing and obsessive conduct toward his fiancé (which included calling her 40 times in one day and spending more than 23 hours a week on the phone with her), his refusal to address his financial and relationship issues with his

[1] The parties agreed that the information in appellant's previous provisional discharge plan, which was prepared in connection with his 2007 petition for provisional release, was stale and that preparation of a new plan was necessary.

treatment team, and his apparent attempts to influence the outcome of his penile plethysmograph (PPG) test in order to create the false impression that he was not aroused by various images.

The review board also considered a Sexual Violence Risk Assessment completed in August 2010 and supplemented in November 2010. The Sexual Violence Risk Assessment indicated that appellant is at a high risk to reoffend under the Static-99 test, displays a high degree of psychopathy under the PCL-R test, and presents a high risk for sexual recidivism under the combined results of the Static-99 and the Stable-2007 tests.

The court-appointed examiner, James M. Alsdurf, Ph.D., LP, did not testify at the hearing before the review board, but the board considered his August 2010 letter recommending that appellant be transferred to the CPS program. In that letter, Dr. Alsdurf stated that appellant can "benefit from the CPS placement as a step to prepare him for his placement in the community" and that the transfer would provide appellant with "a practical opportunity to exhibit his ability and willingness to take responsibility for himself in completing this final treatment component prior to a provisional discharge."

Based on the evidence presented to it, the review board recommended that appellant's petition for provisional discharge be denied and that he continue treatment in the CPS program. The commissioner adopted the recommendation, and appellant petitioned the judicial appeal panel for review.

The judicial appeal panel held a first-phase hearing on July 15, 2011. Appellant, his fiancé, and Dr. Alsdurf testified. Appellant acknowledged that he was only in stage

one of the three-stage CPS program and that he had not been interviewed by or accepted into any halfway house. He also conceded that his MSOP treatment team did not support his provisional discharge and that CPS patients are not typically even considered for outpatient treatment (such as that offered by Project Pathfinders), which precedes halfway-house placement, until they have reached the second stage of treatment. Appellant testified about the PPG (arousal) test administered at the MSOP and the MSOP employees' suspicion that he had somehow distorted his performance in order to create the impression that he was not aroused by material considered inappropriate by MSOP therapists (as evidenced by the fact that he "flat-lined" the test); appellant was made to take a polygraph test to see if he had attempted to influence the PPG results, and the polygraph indicated that he had. Appellant stated that he felt he was being treated unfairly by his primary therapist, who required appellant to submit to a polygraph after the PPG test but did not require the same of other similarly situated patients.

Appellant's fiancé testified that she met appellant in 2002 when he was in Moose Lake correctional facility. She further stated that the couple became engaged in 2003, that they have a good relationship, and that she is willing to participate in therapy by telephone with him.

Dr. Alsdurf, who has worked on appellant's case since his initial commitment and petition for discharge, interviewed appellant in May 2011 and submitted a report addressing appellant's updated medical records. In his report, Dr. Alsdurf stated that while appellant has made "tremendous changes to date," he believes that appellant continues to require treatment in the MSOP treatment setting, despite appellant's

statement that "as far as I've decided, I've completed [the] MSOP program." Dr. Alsdurf's report also states that appellant's most recent records show that he exhibits difficulty "advancing in treatment due to his defensiveness" and that "[o]verall [appellant is] resisting the work of gaining greater insight into his struggles than what he has acquired thus far and of being defensive in a manner that contributes to his limited treatment success."

Dr. Alsdurf testified that the MSOP program has helped appellant but that it would be a mistake to allow appellant to skip the rest of the first stage of the CPS program as well as the entire second and third stages and allow him to proceed directly to provisional discharge. Dr. Alsdurf stated that appellant still needs supervision in the MSOP setting, and "doesn't belong in the community at this point in time."

At the close of appellant's case, the commissioner moved for dismissal of the petition pursuant to Minn. R. Civ. P. 41.02(b), and the county joined the motion. The judicial appeal panel granted the motion to dismiss, and this appeal follows.

D E C I S I O N

A person committed as an SDP may be discharged only if "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 patient is capable of making an acceptable adjustment to open society." Minn. Stat. § 253B.185, subd. 12 (2010). In determining the propriety of provisional discharge, the appeal panel is to consider the following factors:

> (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., subd. 12(1), (2).

I.

The decision whether to admit or exclude evidence is generally within the discretion of the decision-maker and will be reversed only for a clear abuse of discretion. *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 270 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). In a commitment proceeding, a judicial appeal panel "shall hear and receive all relevant testimony and evidence." Minn. Stat. § 253B.19, subd. 2(d) (2010).

A. Admission of commissioner's exhibits during first phase.

Appellant challenges the judicial appeal panel's decision to admit exhibits 61 through 79, which were offered by the commissioner during the first-phase hearing. Appellant argues that the first-phase hearing was reserved for his prima facie case and that the commissioner should not introduce evidence until the second-phase hearing. *See* Minn. Stat. § 253B.19, subd. 2(d) (setting out burden of petitioning party). Respondents counter that the commissioner properly offered the exhibits to provide the necessary context to allow the judicial appeal panel to determine whether appellant met his burden of production.

Exhibits 61 through 79 include court orders and appellant's medical-treatment records for the period from this court's 2009 decision remanding this matter to the judicial appeal panel until the July 15, 2011 appeal panel hearing on appellant's updated provisional-discharge plan. Although appellant asserts that he was subjected to an evidentiary "ambush," it seems unlikely that he was unfamiliar with the challenged exhibits, which are his own treatment records, or that he was unprepared to address them during his own case-in-chief for the same reason the judicial appeal panel consulted them: to provide context in which to consider whether he made out a prima facie case.

Moreover, as respondents observe, insofar as Dr. Alsdurf, whom appellant called to testify, indicated that he reviewed appellant's entire medical record in preparing his testimony, respondents could have introduced the records in question during Dr. Alsdurf's cross-examination. Appellant does not demonstrate that the admission of the exhibits prejudiced his ability to satisfy his burden of going forward with evidence.

Appellant also challenges the admission of the commissioner's exhibits on the ground that he was not allowed to cross-examine the people who prepared the documents. A patient petitioning for discharge has a right to be present at the hearing on his petition "and may present and cross-examine all witnesses." *Id.* The record indicates that appellant called Dr. Alsdurf, the court-appointed examiner, whose report had been introduced into evidence, and examined him at length. The transcript also indicates that at a pretrial hearing held some weeks before the hearing, appellant indicated that he might wish to call MSOP employees to testify, but that he never pursued the issue further. Appellant could have subpoenaed and examined additional witnesses, but chose

not to do so. Thus, the judicial appeal panel did not violate appellant's right to cross-examine witnesses by admitting exhibits 61 through 79.

Appellant argues that the judicial appeal panel erred by making findings that are based on the exhibits introduced by the commissioner. More specifically, he argues that findings 1-16 (out of 23 findings) are erroneous because they rest on the exhibits offered by the commissioner. The findings challenged by appellant were clearly made for the same purpose that the challenged exhibits were offered—to provide context. Findings 1 through 6 provide background information consisting of events that occurred before appellant's commitment. Findings 7 through 16 address appellant's diagnoses, his behavior while in MSOP, and his therapeutic regression since entering the CPS program. None of the findings are clearly erroneous or contain prohibited inferences, as appellant contends. We therefore conclude that the judicial appeal panel did not abuse its discretion in admitting exhibits 61 through 79.

B. Exclusion of appellant's exhibits 83 and 84.

Appellant challenges the judicial appeal panel's decision to exclude admission of exhibits 83 and 84, which are transcripts of sworn testimony given in a hearing before the judicial appeal panel involving another MSOP patient.[2] The judicial appeal panel refused to admit either exhibit, reasoning that both were irrelevant to the extent that they

[2] Exhibit 83 contains the testimony of the CEO of 180 Degrees Inc., which provides transitional services for individuals who have been committed to the MSOP and are returning to the community. The testimony generally describes a halfway-house program presumably similar to the one appellant might enter were he to be granted provisional discharge. Exhibit 84 is the testimony of an MSOP reintegration specialist, who describes the process by which individuals who have been civilly committed are prepared for transition for provisional discharge to the community.

concerned another candidate for provisional release and primarily addressed that candidate's provisional-discharge plan, and did not specifically address appellant's situation. The judicial appeal panel informed appellant's counsel that she was free to call either of the witnesses to testify, and counsel requested a continuance to do so; the judicial appeal panel responded that the hearing should proceed and that at the end of the day, "[W]e'll see where we go." Appellant's counsel did not raise the issue again.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Neither exhibit would assist the judicial appeal panel in determining whether appellant came forward with evidence to present a prima facie case for provisional release from confinement. *See* Minn. Stat. § 253B.185, subd. 12 (2010). In light of appellant's concession at the hearing that no halfway-house had admitted him, the reintegration programming available at various outpatient and halfway-house programs is, as the judicial appeal panel concluded, irrelevant.

Appellant also challenges the judicial appeal panel's refusal to admit a handbook for the 180 Degrees program, where appellant could theoretically reside if granted provisional discharge, as well as testimony concerning various other halfway houses. Appellant's argument that the judicial appeal panel refused to allow him to make an offer of proof of the handbook is not supported by the transcript, which indicates that after the judicial appeal panel sustained a relevancy objection to the handbook (on the ground that

180 Degrees had never interviewed or accepted appellant), it permitted appellant's counsel to make an oral proffer.

The judicial appeal panel excluded all evidence concerning halfway-house programs as irrelevant because appellant was never interviewed by, let alone admitted to, any of them and because appellant, who was struggling to make progress in the first stage of the CPS program, would still need to complete the second and third stages (each of which is six to nine months long) before becoming a candidate for reduced confinement. *See* Minn. Stat. § 253B.185, subd. 12(1) (2010) (providing that prior to consideration of patient's provisional discharge plan, judicial appeal panel must determine "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"). The judicial appeal panel's refusal to admit evidence of community-based halfway-house programs is consistent with Dr. Alsdurf's testimony that any consideration of outpatient programs is entirely premature, speculative, and irrelevant as long as appellant continues to need treatment at MSOP. We therefore conclude that the judicial appeal panel did not abuse its discretion in excluding the transcripts of another patient's hearing or evidence related to different halfway houses where appellant might reside were he to be granted provisional discharge.

II.

Appellant challenges the decision by the judicial appeal panel denying his petition and dismissing it under Minn. R. Civ. P. 41.02(b) for failing to meet the initial burden of demonstrating a right to relief. The petitioner must present "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). In *Coker*, this court interpreted the petitioner's burden as a burden of production (rather than of persuasion) according to which "the petitioner need not actually prove anything, but instead must only present evidence on each element sufficient to avoid judgment as a matter of law." 775 N.W.2d at 665.

Here, the evidence concerning the propriety of provisional discharge is found primarily in the report that Dr. Alsdurf submitted in advance of the July 2011 hearing and in Dr. Alsdurf's testimony, which is substantively similar to the report. As noted above, Dr. Alsdurf reported and testified that appellant has not brought his sexual conduct under control, that he continues to need sex-offender treatment, that his risk of reoffense is too great to permit provisional discharge, and that appellant's provisional-discharge plan is insufficient to protect the public in light of appellant's risk of reoffense.

Based on this evidence, the judicial appeal panel found that although appellant had made some progress in treatment, resulting in his transfer to CPS in August 2010, "[i]nstead of improving, [appellant] has regressed in treatment" since then, showing increased rigidity, irrational thinking and less willingness to problem solve in flexible and appropriate ways. The panel found that appellant had recently shown "significant difficulty in managing his level of stress and emotional discomfort" and demonstrated "a lack of social awareness and a deficit of interpersonal problem-solving skills that, in part, led to his mistreatment and sexual subjugation of women in the past." The judicial appeal panel noted that appellant and his attorney were the only people who supported provisional discharge and that appellant had acknowledged to the review board that none

of the outpatient locations he had proposed in his provisional discharge plan would have accepted him as a client, particularly because he could not enter any outpatient program before completing the third stage of the CPS program. The judicial appeal panel also noted Dr. Alsdurf's testimony opposing provisional discharge in light of appellant's lack of progress (and regression) in CPS and appellant's statement that he is "done" with treatment.

Based on these findings, the judicial appeal panel concluded that appellant failed to present any competent evidence to meet his initial burden of production to establish a prima facie case for a provisional discharge. Appellant was required to provide "competent" evidence to meet his burden of production. *See* Minn. Stat. § 253B.19, subd. 2(d). A party provides competent evidence by providing evidence which, if proven, would satisfy the requisite statutory criteria. *See Lewis-Miller v. Ross*, 710 N.W.2d 565, 570 (Minn. 2006). The judicial appeal panel, by crediting Dr. Alsdurf's testimony, and not that of appellant or his fiancé, implicitly concluded that Dr. Alsdurf is the sole witness with sufficient familiarity with appellant and foundational competence to assess the treatment needs and dangerousness of civilly committed sex offenders. The evidence presented here amply supports the judicial appeal panel's determination that appellant failed to meet his burden of production.

Appellant nevertheless argues that he did present competent evidence to support his petition for provisional discharge. He first asserts that this court, in its earlier opinion, suggested that the evidence presented at the 2009 hearing was sufficient to establish a prima facie case. But this court specifically took "no position on whether [appellant's]

petition met his burden for transfer, discharge, or provisional discharge in the previous hearing." *Coker*, 775 N.W.2d at 665. And, even if this court had expressed an opinion as to whether appellant met his burden at the 2009 hearing, the circumstances and provisional discharge plan at issue here are substantially different, making this court's earlier statements neither controlling nor relevant to the issue currently presented.

Appellant also refers to Dr. Alsdurf's testimony at the January 2009 special review board hearing that as of December 18, 2008, appellant's deviant sexual interests had remitted and were "no longer an issue" for him. Appellant is correct that at the January 2009 hearing, Dr. Alsdurf, relying on the fact that appellant had "flat-lined" (that is, not reacted at all to) his PPG test—which measures arousal in response to "deviant" pornographic imagery—stated that "our concern about sexual deviance has essentially remitted." Appellant contends that the absence of current deviancy is sufficient on its own to prove his prima facie case, citing *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (stating that "if there is a remission of [the committed individual's] sexual disorder, if his deviant sexual assaultive conduct is brought under control, he . . . is entitled to be released").

Although appellant's citation to *Blodgett* is accurate, his reliance on that case is misplaced. As Dr. Alsdurf's testimony at the January 2009 hearing made clear, deviant sexual arousal does not represent the totality of behaviors and pathologies that characterize appellant's sexual disorder and warrant his continued commitment, such that even without the deviant arousal, Dr. Alsdurf believed that appellant "continue[d] to require treatment at MSOP [and] that his risk level remain[ed] sufficiently high to require

services available to him only in [the MSOP] treatment setting." While it may be true, therefore, that a demonstrated remission of appellant's sexual disorder could conceivably constitute a prima facie case, appellant's reliance upon a single positive aspect of his treatment described at a hearing two years ago is insufficient to warrant a reduction in confinement, especially since neither the examiner nor the MSOP treatment staff believe that appellant is ready to proceed to an outpatient program.

Appellant asserts that some weight should be given to the fact that he lived in the community without reoffending between July 1992, when he committed the third of three violent abductions and sexual assaults of teenage girls in an eight-month period, and 1995, when he was arrested after a DNA test identified him as the perpetrator of the three sexual assaults. He cites to studies showing that the risk of recidivism decreases the longer an individual remains in the community without reoffending. But there is no way of knowing whether appellant reoffended during that period; the most that can be said is that he was not convicted of any criminal conduct. And even if there were no other offenses committed, it is difficult to consider the fact that appellant "only" sexually assaulted three teenagers in a four-year period (from 1991 to 1995) as evidence that he is not likely to reoffend if he is released into the community now. Moreover, evidence of appellant's behavior nearly 20 years ago is less relevant to his current risk to reoffend than the record of his current behavior, as provided by the examiner and his MSOP treatment staff.

On this record, given the unequivocal and unrebutted testimony of the court-appointed examiner that appellant is not ready to proceed to provisional release, the

judicial appeal panel did not err by concluding that appellant failed to come forward with evidence sufficient to meet his burden of production and in granting respondents' motion for dismissal.

III.

Appellant argues for the first time on appeal that the burden-shifting mechanism of Minn. Stat. § 253B.19 (2010) is unconstitutional because it places the initial burden of going forward on the individual seeking a reduction in confinement. Because appellant did not raise this argument to the district court and because "[t]he law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal," this issue is deemed waived. *See State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980).

Even if the issue is not waived, appellant's arguments fail. In *Caprice v. Gomez*, 552 N.W.2d 753, 756-59 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996), this court held that "the burden of going forward with the evidence" in Minn. Stat. § 253B.19, subd. 2 (1994), does not violate the constitution's double-jeopardy, substantive-due-process, or equal-protection clauses, and is not unconstitutionally vague. And the Minnesota Supreme Court has rejected the argument that the provisional-discharge statute is unconstitutional because the standard for continuing commitment is not identical to the initial criteria for commitment. *See Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

Affirmed.