STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1746

Kevin Scott Karsjens,
Appellant,

vs.

Lucinda Jesson,
Commissioner of Human Services,
Respondent.

Filed March 10, 2014
Affirmed
Johnson, Judge

Morrison County District Court
File No. 49-PR-08-1461

Jennifer L. Thon, Ryan B. Magnus, Jones and Magnus, Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, Nathan A. Brennaman, Deputy Attorney General, Ricardo Figueroa, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk, Judge.

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

JOHNSON, Judge

Kevin Scott Karsjens was civilly committed as a sexually dangerous person. He petitioned for transfer, provisional discharge, or full discharge from his commitment. A

special review board recommended that his petition be denied, and Karsjens sought review by a judicial appeal panel, which conducted an evidentiary hearing. At the close of Karsjens's case-in-chief, the commissioner moved to dismiss Karsjens's petition pursuant to rule 41.02(b) of the Minnesota Rules of Civil Procedure. The judicial appeal panel granted the commissioner's motion on the ground that Karsjens failed to satisfy his burden of production because he did not introduce competent evidence that would create a question of fact as to whether his petition for transfer or discharge should be granted. We conclude that the evidence introduced by Karsjens, even when viewed in a light most favorable to him, is insufficient to satisfy his burden of production. Therefore, we affirm.

FACTS

Karsjens is a 50-year-old man who has been charged or convicted of criminal sexual conduct on two occasions.[1] In 1995, a Morrison County jury found him guilty of first-degree criminal sexual conduct, terroristic threats, and kidnapping, based on evidence that he physically and sexually assaulted a girlfriend after she attempted to break up with him. The district court imposed a sentence of 150 months of imprisonment. Karsjens was released from prison in 2003.

In 2005, Karsjens was charged in Morrison County with, among other things, first- and third-degree criminal sexual conduct. The original complaint alleged that Karsjens physically and sexually assaulted a girlfriend. After the complaint was amended, Karsjens pleaded guilty to gross-misdemeanor domestic assault and terroristic threats,

[1]Between 1982 and 1989, Karsjens also was convicted of numerous non-sexual offenses, including felony theft, fleeing a police officer, deer shining, disorderly conduct, DWI, and violations of orders for protection.

and the state dismissed the charges of criminal sexual conduct. In December 2005, the district court imposed a sentence of 41 months of imprisonment. Karsjens was referred to the department of correction's sex-offender treatment program, but he refused to participate. As a consequence, corrections officials extended his release date by 540 days.

In June 2008, three days before Karsjens was scheduled to be released from prison, Morrison County petitioned the district court for an order to civilly commit him as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). In November 2009, after a six-day trial, the district court granted the petition and ordered Karsjens's initial commitment as an SDP. In February 2010, the district court issued an order for his indeterminate commitment. This court affirmed. *In re Civil Commitment of Karsjens*, No. A10-0489, 2010 WL 3000723 (Minn. App. Aug. 3, 2010), *review denied* (Minn. Sept. 29, 2010). Karsjens presently is in the custody of the commissioner of human services in the Minnesota Sex Offender Program (MSOP) at its Moose Lake facility.

In October 2011, Karsjens petitioned for, alternatively, transfer to a non-secure facility, provisional discharge from his civil commitment, or full discharge from his civil commitment. *See* Minn. Stat. § 253D.27, subd. 2 (Supp. 2013); *see also* Minn. Stat. § 253B.185, subd. 9(c) (2012).[2] In March 2012, the special review board held an

[2]In 2013, the legislature recodified the statutes governing SDP and SPP civil commitments. *See* 2013 Minn. Laws, ch. 49 (codified at Minn. Stat. ch. 253D). In this opinion, we cite the current versions of the statutes because, for purposes of this case, the

evidentiary hearing and, 14 days later, recommended that Karsjens's petition be denied. *See* Minn. Stat. § 253D.27, subd. 4.

Karsjens petitioned for rehearing and reconsideration of his discharge petition by a judicial appeal panel. *See* Minn. Stat. § 253D.28, subd. 1 (Supp. 2013). In May 2013, the three-judge appeal panel conducted a first-phase evidentiary hearing. With the assistance of counsel, Karsjens testified in support of his petition and called one witness, Paul Reitman, Ph.D., the court-appointed independent examiner. Karsjens introduced only one exhibit, Dr. Reitman's report.

Dr. Reitman's report reviewed Karsjens's history of mental and physical health, his history of chemical dependency, and his history of sex-offender treatment. The report detailed Karsjens's 30-year history of sexually assaulting women, which includes "multiple occasions of forced sexual compliance for penile oral penetration, digital and penile vaginal penetration, and penile anal penetration." The report indicated that Karsjens's six victims, who were between the ages of 5 and 32 at the relevant times, endured "physical assaults and pain, physical restraining, threats of physical harm, terroristic threats involving harm [to] victims' children and family members, verbal abuse, and threats with a weapon." The report stated that, during a clinical interview with Dr. Reitman, Karsjens denied all of the criminal-sexual-conduct accusations that had been made against him and stated that he did not need sex-offender treatment. The report stated that Karsjens blamed MSOP for not providing him with treatment and for keeping

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legislature merely clarified pre-existing law without making any substantive changes. *See Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012).

him in the first phase of the program. The report concluded by opining that Karsjens' request for transfer should be denied. At the evidentiary hearing, Dr. Reitman testified that Karsjens's requests for provisional discharge or full discharge also should be denied. Dr. Reitman testified that Karsjens's denial that he has committed any sex offenses is a predictor of recidivism and that "if he was discharged to the community, he would be highly likely to recidivate sexually."

Karsjens testified at the evidentiary hearing that he meets the criteria for discharge because the medical professionals' diagnoses are incorrect. He testified that he does not need sex-offender treatment because he is not a sex offender. He testified that he does not participate in certain parts of the MSOP therapy program because MSOP is unable to tell him what he can do "without admitting to offenses I didn't do." He also testified that he is not a danger to the community and that his plan to protect the public after his release is not to have any relationships with women. He further testified that his transition into the community would be smooth because he has supportive family and friends, he would reside in a home he owns, and he has matured with age.

At the close of Karsjens's case-in-chief, the commissioner moved to dismiss Karsjen's petition pursuant to rule 41.02(b) of the Minnesota Rules of Civil Procedure. The commissioner argued that Karsjens had failed to satisfy his burden of production with respect to his request for discharge because he did not introduce competent evidence that is sufficient to create a question of fact as to whether he should be discharged. The commissioner also argued that Karsjens had failed to meet his burden of production with respect to his request for transfer because he did not introduce competent evidence that is

sufficient to satisfy his burden of persuading the panel that he should be transferred. In June 2013, the judicial appeal panel issued an order granting the commissioner's motion to dismiss Karsjens's petition. Karsjens appeals.

D E C I S I O N

Karsjens argues that the judicial appeal panel erred by granting the commissioner's rule 41.02(b) motion to dismiss his petition with respect to his request for provisional discharge or full discharge. Karsjens does not challenge the judicial appeal panel's decision with respect to his request for transfer to a non-secure facility.

A.

A person who is committed as an SDP or an SPP may petition the special review board for discharge. Minn. Stat. § 253D.27, subd. 2. A committed person may be provisionally discharged only if the judicial appeal panel determines that "the committed person is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a) (Supp. 2013). The judicial appeal panel must consider two factors in determining whether to order 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).

Similarly, a committed person may be fully discharged only if a judicial appeal panel determines 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 inpatient treatment and supervision." Minn. Stat. § 253D.31 (Supp. 2013). In determining whether to order a full discharge, the judicial appeal panel 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.*

In a proceeding before the judicial appeal panel on a petition for discharge, the petitioner "'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) (quoting Minn. Stat. § 253B.19, subd. 2(d) (2012)). This burden is merely a burden of production. *Id.* at 486. To satisfy the burden of production, the petitioner must "'come forward with sufficient, competent evidence that, if proven, would entitle the petitioner to relief.'" *Id.* (quoting *Braylock*, 819 N.W.2d at 589). If the petitioner satisfies the burden of production at the initial "first-phase hearing" of a proceeding before the judicial appeal panel, the burden then shifts to the commissioner, who bears a burden of persuasion on the merits of a discharge petition. *See id.* In that event, the commissioner must prove "'by clear and convincing evidence that the discharge or provisional discharge should be denied.'" *Id.* (quoting Minn. Stat. § 253B.19, subd. 2(d)).

If the commissioner believes that a petitioner has not satisfied his burden of production at the first-phase hearing, the commissioner may move to dismiss the petition pursuant to rule 41.02(b) of the Minnesota Rules of Civil Procedure. *Id.* at 489-91. The relevant portion of the rule 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. . . .

Minn. R. Civ. P. 41.02(b); *see also Coker*, 831 N.W.2d at 490 (holding that subsequent sentences of rule 41.02(b) do not apply because they conflict with commitment statute). When considering a motion to dismiss pursuant to rule 41.02(b) after the petitioner's case-in-chief, the judicial appeal panel "may not weigh the evidence or make credibility determinations." *Coker*, 831 N.W.2d at 490-91. "Instead, the Appeal Panel is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person." *Id.* at 491. The supreme court's *Coker* opinion demonstrates that a rule 41.02(b) motion should not be granted in every proceeding before the judicial appeal panel in which a committed person is not entitled to discharge. *See id.* at 492. Whether rule 41.02(b) motions should be granted frequently or infrequently is yet to be revealed by caselaw.

Neither the supreme court nor this court has identified the standard of review that applies to a judicial appeal panel's grant of a rule 41.02(b) motion to dismiss a petition for discharge from civil commitment. A rule 41.02(b) motion "require[s] the determination of whether, *as a matter of law*, the evidence is sufficient to present a fact

question" for consideration by the fact-finder. *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980) (emphasis added). Questions that are decided "as a matter of law" generally are subject to a *de novo* standard of review. *See, e.g.*, *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010). In addition, the procedure and legal analysis prescribed by a rule 41.02(b) motion "is equivalent to" that of a rule 50.01 motion for directed verdict (now known as a motion for "judgment as a matter of law during trial"). *Paradise*, 297 N.W.2d at 155; *see also* Minn. R. Civ. P. 50.01. A *de novo* standard of review applies to a district court's ruling on a rule 50.02 motion for judgment as a matter of law after trial. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009); *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 273 (Minn. 2002). It appears that a *de novo* standard of review also applies to a rule 50.01 motion for judgment as a matter of law made during trial. *See Jerry's Enters., Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006); *J.N. Sullivan & Assocs., Inc. v. F.D. Chapman Constr. Co.*, 304 Minn. 334, 336, 231 N.W.2d 87, 89 (1975); *see also Bahr*, 766 N.W.2d at 919 & n.10. Thus, this court will apply a *de novo* standard of review to the judicial appeal panel's grant of the commissioner's rule 41.02(b) motion to dismiss.

B.

In his brief, Karsjens notes that the criteria for the two forms of alternative relief at issue on appeal, provisional discharge and full discharge, are somewhat overlapping such that they may be analyzed together. Because the criteria for provisional discharge are more lenient than the criteria for full discharge, we will begin by analyzing whether the

evidence introduced by Karsjens at the first-phase hearing is sufficient to satisfy his burden of production with respect to provisional discharge.

As stated above, a person committed as an SDP may obtain provisional discharge only if he "is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a). That question must be answered based on two considerations: (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).

In this case, the judicial appeal panel's decision is reflected in a five-page order, which contains fifteen paragraphs of "findings of fact"[3] and one final paragraph stating that the commissioner's motion is granted. In paragraph 12, the panel cited the supreme court's *Coker* opinion and reasoned that, even if Karsjens's evidence is viewed in the light most favorable to him, he nonetheless failed to present competent evidence that he is entitled to provisional discharge or full discharge and, thus, failed to satisfy his burden

[3]The supreme court and this court previously have stated that "findings of fact" are inappropriate in an order resolving a motion to dismiss filed pursuant to Minn. R. Civ. P. 12 or a motion for summary judgment filed pursuant to Minn. R. Civ. P. 56. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997); *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010); *see also* Minn. R. Civ. P. 52.01. Findings of fact are likewise inappropriate in a judicial appeal panel order resolving a motion to dismiss filed pursuant to rule 41.02(b). The question at the close of a petitioner's case-in-chief is not whether a fact has or has not been established; the question is whether the petitioner's evidence, if proven, would entitle the petitioner to relief. *See Coker*, 831 N.W.2d at 491.

of production. In paragraph 15, the panel elaborated on its conclusion somewhat by stating,

> A provisional or full discharge is . . . inappropriate because of his continued need for institutionalization, his continued need for treatment in a secure setting, and because a release into the community under either a provisional or full discharge would not provide a reasonable degree of safety for the public and he is not able at present to adjust acceptably to the community.

Karsjens contends that the panel erred in its reasoning with respect to both factors relevant to provisional discharge.

1.

With respect to the first factor, Karsjens contends that the judicial appeal panel erred because his evidence (consisting of his own testimony, Dr. Reitman's report, and Dr. Reitman's testimony) is sufficient to create a question of fact as to whether he continues to need treatment and supervision in his current treatment setting. He points to his own testimony that he has not acted out on any of the paraphilias or paraphilic tendencies that are the basis for his diagnosis, that he has participated in treatment for more than three years and made progress, and that he partakes in "anything that they have to offer me as far as core groups." Karsjens also points to portions of Dr. Rietman's report that say he does not appear to be "suffering from any somatic or cognitive complaints, or of emotional, behavioral, or interpersonal dysfunction"; that he is "doing fairly well in treatment"; and that he has made progress in his treatment. In addition, Karsjens points to Dr. Rietman's testimony that he no longer should be diagnosed as an alcoholic.

In *Coker*, the petitioner's evidence consisted of his own testimony, the testimony of his fiancé, and a court-appointed examiner's written report and testimony. *Coker*, 831 N.W.2d at 487. The examiner's opinions were somewhat favorable in that he testified that Coker "had made considerable progress and had accomplished more than anyone else that he had evaluated at MSOP" and, furthermore, that Coker's penile plethysmograph (PPG), which tests arousal to sexually deviant images, produced a flatline response. *Id.* The examiner concluded that his "concern about sexual deviance has essentially remitted," although the examiner did not recommend provisional discharge for various other reasons. *Id.* The supreme court held that Coker's evidence was sufficient to satisfy his burden of production because, in the circumstances of that case, a reasonable fact-finder could accept the examiner's favorable opinions, reject the examiner's unfavorable opinions, consider the petitioner's own testimony and that of his fiancé, and conclude that provisional discharge was appropriate. *Id.* at 492.

This case is distinguishable from *Coker* because the factual record is different. The favorable portions of Dr. Reitman's opinions are far less favorable than the favorable opinions in *Coker*, which indicated that Coker was an unusually good or exceptional patient in more than one respect. *See id.* at 487. In this case, however, Dr. Reitman's most favorable opinions are not very favorable at all and are inextricably mixed with unfavorable opinions. For example, Dr. Reitman's written report states that Karsjens "is doing fairly well in treatment, *but still has no accountability for his sex offense*." (Emphasis added.) Dr. Reitman's report also refers to one annual report that "indicates progress *but [also indicates that] attention is needed*" in multiple other respects.

(Emphasis added.) The other evidence on which Karsjens relies cannot be characterized as favorable at all because it simply tends to limit or qualify the unfavorable portions of Karsjens's evidence. For example, Dr. Reitman testified that Karsjens does not appear to suffer from any somatic or cognitive complaints or of emotional, behavioral, or interpersonal dysfunction, and that he no longer is dependent on alcohol. The absence of such problems, however, does not indicate that Karsjens no longer is an SDP; their absence merely indicates that his condition is not as severe as it might be if certain other factors were present. Even if a reasonable fact-finder were to accept as true the portions of Dr. Reitman's evidence that Karsjens highlights in his brief, the fact-finder still would not have a factual basis from which to conclude that "there is no longer a need for treatment and supervision in [his] current treatment setting." *See* Minn. Stat. § 253D.30, subd. 1(b)(1).

Karsjens also contends that the judicial appeal panel erred because it weighed the evidence and made a credibility determination when it discounted his evidence that another MSOP psychologist, Dr. Vieteanan, told him that he did not need sex-offender treatment. This contention has superficial appeal but ultimately fails because it is not supported by Karsjens's own evidence. Karsjens testified initially that Dr. Vieteanan told him that she would recommend domestic-abuse treatment and perhaps anger-management treatment but would *not* recommend sex-offender treatment. On further questioning, however, Karsjens admitted that Dr. Vieteanan confined herself to the issues of domestic-abuse treatment and anger-management treatment and did not express any opinion as to whether he should receive sex-offender treatment. He also admitted that

Dr. Vieteanan did not support his request for transfer or discharge. Thus, considering all of Karsjens's testimony, a reasonable fact-finder who accepted his testimony as true with respect to Dr. Vieteanan's prior statements still would not have a factual basis to conclude that "there is no longer a need for treatment and supervision in [his] current treatment setting." *See id.*

In the absence of supporting evidence from the court-appointed examiner or any other psychologist, Karsjens has only his own testimony to support the first factor relevant to his petition for discharge. Karsjens's own testimony consists primarily of conclusory statements to the effect that he does not need sex-offender treatment. Bare assertions that are lacking in foundation, detail, or explanation usually are insufficient to create a question of fact for a fact-finder. *See, e.g., Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993); *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). That is especially so in this case because Karsjens did not testify that his condition has improved through treatment but instead testified that he never needed sex-offender treatment in the first place, a premise that is belied by the district court's commitment order. Thus, given all the evidence in the record of the first-phase evidentiary hearing, a reasonable fact-finder who considered and accepted Karsjens's conclusory testimony concerning his need for treatment would not have a factual basis to conclude that "there is no longer a need for treatment and supervision in [his] current treatment setting." *See* Minn. Stat. § 253D.30, subd. 1(b)(1).

Therefore, Karsjens's evidence, viewed in a light most favorable to him, does not create a question of fact as to the first statutory factor relevant to provisional discharge, whether he still needs treatment and supervision in the MSOP program.

2.

With respect to the second factor, Karsjens contends that the judicial appeal panel erred because his evidence is sufficient to create a question of fact as to whether the conditions of his provisional discharge plan would provide a reasonable degree of protection to the public and would enable him to adjust successfully to the community. He points to his own testimony that he owns a home in the small city of Hillman and plans to reside there if released; that he has a strong network of family and friends; that "he is different now" due to increased age, maturity, and understanding; that he has demonstrated the ability to control himself; that he plans to avoid relationships with women; and that he is willing to participate in out-patient treatment. Karsjens also points to Dr. Rietman's testimony that increased age reduces the likelihood of recidivism.

Karsjens's evidence concerning the second factor relevant to provisional discharge is flawed primarily because it is not tailored to the requirements of the statute. The second factor asks "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." Minn. Stat. § 253D.30, subd. 1(b)(2) (emphasis added). The provisional discharge plan mentioned in subdivision 1 of the statute is required by the next subdivision of the statute, which provides, "A provisional discharge plan shall be developed, implemented, and monitored by the executive director in

conjunction with the committed person and other appropriate persons." *Id.*, subd. 2. As far as the record reveals, there is no mutually agreed-upon provisional discharge plan in this case, and the parties do not address who is responsible for the absence of such a plan. In his brief, Karsjens acknowledges the absence of a provisional discharge plan but contends that he has proposed "the basic structure" of a plan. The statute, however, requires a plan with "conditions." *Id.* Karsjens has not identified any conditions that would limit his freedom while on provisional discharge. In reality, Karsjens has proposed a plan for full discharge, without any conditions that could be monitored or any mechanism by which his compliance could be measured. *See id.* In the absence of a plan with conditions, the judicial appeal panel could not find that "the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public." *See id.*, subd. 1(b)(2).

Thus, Karsjens's evidence, viewed in a light most favorable to him, is insufficient to create a question of fact as to the second statutory factor relevant to provisional discharge, whether his provisional discharge would provide a reasonable degree of protection to the public and would enable him to adjust successfully to the community.

Without competent evidence on either the first or second factor relevant to provisional discharge, the judicial appeal panel could not conclude that Karsjens "is capable of making an acceptable adjustment to open society." *See id.*, subd. 1(a). Therefore, we conclude that Karsjens did not satisfy his burden of production on his request for provisional discharge. Accordingly, the judicial appeal panel did not err by granting the commissioner's rule 41.02(b) motion to dismiss Karsjens's petition with

respect to his request for a provisional discharge. In light of that conclusion, we need not separately analyze the question whether Karsjens satisfied his burden of production with respect to his request for full discharge, which is governed by more rigorous criteria.

Affirmed.