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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1094**

Dezeray Marie Roblero-Barrios
f/k/a Wesley Ross Mullins,
Appellant,

vs.

Cal R. Ludeman, Commissioner of Human Services,
Respondent.

**Filed December 16, 2008
Affirmed
Shumaker, Judge**

Olmsted County District Court
File No. 55-P6-99-002869
Appeal Panel File No. AP079022

David A. Jaehne, 60 East Marie Avenue, Suite 109, West St. Paul, MN 55118 (for appellant)

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2131 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant challenges an order of a judicial appeal panel denying his petition for provisional discharge from commitment as a sexually dangerous person. We affirm.

FACTS

The facts are not in dispute. On October 5, 1997, appellant Dezeray Marie Roblero-Barrios attempted to sexually assault a six-year-old boy in a K-Mart restroom. On February 9, 1998, Barrios pleaded guilty to second-degree assault and attempted second-degree criminal sexual conduct in relation to this incident. He was sentenced to serve a total of 36 months imprisonment.

Barrios was released from prison on October 4, 2000, and was transferred directly to the custody of the Minnesota Sex Offender Program (MSOP) pending the outcome of a petition to commit him as a sexual psychopathic personality (SPP) and as a sexually dangerous person (SDP). In June 2001, the district court committed Barrios indeterminately as a sexually dangerous person. In July 2001, Barrios was sent back to prison for violating his parole by assaulting a staff member at MSOP. He returned to MSOP on April 19, 2005. During his commitment, Barrios legally changed his name from Wesley Ross Mullins to Dezeray Marie Roblero-Barrios because he says he feels like a woman trapped in a man's body.

Besides the assault at K-Mart, Barrios has admitted to sexually assaulting four other children. At age 13, he sexually molested a five-year-old relative. At age 14 or 15, he sexually assaulted an 11-or 12-year-old girl who he was babysitting. At age 15, he had anal intercourse with an eight-year-old boy. At the time, Barrios was the boy's Sunday-school teacher, and he repeatedly molested the boy during a two-year period. At age 22, he sexually assaulted a 15-year-old girl several times after having consensual sex with her once. Before entering prison, he began a sexual "relationship" with a 14-year-

old boy and maintained this relationship while in prison. Barrios has recanted many of these stories but has consistently maintained a lack of remorse for his offenses. For instance, he has claimed that the five-year-old initiated the abuse by touching his penis, and that his abuse of the 14-year-old was not a sexual offense because it was a “love relationship.”

On July 25, 2007, a special review board heard Barrios’s petition for full or provisional discharge from civil commitment. Dr. Elizabeth J. Barbo, Ph.D., L.P., Director of Psychology at MSOP, prepared an evaluation for the board’s consideration. The State Operated Forensic Services also prepared a “Risk Appraisal” for the board’s review. The appraisal placed Barrios in the group with the highest rate of sexually violent recidivism, and indicated that he had a higher-than-average risk for violent recidivism. The review board found that Barrios was not participating in treatment because he could not control his behavior and was often placed in isolation as a consequence. At the time of this hearing, Barrios had pending felony assault charges. Following the recommendation of the review board, the commissioner denied Barrios’s petition for provisional discharge, and Barrios appealed.

On March 21, 2008, a judicial appeal panel heard Barrios’s appeal. Barrios testified that he was seeking provisional discharge, that he had not completed sex-offender treatment, and that he would like to seek treatment at Alpha House or the Pride Institute if he were provisionally discharged. He expressed concern that he would not be able to receive therapy for his gender identity issues if he remained at MSOP. He also testified that he pleaded guilty in August of 2007 to a felony assault, that none of the

programs in his discharge plan had actually accepted him, and that he did not have the assistance or approval of his case manager or MSOP staff members in creating the plan.

The appeal panel concluded that Barrios had not established a prima facie case that he was capable of making an acceptable adjustment to open society, finding he continued to need treatment in the MSOP setting, and that his provisional discharge plan did not adequately protect the public. Therefore, it granted the state's motion to dismiss and affirmed the commissioner's order denying Barrios's release. Barrios appealed to this court.

D E C I S I O N

Barrios argues that the evidence as a whole does not support the denial of his provisional discharge under Minn. Stat. § 253B.18, subd. 7 (2006). He also raises two other issues: (1) the treatment team's lack of support for his provisional discharge is unsupported by the evidence; and (2) his discharge plan satisfies public safety needs and offers adequate treatment. The first of these is not an appealable order of the court but a decision of his medical team. The second is not a separate issue, but an alternate way of phrasing the argument that, based on the evidence, the panel should have reached a different conclusion. Thus, all issues are addressed under the umbrella of whether the panel's findings that Barrios should not be provisionally discharged are supported by the record.

The appeals panel conducted a hearing on appellant's motion for provisional discharge. It considered his claim in accordance with Minn. Stat. § 253B.18, subd. 7 (2006), which states that a "mentally ill and dangerous person shall not be provisionally

discharged unless” the commissioner and the special review board find that “the patient is capable of making an acceptable adjustment to open society.” In considering whether an individual is capable of such an adjustment, the panel considers two factors:

- (a) whether the patient’s course of hospitalization and present mental status indicate there is no longer a need for treatment and supervision in the patient’s current treatment setting; and
- (b) 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.

Minn. Stat. § 253B.18, subd. 7. Barrios had the burden of showing that he met the standards for discharge. Minn. Stat. § 253B.19, subd. 2 (2006) (providing that a petitioner for discharge has burden of “going forward with the evidence”); Minn. Stat. § 253B.185, subd. 1 (2006) (providing that civil commitment proceedings for sexually dangerous persons are similar to procedures for committing mentally ill and dangerous person); *Caprice v. Gomez*, 552 N.W.2d 753, 758 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Once he did so, the burden would shift to the state to prove by clear and convincing evidence that Barrios did not meet the standards for discharge. *Caprice*, 552 N.W.2d at 758. Barrios’s panel found that he had not established the required prima facie case that he could make an acceptable adjustment to open society.

Barrios argues that the court erroneously concluded that he was unable to adjust to society. On reviewing a decision of the appeal panel, we do not “weigh the evidence as if trying the matter *de novo*.” *Enebak v. Noot*, 353 N.W.2d 544, 548 (Minn. 1984) (quotation omitted). Rather, we look to see if the record as a whole sustains the appeal panel’s findings. *Id.* “If it does so, it is immaterial that the record might also provide a

reasonable basis for inferences and findings to the contrary.” *Id.* Thus, we will only reverse the appeal panel’s decision if it is clearly erroneous. *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985). Here, there was ample evidence to support the appeal panel’s factual findings and ultimate conclusion that Barrios should not be provisionally discharged.

At the evidentiary hearing, the panel heard testimony from two witnesses and considered 18 exhibits. First, Dr. John Rauenhorst, M.D., an independent psychiatrist appointed to examine Barrios, testified regarding his findings. He testified that Barrios suffered from a depressive disorder, pedophilia, gender identity disorder, personality disorder, and a history of polysubstance abuse. Dr. Rauenhorst also testified that Barrios needed chemical-dependency, gender-identification and sex-offender treatment; that gender-identification treatment was not available at MSOP; that “[c]ertainly the substance abuse would be a problem were he outside of an institution and some kind of supportive behavior for that, a 12-step program of some sort would be appropriate;” and that there are community programs available for sex-offender treatment. He noted that Barrios was, at the time of the interview, only “partially” engaged in his Dialectical Behavior Therapy (DBT) program because he was placed in isolation.

Dr. Rauenhorst also testified about Barrios’s provisional discharge plan to attend outpatient treatment at varying facilities, wear an ankle bracelet, check in periodically with law enforcement, and live in one hotel or another. He stated that it was extremely unlikely that any of the outpatient programs listed in Barrios’s plan would admit him

without MSOP's approval, and that the ankle bracelet and "check-in" plans would "not be acceptable for most people," in terms of public safety.

Next, Barrios testified that he had not completed sex-offender treatment, had done "some" chemical-dependency treatment, and was just starting his DBT program over again.¹ He said that he would like to attend the Alpha House or Pride Institute, both of which are in-patient programs, and possibly attend a sex-addicts support group. Finally, Barrios testified that he had not been officially accepted into any of the programs on his list, that none of the staff at MSOP had assisted him with his plan, that they did not think such a plan was appropriate at that time, and that he had recently pleaded guilty to a felony assault.

The panel also considered 18 exhibits, none of which recommended that Barrios be released, and most of which characterized him as impulsive, violent, unresponsive to treatment, and lacking remorse or insight into his behavior. A forensic psychiatrist, Dr. Robin R. Ballina, M.D., J.D., prepared a "Risk Appraisal" for Barrios in June of 2007. In the appraisal, she described Barrios's lack of remorse and his "generally nonparticipatory" and "disruptive" behaviors in his groups. A summary of Barrios's history in the prison system lists about 40 behavioral incidents between 1999 and 2005, and ten such incidents at MSOP from 2000 to 2001 and 2005 to 2006. Nearly all of these incidents involved threatening or assaultive behavior, and some involved sexually

¹ The DBT program focuses on behaviors rather than on "understanding." Barrios's team believes it will assist him in his sex-offender treatment. The DBT program has several modules that the patient must complete two times; going through the modules one time can take anywhere between six months and two years to complete. Barrios has not completed the first set of modules.

inappropriate behavior. Barrios has had 11 more documented rule violations since January 2007, including the fourth-degree assault charge and exposing his genitalia to staff members at MSOP. Dr. Barbo's report concluded that "[i]t is the opinion of his treatment team and this examiner that [Barrios] continues to require the highly structured and supervised setting of an inpatient placement . . . Mr. Roblero-Barrios's petition for a provisional discharge . . . is currently without the support of the MSOP treatment team."

Based on the testimony and exhibits introduced, the appeal panel made the following findings: "To date, no programs have indicated a willingness to accept him and acceptance is unlikely until it is recommended by the MSOP treatment team"; "[h]is treatment team did not assist with creation of the discharge plan and they do not support it at this time"; he "needs to complete chemical dependency treatment"; "MSOP does not offer treatment for Gender Identity issues and Mr. Roblero-Barrios will have to defer that until he is released to the community"; "[a]s an untreated sex offender, [he] presents a high risk to reoffend"; and Barrios "has an extensive history of assaultive, disruptive behaviors, attempted assaults, sexually inappropriate conduct, and threats while hospitalized in the MSOP."

As trier of fact, the appeal panel must resolve factual conflicts and determine the credibility of witnesses. Minn. R. Civ. P. 52.01. Its findings will not be reversed unless they are clearly erroneous. *Id.*

All of the appeal panel's conclusions are supported by Barrios's own testimony: he has not finished any treatment for his pedophilia and chemical dependency, he continues to engage in assaultive behavior, no program has accepted him, and no

program is likely to accept him because his treatment team does not believe he is ready to be discharged. Barrios failed to provide the panel with any explanation for why he is no longer dangerous to others or in need of in-patient treatment. Rather, he merely expressed his desire to attend different programs. All of the testimony and exhibits led the panel to properly conclude that Barrios failed to make a showing that he was ready to be provisionally discharged.

The appeal panel properly considered Minn. Stat. § 253B.18, subd. 7, and properly concluded that Barrios failed to establish a prima facie case that he could adjust to open society because he continued to engage in violent behavior and had failed to finish any kind of treatment.

Affirmed.