STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1567

Wayne C. Nicolaison,
Appellant,

vs.

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

Filed March 1, 2011
Affirmed; motion denied
Johnson, Chief Judge

Judicial Appeal Panel
File No. AP099028

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

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, St. Paul, Minnesota (for respondent Cal R. Ludeman)

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Considered and decided by Johnson, Chief Judge; Klaphake, Judge; and Bjorkman, Judge.

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

JOHNSON, Chief Judge

Wayne C. Nicolaison is civilly committed to the Minnesota Sex Offender Program at Moose Lake. In February 2009, he petitioned for discharge pursuant to Minnesota Statutes section 253B.18, subdivision 15 (2008). The special review board recommended denying the petition, and a three-judge judicial appeal panel adopted that recommendation and dismissed Nicolaison's petition. We affirm.

FACTS

Nicolaison, who now is 60 years old, was civilly committed in 1992 because of a history of violent sexual behavior. He pleaded guilty to first-degree criminal sexual assault following an incident in 1980 in which he forcibly entered a woman's home at night and sexually assaulted her at knifepoint. He pleaded guilty to disorderly conduct after the state alleged that, in January 1984, approximately five months after being released on parole, he assaulted a woman on a street. He pleaded guilty to first-degree criminal sexual conduct after the state alleged that, in October 2004, approximately three months after being released on parole, he kidnapped a woman at knifepoint, led her to a wooded area, and sexually assaulted her. In 1990, while in prison, Nicolaison harassed a female prison guard by sending her numerous letters and repeatedly calling her on the telephone.

In August 1991, Hennepin County petitioned for Nicolaison's commitment as a psychopathic personality. The district court initially committed him in January 1992 and committed him on an indeterminate basis in June 1992. This court affirmed his

commitment. *In re Nicolaison*, No. C1-92-613, 1992 WL 160843 (Minn. App. July 4, 1992).

In February 2009, Nicolaison petitioned the special review board for a full discharge pursuant to Minn. Stat. § 253B.18, subd. 15. In June 2009, the special review board recommended denial of Nicolaison's petition on the grounds that he "has done nothing to reduce his risk factor" and "remains dangerous and in need of treatment in a secure facility." Nicolaison sought reconsideration by the judicial appeal panel in July 2009.

The judicial appeal panel bifurcated its review of Nicolaison's discharge petition. According to its procedures, the judicial appeal panel held a first-phase hearing in May 2010 to determine whether Nicolaison met his initial burden of going forward with evidence to present a *prima facie* case for release from confinement. *See* Minn. Stat. § 253B.19, subd. 2(d) (2008) (setting out burden of petitioning party). At the first-phase hearing, the judicial appeal panel heard testimony from Nicolaison and Thomas Alberg, the court-appointed examiner. The panel also received into evidence, over Nicolaison's objection, 22 exhibits offered by the commissioner of human services relating to Nicolaison's history and treatment.

The judicial appeal panel contemplated a second-phase hearing at which Hennepin County and the commissioner would be required to prove by clear and convincing evidence that Nicolaison should remained committed. *See id.* (setting out burden of party opposing discharge). At the conclusion of the first-phase hearing, Hennepin County and the commissioner moved to dismiss the discharge petition pursuant to Rule 41.02(b) of

the Minnesota Rules of Civil Procedure. The judicial appeal panel granted the motion and denied Nicolaison's petition for discharge. Nicolaison appeals.

D E C I S I O N

Nicolaison's discharge petition and the proceedings that are under review are based on the following statute:

> A patient who is mentally ill and dangerous shall not be discharged unless it appears to the satisfaction of the commissioner, after a hearing and a favorable recommendation by a majority of the special review board, that the patient 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.
>
> In determining whether a discharge shall be recommended, the special review board and commissioner shall 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. If the desired conditions do not exist, the discharge shall not be granted.

Minn. Stat. § 253B.18, subd. 15.

I. Motion to File Redacted Brief

Before addressing Nicolaison's arguments for reversal, we first address a motion filed with this court by Hennepin County. During briefing, Hennepin County filed a conditional motion for leave to file both redacted and unredacted versions of its responsive brief. The county's motion is precautionary; its primary argument is that a redacted version of its brief is unnecessary because the rules relating to commitment proceedings permit parties to file appellate briefs that mention information found in confidential documents. The county argues in the alternative that, if the rules of civil

appellate procedure forbid the county from filing a single version of its appellate brief that mentions information contained in confidential documents, the county should be permitted to file an unredacted version of its brief under seal and a redacted version that would be accessible to the public. Hennepin County's motion is accompanied by both versions of its brief.

As a general rule, "Every party to an appeal must take reasonable steps to prevent the disclosure of confidential information, both in oral argument and written submissions filed with the court." Minn. R. Civ. App. P. 112.03. Confidential evidentiary materials should be submitted to this court in a separately bound confidential appendix under seal, and a party need not seek leave of court to do so. *See* Minn. R. Civ. App. P. 112.01, subd. 1; *see also In re Jarvis*, 433 N.W.2d 120, 124 (Minn. App. 1988). But an appellate brief cannot be filed under seal in a manner that completely deprives the public of access; an appellate brief "must be accessible to the public in some form." *Coursolle v. EMC Ins. Group, Inc.*, ____ N.W.2d ____, ____ n.1, 2011 WL 382783, at *1 n.1 (Minn. App. Feb. 8, 2011). Under the rules of civil appellate procedure,

> A party wishing to protect confidential information may seek leave to file both a redacted version that is accessible to the public and a full version that is under seal, and the court will grant such leave if "the inability to discuss confidential information" in the brief "would cause substantial hardship or prevent the fair presentation of a party's argument."

Id. (quoting Minn. R. Civ. App. P. 112.03, advisory comm. cmt.). As alternatives to filing a redacted version of a brief, a party may refer to persons by their initials instead of their names or may allude generally to confidential information by "its specific location

in the confidential part of the record without disclosing the information itself." Minn. R. Civ. App. P. 112.03 advisory comm. cmt.

Hennepin County argues that it is not bound by appellate rule 112.03 to the extent that the rule is inconsistent with the following rule governing public access to records in commitment cases:

> The court administrator shall create a separate section or file in which the prepetition screening report, court appointed examiner's report, and all medical records shall be filed. Records in that section or file shall not be disclosed to the public except by express order of the district court. *This provision shall not limit the parties' ability to mention the contents of the pre-petition screening report, court appointed examiner's report and medical records in the course of proceedings under Minn. Stat. ch. 253B.*

Minn. Spec. R. Commit. & Treat. Act 21(b) (emphasis added). Hennepin County notes that, even though commitment rule 21(b) provides that certain records may not be disclosed to the public, the rule permits parties to "mention the contents of" confidential documents in the course of civil-commitment proceedings. The county contends that the ability to "mention" confidential information includes the ability to include such information in an appellate brief.

The question at the crux of Hennepin County's motion is which rule—appellate rule 112.03 or commitment rule 21(b)—governs cases of this type to the extent that the two rules are in conflict. Appellate rule 112.03 would prohibit parties from filing a brief that refers to confidential information; commitment rule 21(b) would permit parties to file a brief that mentions information contained in a confidential appendix. The answer to the question lies in a commitment rule that provides: "The Special Rules shall supersede any

other body of rules otherwise applicable (e.g., the Rules of Civil Procedure for the District Courts, Probate Court Rules, etc.) in conflict with these Special Rules." Minn. Spec. R. Commit. & Treat. Act 1(b). This court previously has relied on commitment rule 1(b) to hold that the commitment rules supersede conflicting rules of evidence. *In re Commitment of Williams*, 735 N.W.2d 727, 730-31 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007). Commitment rule 21(b) applies to this appeal because, by its terms, the rule applies "in the course of proceedings under Minn. Stat. ch. 253B," Minn. Spec. R. Commit. & Treat. Act 21(b), and an appeal from a decision of a judicial appeal panel is a proceeding under chapter 253B, *see* Minn. Stat. § 253B.19, subd. 5 (2010).

Commitment rule 1(b) makes clear that commitment appeals are to be treated differently from other appeals. In light of commitment rule 1(b), parties who appeal from a civil-commitment proceeding may, consistent with commitment rule 21(b), mention in their briefs information contained in the prepetition screening report, court-appointed examiner's report, and all medical records, notwithstanding appellate rule 112.03. Thus, we deny Hennepin County's motion for leave to file redacted and unredacted briefs.

II. Admission of Evidence Offered by the Commissioner

Nicolaison argues that the judicial appeal panel erred by admitting into evidence, at the beginning of the first-phase hearing, the 22 exhibits offered by the commissioner of human services. The exhibits include a risk assessment performed by MSOP, Alberg's medical report, the special review board's evaluation, the commitment order, and various assessments performed prior to Nicolaison's commitment. Nicolaison's argument appears to have two parts. First, he argues that it was inappropriate to allow the

commissioner to offer evidence during Nicolaison's case in chief. Second, he argues that the exhibits were not relevant and were offered in a way that deprived him of his right to cross-examine adverse witnesses.

A. Timing of Admission of Exhibits

Nicolaison argues that the introduction of the 22 exhibits interfered with his ability to make out a *prima facie* case for discharge. Nicolaison contends that the district court should not have admitted the exhibits offered by the commissioner during his case in chief but, rather, should have waited until the second-phase hearing to admit the exhibits. Hennepin County argues in response that the judicial appeal panel typically receives exhibits offered by the commissioner or a county during the first-phase hearing to provide context for the issues to be decided by the panel.

Nicolaison has failed to demonstrate that the admission of the exhibits at the outset of the first-phase hearing prejudiced his ability to satisfy his burden of going forward with the evidence. *See* Minn. Stat. § 253B.19, subd. 2(d) (2010). To meet his burden, Nicolaison "may be initially required to show that he meets the standards for discharge." *Caprice v. Gomez*, 552 N.W.2d 753, 758 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). The mere filing of a petition for discharge is not sufficient to meet this burden. *Coker v. Ludeman*, 775 N.W.2d 660, 664 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010). Rather, Nicolaison must provide some "sworn competent testimony that would enable a fact-finder to determine that the patient is ready to be discharged." *Id.* (quoting *Caprice*, 552 N.W.2d at 758).

Whether Nicolaison has met his burden of production is a question that may be answered independently of the evidence offered by the commissioner during the first-phase hearing. That the commissioner's exhibits were in the evidentiary record when the judicial appeal panel analyzed Nicolaison's evidence and determined whether he satisfied his initial burden is not, by itself, erroneous. Whether the judicial appeal panel inappropriately considered the commissioner's evidence at that stage may be considered on a case-by-case basis. Thus, the district court did not abuse its discretion by admitting the state's evidence during Nicolaison's case-in-chief.

B. Admissibility of Exhibits

Nicolaison argues that the 22 exhibits should not have been admitted because they were not relevant at the time they were offered. In a commitment proceeding, a judicial appeals panel "shall hear and receive all relevant testimony and evidence." Minn. Stat. § 253B.19, subd. 2(d). Evidence is relevant so long as it has "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. Evidence is presumed to be admissible in commitment proceedings. *Williams*, 735 N.W.2d at 731.

In this case, the evidence presented by the commissioner was relevant because it guided the judicial appeal panel's determination whether Nicolaison met the standard for release. *See* Minn. Stat. § 253B.18, subd. 15. We conclude that the judicial appeal panel did not abuse its discretion by admitting the 22 exhibits over Nicolaison's relevance

objection. *See In re Commitment of Ramey*, 648 N.W.2d 260, 270 (Minn. App. 2002) (stating standard of review), *review denied* (Minn. Sept. 17, 2002).

Nicolaison also challenges the admission of the 22 exhibits on the ground that he was not allowed to cross-examine the persons 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." Minn. Stat. § 253B.19, subd. 2(d). However, a judicial appeal panel "may admit all relevant, reliable evidence, including but not limited to the respondent's medical records, *without requiring foundation witnesses*." Minn. Spec. R. Commit. & Treat. Act 15 (emphasis added). The record indicates that Nicolaison called the court-appointed examiner, whose report had been introduced into evidence, and examined him at length. Nicolaison could have subpoenaed and examined additional witnesses but chose not to do so. Thus, the judicial appeal panel did not violate Nicolaison's right to cross-examine opposing witnesses.

III. Grant of Rule 41.02(b) Motion

Nicolaison also argues that the judicial appeal panel erred by granting the county's and the commissioner's motion to dismiss pursuant to rule 41.02(b) of the rules of civil procedure. He claims that Hennepin County and the commissioner were barred from bringing the dismissal motion by the commissioner's proffer of evidence during Nicolaison's first-phase hearing. 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)

(emphasis added). The commissioner's introduction of evidence during Nicolaison's case in chief does not preclude the commissioner and Hennepin County from moving to dismiss under rule 41.02(b).

Nicolaison also 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 the judicial appeal panel erred by making findings 2, 3, 4, 5, 7, 8, 9, and 11 because those findings necessarily rest on the exhibits offered by the commissioner.

Rule 41.02(b) provides that if the district court grants a defendant's motion to dismiss and renders judgment on the merits against the plaintiff, the court must make findings as provided in rule 52.01. *Id.* Rule 52.01 states that on review, findings of fact "shall not be set aside unless clearly erroneous," and that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. We apply an abuse-of-discretion standard to a district court's dismissal under rule 41. *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. App. 1998).

The findings of fact that Nicolaison challenges on appeal appear to have been written for the same purpose that the challenged exhibits were offered—to provide context. Findings 1 through 4 merely provide background information consisting of events that occurred before Nicolaison's commitment. None of the challenged findings is dispositive of Nicolaison's petition. The unchallenged findings—6, 10, 12, 13, and 14—are based on the evidence offered by Nicolaison and provide an adequate basis for granting the county's and the commissioner's motion to dismiss.

The absence of error in granting the rule 41.02 motion is obvious in light of Nicolaison's evidence. Nicolaison remains an untreated sex offender. He has not completed sex-offender treatment or chemical-abuse treatment because he always has refused to participate in those forms of treatment. At the hearing, Nicolaison evaded questions regarding his lack of participation in treatment, insisting that MSOP did not provide treatment and that the state had never proven his need for treatment. Thus, the judicial appeal panel did not abuse its discretion by granting the county's and commissioner's motion to dismiss Nicolaison's discharge petition.

We note that Nicolaison also presents several arguments challenging the constitutionality of the Minnesota commitment statute. But he did not make these arguments to the judicial appeal panel, so they have been forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In sum, the judicial appeal panel did not err by admitting the exhibits offered by the commissioner of human services into evidence or by granting the commissioner's and Hennepin County's motion to dismiss Nicolaison's petition for discharge from civil commitment.

Affirmed; motion denied.