STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1780

Guy I. Greene,
Appellant,

vs.

Lucinda Jesson, Commissioner of Human Services,
Respondent.

Filed January 21, 2014
Affirmed
Cleary, Chief Judge

Sherburne County District Court
File No. 71-P9-05-002825

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

Lori Swanson, Attorney General, Barry R. Greller, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Peterson, Judge; and Halbrooks, Judge.

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

CLEARY, Chief Judge

Appellant challenges a judicial appeal panel's denial of his request for a discharge or provisional discharge from the Minnesota Sex Offender Program (MSOP). He

contends that, at a hearing before the judicial appeal panel, he presented a prima facie case with competent evidence that he is entitled to a discharge or provisional discharge. Because the decision of the judicial appeal panel was not clearly erroneous, we affirm.

FACTS

Appellant Guy Greene was civilly committed to the MSOP as a sexually dangerous person in 2006. *See In re Civil Commitment of Giishig*, No. A07-0616 (Minn. App. Sept. 11, 2007) (detailing appellant's criminal history and affirming his commitment), *review denied* (Minn. Nov. 13, 2007). Following commitment, appellant participated in sex-offender treatment in the MSOP for approximately three years. He declined to continue with treatment in 2010, and he has not undergone treatment since that time. In 2011, appellant filed a petition requesting a discharge or provisional discharge from the MSOP or a transfer to a non-secure facility. A special review board issued a recommendation in November 2011 that the petition be denied.

On June 21, 2013, a judicial appeal panel held a hearing to consider the special review board's recommendation. Dr. Thomas Alberg, a licensed psychologist who independently examined appellant and reviewed his records, testified during the hearing, and Dr. Alberg's report was accepted into evidence. He stated that appellant has been diagnosed with paraphilia, frotteurism, cocaine and alcohol dependency, major depressive disorder, anxiety disorder, and antisocial personality disorder with narcissistic features. Dr. Alberg stated that he is skeptical about the depression and anxiety diagnoses. He confirmed that appellant meets the criteria for being a clinical psychopath.

Dr. Alberg testified that sex-offender treatment is recommended for a person with diagnoses of paraphilia and frotteurism and that "[y]ou could" "deal with these diagnoses appropriately" in either an inpatient or outpatient setting. But he testified that the MSOP is "the only treatment program that I'm aware of that's available to [appellant]" and is "probably the only place that will accept him at the present time." Dr. Alberg testified that appellant could "appropriately deal with" his chemical dependency and any depression or anxiety in an outpatient setting. He also stated that "[p]robably the greatest percentage of people suffering from [appellant's antisocial personality disorder] are in prison" and that treatment for this disorder involves intensive psychotherapy.

Dr. Alberg testified that appellant is in need of inpatient treatment in the MSOP. He stated that appellant's request for a discharge, provisional discharge, or transfer is "inappropriate at this time" because appellant is not advancing, or even participating, in treatment and there has been no "significant change" in appellant since he was committed. Dr. Alberg stated that the MSOP "is the only program available to [appellant] and he needs to be able to demonstrate that he can advance through this program before any type of release program could be considered." According to Dr. Alberg, appellant would be in phase one of treatment if he were to restart treatment in the MSOP.

Dr. Alberg stated that appellant has engaged in threatening behavior and behavior of exposing himself while committed to the MSOP. At the time of the hearing before the judicial appeal panel, appellant was being held in jail due to alleged assault of MSOP staff. According to Dr. Alberg, before this alleged assault, appellant was residing in the

"behavior therapy unit" of the MSOP, which is "a unit designed for [patients] who demonstrate behaviors that are disruptive to the general population and/or affect the safety of the facility." Dr. Alberg's report states that appellant underwent a sexual-violence-risk assessment in August 2011, and that his score on that assessment "placed him in the high risk category for being charged or convicted of another sexual offense."

Appellant also testified during the hearing before the judicial appeal panel. Appellant is a member of the White Earth Band of Ojibwe. He stated that, if discharged from the MSOP, he would return to his reservation and seek treatment through his tribe and family. He testified that his tribe and family could assist him with issues such as chemical dependency, mental health, anger management, housing, and employment. He stated that the tribe could also accommodate both inpatient and outpatient sex-offender treatment on the reservation. But appellant admitted that he had not had "any conversations with anyone on the reservation regarding whether or not they can appropriately treat" the sexual disorders that he has been diagnosed with. He also testified that he had been accepted for outpatient sex-offender treatment at a facility in Minneapolis, but he did not know the name of the facility and did not provide the panel with any further information regarding the facility or treatment program. Appellant stated that whether he would be under any type of formal supervision if released "would be up to the powers of the tribe," but that "[t]hey do have the resources for monitoring and ankle bracelet monitoring and things like that on the reservation." He testified that his current relapse-prevention plan was completed in 2008 and has not been updated

since then and that he does not have a current provisional-discharge plan other than "[j]ust winging it, you know, to go back to the reservation to get treated."

Regarding appellant's plan for release, Dr. Alberg testified that the reservation could provide outpatient chemical-dependency treatment and "some general medical services," but that "they don't have an inpatient hospital and . . . I don't remember a specific sex offender treatment program being available on the reservation."

Upon completion of the testimony, respondent Commissioner of Human Services moved to have appellant's petition dismissed pursuant to Minn. R. Civ. P. 41.02(b) for failure to show a right to relief. On July 26, 2013, the judicial appeal panel issued an order adopting the special review board's recommendation, granting respondent's motion to dismiss, and denying appellant's petition. The panel found that appellant "essentially remains an untreated sex offender who is sabotaging his own opportunity for treatment [in the] MSOP due to his refusal to comply with behavioral expectations." The panel concluded that appellant had not satisfied his burden of presenting a prima facie case with competent evidence that he is entitled to a discharge or provisional discharge. The panel further concluded that appellant had not established by a preponderance of the evidence that a transfer to a non-secure facility is appropriate. This appeal followed.

D E C I S I O N

Appellant challenges the judicial appeal panel's denial of his request for a discharge or provisional discharge from the MSOP. He does not appeal the denial of his request for a transfer to a non-secure facility. A decision of a judicial appeal panel will be reversed only if it is clearly erroneous. *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn.

App. 1985). The appellate court must examine the record as a whole to determine whether it sustains the panel's findings of fact. *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992).

A patient committed as a sexually dangerous person

> shall not be discharged unless 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, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.

Minn. Stat. § 253B.185, subd. 18 (2012).

> In determining whether a discharge shall be recommended, the special review board and judicial appeal panel 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.

Id.

A patient committed as a sexually dangerous person "shall not be provisionally discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and a 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 (2012). In determining whether a provisional discharge shall be recommended, factors to be considered are:

> (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.

A patient seeking a discharge or provisional discharge "bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the [patient] is entitled to the requested relief." Minn. Stat. § 253B.19, subd. 2(d) (2012). When determining whether the patient has satisfied this burden of production, the judicial appeal panel may not weigh the evidence or make credibility determinations, but must view the evidence produced in a light most favorable to the patient. *Coker v. Jesson*, 831 N.W.2d 483, 490-91 (Minn. 2013). If the patient satisfies his burden of production, the matter goes forward to a "second-phase hearing" where the party opposing the discharge or provisional discharge bears the burden of proving by clear and convincing evidence that the requested relief should be denied. *See* Minn. Stat. § 253B.19, subd. 2(d); *Coker*, 831 N.W.2d at 486.

The judicial appeal panel's determination that appellant did not present a prima facie case with competent evidence that he is capable of making an acceptable adjustment to open society is not clearly erroneous. *Cf.* Minn. Stat. § 253B.185, subds. 12, 18. Dr. Alberg stated that appellant has not significantly changed since being committed and that he has engaged in threatening behavior and behavior of exposing himself while committed. Just prior to the hearing before the judicial appeal panel, appellant allegedly assaulted MSOP staff. His score on a sexual-violence-risk assessment placed him in the

"high risk category" to sexually reoffend. And while appellant testified that his tribe and family could assist him with programs, housing, and employment that would help him to adjust to society, he did not produce competent evidence that he is capable at this time of making an acceptable adjustment to open society.

The judicial appeal panel's determination that appellant did not present a prima facie case with competent evidence that he is no longer in need of treatment and supervision in the MSOP is not clearly erroneous. *Cf.* Minn. Stat. § 253B.185, subds. 12(1), 18. Dr. Alberg stated that appellant is in need of inpatient sex-offender treatment for his sexual disorders and that the MSOP is the only program available to him. Appellant testified that he could receive inpatient and outpatient sex-offender treatment on his reservation and that he had been accepted for outpatient sex-offender treatment at a Minneapolis facility. However, appellant also admitted that he had not spoken with anyone on the reservation regarding whether his sexual disorders could be appropriately treated there, and he did not provide the name of or any information regarding the Minneapolis facility. Appellant points out that he is not currently receiving treatment, but it does not follow that he no longer needs treatment and supervision in the MSOP. Appellant declined to participate in treatment for several years. He signed a consent-for-treatment form in January 2013, but his treatment has not restarted. He indicated during his interview with Dr. Alberg that this is because he refused to submit to a sex-offender assessment that the MSOP required of him before restarting his treatment.

Finally, the judicial appeal panel's determination that appellant did not present a prima facie case with competent evidence that conditions of discharge or provisional

discharge exist to provide a reasonable degree of protection to the public and to assist him in adjusting to the community is not clearly erroneous. *Cf.* Minn. Stat. § 253B.185, subds. 12(2), 18. Appellant did not propose conditions of discharge and did not have a discharge plan. Rather, appellant indicated that the conditions of his release and supervision would be determined by his tribe and that his plan was to "[j]ust wing[] it" after returning to his reservation.

Given the evidence before the judicial appeal panel, the panel's conclusion that appellant did not satisfy his burden of presenting a prima facie case with competent evidence that he is entitled to a discharge or provisional discharge is not clearly erroneous. The panel's denial of appellant's request for a discharge or provisional discharge from the MSOP is not clearly erroneous.

Affirmed.