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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1754

Ben Braylock,
Appellant,

vs.

Lucinda Jesson, Commissioner of Human Services,
Respondent,

Hennepin County,
Respondent.

Filed March 22, 2011
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-MH-PR-05-554
Appeal Panel No. AP099021

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Considered and decided by Wright, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

WRIGHT, Judge

Appellant challenges the Supreme Court Appeal Panel's decision dismissing and denying his petition for provisional or full discharge from his indeterminate commitment as a sexually dangerous person on the ground that he did not present sufficient evidence to meet his initial burden of going forward with the evidence. We affirm.

FACTS

Appellant Ben Braylock's criminal history began in 1968, when he was convicted of burglary. In 1982, Braylock pleaded guilty to second-degree murder for killing his wife. He was released from custody on January 31, 1988. Less than seven months later, on July 14, 1988, he forcibly engaged in sexual intercourse with a 13-year-old girl in his apartment. He pleaded guilty to third-degree criminal sexual conduct for this offense on October 27, 1988 and was sentenced to prison.

Braylock was released from prison on August 23, 1990. Eleven days later, he forcibly engaged in sexual intercourse with a 14-year-old female relative while he was at his daughter's apartment. A jury convicted him of first-degree criminal sexual conduct, and the district court sentenced him to 268 months' imprisonment as a patterned sex offender.

In 2005, while Braylock was still incarcerated, the Minnesota Department of Corrections petitioned for Braylock's commitment as a sexual psychopathic personality and as a sexually dangerous person. After a hearing, the district court ordered his initial commitment as a sexually dangerous person. In 2006, after a review hearing, the district

court ordered Braylock's indeterminate commitment as a sexually dangerous person, which we affirmed in *In re Civil Commitment of Braylock*, A06-1053, 2006 WL 3409875, at *1 (Minn. App. Nov. 28, 2006).

On November 24, 2008, Braylock petitioned the Special Review Board (Review Board) for a provisional or full discharge from his commitment, and he submitted a provisional discharge/discharge plan. The Review Board held a hearing on May 6, 2009, and on May 27, 2009, issued findings of fact and a recommendation to deny Braylock's petition for provisional or full discharge. On July 6, 2009, Braylock petitioned the Supreme Court Appeal Panel (Appeal Panel) for rehearing and reconsideration.

The Appeal Panel held a hearing on April 30, 2010. Braylock, who was 78 years old at the time of the hearing, testified that if discharged, he planned to reside with his son and daughter-in-law. They in turn testified that they would ensure that Braylock followed the requisite supervised-release conditions of parole, including that he have no contact with minor children. They also testified, as did another son and two stepdaughters of Braylock, that they supported his discharge, would report any violations of his supervised-release conditions to his parole officer, and did not believe that Braylock would pose a danger to anyone if discharged to reside in his family's home. His pastor also supported Braylock's discharge and testified that he would report to law-enforcement authorities any failure of Braylock to comply with the conditions of the discharge.

Despite Braylock's convictions of first-degree and third-degree criminal sexual conduct, one of which was based on his guilty plea, his daughter-in-law, with whom he

planned to reside if discharged, testified that she does not believe that he committed the first-degree assault of which he was convicted. Braylock also testified that he did not commit either sexual-assault offense, although he acknowledged that he touched the breasts and pulled off the clothes of the 13-year-old victim in 1988.

Dr. James Gilbertson, the court-appointed examiner, submitted a report to the Appeal Panel and the parties. Given Braylock's present level of denial, intellectual and cognitive decline, and his functional illiteracy, Dr. Gilbertson does not believe that Braylock could complete sex-offender treatment in his current treatment setting. Nor does Dr. Gilbertson believe that a maximum security treatment/management program is required to meet the demands of public safety.

As to provisional discharge to Braylock's family, Dr. Gilbertson opined that Braylock's placement with his family would not be consistent with public safety because his family continues to believe that he did not commit the sexual-assault offenses and they would be unable to offer the vigilant 24-hour-per-day supervision required. Dr. Gilbertson considered the context in which Braylock's offenses occurred—his victims were known to him, the offenses occurred in his apartment and his daughter's apartment, there was no oversight or supervision of his whereabouts, and he was not subject to specific risk-management programming. If these contextual factors could be controlled in the future, his risk for re-offense would drop markedly, Dr. Gilbertson concluded. Thus, Dr. Gilbertson opined that Braylock's treatment and risk-management needs could be met in a manner consistent with public safety by a provisional discharge to a facility with 24-hour-per-day supervision, such as a forensic geriatric facility. But

Dr. Gilbertson did not know of a specific available facility that would meet these requirements and, therefore, concluded that Braylock should continue to reside in his current hospital setting. Dr. Gilbertson also did not recommend full discharge from commitment. Although Braylock acknowledges that Dr. Gilbertson was present at the hearing, Braylock did not call Dr. Gilbertson for cross-examination.

At the close of Braylock's case, respondent Commissioner of Human Services moved to dismiss the petition, and respondent Hennepin County joined the motion. The Appeal Panel granted the motion and denied the petition for provisional or full discharge, concluding that Braylock did not produce evidence sufficient to avoid judgment as a matter of law. The Appeal Panel observed that Dr. Gilbertson's report did not support Braylock's petition and Braylock failed to present sufficient competent evidence to meet his initial burden to proceed on the petition. This appeal followed.

D E C I S I O N

I.

Braylock challenges the decision by the 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. Whether the Appeal Panel's dismissal pursuant to rule 41.02(b) was proper and whether the Appeal Panel correctly applied the evidentiary burdens in addressing a petition for provisional or full discharge present questions of law, which we review de novo. *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980); *Coker v. Ludeman*, 775 N.W.2d 660, 663 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010).

Although Braylock challenges the decision dismissing his petition for provisional or full discharge, his focus, he contends, is on the elements regarding provisional discharge. He seeks remand for a proceeding in which the Appeal Panel properly allocates the statutory burdens of production and persuasion.

As a petitioner seeking discharge or provisional discharge, Braylock bears the burden of going forward with the evidence. Minn. Stat. § 253B.19, subd. 2(d) (2010). This burden requires Braylock to present a prima facie case with competent evidence to demonstrate that he is entitled to the relief requested. *Id.*[1] As such, Braylock has a burden of production rather than persuasion; Braylock "need not actually prove anything, but instead must only present evidence on each element sufficient to avoid judgment as a matter of law." *Coker*, 775 N.W.2d at 665. The Appeal Panel must view the credibility of the evidence and inferences drawn therefrom in favor of Braylock, who is the party-opponent on the rule 41.02(b) motion. *Paradise*, 297 N.W.2d at 155. If Braylock has met the burden of going forward with the evidence, the commissioner, who is the party opposing discharge or provisional discharge, "bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied." Minn. Stat. § 253B.19, subd. 2(d).

[1] In 2010, the Minnesota legislature clarified the respective burdens of proof in a petition for provisional or full discharge consistent with *Coker*, 775 N.W.2d at 665. *See* 2010 Minn. Laws ch. 300, § 27. Because the act did not provide any specific effective date, it took effect on August 1, 2010. *See* Minn. Stat. § 645.02 (2010) (providing that each act "takes effect on August 1 next following its final enactment, unless a different date is specified in the act"). The Appeal Panel's decision was on August 6, 2010, and it relied on the provisions in *Coker*, which are now reflected in the amended statute.

A person who has been committed for an indeterminate period as a sexually dangerous person or sexual psychopathic personality "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, subds. 1(c), 12 (2010).[2] The following factors must be considered:

> (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.

Braylock asserts that he met his burden of production and made a prima facie showing that his course of treatment and present mental status indicate that he no longer needs treatment in his current treatment setting. The Appeal Panel found that, with treatment in his current setting, it is unlikely that Braylock will be able to make the significant progress required for release into any currently available placement because of

[2] Previously, the provisions that now appear in Minn. Stat. § 253B.18, subds. 6-10, 15 (2010) (addressing changes in custody for those committed for an indeterminate period as mentally ill and dangerous), generally were applicable to sexual-psychopathic-personality and sexually-dangerous-person commitments under Minn. Stat. § 253B.185, subd. 1 (2008). In 2010, the legislature recodified these provisions at Minn. Stat. § 253B.185, subds. 11-15, 18 (2010), where other provisions addressing sexual-psychopathic-personality and sexually-dangerous-person commitments are found. 2010 Minn. Laws ch. 300, § 26.

his illiteracy, limited intellectual abilities, cognitive deficits, and inability or refusal to acknowledge that he committed the sexual offenses of which he was convicted. The record, even when viewed in favor of Braylock's petition, supports this determination.

Braylock testified that he has participated and made some progress in treatment. He also contends that, rather than blaming him for his lack of progress, the focus of our analysis should rest on his right, as a committed person, to proper care and treatment that will render further supervision unnecessary. *See* Minn. Stat. § 253B.03, subd. 7 (2010). He faults the Minnesota Sex Offender Program for his failure to make more significant progress, citing a four-year delay in transferring him to a program for patients with limited academic abilities, which required him to start treatment anew. In addition, he testified that his eyesight is poor because of his untreated cataracts. This condition interferes with his ability to complete his assignments for the treatment program. And despite a diagnosis of cataracts three years before the hearing and his submission of a grievance addressing the issue, he has not received surgical treatment for the condition. These facts do not advance his argument that he has met the burden of production for a provisional discharge.

Dr. Gilbertson's opinion as to the reason for Braylock's inability to advance in treatment rests on Braylock's fundamental denial that he committed the sex offenses of which he was convicted. Dr. Gilbertson concluded that Braylock could remain in his current hospital setting, even though he will not engage in the sex-offender treatment, because his current need for treatment is based on "harm reduction management." While a community setting such as a forensic geriatric facility with 24-hour supervision could

provide this, no such facility is known to be available. Recognizing this challenge, the Appeal Panel warned that, "[a]s the committed sex offender population ages, this dilemma will grow."

Contrary to Braylock's arguments, the Appeal Panel concluded that Braylock neither met the burden of production nor made a prima facie showing that the conditions of his provisional discharge plan provide adequate supervision of Braylock and a reasonable degree of protection to the public. A provisional discharge plan must be developed, implemented, and monitored by the head of the treatment facility or a designee, in conjunction with the patient and other appropriate persons. Minn. Stat. § 253B.185, subd. 13. The Appeal Panel concluded that Braylock's plan to reside with his son and daughter-in-law failed to provide adequate protection to the public or adequate supervision of Braylock, in part because his son and daughter-in-law do not believe that he is guilty of the offenses of which he was convicted. Consequently, the Appeal Panel was not convinced that Braylock's son and daughter-in-law would be adequately motivated to monitor Braylock's access to adolescents. Although the Appeal Panel found these family members sincere in their testimony that they could care for Braylock in the community and in their promises to report any violations of his discharge plan, the Appeal Panel ruled that, because they did not accept that he is a sexual predator, supervision by these family members would be inadequate to protect the community.

Braylock argues that the Appeal Panel weighed the evidence and discredited the testimony of his witnesses, which is improper in this procedural posture. We disagree. The burden of production in these proceedings "may be met with evidence that is

sufficient to avoid a directed verdict, to permit the fact-finder to make a decision about the facts, or to constitute conclusive evidence." *Coker*, 775 N.W.2d at 664 (quotation omitted). Contrary to Braylock's claims, the Appeal Panel accepted the credibility of the testimony of Braylock's witnesses and found their testimony sincere. However, the Appeal Panel found this evidence insufficient to meet Braylock's burden of production.

Braylock was required to provide "competent" evidence to meet his burden of production. *See* Minn. Stat. § 253B.19, subd. 2(d). The commissioner asserts that Dr. Gilbertson, not Braylock's witnesses, has sufficient foundational competence to assess the treatment needs and dangerousness of civilly committed sex offenders. 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) (holding that in third-party custody proceeding petition, statutory competent evidence requirement is met when facts alleged, if proven, would meet statutory requirement, but declining to provide specific definition of "competent evidence"). We therefore address, as the Appeal Panel did, whether Braylock provided competent evidence to meet his burden of production.

Dr. Gilbertson acknowledged that Braylock's age-related risk reduction and cognitive decline indicate a moderate risk of reoffending. But Dr. Gilbertson explained that other factors override the lower risk suggested by these actuarial findings. These include Braylock's sexual attraction to adolescent females; his commission of the second sexual offense shortly after his release from prison for his first sexual offense; his

commission of the second offense at an advanced age; his adamant denial that he committed either sexual offense; and his failure to advance in sex-offender treatment. This evidence is uncontroverted.

Dr. Gilbertson also found particularly significant Braylock's contextual risk factors, such as the victim pool, victim opportunity, the physical setting of his risk for sexual offenses, and the presence/absence of extended supervisory oversight. Braylock's victims were known to him; his sexual offenses took place in his apartment and his daughter's apartment; his travel had not been supervised or monitored; and he had not been subject to risk-management programming. Dr. Gilbertson predicted that if Braylock lived in the community as a resident in a facility that provides vigilant 24-hour supervision, his risk of reoffending would drop markedly. Placement with Braylock's family is inconsistent with the uncontroverted evidence of what is required for public safety. The Appeal Panel correctly ruled as a matter of law that Braylock failed to establish a prima facie case that he could meet the standards for provisional discharge.

Full discharge is appropriate only if the Appeal Panel determines, 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. The Appeal Panel must 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.* Because Braylock fails to establish a prima facie case as to less rigorous factors for provisional discharge, he also fails to establish a prima facie case for full discharge.

II.

Braylock raises several other issues that we address briefly. Braylock challenges the use of Dr. Gilbertson's report. Minnesota law grants the Appeal Panel authority to appoint examiners. Minn. Stat. § 253B.19, subd. 2(d). After examining the petitioner, the court-appointed examiner prepares a separate report stating the examiner's opinion and the facts on which the opinion is based. *See* Minn. Spec. R. Commit. & Treat. Act 12 (addressing initial commitment proceedings). Dr. Gilbertson examined Braylock and filed his report with the Appeal Panel; and the parties received the report in a timely manner as required by statute and without Braylock's objection. *Id.*

Although Braylock acknowledges that Dr. Gilbertson was present at the evidentiary hearing, Braylock argues that he was not given the opportunity to cross-examine him. The parties "*may* present and cross-examine all witnesses." Minn. Stat. § 253B.19, subd. 2(d) (emphasis added). But Braylock chose not to call Dr. Gilbertson; and his counsel's decision not to cross-examine a witness is a matter of trial strategy, which falls well within the discretion of Braylock's counsel and beyond appellate review. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (providing that such discretionary decision will not be examined on appeal in the context of a claim of ineffective assistance of counsel).

Braylock also contends that the Appeal Panel erred by relying on Dr. Gilbertson's "conclusory opinions." Far from being "conclusory," which is defined as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based," *Black's Law Dictionary* 329 (9th ed. 2009), Dr. Gilbertson's opinions were based on facts obtained from Braylock during his examination and Braylock's treatment records and risk assessments, which Dr. Gilbertson carefully explained when offering his reasoned opinions.

While acknowledging that the Appeal Panel properly referred to his limited burden of production, Braylock contends that the Appeal Panel's decision improperly relieved respondents of their burden of proof. But Braylock's arguments are not supported by the record or the Appeal Panel's order. The Appeal Panel carefully addressed the shifting burdens, cited *Coker*, and repeatedly referred to Braylock's burden of production. When it referred to Braylock's failure to produce sufficient evidence, it expressly tied this conclusion to the burden of going forward with the evidence. From the Appeal Panel's order, it is evident that the Appeal Panel properly analyzed and applied Braylock's burden of production.

In sum, because Braylock failed to present a prima facie case establishing that he met the standards for either a provisional or full discharge, the Appeal Panel properly dismissed and denied Braylock's petition.

Affirmed.