STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2124

Daniel Lee Larsen,
Appellant,

vs.

Lucinda Jessen,
Commissioner of Human Services,
Respondent

Filed May 23, 2011
Affirmed
Stauber, Judge

Anoka County District Court
File No. 02P577002568

Michael C. Hager, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Corrie A. Oberg, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner)

Robert M.A. Johnson, Anoka County Attorney, Janice M. Allen, Assistant County Attorney, Anoka, Minnesota (for respondent Anoka County)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

STAUBER, Judge

Appellant, who was indeterminately committed as a psychopathic personality in 1977 when he was 16 years old, filed a petition with the Special Review Board (SRB) for

a transfer to a non-secure Department of Human Services (DHS) facility. The petition was denied and appellant requested reconsideration before a Judicial Appeal Panel. On appeal from the panel's grant of the state's motion to dismiss under Minn. R. Civ. P. 41.02 (b), appellant argues that he produced sufficient evidence to avoid dismissal and established that he is entitled to a transfer under Minn. Stat. § 253B.185, subd. 11 (2010). In the alternative, appellant asserts that he is entitled to a provisional or full discharge of his commitment. We affirm.

FACTS

Appellant Daniel Larsen was born in March 1961. Appellant's father left the family six months after appellant was born, and appellant's mother neglected and physically abused him. When appellant was six years old, he witnessed the rape of his mother. Four years later, at age ten, he witnessed his mother's murder.

In July and August 1976, when appellant was 15 years old, delinquency petitions were filed against him for exposing himself and for abducting and attempting to rape a nine-year-old girl. Appellant was placed in the custody of Anoka County Social Services and subsequently ran away from various placements and shelters. Appellant eventually completed inpatient treatment at the Fairview Hospital Psychiatric Unit in June 1977 and was released to the outpatient program. Eight days later, he raped a ten-year-old girl.

After a delinquency petition was filed against appellant, the district court determined that appellant was mentally ill and directed respondent Anoka County (the county) to file a petition to commit appellant for mental illness. The county subsequently filed a petition to commit appellant as mentally ill and dangerous. Following an

evidentiary hearing, the district court found that appellant was a paranoid schizophrenic with "severe character disorder," and that appellant met the criteria for commitment as a person who is mentally ill and dangerous. The court then committed appellant to the Minnesota Security Hospital in St. Peter and directed that a review of appellant's case be conducted within 60 days.

In the 60-day report required by the district court and submitted for the September 1977 petition, the treating physician stated that appellant did not appear to meet the statutory criteria for mentally ill and dangerous, but did meet the statutory criteria for psychopathic personality. The county then filed a petition to commit appellant as a psychopathic personality. At the hearing, evidence was submitted demonstrating that during his time at the security hospital in 1979, appellant was involved in repeated physical altercations with other patients; that he kept other patients awake at night by openly masturbating in the dormitories and wiping his semen on other patients; that appellant masturbated during group therapy and during meetings with nurses; that appellant exposed himself to other patients; and that appellant admitted to hospital staff that he had committed as many as three rapes for which he was never charged. In addition, a psychiatric consultant at the security hospital opined that the documented instances of appellant's aggressive and inappropriate behavior "represent only a fragment of his sexual activity within the hospital."

The district court found appellant to be a psychopathic personality and committed him as such to the Minnesota Security Hospital. Two months later, the district court issued a final determination committing appellant to the Minnesota Security Hospital

indeterminately as a psychopathic personality. Appellant did not appeal the commitment order, but has filed several petitions for writs of habeas corpus. The denial of appellant's last habeas corpus petition was affirmed by this court in 2004. *See In re Larsen*, No. A03-1410 (Minn. App. May 11, 2004), *review denied* (Minn. July 20, 2004). In addition, appellant has unsuccessfully petitioned the SRB at least nine times since 1981 for a full or provisional discharge from his civil commitment.

Most recently, on April 23, 2009, appellant petitioned the SRB for a discharge from commitment, a provisional discharge, or a transfer to a non-secure facility. Following a hearing, the SRB recommended that the petition be denied. Appellant subsequently requested rehearing and reconsideration of the SRB's recommendation, and an evidentiary hearing was held before the three-judge appeal panel.

At the hearing, court-appointed examiner Dr. James Gilbertson testified, consistent with his 2008 and 2010 reports, that his diagnosis for appellant is sexual abuse of a child or children. Dr. Gilbertson testified that this diagnosis, as opposed to the diagnosis of pedophilia, "bears upon . . . future risk of acting out, . . . responsiveness to treatment, . . . the kind and quality of the relapse prevention plan that would be asked of the individual, . . . and the kind of supervision that would be needed once placed in the community." Dr. Gilbertson also testified that he would classify appellant as an untreated sex offender who does not currently possess the skills necessary to cope in the community. Dr. Gilbertson further testified that despite the absence of a diagnosis of pedophilia, he believed appellant was a "moderate high risk" to reoffend. Thus, Dr. Gilbertson could not support appellant's discharge from civil commitment or a provisional discharge.

And, although Dr. Gilbertson's 2008 report acknowledged that appellant was appropriate for a "moderately-secure" program, he clarified at the hearing that he did not think such a transfer was appropriate "at this time."

Appellant testified at length about witnessing the rape and death of his mother as a child and about the emotions he was experiencing as a result of those ordeals. But appellant claimed that "I've grown up since then" and "changed myself for the better." Appellant testified that he now understands how to control his anger issues and believes he understands and can prevent relapse of victimization of children who were his age when he was victimized.

At the close of appellant's case, the county and respondent Commissioner of Human Services (commissioner) moved to dismiss pursuant to Minn. R. Civ. P. 41.02(b) based on appellant's failure to produce credible evidence that he met the statutory criteria for full discharge, provisional discharge, or transfer to a non-secure DHS facility. The panel granted the motion and subsequently issued its order denying appellant's requested relief. The panel found that appellant's treatment team opposed his requested relief because appellant fails to control his aggressive behavior, has not been accountable for his sexual offending, and denies entire offenses and significant aspects of offenses he admits to committing. The panel also found that appellant has minimally participated in sex-offender treatment since 1995 and that appellant continues to present a high risk to reoffend and be dangerous to others. Finally, the panel found that appellant's provisional discharge plan is not realistic and does not provide a reasonable degree of protection to the public. This appeal followed.

D E C I S I O N

We will reverse a decision of the judicial appeal panel only if it is clearly erroneous. *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985). In reviewing a decision of the judicial appeal panel, we must determine from an examination of the record whether the evidence as a whole sustains the panel's findings. *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992). "[I]t is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Id.* (quoting *Johnson v. Noot*, 323 N.W.2d 724, 728 (Minn. 1982)).

I.

Appellant argues that the evidence presented at the hearing supports a conclusion that transfer would benefit him and also not place the public at unreasonable risk. Thus, appellant argues that the judicial appeal panel erred by granting the state's motion to dismiss after appellant's production of evidence.

Minnesota law provides that a person who is committed as a sexual psychopathic personality (SPP) "shall not be transferred out of a secure treatment facility unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the [SRB], that the transfer is appropriate." Minn. Stat. § 253B.185, subd. 11(a) (2010). The following factors are to be considered in determining whether a transfer is appropriate: "(1) the person's clinical progress and present treatment needs; (2) the need for security to accomplish continuing treatment; (3) the need for continued institutionalization; (4) which facility can best meet the

person's needs; and (5) whether transfer can be accomplished with a reasonable degree of safety for the public." Minn. Stat. § 253B.185, subd. 11(b) (2010).

A. The person's clinical progress and treatment needs

Appellant argues that his present treatment needs include some relaxation of security to promote completion. Appellant asserts that such treatment is recommended by Dr. Gilbertson, and the Minnesota Sex Offender Treatment Program (MSOP) does not offer such treatment options. Thus, appellant argues that his treatment needs weigh in favor of transfer. This assertion is not entirely without merit.

Dr. Gilbertson's 2008 report stated that "public safety could be served and [appellant's] treatment needs . . . met in a program that could be moderately secure." But the report also acknowledged that no such treatment facility exists in Minnesota. Thus, appellant continues to be in a "catch 22" status. Moreover, Dr. Gilbertson clarified at the hearing that a transfer may be appropriate in the future, "but not at this time." Dr. Gilbertson classified appellant as an untreated sex offender, and the record reflects that appellant has never completed sex-offender treatment. The record further reflects that despite his claim that the public would not be at risk if he was transferred to a less secure facility, appellant was placed in protective isolation shortly before the hearing for fighting with another MSOP patient. Although altercations of this sort are not uncommon in a secure setting housing a variety of individuals with mental illnesses, we must conclude that appellant's conduct does not weigh in favor of transfer.

B. The needs for security to accomplish continuing treatment

Appellant argues that security is no longer necessary to accomplish treatment now that he is much older. Appellant contends that he demonstrated a lack of necessity for security to accomplish treatment by being rewarded with "reduction of security status permitting him passes at St. Peter." Thus, appellant argues that this factor weighs in favor of transfer.

As addressed above, despite nearly 34 years of secure detention, appellant is still an untreated sex offender who, based on his history, has shown no ability to complete treatment at a secure facility. Thus, a less restrictive placement is premature. Moreover, appellant's psychological test scores indicate that appellant is still a moderate-high risk to reoffend. Without evidence demonstrating that appellant has taken the necessary steps to complete treatment, the need for security to accomplish appellant's continuing treatment weighs against transfer.

C. Need for continued institutionalization

Appellant argues that any need for continued institutionalization would be satisfied by a transfer because he would remain within institutional supervision in a manner that would afford him more freedom. But Dr. Gilbertson testified that one of the secondary goals of any treatment program is to work on socialization demands, empathy building, and a variety of other treatment modules that go toward helping an individual mature to cope better in real-life situations. Because appellant has not completed any of his treatment requirements, he has not made the strides necessary to adjust to life in the community.

D. Facility that can best meet appellant's needs

Appellant argues that the best facility that can meet his needs is a less restrictive facility that offers "a more therapeutic setting." While appellant certainly cannot articulate which facility best meets his needs, Dr. Gilbertson's testimony indicates that there is no such facility in Minnesota that is less restrictive yet offers the type of treatment that appellant needs. The record indicates that it is either MSOP or no treatment program at all. Therefore, and very unfortunately, it appears that appellant's current placement is the only appropriate setting to meet his needs.

E. Transfer and the necessity of safety to the public

Appellant argues that, in light of his current age, his age when he committed the sexual assaults, and his "reduced diagnosis," a transfer can be accomplished with a reasonable degree of safety for the public. But the record we have before us reflects otherwise. Unfortunately, appellant does not recognize his risk factors. Moreover, the record reflects that appellant still occasionally engages in violent behavior, which is demonstrated by his recent placement in protective isolation following a fight with another MSOP patient. And, perhaps most importantly, appellant has shown no accountability for his behavior by denying that he even engaged in certain conduct. For example, appellant has a long history of masturbating during meetings and in front of cellmates. But when asked about this conduct at the hearing, appellant denied that the conduct occurred. Appellant's inability to admit such deviant conduct, while understandable, is reflective of his inability to be transferred to a less secure facility without reasonably endangering public safety. And, despite the nearly 34 years appellant

has been in a locked facility, without hope for release, we cannot substitute our reservations about the efficacy of the civil commitment system for the decision of the SRB and the three judge panel which heard the testimony, considered the evidence, and applied the law. Accordingly, the panel did not abuse its discretion by denying appellant's petition for a transfer to a less secure DHS facility.

II.

Appellant argues that he is entitled to a full or provisional discharge from his civil commitment. On a petition for full or provisional discharge, the petitioner has the burden of going forward with the evidence. Minn. Stat. § 253B.19, subd. 2(d) (2010). To meet the burden of production, the petitioner must present "a prima facie case with competent evidence to show that the person is entitled to the requested relief." *Id.* "If the petitioning party has met this burden, 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." *Id.*

A provisional discharge of a person committed as an SPP may be granted only if

> it appears to the satisfaction of the judicial appeal panel, after a hearing and a recommendation by a majority of the [SRB], that the patient is capable of making an acceptable adjustment to open society.
>
> The following factors are to be considered in determining whether a provisional discharge shall be recommended:
>
> (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.

Minn. Stat. § 253B.185, subd. 12 (2010).

A full discharge of a person committed as an SPP may be granted only if

> it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the [SRB], 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 [SRB] and judicial 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.

Minn. Stat. § 253B.185, subd. 18 (2010).

Appellant argues that he is entitled to a full or provisional discharge because the evidence demonstrates that (1) the public was not at risk when he went on unsupervised passes into the community; (2) he is not a pedophile; (3) he has a fiancée and a stable family environment; and (4) whatever "substantial psychopathy was found in 1977 is no longer substantiated." But Dr. Gilbertson testified that appellant "hasn't done the work and hasn't reached the point where provisional discharge could be . . . considered a realistic option." The panel found Dr. Gilbertson's testimony to be credible, and we defer to the panel's credibility determinations. *See In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995) (stating that appellate courts give deference to a district court's credibility determinations). Moreover, the record reflects that appellant has not completed treatment

and refuses to acknowledge at least some of his sexually deviant behavior. Without full cooperation in the treatment process, questions are raised about the sincerity of appellant's testimony. As a result, there is insufficient evidence to show that a full or provisional discharge would provide a reasonable degree of protection to the public, and appellant will continue institutionalized indefinitely, as he has been for the last 34 years. Accordingly, the panel did not abuse its discretion in denying appellant's petition for a provisional or full discharge of his commitment.

Affirmed.