

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1793
A18-1851**

In the Matter of the Civil Commitment of: Lawrence Dean Anderson.

**Filed March 25, 2019
Affirmed
Schellhas, Judge**

Supreme Court Appeal Panel - SCAP
File No. AP17-9148

Keith Ellison, Attorney General, Michael Leonard, Assistant Attorney General, St. Paul, Minnesota (for appellant Commissioner of Minnesota Department of Human Services)

Michael Freeman, Hennepin County Attorney, Annsara Lovejoy Elasky, Assistant County Attorney, Minneapolis, Minnesota (for appellant Hennepin County)

Michael C. Hager, Minneapolis, Minnesota (for respondent Anderson)

Considered and decided by Schellhas, Presiding Judge; Slieter, Judge; and Stauber, Judge.*

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

SCHELLHAS, Judge

Appellants challenge a supreme court appeal panel's order granting respondent's petition for transfer to community preparation services, arguing that the panel (1) deprived appellants of due process by failing to provide them with the opportunity to present evidence;

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

(2) abused its discretion by denying appellants' motion for reconsideration, and (3) clearly erred by granting respondent's transfer petition. We affirm.

FACTS

Respondent Lawrence Anderson has been indeterminately committed as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP) since June 2000. In January 2017, Anderson petitioned a special review board (SRB) for a transfer to community preparation services (CPS), a provisional discharge, and a full discharge from civil commitment. Appellants Commissioner of Minnesota Department of Human Services (commissioner) and Hennepin County (county) opposed Anderson's petition.¹ Following a hearing in September 2017, the SRB denied Anderson's petition. Anderson then filed a petition for rehearing and reconsideration of his petition by a supreme court appeal panel (judicial appeal panel), and the judicial appeal panel conducted a half-day hearing on June 12, 2018.

Before the hearing began, Anderson withdrew his request for provisional and full discharge, and proceeded solely with his request for a transfer to CPS. At the hearing, he offered three exhibits into evidence, including his relapse plan, his pre-discharge plan, and court-appointed examiner Dr. Andrea Lovett's report supporting Anderson's requested transfer. Appellants offered 17 exhibits into evidence, including an adverse sexual violence risk (SVR) assessment, dated September 6, 2017; an SRB treatment report, dated August 24, 2017; and other recent treatment-related assessments. The panel heard testimony from

¹ The county and the commissioner hereinafter referred to collectively as "appellants."

Dr. Lovett, as well as four employees from the Minnesota Sex Offender Program (MSOP), who have been involved in Anderson's treatment: clinical therapist Anoria Zuehlke, clinician Kelly Meyer, clinician Elizabeth Marti, and clinical supervisor Michael Hettig.

Following the hearing, the judicial appeal panel found that "Dr. Lovett opined that [Anderson] has made significant progress in his treatment and [that] she supports his request for a transfer to CPS" because "CPS is the facility that can best meet [Anderson]'s needs" by providing "him with opportunities to utilize the skills he has learned in treatment and would further advance his treatment." The panel also found that Anderson "presents an average risk of recidivism," and that "the security measures at CPS are sufficient." The panel found that although the exhibits relied upon by appellants conclude that a transfer of Anderson to CPS is premature, the "opinion of Dr. Lovett regarding [Anderson]'s request for a transfer to CPS is more persuasive." On September 13, 2018, the panel issued an order granting Anderson's "petition to transfer to a less restrictive facility (CPS)."

The county moved for reconsideration, claiming that because Anderson's petition did not present a transfer-only case, the hearing before the judicial appeal panel was "scheduled for a half-day, phase I hearing," to allow Anderson to present evidence that he was entitled to relief. Although Anderson withdrew his request for provisional and full discharges before the hearing began, the county claimed that it "was not under the impression that this phase I proceeding would be dispositive without the opportunity to present its evidence opposing transfer." The county therefore requested that a "Phase II" hearing be scheduled on the ground that the panel did not afford the county an opportunity

to present its case opposing transfer. The commissioner requested permission to move for reconsideration on the same grounds.

The judicial appeal panel stayed its September 13, 2018 transfer order, and ordered appellants to submit an offer of proof identifying all the evidence that they would offer at a Phase II hearing. Appellants submitted an offer of proof on October 10, indicating that at a Phase II hearing, they would offer testimony from MSOP clinical director Christopher Schiffer, MSOP forensic psychologist Dr. Lauren Reed, and CPS operations manager Michelle Sexe. Appellants also noted that “consistent with standard practice” in advance of a Phase II hearing, MSOP would prepare an updated SRB treatment report, which would “likely” be authored by Schiffer, and that appellants expected Schiffer’s report to be consistent with the August 24, 2017 SRB treatment report opposing Anderson’s transfer to CPS.

The judicial appeal panel denied appellants’ motion to reconsider the September 13, 2018 transfer order and to schedule a Phase II hearing and reinstated the transfer order. The panel stated that it provided appellants “with ample due process by giving [them] an opportunity to make an offer of proof,” analyzed the evidence in appellants’ offer of proof, and determined that appellants’ response not only failed to “comply with the Panel’s September 25, 2018 Order to provide this Panel with the offer of proof it requested” but also bolstered the panel’s confidence about the appropriateness of its decision to grant Anderson’s petition for transfer to CPS.

This appeal follows.

DECISION

I. Due process

Appellants argue that the panel denied them due process by granting Anderson's petition for transfer to CPS without scheduling a Phase II hearing at which they could present their case-in-chief. As a result, appellants contend that we should vacate the panel's decision and "remand the matter with instructions to schedule a Phase II hearing." We disagree.

Generally, due process requires adequate notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976). This court reviews the procedural due process afforded a party de novo. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012).

A person who is committed as an SDP or SPP may petition the SRB for a reduction in custody. Minn. Stat. § 253D.27 (2018). The term "reduction in custody" includes a provisional discharge, a full discharge, and a transfer to CPS. *Id.*, subd. 1(b). If the SRB recommends that the commissioner deny the petition for a reduction in custody, the committed person may then ask the judicial appeal panel for reconsideration of the SRB's recommendation. Minn. Stat. § 253D.28, subd. 1(a) (2018).

When appearing before the judicial appeal panel on a petition for provisional or full discharge, the committed person "bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." Minn. Stat. § 253D.28, subd. 2(d) (2018); see *Coker v. Jesson*, 831 N.W.2d 483, 485–86 (Minn. 2013) (describing this burden as a

“burden of production,” that requires “the committed person to come forward with sufficient, competent evidence that, if proven, would entitle the petitioner to relief” (quotation omitted)). In considering such a motion, the panel “may not weigh the evidence or make credibility determinations,” but instead must view the evidence in a light most favorable to the committed person. *Coker*, 831 N.W.2d at 490–91. “The proceeding in which a committed person produces evidence is commonly referred to as a ‘first-phase hearing.’” *Id.* at 486. If a committed person satisfies his burden of production at the “first-phase hearing,” the proceeding moves to a “second-phase hearing.” *Id.* At this phase, the party opposing the petition “bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied.” Minn. Stat. § 253D.28, subd. 2(d).

“[U]nlike a discharge petition, a petition for transfer imposes the burdens of production *and* persuasion on the petitioner at the hearing before the judicial appeal panel.” *Foster v. Jesson*, 857 N.W.2d 545, 548 (Minn. App. 2014); *see also* Minn. Stat. § 253D.28, subd. 2(e) (2018) (“A party seeking transfer . . . must establish . . . that the transfer is appropriate.”). In this situation, the panel sits as the trier of fact to determine whether a petitioner proves by a preponderance of the evidence that transfer is appropriate. *Id.* The description of discharge hearings as first-phase and second-phase therefore is inapplicable to transfer hearings. *See Coker*, 831 N.W.2d at 485–91 (distinguishing between first- and second-phase hearings); *Foster*, 857 N.W.2d at 548–49 (describing difference between proceedings when individual petitions for discharge versus petitions for transfer).

Here, because Anderson withdrew his petition for discharge, the only issue before the judicial appeal panel was his petition for transfer. Under these circumstances, the matter no longer needed to be bifurcated between Phase I and Phase II hearings; rather, the panel sat as the trier of fact and Anderson bore both the burden of production and persuasion to show that he was is entitled to a transfer. *See Coker*, 831 N.W.2d 485–86 (distinguishing between first- and second-phase hearings). The record reflects that in proceeding on Anderson’s petition for transfer, the panel accepted appellants’ 17 exhibits. By accepting these exhibits, appellants knew or should have known that a Phase II hearing would not be held because Anderson withdrew his petition for discharge, and the procedural posture of the hearing was no longer consistent with a Phase I hearing. *See id.* at 491 n.9 (noting that in a Phase I hearing the “better practice” is to “wait until the second-phase hearing before receiving the exhibits, testimony, and other evidence offered by the Commissioner” because “the submission of competing facts by an adverse party makes the application of the ‘viewed in a light most favorable to the committed person’ standard more difficult to apply”); *see also In re Commitment of Poole*, 921 N.W.2d 62, 66 (Minn. App. 2018) (holding that the “testimony and reports of a witness called by the panel are not evidence produced by the committed person” and, therefore, the “panel should not have called its own examiner and should not have admitted her report at [the committed person]’s first-phase hearing”), *review denied* (Minn. Jan. 15, 2019). And, at the end of the hearing, the panel stated that it would “conclude the hearing then here today,” and that it would “make a determination and . . . advise the parties of [its] decision.” The panel’s statement implies that a Phase II hearing would not be conducted.

Moreover, the judicial appeal panel's acceptance of appellants' 17 exhibits indicates that appellants were not denied the opportunity to be heard. Although the proceeding ended without appellants calling any witnesses, nothing in the record indicates that they were deprived of the right to be heard. Instead, the record reflects that after Anderson rested, the panel specifically asked if there was "[a]nything from [appellants]," to which appellants replied no. Nothing in the record indicates that the panel would not have allowed appellants to call their witnesses, had they asked to do so. As Anderson points out, if appellants "were not prepared to call their own witnesses," appellants could have sought a continuance. They did not.

Finally, the United States Supreme Court has stated that adequate notice and a meaningful opportunity to be heard are "flexible" concepts depending on the circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). And the Minnesota Supreme Court has stated that "[a]lthough the amount of process due in a particular case varies with the unique circumstances of that case, prejudice as a result of the alleged violation is an essential component of the due process analysis." *In re Welfare of Child of B.J.-M.*, 744 N.W.2d 669, 673 (Minn. 2008) (citation omitted).

Here the judicial appeal panel requested and received an "offer of proof identifying all additional evidence [appellants] wish[ed] to offer at any Phase II hearing." The panel appeared to have accepted the evidence as if it had been given at the hearing, and the panel determined that the offer of proof "provides the Panel with additional confidence that its decision to grant transfer was appropriate." Accordingly, appellants cannot establish that the procedure in this case violated the principles of due process.

II. Request for reconsideration

Appellants also contend that the judicial appeal panel abused its discretion by denying its request to file a motion to reconsider under Minn. R. Gen. Prac. 115.11. That rule provides that “[m]otions to reconsider are prohibited except by express permission by the court, which will be granted only upon a showing of compelling circumstances.” Minn. R. Gen. Prac. 115.11. A district court’s decision regarding a motion for reconsideration is reviewed for an abuse of discretion. *In re Welfare of S.M.E.*, 725 N.W.2d 740, 743 (Minn. 2007).

In denying appellants’ request to reconsider, the judicial appeal panel found that Schiffer “is not qualified” to testify “regarding the testimony and report of the court-appointed examiner in any [Supreme Court Appeal Panel] case.” Appellants argue that this determination is “plainly erroneous” because the testimony and report of the court-appointed examiner, “are all within the area of Mr. Schiffer’s personal knowledge or expertise as clinical director and as the author of the Recommendation section of [Anderson]’s SRB Treatment Report.” Appellants also challenge the panel’s finding that it “is virtually always presented with an updated [SVR] Assessment and an updated [SRB] Treatment report in advance of a Phase I hearing.” Appellants contend that because these findings are “contrary to the facts of the record,” the panel abused its discretion by denying the motion for reconsideration.

Appellants are unable to establish that they are entitled to relief because even if their argument has merit, they are unable to show that the judicial appeal panel abused its discretion in denying their reconsideration motion. The panel did not make its decision

based on the findings challenged by appellants. Rather, the panel carefully analyzed the offer of proof submitted by appellants and determined that nothing in appellants' offer of proof persuaded the panel "to change its decision that [Anderson] is eligible for a transfer to CPS." Moreover, as noted above, the panel noted that appellants' offer of proof bolstered its "confidence that its decision to grant transfer was appropriate." The panel did not abuse its discretion by denying the appellants' request for reconsideration.

III. Evidentiary support for Anderson's petition for transfer

In determining whether a transfer to CPS is appropriate, a judicial appeal panel must consider five factors: "(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. § 253D.29, subd. 1(b) (2018). This court reviews decisions of the panel "for clear error, examining the record to determine whether the evidence as a whole sustains the appeal panels' findings and not weighing the evidence as if trying the matter de novo." *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014) (quotations omitted). "Where the findings of fact rest almost entirely on expert testimony, the [panel]'s evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

Appellants argue that the judicial appeal panel clearly erred in granting Anderson's petition for transfer because the SVR assessment and the SRB treatment report "concluded that [Anderson]'s petition for transfer to CPS was premature." But Dr. Lovett opined that Anderson "has made significant progress in his treatment," that Anderson "presents an

average risk of recidivism,” that “CPS will provide any necessary security,” and that the “security measures at CPS are sufficient.” Dr. Lovett also opined that “CPS is the facility that can best meet [Anderson]’s needs because it would provide him with opportunities to utilize the skills he has learned in treatment and would further advance his treatment.” Thus, Dr. Lovett supported Anderson’s request for a transfer to CPS. Although the panel recognized the recommendations of the SVR assessment and the SRB treatment report, the panel found Dr. Lovett’s opinion on the transfer issue to be “more persuasive.”

Appellants acknowledge the judicial appeal panel’s credibility finding, but contend that the decision granting Anderson’s transfer petition was clearly erroneous because the panel failed to explain why it found the opinion of Dr. Lovett more “persuasive” than the conflicting evidence offered by appellants. To support its claim, appellants cite *In re Civil Commitment of Spicer*, 853 N.W.2d 803 (Minn. App. 2014), for the proposition that “a court must explain its reasons for determining which witnesses are credible and which witnesses are not.” In that case, this court held that the district court’s findings in Spicer’s commitment proceedings were insufficient because this court was unable to determine which of the statutory factors the district court considered most significant in reaching its conclusion, or which portions of the experts’ inconsistent and contradictory opinions the district court relied on in making its decisions. *Id.* at 810–12. This court then reversed in part and remanded for further findings. *Id.* at 812.

Spicer is distinguishable from this case because that case was an appeal following the commitment of Spicer as a SDP. Moreover, our supreme court has stated that when the “findings of fact rest almost entirely on expert testimony, the [district] court’s evaluation

of credibility is of particular significance.” *Knops*, 536 N.W.2d at 620. Here, the judicial appeal panel’s decision hinged on a credibility determination of the evidence and testimony provided. The panel acknowledged the statutory factors that must be evaluated in considering a transfer petition and determined that an application of these factors to the evidence presented supported a transfer. In making this decision, the panel recognized the evidence presented both for and against Anderson’s transfer petition and explained that it “carefully considered the opinions and recommendations contained” in the SVR assessment and the SRB treatment report, as well as the opinion of Dr. Lovett, and concluded that Dr. Lovett’s opinion was “more persuasive.” Although a more detailed explanation of why the panel found Dr. Lovett’s opinion to be “more persuasive” may have been helpful, the panel’s findings are adequate to demonstrate why Anderson met his burden of proof. In light of deference afforded the panel in making its credibility determinations, the panel’s decision to grant Anderson’s motion for transfer to CPS therefore is not clearly erroneous.

Affirmed.