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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1815**

In the Matter of the Civil Commitment of: Thomas Ladon Webber.

**Filed March 18, 2019
Affirmed
Reilly, Judge**

Judicial Appeal Panel
File No. AP17-9172

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Keith Ellison, Attorney General, Brett O'Neill Terry, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

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Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and
Kalitowski, Judge.*

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges a judicial appeal panel's dismissal of his petition for a reduction in custody and argues that the Minnesota Commitment and Treatment Act violates his constitutional rights. We affirm.

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

FACTS

Appellant Thomas Ladon Webber (Webber) is indeterminately committed as a Sexual Psychopathic Personality (SPP) and a Sexually Dangerous Person (SDP). Webber has a history of violent sexual offenses against female adolescents (ages 13 to 17).

In 1991, Webber was charged with two counts of third-degree criminal sexual conduct after a 15-year-old female reported that Webber pinned her to the floor in her home and raped her. Webber pleaded guilty to third-degree criminal sexual conduct and received an 18-month prison sentence that was stayed on conditions of probation for five years.

In 1993, Webber was charged with first-degree criminal sexual conduct after a 17-year-old victim reported that Webber put his arm around her throat, knocked her unconscious, carried her to his car, drove her to a lake and raped her. A medical examination of the victim confirmed contusions and bruises on her body and abrasions in her vaginal area. Webber pleaded guilty to third-degree criminal sexual conduct, the stay of his 18-month sentence from 1991 was revoked, and the district court sentenced him to 64 months in prison.¹

Early in his prison term, Webber was interviewed for admission to sex offender treatment at the Lino Lakes prison. Because he refused to discuss his offenses, he was considered unamenable to treatment and was not admitted. Webber later entered the

¹ Also in 1993, before being imprisoned for the sexual assaults, Webber was arrested and charged with possession of a firearm by a felon. In May 1994, Webber pleaded guilty to the charge and was sentenced to 17 months in prison, to be served concurrently with his criminal sexual conduct sentences.

treatment program and apparently began to progress, passing into “Phase II” and eventually “Phase III” of the program. He continued treatment until his release in March 1997.

In 2001, Webber was charged with third-degree criminal sexual conduct for sexually assaulting another 17-year-old girl,² and two counts of fourth-degree criminal sexual conduct for inappropriately touching the inner thigh and vagina of a 13-year-old girl, and for touching the vagina of a 14-year-old girl. The district court found Webber guilty of four crimes: (1) third-degree criminal sexual conduct for the incident with the 17-year-old victim; (2) fourth-degree criminal sexual conduct for the incident with the 13-year-old victim; (3) false imprisonment for the incident with the 14-year-old victim; and (4) failure to register as a sex offender. The district court sentenced Webber to prison for a total of 88 months. Because Webber refused to discuss the offenses and denied committing them, he was not admitted to sex offender treatment during his incarceration.

In May 2007, the district court committed Webber to the Minnesota Sex Offender Program (MSOP), concluding that he satisfied the requirements for commitment as a SDP and SPP. The district court later granted the state’s petition for indeterminate commitment. In 2009, Webber appealed his indeterminate commitment, and this court affirmed the district court’s determination.

In 2017, Webber petitioned the special review board (SRB) for a transfer to community preparation services (CPS), provisional discharge, or full discharge. The SRB

² The 17-year-old victim reported that Webber entered the bathroom where she was bathing, reached in the bathwater and inserted his finger into her vagina. As the girl was drying off, Webber grabbed her legs, digitally penetrated her vagina again, and then put his mouth on her vagina and kept it there while she attempted to push him away.

recommended denying provisional discharge and full discharge but granting transfer to CPS. The Commissioner of Minnesota Department of Human Services (Commissioner) and Hennepin County (county) filed a timely petition for rehearing and reconsideration of the SRB Findings of Fact and Recommendation that recommended transfer. Webber was permitted to file a late petition for rehearing and reconsideration of the SRB's recommendation to deny provisional or full discharge.

In June 2018, the Judicial Appeal Panel (appeal panel) held the hearing. During Webber's case-in-chief, he called three witnesses to testify: (1) Sharon Green, CEO of Peace of Hope, Inc.³; (2) Cheryl Bradford, Webber's mother; and (3) Dr. Adam Gierok, the court-appointed examiner. Dr. Gierok evaluated Webber and believed that Webber met criteria for (1) other specific paraphilic disorder based on his offending against individuals who were nonconsenting, and (2) other specific personality disorder based on the presence of fairly significant antisocial traits. Based upon his assessments and observations, Dr. Gierok testified that Webber did not meet the statutory criteria for provisional or full discharge. However, due to Webber's scores on multiple risk assessments and his participation and engagement in treatment, Dr. Gierok testified that Webber met the statutory criteria for transfer to CPS. Dr. Gierok admitted that Webber continues to disagree with his offending history and denies using force. Dr. Gierok explained that an indication of deception on two of Webber's polygraphs "shows the development of a

³ Green works at a nonprofit that supports incarcerated individuals and knows Webber through her church. She testified that she has not ever been involved in treating sex offenders. She does not support Webber continuing in sex offender treatment at MSOP.

pattern or a persistence of an inability to acknowledge or to apparently be open about certain aspects of his offending history.” Dr. Gierok admitted that the recommendation for transfer was a “close call.”

At the close of Webber’s case-in-chief, the Commissioner moved to dismiss the petition for provisional discharge and discharge pursuant to Minnesota Rule of Civil Procedure 41.02(b) and Minnesota Statutes section 253D.28 (2018), and the county joined in the motion. The appeal panel granted the Commissioner’s motion, finding that Webber did not meet his prima facie burden of production.

The Commissioner then proceeded to present its case-in-chief on the issue of transfer. The Commissioner called three witnesses during its case-in-chief including Michelle Sexe, Operations Manager of CPS; Peter Puffer, Clinic Director of Moose Lake MSOP; and Dr. Jennifer Tippet, a forensic evaluator for the Minnesota Department of Human Services. Sexe testified that the CPS facility is designed to provide MSOP clients with reintegration opportunities before living in the community. The CPS facility is not secure and does not have razor wire, locked doors, or security cameras in the clients’ rooms. Puffer testified that MSOP does not support Webber’s petition for transfer to CPS because Webber is in the middle of Phase II of the three-phase treatment program and self-monitoring, thinking errors, and sexuality all remain areas of need. Puffer explained that Webber had remaining treatment needs in the area of sexuality, including the completion of a penile plethysmograph (PPG) and Webber indicated deception on his full disclosure of sexual history polygraph. Though Webber has been using daily journals, Webber has

not completed iceberg journals⁴ as preferred by MSOP. Dr. Tippet evaluated Webber, spoke to Webber’s primary therapist, reviewed medical records, and used actuarial tools to complete a sexual violence risk assessment (SVRA). Dr. Tippet testified that Webber does not meet the statutory criteria for transfer to CPS.

On October 5, 2018, the appeal panel issued an order denying Webber’s petition in its entirety. The appeal panel determined that Webber did not establish, by a preponderance of the evidence, that a transfer was appropriate under Minn. Stat. § 253D.28, subd. 2(e).

Webber now appeals.⁵

D E C I S I O N

I. The appeal panel properly denied appellant’s petition for transfer.

The Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA), Minn. Stat. §§ 253D.01–.36 (2018), governs discharge proceedings of a person committed as SDP or SPP. A person who is committed as an SDP or SPP may petition the SRB for a reduction in custody. Minn. Stat. § 253D.27, subd. 2. The term “reduction in custody” includes a provisional discharge, a full discharge, or a transfer out of a secure treatment facility. *Id.*, subd. 1(b). If the SRB recommends a reduction in custody, the county attorney of the county from which the person would be

⁴ Iceberg journaling is described as an exercise where clients identify both surface-level and underlying causes to their actions and behaviors.

⁵ Although Webber’s petition to the appeal panel also included a request for provisional discharge or full discharge, Webber’s brief does not provide an argument as to why the appeal panel’s dismissal of Webber’s request for discharge was erroneous. We do not decide issues that have not been adequately briefed. *State Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). Therefore, this opinion only addresses the appeal panel’s dismissal of Webber’s request for transfer.

committed or the Commissioner may petition the judicial appeal panel for reconsideration of the SRB's recommendation. *Id.* at § 253D.28, subd. 1(a).

A person who is committed as an SPP or SDP may be transferred to CPS only if “the transfer is appropriate.” *Id.* at § 253D.29, subd. 1(a). In determining whether a transfer 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.

Id., subd. 1(b). If a committed person requests a transfer to CPS, he bears both “the burdens of production *and* persuasion . . . 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) (“A party seeking transfer . . . must establish by a preponderance of the evidence that transfer is appropriate.”).

Generally, this court reviews decisions by a judicial appeal panel for clear error, “examin[ing] the record to determine whether the evidence as a whole sustains the appeal panels' findings” and not “weigh[ing] the evidence as if trying the matter de novo.” *Larson v. Jesson*, 847 N.W.2d 531 (Minn. App. 2014) (citing *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985) (quotation omitted); *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992)). This court reviews de novo the

application of the facts to the statutory criteria. *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *review denied* (Minn. June 20, 2017).

Here, the appeal panel made findings of fact based on the evidence presented at the hearing and concluded that Webber failed to establish by a preponderance of the evidence that transfer was appropriate. Webber does not argue that there was clear error in the appeal panel's factual findings or that the appeal panel improperly applied the statutory criteria to its factual findings. Instead, Webber raises three arguments regarding the appeal panel's transfer decision.

First, Webber argues that the SRB's and the independent examiner's recommendations were not properly weighed by the appeal panel. This argument is unavailing because on review this court does not reweigh evidence, but instead looks to see if the evidence as a whole supports the appeal panel's conclusion. *See In re Civil Commitment of Duvall*, 916 N.W.2d 887, 892, 894 (Minn. App. 2018), *review denied* (Sept. 18, 2018) ("In reviewing the panel's order, we will not reweigh the evidence."); *In re Civil Commitment of Fugelseth*, 907 N.W.2d 248, 253 (Minn. App. 2018) (noting that "it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary") (quotation omitted), *review denied* (Minn. Apr. 17, 2018).

Second, Webber argues that the appeal panel should have considered Webber's time spent in treatment when making its transfer determination. However, this argument is likewise unavailing because time spent in treatment is not on the statutorily enumerated list of factors for the appeal panel's consideration. *See* Minn. Stat. § 253D.29, subd. 1(b)

(providing that the judicial appeal panel must consider five factors in a transfer determination, none of which is regarding the individual's time spent in treatment).

Third, Webber argues that it was not shown that he could not address his treatment needs at CPS. However, this is not the question at hand. Rather, the statutory criteria requires that the appeal panel examine "which facility can best meet the person's needs." Minn. Stat. § 253D.29, subd. 1(b). The appeal panel was "convinced" that Webber's current placement is the best facility to meet his needs. The appeal panel made very detailed findings in this case. The appeal panel relied on the expert opinions of Dr. Tippet and Mr. Puffer. The appeal panel cited to Dr. Tippet's SVRA report which provided:

Despite this clinical progress, it appears evident that [Webber] has remaining treatment needs, primarily in the areas of sexuality and problem solving. . . . [Webber's] ability or unwillingness to explore this arousal, in tandem with an absence of objective measures of sexual arousal/interests and possible dishonesty regarding his sexual offending, leaves a gap in important aspects of his overall offending cycle.

The appeal panel also considered the SRB's treatment report, which indicated transfer to CPS was premature:

In light of continuing treatment needs . . . and the role aggression played in his sexual offending, it is the opinion of the MSOP clinical leadership that [Webber's] petition for any reduction in custody is considered premature at this time.

The appeal panel thoroughly weighed the evidence for and against transfer in its order, writing:

[Webber] has not completed sex offender treatment and is in the middle stage of Phase II of the three-phase treatment program at MSOP. . . . Dr. Tippet opined that [Webber] does not meet the statutory criteria for a transfer to CPS, given

[Webber's] remaining treatment needs, as well as his need for security. In her testimony, Dr. Tippet also opined that [Webber's] current facility is the best facility to meet his needs.

Although Dr. Gierok supported [Webber's] request for a transfer to CPS, he admitted that it was a "close call." Dr. Gierok stated that [Webber] has remaining treatment needs. Additionally, Dr. Gierok testified that he would like [Webber] to participate in a PPG and full disclosure polygraph.

...

The Panel has weighed the evidence and is persuaded by the expert opinions of Dr. Tippet and Mr. Puffer. The Panel is convinced that [Webber's] current placement is the best facility to meet his ongoing treatment needs. The Panel also concludes that [Webber's] current placement is at the facility which can best meet the need for security to accomplish [Webber's] continuing treatment. Additionally, [Webber] requires continued institutionalization. . . . [T]he Panel is not confident that a transfer can be made with a reasonable degree of safety for the public.

Based upon our review of the record, we affirm the appeal panel's determination that transfer was not appropriate in this case.

II. The MCTA does not violate appellant's due-process rights.

Webber appears to argue that the three-phase treatment program violates his constitutional right to due process. We note that Webber did not raise this argument to the SRB or the appeal panel, and even if it were properly before this court, it is without merit.

We review a question of a statute's constitutionality *de novo*. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). The party challenging the constitutional validity of a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). We presume a

statute to be constitutional and will not declare one unconstitutional unless absolutely necessary. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

The supreme court upheld the constitutionality of the MCTA in *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995). The court held that a civilly committed person's due-process rights are protected by procedural safeguards including the ability to petition for transfer or discharge, periodic review, and the right to competent medical care and treatment. *Id.* at 318-319. This court is bound by the supreme court's interpretation of a statute. *State v. Rohan*, 834 N.W.2d 223, 227 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). And the Eighth Circuit has rejected both facial and as-applied challenges to the MCTA in *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017). Therefore, Webber's argument fails.

Affirmed.