STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1181

In the Matter of the Civil Commitment of: Steven Merrill Hogy.

Filed November 25, 2019
Affirmed
Larkin, Judge

Commitment Appeal Panel
File No. AP18-9071

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Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

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

LARKIN, Judge

Appellant challenges the dismissal of his petition for full discharge from his civil commitment to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous

person (SDP) and as a sexual psychopathic personality (SPP). He argues that he presented a prima facie case for full discharge and is entitled to an evidentiary hearing. We affirm.

FACTS

Appellant Steven Merrill Hogy is a 67-year-old man with a history of engaging in criminal sexual conduct. Hogy has sexually assaulted multiple male and female children, ranging in age from 5 to 15 years old. Hogy's offenses included fondling over and under clothing, frotteurism,[1] voyeurism, oral sex, masturbation, digital penetration, penile-vaginal penetration, and penile-anal penetration. In 1995, Hogy pleaded guilty to one count of second-degree criminal sexual conduct based on the sexual assault of one of his victims. In 1999, Hogy entered an *Alford* guilty plea[2] to one count of first-degree criminal sexual conduct involving another victim.

In December 2007, Hogy was civilly committed to MSOP as an SDP and an SPP under Minn. Stat. § 253B.02, subds. 18b, 18c (2006).[3] In July 2018, Hogy's indeterminate commitment to MSOP was finalized. Hogy has been in Phase I of MSOP's three-phase

[1] Frotteurism refers to "rubbing up against other individuals, fondling other individuals, having some form of physical contact or groping that is sexually arousing to that person, but is without consent or without knowledge of the other person involved."

[2] Under *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970), a defendant "may plead guilty to an offense, even though the defendant maintains his or her innocence, if the defendant reasonably believes, and the record establishes, the state has sufficient evidence to obtain a conviction." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (citing *Alford*, 400 U.S. at 37, 91 S. Ct. at 167).

[3] In 2013, the legislature amended the Minnesota Commitment and Treatment Act by removing provisions regarding SDP and SPP commitments from chapter 253B and moving them to a new chapter 253D, entitled the "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities." 2013 Minn. Laws ch. 49, §§ 1-22, at 210-31.

program for 11 years. He has not participated in sex-offender treatment at MSOP since 2014.

In April 2017, Hogy petitioned the special review board (SRB) for transfer to community preparation services, provisional discharge, or a full discharge from his civil commitment. *See* Minn. Stat. § 253B.18, subd. 4c (2018) (establishing special review board); Minn. Stat. § 253D.27 (2018) (setting forth procedure by which persons civilly committed as sex offenders may petition the special review board for a "reduction in custody," which means transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment). Respondents Minnesota Commissioner of Human Services and Goodhue County opposed Hogy's petition. The SRB recommended that Hogy's petition be denied in its entirety.

Hogy petitioned the commitment appeal panel (CAP) for rehearing and reconsideration.[4] *See* Minn. Stat. § 253D.28, subd. 1 (authorizing petition to the CAP for rehearing and reconsideration of a recommendation of the SRB under section 253D.27). In March 2019, the CAP held a hearing on Hogy's petition. At the beginning of the hearing, Hogy withdrew his request for transfer and provisional discharge. Hogy testified on his own behalf and presented testimony from his primary therapist at MSOP and Dr. Adam Gierok, a clinical forensic psychologist and court-appointed examiner.

[4] We refer to the entity formerly known as the supreme court appeal panel or judicial appeal panel as the "commitment appeal panel." *See* Minn. Stat. § 253D.28, subd. 1 (2018) (providing for review by "the judicial appeal panel established under section 253B.19, subdivision 1"); Minn. Stat. § 253B.19, subd. 1 (2018) (providing that the supreme court shall establish an appeal panel).

Hogy submitted several exhibits, which the CAP received as evidence, including Hogy's discharge plan, a report by Dr. Gierok, and Hogy's mental-health assessments from January 2013, March 2017, and February 2018. Dr. Gierok reported that Hogy did not meet the criteria for full discharge because he continues to need treatment and supervision and there is no objective data suggesting he is no longer a danger to the public. The commissioner and the county jointly moved to dismiss Hogy's petition under Minn. R. Civ. P. 41.02(b). The CAP granted the motion, reasoning that Hogy "did not present sufficient evidence on the statutory elements governing discharge to avoid judgment as a matter of law." Hogy appeals.

D E C I S I O N

A petition for full discharge from civil commitment as an SDP and an SPP is authorized under section 253D.31 of the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA: SDP/SPP), Minn. Stat. §§ 253D.01-.36 (2018). A person who is committed as an SDP or an SPP "shall not be [fully] discharged unless it appears to the satisfaction of the [CAP] . . . that the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of treatment and supervision." Minn. Stat. § 253D.31. In determining whether to grant a full discharge, a CAP must consider whether "specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community." *Id.* "If the desired conditions do not exist, the discharge shall not be granted." *Id.*

A petitioner seeking discharge "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). "The proceeding in which a committed person produces evidence is commonly referred to as a 'first-phase hearing.'" *Coker v. Jesson*, 831 N.W.2d 483, 486 (Minn. 2013). If the petitioner meets his burden of production at the first-phase hearing, then the party opposing discharge must prove, by clear and convincing evidence, that the discharge request should be denied. Minn. Stat. § 253D.28, subd. 2(d). "The proceeding in which the opposing party attempts to prove that the discharge petition should be denied is commonly referred to as a 'second-phase hearing.'" *Coker*, 831 N.W.2d at 486.

In this case, the CAP granted respondents' joint motion to dismiss under Minn. R. Civ. P. 41.02(b) at the end of the first-phase hearing. *See Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014) ("After the [petitioner] has completed the presentation of evidence, the commissioner may move to dismiss the petition under Minn. R. Civ. P. 41.02(b)."). Rule 41.02(b) provides, "After the plaintiff has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief." When considering a motion to dismiss under rule 41.02(b), a CAP "is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person" and "may not weigh the evidence or make credibility determinations." *Coker*, 831 N.W.2d at 484, 490-91. This court reviews the

dismissal of a discharge petition under rule 41.02(b) de novo. *Larson*, 847 N.W.2d at 532-33.

Before applying the statutory discharge criteria de novo, we review the caselaw regarding that criteria. In *Call v. Gomez*, a case involving a person committed as a psychopathic personality under the predecessor statute to the MCTA: SDP/SPP, the Minnesota Supreme Court held that the statutory discharge criteria for persons committed as mentally ill and dangerous to the public applied to persons committed as psychopathic personalities. 535 N.W.2d 312, 313, 318 (Minn. 1995). The supreme court explained that "so long as application of the statutory criteria comports with the basic constitutional requirement that the nature of commitment bear some reasonable relation to the purpose for which the individual was originally committed, the statutory discharge criteria . . . should apply to persons committed as psychopathic personalities." *Id.* at 318 (quotation omitted). The supreme court further explained that confinement bears a reasonable relation to the original reason for commitment so long as a person subject to commitment as a psychopathic personality "is confined for only so long as he . . . continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public." *Id.* at 319.

In *In re Civil Commitment of Fugelseth*, the commissioner argued that the CAP erred by requiring the commissioner to prove that a person committed as an SDP and an SPP was in need of *inpatient* treatment and supervision to continue his civil commitment. 907 N.W.2d 248, 253 (Minn. App. 2018), *review denied* (Minn. Apr. 17, 2018). This court rejected that argument on two grounds. *Id.* at 254-55. First, this court applied the plain

language of section 253D.31, which at that time expressly stated that an SDP or an SPP "should receive a full discharge (assuming all other requirements are satisfied) if he 'is no longer in need of *inpatient* treatment and supervision.'" *Id.* at 254 (quoting Minn. Stat. § 253D.31 (2016)). Second, this court reasoned that it was "not at liberty to construe section 253D.31" to not include an inpatient-treatment requirement because "[t]o do so would result in a discharge standard that is more stringent than what is allowed by the United States Constitution, as interpreted by *Call*." *Id.* at 255. This court explained that "[t]he *Call* opinion provides that, as a matter of constitutional law, a person committed as an SDP or an SPP must be discharged if he no longer needs 'inpatient treatment and supervision.'" *Id.* (quoting *Call*, 535 N.W.2d at 318-19).

Later, in *In re Civil Commitment of Poole*, a person indeterminately committed as an SDP and an SPP argued that the statutory discharge criteria deprived committed persons of due process because those criteria permitted continued confinement even after confinement no longer bears a reasonable relationship to the purpose of a person's commitment. 921 N.W.2d 62, 69 (Minn. App. 2018), *review denied* (Minn. Jan. 15, 2019). This court rejected that argument, reasoning that the Minnesota Supreme Court has upheld the constitutionality of the SDP statute and the predecessor to the SPP statute. *Id.* at 70. In doing so, this court reiterated *Call*'s admonition that a person "can remain confined 'for only so long as he . . . continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public.'" *Id.* at 66, 69 (quoting *Call*, 535 N.W.2d at 319).

Call, *Fugelseth*, and *Poole* establish that continued civil commitment of a person as an SDP or an SPP is constitutional only if it "bear[s] some reasonable relation to the purpose for which the individual was originally committed." *Call*, 535 N.W.2d at 318. Continued confinement bears a reasonable relation to the original reason for commitment so long as the statutory discharge criteria are applied in such a way that a person subject to commitment "is confined for only so long as he . . . continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public." *Id.* at 319. In sum, the Minnesota Supreme Court and this court have consistently identified a need for further *inpatient* treatment and supervision as a relevant factor in determining whether continued commitment is warranted.

The commissioner notes that in 2018, the word "inpatient" was removed from the phrase "is no longer in need of inpatient treatment and supervision" in section 253D.31. 2018 Minn. Laws ch. 194, § 2, at 423-24. That amendment became effective May 30, 2018, "for any person committed as a sexually dangerous person or a person with a sexual psychopathic personality, and any pending petition for a reduction in custody, unless, for such a pending petition, an order of the [CAP] discharging the person from commitment has been issued." *Id.* Because Hogy's petition was pending in May 2018 and an order discharging him from commitment has not been issued, the 2018 amendment to section 253D.31 applies here.

However, as explained above, appellate courts of this state have repeatedly said that, as a matter of constitutional law, the relevant discharge standard must include the need for further *inpatient* treatment. *See Fugelseth*, 907 N.W.2d at 255. Although the

commissioner cited the 2018 statutory amendment, Hogy neither acknowledged the amendment in his briefing nor argued that the new, more stringent, discharge standard cannot be reconciled with the constitutional standard set forth in caselaw. Because that issue ultimately does not impact our decision in this case, we leave it for another day. However, we apply the constitutional standard set forth in caselaw and determine, de novo, whether Hogy's evidence, viewed in the light most favorable to him, is sufficient to support findings that he does not need inpatient treatment and supervision and that he does not pose a danger to the public. We address each of those factors in turn.

Need for Inpatient Treatment and Supervision

As to the need for inpatient treatment and supervision, Hogy argues,

> While [he] has not engaged in treatment to the extent expected by MSOP, the discharge statute does not require completion of treatment. Despite his lack of active participation in treatment, there is no recent or present conduct by [him] that suggests that he continues to be a danger to the public.

Essentially, Hogy argues that his good behavior at MSOP proves that he does not need sex-offender treatment. Again, under caselaw, this court asks whether the evidence supports a finding that Hogy does not need inpatient treatment. *See id.* The supreme court has explained that "treatment" refers to the need for "inpatient treatment and supervision for [a patient's] *sexual disorder*." *Call*, 535 N.W.2d at 319 (emphasis added); *see also In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (noting that if there is a remission of a committed person's sexual disorder, the person is entitled to be released).

Dr. Gierok reported that, after reviewing records and interviewing Hogy, he diagnosed Hogy with "Pedophilic disorder, Sexually attracted to both, Nonexclusive type"; "Frotteuristic disorder, In a controlled environment"; "Narcissistic personality disorder, with related Antisocial traits"; and "Problems related to other legal circumstances (Civil Commitment)." Dr. Gierok reported that Hogy "has not successfully completed any maintenance polygraphs, let alone a full disclosure polygraph, [penile plethysmograph], or assessment of sexual interest." And "[Hogy's] treatment team has not yet even recommended he participate in such assessments due to his lack of participation in treatment programming." Dr. Gierok noted that Hogy has "historically stated he's interested in treatment," but "he's not able or willing . . . to acknowledge or admit to the offense[s] that he's been convicted of." Dr. Gierok concluded that Hogy continues to need treatment and that there is a "high need for supervision."

Hogy testified that he discontinued sex-offender treatment at MSOP because Phase I treatment is "repetitive," he was "[n]ot allowed to talk about any sexual stuff," it is not designed "to progress you," and he was not "gaining anything" from group treatment. Hogy noted that he has engaged in individual therapy and that it has been more beneficial than group treatment. Hogy testified that "[t]here is no getting out of treatment because there is no treatment [in MSOP] that's actually sex offender based." Hogy further testified that he "gave it a real good effort in the beginning to work the program," that he has not misbehaved at MSOP, that he has not experienced any deviant sexual fantasies while at MSOP, and that he is respectful to others. Hogy also testified that "it's in remission or what happened happened" and that "it's time to move on." Hogy's discharge plan states

that "[i]f it is determined that [he] should continue treatment," he will get himself admitted to an outpatient program, attend other support groups, and meet with his therapist.

The only evidence that supports Hogy's assertion that he no longer needs inpatient treatment and supervision is his own testimony that he has not experienced any deviant sexual fantasies while at MSOP, that "it's in remission," and that "it's time to move on." Such "conclusory assertions by a committed person," standing alone, are insufficient "to avoid dismissal of a petition for discharge from MSOP." *See Poole*, 921 N.W.2d at 69. Moreover, Hogy's own submissions, particularly Dr. Gierok's report and testimony, indicate that Hogy has pedophilic disorder, that he continues to deny the sexual offenses underlying his commitment, that he has failed to address the urges stemming from his pedophilic disorder that caused those offenses, and that there is a "high need for supervision." In sum, viewing the record in the light most favorable to Hogy, Hogy's otherwise uncorroborated assertions do not meet his burden of production to show that he does not need inpatient treatment and supervision. *See id.* (concluding that a committed person's "otherwise uncorroborated assertions regarding the risk he poses to the public [were not] sufficient to establish a prima facie case that he [was] not a danger to the public").

Danger to the Public

As to the dangerousness requirement, Hogy argues that "in determining his risk of danger to the public, this Court cannot just look at his past." He further argues that "looking at his behaviors and conduct during his extensive time in MSOP, his age, and his time spent

in [the] community without re-offending," he has met his burden of production to show that he is no longer a danger to the public.

Again, the reason for continued commitment must "bear some reasonable relation to the purpose for which [an] individual was originally committed." *Call*, 535 N.W.2d at 318 (quotation omitted). The reasons for Hogy's original commitment as an SDP and an SPP included his sexual assaults of children. That is the danger that justified commitment. We therefore ask whether Hogy's evidence supports a finding that he is not dangerous to children.

As noted above, Dr. Gierok diagnosed Hogy with "Pedophilic disorder, Sexually attracted to both, Nonexclusive type." Dr. Gierok reported that he gave Hogy a score of "+5" on the Static-99R, which places him in an above-average risk category. Dr. Gierok reported that another forensic evaluator had placed Hogy in the above-average risk category on the Static-99R and Static-2002R based on an October 2017 sexual-violence risk assessment. Dr. Gierok also reported that because Hogy has not participated in assessments designed to assess sexual interest—as a result of his lack of participation in treatment—"there is no objective data to suggest he is no longer a danger to the public." Dr. Gierok acknowledged that Hogy has not engaged in sexual behavior while at MSOP and that his diagnosis of pedophilic disorder is based on Hogy's prior conduct. But Dr. Gierok noted that Hogy is not exposed to children while at MSOP and that, although he has the ability to demonstrate that "he's addressing why he acted on those urges in the past" through treatment, "he's not [demonstrating] that at this time." Dr. Gierok also noted that pedophilic disorder is considered a lifelong condition and cannot be diagnosed as in

remission. Lastly, Dr. Gierok testified that he is concerned about Hogy's ability to safely adjust in the community because he is not engaged in treatment, he has denied committing sex offenses, and his discharge plan is "very superficial."

Hogy testified that he has maintained his innocence regarding the sexual offenses that led to his commitment, including the offenses that were the basis for his convictions. Hogy testified that he is respectful towards others at MSOP and that there have been no concerns about him violating boundaries or engaging in sexual misconduct there. Hogy testified that he does not pose a danger to the public, and when his attorney asked him why the CAP "should not be concerned about [him] being a danger to the public," Hogy replied, "Quite frankly I wouldn't want to go back to the h--l hole I'm living in of hopelessness."

Although Hogy's evidence establishes that he has behaved appropriately at MSOP and has not acted out sexually, there is no indication that he has had any contact with children, and therefore, an opportunity to sexually assault them. Moreover, Hogy's own evidence, especially Dr. Gierok's report and testimony, indicates that he is diagnosed with pedophilic disorder, his risk of recidivism is above average, and he therefore continues to pose a danger to the public. In sum, viewing the record in the light most favorable to Hogy, Hogy's uncorroborated assertions do not meet his burden of production to show that he does not pose a danger to the public. *See Poole*, 921 N.W.2d at 69.

Because Hogy did not present a prima facie case with competent evidence showing that he is entitled to full discharge, the CAP did not err by dismissing his petition under rule 41.02(b).

Affirmed.