

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0645**

In the Matter of the Civil Commitment of:
Edward Eugene Dooley.

**Filed November 8, 2021
Affirmed
Segal, Chief Judge**

Commitment Appeal Panel
File No. AP19-9167

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Considered and decided by Segal, Chief Judge; Ross, Judge; and Gaitas, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the denial of his petition for a provisional discharge or transfer from his indeterminate civil commitment to the Minnesota Sex Offender Program as a sexually dangerous person. Because appellant failed to make out a prima facie case to support his petition for provisional discharge and failed to prove by a preponderance of the evidence that he is entitled to a transfer, we affirm.

FACTS

Appellant Edward Dooley was committed in 2014 on an indeterminate basis to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP). In September 2018, Dooley petitioned the Special Review Board (review board) seeking a provisional or full discharge from civil commitment, or a transfer to Community Preparation Services¹ (preparation services).

A hearing was held on the petition in October 2019. In its findings of fact and recommendation, the review board summarized Dooley's diagnoses as including: other specified paraphilic disorder, non-consenting individuals, in a controlled environment; voyeuristic disorder, in a controlled environment; and exhibitionistic disorder, in a controlled environment. The review board noted that "Dooley's sexually abusive conduct victimized prepubescent to adult males" and that Dooley had acknowledged "sexual activity with prepubescent males" and attempted sexual "penetration of an unconscious adult male."

At the time of the hearing, Dooley was in Phase II of MSOP's three-phase treatment program.² The review board noted that Dooley had at first made minimal progress in Phase II but had shown "dramatically improved motivation for change since July 2018,"

¹ Minn. Stat. § 246B.01, subd. 2a (2020), defines "community preparation services" as "specialized residential services or programs" that are located "outside of a secure treatment facility" and "are designed to assist civilly committed sex offenders in developing the appropriate skills and resources necessary for an eventual successful reintegration into a community."

² Dooley was placed into Phase II of the treatment program in April 2016.

and was consistently adhering to rules and supervision, attending treatment groups, exhibiting awareness of his treatment needs, and demonstrating conflict-resolution and stress-management skills. The review board, however, also found that Dooley still had several remaining Phase II treatment needs, was not forthcoming about his sexual thoughts, and had an above average static risk of reoffending.

Based on the record at the October 2019 hearing, the review board recommended granting the transfer to preparation services but denied provisional or full discharge. With regard to the transfer, the review board commented that, while “Mr. Dooley’s progress in treatment is less than ideal for a move to [preparation services],” because he has “demonstrated consistent adherence to rules and supervision for a relatively long time, his need for security and institutionalization could be met at [preparation services].” The review board thus concluded that even though “[i]t would be preferable if Mr. Dooley had petitioned for a reduction in custody after he had made more progress in treatment, . . . on balance he satisfies statutory criteria for Transfer.” The review board added that “[i]t is the [review board]’s hope and expectation that he will continue to make treatment progress while awaiting an opening at [preparation services].” In denying his request for a provisional or full discharge, the review board stated that, because “Mr. Dooley has ongoing needs for treatment and supervision[,] it is unlikely that his current needs could be met in any community-based setting.” The review board thus concluded that Dooley “is not yet capable of making an acceptable adjustment to open society [and he] remains dangerous to the public.”

Both Dooley and the Commissioner of Human Services petitioned the Commitment Appeal Panel (appeal panel) for rehearing and reconsideration. Dooley sought reconsideration of the review board's recommendation denying provisional or full discharge, and the commissioner sought reconsideration of the review board's recommendation granting the transfer request to preparation services.

The appeal panel hearing took place in February 2021.³ Dooley testified on his own behalf and submitted several exhibits, including a sexual-violence risk assessment, quarterly and annual treatment reports, a list of discharge plan conditions, and the review board's findings and recommendations. The commissioner also submitted various exhibits including updated reports, mental-health and tier-level assessments, and progress notes, along with behavioral expectation and incident reports.

At the close of Dooley's case, the commissioner moved for dismissal under Minn. R. Civ. P. 41.02(b). The appeal panel granted the commissioner's motion, ruling that Dooley failed to produce evidence sufficient to establish a prima facie case for provisional discharge and failed to prove by a preponderance of the evidence that he is entitled to a transfer. In connection with its ruling on the transfer issue, the appeal panel noted that Dooley had regressed in his progress in the 18 months between the review board and the appeal panel hearings. Dooley now appeals.

³ Dooley withdrew his appeal of the review board's denial of a full discharge, but maintained his appeal of the provisional discharge denial.

DECISION

Dooley argues that the appeal panel erred by granting the commissioner's motion to dismiss. A person who is committed as an SDP may petition the review board for a reduction in custody. Minn. Stat. § 253D.27, subd. 2 (2020). In the event of an adverse ruling from the review board, the committed person may seek reconsideration of that determination from the appeal panel. Minn. Stat. §§ 253B.185, subd. 9(f), .19, subd. 2(b) (2020).

If the commissioner wishes to challenge a committed person's entitlement to relief after he rests his case at the appeal panel hearing, the commissioner may move to dismiss the petition pursuant to rule 41.02(b) of the rules of civil procedure.⁴ *See Coker v. Jesson*, 831 N.W.2d 483, 489-91 (Minn. 2013) (addressing motions to dismiss in the context of petitions for discharge). Because of differences in the statutory burdens placed on committed persons for discharge petitions and petitions for a transfer, different standards apply in evaluating the evidence. *See Foster v. Jesson*, 857 N.W.2d 545, 548-49 (Minn. App. 2014) (addressing these differences).

On a petition for 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. § 253B.19, subd. 2(c) (2020). The burden on the committed person is a "burden of production," not

⁴ Minn. R. Civ. P. 41.02(b) provides that a defendant may move for a dismissal of an action, at the close of the plaintiff's case, "on the ground that[,] upon the facts and the law, the plaintiff has shown no right to relief."

persuasion. *Coker*, 831 N.W.2d at 486. And the supreme court has held that, on a motion to dismiss a discharge petition at the close of the petitioner’s case, the appeal panel must “view the evidence . . . in a light most favorable to the committed person.” *Id.* at 491.

By contrast, on a petition for transfer, the person seeking the transfer has the burden of establishing “by a preponderance of the evidence that transfer is appropriate.” Minn. Stat. § 253D.28, subd. 2(e) (2020). The committed person’s burden on a petition for transfer is thus one of both production and persuasion. *Foster*, 857 N.W.2d at 548.

As a result of these two different types of burdens in proceedings before the appeal panel, we review the grant of a commissioner’s motion to dismiss a discharge petition de novo, while we review the findings of fact relating to a transfer petition for clear error. *Id.*; *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014).

I.

We turn first to Dooley’s challenge to the dismissal of his petition for provisional discharge. He maintains that he satisfied his burden of making out a prima facie case and that the appeal panel erred in holding that his testimony by itself was insufficient to satisfy the burden. He also argues that, even if his testimony alone was not sufficient, he submitted corroborating evidence through his exhibits and that this plainly satisfied his burden of production. We are not persuaded.

A person who is committed as an SDP “shall not be provisionally discharged unless [he] is capable of making an acceptable adjustment to open society.” Minn. Stat. § 253D.30, subd. 1(a) (2020). The two statutory criteria that guide this assessment are:

(1) whether the committed person’s course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person’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 committed person to adjust successfully to the community.

Id., subd. 1(b) (2020).

To withstand a motion to dismiss a petition under Minn. R. Civ. P. 41.02 (b) for failure to present a prima facie case, the committed person must provide competent evidence on both factors. Minn. Stat. § 253D.28, subd. 2(d) (2020); *see also Coker*, 831 N.W.2d at 485-86. But, as discussed above, the appeal panel “may not weigh the evidence or make credibility determinations.” *Coker*, 831 N.W.2d at 490.

The appeal panel reviewed the evidence in the light most favorable to Dooley and found it lacking. The appeal panel summarized Dooley’s own positive assessment of his need for treatment and supervision, but noted that Dooley “admitted that he has had six [behavioral expectation reports] since the [review board] hearing and his tier level of privileges were reduced from 5 to 4.” The appeal panel also noted that the risk assessments and other reports and documents Dooley submitted as exhibits show that, instead of “demonstrat[ing] consistent adherence to rules and supervision” as was the case at the time of the review board hearing, his “adherence to rules and supervision has lapsed and he is now receiving scores [in his treatment progress reports] of mostly ‘Needs Attention.’”

The appeal panel concluded that “[t]he only evidence supporting provisional discharge and discharge was Petitioner’s own testimony” The appeal panel’s

conclusion is supported by the record. This court has held that “conclusory assertions by a committed person,” standing alone, are insufficient to avoid dismissal of a discharge petition under rule 41.02(b). *In re Civil Commitment of Poole*, 921 N.W.2d 62, 69 (Minn. App. 2018), *rev. denied* (Minn. Jan. 15, 2019). Dooley has thus failed to “satisfy the burden of production as to the statutory criteria.”⁵ And we therefore affirm the appeal panel’s grant of the commissioner’s motion to dismiss Dooley’s petition for provisional discharge.

II.

We turn next to the dismissal of Dooley’s transfer petition. A person who is committed as an SDP may be transferred to preparation services only if “the transfer is appropriate.” Minn. Stat. § 253D.29, subd. 1(a) (2020). In determining whether a transfer is appropriate, the 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.

⁵ Dooley also argues that the appeal panel erred because there is no evidence that Dooley continued to be dangerous. We reject this argument and note that an assessment of ongoing dangerousness is subsumed in the two statutory criteria for determining whether discharge is appropriate—the need for ongoing treatment and supervision and whether the provisional discharge plan “will provide a reasonable degree of protection to the public.” Minn. Stat. § 253D.30, subd. 1(b).

Id., subd. 1(b) (2020). Because the committed person bears the burden of persuasion on a petition for transfer, the appeal panel need not view the evidence in a light most favorable to the committed person when considering a motion to dismiss. *Foster*, 857 N.W.2d at 548. Instead, we “examine the record to determine whether the evidence as a whole sustains the appeal panel[’s] findings.” *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985) (quotation omitted).

Here, the appeal panel discussed each of the five statutory factors and determined that Dooley did not meet the statutory criteria for transfer. In reaching that conclusion, the appeal panel focused on the fact that Dooley had regressed in his compliance since the October 2019 review board hearing. As noted above, his matrix scores for treatment progress declined to “needing attention” in most areas instead of the mostly positive scores he had as of the time of the review board hearing. In addition, since the review board hearing, Dooley had received several major behavioral expectation reports, which led him to lose his vocational placement, and his level of privileges was reduced from tier 4 to 5.

The appeal panel noted positive progress by Dooley, including the fact that Dooley had passed a full disclosure polygraph, “an important treatment milestone.” But the appeal panel ultimately agreed with the recommendations of both the forensic examiner and the sexual risk assessor that transfer to preparation services was not appropriate as of the date of the appeal hearing.

Dooley contends that the appeal panel clearly erred in finding that he had failed to submit sufficient evidence to support his petition for a transfer to preparation services. He points to the fact that the review board granted his transfer request. He also points to the

quarterly treatment reports he submitted that describe Dooley’s “hard work in meeting his treatment goals” and that he consistently earned “satisfactory” marks on his treatment evaluations. But the review board determination was based on evidence that was current as of the October 2019 hearing date. The appeal board, in reaching the opposite conclusion, relied on the significant decline in Dooley’s behavior that occurred in the 18 months since the review board hearing. The appeal panel concluded that “his recent struggles with rule breaking and disrupting relationships demonstrates that he is not ready for transfer to [preparation services].” Based on this evidence and the fact that both the risk assessor and the forensic examiner opined that transfer to preparation services would not be appropriate, the appeal panel found that Dooley “failed to demonstrate by a preponderance of the evidence that transfer to a less restrictive facility is appropriate at this time.”

On this record, we discern no clear error in the appeal panel’s findings and affirm the dismissal of his transfer petition.

III.

For the first time on appeal, Dooley contends that he was being subjected to unconstitutional punishment and this supports his petition for a transfer to preparation services. Constitutional challenges to a statute generally may not be raised for the first time on appeal. *State v. Frazier*, 649 N.W.2d 828, 839 (Minn. 2002). Because Dooley

failed to first raise this constitutional argument to the appeal panel, the argument is forfeited on appeal.⁶

Affirmed.

⁶ Even if we were to address Dooley's argument, we are not persuaded by it for two reasons. First, Dooley asks us to apply a test expressed in an Eighth Circuit case, *Karsjens v. Lourey*, 988 F.3d 1047, 1053 (8th Cir. 2021). And we are not bound by Eighth Circuit precedent. See *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003) (recognizing that this court is only bound by decisions of the United States Supreme Court and the Minnesota Supreme Court). Second, Dooley failed to bring forward evidence sufficient to satisfy the test that he is asking this court to apply. His argument would thus fail even if we were to address it and apply the *Karsjens* test.