

*This opinion is nonprecedential except as provided by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
A23-1260**

In the Matter of the Civil Commitment of: Peter Allan.

**Filed February 12, 2024
Affirmed
Wheelock, Judge**

Commitment Appeal Panel
File No. AP22-9004

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Keith Ellison, Attorney General, Brandon Boese, Assistant Attorney General, St. Paul, Minnesota (for respondent commissioner of human services)

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Considered and decided by Gaïtas, Presiding Judge; Smith, Tracy M., Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges the denial of his petitions for full discharge or provisional discharge from his indeterminate civil commitment to the Minnesota Sex Offender Program as a sexually dangerous person and sexual psychopathic personality. Because appellant failed to establish prima facie cases to support his petitions, we affirm.

FACTS

Appellant Peter Allan is indeterminately civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). His commitment is based on a series of sexual assaults he committed between 1994 and 1998, in which he drugged victims with alcohol and Ambien and had nonconsensual sexual intercourse with them while they were incapacitated. The circumstances of the assaults and his initial commitment are described in our opinion affirming his commitment, *In re Civil Commitment of Allan*, No. A09-1607, 2010 WL 608028, at *1-2 (Minn. App. Feb. 23, 2010).

In February 2000, a federal district court sentenced Allan to 108 months in federal prison for convictions related to the assaults. He was placed on supervised release in September 2007 and was detained for civil commitment at MSOP in December 2007. Shortly after his indeterminate commitment in July 2009, he was resentenced to 24 months' imprisonment in his federal case. If and when Allan is discharged from MSOP, he must serve his pending federal prison sentence.

On September 22, 2020, Allan petitioned the Special Review Board (SRB) pursuant to Minn. Stat. § 253D.27, subd. 2 (2022),¹ for three forms of relief: discharge, provisional discharge, or transfer from MSOP's secure facility to Community Preparation Services

¹ Allan brought his petitions under the 2020 version of the statute. We cite the most recent version of Minn. Stat. § 253D.27 because it has not been amended. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, in general, "appellate courts apply the law as it exists at the time they rule on a case"). For the same reason, we also cite the current versions of other statutes in this opinion.

(CPS).² In support of his request for provisional discharge, Allan proposed a provisional-discharge plan that required that he (1) serve the balance of his federal prison sentence; (2) attend sex-offender treatment during his federal incarceration; and (3) comply with MSOP’s standard provisional-discharge terms upon his release from federal prison. The provisional-discharge plan also provided that if Allan failed to satisfactorily complete sex-offender treatment in federal prison, MSOP could revoke his provisional discharge and return him to a secure MSOP facility, and he would waive his right to appeal the revocation.³

After holding a hearing, the SRB issued findings of fact and recommended denial of Allan’s petitions. Allan then timely filed a petition for rehearing and reconsideration pursuant to Minn. Stat. § 253D.28, subd. 1(a), (b) (2022). In November 2022 and March 2023, the commitment appeal panel (CAP)⁴ held a two-day first-phase hearing on Allan’s

² “Community preparation services” means specialized residential services or programs operated or administered by the Minnesota Sex Offender Program outside of a secure treatment facility. Community preparation services are designed to assist civilly committed sex offenders in developing the appropriate skills and resources necessary for an eventual successful reintegration into a community.

Minn. Stat. § 246B.01, subd. 2a (2022).

³ We express no opinion as to whether a committed person may waive their right to appeal a revocation of a provisional discharge under Minn. Stat. § 253D.30, subd. 6 (2022).

⁴ We refer to the entity formerly known as the supreme court appeal panel, or statutorily as the judicial appeal panel, as the commitment appeal panel (CAP). *See* Minn. Stat. § 253D.28, subd. 1(a) (providing for review by “the judicial appeal panel established under section 253B.19, subdivision 1”).

petitions. Among other exhibits, Allan submitted copies of an initial psychological-evaluation report dated November 2021 and an updated report dated October 2022, both of which were prepared by Dr. Jessica Mugge, a forensic psychologist Allan had retained.

To prepare her initial report, Dr. Mugge interviewed Allan, administered various assessments,⁵ and reviewed numerous records and documents, including past treatment and psychological reports. The assessments indicated a moderate level of psychopathy, a “below average” risk of sexual recidivism, “some need” for treatment, and that Allan’s treatment needs were greater in the self-management and relational-style domains and lower in the sexual-interest domain. Based on Allan’s risk level, Dr. Mugge determined that his optimal “dosage of treatment” was 100-149 hours of sex-offender treatment, but she did not specify what type of therapy constitutes sex-offender treatment.

Dr. Mugge noted that Allan’s sexual-interest-domain score may have been “artificially reduced” because it was based solely on Allan’s self-reports, and the documents she reviewed revealed that Allan had been reluctant to disclose information and had refused to engage in treatment for the first 14 years of his commitment. In his self-reports, Allan denied the following behaviors: that he has sexual fantasies, that he “currently masturbates,” and that he had ever engaged in sexual activity with someone who was sleeping or unconscious. Dr. Mugge’s report indicates that she did not analyze the

⁵ Dr. Mugge administered the following assessments: the Hare Psychopathy Checklist-Revised 2nd edition (PCL-R), the Static-99R, and the Structured Risk Assessment-Forensic Version (SRA-FV).

results of any physiological examinations that test sexual responses to certain stimuli. At the time of her report, Allan had not submitted to a polygraph since approximately 2003, and there is no evidence in the record that Allan has ever submitted to a penile plethysmograph.

Dr. Mugge also completed a diagnostic assessment to evaluate whether Allan met the criteria for paraphilic or other psychological disorders. She opined that based on the available documents and Allan's self-reports, there was "insufficient evidence" to diagnose Allan with a paraphilic or personality disorder. She concluded that his history of alcohol use met the criteria for Alcohol Use Disorder but opined that his ability to sustain sobriety prior to his incarceration suggested that this disorder was in remission.

Regarding full discharge, Dr. Mugge opined:

To be sure, Mr. Allan presents with a low level of static risk. Although the SRA-FV revealed a low level of criminogenic needs, this assessment may be an underestimate of his dynamic risk factors given his reluctance to disclose information and refusal to engage in treatment. As such, we cannot determine that these aforementioned protective factors⁶ have effectively reduced the impact of his risk for reoffending such that he is *no longer dangerous to the public* and *is no longer in need of treatment and supervision*. Indeed, the multifaceted and complex decisions associated with civil commitment require the use of comprehensive, evidence-based practices.

⁶ "Protective factors" are traits that indicate a reduced risk of recidivism and treatment needs. Dr. Mugge identified the following protective factors in Allan's case: problem-solving and interpersonal skills, advocating for his peers, using his culture to positively influence others, positive and supportive relationships with his family, and prosocial interests and pursuits.

Given this ambiguity, one cannot conclude with a reasonable degree of scientific certainty that Mr. Allan meets the statutory criteria for full discharge from civil commitment.

Regarding provisional discharge, Dr. Mugge opined:

Mr. Allan's present course of treatment and mental status indicate there is no longer a need for treatment and supervision in his current treatment setting: My understanding is that Mr. Allan would be transferred to a federal facility upon a release from MSOP to serve a 2-year sentence (and would not be directly discharged to the community).

....

Although Mr. Allan also meets the statutory requirements for transfer to [CPS] . . . , provisional discharge to the federal prison and its [sex-offender treatment program] provides a better option.

In her updated report, Dr. Mugge noted that Allan had made “honorable (and commendable) efforts and significant gains in exploring factors underlying sexual offending behaviors” in treatment since her November 2021 report. Allan had begun attending group therapy in May 2022 for the first time since his initial commitment 14 years earlier, and since then, he had exhibited improvements in prosocial behaviors and relationships with peers and staff at MSOP. He had also formed a more “positive therapeutic alliance” with his primary therapist and had begun to show signs of willingness to acknowledge his sexually offending behavior and discuss his sexual desires. Notwithstanding that progress, Dr. Mugge opined that these changes were “relatively recent” and therefore “ha[d] not been adequately demonstrated or challenged across relevant high-risk situations.” Thus, she did not change her opinion that provisional discharge for further treatment in federal prison was the best option.

At the hearing, Dr. Mugge opined that CPS was a more appropriate treatment setting for Allan than MSOP, but that, because of the practical considerations surrounding Allan's federal prison sentence, the best options were either transfer to or provisional discharge to federal prison in accordance with Allan's provisional-discharge plan. Specifically, she testified that it would be counterintuitive to prepare Allan for provisional discharge to a less restrictive setting only for him to end up in the more restrictive setting of federal prison.

Allan's former primary therapist, who treated him from sometime in 2019 until February 2021, testified about Allan's progress in treatment. She testified that Allan had demonstrated improvements in his antisocial behaviors as a result of individual therapy sessions with her. She also testified that attending more group therapy sessions would be an important part of progressing in treatment and that Allan had not yet progressed to the stage of treatment that addresses the "more difficult topics of actually beginning to address the offending behaviors." MSOP's Reintegration Director testified about MSOP's treatment program and Allan's provisional-discharge plan. Finally, Allan testified about the same topics as the other witnesses as well as his progress in another treatment program, his spirituality, and his community service and other pursuits. As of the March 2023 hearing, Allan was still in phase one of MSOP's three-phase treatment program, and he testified that he had not progressed to phase two because the clinical supervisor wanted him to "dig a little deeper into [his] thoughts and offending behaviors."

At the conclusion of the first-phase hearing, respondent Otter Tail County and respondent Minnesota Commissioner of Human Services both moved to dismiss Allan's

petitions under Minn. R. Civ. P. 41.02(b).⁷ The CAP granted respondents' motions to dismiss, determining that Allan had failed to present sufficient competent evidence for a prima facie demonstration that he was entitled to full or provisional discharge under Minn. Stat. §§ 253D.30-.31 (2022) and had failed to establish by a preponderance of the evidence that he was entitled to transfer under Minn. Stat. § 253D.29 (2022).

Allan appeals.

DECISION

Allan challenges the CAP's first-phase dismissal of his petitions for discharge and provisional discharge, arguing that he met his burden to produce evidence that he is entitled to a reduction in custody from MSOP's secure facility.⁸ The CAP dismissed Allan's petitions under rule 41.02(b) because it determined that he had failed to establish a prima facie case for either full or provisional discharge.

We first set forth the framework for how petitions for full discharge and for provisional discharge proceed. A person who is civilly committed as an SDP or SPP may seek a reduction in custody by petitioning for transfer, provisional discharge, or full discharge. Minn. Stat. §§ 253D.29-.31. The committed person files a petition with the SRB, which conducts a hearing and issues a recommendation to the CAP. Minn. Stat. § 253D.27, subds. 2, 4 (2022). If the SRB recommends denial of the petition, the person

⁷ The commissioner later withdrew its motion to dismiss Allan's petition for full discharge, but the county did not withdraw its motion on that point.

⁸ Allan does not challenge the CAP's denial of his petition for transfer to CPS.

may seek rehearing and reconsideration of the SRB's recommendation by petitioning the CAP. Minn. Stat. § 253D.28, subd. 1(a). CAP hearings then proceed in two phases.

At a first-phase hearing on a petition for discharge or for provisional discharge, the petitioner bears the burden of production to “present[] a prima facie case with competent evidence to show that the person is entitled to the requested relief.” *Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014) (quotation omitted). To make a prima facie case, the petitioner must produce “sufficient, competent evidence that, if proven, would entitle the petitioner to relief.” *Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013) (quotation omitted). If the petitioner satisfies their burden of production during the first-phase hearing, the CAP holds a second-phase hearing at which the party opposing the petition bears the burden of proving “by clear and convincing evidence that the discharge or provisional discharge should be denied.” *Id.* (quotation omitted). However, the party opposing the petition may move to dismiss it under Minn. R. Civ. P. 41.02(b) after the first-phase hearing on the basis that the petitioner did not meet their burden at that phase. When considering a motion to dismiss under rule 41.02(b), the CAP may not weigh evidence or make credibility assessments and must view the evidence in the light most favorable to the petitioner. *Id.* at 490-91. If the CAP determines that the petitioner failed to present a prima facie case, it will dismiss the petition and forgo the second-phase hearing. *See Larson*, 847 N.W.2d at 535.

This court reviews the CAP's rule 41.02(b) dismissal of a discharge or provisional-discharge petition de novo. *Id.* at 534. In doing so, we view the evidence and apply the law in the same manner as the CAP, viewing the evidence in the light most

favorable to the petitioner without weighing evidence or assessing credibility. *See Foster v. Jesson*, 857 N.W.2d 545, 549 (Minn. App. 2014). We first consider the CAP’s denial of Allan’s petition for provisional discharge because “the criteria for a provisional discharge are more lenient than the criteria for a [full] discharge.” *Larson*, 847 N.W.2d at 535.

I. The CAP did not err by dismissing Allan’s petition for provisional discharge.

Allan argues that he satisfied his burden of production because he produced sufficient competent evidence that, if true, met the statutory criteria for provisional discharge. He also asserts that the CAP erred in its assessment of the evidence and legal conclusions. We are not persuaded.

To avoid dismissal of their petition for provisional discharge, a committed person must make a prima facie case by producing “sufficient, competent evidence that, if proven, would entitle [them] to relief.” *Coker*, 831 N.W.2d at 486; *accord* Minn. Stat. § 253D.28, subd. 2(d) (2022). A petitioner who is civilly committed as an SDP or SPP “shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society.” Minn. Stat. § 253D.30, subd. 1(a). The CAP determines whether a petitioner has made that showing by considering two criteria:

(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). A petitioner's self-serving testimony, without more, is insufficient to satisfy their threshold burden of production. See *In re Civ. Commitment of Poole*, 921 N.W.2d 62, 68-69 (Minn. App. 2018), *rev. denied* (Minn. Jan. 15, 2019).

As to the first criterion, Allan asserts that he met his burden of production because he introduced evidence that he (1) exceeded the optimal number of treatment hours recommended by Dr. Mugge, (2) does not have a sexual disorder, and (3) no longer needs treatment at MSOP because, in the absence of a sexual disorder, he does not need sex-offender treatment.

Allan misconstrues the testimony of his independent examiner, Dr. Mugge, as supporting his request for provisional discharge. But section 253D.30, subdivision 1, does not contain any language that allows the CAP to determine that a petitioner has met their burden by relying on conditional terms. Evidence of an examiner's conditional opinion is not sufficient to make a *prima facie* case that the petitioner no longer needs treatment and supervision in their current treatment setting. In *Foster*, we stated that a petitioner's evidence was insufficient to meet a *prima facie* burden of production when the examiner opined that "'if appellant has not yet done [a polygraph] . . . that has to happen first' before he could recommend . . . transfer." 857 N.W.2d at 547, 549. Here, Dr. Mugge did not opine that Allan's course of treatment and then-present mental status indicated that there was no longer a need for treatment and supervision in his current treatment setting. Rather, as occurred in *Foster*, Dr. Mugge opined that Allan would no longer need treatment and

supervision in his current setting at a secure MSOP facility *on two conditions*: (1) that Allan be transferred to a secure federal prison upon release and (2) that Allan be required to participate in sex-offense-specific treatment while in federal prison. Dr. Mugge’s opinion that Allan no longer needs treatment or supervision at his current MSOP facility is *dependent on* her recommendation that he participate in sex-offender treatment in a secure federal prison.

Moreover, in Dr. Mugge’s October 2022 report, she opined that

while his ability to engage in treatment is certainly impressive, this remarkable progress is ultimately insufficient to conclude that Mr. Allan is no longer dangerous to the public and is no longer in need of treatment and supervision. As such we cannot determine, with a reasonable degree of scientific certain[t]y, that Mr. Allan meets the statutory criteria for full discharge from civil commitment.

Although Dr. Mugge was referring to the criteria for full discharge—no longer dangerous to the public and no longer in need of treatment and supervision—she stated in unequivocal terms that Allan has not progressed sufficiently in treatment for her to conclude that he was no longer in need of treatment and supervision. This further supports our conclusion that Allan did not meet his burden during the first-phase hearing to produce evidence that he is no longer in need of treatment and supervision in his current treatment setting.

In its order denying Allan’s petitions, the CAP also pointed to (1) Dr. Mugge’s disclosure that she based Allan’s SRA-FV score, which demonstrates his risk level and, by extension, his optimal treatment dosage, solely on his limited self-reports because of his historical reluctance to discuss sexual topics; (2) her conclusion that Allan’s risk level may have been “artificially reduced” and “may be an underestimate”; and (3) her conclusion

that Allan's recent progress in treatment was "ultimately insufficient" to conclude that he was no longer dangerous. Dr. Mugge's description of her interview with Allan, as well as Allan's self-reports in the documents she reviewed, reveals that Allan's self-reports were limited to conclusory, uncorroborated denials of having any sexual interests at all, which self-reports are insufficient to avoid dismissal at the first phase. *See Poole*, 921 N.W.2d at 69. Presenting a committed person's conclusory assertions in an expert's report rather than through the committed person's testimony or argument does not transform the assertions into competent evidence. Dr. Mugge acknowledged that the data was unreliable, and a petitioner is not entitled to move forward to a second-phase hearing based on concededly unreliable information.

Thus, the information in the sole expert witness's assessments, if proved, could show at most that there is a possibility that Allan meets the first criterion for provisional discharge and that such a possibility exists only if the conditions mentioned by the expert are met. This is not enough to establish a *prima facie* case. Appellant's own testimony that he does not have a sexual disorder, does not need treatment, and is no longer in need of treatment and supervision in his current setting is insufficient to make a *prima facie* case. Ultimately, Dr. Mugge was unable to unconditionally say that Allan's course of treatment and present mental status indicate that there is no longer a need for his treatment and supervision at MSOP.

Viewing the evidence in the light most favorable to Allan, we conclude that he failed to present sufficient competent evidence that, if true, would show that his "course of treatment and present mental status indicate there is no longer a need for treatment and

supervision in [his] current treatment setting,” as required by Minn. Stat. § 253D.30, subd. 1(b)(1). Because the first criterion is not satisfied, we need not consider Allan’s argument on the second criterion or decide whether a committed person can premise a provisional-discharge plan on a requirement that he be transferred to federal prison or whether such a provisional-discharge plan could provide a reasonable degree of protection to the public and enable him to adjust successfully to the community.

We discern no error in the CAP’s determination that Allan did not make a prima facie case for provisional discharge, and therefore, the CAP did not err in its subsequent denial of his petition.

II. The CAP did not err when it dismissed Allan’s petition for full discharge.

Allan next argues that he satisfied his burden of production because he produced sufficient competent evidence that, if true, met the statutory criteria for full discharge. Allan asserts that he presented sufficient competent evidence (1) that he is no longer dangerous and no longer needs inpatient treatment and (2) that he is not currently diagnosed with a sexual disorder and, therefore, continued commitment would violate his right to constitutional due process. We are not persuaded.

A petitioner who is civilly committed as an SDP or SPP “shall not be 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. The CAP determines whether a petitioner has made that showing by considering “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 petitioner does not establish that these conditions exist, the CAP “shall not” grant the petition for full discharge. *Id.*

Here, Allan could not make a *prima facie* case for discharge because his independent examiner opined that his

progress is ultimately *insufficient to conclude* that Mr. Allan is *no longer dangerous to the public* and *is no longer in need of treatment and supervision*. As such, we cannot determine, with a reasonable degree of scientific certainty, that Mr. Allan meets the statutory criteria for full discharge from civil commitment.

(First emphasis added.) Given the examiner’s conclusion, Allan was unable to meet his burden on two of three statutory requirements.

We next consider Allan’s argument that the CAP violated his constitutional rights by dismissing his petition because he produced sufficient competent evidence that he is no longer in need of treatment for a sexual disorder because he has no sexual disorder. Courts have limited the application of the statutory criteria for civil commitment to comport with the Due Process Clause of the United States Constitution, requiring discharge “if no reasonable relation exists between the original reason for commitment and the continued confinement.” *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995). This means that a committed person may be “confined for only so long as he or she continues both to need further inpatient treatment and supervision for his [or her] sexual disorder *and* to pose a danger to the public.” *Id.* (emphasis added).

However, due process does “not require[] any particular mental condition as a prerequisite for a person’s ongoing civil commitment.” *In re Civ. Commitment of Opiacha*,

943 N.W.2d 220, 228 (Minn. App. 2020). And legal definitions of mental-health conditions in the civil-commitment context “need not mirror” those employed by the medical community. *Id.* at 228-29 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997)).⁹ Under *Opiacha*, the question is whether the committed person has presented evidence that they do not have “serious difficulty in controlling behavior.” *Id.* at 229 (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)). Thus, an expert’s scientific opinion regarding specific diagnoses, while helpful, is not dispositive.

Allan contends that the CAP erred by rejecting his argument that he does not have a sexual disorder because, in doing so, it impermissibly weighed evidence and evaluated credibility. Specifically, Allan argues that the CAP weighed Dr. Mugge’s opinion by evaluating the quality of her assessment when it stated that her conclusions were “based on [Allan’s] self-reports and the limited records in light of his limited participation in treatment.” But the CAP did not need to weigh evidence or evaluate credibility to determine that Allan did not satisfy his burden—Dr. Mugge’s report states in no uncertain terms that the information available to her did not alter her ultimate conclusions. Moreover, the record contains no evidence to the contrary. *See Poole*, 921 N.W.2d at 69 (“Poole’s own submissions include multiple statements that he remains a danger to the public and these submissions lack evidence, other than Poole’s own statements, to the contrary.”).

⁹ Allan asserts that “not otherwise specified” disorders cannot justify continued commitment. We rejected this argument in *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn. App. 2011), *rev. denied* (Minn. Aug. 24, 2011).

By itself, a recent willingness to explore sexual topics does not entitle a committed person to full discharge. *See Call*, 535 N.W.2d at 319 (Minn. 1995) (stating that “a slight change or improvement in the person’s condition is not sufficient to justify discharge”). Without evidence that provides further insight into Allan’s sexual interests and responses to challenges, the CAP is unable to evaluate Allan’s difficulty in controlling sexual behavior at a second-phase hearing. Allan has not produced sufficient competent evidence that there is no reasonable relation between the original reason for his commitment—his behaviors of sexually assaulting individuals of varying ages, including a minor, after incapacitating them with alcohol and Ambien—and his continued confinement.

Viewing the evidence in the light most favorable to Allan, we conclude that he failed to present sufficient competent evidence that he 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. The CAP’s determinations do not violate Allan’s constitutional rights, and we discern no error in the CAP’s determination that Allan did not produce a *prima facie* case for full discharge. The CAP thus did not err in its subsequent denial of his petition.

In sum, we conclude that the CAP did not weigh evidence or make credibility determinations when it considered Allan’s petitions for full or provisional discharge and that Allan did not satisfy his burden to present *prima facie* cases in support of his petitions. Therefore, Allan is not entitled to a second-phase hearing, and the CAP did not err by dismissing his petitions.

Affirmed.