

*This opinion is nonprecedential except as provided by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
A24-0486**

In the Matter of the Civil Commitment of: Allyn Lee Schlumpberger.

**Filed September 16, 2024
Affirmed
Wheelock, Judge**

Commitment Appeal Panel
File No. AP21-9155

MacKenzie Guptil, Bina & Guptil, LLC, Pine City, Minnesota (for appellant Allyn Lee Schlumpberger)

Keith Ellison, Attorney General, Aaron Winter, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

James P. Ratz, Aitkin County Attorney, Lisa Roggenkamp Rakotz, Senior Assistant County Attorney, Aitkin, Minnesota (for respondent Aitkin County)

Considered and decided by Ede, Presiding Judge; Cochran, 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NONPRECEDENTIAL OPINION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 (MSOP) as a sexually dangerous person (SDP). We affirm.

FACTS

In 2012, appellant Allyn Lee Schlumpberger was indeterminately civilly committed to MSOP as an SDP. His commitment is based on numerous charged and uncharged sexual assaults that he committed from age 20 to age 37 that include the following:

- Sexually abusing his then-girlfriend's 13-year-old female cousin by forcing intercourse and oral sex and exposing his genitals to her on multiple occasions over a period of approximately six months;
- Exposing his genitals to the cousin's 14-year-old female friend and propositioning her for sex;
- Touching his then-girlfriend's three-year-old son's penis and anus, punching him, and making him drink juice in which Schlumpberger had urinated;
- Violently sexually assaulting two adult female acquaintances on separate occasions;
- Asking his nephew, who was four or five years old, to touch Schlumpberger's genitals;
- Exposing his genitals to his niece and asking to see her genitals when she was nine and ten years old; and
- Laying down on a mattress next to his 14-year-old niece and touching her breast.

Schlumpberger also has an extensive history of non-sexual criminal convictions and antisocial behavior, most of which involved heavy drinking.

In August 2020, Schlumpberger petitioned the Special Review Board (SRB) for a reduction in custody pursuant to Minn. Stat. § 253D.27, subd. 2 (2022),¹ seeking full

¹ Schlumpberger 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*

discharge, provisional discharge, or transfer from MSOP's secure facility to Community Preparation Services (CPS).² Following a hearing, the SRB recommended denying Schlumpberger's petitions.

The SRB's findings and recommendation were based in part on two reports written in August 2021: (1) an SRB treatment report authored by an MSOP clinical counselor, Courtney Sturgis, and (2) a Sexual Violence Risk Assessment (SVRA) authored by a court-appointed examiner, Dr. Rachel Mack.

Sturgis and Dr. Mack opined that Schlumpberger did not meet the criteria for any of the relief sought and noted that Schlumpberger did not consistently participate in treatment from the time he was committed in 2012, withdrew his consent for treatment in 2018, and had not participated in treatment since then. Schlumpberger's most recent mental-health assessment, conducted in November 2020, denoted diagnoses of (1) other specified paraphilic disorder, non-consent, in a controlled environment; (2) antisocial personality disorder; (3) alcohol-use disorder, severe, in sustained remission, in a

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.

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).

controlled environment; and (4) problems related to other legal circumstances (civil commitment). Schlumpberger had not submitted to polygraph tests or physiological assessments of his sexual interests and arousal.

Dr. Mack conducted actuarial assessments to determine Schlumpberger's risk of reoffending and treatment needs. The Static-99R and Static-2002R tools, which test a person's "historical, essentially unchangeable[]" variables that are immune to the effects of treatment," resulted in well-above-average and above-average scores, respectively. All of the factors considered in the Static-99R and Static-2002R, except age, indicated above-average risk: Schlumpberger had never lived with an intimate partner for two years or more; he had engaged in non-sexual violence that resulted in convictions; he had one conviction for a "non-contact" sexual offense; he committed sexual offenses against victims who were outside of his immediate family; and he had engaged in sexually abusive behaviors directed toward male victims. With respect to the age factor, although Schlumpberger was 50 years old at the time of Dr. Mack's assessment, Dr. Mack stated that "Mr. Schlumpberger's age of 39 will be used [for the assessment] as that is when he was exposed to risk" in the community and that, "[t]herefore, the effects of aging related to Mr. Schlumpberger's current risk will need to be considered external to the Static-99R" and the Static-2002R.

Dr. Mack was unable to score the Stable-2007, which measures a person's risk of recidivism due to "dynamic" or "changeable[]" factors" that "can be influenced through effortful intervention" and identifies current treatment needs. Dr. Mack explained that she could not score Schlumpberger's dynamic risks and needs with a reasonable degree of

certainty because Schlumpberger had not participated in treatment and refused to be interviewed for Dr. Mack's assessment.

Based upon the available information, however, Dr. Mack opined that Schlumpberger's dynamic risk factors included significant social influences, intimacy deficits, general self-regulation, sexual self-regulation, and cooperation with supervision. As relevant to this appeal, Dr. Mack noted that general self-regulation and cooperation with supervision were lacking because Schlumpberger threatened and crossed boundaries with MSOP staff and refused to discuss his role in those conflicts; refused to discuss his barriers to treatment; resisted rules and supervisory efforts; received five behavioral-expectation reports (BERs) within the last year; and had been described as "rude, hostile, condescending and disrespectful." Dr. Mack noted that sexual self-regulation, which she described as "one of the most robust predictors of sexual recidivism," was lacking based on the circumstances giving rise to his commitment. She also noted that his refusal of treatment prevented his providers from assessing his deviant sexual interests.

Dr. Mack also did not score the Structured Assessment of Protective Factors for Violence (SAPROF), which measures 17 "factors considered to protect an offender from engaging in future acts of sexual or non-sexual violence," but noted that only two of the 17 factors were present and 12 were potential areas for improvement. The two factors that Dr. Mack found may be protective for Schlumpberger were "inherent to his current environment" at MSOP's secure facility: living circumstances and external control. The 12 potential areas for improvement were "financial management, professional care,

self-control, empathy, coping, work, leisure activities, motivation for treatment, life goals, attitude toward authority, social network, and intimate relationship.”

Dr. Mack concluded that Schlumpberger did not meet the criteria for full discharge, provisional discharge, or transfer because

[h]e has a number of remaining treatment needs related to his sexual offending behavior and paraphilic disorder. His remaining treatment needs require ongoing inpatient treatment and supervision. He continues to require a high degree of security evidenced by his hostile and adversarial behavior, including making threats of harm to others, boundary violations, and continued BERs. . . . Continued institutionalization and a high level of external controls are warranted, as Mr. Schlumpberger does not yet have the internal resources to manage his behavior. Additionally, he has a number of criminogenic needs which require further intervention and has been assessed as Well Above Average risk, which suggests the need for a high level of supervision. He has few protective factors and those present are inherent to his current environment. Mr. Schlumpberger remains an undue risk to society and could not be managed in a less restrictive setting currently.

After the SRB issued its recommendation to deny the petitions, Schlumpberger petitioned the Commitment Appeal Panel (CAP)³ for rehearing and reconsideration of his petitions for full discharge and provisional discharge pursuant to Minn. Stat. § 253D.28, subd. 1(a)-(b) (2022).⁴ The CAP appointed Dr. Kristen Otte as an independent expert

³ We refer to the entity formerly known as the supreme court appeal panel, or statutorily as the judicial appeal panel, as the CAP. *See* Minn. Stat. § 253D.28, subd. 1(a) (2022) (providing for review by “the judicial appeal panel established under section 253B.19, subdivision 1”).

⁴ Schlumpberger also sought rehearing and reconsideration of his petition for transfer but later withdrew that petition.

examiner to prepare a “focused-review report.”⁵ The CAP’s order explains that, under its focused-review process, the CAP appoints an independent examiner to determine whether a petitioner who received an adverse recommendation from the SRB should receive a full risk assessment prior to the CAP hearing. If the CAP agrees with the examiner’s report that a full assessment is not warranted, the petitioner’s case proceeds on the existing record.

Dr. Otte’s testimony in the CAP proceedings described what an examiner does during the focused-review process. When preparing a focused-review report, the examiner first reviews the SRB’s findings to determine the reasons for the SRB’s adverse recommendation. The examiner assumes that the SRB’s factual findings are accurate and does not opine whether the SRB’s recommendation was right or wrong. Second, the examiner reviews the evidence that was submitted to the SRB, including any treatment reports. The examiner assumes that the content of the reports is accurate, including any risk-assessment scores contained therein, and does not conduct any new risk assessments. Third, the examiner reviews the petitioner’s intervening treatment records from the time of the SRB hearing up to the time of the focused-review report to determine whether the petitioner has made meaningful progress in the areas that the SRB identified as contributing to the adverse recommendation. If the treatment records show meaningful progress, the

⁵ The CAP’s order denying Schlumpberger’s petitions states that the CAP implemented the focused-review process because the COVID-19 pandemic resulted in a significant backlog of CAP petitions. It explains that the process reduces wait times for petitioners to receive full risk assessments prior to their hearings, ensures that appropriate cases are referred for assessments, and preserves judicial resources by forgoing full assessments when they would not be useful.

examiner recommends an updated full risk assessment for the CAP to consider at the hearing.

Dr. Otte's focused-review report concluded that an updated full risk assessment was not warranted here. In her summary of the SRB's findings and recommendation, Dr. Otte wrote:

It was noted that he minimally participated in treatment at the MSOP and withdrew his consent for treatment in February 2018; maintained a hostile attitude and received four BERs in the preceding year; had a number of remaining treatment needs related to his sexual offending behavior and paraphilic disorder; and had an above-average to well-above-average risk of recidivism.

With respect to Schlumpberger's progress since the SRB hearing, Dr. Otte noted that Schlumpberger's recent treatment records showed that, in late 2022, Schlumpberger attended an "annual meeting" and "expressed interest in meeting with a primary therapist," but "by January 2023, he had not attended further individual [therapy] sessions or scheduled treatment meetings." In addition, Dr. Otte stated that Schlumpberger "remained a non-participant in sex offender group treatment," "there was no indication he participated in assessments of sexual interest and sexual arousal," and he "demonstrated ongoing resistance to addressing areas of dynamic risk, his history of sexual offending patterns and behaviors, or any areas related to sexuality or deviance."

Consistent with Dr. Otte's recommendation, Schlumpberger's case proceeded to a first-phase hearing⁶ before the CAP without an updated risk assessment. Schlumpberger

⁶ Hearings before the CAP occur in two phases. In the first-phase hearing, the petitioner bears the burden of producing evidence to demonstrate that they can meet the statutory

submitted the following exhibits at the hearing: (1) MSOP's Standard Provisional Discharge Plan; (2) Dr. Mack's SVRA report; (3) Dr. Otte's focused-review report; and (4) the coding rules for Static-99R assessments. The CAP also heard testimony from Dr. Otte and Schlumpberger.

Dr. Otte testified that she concurred with Schlumpberger's diagnoses identified in the Sturgis and Mack reports. She explained that Schlumpberger's paraphilic disorder was classified as "other specified paraphilic disorder non-consent" because, although "non-consent" is not a specifically defined paraphilic disorder, such as pedophilia or sexual sadism, his disorder "couldn't be more narrowly defined . . . because there ha[d] not been any assessment of sexual arousal or sexual interest" and Schlumpberger's "lack of engagement in treatment has . . . interfered with further exploration of what motivated [his] prior behaviors."

Dr. Otte also testified about how alcohol use contributes to an offender's risk of recidivism. When asked how she would "detract and set aside whether or not somebody has [a] paraphilic interest or has really bad boundaries when they drink," Dr. Otte answered, "That would be difficult to parse apart in some cases. Alcohol can contribute to sexual offending in all sorts of ways. It can disinhibit behavior [or] contribute to new behaviors"

criteria for the requested relief. *Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014). If the petitioner meets their burden, the petition proceeds to a second-phase hearing in which the respondent must prove by clear and convincing evidence that the relief should be denied. *Id.*

When asked whether “individuals need treatment to reduce their recidivism,” Dr. Otte opined that the “sex offender treatment research would suggest, yes, that treatment is a mode for reducing recidivism.” Schlumpberger’s counsel then suggested that treatment is “not conclusive” and asked whether age is another factor that reduces recidivism. Dr. Otte answered, “There are a variety of factors that reduce overall risk, yes. Treatment is the primary mode for mitigating that risk successfully and sufficiently.”

In his testimony, Schlumpberger denied having committed an offense against his nephew. He also stated that alcohol was “tied to [his] continued run-ins with the law” and that, if he was released, he would not drink alcohol. He explained, “I am convinced that if I go out and drink, not right away but any time, I am going to be talking to you people again.”

At the conclusion of the hearing, respondent commissioner of human services moved to dismiss Schlumpberger’s petitions pursuant to Minn. R. Civ. P. 41.02(b). Respondent Aitkin County joined in the commissioner’s motion. The CAP granted respondents’ motions to dismiss, determining that Schlumpberger was not entitled to a second-phase hearing because he 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).

Schlumpberger appeals.

DECISION

Schlumpberger challenges the CAP's first-phase dismissal of his petitions for full 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.

We first set forth the framework for how petitions for full discharge and provisional discharge proceed. A person who is civilly committed as an SDP may seek a reduction in custody by petitioning for transfer, provisional discharge, or full discharge. Minn. Stat. §§ 253D.29-.31 (2022). 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 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 full 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*, 847 N.W.2d at 535 (quotation omitted). To make a prima facie case, the petitioner must produce “sufficient, competent evidence that, if proven, would entitle the petitioner to relief” under the statutory criteria for discharge. *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.* at 486 (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. *Larson*, 847 N.W.2d at 535. When considering a motion to dismiss under rule 41.02(b), the CAP may not weigh evidence or make credibility determinations and must view the evidence in the light most favorable to the petitioner. *Coker*, 831 N.W.2d 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.

We review the CAP's rule 41.02(b) dismissal of a full-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).

I. The CAP did not err when it dismissed Schlumpberger's petition for full discharge.

A petitioner who is civilly committed as an SDP “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.*

The application of the statutory criteria for civil commitment must comport with the Due Process Clause of the United States Constitution, which requires 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 [their] sexual disorder and to pose a danger to the public.” *Id.*

Schlumpberger first contends that the CAP failed to consider the evidence in the light most favorable to him because it did not consider the “context” of his offending behaviors—which, he asserts, was his alcohol-use disorder. He states that alcohol was “heavily involved” with his offending pattern, which appears to be an argument that he will not reoffend upon release because his alcohol-use disorder is now in sustained remission. The evidence that Schlumpberger produced to support his argument is (1) his testimony that he will not drink alcohol upon release and (2) the expert reports and expert testimony that he is diagnosed with “alcohol use disorder, severe, in sustained remission, in a controlled environment.”

A petitioner’s self-serving testimony, without more, is insufficient to satisfy their burden of production. *In re Civ. Commitment of Poole*, 921 N.W.2d 62, 68-69 (Minn. App. 2018), *rev. denied* (Minn. Jan. 15, 2019). Therefore, Schlumpberger’s testimony that he will not drink alcohol upon release is insufficient on its own to establish a *prima facie* case.

In addition, Schlumpberger has not produced any evidence that alcohol was the sole reason for his sexually offending behaviors. Indeed, Dr. Mack's report indicates that Schlumpberger was not always intoxicated during the sexual offenses he committed, and all of the reports indicate that the reason for his offending behaviors is uncertain because he refuses to discuss the topic with his providers. Schlumpberger's argument does not address his other diagnoses. Therefore, Schlumpberger's evidence that his alcohol-use disorder is in remission, if true, would be insufficient to show 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." Minn. Stat. § 253D.31. It is also insufficient to show that "no reasonable relation exists between the original reason for commitment and the continued confinement." *Call*, 535 N.W.2d at 319.

Second, Schlumpberger contends that the CAP failed to view the evidence in the light most favorable to him because it did not consider what he claims are errors in Dr. Mack's actuarial assessments. He asserts that his Static-99R score (and presumably his Static-2002R score) overestimated his risk of recidivism because Dr. Mack did not sufficiently account for his age and should not have assigned risk points for a non-sexual violent offense, a non-contact sex offense, and offending against a male. The only evidence he produced to support his argument that his risk of recidivism should have been scored lower was the Coding Rules for the Static-99R tool.

Even assuming that his static scores overestimate his risk, however, Schlumpberger does not explain how correcting any errors would alter the conclusion that he did not make a *prima facie* case that he meets the discharge criteria. He does not challenge the other risk

factors that contributed to his well-above-average risk scores and does not challenge Dr. Mack's observation that virtually no mitigating factors were present.

Schlumpberger's evidence shows that (1) he is diagnosed with antisocial personality disorder and a paraphilic disorder; (2) he has done little, if anything, to address those disorders; (3) he has not participated in treatment; (4) he has not submitted to physiological tests that would enable providers to assess his sexual interests and arousal; and (5) he continues to engage in antisocial behavior even in a controlled setting. Contrary to his arguments, this evidence demonstrates that Schlumpberger does not meet the discharge criteria.

Viewing the evidence in the light most favorable to Schlumpberger, 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 as Minn. Stat. § 253D.31 requires for his discharge. And because Schlumpberger has not proved that he no longer needs treatment and supervision, the CAP's determinations do not violate Schlumpberger's constitutional rights. Therefore, the CAP did not err in its determination that Schlumpberger did not make a prima facie case for discharge, and we affirm the CAP's denial of his petition for full discharge.

II. The CAP did not err when it dismissed Schlumpberger's petition for provisional discharge.

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 485-86; *accord* Minn. Stat. § 253D.28, subd. 2(d) (2022). A petitioner who is civilly committed as an SDP “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).

Schlumpberger asserts that he met his burden of production on his petition for provisional discharge for the same reasons set forth above with regard to full discharge. He also appears to assert that his treatment needs could be met through outpatient treatment because he “testified consistent with a view that he would attend programming and live in appropriate housing in the community.” Schlumpberger testified that he would “entertain aftercare to ensure [his] life is going in the proper direction,” but with regard to treatment, Schlumpberger testified only that he had already completed chemical-dependency treatment before he was committed.

As noted above, a petitioner’s self-serving testimony, without more, is insufficient to satisfy their burden of production. *Poole*, 921 N.W.2d at 68-69. With respect to the first criterion, Schlumpberger’s evidence shows that his course of treatment is virtually

nonexistent, that his present mental status with regard to sexual deviance is unknown, and that his present mental status in general is indicative of antisocial behaviors. With respect to the second criterion, Schlumpberger's evidence shows that MSOP's standard provisional-discharge conditions (1) would not provide a reasonable degree of protection to the public because he is a danger to others even in a confined setting and (2) would not enable him to adjust successfully to the community because he has only minimally engaged in inpatient treatment.

Viewing the evidence in the light most favorable to Schlumpberger, we conclude that he failed to present sufficient competent evidence that he no longer needs treatment and supervision in his current treatment setting and that the provisional-discharge plan will provide a reasonable degree of protection to the public and will enable him to adjust successfully to the community. Therefore, the CAP did not err in its determination that Schlumpberger did not make a prima facie case for provisional discharge and we affirm the CAP's denial of his petition.

In sum, we conclude that the CAP did not err when it determined that Schlumpberger did not satisfy his burden to present prima facie cases in support of his petitions. Therefore, Schlumpberger is not entitled to a second-phase hearing and the CAP did not err by dismissing his petitions.

Affirmed.