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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A17-0558

A17-0613

In the Matter of the Civil Commitment of: Kenrick Allen Shell

Filed August 21, 2017

Affirmed

Rodenberg, Judge

Judicial Appeal Panel

File No. AP16-9019

Hennepin County File No. 27-MH-PR-06-838

Lori Swanson, Attorney General, Heather N. Kjos, Assistant Attorney General, St. Paul, Minnesota (for appellant Commissioner of Human Services)

Michael Freeman, Hennepin County Attorney, Elizabeth S. Beltaos, Sr. Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

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Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Minnesota Commissioner of Human Services challenges the judicial appeal panel's grant of provisional discharge from the Minnesota Sex Offender Program (MSOP) to respondent Kenrick Allen Shell. We affirm.

DECISION

Respondent was judicially committed as a sexually dangerous person in 2007. He petitioned for provisional discharge and for discharge in 2015. A special review board recommended that respondent be provisionally discharged. A hearing was held before a judicial appeal panel (panel). The panel found that respondent had established a prima facie case for provisional discharge. At the hearing, appellant produced evidence and expert testimony supporting denial of respondent's provisional-discharge request. The panel granted respondent's petition for provisional discharge, and denied his petition for discharge. On appeal, appellant argues that the panel failed to make sufficient findings and erred in concluding that appellant had not shown by clear and convincing evidence that provisional discharge should be denied.

We review a judicial appeal panel's decision for clear error, "examining the record to determine whether the evidence as a whole sustains the appeal panel's findings and not weighing the evidence as if trying the matter de novo." *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014) (quotations omitted). "Findings of fact will not be reversed if the record as a whole sustains those findings." *Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004). If the record sustains the findings of the panel, it is immaterial that it might also support contrary findings. *Id.* at 314; *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992). "[T]his court reviews de novo questions of statutory construction and the application of statutory criteria to the facts found." *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *review denied* (Minn. June 20, 2017).

I. The findings are sufficiently particular to permit appellate review.

As an initial matter, appellant argues that the panel failed to make sufficiently particular findings of fact to enable appellate review because the panel's findings were mere recitations of evidence and not meaningfully tied to the panel's conclusions of law. Citing *In re Civil Commitment of Spicer*, 853 N.W.2d 803, 810-12 (Minn. App. 2014), appellant argues that the case should be remanded to the panel for further findings.

In *Spicer*, a district court concluded that the state had met its burden of proving by clear and convincing evidence that Spicer satisfied the criteria for commitment as both a sexually dangerous person and a sexual psychopathic personality. 853 N.W.2d at 807. On appeal, we held that the district court's findings were not sufficient because we were unable to determine which of the statutory factors the district court considered most significant in reaching its conclusion, or which portions of the experts' inconsistent and contradictory opinions the district court relied on in making its decisions. *Id.* at 810-12.

This case is unlike *Spicer*. In *Spicer*, the district court concluded that the state had met its burden of proof by clear and convincing evidence, but we were unable to determine how it reached that conclusion in light of various inconsistencies. *Id.* Here, appellant had the burden of proving, by clear and convincing evidence, that discharge should be denied. Minn. Stat. § 253D.28, subd. 2(d) (2016). The panel concluded that the burden of proof was not met. The panel's findings, though largely recitations of the evidence presented, clearly indicate why appellant failed to carry the burden of proof. The panel tied those facts to the conclusions of law by stating that it found that the recommendations of the

clinical leadership and treatment staff, and the security provided by the provisional discharge plan, outweighed the concerns expressed by appellant's expert witness.

II. The record supports the panel's conclusion that appellant had not produced clear and convincing evidence that provisional discharge should be denied.

Appellant next argues that the panel erroneously concluded that appellant failed to prove by clear and convincing evidence that the provisional discharge should be denied. Clear and convincing evidence is "more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Limberg v. Mitchell*, 834 N.W.2d 211, 218 (Minn. App. 2013) (quoting *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)). The standard has been met "when the truth of the facts asserted is highly probable." *Id.* (quotation omitted).

Appellant was required to prove by clear and convincing evidence that respondent was not "capable of making an acceptable adjustment to open society." Minn. Stat. §§ 253D.28, subd. 2(d), .30, subd. 1(a) (2016). Appellant could have established this by proving either (1) respondent needed treatment and supervision in his current setting, or (2) the provisional discharge plan would not provide a reasonable degree of protection to the public or allow respondent to adjust successfully to the community. Minn. Stat. § 253D.30, subd. 1(b) (2016).

Appellant argues that the burden of proof was satisfied by evidence which suggests that respondent needs continued treatment in his current setting for issues concerning his sexual arousal and emotional instability. Appellant also argues that the evidence supports a conclusion that respondent would be a risk to the public and unable to successfully adjust to society if his sexual and psychological issues were unresolved. Appellant relied on the

expert testimony and report of Dr. Thornton, who recommended that respondent continue treatment at Community Preparation Services until respondent's arousal patterns were managed, and until respondent had addressed issues surrounding his sexual preferences and the causes of his emotional distress. Dr. Thornton did not believe that the provisional-discharge plan adequately addressed his concerns regarding the risk to the public and respondent.

The evidence amply supports the panel's decision to grant provisional discharge.

The MSOP clinical leadership supported respondent's petition for provisional discharge, noting that respondent had successfully completed a nine-month arousal-management program. Respondent exhibited positive behavior while in the community, including seeking opportunities to expand his support network, self-monitoring, and utilizing his relapse-prevention plan. The clinical leadership reported that respondent has also made progress in the area of emotional and cognitive distortions management, and practices mindfulness exercises "for stress reduction and mood management." The MSOP clinical leadership, while recognizing that respondent had continuing areas of treatment need, recommended "a period of community placement where he could continue to work with a sex offender specific treatment provider to further generalize his treatment gains and further establish his arousal management practices in the community setting."

Two licensed psychologists likewise supported provisional discharge. Dr. Mack acknowledged that respondent continues to have risk factors that need treatment, but opined that respondent's "remaining treatment needs may best be addressed in a community setting." The psychologist concluded that a residential placement with staff

support and security measures would be an appropriate placement for respondent. Dr. Thompson also believed that a gradual adjustment to society would be appropriate and that the provisional discharge plan addresses his concerns about the type of placement respondent needed. He opined that respondent's areas of treatment need could be adequately addressed in an outpatient sex-offender treatment program.

The reintegration director of MSOP testified concerning the supervision and treatment requirements for persons who are provisionally discharged. Without opining about whether respondent was an appropriate candidate for provisional discharge, the director testified about the security offered by a provisional-discharge placement at Zumbro House. The director testified that Zumbro House is a high-security residence with around-the-clock staff, cameras in common areas, and alarms on exterior doors. He also testified that persons on provisional discharge are monitored by GPS units. After the panel issued an order granting provisional discharge, the order was amended to indicate that respondent had been accepted for a placement at Zumbro House.

Dr. Thornton's concerns, in light of the record as a whole, do not amount to clear and convincing evidence that provisional discharge should be denied. The panel opted to credit other evidence, which supports its conclusion that appellant failed to demonstrate that respondent needed continued treatment or supervision in his current setting. *Id.*, subd. 1(b)(1). The record also supports the panel's conclusion that appellant failed to demonstrate by clear and convincing evidence that the provisional discharge plan would not provide a reasonable degree of protection to the public or permit respondent to adjust

successfully to the community. *Id.*, subd. 1(b)(2). Because the record as a whole supports the panel's findings, we affirm.

Affirmed.