

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1236**

In the Matter of the Civil Commitment of: Kirk Alan Fugelseth

**Filed January 29, 2018
Affirmed
Johnson, Judge**

Judicial Appeal Panel
File No. AP13-9041
Clay County District Court
File No. 14-PX-02-001341

Lori Swanson, Attorney General, Aaron Winter, Assistant Attorney General, St. Paul, Minnesota (for appellant Commissioner of Minnesota Department of Human Services)

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Michael C. Hager, Minneapolis, Minnesota (for respondent Kirk Alan Fugelseth)

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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Bratvold, Judge.

S Y L L A B U S

If a person who was civilly committed as a sexually dangerous person or a sexual psychopathic personality seeks a full discharge and satisfies the initial burden of production, he must be discharged unless the party opposing discharge proves by clear and convincing evidence that, first, he continues to need inpatient treatment and supervision and, second, he continues to be dangerous to the public.

OPINION

JOHNSON, Judge

Kirk Alan Fugelseth was civilly committed as a sexually dangerous person and a sexual psychopathic personality in 2003. Ten years later, he requested a provisional discharge from his commitment, and he later requested a full discharge. The judicial appeal panel granted his request for a full discharge. The commissioner of human services appeals. We conclude that the judicial appeal panel did not err by interpreting the applicable statute to require the commissioner to prove that Fugelseth is no longer in need of inpatient treatment and supervision. We further conclude that the judicial appeal panel did not err by finding that Fugelseth is no longer dangerous to the public. Therefore, we affirm.

FACTS

Fugelseth is a 50-year-old man who was determined to be a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP) and was civilly committed to the Minnesota Sex Offender Program (MSOP).

Fugelseth's status as an SDP and an SPP is based on sexual misconduct occurring approximately 20 to 30 years ago. In 1994, he pleaded guilty in Oregon to one count of second-degree sodomy and one count of third-degree sexual abuse. He admitted that, beginning in 1989, he sexually abused two pre-teen boys on multiple occasions over approximately one and one-half years. The Oregon court sentenced Fugelseth to concurrent probation terms of five years and ten years.

In 1997, Fugelseth was found guilty in Arizona of one count of attempted felony child molestation. He admitted that, on one occasion in December 1997, he sexually

molested an eight-year-old girl. The Arizona court sentenced him to 12 months of imprisonment and a lifetime term of probation.

While Fugelseth was serving his prison term in Arizona, he was extradited to Minnesota to face criminal charges for sexual misconduct toward the same girl. In 1999, he pleaded guilty in Clay County to one count of second-degree criminal sexual conduct. He admitted that, in late 1995 or early 1996, he sexually abused the girl on multiple occasions over approximately one year. The district court sentenced him to 45 months of imprisonment.

In 2000, Fugelseth was convicted in federal court in Minnesota of possession of child pornography. Fugelseth admitted that he downloaded and e-mailed hundreds of pornographic images. The federal district court sentenced him to 60 months of imprisonment.

In January 2003, Clay County petitioned to civilly commit Fugelseth as an SDP and an SPP. In September 2003, the Clay County District Court granted the petition and committed Fugelseth to the custody of the commissioner of human services for an indeterminate period of time. Since his commitment, Fugelseth has been in MSOP at either the Moose Lake location or the St. Peter location. In the summer of 2010, Fugelseth was transferred to the Community Preparation Services (CPS) program, which is in a non-secure facility at MSOP's St. Peter location.

In January 2013, Fugelseth petitioned the special review board for a provisional discharge. In October 2013, during a hearing before the special review board, Fugelseth amended his petition to request a full discharge or a provisional discharge. In November

2016, the special review board recommended granting his request for a provisional discharge and denying his request for a full discharge.

Fugelseth then petitioned the judicial appeal panel for a rehearing and reconsideration of his request for a full discharge. The judicial appeal panel held three evidentiary hearings in December 2016, March 2017, and April 2017. Fugelseth called six witnesses. Lauren Herbert, a forensic psychologist at MSOP, testified in support of Fugelseth's request for a full discharge. The founder of a support group called Choosing Healthy Sexual Boundaries testified that Fugelseth participates in the group and attends weekly meetings. Katie Holmgren, the clinical supervisor of the support group Project Pathfinder and Fugelseth's current therapist, testified about Fugelseth's participation in individual therapy and group therapy, asserted that he was a "model group member," and stated that he will not successfully complete the Project Pathfinder program until he lives in the community. A member of the Project Pathfinder support group testified that he would hire Fugelseth for a part-time position in his food truck if Fugelseth were discharged. A homeowner testified that he has space in his home where Fugelseth could live if he were discharged. Fugelseth also testified on his own behalf.

The commissioner called three witnesses. Christopher Kunkel, an independent forensic psychologist, testified that Fugelseth should be granted a provisional discharge but not a full discharge. Christopher Schiffer, the clinical director of MSOP at St. Peter, testified that a full discharge would be premature because Fugelseth needs to complete community-based sex-offender treatment. The commissioner also called Fugelseth to testify about the assessments in MSOP's quarterly treatment-progress reports.

In July 2017, the judicial appeal panel issued a 32-page order and memorandum in which it granted Fugelseth's petition for a full discharge. The panel concluded that Fugelseth satisfied the statutory discharge criteria because the commissioner had not proved by clear and convincing evidence that Fugelseth is still in need of inpatient treatment and supervision or that Fugelseth is still dangerous to the public. The panel also concluded that Fugelseth's continued commitment would be unconstitutional. The commissioner appeals.

ISSUES

I. If an SDP or an SPP petitions for a full discharge from civil commitment, must the commissioner prove that the committed person continues to be in need of *inpatient* treatment and supervision?

II. Did the judicial appeal panel err by finding that Fugelseth is no longer dangerous to the public?

ANALYSIS

The commissioner argues that the district court erred by granting Fugelseth's request for a full discharge for two reasons. First, the commissioner argues that the judicial appeal panel erred in its interpretation of the statute governing full discharge and, thus, erred by finding that Fugelseth is no longer in need of inpatient treatment and supervision. Second, the commissioner argues that the judicial appeal panel erred by finding that Fugelseth is no longer dangerous to the public.¹

¹The commissioner also makes a third argument, that the judicial appeal panel erred by finding that "specific conditions exist to provide a reasonable degree of protection to the public." See Minn. Stat. § 253D.31 (2016). An appellate court generally will not consider an argument that was not preserved by being presented to a district court. *Thiele*

Fugelseth was civilly committed as an SDP and an SPP. A person who is committed as an SDP or an SPP may petition the special review board for a reduction in custody. Minn. Stat. § 253D.27, subd. 2 (2016). The term “reduction in custody” encompasses both provisional discharge and full discharge. *Id.*, subd. 1(b). The legislature has specified certain criteria for a full discharge:

A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the special review board, that the committed person [1] is capable of making an acceptable adjustment to open society, [2] is no longer dangerous to the public, and [3] is no longer in need of inpatient treatment and supervision.

In determining whether a discharge shall be recommended, the special review board and judicial appeal panel shall 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. If the desired conditions do not exist, the discharge shall not be granted.

Minn. Stat. § 253D.31 (2016).

The parties generally agree that these statutory criteria must be applied in a manner that respects a committed person’s constitutional rights. They further agree that the supreme court’s opinion in *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995), applies, although

v. Stich, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 42-43 (Minn. App. 2014). The preservation requirement applies with full force in appeals from decisions of the judicial appeal panel. See *In re Kropp*, 895 N.W.2d 647, 653 (Minn. App. 2017), *review denied* (Minn. June 20, 2017). In this case, the commissioner did not make the third argument to the judicial appeal panel. Because the commissioner did not dispute the issue and did not prompt the judicial appeal panel to resolve the issue, the commissioner forfeited the argument. Accordingly, this court will not consider the issue for the first time on appeal.

they disagree about the precise manner in which it applies. Nonetheless, the commissioner acknowledges that, in light of *Call*, the first paragraph of section 253D.31 must be applied in a manner that ensures that an SDP or an SPP is “discharged if no reasonable relation exists between the original reason for commitment and the continued confinement.” See *id.* at 319. To fulfill that principle, the *Call* court held as follows:

So long as the statutory discharge criteria are applied in a way that the person subject to commitment . . . is confined for only so long as he or she continues both [1] to need further inpatient treatment and supervision for his sexual disorder and [2] to pose a danger to the public, continued commitment is justified.

Id. The commissioner notes that, in essence, the *Call* court held that the first requirement in the first paragraph of section 253D.31 (that the committed person be “capable of making an acceptable adjustment to open society”) no longer applies. See *id.* Accordingly, under *Call*, a person committed as an SDP or an SPP must be fully discharged from his civil commitment unless he “[1] continues to need inpatient treatment and supervision . . . and [2] continues to be a danger to the public.” See *id.*

As a procedural matter, a person who seeks a full discharge from civil commitment bears an initial burden of production, which requires “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) (2016);² see also *Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013)

²In 2013, the legislature recodified the statutes governing full discharge and provisional discharge. See 2013 Minn. Laws ch. 49, at 1-19 (codified at Minn. Stat. ch. 253D). Fugelseth petitioned for provisional discharge before the 2013 recodification. Nonetheless, we apply the current versions of the relevant statutes because, for purposes of this case, the legislature merely clarified pre-existing law without making any substantive changes. See *Coker v. Jesson*, 831 N.W.2d 483, 486 & n.2 (Minn. 2013); *Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012).

(reviewing denial of petition for provisional discharge). If the committed person satisfies that burden of production, then “the party opposing discharge . . . bears the burden of proof by clear and convincing evidence that the discharge . . . should be denied.” Minn. Stat. § 253D.28, subd. 2(d); *see also Coker*, 831 N.W.2d at 486.

This court applies a clear-error standard of review to a judicial appeal panel’s findings of fact by “examining the record to determine whether the evidence as a whole sustains the panel’s findings.” *In re Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017) (reviewing denial of petition for provisional discharge), *review denied* (Minn. June 20, 2017). In doing so, “we do not reweigh the evidence,” and “it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *Id.* In addition, we apply a *de novo* standard of review to issues of statutory interpretation and to a judicial appeal panel’s application of the law to the facts of a particular case. *Id.*

I.

The commissioner argues that the judicial appeal panel erred in its interpretation of the statute governing full discharge. Specifically, the commissioner argues that the judicial appeal panel erred by requiring the commissioner to prove that Fugelseth is “in need of *inpatient* treatment and supervision.” *See* Minn. Stat. § 253D.31 (emphasis added). The commissioner contends that the judicial appeal panel should have required her to prove merely that Fugelseth is in need of treatment and supervision of any type, inpatient or otherwise.

The commissioner initially attempts to justify her interpretation of section 253D.31 by contending that the supreme court in *Call* construed a predecessor statute by eliminating the modifier “inpatient” so that the statute asked only whether a committed person is no

longer in need of “treatment and supervision.” This contention is based on the fact that, in certain portions of the *Call* opinion, the supreme court referred to the statute’s use of the word “treatment” without using the modifier “inpatient.” *See Call*, 535 N.W.2d at 318-19. In four other portions of the *Call* opinion, however, the supreme court retained the modifier “inpatient” when referring to the statute’s use of the word “treatment” or the phrase “treatment and supervision.” *See id.* at 317, 319. It appears to this court that the supreme court did not omit the word “inpatient” for the purpose of construing the phrase “treatment and supervision” more broadly than the plain meaning of the language used by the legislature. The supreme court did not explain why the word “inpatient” sometimes was omitted and did not otherwise call attention to it. *See id.* Consequently, we do not read the *Call* opinion as eliminating the word “inpatient” from the predecessor statute and, thus, do not read *Call* to require the elimination of the word “inpatient” from the present statute. Thus, the judicial appeal panel’s interpretation of the first paragraph of section 253D.31 is not inconsistent with *Call*.

The commissioner next contends that, if the first paragraph of section 253D.31 is interpreted as written to mean “inpatient treatment and supervision,” the statute would be “irreconcilable with” other statutes within chapter 253D, such as sections 253D.07, 253D.14, and 253D.30. The commissioner urges us to resolve the asserted irreconcilabilities by allowing the latter-enacted statutes (sections 253D.07, 253D.14, and 253D.30) to prevail. The commissioner also contends that a straightforward interpretation of the plain meaning of the first paragraph of section 253D.31 would be absurd. The commissioner explains that, if a full discharge must be granted in any case in which inpatient treatment and supervision is no longer needed, there would be no purpose in

section 253D.30, which provides for provisional discharge, because any person who satisfies the requirements of provisional discharge would not need inpatient treatment, which would mean that any such person also would satisfy the requirements of full discharge.

To resolve these contentions, we would need to interpret the first paragraph of section 253D.31. “The first step in statutory interpretation is to determine whether the statute’s language, on its face, is ambiguous.” *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). ““A statute is ambiguous only if it is subject to more than one reasonable interpretation.”” *Id.* (quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013)). If a statute is unambiguous, “then we must apply the statute’s plain meaning.” *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014) (quotation omitted). But if a statute is ambiguous, “then we may apply the canons of construction to resolve the ambiguity.” *Thonesavanh*, 904 N.W.2d at 435.

We proceed by asking whether the text of the first paragraph of section 253D.31 provides that a person committed as an SDP or an SPP must be fully discharged if he is no longer in need of *inpatient* treatment and supervision, as Fugelseth contends, or if he is no longer in need of *any* treatment and supervision, as the commissioner contends. On that issue, the statute is unambiguous: according to its plain meaning, 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.” Minn. Stat. § 253D.31 (emphasis added). Because the statute is unambiguous, “we must apply the statute’s plain meaning.” *Nelson*, 842 N.W.2d at 436.

As stated above, the commissioner contends that the plain meaning of the phrase “inpatient treatment and supervision” is irreconcilable with other statutes and is absurd. We question whether we may analyze the issues of irreconcilability and absurdity without determining that the statute is ambiguous. *Compare Thonesavanh*, 904 N.W.2d at 436-37 (applying extrinsic canon after determining statute to be ambiguous), *with Nielsen v. 2003 Honda Accord*, 845 N.W.2d 754, 756-58 (Minn. 2013) (analyzing irreconcilability argument without determination of ambiguity). We also question whether section 253D.31 actually cannot be reconciled with the other statutes identified by the commissioner. Regardless, we need not resolve those questions because we are not at liberty to construe section 253D.31 in the manner urged by the commissioner. To 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*. To reiterate, the *Call* opinion states that statutory discharge criteria must be applied in a manner that ensures that a committed person is “discharged if no reasonable relation exists between the original reason for commitment and the continued confinement.” *Call*, 535 N.W.2d at 319. The *Call* opinion stated a corollary rule:

So long as the statutory discharge criteria are applied in a way that the person subject to commitment . . . is confined for only so long as he or she continues both [1] to need further inpatient treatment and supervision for his sexual disorder and [2] to pose a danger to the public, continued commitment is justified.

Id. The commissioner concedes that *Call* applies to a person committed as an SDP or an SPP. The *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.* at 318-19. In light of *Call*, we believe that the commissioner’s interpretation of section 253D.31 would cause Fugelseth’s continued commitment to violate his constitutional rights.

Thus, the judicial appeal panel correctly interpreted the first paragraph of section 253D.31. The commissioner concedes that she did not present evidence capable of proving that Fugelseth is “in need of *inpatient* treatment and supervision.” See Minn. Stat. § 253D.31 (emphasis added). Accordingly, the judicial appeal panel did not err by concluding that the commissioner failed to satisfy her burden of persuasion on the question whether Fugelseth is no longer in need of inpatient treatment and supervision.

II.

The commissioner also argues that the judicial appeal panel erred by finding that Fugelseth is no longer dangerous to the public.

The judicial appeal panel heard testimony from two forensic psychologists: Herbert, who was called by Fugelseth, and Kunkel, who was called by the commissioner. Herbert testified that she relied on various risk-assessment tools (namely, the Static-99R, the Stable-2007, the Acute-2007, and the SAPROF) to predict Fugelseth’s likelihood of reoffending, which she estimated to be 15.2 percent over five years. Herbert acknowledged that Fugelseth had reported “interest and/or thoughts of children and/or adolescents” and was diagnosed with pedophilic disorder, and she testified that Fugelseth’s diagnosis would be “present and lifelong” and that he would always require support. But Herbert testified that Fugelseth had means of mitigating the risk of reoffending. She opined that, in light of *Call*, “Fugelseth has met the criteria for a full discharge.”

Kunkel testified that he also relied on a risk-assessment tool (the VRS:SO) to predict Fugelseth's likelihood of reoffending, which he estimated to be 12.7 percent over five years. Kunkel testified that Fugelseth "has a deviant sexual preference" and "a history of sexual compulsivity" and that his past sexual misconduct involved planning and manipulation. Kunkel acknowledged that Fugelseth must "manage the deviance, [but] not necessarily cure it" and that he has been applying treatment methods to accomplish that goal. Kunkel testified that Fugelseth's risk of reoffending had declined and that he continues to make progress but that he nevertheless needs monitoring and treatment. Kunkel opined that the logical next step was provisional discharge, not full discharge.

In a memorandum attached to its order, the judicial appeal panel found that Fugelseth has a low risk of recidivism, has had privileges in the community on a regular basis without incident, has a strong support network, and has completed all recommended treatment programming. The judicial appeal panel concluded, "The Commissioner has failed to show by clear and convincing evidence that Petitioner is a danger to the public."

On appeal, the commissioner contends that the judicial appeal panel's findings and conclusions are inconsistent with the evidence. For example, the commissioner contends that the panel misinterpreted Kunkel's testimony concerning whether high-risk offenders have "the best prognosis" or "a good prognosis," whether Hebert's or Kunkel's estimated recidivism rate was lower than the other, and whether Fugelseth is in a "low" or "low-moderate" risk category. These issues were not determinative in the panel's assessment of the evidence, either individually or collectively.

The commissioner further contends that, in light of the judicial appeal panel's erroneous understanding of the factual record, she did prove by clear and convincing

evidence that Fugelseth still is dangerous to the public. This contention is contrary to the principles that “we do not reweigh the evidence” and that “it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *See Kropp*, 895 N.W.2d at 650. The question is *not* whether the record could support a finding that Fugelseth still is dangerous to the public; the question is whether the judicial appeal panel clearly erred by finding that Fugelseth no longer is dangerous to the public. *See id.* The judicial appeal panel considered conflicting evidence and determined that Herbert’s testimony was entitled to more weight than Kunkel’s testimony. This court generally will “defer to a district court’s evaluation of expert testimony.” *In re Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Furthermore, the panel reasonably relied on Fugelseth’s testimony that he would continue out-patient treatment and would utilize his support network.

Thus, the judicial appeal panel did not clearly err by finding that Fugelseth is no longer dangerous to the public.

D E C I S I O N

The judicial appeal panel did not err by granting Fugelseth’s request for a full discharge.

Affirmed.