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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1175**

In the Matter of the Civil Commitment of: Joe Nathaniel Givens.

**Filed December 17, 2018
Affirmed
Schellhas, Judge**

Judicial Appeal Panel
File No. AP16-9175

Michael J. Biglow, Minneapolis, Minnesota; and

Michael C. Hager, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Anthony R. Noss, Noah A. Cashman, Assistant Attorneys General, St. Paul, Minnesota (for respondent comm'r of human servs.)

Michael O. Freeman, Hennepin County Attorney, John R. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Considered and decided by Schellhas, Presiding Judge; Cleary, Chief Judge; and Reilly, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges a judicial appeal panel's denial of his petition for provisional discharge. We affirm.

FACTS

Except for approximately two years between confinements, appellant Joe Givens, born October 28, 1963, has spent his entire adulthood in secure confinement. As noted in *State v. Blue*, 327 N.W.2d 7, 9 (Minn. 1982), involving a co-offender, Givens, at age 17, participated in a robbery. When the female victim attempted to escape, a co-offender hit her on the head until she collapsed. *Id.* Givens then raped her as she was dying or already dead. *Id.* A jury found Givens guilty of third-degree murder, second-degree criminal sexual conduct, kidnapping, and aggravated robbery. *State v. Givens*, 332 N.W.2d 187, 188 (Minn. 1983). While on parole in 1996, Givens raped another woman, and pleaded guilty to second-degree criminal sexual conduct. Givens also has other uncharged incidents of sexual misconduct. At age 15, he initiated sexual contact with his mother's "foster daughter," while she was sleeping. Givens testified that the woman was 26 years old. In another incident, he threatened to beat a woman, raped her, and robbed her. On two other occasions, Givens "used aggression and . . . threats" to coerce women into having sex with him. On a fifth occasion, Givens coerced another client at the Minnesota Sex Offender Program (MSOP) to have sex with him.

During his first and second incarcerations in prison, Givens participated in sex-offender treatment. In June 1999, during his second incarceration, the treatment program terminated his participation based on his aggressive behavior. In 2000, he reentered sex-offender treatment, but based on his failure to progress and an assessment that rated him as "highly likely to reoffend," the Minnesota Department of Corrections petitioned for his

civil commitment as a sexually dangerous person/sexual psychopathic personality (SDP/SPP). In 2002, a district court committed Givens to MSOP as a SDP/SPP.

Givens's diagnoses include paraphilia, marijuana dependence, polysubstance abuse, dysthymic disorder, and anti-social personality disorder, and a district court ordered Givens indeterminately committed in April 2002. During his initial treatment at MSOP, Givens sexually acted out, used marijuana, ran a contraband store out of his room, and maintained a hostile attitude towards other clients and staff. In 2008, Givens progressed to Phase III of MSOP's program and transferred into the Social Integration Unit, a precursor to Community Preparation Services. In 2009, MSOP demoted Givens to Phase I due to disclosures from other clients of Givens's sexual contact, smuggling, and drug use. In January 2012, Givens progressed to Phase II and, in January 2014, to Phase III.

In February 2015, a judicial appeal panel granted Givens's petition for transfer to Community Preparation Services. On January 4, 2016, Givens petitioned for provisional discharge and full discharge from his civil commitment. Following an evidentiary hearing in October 2016, a special review board recommended that Givens's full-discharge request be denied and his provisional-discharge request be granted. Givens did not challenge the recommendations. Respondents Hennepin County and the Minnesota Commissioner of the Department of Human Services petitioned for rehearing and reconsideration of the special review board's recommendation for provisional discharge.

A judicial appeal panel (appeal panel) conducted a hearing and heard testimony from:

Givens;
Sandrel Bunting, Givens's fiancée;
Moi Boudouir, Givens's mentor;
Christopher Schiffer, MSOP's clinical director;
Scott Halvorson, MSOP reintegration director;
Dr. Cindy Spielman, MSOP sexual-violence risk assessor;
Dr. Nicole Elsen, MSOP assessment director;
Dr. Amanda Knoll, MSOP treatment psychologist;
Melissa Hegland-Smith, Project Pathfinder senior
clinical supervisor;
Dr. Mary Kenning, commissioner's expert witness;
Dr. Harry Hoberman, commissioner's expert witness; and
Dr. Penny Zwecker, a court-appointed examiner.

By stipulation of the parties, the appeal panel received multiple exhibits, including Givens's commitment orders, MSOP treatment reports, MSOP mental-health, chemical-dependency, and sexual-arousal/interest assessments, and Givens's provisional-discharge plan.

The appeal panel denied Givens's petition for provisional discharge. Givens's appeal of the appeal panel's denial of provisional discharge follows.

D E C I S I O N

The Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities, Minn. Stat. §§ 253D.01–.36 (2018), governs discharge proceedings of a person committed as a SDP/SPP. “A person committed as a [SDP/SPP] . . . ; the county . . . ; or the commissioner may petition the judicial appeal panel . . . for a rehearing and reconsideration of a recommendation of the special review board.” Minn. Stat. § 253D.28, subd. 1(a). A person seeking discharge has the burden of production and must “present[] a prima facie case with competent evidence to show that the person is entitled to the requested relief.” *Id.*, subd. 2(d). If the person seeking discharge meets this

burden, the opposing party “bears the burden of proof by clear and convincing evidence that the . . . provisional discharge should be denied.” *Id.* “A majority of the judicial appeal panel shall rule upon the [discharge] petition . . . consider[ing] the petition de novo.” *Id.*, subd. 3. “A party aggrieved by an order of the appeal panel may appeal that order.” *Id.*, subd. 4.

A person committed as a SDP/SPP

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 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.

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. When determining whether an individual is capable of making an acceptable adjustment to open society, a special review board and judicial appeal panel must consider:

(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 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.

Minn. Stat. § 253D.30, subd. 1(b).

This court reviews a judicial appeal panel’s decision for clear error and examines the record “to determine whether the evidence as a whole sustains the panel’s findings.” *In re Civil Commitment of Duvall*, 916 N.W.2d 887, 892 (Minn. App. 2018) (quoting *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *review denied* (Minn. June 20, 2017)), *review denied* (Minn. Sept. 18, 2018). And we apply “a de novo standard of review to issues of statutory interpretation and to a . . . panel’s application of the law to the facts of a particular case.” *In re Civil Commitment of Fugelseth*, 907 N.W.2d 248, 253 (Minn. App. 2018), *review denied* (Minn. Apr. 17, 2018). We view the record “in a light most favorable to the findings.” *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 647 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). 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.” *Fugelseth*, 907 N.W.2d at 253 (quotations omitted). We also defer to a judicial appeal panel’s evaluation of testimony. *Id.* at 256.

At the review-panel hearing, Givens testified about his offenses and treatment history. He challenged MSOP’s visitor-policy violation reports regarding inappropriate contact with his fiancée because he did not agree with MSOP’s policies against touching visitors. Givens admitted that he has “thoughts of --- like if I get mad, wanting to smack somebody or a thought of rape.” He testified about his provisional-discharge plan, stating that he would live at Zumbro House and seek admission to Project Pathfinder for sex-offender treatment.¹ He both described his receipt of “proficient” and “enhanced” scores

¹ Zumbro House provides apartment-style living for discharged MSOP clients; it is supervised 24-hours a day with camera and alarms on external doors; it does not provide

on his annual treatment reports and admitted manipulating MSOP peers and misleading the program by hiding his misbehavior from examiners.

Bunting, Givens's fiancée, testified that she had known Givens for over 20 years, had attended therapy with him and training at Project Pathfinder, and would support him in the community. She acknowledged smuggling marijuana into prison for Givens, explaining that she had been "manipulated" by him.

Boudouir, Givens's mentor, testified that he would support Givens in the community but also stated that Givens had not shared any details of his prior offenses and had claimed that he had only "made advances towards" one of his victims; Givens had not admitted that he raped her.

Schiffer, MSOP's clinical director, testified about the most recent special review board treatment report, noting that "while there's the possibility for . . . incremental gains in [Givens's] current location, for him to further generalize his treatment gains, it would be beneficial for him to be placed in the community." But Schiffer admitted that neither his report nor his recommendation contained or contemplated a risk assessment, instead it was "purely . . . from a treatment perspective."

Halvorson, MSOP reintegration director, testified that MSOP's staff supported Givens's discharge plan but had not assisted in creating it, beyond providing a template. Halvorson opined that Givens's discharge plan provided a reasonable degree of protection for the community.

any treatment, but rather a "therapeutic community." Project Pathfinder provides outpatient sex-offender treatment.

Dr. Spielman, MSOP sexual-violence risk assessor, testified about the results of Givens's sexual-violence risk assessment, which utilized two different actuarial tools, the Static-99R and the Stable-2007, to estimate Givens's risk of reoffending. Dr. Spielman's assessment rated Givens "in the low end of the Moderate Risk category" for reoffending, but having a moderate-high nominal risk of sexual recidivism and requiring a moderate-high level of supervision. Dr. Spielman also reviewed Givens's scores on the Hare Psychopathy Checklist-Revised, an instrument that measures an individual's behaviors and traits associated with psychopathy. She reported that "Givens has been assessed as having a High degree of psychopathy" putting him "at greater risk for future recidivism," but she supported granting him provisional discharge.

Dr. Elsen, MSOP assessment director, reviewed Givens's arousal-management program. She conducted two penile plethysmographs, which measures a client's arousal to deviant sexual encounters, one of which did not provide a clinically significant result that she could analyze and the other indicated that Givens "responded more to the deviant sexual stimuli than to the consenting sexual stimuli." Elsen testified that Givens had not participated in arousal-management aftercare, the group-therapy portion of the program.

Dr. Knoll, MSOP treatment psychologist, testified about the sex-offender assessment that she administered to Givens, which offers "information regarding the individual's current psychological functioning and participation in treatment." The assessment included administration of different tools that measured Givens's psychological and personality functioning, level of sexual-deviancy suppression, and a broad range of psychosexual characteristics that occur in adult sexual offenders. Dr. Knoll

also utilized the Static-99R, placing Givens in the above-average risk category for reoffending. She also diagnosed Givens with “Other Specified Paraphilic Disorder, Arousal to Nonconsenting Females, In a Controlled Environment; Antisocial Personality Disorder; Cannabis Use Disorder; . . . [and] Problems Related to Other Legal Circumstances (Civil Commitment).” Dr. Knoll recommended provisional discharge for Givens but acknowledged that Givens “may continue to minimize his offending” and “had a high level of denial with respect to his interest in deviant sex.”

Hegland-Smith, Project Pathfinder senior clinical supervisor, testified that she had received MSOP’s referral for Givens but had not yet admitted him to the program.

Dr. Zwecker, the court-appointed licensed psychologist, testified that to prepare her report, she interviewed Givens but not MSOP staff, and that she did not conduct a psychological evaluation of Givens. Zwecker acknowledged that her report discusses only Givens’s most recent quarterly treatment report and that she had heard for the first time during Givens’s testimony some behavior that caused her “concern.” She acknowledged the possibility that Givens continued to minimize his offensive conduct, citing his failure to disclose to her all of his previous sex offenses. She admitted to not having a full grasp of Givens’s offenses and to having adopted language and assessments from Dr. Spielman’s report, including her analysis of the scores from the Static-99R and Stable-2007, without conducting her own independent analysis. Dr. Zwecker acknowledged that Givens’s records reflect that he did not begin to engage in treatment until 2014, and she opined that he still needs treatment and that his current program “is helping him a lot.” Zwecker testified that she supports Givens’s provisional discharge.

The appeal panel noted that Dr. Zwecker had “not received training on normative group selection for the Static-99R,” “may not be qualified to score this instrument, although she recalled receiving some training in the past two years,” had “not received training in the past three to four years on the Stable-2007,” and was “no longer qualified to score or interpret scores for the Stable-2007.” The appeal panel therefore gave no weight to Dr. Zwecker’s testimony or report and did not consider her report or testimony in reaching its decision. Nor do we. Rather, we defer to the panel’s credibility determinations. *See Duvall*, 916 N.W.2d at 895 (deferring to a panel’s expert-credibility determinations).

Dr. Kenning, commissioner’s expert witness, who served as the court-appointed examiner during Givens’s initial commitment, administered her own sex-offender assessment of Givens using the Static-99R, in addition to other tests to measure Givens’s risk of recidivism, and protective factors available in his current treatment setting. Dr. Kenning testified that she did not support Givens’s provisional discharge because he minimized his offenses, represented a “High Risk/High Needs” offender requiring further treatment, had not been fully treated for sexual sadism, and had a “limited history of demonstrating stability with regard to treatment gains.” She also classified him as “well above average” regarding his risk of reoffending.

Dr. Hoberman, commissioner’s expert witness, who also served as an expert witness during Givens’s initial commitment, prepared a report based on Givens’s offense history, sex-offender treatment reports, psychological testing, and various actuarial tools, including the Static-99R, to measure Givens’s risk of reoffending. Dr. Hoberman testified that he did not support Givens’s provisional discharge because of his lack of insight into his offending,

failure to make adequate treatment gains showing he could self-regulate his behavior, and failure to acknowledge and address his sexual sadism. He also noted that Givens's discharge plan was "generic" and not tailored to his needs.

The appeal panel found the opinions of Drs. Kenning and Hoberman more credible than the opinions of MSOP's clinical staff. Givens challenges the qualifications of Drs. Kenning and Hoberman, but he did not object to their qualifications during the hearing. We therefore do not consider this argument. *See Beaulieu v. Minnesota Dept. of Human Servs.*, 825 N.W.2d 716, 724 (Minn. 2013) (concluding issue waived where appellant failed to raise the issue before the lower court). We also defer to the panel's credibility determinations. *See Duvall*, 916 N.W.2d at 895 (deferring to a panel's expert-credibility determinations).

The appeal panel concluded that although Givens presented a prima facie case for provisional discharge, the county and the commissioner had provided clear and convincing evidence to support a denial of his petition. The appeal panel noted Givens's failure to complete Community Preparation Services and the arousal-management aftercare; his inability "to receive the feedback and accept it without having an outburst"; his deception of MSOP staff, as reflected in treatment records and violation reports; his "high level of denial regarding his deviance which is unexpected in his current phase of treatment"; his lack of understanding of his deviant arousal and risk of reoffending; and his failure to "fully internalize[] [his] treatment." The panel also concluded that Givens was not capable of "making an acceptable adjustment to open society," that he still has "substantive treatment gains to achieve with regard to deviant arousal," that his "course of treatment and present

mental status indicate that he continues to need treatment and supervision in his current setting,” and that the conditions of Givens’s proposed discharge plan would not provide a reasonable degree of protection to the public and would not enable him to adjust successfully to the community.

Givens argues that the county and the commissioner failed to meet their burden “to prove that [he] is incapable of making an acceptable adjustment to open society.” He argues that the appeal panel’s determination that “there were substantive treatment gains to achieve to deviant arousal” was not proven by clear and convincing evidence. He claims that the appeal panel failed to consider “the year after year progress confirmed by standard polygraph testing.” But Givens’s treatment records reveal that MSOP demoted him from Phase III of the treatment program due to his failure to disclose misbehavior and to undergo the arousal-management aftercare program. The appeal panel cited Givens’s testimony downplaying aspects of his offenses and deviancy, and Dr. Knoll’s testimony and report about Givens’s sex-offender assessment, which showed that he “lacks understanding of his deviant arousal and pre-assault planning.” Both Drs. Kenning and Hoberman reported that Givens lacks an understanding of his sexual sadism and deviant arousal, has a continued need for fully supervised treatment, and lacks empathy for his victims. And Dr. Knoll testified that the results of Givens’s sex-offender assessment demonstrated that he lacked an understanding of his deviant arousal and risk of reoffending. This evidence in the record supports the panel’s determination regarding Givens’s need for further treatment.

As for Givens’s claim that the appeal panel failed to consider his “year after year progress confirmed by standard polygraph testing,” he is simply incorrect. The appeal

panel’s detailed findings reference Givens’s ten polygraph or attempted polygraph exams, which indicate Givens’s answers to relevant questions and whether he was deemed truthful. Givens’s claim on appeal that he passed each exam is not supported by the record, which reveals that he was “not truthful” for one exam and “no opinion” was rendered in another exam because the examiner could not “make a determination as to the truthfulness of [his] responses.”

Citing *Duvall*, Givens also argues that the appeal panel erred by not deferring to the opinions of MSOP’s staff that he no longer required treatment in a supervised setting at MSOP. But in addressing the recommendations of MSOP leadership and Givens’s treating psychologists, the appeal panel explained why it did and did not find credible the recommendations. Moreover, *Duvall* is inapposite because Duvall had participated in the final stage of Community Preparation Services at an out-patient treatment facility for multiple years at the time he requested discharge, and he had completed MSOP’s treatment program. 916 N.W.2d at 893–98. Unlike Duvall, Givens had not reached the final stage of Community Preparation Services, had not completed MSOP’s treatment program, and had not participated in or been accepted in an out-patient program. While this court affirmed Duvall’s discharge by a judicial appeal panel that had deferred to MSOP’s discharge recommendations, we did not hold that MSOP’s support of discharge is dispositive.

Givens argues that the appeal panel erred by considering his risk of reoffending based on his past offenses. But he cites no authority prohibiting the appeal panel from considering his risk assessment, and he ignores his behavior at MSOP, most notably the use of illicit drugs, coercing another client to have sex with him, smuggling, running a

contraband store, and failing to initially disclose his misbehavior. He also ignores numerous incidents involving inappropriate contact with his fiancée.

In this case, the record supports the appeal panel's thorough findings. Although the record could support a finding that Givens does not require treatment in his current supervised setting, "the question is whether the [appeal panel] clearly erred" in determining that Givens continues to require his current treatment setting. *See Fugelseth*, 907 N.W.2d at 256 ("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." (emphasis omitted)). Because the record here supports the appeal panel's findings, we conclude that the appeal panel did not clearly err by concluding that Givens requires treatment in his current setting.

The appeal panel determined that Givens's provisional-discharge plan did not provide a reasonable degree of protection to public safety, but the panel acknowledged Givens's treatment gains and determined that his discharge plan would allow him to successfully adjust to the community. The appeal panel also determined that the plan did not provide an adequate level of supervision based on Givens's risk of reoffending and his treatment needs. Specifically, the appeal panel noted mitigating factors that provisional discharge would lack, including "professional care, living circumstances, and external control," and concluded that Givens still had "substantive treatment gains to achieve . . . that directly impact his risk of re-offense."

Givens argues that the appeal panel's conclusion that he is incapable of making acceptable adjustment to open society is directly contradicted by its determination that his

discharge plan would allow him to successfully adjust to the community. But Givens's argument ignores the statutory scheme of section 253D.30, subdivision 1. An appeal panel may grant provisional discharge only after it finds that a committed person "is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a). To determine if a committed person "is capable of making an acceptable adjustment to open society," a panel considers two factors: "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 whether the committed person's 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).

Under section 253D.30, an appeal panel can conclude that a committed person's provisional-discharge plan could enable them to successfully adjust to the community, while still concluding that the committed person is not capable of making an acceptable adjustment to open society due to their treatment needs, mental status, and lack of a reasonable degree of protection to the public. We conclude that the appeal panel therefore did not err when it concluded that Givens was incapable of successfully adjusting to the community because he still required treatment in his current setting and his provisional-discharge plan did not provide reasonable protection for public safety.

The record supports the panel's findings, including the experts' reports and testimony, Givens's treatment records, and his own testimony. The appeal panel made detailed and thorough findings to support its conclusion that Givens did not meet the

statutory criteria for provisional discharge. This court “will not reweigh the evidence, and it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *Duvall*, 916 N.W.2d at 894 (quotation omitted). We conclude that the panel did not clearly err by denying Givens’s petition for provisional discharge because the evidence as a whole sustains its findings. We therefore affirm.

Affirmed.