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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1191**

In the Matter of the Civil Commitment of:
Jerry Gene Kerkhoff.

**Filed January 14, 2019
Remanded
Ross, Judge**

Judicial Appeal Panel
File No. AP17-9002
Douglas County File No. 21-P0-99-000371

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

After the judicial appeal panel granted Jerry Kerkhoff's request for provisional discharge from the Minnesota Sex Offender Program, the commissioner of human services appealed, arguing that she had met her burden of offering clear and convincing opposing evidence. Because the panel rendered insufficient factual findings, we cannot effectively review de novo the panel's application of the statutory criteria to the facts. We remand for additional findings.

FACTS

Forty-five year old Jerry Kerkhoff has been indeterminately committed to the Minnesota Sex Offender Program as a sexually dangerous person since 1999 after he committed more than 1,000 sexual offenses against at least 41 children ages 3 months to 15 years, with conduct ranging "from peeping and fondling, to digital, vaginal, oral, and anal intercourse." The state moved Kerkhoff to community preparation services in 2015, where he is currently in stage two. Kerkhoff petitioned the special review board in March 2016, seeking a provisional or full discharge from civil commitment. The board recommended denial. Kerkhoff petitioned a judicial appeal panel for rehearing and reconsideration. The commissioner moved to dismiss Kerkhoff's petition. The panel granted the motion with respect to full discharge but denied it with respect to provisional discharge.

The participating experts opining about the petition (court-appointed examiner Dr. Adam Gierok; forensic evaluator Dr. Mallory Obermire; and program clinical director,

Christopher Schiffer) were unanimous in concluding that Kerkhoff needed continued treatment in community preparation services at St. Peter. The panel nevertheless granted Kerkhoff's request for a provisional discharge, declaring that "he no longer needs residential sex offender treatment and supervision in his current setting."

The commissioner appeals.

D E C I S I O N

The commissioner offers three arguments. She argues that the panel made insufficiently particular incorrect factual findings, that the panel erred by finding that the commissioner had not met her burden of providing clear and convincing evidence opposing Kerkhoff's petition, and that the panel lacked the authority to order the program's executive director to identify a residential treatment facility to place Kerkhoff. We cannot assess the arguments because the panel's factual findings lack the clarity necessary for our de novo application of the law to the facts.

The imprecise nature of the factual findings leaves us unable to assess the commissioner's primary argument that Kerkhoff cannot be provisionally discharged because the provisional-discharge plan fails to protect the public from harm. A person committed as a sexually dangerous person "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) (2018). Once the person seeking provisional discharge satisfies his initial burden of production showing that he is entitled to provisional discharge, "the party opposing . . . provisional discharge bears the burden of proof by clear and convincing evidence that the . . . provisional discharge should be denied." Minn.

Stat. § 253D.28, subd. 2(d) (2018). We review for clear error 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 Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *rehearing denied* (Minn. June 20, 2017). The panel must consider two factors when evaluating a petition for provisional discharge:

(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.

Minn. Stat. § 253D.30, subd. 1(b) (2018). We do not reweigh evidence on appeal, and we will affirm even if the record provides a reasonable basis for a different conclusion. *Kropp*, 895 N.W.2d at 650. But we review the application of statutory criteria to the facts de novo. *In re Civil Commitment of Duvall*, 916 N.W.2d 887, 893 (Minn. App. 2018), *review denied* (Minn. Sept. 18, 2018). Our de novo review requires us to know how the panel resolved disputed evidence.

Unless the panel rejected the unanimous opinion of the experts, the commissioner met her burden of producing clear and convincing evidence opposing Kerkhoff's petition. Clear and convincing evidence exists when it is highly probable that the facts asserted are true. *Kropp*, 895 N.W.2d at 654. All the experts testified that Kerkhoff needs continued treatment and that a provisional discharge is premature. Even the two experts who conceded that some living arrangements might alleviate safety concerns held to their

opinion that Kerkhoff is not ready for provisional discharge. Because all the experts opposed the requested discharge, the commissioner seems to have met her evidentiary burden. The only contrary possibility is that the panel rejected the opinion for some reason.

But the panel did not say that it was rejecting the experts' unanimous opinion or, if it was, on what evidentiary or reasoned basis it was doing so. We must examine "the record to determine whether the evidence as a whole sustains the panel's findings." *Kropp*, 895 N.W.2d at 650. While the panel gave an extensive recounting of the evidence *presented* to the panel, it did not offer its assessment of the evidence. Merely identifying evidence cannot substitute for clearly finding facts. *In re Civil Commitment of Spicer*, 853 N.W.2d 803, 810 (Minn. App. 2014). "[I]t is insufficient for a district court to 'merely recite[] or summarize[] excerpted portions of testimony of [the] witnesses without commenting independently either upon their opinions or the foundation for their opinions or the relative credibility of the various witnesses.'" *Id.* (quoting *In re Welfare of M.M.*, 452 N.W.2d 236, 239 (Minn. 1990)). Here the panel recited the evidence but failed to say whether it was credible or why, if it was credible, the panel's decision contradicts it. We are not suggesting that extensive evaluation of every witness's credibility is necessary for our review, but the panel's silence on the evidence prevents us from reviewing its findings for clear error and from applying the law to the findings that are supported by evidence.

We offer no opinion on the issues raised by the commissioner in light of our need for a clear statement of facts. We remand for the panel to make findings that explain the rationale of its decision.

Remanded.